



GUEST ESSAYS

EXPUNGE BOB, BROWN PANTS **Defending Claims Without Your Star Witness**

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When something goes wrong, your first instinct may be to maim, torture or fire the responsible employee. Even in the absence of project challenges, a/e's tend to move from firm to firm, start their own practices, and generally advance their careers elsewhere. Human health and longevity being what they are also add the possibility that critical witnesses will die before a claim winds its way through the courts.

Regardless of the employment or survival of employees and partners, the claims trail behind, sometimes years later. The claims arising out of a former employee's error or a deceased partner's work may require literal archeology of notes, calculations, plans and ultimately a professional liability insurance policy. Each of these situations creates unique obstacles to self-defense and requires both advance planning and sometimes creative lawyering.

The absence or lack of cooperation of critical witnesses in a lawsuit can be fatal to its defense, even in the most defensible claims. Lawyers often see this issue arise when those critical witnesses are fired, quit or die, before and even during the defense of a claim. Knowing how and when to document and preserve the components of a good defense can mean the difference between no defense and a tolerable outcome.

Bob Goofs

On the roof of a three story row house, a subcontractor's employee places two boards on top of two sawhorses and begins to apply a stucco exterior coating. Horrified, a young architect from your office demands that the painter get off of the roof before he hurts himself. Startled at the scolding, the painter stumbles backward and falls to the ground, sustaining serious but nonfatal injuries. You are (a) relieved that your attentive young employee enforced the regulations of OSHA and other administrative bodies governing worksite safety, (b) relieved that the painter and his pre-accident recollection survived the fall, (c) a wee bit unhappy with your over-anxious young architect and plotting his punishment, or (d) on the phone with your lawyer or insurance representative.

Expunge Bob?

Your young architect and the painter were the only two people on the roof that day. The lawsuit may not be filed for several years. If the young architect remembers yelling only after the painter began to fall, or that another painter bumped the makeshift scaffold causing the fall, it will be important to document that recollection before too much time passes. If you fire the employee in a fit of rage as he weeps into a box of personal effects and stumbles out the door, he may not remember the accident or be inclined to help your lawyer a few years later.

Brown Pants

Probably not an appropriate joke for these pages, but it illustrates the point:

Long ago, when sailing ships ruled the oceans, a sea captain and his crew were in danger of being boarded by pirates. As the crew prepared for battle, the captain bellowed to his First Mate, "Bring me my red shirt!" The First Mate quickly retrieved the captain's red shirt, which the captain wore and led the crew to battle the boarding party. The pirates were repelled. Later that day, the lookout screamed that there were two pirate vessels sending boarding parties. The crew again prepared for battle, but the captain again calmly bellowed, "Bring me my red shirt!" And once again the pirates were repelled, though this time the crew sustained more casualties. Weary from the battles, the men sat around on deck that night recounting the day's occurrences when an ensign looked to the Captain and asked, "Sir, why do you call for your red shirt before battle?" The Captain, giving the ensign a look that only a captain can give, exhorted, "If I am wounded in battle, the red shirt will not show the wound and thus, you men will continue to fight unafraid." The men sat in silence marveling at the courage of such a man. At dawn the next morning, the lookout screamed that there were pirate ships, 10 of them, all with boarding parties on their way. The men became silent and looked to the Captain for his usual command. The Captain, calm as ever, bellowed, "First Mate, Bring me my brown pants!"

Once a claim arises, call your lawyer or insurance representative, in whatever order you prefer, but Brown Pants await the impulsive. Persecuting the guilty must be deferred until cooler heads and paid advocates can consider the consequences. Talk to your lawyer or insurance representative about creating an affidavit or a documenting the events of the day, preferably before committing pen to paper. Discussions with your lawyer will be cloaked in attorney/client privilege. Discussions with your insurance broker may not be protected, so be careful what gets put in writing. Drafts of memoranda in your files will be subject to discovery in the lawsuit, but drafts sent to your lawyer will be shielded.

You should also consider the state of the project and your firm before reacting. That same employee may be able to help with more than the pending claim. Shop drawing reviews may still be pending, remedial work may need to be analyzed and specified for whatever gave rise to the claim. There may still be work to do. Are there enough others in the firm to absorb this employee's duties? Are there enough licensed architects available in your community to be recruited to replace your former employee? How long does it take to hire an architect in this economy? How much will you have to pay the new architect?

Even after the claim is underway, care must be taken to preserve your defense. Talk to your lawyer about any plans to send the young architect to a project in the South Pacific or to volunteer him for medical experiments. If the lawsuit has already been filed, depositions can be taken to preserve testimony before the medical experiments begin. If the employee is fired and decides to retaliate with angry, questionable testimony later, at least the jury may be able to hear the deposition testimony and the explanation of bias at trial. Not ideal, but better than nothing. Without the pre-firing deposition, only the painter's story will be told at trial and be known before trial. Firing that witness may also have implications for trial preparation and working with expert witnesses. Having Bob explain how he reached a particular conclusion or the sequence of events leading to an error will present a more sympathetic defense than an expert piecing together what he thinks may have happened.

Expired Pants

In my first example, the employer has a chance to plan before reacting. Another problem arises with the sudden death of a partner or key employee.

You were made a partner in a five person, two partner firm. Your partner works with one group of clients, while you work primarily with another. Eighty percent through construction of a large public works project, your partner is in the midst of arguing in favor of declaring the default of the general contractor for interminable project delays. One morning after a brief letter-writing campaign between your partner and the general contractor, your partner and the client notify the surety of a default and terminate the contract. The next morning, your partner expires in his sleep. Respectful and sympathetic to your grief, the contractor waits two days to file suit. In the lawsuit, the contractor claims that your partner's actions were malicious and motivated by racial animus and to cover for his own design errors.

In many firms, there is a literal division of labor that makes the sudden death of a partner a literal disaster. Just as you plan for your own death with a will, you must be responsible to your firm with the corporate equivalent of estate planning. That planning should start with big-picture items like a buy-sell agreement, life insurance on key partners and corporate succession planning that will allow the enterprise to survive the death of any one member (you've done all of that, right?).

You must also think about the archeology that will be necessary in the event of a death. Develop written, internal procedures for organization of files, documentation of meetings, logs of submittals, change orders and RFI's and stick to them for every project in the office. The absence of a deceased witness is inevitable, but the inability to prove a defense to a claim is not. Archeology is possible and productive if the bones are left in an orderly state.

One common misunderstanding in this context by clients and lawyers alike is the application of the "Dead Man's Act." Most states have such statutes, but they do not usually bar testimony in a commercial lawsuit. A dead witness can be the subject of testimony unless the parties are arguing about shares of an estate in probate. The contractor in my example was able to testify about his conversations with the deceased engineer. Nevertheless, much of the conversations, meetings, calculations and even photographs made their way to the engineer's files. Working with the documents and expert witnesses made the claim defensible, almost to the same extent as it would have been without the engineer's death.

Notes, memos, meeting minutes and similar project documents help persuade juries because they are prepared at the time of the event. Recollections are better at the time of an event than they will be years later. For this reason, documents prepared at the time are inherently more trustworthy and constitute stronger proof than materials prepared later. Before you expunge Bob or Bob expires, avoid future unclean pants by documenting and preserving the evidence that you will need when the claim rolls in.

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NOTE: This article is intended for general discussion of the subject, and should not be mistaken for legal advice. Readers are cautioned to consult appropriate advisors for advice applicable to their individual circumstances.