My Building is Evidence? The Line Between Repairs and Spoliation of Evidence

Nelson A. F. Mixon

When lawyers talk about spoliation of evidence in the year 2019, they most often talk about ESI. Electronic data is certainly important, but sticks and bricks in the field are the heart of most construction cases. This article surveys recent case law on the issue of spoliation of evidence when work in place is demolished, replaced, or repaired. The cases teach that even though the best, physical evidence may have been lost, spoliation sanctions are not automatic. Rather, the inquiry depends heavily on questions of notice, the availability of evidence from other sources, and whether there has been bad faith.

How does this problem arise?
Most owners do not want a building with defects. When defects (actual or perceived) are discovered, an owner typically asks the contractor who performed the work to repair the defects. But there may be disagreements over the existence of or responsibility for defects. The contractor may be unable to secure the cooperation of its subcontractors. Repairs may be beyond the contractor’s financial capacity. Or maybe the parties just fail to communicate or cooperate. Any of these situations may lead to the owner hiring another contractor to perform the repairs and suing for the repair cost.

Most owners probably do not think they are destroying evidence by performing repairs. For an owner, a building is a home or place of business. Repairs are simply a matter of necessity to ensure proper functioning or appearance. Repairs seem nothing like the Enron shredding debacle.

From a contractor’s perspective, its work in place may be the best evidence to show the work was performed properly or that any claimed defects are not as severe or pervasive as claimed. Once a contractor’s work in place has been removed or altered no longer, the as-built condition is no longer available for inspection or demonstration.

The situation becomes more complicated because of the number of parties who may be involved in the eventual lawsuit. A defect lawsuit is likely to involve the owner, contractor, one or more subcontractors, and maybe even design- or construction-management professionals, materialmen, and product manufacturers. It is not uncommon for parties to be added who were not originally in the case or who may not have even been aware of the initial dispute.

Moreover, construction disputes and litigation evolve as more information is learned, parties are added to the case, new expert reports come out, new allegations are made, or positions change with the evidence. It is not uncommon for parties to want to re-inspect a building multiple times throughout the case.

Under Construction (ISSN: 8756-7962) is published three times per year, by season, by the American Bar Association Forum on Construction Law, 321 North Clark Street, Chicago, Illinois 60654-7598. Under Construction seeks to support the Forum on Construction Law’s mission to “build the best construction lawyers” by publishing articles, columns, and reviews concerning legal developments relevant to the construction industry.

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Law on Spoliation of Evidence.
Most courts recognize the availability of sanctions for spoliation of evidence, which is the failure to preserve relevant evidence. As a general rule, a party has a duty to take reasonable steps to preserve evidence that is or may be relevant to foreseeable litigation. The available sanctions range from awards of attorneys’ fees and costs to dismissal of a claim or defense, although this harsh sanction is reserved for the most extreme cases. In some states, spoliation of evidence is an independent cause of action, but the concept is most often used as a basis to seek some sort of sanction against litigation opponents.

Spoliation of Evidence in Construction Cases.
A number of courts have addressed spoliation of evidence based on the destruction, repair, or reconstruction of work in place in construction cases. The two most prominent recent cases are probably Robertet Flavors, Inc. v. Tri-Form Construction, Inc. and Miller v. Lankow. These cases are discussed in some detail below, followed by shorter summaries of other recent construction cases addressing spoliation of evidence based on demolition, repair, or reconstruction.

Read together, the cases teach that it is critical for an owner to provide advance notice before any demolition, repair, or reconstruction of a contractor’s work. However, deficient notice does not necessarily warrant spoliation sanctions, especially when it comes to harsh sanctions like dismissal or default.

A. Robertet Flavors, Inc. v. Tri-Form Construction, Inc.
Perhaps the most notable case to address spoliation in the construction context is Robertet Flavors, Inc. v. Tri-Form Construction, Inc., a case arising out of a leaky strip-window system. The case involved fairly striking spoliation (during the lawsuit, the owner completely replaced the contractor’s work without telling any of the parties), but the New Jersey Supreme Court still concluded dismissal of the owner’s claim was too harsh.

In Robertet Flavors, the owner, who acted as its own general contractor, sued the glazing subcontractor who installed the strip-window system and the construction manager. After filing suit, the owner performed destructive testing, removed and replaced the strip-window system, and removed and replaced the mold-damaged property without informing counsel for the glazing subcontractor and construction manager. The trial court precluded the owner’s expert from testifying, the plaintiff withdrew certain claims, and then later the trial court granted summary judgment to the glazing subcontractor and construction manager. On appeal, the New Jersey Supreme Court reversed the sanctions as to the glazing subcontractor, but affirmed as to the construction manager. The court reasoned the glazing subcontractor had pre-litigation notice of the leaky windows, had inspected the site, and presumably had access to records of the work it performed. However, the construction manager had been given no notification of the window leaks and so the court reached a different conclusion.

In its opinion, the court explained that “[t]he ordinary business practices in commercial construction projects therefore lend themselves to creative ways of leveling the playing field if something is lost.” The court listed a number of factors unique to the construction arena that should be considered when weighing spoliation sanctions:

- The need to timely correct the defect;
- Whether the defect threatens the integrity of the building;
- The non-spoiling party’s responsibility (i.e., failing to make records when called to a project to evaluate a defect);
- The available records of the contractor performing the work, such as purchase orders, logs, meeting minutes, and time records;
- The existence of plans, shop drawings, and as-built;
- Whether there are photographs and video documenting the construction and its progress.

The court observed that “[i]n the construction litigation context, it will often be the case that a sanction for spoliation” should be less severe than dismissal of a claim.5

B. Miller v. Lankow
Miller v. Lankow is another opinion recognizing that spoliation sanctions may not be warranted even where an owner performs repairs without providing adequate notice. The case involved a lawsuit by a home purchaser against the seller and various construction professionals hired by the seller. The purchaser claimed mold and water intrusion as a result of defective construction. Before filing suit, the purchaser notified the seller and construction professionals about the mold and water-intrusion problems, and met with them on site to show them the problems. The construction professionals offered to perform repairs at a “fairly good price” but did not perform the repairs or, apparently, document the condition of the home. The purchaser’s attorney then sent a demand letter to the seller and construction professionals and offered to make the home available for inspection. Some of the construction professionals inspected the house again, but others did not. A year later, the purchaser’s attorney sent a letter to the seller and construction professionals advising that the purchaser intended to commence repairs, although the stucco may have been removed before the date stated in the letter. On these facts, the trial court granted summary judgment for the seller and construction professionals as a sanction for spoliation of evidence. The Minnesota Supreme Court reversed the sanctions, explaining that the owners notified the construction professionals of the problems and offered to allow them to inspect and make repairs, and that the fact that the stucco may have been removed before the date stated in the letter was irrelevant to the question of spoliation.

The court stated that “spoliation sanctions are aimed at ensuring that a party has not ‘disposed of evidence that was relevant to [the] litigation’” and that the purpose of these sanctions is to prevent “the spoliator from taking such action without giving the other party an opportunity to use the evidence in its defense.” The court noted that the owner had notified the construction professionals of the problems and that the stucco had been removed before the date stated in the letter. Therefore, the court concluded that the sanctions were inappropriate in this case.

The court also considered the nature of the case and the potential for spoliation. The case involved a dispute over construction defects, which are often complex and require the involvement of multiple parties. The court noted that the owner had notified the construction professionals of the problems and that the stucco had been removed before the date stated in the letter. Therefore, the court concluded that the sanctions were inappropriate in this case.

In conclusion, spoliation of evidence in construction cases is a complex issue that requires careful consideration of the facts and the purpose of the sanctions. The court in Miller v. Lankow recognized that spoliation sanctions are aimed at ensuring that a party has not disposed of evidence that was relevant to the litigation and that the purpose of these sanctions is to prevent the spoliator from taking such action without giving the other party an opportunity to use the evidence in its defense. The court also considered the nature of the case and the potential for spoliation, and concluded that the sanctions were inappropriate in this case.
Court reversed the trial court’s dismissal of the purchaser’s claim and remanded for determination of whether the purchaser “provided notice sufficient to enable the respondents to protect themselves by inspecting the relevant evidence.” The court declined to adopt a rule requiring the party possessing evidence to provide actual notice of the nature and timing of any act that might lead to the loss of evidence. Instead, the court adopted the rule that the obligation is only to “provide sufficient notice and a full and fair opportunity to inspect the evidence so that the noncustodial parties can protect their interests with respect to the relevant evidence that may be destroyed.” The court reasoned that if “noncustodial parties had sufficient knowledge to protect their interests, but nonetheless failed to inspect important evidence,” that should not “deprive the custodial party of an otherwise valid claim or defense.”

The court did provide some valuable guidance: “A meeting or a letter indicating the time and nature of any action likely to lead to destruction of the evidence, and offering a full and fair opportunity to inspect will usually be sufficient.”

C. Other Cases Tend to Conclude Spoliation Sanctions Are Proper.

Robertet Flavors and Miller represent one side of the case law spectrum on spoliation of evidence in the construction context. Below are a number of other recent construction cases, all of which imposed some form of spoliation sanction—either dismissal, the preclusion of evidence, or an adverse inference—even though in none of the cases did the court find a bad faith attempt to deny access to evidence.

Kinder v. Heritage Lower Salford, L.P. affirmed summary judgment against the owner on spoliation grounds. Two years after filing suit, the owner repaired the defects without telling his counsel or the adverse parties and before the contractor and subcontractors had performed an expert inspection.

Scholastic, Inc. v. Pace Plumbing Corp. concluded that an adverse inference instruction might be appropriate if at trial the contractor proved that the owner’s repairmen and cleaning crew negligently disposed of the plumbing coupling at issue while trying to repair the plumbing after a pipe burst.

Miner Dederick Construction, L.L.P v. Gulf Chemical & Metallurgical Corp. reversed a trial court’s refusal to grant summary judgment against an owner for spoiling evidence. The owner failed to inform the contractor about destructive testing and ignored the contractor’s requests to observe the repair work.

Aktas v. JMC Development Co. gave the defendants an adverse inference instruction when the owner locked the contractor out of a home-remodel project and removed most of the contractor’s work by the time the owner gave notice of claim to the contractor.

Fines v. Ressler Enterprises, Inc. dismissed the owner’s claim for defective siding installation because the owner removed the siding from her house. The only notice provided by the owner was a fax to the contractor’s counsel on a Friday afternoon advising the siding would be removed the following Monday, which was a holiday.

Harborview Office Center, LLC v. Camosy, Inc. dismissed the owner’s complaint as a sanction for repairing V-grooves in EIFS system the owner determined were contributing to water leaks without providing notice to the contractor.

Story v. RAJ Properties, Inc. affirmed summary judgment for the contractor, subcontractor, and manufacturer on spoliation grounds where the owner removed and replaced the allegedly defective stucco system after filing a lawsuit, but without informing defendants.

Manorcare Health Services, Inc. v. Osmose Wood Preserving, Inc. precluded an owner from using evidence obtained during removal and replacement of the roof because the owner failed to provide notice to the defendant plywood manufacturer despite the manufacturer’s written request for notice. The court concluded dismissal would be improper because the manufacturer inspected plywood on a previous occasion.

Conclusion
Repairing defects can create serious spoliation-of-evidence problems, even if repairs are performed innocently. There are plenty of reasons why harsh spoliation sanctions such as dismissal would be disfavored in construction litigation, particularly because there are often various other sources of information to document the construction. Nevertheless, many courts seem to view the destruction/replacement of a contractor’s work in place as being inherently prejudicial—and thus appropriate for spoliation sanctions. Because so many cases seem to come down on the side of sanctioning the owner for spoliation, owners and their counsel should be especially careful to provide advance notice of any demolition, repair, or reconstruction.

Endnotes
3. 1 A.3d 658 (N.J. 2010).
4. Id. at 675-76.
5. Id. at 676.
6. 801 N.W.2d 120 (Minn. 2011).
7. Id. at 134.
8. Id.
9. Id.
10. Id. at 132.
15. 820 N.W.2d 688 (N.D. 2012).
17. 909 So.2d 797 (Ala. 2005).

Non-disclosure agreements (NDAs) are amongst the most common agreements that come across an in-house attorney’s desk. In the construction industry NDAs are used in many contexts, such as: limiting access to a confidential request-for-proposal, prefacing discussion of an asset purchase, or protecting proprietary information shared with a subcontractor. Despite the variations, the primary purpose of an NDA is to protect information that one or both parties do not want to become public or shared with competitors. Read Non-Disclosure Agreements in Review, an article written by Division 11 Chair, Catherine Bragg, Vice President and Deputy General Counsel for TRC online at www.ambar.org/FCLUC.

Catherine Bragg, TRC Companies, Inc., Charlotte, NC, Division 11 (In-House Counsel)
When Mediations Attack: A Case against Deferred Rulings on Motions to Compel Arbitration

Jean M. Terry

Construction contracts commonly specify their preferred method of dispute resolution. Some contracts require that mediation be completed or attempted before a party may move forward with arbitration or litigation. Just as many, though, do not have mediation as a condition precedent and may not have mediation at all. Instead, the contract may dictate only where the parties need to file their case in order to be heard. However, there is a recent trend of parties being ordered to participate in mediation prior to ruling on a motion to compel arbitration, even in instances where mediation is not a condition precedent to arbitration. As such rulings are outside the jurisdiction of the trial court and frustrate the purposes of the Federal Arbitration Act, they should be uniformly barred.

Arbitration is Liberally Favored


Once a trial court answers this question in the affirmative, however, the court loses jurisdiction and is “required by statute to compel arbitration.” 9 U.S.C.A. § 4; Sanford, 813 N.E.2d at 416. In fact, the trial court loses all ability to rule on any procedural questions, including whether a party can avoid the duty to arbitrate, after this determination. In re Weekley Homes, 985 S.W.2d 111, 113-114 (Tx. App. Ct. 1998). That power shifts completely to the arbitrator once it is determined that the parties have agreed upon arbitration.

Id. (citing John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964). Courts have recognized that “judicial intervention can undermine legitimate expectations based on an ADR clause produced through due bargaining....” PSI Energy, Inc. v. AMAX, INC., 644 N.E.2d 96, 100 (Ind. 1994).

In Spite of Favorable Policy, Courts Opt to Retain Jurisdiction

But regardless of this favorable treatment, some courts have opted, in derogation of statutes and case law, to retain jurisdiction over the case. These courts effectively hold the parties hostage until some unbargained for condition is met, be it mediation or discovery. For example, the trial court in In re Frank A. Smith Sales, Inc., No. 13-16-00020-CV, 2016 Tex. App. LEXIS 1809, *8, (Tx. Ct. App. Feb. 22, 2016), deferred its ruling on a motion to compel arbitration and ordered the parties to mediation. Likewise, in Hangartner v. Alexander, 2015 IL APP (4th) 140272-U, the trial court ordered that parties "mediate/arbitrate" before it would rule on a pending motion to compel arbitration, ostensibly intending the for the parties to mediate first. Texas’ arbitration statute even makes an express allowance for discovery before a determination on a motion to compel. This allowance, however, is limited to what is "necessary to permit the court to make a proper decision on a motion to compel arbitration but not to authorize discovery into the case’s merits.” Tantrum St. LLC v. Carson, 2017 Tex. App. LEXIS 6912, *22-23.

While the Federal Arbitration Act (“FAA”) and most states have a statute allowing for the immediate appeal of a denial of a motion to compel arbitration, these statutes still fail to address the deferral of a ruling on such a motion. See 9 U.S. Code § 16; KRS 417.220; I.C. § 34-57-2-19. For example, the Hangartner court determined that it lacked jurisdiction to hear an appeal of the trial court’s order to “mediate/arbitrate,” reasoning that “orders requiring mediation are not appealable” because they are merely a way for a court to control its docket. Hangartner, 2015 IL APP (4th) 140272-U, P15.

Some states, however, have acknowledged the importance of enforcing parties’ negotiated agreements, and have provided a direct method of appeal when a trial court refuses to rule upon a Motion to Compel. In Smith Sales, , the Texas Court of Appeals found such actions by the lower court were an abuse of discretion. The appellate court reasoned: “Arbitration is intended to provide a lower-cost, expedited means to resolve disputes. Motions to compel arbitration should be resolved without delay. Accordingly, mandamus is available to review a trial court’s deferral of a ruling on a motion to compel arbitration.” Id. The Texas Court of Appeals has even stated that "[d]elaying a decision on the merits of arbitrability until after discovery...force[s] [parties] to litigate....” In re Heritage Bldg. Sys., 185 S.W.3d 539, 542 (Tx. App. Ct. 2005).

Be Wary of Waving Arbitration

Meanwhile, astute counsel should be wary of waiving their arbitration rights by participating in the litigation. “A party waives its right to arbitration by substantially involving the judicial process to the other party’s detriment or prejudice.” Tantrum, 2017 Tex. App. LEXIS 6912, *14; Safety Nat’l Cas. Co. v. Cinerg Corp., 829 N.E.2d 986, 1004 (Ind. Ct. App. 2005). One court has found that a party’s participation in mediation was a factor
CONSTRUCTION LAW 101

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Construction 101: Anatomy of a Standard Form Construction Contract
By Luke J. Farley, Ellis & Winters LLP, Raleigh, NC, Young Lawyers Division & Division 7 (Liens, Bond, and Insurance)
The construction industry utilizes a variety of contract forms. This article explores the building blocks of a typical form construction contract and how these blocks work together on your construction project.

What is the “Last” “Work,” “Labor,” and “Materials” that Triggers Bond and Lien Filing Deadlines?
By Samuel D. Gregory, Baker Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, Mississippi, Division 9, Young Lawyers Division
Federal and state statutes that set time limitations from when work was “last performed” for bond and lien claims differ widely in their interpretations of what constitutes “work” under the statutes. This article explores the different approaches taken by various courts and provides practical solutions for facing this issue in your practice.

Indemnity vs. Duty to Defend: Know the Differences and Potential Critical Variations in State Law
By Sean McChristian, Porter Hedges LLP, Houston, Texas
Defense and indemnity clauses are routine devices used in construction contracts to shift responsibility for potential risks. It is critical for construction attorneys to understand: (1) the difference between the duty to indemnify and the duty to defend and (2) that in some jurisdictions, an indemnity obligation automatically carries with it the duty to defend regardless of whether the duty to defend is expressly stated.

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exhibiting waiver of arbitration rights. Robinson v. Food Serv. of Belton, 415 F.Supp.2d 1221, 1225 (D. Kan. 2005). The Robinson court reasoned that the movant had substantially invoked the “litigation machinery” by participating in discovery, mediation, pre-trial conferences, and asserting a counterclaim. Id. at 1226. The Texas Supreme Court has found that discovery was a factor to be weighed when making a waiver determination. Tantrum, 2017 Tex. App. LEXIS 6912, *15.

So what’s a movant to do? Violate a court order to mediate and risk contempt? Or comply with the order and thereby waive the party’s right to arbitrate? Either way, the movant is forced to make this choice despite the fact that it had a commercially enforceable agreement to arbitrate whose validity was never challenged by the opposing party. Thus, it is imperative that more states consider Texas’ approach in order to maintain the integrity of arbitration clauses. Otherwise, parties could be subjected to indefinite deferred rulings while losing their properly contracted rights to arbitrate. What’s more, courts must recognize that, similar to the considerations made during a determination of whether a party has waived its right to arbitrate, a party whose arbitration rights are deferred also experiences prejudice in the form of “inherent unfairness in terms of delay, expense, or damage to a party’s legal position.” Perry Homes v. Cull, 258 S.W.3d 580, 597 (Tex. 2008). These deferrals must end so that the FAA, state statutes, and precedent are followed and so that agreements to arbitrate are uniformly enforced. ■
Welcoming a New Decade

Kristine A. Kubes

As we prepare to greet the year 2020, I am pleased to report that we have five teams of extraordinary Forum leaders working with me to plan five programs for the benefit of our members and all construction lawyers. Here is a preview. I sincerely invite you to participate!

Big-picture developments:
In the coming year, the Forum is focusing on professionalism, inclusion, engagement, and foresight. I invite you to join in the conversation. Each of the items and programs outlined here relates to these principles.

In 2016, the Forum made a significant donation to found a non-profit company entitled, Building for Good, Inc. (“B4G”). The goal of B4G is to provide a volunteer network of construction lawyers to serve non-profits and charities who have need for construction law help. B4G will connect those non-profits and charities with a local Forum construction lawyer for pro bono help, meaning the charities can put their funds toward their mission rather than legal fees. We are very proud to announce that B4G has commenced operations in four pilot states: Florida, Massachusetts, Minnesota, and New Jersey! Please visit the website and volunteer for B4G at www.building4good.org!

In keeping with the Forum’s strategic plan focus on outreach, in this last year, the Forum has formalized a relationship with the Construction Management Association of America ("CMAA") to collaborate in programming and thought-leadership, similar to the relationships we have with AIA and AGC. Forum members and CMAA members will be able to attend one another’s meetings and purchase publications at member rates.

In keeping with the Forum’s strategic goal of member engagement, we will be increasing our communications with members via ABA Connect (https://connect.ambar.org/), the Forum App (search “ABA FCL”), and Forum social media outlets (@ABAConstruction). Please be sure you are registered for and connected to all of these portals so that Forum news reaches you.

Program Preview:
We will kick off the new Bar year with our Regional Program, Sticks & Bricks – ever-popular for its technical education for construction lawyers. The program will be held on Sept. 9 in Charlotte, NC; and on Sept. 20 in Chicago, New York City, and Sacramento. The registration fee includes the book of the same name, plus attendees will receive a discount on the new book, “More Sticks & Bricks.” Don’t miss it! To register, visit ambar.org/regionals.

Next, we welcome you to the City of Brotherly Love, Philadelphia, PA, for our Fall Meeting, Oct. 23-25, 2019. This first-of-its kind program, Building a Better Construction Industry through Inclusion, Diversity, & Professionalism, will host leaders from the ABA, ACEC, AGC, and AIA in addressing cultural and demographic shifts for the construction industry. Learn the business case for diversity and inclusion in your practice and your client’s market sectors. We are honored to report that eight ABA entities have come alongside the Forum to co-sponsor and support this program! We look forward to your participation. To register, visit ambar.org/Fall19.

Our Forum Midwinter Meeting will take us to Tucson, AZ – where the Forum has never been – and to the exquisite El Conquistador Hilton resort. Save the dates of Jan. 22-24, 2020, for a unique program examining risk in the new decade. Risk our clients face due to technology changing how they design and construct projects; and risks lawyers face due to the pace/pressure technology puts on the practice. Futurist Simon Anderson will be our keynote.

The Forum will host the Trial Academy, a three-day intensive trial program for construction lawyers, in Dallas, TX, on March 4-7. The Forum will be using new program materials customized for this program as a result of a juried contest. We are very grateful for our members’ significant efforts to create challenging and meaningful materials to help students cultivate their construction trial skills. We have also refined the role of the consultants in the Trial Academy, adding a consultant representative on our program planning team, and registering them as full program participants to hone their skills as testifying experts. Please save the date. Space is limited to 36 lawyers and 24 consultants.

We will cap off the year with our Annual Meeting in downtown Seattle, WA – where the Forum has not visited in over 20 years. Save the dates of April 22-24, 2020, for a first-ever program dedicated to project management from all sides of the construction and design equation. This program will feature a keynote by renowned author, Edward W. Merrow and two sessions presenting the Fall 2019 revisions to the AIA CM-Advisor and CM-at Risk contracts. Please mark your calendars and join us for this valuable program.

Thank you for this opportunity to serve the Forum. I look forward to meeting you at the next program!
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The Effective Use of Forensic Experts in Construction Litigation
In today’s litigious world, there is no guarantee that a construction project will not end up in litigation or arbitration. And because of the complexities involved in a construction project, a typical judge, jury member or arbitrator may not possess the expertise to grasp some of the nuances of construction issues. In order to be fair, the judge, jurors or arbitrators will need to hear and see evidence produced by forensic technical experts who possess the knowledge and skill to identify, investigate, and analyze problems, and then give testimony that will facilitate a just decision. This book examines the issues surrounding expert witnesses or consultants who help present or defend a case.

Construction Law, Second Edition
Written by leading construction law practitioners, the Forum on the Construction Law’s newly updated textbook Construction Law, Second Edition meets the pressing need for a comprehensive law school textbook. It provides a complete orientation to the construction industry and its processes, and it can be used for introductory survey courses or more advanced courses oriented towards litigation or transactions.