

## Scribbles Squibs<sup>1</sup> #58<sup>1</sup> (September 6, 2017)

# MAKING MORE MONEY WITH GOOD DAILY REPORTS AND PICTURES

By Massachusetts Construction Law Attorney Jonathan Sauer

### I. INTRODUCTION.

The latest statistic I have seen is that only 1% of superior court civil cases actually go through an entire trial, which won't happen for approximately five years from the date of the filing of the complaint. (Last time I was there, add an additional year if your case is in Worcester County.) At the same time, one has to prepare every case as if it were going to trial. Those familiar with the process know that, frequently, the more prepared a party is for a trial, the more likely the other side will settle with them. And, earlier! Because, if you wait to settle the case until the courthouse steps the day of the trial: (a) that's a rather long wait; (b) you are not likely to get much (any?) interest as part of your settlement; (c) you will have had to answer interrogatories and be deposed and prepared as a witness for trial; (d) whatever you settle for is lessened by the amount of attorneys' fees. They say that it is the early worm that gets the worm.<sup>2</sup>

In a trial, the plaintiff (the one suing) has the burden of proof as to its case and the burden of production of evidence, meaning that it is the plaintiff who has to produce the witnesses and documents supporting its case. All of the plaintiff's written evidence and witnesses go into the record of the trial before the defendant has to do anything other than cross-examine the plaintiff's witnesses.

Now, I'm not telling you something you don't already know in saying that one's employees tend to move around. What employees do you have now that you didn't have five years ago? And, conversely, what employees did you have five years ago that you don't have now?

Employees move to different areas of the country. In the main, no civil court subpoena can be served outside of Massachusetts to compel attendance at a Massachusetts court. So, even though southern New Hampshire isn't very far away from Essex Superior Court (Lawrence), there is no way to compel the attendance and testimony of witnesses from southern New Hampshire. Sure, if you want it badly enough and are willing to jump through some procedural hoops, you can probably get a court order to depose the witness in New Hampshire. But, depositions are the most expensive discovery tool. And, if you need this person's testimony, you will probably want to take an audio/visual deposition, which is *very* expensive.

Also, it's not unusual for some employees to leave with hard feelings for any number of reasons. Yet, if you have a case, you might need their cooperation – however unlikely it is that

you might get it – or figure some other way to prove your case trying to substitute some other evidence for what they were likely to say.

And, memories of past events don't tend to improve as past events fade into the rear view mirror. Yet, the specifics of particular factual issues – not just general impressions – is what is necessary to have effective evidence.

Daily reports and good pictures and videos are outstanding evidence to have in most civil trials where one party alleges the other party breached the contract or didn't keep up with the schedule or delayed the job. And, they are relatively easy and inexpensive to obtain.

## **II. DAILY REPORTS AS BUSINESS RECORDS.**

Like most professions, the tv is not generally realistic in terms of what happens at a trial.

A big problem is that, generally speaking, out of court statements cannot be testified to as evidence at trial because this is hearsay evidence. Say a witness would like to say that Joe Blow told him at the jobsite that the building was not ready to be painted at some particular point in time. This couldn't go into evidence in this form. The reason for this rule is that the non-proponent of the testimony has an inherent right to cross examine witnesses giving evidence. So, to prove that point, the lawyer would subpoena Joe Blow in and ask him whether or not the building was ready to be painted as of some particular point in time.<sup>3</sup>

How does that affect *you*? Well, you are on the job and the Architect gives you an important oral direction. But, since your suit is not with the Architect, that statement cannot go into evidence as it is because it is hearsay evidence. You'd have to get the Architect to testify as to that statement from the witness stand. Just getting the Architect into court will be a trip and one-half.<sup>4</sup>

Or, as you are working doing your contract work, perhaps you are being delayed. Or, you are suffering an inefficiency of labor due to a stacking of the trades. Or, you are working on an important piece of extra work as to which it will be incumbent upon you to be able to prove on any particular day what labor and materials and equipment were expended on contract work and what labor and materials and equipment were expended on the extra. Or, you have been directed to paint but it was too cold to paint because the temperature would fall below the minimum temperature necessary for the paint to properly dry. Or, the subbase for paving was improper to be paved. Yet, you are directed to paint (or pave) or suffer termination if you don't.

A daily report - assuming it is your company's practice to prepare these on *all* of your jobs - is a *business record*. That means that *everything* contained in that report goes into evidence without any oral testimony being necessary to authenticate the written words, even when the daily report contains all kinds of hearsay evidence, opinions and other evidentiary problems which otherwise might bar a piece of information from going into evidence as is.

Without a ‘business record’, to prove temperature involves getting expert testimony on this or some kind of record from a weather service, which takes time to get and costs money. By the time you realize that you need this, it may be too late to get it.<sup>5</sup>

So, what is a ‘business record’? In Massachusetts, this is defined by statute:

M.G.L.A. 233 § 78

§ 78. Entry, writing or record made in regular course of business; impeachment

“An entry in an account kept in a book or by a card system or by any other system of keeping accounts, or a writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall not be inadmissible in any civil or criminal proceeding as evidence of the facts therein stated because it is transcribed or because it is hearsay or self-serving, **if the court finds that the entry, writing or record was made in good faith in the regular course of business** and before the beginning of the civil or criminal proceeding aforesaid **and that it was the regular course of such business to make such memorandum or record** at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. For the purposes hereof, the word “business”, in addition to its ordinary meaning, shall include profession, occupation and calling of every kind. . .” (Emphasis added)

What are the elements, then, of a ‘business record’? There are principally two:

- (1) It must be made in good faith in the ordinary course of your business;
- (2) It is the regular practice of your business to keep such a record;

What are the kinds of ‘evidence’ that can be included in a daily report admissible as a ‘business record’?

Here are some examples only.<sup>6</sup>

- (1) What the temperature was at, say, 7am, 11am, 1pm, 3pm and 5pm.
- (2) What specific labor, materials and equipment were being expended to perform contract work and what labor, materials and equipment were furnished with regard to a possible change order/change order proposal/differing site condition or item of extra work.
- (3) What specific oral direction was given to your superintendent at the job by the owner, the general contractor or the architect.

- (4) Being able to include statements in the record: “We are being delayed” for this reason or for that reason.
- (5) Areas of the job where you are delayed/hindered or suffer an inefficiency of labor factor with a statement as to ‘why’.
- (6) Who were visitors to the job.
- (7) What tests or inspections occurred on that day and what were the results of the same.
- (8) What progress was made for your trade and where in the job were you working.
- (9) What interference was there with progress on your trade on this date.
- (10) What unresolved factors and issues are contributing to a delay.
- (11) What preparatory work to your work was not performed/properly performed as of this date, which was affecting your ability to perform your own work.
- (12) What meetings occurred on this date and what statements were made helpful to your position or claim.

These are just the kinds of things you might want your superintendent to testify to if: (a) he still has any inclination to help you; (b) he is still located within the state of Massachusetts at the time of trial, thus susceptible of being subpoenaed; (c) he could remember, actually, what happened on each and every day important to your issue, which will never be to the same extent and detail as a written record prepared on each and every day important to your issue.

The above list is not all-inclusive. There could be necessary evidence applicable to your trade or job not listed above but which could be listed in a daily report.

A foreman’s log is not a ‘business record’. This is because it is a record kept by a particular foreman for this particular job, not something universally required by his/her employer on all of its jobs. Also, it has been my experience that foremen tend to treat their logs as their own personal property, something that is not even kept within a business’s files and something the foreman takes with him/her as they move on to a different job.

Daily reports are not a panacea. They are not the alpha and the omega of your potential proof problems. But, they are a very good start and something that will establish the facts and the evidence that you would otherwise have to try to get out of that difficult or unavailable employee. And, since that record is prepared on a daily basis – hopefully, on the very day the report is dated – the document will never suffer from any recollection or memory issues. And, since any number of pieces of information and opinion can be stated in the document that the witness if called to testify wouldn’t be allowed to testify to, you are probably way ahead of the game using a properly prepared daily report.<sup>7</sup>

### **III. PICTURES AND VIDEOS.**

As an introduction to this topic, let’s briefly discuss how pictures and videos can assist with typical construction litigation issues, such as establishing the factual basis for a defense of concurrent delay. That legal principle can be summarized as stating that when a contractor and an owner both contribute to a delay, neither party is able to collect delay damages. Also, an owner is not entitled to assess liquidated damages for delay when a concurrent delay is proved. Another way of putting this is to say that since the two parties contributed to ‘concurrent’ delays

– each delaying the job at roughly the same time - neither will have a claim for delay damages or be liable for delay damages.

Since the mechanical trades (plumbing, HVAC and electrical) tend to work at about the same time, the progress or lack of progress of one of these trades may be probative as to whether or not another of these trades delayed the job. For example, if the plumber is at 30% completion as of a certain point in time and the HVAC guy is at 40% completion as of that same period of time, it is unrealistic to expect the electrical guy to be at 80% completion as of that same period of time.

Pictures show the factfinder what was going on as of a certain period of time. They help to prove the 30% completion of the plumber and the 40% completion of the HVAC contractor. So, pictures help in defeating delay claims and/or claims that the electrical guy is not keeping up with the schedule. Conversely, pictures can help a plaintiff contractor in proving that it has been delayed when comparing what the pictures show with the construction schedule. Pictures provide compelling evidence as to whether or not a building is weather tight as of a certain period of time.

They are also a way of establishing evidence of differing site conditions.

They are good evidence of the fact that a certain piece of required work before another contractor has to perform simply hasn't been done.

It's one thing to have testimony or even a daily report that says there is a foot of snow on the ground. A picture is better evidence because people can see this with their own two eyes. People are much more inclined to believe what they see and are less inclined to believe what a person says.<sup>8</sup> After all, each witness is called by one of the parties, which naturally leads one to conclude that this person is going to testify in a manner to support a party's claims or defenses. A picture is neutral. It shows what it shows irrespective of whether this helps a party or hurts it. The evidence proves itself to the factfinder in a way a person can never effectively testify to. A witness will say 'these are the facts'. But, if it's a good picture, the fact-finder will be able to determine for itself what the facts are. A good picture allows the fact-finder to make whatever inferences he or she wants to from the picture.

Perhaps, this even more so today than used to be the case. People are forever looking at their phones, their tablets or their other digital devices. And, many (most?) people who work in offices spend at least part of their day staring at a computer. We are all used to *seeing* things and there is that saying, first recorded in 1639 (Wikipedia) that 'seeing is believing'.

The use of pictures also saves trial time.

Both judges and juries get quickly bored with construction cases with their boxes of records and how the witnesses tend to drone on and on as to some point that interests the witness but which can be more effective than NyQuil for putting the fact-finder to sleep. It's one thing to have someone describe in words through testimony a certain job condition. It is more effective to simply show someone a picture. And, a lot quicker, also.

The pictures or videos should be dated.

They are fairly easy to introduce into evidence. The principal requirement for doing so is for someone to testify that ‘it is a true and fair representation of the subject matter at issue at the relevant time.’ (Judicial language from a case.) And, providing that there is a witness who can so testify, I am unaware of any legal requirement that the party authenticating the picture has to be the person who actually took the picture. That person might be long gone. The person who held the camera might be one of those difficult or unavailable witnesses. But, if the pictures remain, we essentially have the benefit of that witness’s visual testimony. And, unlike a witness, an opposing lawyer can’t cross-examine a picture.

#### **IV. CONCLUSION.**

I commenced this Squib by stating that only about one percent of all civil cases go through a complete trial and the better (and earlier) a party is prepared for trial, the more likely there will be an earlier settlement.

My experience has been that for many construction cases I have tried, good daily reports and pictures are among the most necessary of exhibits, a party’s best evidence. This is particularly so in cases with issues of delay or non-adherence to a schedule or claims for material breach of contract based on this reason or that reason.

If I had a nickel for every time a business owner told me that he couldn’t get his supers to prepare decent daily reports, I’d have a lot of nickels! Coach Belichick, who works not even five miles away from our main office, in his efforts to motivate his players, likes to tell them that the bus stops daily right in front of the stadium. Some people get off the bus while other people may be forced to get on the bus. The Coach giveth and the Coach taketh away.

Employees can be like children in that they’ll get away with whatever you *let* them get away with. If it were me, I’d tell the supers that when they come to pick up their weekly check, they had better have a set of *decent* daily reports covering the last week. If the supers truly believe that you, the business owner, are really serious about this, this issue will last precisely one week, possibly even less. And, for those supers who still can’t/won’t perform, there is always that bus!

Almost all cell phones these days, other than the cheapest of burners, take both pictures and videos. Supers should be encouraged to take as many pictures as they deem necessary to document actual issues and *possible* issues at the job. For pictures of more important things, there might even be a reference on a daily report to the effect of ‘pictures taken’. This will help the lawyer in organizing the evidence and help to support a witness’s oral testimony.

Having good daily reports and comprehensive representative pictures available for trial will help you make more money. As a plaintiff, because they will help you prove your case when you are seeking monetary damages. And, as a defendant, they will help with both rebutting the plaintiff’s evidence and in proving the defendant’s affirmative defenses and

counterclaim, which evidence, if successful, is likely to minimize any payment that a defendant need make. And, if you have access to this evidence and the other side doesn't have this kind of evidence or evidence to the level of your quality, this helps to settle cases.

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<sup>1</sup> 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.”

<sup>2</sup> I am advised by a friend who was on the ‘*Survivor*’ show that worms can be quite tasty when roasted in a certain way. He did say, however, that he never really acquired a taste for sea slugs, although he did try them several times.

<sup>3</sup> Statements by a party made outside of court are generally admissible as ‘admissions’ or ‘declarations against interest’, this being an exception to the hearsay evidence rule.

<sup>4</sup> Architects don’t generally like to testify because they can’t cut and paste their words from another trial the way they can cut and paste their bid documents.

<sup>5</sup> Lining up witnesses and the evidence they will testify to is largely done in the week or two prior to trial. If a written record as to temperature has to be ordered, there may be insufficient time to obtain it. And, for superior court civil trials, all of the documentary evidence has to be pre-marked as exhibits. If you don’t have that weather record at that time, you may not be able to get it into evidence.

<sup>6</sup> At Sauer & Sauer, we prepare any number of custom contracts and other forms that our clients are able to use in their businesses.

<sup>7</sup> In a trial, generally speaking, the only witness who can offer an opinion is an expert witness. All other witnesses are limited to testifying as to the facts as they understand them and not as to their opinions as to what those facts mean.

<sup>8</sup> Marvin Gaye in ‘I Heard It Through The Grapevine’ sang: “People say believe half of what you see Son, and none of what you hear”. Does that mean that at some point in time he had to serve on a jury?