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Litigation and Discovery in the Computer Age:

Engineering Issues in a Hypothetical Mold Case

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Litigation and E-Discovery

- Engineers must be careful when creating documents
 - Documents you should always have in your files
 - Documents you should never have in your files
 - Litigation and discovery requests
 - Consequences of improvidently creating, losing, or destroying documents
 - Establishment of a formal document retention policy
 - This presentation is based in large part on “The Good the Bad and The Ugly: What Every ASHRAE Member Should Know About How Documents and E-Mails Are Used in Litigation” from the 2002 Winter Meeting
 - Video available through ASHRAE Bookstore

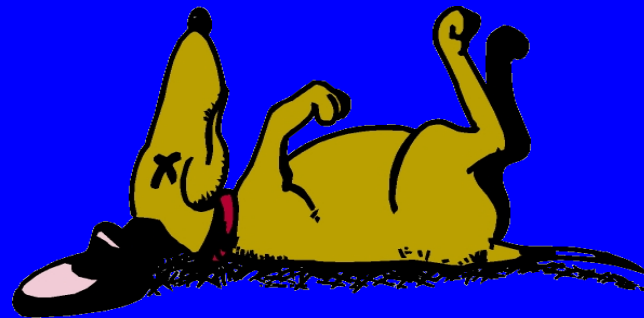
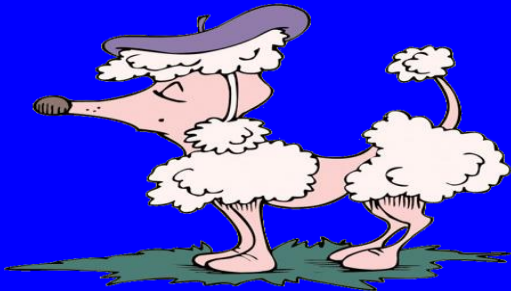
Mold Litigation Hypothetical

- Your firm was hired by a small business owner to design the HVAC system for a new building
- HVAC system was on back-order for several months but Owner insisted project move forward immediately by substituting a larger HVAC unit
- Junior Engineer warned Owner that substitute unit was oversized & may not dehumidify air & could lead to mold problems
- Owner informed Junior Engineer of intent to hire new employees and install new heat producing equipment when construction was completed
- Junior completed “rough” preliminary calculations & determined additional heat would probably justify larger HVAC unit
- Junior e-mailed Senior engineer requesting his advice and stating he would use the larger unit unless he heard otherwise
- Building project was completed with larger HVAC system installed

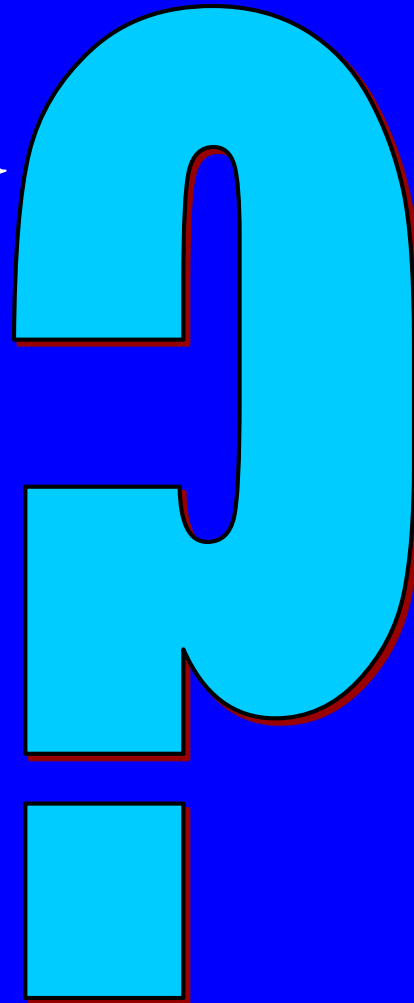
Mold Litigation Hypothetical

1 year later:

- Building develops mold so severe it must be demolished
- Owner and employees allege chronic asthma and pulmonary problems, and Owner's dog dies allegedly from exposure to the mold
- Owner's thriving business in ruins
- Owner sues your Firm for gross negligence seeking millions of dollars in damages for loss of business and personal injuries including pain and suffering for the death of the owner's dog



Will Your Documents and
Records Implicate or
Liberate You?



Documents You Should Always Have In Your Files

- Documentary Proof
 - Design Assumptions
 - Calculations
 - Specifications
 - Manner in Which Designs Change Over Time
 - Project History
 - Firm's Position on Issues

Other Documents

- Documents and Calculations Required by Standards
- Requests for Information
- Shop Drawings
- Requests for Change Orders
- Approved Change Orders
- Commissioning Documents
- Scheduling Documents
- Notification Documents

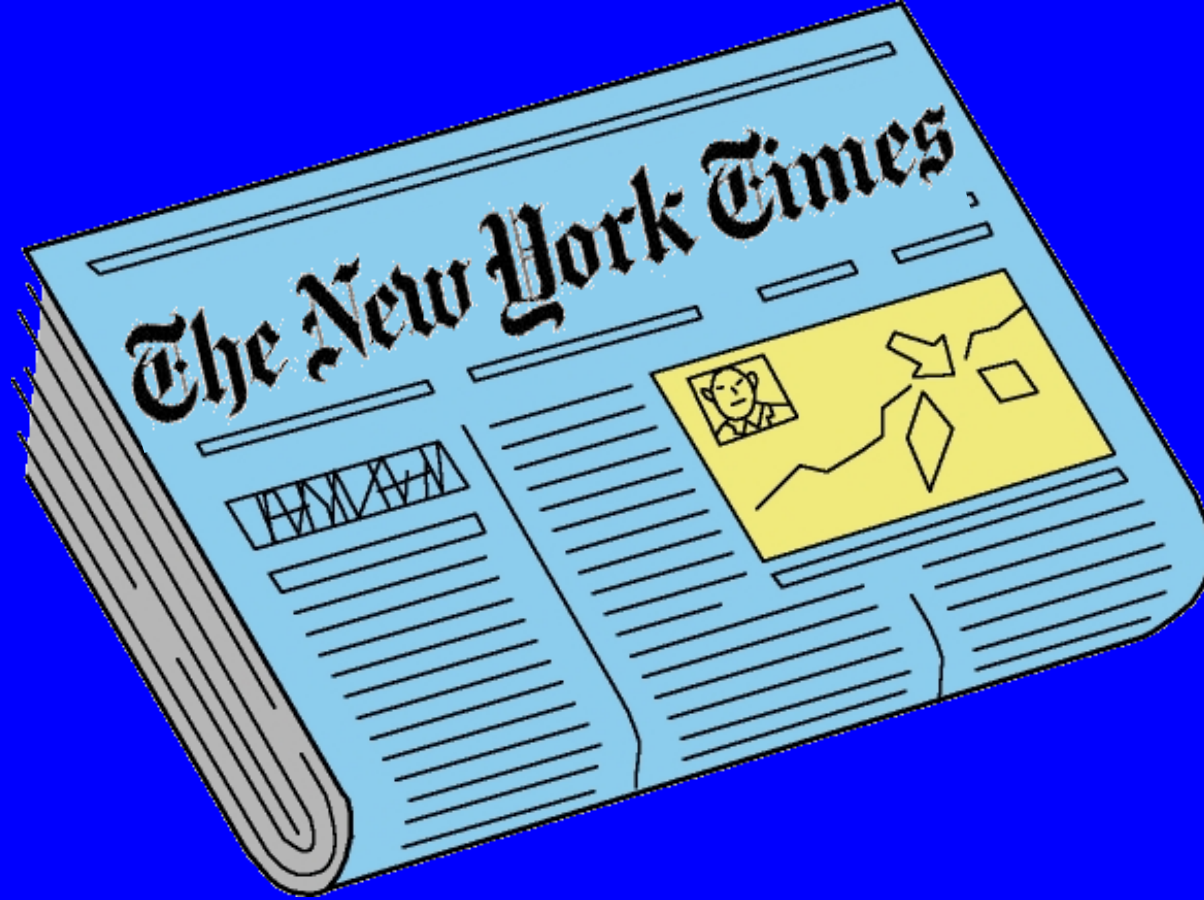
Documents You Should Not Create*

- Documents that Point Out Flaws or Defects in Your Design or Product
- Documents that Say Your Firm's Design or Product Could Have Been Better
- Documents that Admit Responsibility for Problems or Defects
- Documents that Criticize the Work of Other Team Members
- Documents that Suggest Information Be Suppressed
- Documents Acquiescing in Illegal Conduct or Imprudent Design Proposals

*Never lie or create fraudulent documents. Opportunities for opinions to be expressed about design, product, and employee issues should be provided.

Litigation and Discovery

- Requests for Production of Documents and Tangible Items
- Interrogatories
- Request for Admissions
- Depositions



Discovery

“Requests For Production”

Rules for Document Creation

- “S T A P L E”
 - Stick to the facts, don’t speculate
 - Take it seriously, avoid angry or thoughtless statements
 - Avoid inflammatory language
 - Privileged and proprietary information: handle with care
 - Loops: close them
 - E-mail: think before you send

Discovery Exceptions

- Attorney/Client Privilege
- Work Product
- Privilege can be Waived
 - Disclosure can waive privilege!
 - Massachusetts court rejected accounting firm's argument that it inadvertently produced a privileged e-mail and ordered the resulting waiver of privilege extended to all e-mails on the firm's privilege log that pertained to the same subject

Does Your Firm Use Electronic Mail for a lot of Internal Communications on Projects?



Electronic Information
is Discoverable.

Prevalence of Electronic Communications

- 95% of business information is electronic; 35% is never printed
- 755 of the trial exhibits in the *Microsoft* antitrust case were email messages

Discovery and Electronic Documents

- Electronic information relevant to the case is generally discoverable unless it is protected by an applicable privilege
 - **E-Discovery may include:**
 - E-mails
 - Engineering Drawings in AutoCAD
 - Word Processing Documents (which may include backup tapes)
 - Spreadsheets & Databases
 - Deleted Electronic Documents - Potentially

Unusual Issues With Electronic Discovery

- Discovery rules generally require you to produce everything relevant to litigation
- E-mail has no counterpart in a paper-based system
 - Enormous amounts of e-mail created
 - Difficult to filter
 - Managing & retrieval systems are rare
 - Efforts by opponent to access system

Preservation of Evidence

- Duty to retain information that may be relevant to pending or threatened litigation
- Duty may include:
 - Preserving backup tapes
 - Preserving paper documents
 - Preserving electronic documents and e-mails
 - Altering Firm's document retention policy

Preservation of Evidence

Steps to Follow:

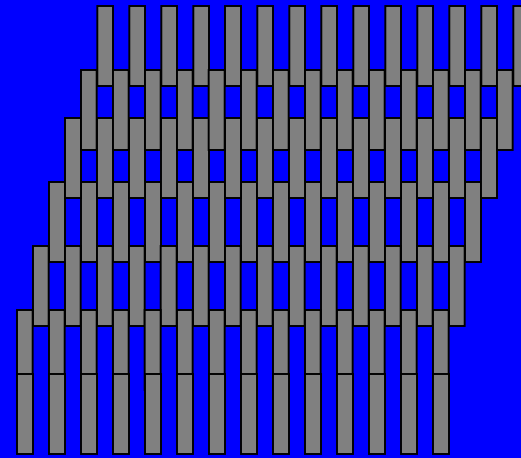
1. Immediately consult IT staff about preservation
2. Identify “key” employees who will play a major role in the dispute resolution
3. Issue a document-hold notice
4. Determine Firm’s recycling program timetables
5. Preserve documents/files not on Firm’s storage system
6. Follow up with “key” employees

John M. Barkett, *Bytes, Bits and Bucks: Cost-Shifting and Sanctions in E-Discovery*, ABA Section of Litigation CLE Conference (May 6, 2004).

Parameters of Discovery















6 Offices



100 Servers

3 Terabytes of Data

Costs of Discovery

- Cost of finding documents on producing party   
- Cost of copying documents on requesting party   
- Cost of attorney's fees for reviewing documents is on producing party, even if producing party is not named in the lawsuit      

Consequences of Improvidently Creating, Losing, or Destroying Documents

Improviently Creating Documents

YOUR FIRM
INTERNAL E-MAIL CORRESPONDENCE

To: [Senior Engineer]

From: [Junior Engineer]

Owner did tell me of plans to increase the amount of equipment and the number of employees at some point after they move into

Owner went ballistic when Owner heard there would be a 3-month delay on the HVAC equipment. We talked about the substitute unit, and I explained to Owner the mold problems that could be caused by an oversized unit – in other words, Owner’s building could end up looking like their fuzzball little dog – but Owner is strongly urging that we agree to the substitution ASAP. I really do not think Owner understands the serious nature of mold infestation issues, including the health effects that can result –that’s a business person’s mentality for you!!!

Owner did tell me of plans to increase the amount of equipment and the number of employees at some point after they move into the new building. I did a quick calculation in my head on the increased heat load, and I’m pretty sure we’ll be ok using the substitute equipment.

I’ll go ahead and authorize the substitute unit unless I hear otherwise from you by next Friday, which is two days after you are to return. Hope you had a good vacation while we were slaving away here.

[Junior Engineer]

YOUR FIRM
INTERNAL E-MAIL CORRESPONDENCE

To: [Senior Engineer]
[Junior Engineer]

From: [Field Engineer]

Re: Substitution of HVAC Equipment

We probably should have specified Brand Z, especially because a Brand Y unit was installed in the Luxury Hotel. You'll recall the Hotel had that horrible mold problem. The consultants said the mold problem was due to improper application of the roof leading to massive water infiltration. The mold problem was partly due to the mold problem involved in the project. You're right about that yappy dog. I just wanted to drop-kick it out the window. blem were not

You're right about that yappy dog. I just wanted to drop-kick it out the window.

[Field Engineer]

**YOUR FIRM
INTERNAL E-MAIL CORRESPONDENCE**

To: Firm Partners

From: [Senior Engineer]

Re: [Junior Engineer]

Although the time has not yet come for a formal performance evaluation, I just wanted to report on Junior Engineer's progress. On the whole, I believe Junior Engineer is performing at the level expected for one of his tenure.

However, I did want to raise some concerns about a recent project. I do this only to further Junior Engineer's

Sometimes Junior Engineer fails to involve project leaders in design decisions in a timely fashion. On a recent project, a client became very upset about the unavailability of a certain piece of equipment, and basically bullied Junior Engineer into agreeing to a substitution.

loads on the project called for. I understand that the client intends to add equipment and employees in short order, which will increase the heat loads to an acceptable level, but the manner in which Junior Engineer handled the situation was problematic.

Junior Engineer needs to avoid making decisions before getting input from project leaders, and he needs to do a better job of keeping the project leaders informed of the status of projects.

Just a few thoughts. Let me know if you would like to discuss.

Improviently Losing or Destroying Documents

YOUR FIRM
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YOUR FIRM
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To: YOUR FIRM
INTERNAL E-MAIL CORRESPONDENCE

From: To:

Re: To: Firm Partners

From:

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Brand Re: [Junior Engineer]

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Although the time has not yet passed, I just wanted to report on Junior Engineer's progress. One of the things I noticed during my time working at the level expected for one of his tenure.

However, I did want to raise this only to further Junior Engineer's development and in the hope that you can help him work with Junior Engineer to address them right away.

Sometimes Junior Engineer makes decisions in a timely fashion. On a recent project, a client became very frustrated with the unavailability of a certain piece of equipment, and basically bullied Junior Engineer into agreeing to a substitution.

This might not be so significant except that the situation involved a larger HVAC unit than the calculated heat loads on the project called for. I understand that the client intends to add equipment and employees in short order, which will increase the heat loads to an acceptable level, but the manner in which Junior Engineer handled the situation was problematic.

Junior Engineer needs to avoid making decisions before getting input from project leaders, and he needs to do a better job of keeping the project leaders informed of the status of projects.

Just a few thoughts. Let me know if you would like to discuss.



Criminal Sanctions

- Deleting e-mail messages is NOT a Good Thing.
 - Frank Quattrone, former CEO of Credit Suisse First Boston, convicted of Obstruction of Justice for sending e-mail titled “Time to Clean Up Those Files” to employees while company under government investigation. *CNN*, May 3, 2004
- Altering e-mail messages is NOT “A Good Thing!”
 - Martha Stewart convicted of Obstruction of Justice in insider trading investigation. *CNN*, March 5, 2004

Civil Sanctions

- Civil Fines
- Restrictions on defense of case
- Ordered to pay damages, attorneys fees, and costs
- Retention, Preservation & Compliance Examples
 - Company sanctioned \$1 million for failing to prevent destruction of documents
 - Adverse-inference jury instruction and attorney's fees levied as sanctions for destroying drafts, although destruction was pursuant to established retention policies
 - Over \$4 million in sanctions for deleting e-mails related to litigation
- Untimely Production Examples
 - Court ordered adverse jury instruction, attorney's fees, and costs to re-depose witnesses where e-mails were deleted and not timely produced
 - Sanctions to be considered for plaintiff corporation's "purposeful sluggishness" in producing e-mails from backup tapes, and possibly vacating \$96.4 million verdict and ordering new trial

Electronic Document Retention Policy

1. Your Firm should have reasonable policies & procedures for managing its information and records
2. The information and records management policies & procedures should be realistic, practical and tailored to the circumstances of your Firm
3. The Firm does not need to retain all electronic information ever generated or received
4. Your records management policy should consider including procedures that address the creation, identification, retention, retrieval and destruction of information and records
5. Your policy should mandate the suspension of ordinary destruction practices as necessary to comply with preservation obligations associated with anticipated or pending litigation, governmental investigations or audits

Summary and Conclusion

- Documents You Should Have
- Documents You Should Not Create
- Discovery and Litigation

Documents You Should Have

- Assumptions
- Design Calculations
- Calculations Required by Standards
- Documents Required by Standards
- Interpretations of Plans or Specifications
- Requests for Information Regarding Plans and Specifications
- Requests for Change Orders
- Approved Change Orders
- Documents Showing Design Changes
- Commissioning Documents
- RFI, Shop Drawings, and Other Logs
- Memoranda, Reports, Photos
- Documentation of Project History
- Documents that Address the Impact of Events on Costs or Scheduling
- Correspondence Setting Forth Position on Issues That Arise

Documents You Should Not Create*

- Documents that Point Out Flaws or Defects in Your Design or Product
- Documents that Say Your Firm's Design or Product Could Have Been Better
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Documents and Litigation

- Discovery: process to obtain information in litigation
- Limits: relevance, privilege, and work product
- Look out for waiver
- Document creation: The front page of the *New York Times* test and STAPLE
- Computerized documents are discoverable, including e-mail and drawings
- Document preservation: parties are obligated to preserve relevant information

Practical Tips From a Lawyer

- Do your work to the best of your ability in a professional and ethical manner
- Develop a business relationship with an attorney; don't wait until you need one
- Pull out an old file, look at its organization, see if you can interpret what was done on the job
- You aren't the only one in your company in the line of fire
- Make sure design documentation goes into the file at the end of the job
- Start your document retention policy now

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