

## History and Special Interests

# In Search of the Past: A Lawyer's Perspective

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**Abstract:** Like historians, lawyers use architectural records as evidence, but their goal is not to interpret the past, but to prove it. The most important element architectural records provide to the defense of legal claims against architects and engineers is the dimension of time. Being able to determine a sequence of events relating to a claim is paramount when arguing whether an architect or engineer acted in a professional manner and exercised professional standards of care in the performance of work. Therefore, until the threat of litigation on a particular project or building is past (and it rarely ever is), the retention of *all* architectural records is safest. Then, in the event of litigation, using their own versions of selection, arrangement, and description, legal teams can work to re-create the events and circumstances of the past.

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WHEN AN ARCHITECT OR engineer is sued in a liability case, his or her practice and livelihood are in jeopardy. The lawyer searching for evidence for the defense in such a case has a pragmatic rather than a scholarly aim but performs a function that is crucial to the design professional, and one to which architectural records are essential. Like historians, lawyers use archival records as evidence.

For ease of discussion, I shall divide legal claims against architects and engineers into four categories. The first is design error: for example, the violation of a building or electrical code. An architect or engineer could be sued for improperly performing calculations for a major structural component, for miscalculating HVAC requirements, or for specifying a roofing material that is incompatible with a roof design. A potential design claim exists wherever function falls short of design intent or of normal standards.

The second category of claims includes those resulting from an architect's or engineer's failure, during the construction phase of a project, to see that what he or she designed actually was built. This type of claim is asserted when a structure as built does not comply with the plans and specifications. The claim is that the architect's or engineer's field representatives, whether called inspectors, supervisors, or observers, have not done their jobs.

The third category is schedule interference. For instance, the project's owner may claim that the architect or engineer has caused a delay that forces acceleration of the construction work in an attempt to meet a completion deadline. Acceleration means more overtime work, extra shifts, and more workers on the job to make up for lost time. The owner then pays more in overtime, in premiums for double shifts, and in the costs of lost productivity incurred because more workers are trying to perform in the same space in order to do the job faster. Another type of schedule interference claim might arise because a delay in completion of a project means that revenue is not generated when expected and that expenses are extended by interest on loans, overhead, and the like. This type of scheduling claim can be brought against an architect or engineer for failing to meet the project schedule for his or her own services or, where construction supervision is part of the architect's duties, to keep the construction work on schedule.

In the fourth category of claims are those arising from excessive changes to a project. An undue number of changes may result because the architect did not understand the implications of a fast-track design process (in which design and construction are overlapped to save time) and as a result subcontractors requested an unusually large number of changes to the design on which bids were based. Because change orders often are not competitively bid, and because the subcontractors already on the job have, so to speak, a monopoly on the work, they can charge a premium for change order work. The owner or the general contractor thus pays more than would have been the cost if the subject of the change had been part of the original design. Change order premiums can be quite substantial and can generate a serious claim.

Why are records important to a defense in such cases? The documents of the project bring the fourth dimension—time—into what would be a static, three-dimensional space to enable the lawyer to understand the project story. The question that will be asked of the jury or the judge at the end of the court proceedings against an architect or engineer is: "Did the architect or engineer follow the standards of care and skill ordinarily exercised in the profession at that time under like circumstances?" That question makes the history of the project a key element in the defense. To determine liability and to calculate what, if any, real damages were incurred, it is necessary to know what was done, under what circumstances the problems occurred, and why the architect or engineer made certain decisions. All of these questions hinge, in large part, on the documentary record.

Let us look at some examples. In a design error case involving deterioration of steel anchors caused by contact between iron and copper, which are incompatible materials, a critical question is whether the manufacturer recommended the products that were used. In a construction phase claim, the question may be whether the architect's field representative, who was supposed to monitor the construction, was right to spend time at the lower level of a building watching concrete being poured, rather than at the roof watching installation of a waterproof membrane that later, when leaking started, was found not to follow the plans. In a scheduling case, the question may be whether the contractor's mismanagement made it necessary to accelerate the work. And in a change order case, the focus may be on whether the professional's failure to provide a complete design and the resulting extra charges from subcontractors were the result of the owner's changes of mind.

Suits such as these are more common than they would have been in the past, in part reflecting a change in standards of practice since the 1950s and 1960s. Design claims involving incompatible materials are more common because architects and engineers today rely more heavily on product information supplied by manufacturers than on their own product research. Products are changing so quickly that often little or no record of performance is available. A claim involving field representation is more likely to arise today because the architect or engineer takes a more distant role in monitoring the details of construction than in the past. Construction processes have become more complex, and because of fear of being sued for worker injuries, architects and engineers do not want to be involved in what are called "means, methods, techniques or construction safety precautions and programs." In short, the contemporary professional shuns the old role of master builder.

The architect's and engineer's roles in scheduling have also changed. Contractors now use computerized scheduling systems that show the time span of each type of work to be performed. The complexity of those systems and their applications puts them beyond the capability of many architects' and engineers' offices. Owners are reluctant to pay the costs of adding someone to the project team to replicate the contractor's proposed schedule in order to test its soundness. Furthermore, in today's economy, many manufacturers have reduced their inventories, so that the lead times required for product fabrication and delivery are longer now than they were a few years or even a few months ago. The architect or engineer has a difficult time keeping abreast of these issues and so becomes less involved with planning the timing of the project.

In sharp contrast with the past, many architectural firms today issue what are called scope drawings—drawings that do not show the details that were typical of drawings years ago. Scope drawings are often issued as part of a fast-track procedure. Foundations are being excavated and structural steel is going out for mill order before the architectural design is complete. The architectural bid package then goes out before the mechanical, electrical, and plumbing designs are finished. All of these items are phased ahead of interiors and associated furniture, furnishings, and equipment. The result is a series of partial bid packages with more generalized drawings, where the architect-engineer of years past would have issued a detailed set of drawings in one bid package. It is easy to see how fast-track processes and the use of scope drawings can lead to design errors and omissions, expensive changes, construction defects, and delays—all fertile ground for lawsuits.

Now to the controversial part: what documents do lawyers want architects and engineers to keep in order to be able to reconstruct what happened on the job? The lawyer's priorities, unlike the historian's or the archivist's, are pragmatic rather than aesthetic or

scholarly. But that pragmatism calls for an admonition to keep everything. Warehouses are filled with documents that have been kept because lawyers have said to do so. A statute of limitations or statute of repose may define an end-time for bringing suit and thus a time when documents can be discarded. Unfortunately, that time period can almost never be guaranteed. Simple fixed limits no longer exist in most jurisdictions. As a result, many lawyers advise that nearly all project documents be microfilmed for indefinite storage in the firm archives. The microfilm is not for the historian's use, but to fill the lawyer's need for evidence in case of suit.

Now, lawyers, of course, face the same problem archivists do in appraising records: With all these documents, how does one avoid burial in the trivial and find what is important? How do we, as lawyers, manage litigation when there is literally a warehouse full of documents? And indeed, for a complex project such as the design and construction of an airport involving a variety of scheduling and change order records, or a sports stadium, a theater complex, or a multi-use building, the number of documents can be very large, and they can be in a perplexing degree of disarray. The challenge is to retrieve, review, and organize the documents in a usable form for the case.

Often, the first thing that is done when a lawsuit is brought is the number stamping of every document in the archives. Every sheet of paper is given an identifying number. The defense lawyer also needs to go through all the documents to review them for privilege; meaning the documents may contain letters from or to lawyers which are privileged communications that need not and should not be disclosed to the opposition. Under U.S. rules of court procedure, the opposition has the right to look at all of the non-privileged documents and designate whatever they want for copying. The defense lawyer needs to know what was taken, that is, what will show up on the other side of the table in the deposition or courtroom. The defense team also identifies, from the universe of project documents, what is truly needed for the case.

Lawyers, legal assistants, engineers, and expert consultants are all involved in this review. Some law firms have made it their business to educate themselves about the issues in this type of case in order to know what is relevant in making such a selection. On perhaps a less grand (and certainly less expensive) scale, historians do this same selective sifting of records in order to establish a sequence of historical events. Lawyers, like historians, face the constant struggle of wanting to select too much. Everyone is afraid of not having a document that may prove to be useful later, so, at the start, lawyers often designate from the universe a subcategory that includes too many irrelevant documents. But, also like the historian, the lawyer keeps winnowing those down until the kernel is found.

How do lawyers keep control of this document selection and copying process? One way is to index the documents or compile a computer database that identifies each document by stamp number, subject, date, author, sender, and all the other names on the piece of paper. These data can be sorted by computer so that when the deposition of witness "X" is taken, all the documents with that person's name on them can be generated in a list, and the number designation on those documents can be used to locate them for the depositions or trial.

More sophisticated and expensive ways exist to identify and categorize documents. A series of subject codes can be used to link each document to a series of key categories that in turn can readily be indexed. For example, the subjects in a case might be (1) roof, (2) flashing, or (3) insulation. The computer again is used to sort and retrieve—this time by coded subjects.

A new and increasingly popular way of controlling the process and enabling retrieval is computer imaging: the document is scanned for storage on CD-ROM. To ask for documents relating to "roof," the user can enter the word "roof" to view, sequentially, all pages containing that word. The pages can then be printed out in more readable form than the original documents. This is an impressive—and expensive—tool. But the hardware and software are only part of the price. The real cost is the time that lawyers, at their high billing rates, must spend reading the documents. (You cannot walk around with a computer disk in your pocket thinking that you know the case. There remains the need to read.)

How do lawyers use the material that has been assembled as the set of key documents? To the attorney, contracts are important because they record what the architect or engineer agreed to do. Did the architect agree to observe the installation of the roof membrane? That is sometimes a difficult question. If there is an ambiguity, it often helps to have access to the notes and drafts of the negotiations. As a result, lawyers tell architects and engineers not to throw out even those materials.

Another important set of documents is the project drawings. But while the archivist is interested primarily in the final drawings, lawyers look at the earlier, more mundane drawing issues. Those may include design development drawings issued for the owner's review at 80 percent completion, drawings issued for pricing, construction drawings issued for bid, and drawings issued for permit. Hundreds of architectural drawings may exist for each issue date. In a case involving delay, a key question is whether the architect was at fault in having added important elements to the project design after bids were submitted. Alternatively, the question of whether the owner changed the design and whether the architect then acted expeditiously in issuing new drawings can be critical to the defense. Those points can be addressed with precision by looking at each drawing. As a result, big architectural firms microfilm every drawing issued. The whole set of materials is available to the lawyer to review and, with expert help, identify the cause of delay.

Alice Carey has explained elsewhere in this volume why the original shop drawings are important to a restoration architect. They are even more important to lawyers. The devil is often in the details, and it is the shop drawings that reveal the details of the design at issue. In the Kansas City Hyatt litigation, which concerned the collapse of an atrium walkway that had been used as a dance floor, the issue was whether the contractor's shop drawings showed a type of connection that differed from what the engineer had shown on the structural plans, and whether the architect's or engineer's failure to notice such a change contributed to the collapse.

Lawyers are also interested in correspondence and meeting minutes. During meetings, the architect may have described a design or explained a decision to use a certain product. The owner may have directed the architect to make changes, and later claim that they should not have been made or were made too late. Meetings provide the context for assessing whether the architect met the standard of care and skill that was ordinarily exercised by other architects and engineers at that time and under those circumstances.

Product submittals, field notes, and logs and schedules are also valuable. They record precisely what happened on the job as events occurred. These records have no creative content, but they are a set of tracings of information that is key to the defense of the design professional. Product submittals can tell a lawyer, for example, when a manufacturer informed the design community through bulletins issued to the industry about a potential incompatibility in the use of a product, and whether other architects at that time received those warnings or interpreted them in a like manner. The notes of the contractor and the architect's on-site representative may show that on a given date the field repre-

sentative was watching to see that reinforcing bars were properly placed while concrete was being poured on a structural slab, a critical safety item, and that he or she was therefore legitimately excused from seeing defective roof membrane being placed at the same time many floors away. In a delay case, the log that records when the shop drawings came in, when they went out, and whether they were approved can show whether the architect or engineer acted expeditiously in reviewing them. Likewise, schedules prepared by the contractor show what the construction team was actually doing at a given time.

In order to show that the architect or engineer did perform in conformance with standards of care, the lawyer becomes, in a sense, an archaeologist, sifting through the trash pits and burial grounds of the project to recreate the design environment and the events that occurred in it. The lawyer can dig into the question of whether design was sacrificed for time or cost, and possibly unearth the answer that professional expertise conflicted with the owner's personal taste.

The archivist preserves and the historian interprets information for posterity—both noble purposes. In contrast, the lawyer has no more lofty objective than to provide a defense, and a paper trail is exceedingly important to that end. But the lawyer's use of architectural records as evidence is more like the historian's than it may seem, even though their motives for wanting to save the recorded architectural past may differ. Thus the lawyer can be one of the archivist's best allies.