

SCRIBBLES SQUIBS* #84

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HOW CONSTRUCTION GENERAL CONTRACTORS AND SUBCONTRACTORS CAN PROFIT FROM TAKING MORE PHOTOS AND VIDEOS AT THE JOBSITE

By Attorney Jonathan Sauer

1. INTRODUCTION.

One of the best general contractor PM's I have ever met told me that he took pictures and videos (PAV) of each of his jobs after the end of the workday every Thursday.

The regularity of performing this activity on the same day each week helped give him the discipline of doing this important work each and every week.

Also, in taking these PAV after everyone has gone home, no one (e.g. the owner, the architect, the subcontractors) knew that he was doing this or that he had the kind of evidence that PAV can supply. He would only pull out the PAV for others to see when they would be instrumental in resolving/assisting with disputes benefitting his employer, a general contractor. Presumably, if the PAV showed things that reflected badly on his employer, the PAV might not have always found their way into his files!

The following are various issues where having good quality PAV can be critical in deciding which party to a dispute is going to win the case, should the dispute go that far.

2. ISSUES INVOLVING DELAY.

Who is responsible for it? Why is the job behind schedule? PAV can sometimes help with these issues.

A. THE GENERAL CONTRACTOR IS BEING DELAYED BY THE OWNER.

Let's assume that a general contractor is being delayed by the owner and/or by the architect. And, that general contractor might either want some money for the delay or, at least, a time extension.¹

¹ It is very important that while a general contractor is working at a job, the completion date must always be in the future. If the owner will not grant the general contractor a time extension before time is going to run out, then it is critical that the general contractor has, at least, a written request for more time on file and pending before time runs out. Otherwise, a judge could infer that the reason that the general contractor didn't request more time was because it knew that it was not entitled to additional time. Bad (and expensive) things can result from such an inference.

PAV might indicate a differing site condition that is negatively affecting job progress and that this is an issue for which the general contractor needs architect direction. PAV can document, in some cases, the existence of a design flaw or the absence of a normal design element of construction that is missing from the contract documents without which the job can't be properly constructed. Various construction activities (e.g. paving, painting) require certain minimum temperatures before the work can be properly done. A picture of a thermometer stuck in a snowbank with that day's newspaper can have greater evidentiary impact than simply having temperatures listed in a daily report.² So, a series of PAV regularly taken can help support the general contractor's claims in these and other regards.

B. THE GENERAL CONTRACTOR IS BEING DELAYED BY A SUBCONTRACTOR'S LACK OF PROGRESS.

A subcontractor's lack of sufficient progress will often negatively affect the whole job, a common problem which public construction general contractors frequently have to deal with, particularly with regard to filed sub-bidders.

Let's assume that we are dealing with the progress of an electrical subcontractor.

The various mechanical subcontractors almost always are working inside the building in the same area and at about the same time.

So, it might be useful to have PAV documenting the electrical subcontractor's progress, along with having PAV as how the other mechanical subcontractors are progressing as of that exact point in time. These PAV might show that at a certain point in the job the plumber is 80% complete, the HVAC subcontractor is about 65% complete and the electrical subcontractor is only 30% complete. Having dated PAV that demonstrate a subcontractor's state of completion at any given time is much better evidence than what some individual witness might testify to. Witnesses lie all the time. And, with trials occurring many years down the road, a witness might not have sufficient recollection of the exact details to provide any degree of accuracy. Having dated PAV demonstrating these different points are something tangible that someone looking at them can draw their own conclusions from. And, by the time it is clear that the general contractor has better PAV than its adversary, the job is either done or this issue is, at least, resolved or covered up. This makes it impossible for another party to take its own PAV as to these matters. Having *some* records is better than having *no* records!

² Unlike people, PAV seldom lie. In the event of a dirty lens, however, the camera might not provide a completely accurate picture of what it is attempting to show. In such case, rather than trying to mislead anyone, the camera might simply be confused.

Having these kinds of records help support backcharges to the subcontractor for delay. They can also be useful if a general contractor is discussing performance issues with the subcontractor's surety.³

3. A SUBCONTRACTOR'S LACK OF JOB PROGRESS IS NEGATIVELY AFFECTING THE PERFORMANCE OF ANOTHER SUBCONTRACTOR OR OF THE GENERAL CONTRACTOR.

I had a case where I represented a subcontractor who was going to pave a Walmart parking lot for a new store, working as a sub-subcontractor to another subcontractor, the site guy. As of a certain point in time near the completion date of the contract, the Walmart had already hired people, obtained inventory and announced the date of the store opening through extensive advertisements in the local papers and in other media. If it couldn't open on that specific date, the Walmart would be incurring tremendous fixed costs against which it would have no income. And, that store would lose all of its anticipated income for each day actual job completion exceeded the announced store opening date. In addition, a delayed store opening would create a negative impression of Walmart for Walmart's potential customer base in that area.⁴ Walmart's damages could be simply astronomical for each day that it failed to open the store on time.

As most of the other necessary construction elements had progressed to the point that substantial completion would shortly occur, the site guy told my paving guy that it should begin paving. The base that would underlie the pavement, however, was far from being level and there was extensive standing water and mud everywhere. My paving guy knew that the paving would fail in the near future if it was placed over the very inadequate base and that it could be left holding the bag.⁵

³One of my GC clients bonds all filed sub-bidder subcontractors. More often than not, if a GC is having subcontractor problems, those problems will be with a filed sub-bidder subcontractor who is, really, the owner's subcontractor and not the GC's own subcontractor.

⁴ One only has one opportunity to make a good first impression. Human nature being what it is, once someone has made their mind up on something, it can be very difficult to get that person to change his/her opinion even when circumstances would warrant such a change.

⁵ Paving is similar, in some regards to painting. When a painter applies paint to a wall, that is an acceptance of the wall even if it has defects. The painter becomes responsible for those defects. If a paver accepts the existing base that will underlie its pavement, then it will be responsible for defects associated with that base once it paves over it.

On my advice, the paving guy refused to pave and the site guy sued the paving subcontractor.⁶

I had pictures of what the proposed base for the paving was, showing the things identified above.

Within a year or two after the filing of suit, the site guy dropped the suit without my guy's paying them anything.

It was the PAV that largely contributed to this result.

PAV are excellent at demonstrating job progress week-to-week and month-to-month.

They are also excellent in demonstrating *lack of* job progress week-to-week and month-to-month.

4. PAV HELP DEMONSTRATE A SUBCONTRACTOR'S LACK OF COMPLIANCE WITH THE REQUIREMENTS OF THE CONTRACT DOCUMENTS OR THAT A SUBCONTRACTOR HAS PERFORMED DEFECTIVE WORK OR THAT IT HAS FAILED TO RECTIFY THOSE DEFECTS OR THAT IT IS USING NON-APPROVED MATERIALS OR THAT IT HAS PERFORMED WORK BEFORE THE ARCHITECT ACTED ON/APPROVED ITS SUBMITTALS.

What more can be said as to these points?! Why gild a lily when the lily is doing well enough on its own!⁸ PAV can provide evidence as to each of these things.

⁶ A contractor or subcontractor should never perform its work when the performance of that work goes against the requirements of the contract documents or goes against what good custom and usage would suggest/require of this trade irrespective of what that company's contracting party demands. Violating the requirements of that trade or disregarding the clear tenets of a trade's customs and usage is indefensible legally and could support a claim of material breach of contract that could lead to a general contractor's/subcontractor's termination.

⁷Getting sued can be traumatic, particularly for the first time. But, it is not the end of the world. From a construction contract standpoint, a lawsuit is only formalizing an existing dispute. Only one percent of MA superior court civil actions ever results in a complete trial. In the early stages of a lawsuit, one has to prepare as if a trial is going to go forward. One needs to keep in mind, however, that it probably won't.

⁸ Like other flowers, lilies do not like to be overwatered or deprived of sunlight for unreasonable periods of time. Some plants also seem to benefit from being talked to. For some reason, many observers of the legal process seem to think that lawyers should be knowledgeable as to horticulture matters.

5. DOCUMENTING JOB CONDITIONS AT THE TIME SOMEONE IS INJURED AND THE EXTENT OF AN INJURED PERSON'S INJURIES AT THE TIME SOMEONE IS INJURED.

In these circumstances, PAV can help with providing a building contractor with a defense. The injury may have been largely caused by an individual's 'contributory negligence' (legal term). In other words, it was how that individual was working that led to his/her injury in whole or in part. Perhaps the injured party was not wearing appropriate clothing or not using appropriate/required safety equipment that would have prevented/minimized his/her injury. Perhaps that person was drunk or high or under the influence of a prescribed medicine which the person has either taken too much of or is having an allergic reaction to.

PAV might also help in that they demonstrate that this injury was caused in whole or in part by the acts and/or the omissions of another subcontractor or of another party.⁹ PAV might show that another subcontractor had carelessly allowed tools or equipment or materials left lying around. The PAV could show that these things were in a place where they should not have been stored. Perhaps, another subcontractor had not policed its job area in terms of cleaning up each and every day, a typical construction contract requirement, and it was this subcontractor's clutter/trash/mess that led to the accident.

Another good thing to do is to take pictures of the injured person *after* the injury/accident. We want PAV of what the injured party's injuries apparently are. Sometimes, after the injured party has seen a lawyer, the injuries (somehow) are worse than originally thought! Many personal injury lawyers work with certain doctors on case after case.¹⁰ One hopes that both the lawyers and the doctors would work with a high degree of ethics. Fifty years doing this job has taught me that this is not always the case.

⁹ With job-site accidents, injured parties often sue any company remotely related to the injury with the exception of that person's employer due to the provisions of workers' compensation laws. The importance of developing whatever favorable evidence there is that is available cannot be overstated. In a personal injury case under Massachusetts law, all that a plaintiff needs to establish is that a general contractor's acts or omissions contributed to the incident by at least one percent of the total causation of the incident. Under Massachusetts' comparative negligence law, the one percent liable general contractor is liable to the plaintiff for the same amount of damages that the ninety-nine percent liable subcontractor is liable for. Since a general contractor has a non-delegable responsibility for job supervision and job safety, it doesn't take much to establish that one percent liability. And, while it is impermissible at trial to mention that any of the defendants is insured for this type of thing, most jurors would simply assume that if anyone has insurance, it would be the general contractor. Jurors will reason that it's not the general contractor itself that will be paying the damages assessed against the general contractor at trial. It will be its insurance company paying those damages. As to the general contractor, then, no harm, no foul. Judges often participate in this kind of thinking because they are always looking for a 'deep pocket' to fund a settlement or judgment. Whose pockets are deeper than those of an insurance company?

¹⁰ Some people might call this as having a stable. That seems excessive and rather judgmental. And, besides, a stable is where they keep horses. While many expert witness doctors and many lawyers may be as***, that doesn't make them horses. Donkeys and mules prove problematic, as each has elements of horseiness. Maybe keep them in a corral outside the stable?

Another war story.

I was defending a defendant with regard to a motor vehicle accident. The plaintiff complained to a great extent that she had a serious loss of function with her legs and was in pain all of the time. When it came time to take her deposition, she said she could only do this if she could lie down on a couch. Which she did, crying throughout her deposition. The law firm I was working for at the time was closely-associated with a private detective agency. What that agency would do is follow plaintiffs on the cases with potential greater damage possibilities to see what might be seen.

In this lady's travels she was going to a strip mall. There was a little hill leading from the parking area to the entrance of the strip mall. The injured plaintiff was filmed trotting up the hill to the entrance of the strip mall perfectly normally in all ways. Even though her lawyer was a good one and one who was quite aggressive in how he handled cases, once shown that video, he dropped the case almost immediately.

(Still) another war story.¹¹

An injured party plaintiff claimed he had a lot of pain in his neck and that he had a high degree of loss of function in his neck.

Again, he was filmed.¹²

His situation caused more than a few chuckles at our firm. This was because he was trying to start a lawn mower and was filmed yanking the cord to start the mower several dozen times with no demonstrable pain or loss of function.

So, if someone does get injured at a work site, be sure to get PAV not only as to the job-site conditions and of the injury to the person's body but also as to how the injured party handles himself/herself after the injury. Did s/he walk to his/her car in a normal way? Was s/he limping or in obvious pain?

While witnesses misremember or lie, PAV don't.¹³

¹¹ A lawyer's life can be defined as an accumulation of war stories. As is the case with other warriors, the last one of these might be considered to be fatal or as having reached an unsustainable number thereafter. Sort of like the straw that broke the camel's back. Camels don't live in stables, either.

¹² No, Mr. De Mille. He definitely was *not* ready for his close-up.

¹³ Both juries and judges like pictures. Much of the evidence as to the content and applicability of technical specifications or construction plans in a case is very boring to everyone except the parties. Also, neither judges nor juries understand what these documents show/say/mean. But, *everyone* is able to understand pictures. And color pictures are a welcome breath of fresh air when compared with the enormous amount of black and white documents associated with the trial of a construction case, where documentary evidence might be weighed by the pound.

6. PAV PROVIDE OUR WITNESSES WITH ASSISTANCE AS TO WHAT HAPPENDED AT THE TIME OF THE INJURY OR EVENT.

Civil cases in the superior court take approximately five years to come to trial. Events occurring *today* that one could address with particularity *today* become things that a witness might only have general impressions of five years from today. It is the way memory works. Our minds are primarily interested in the things that we are involved with today or will be involved with in the near future. Less so as to things that have happened in the past. Particularly, events that happened five or more years ago.

Over a period of five years, a potential witness may have worked on a dozen subsequent jobs, many of which were similar in nature to the job in which the plaintiff claimed to be injured at or where there were elements of contract non-performance or delay. While the witness might have a *general* impression as to what happened five years ago, a 'general impression' quite often is insufficient detail to prove a point at trial because to prove a point, it has to be proven by a preponderance of the evidence and insufficient detail is a couple of steps short of this.

PAV are allowed as evidence to 'refresh a witness's recollection' (legal expression) so that the quality and particularity of his/her memory is substantially improved upon from just having a general impression as to a certain point to having specific evidence to give with particularity after that individual has an opportunity to review the PAV.

7. CONCLUSION.

Taking PAV these days can be accomplished by almost all cell phones. Easy peasy.

A party to a litigation that has better records than the other party to the lawsuit frequently has its disputes resolved more quickly and in its favor. Since the vast majority of superior cases are resolved prior to trial - through settlement or something like mediation - having better records than the other side encourages an earlier resolution of the dispute.

Litigation has many parallels to military conflicts.

S/he who has the better weapons has the greater chance of prevailing!

Well-experienced lawyers are loathe to try cases when they know the other side has significantly better evidence than his/her client has. Where personal injury lawyers usually work for a percentage of the settlement or judgment, to paraphrase Billy Preston 'nothin' from nothin' leaves nothin'. Ouch! No new Cadillac this year!

** A 'squib' is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines a 'squib' as: "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."*

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(As I have two different offices with two different phone providers and with two different phone systems, I seem to get my messages better and more quickly through emails than through voicemails, which are often problematic and sometimes non-existent. So, if you wish to speak with me, dropping me an email would be the fastest and most reliable way to getting started.)

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