

**American Bar Association
Forum on the Construction Industry**

**Swimming with the Sharks: Litigating the Construction
Case and More**

**MODEL JURY INSTRUCTIONS FOR
CONSTRUCTION LITIGATION:
MAKING YOUR CASE CLEAR TO THE JURY**

**Michael R. Libor, Esquire
Victoria J. Miller, Esquire
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103**

**May 18-19, 2006
Paradise Point Resort & Spa, San Diego, CA**

© 2006 American Bar Association

**SUGGESTED JURY INSTRUCTIONS IN CONSTRUCTION LITIGATION
MAKING YOUR CASE CLEAR TO THE JURY**

**Michael R. Libor
Victoria J. Miller
Morgan, Lewis & Bockius LLP
1701 Market St.
Philadelphia, PA 19103-2921
215.963.4936
mlibor@morganlewis.com
vmiller@morganlewis.com**

I. INTRODUCTION

This article highlights the significance of effective jury instructions in construction litigation. Section II briefly covers basic background material and requirements concerning jury instructions. Section III discusses instructions covering some of the claims encountered in construction litigation, including a discussion of the Model Jury Instructions published by the American Bar Association, Litigation Section, in 2001. These instructions serve as a helpful starting point for preparing more case-specific instructions that should be tailored to the pleadings and evidence of each particular case. Section IV highlights some of the instructions provided in the ABA Model Jury Instruction publication, and also provides suggested supplemental instructions on issues such as spoliation of evidence and the fiduciary relationship between a construction manager and an owner. The end result is a set of jury instructions that will promote the development of counsel's case during discovery and in the preparation of the evidence to be presented at trial, and explain the legal theories and concepts in a clear, understandable fashion to jurors.

II. JURY INSTRUCTION STANDARDS – THE BASICS

A federal district judge has the obligation to instruct the jury as to the applicable law: “[p]erhaps the most important duty of the trial judge is the careful, accurate instruction of the jury as to the law that they must apply to the facts that they find.” *Mosher v. Speedstar Division*

of *AMCA*, 979 F.2d 823, 824 (11th Cir. 1992), *appeal after remand*, 52 F.3d 913 (11th Cir. 1995) (citation omitted). In fulfilling this duty, the judge has wide discretion to help the jury arrive at a just conclusion “by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important, and . . . [by] express[ing] his opinion upon the facts, provided he makes clear to the jury that all matters of fact are submitted to their determination.” *Quercia v. United States*, 289 U.S. 466, 469, 53 S.Ct. 698, 699 (1933).

Judges do not bear the full responsibility for crafting jury instruction. Counsel should prepare and submit written instructions in every case. *See* Kevin F. O'Malley, Jay E. Grenig & Hon. William C. Lee, *Federal Jury Practice and Instructions* § 7.02 (5th ed. 2000). Preparation of jury instructions by counsel serves at least three purposes. First, it assists the jury by: explaining for the jurors their role in the trial process and focusing them on their duties and responsibilities as well as the factual contentions of the parties. *See id.* As one court has described it, the function of the jury charge is “the instructional equivalent of the mariner's compass and sea-lane map in order that lay jurors might successfully complete their voyage.” *Midwest Precision Servs. v. PTM Indus. Corp.*, 887 F.2d 1128, 1137 (1st Cir. 1989). Second, preparation of jury instructions by counsel provides the court with an opportunity to understand fully counsel's legal theory of the case. Properly prepared requests for jury instructions submitted to the court can perform the same role as a pretrial brief. Finally, early preparation of jury instructions can promote counsel's development of the case during the discovery phase and in the preparation of the evidence to be presented at trial.

The procedural aspects of civil jury instructions in federal courts are specifically governed by Rule 51 of the Federal Rules of Civil Procedure as well as local rules. The rule governs issues relating to the proffer, acceptance, or denial of jury instructions, and the trial

court's duties concerning the instructions in civil cases. Rule 51 was amended in 2003 and as the comments to the amendments indicate, the revisions incorporate interpretations that have emerged through common practice. While this is not a complete review of Rule 51, a summary of the basics is appropriate. The obligations of the parties to provide instructions are described in the Rule as follows:

(a) (1) A party may, at the close of evidence or at such earlier reasonable time that the court directs, file and furnish to every other party written requests that the court instruct the jury on the law as set forth in the requests.

The following are, in part, the court's obligations. The court:

(b) (1) Must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing to the proposed instructions and actions on requests before the instructions and arguments are delivered; and

(3) may instruct the jury at any time after trial begins and before the jury is discharged.

Fed. R. Civ. P. 51(b).

The judge must inform counsel of his proposed action concerning the requested instructions before the arguments to the jury, so that counsel may frame their arguments to the jury in light of the law and to permit them to object to the instructions before the jury retires. *See United States v. Prawl*, 168 F.3d 622 (2d Cir. 1999).

Furthermore, a party will waive the right to appeal by not requesting specific instructions or not specifically and timely objecting to others. To preserve its right to appeal, a party must ensure that it has properly objected to an instruction given and/or to the denial of its request to have its instruction given. The party must object on the record, stating the instruction objected to

and the reasons for the objection. The objection is timely if the party: (1) has been informed that an instruction will be given or the request has been acted upon and objects before the jury is instructed and before final argument; or (2) has not been informed of an instruction or an action on a request before the instruction is given and objects “promptly after it learns that the instruction or request will be, or has been given or refused.” Fed. R. Civ. P. 51(c)(2).

Objections must be made outside of the hearing of the jury. Ordinarily, objections made in the presence of the jury will be prejudicial error, unless it is clear that no prejudice resulted. *See Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887 (1974). Objections to instructions should be timely and specific, stating the precise grounds upon which the objection rests, so that the judge is aware of what the objection is and why the proposed instruction is wrong, so that the objection can be preserved for appeal. *See Dotson v. Scotty's Contracting, Inc.*, 86 F.3d 613, 616 (6th Cir. 1996). Timely and specific objections are necessary to permit the court the time to correct any errors with the instructions before it is too late. Thus, the objections must be made before the jury retires to determine a verdict.

It must be remembered that the court is not obligated to give any instruction raised by the evidence unless it is raised by a party. Therefore, a party will lose the right to appeal when it has not requested an instruction.

Importantly, the new rule continues the need to repeat the request by way of objection if the instruction is requested and not given and the court does not give a definitive ruling on the record rejecting the request. *See Comment to (d)(1)(B)*. As in the prior practice that the new Rule incorporates, this makes it clear for the record that counsel has objected before the jury retires to deliberate.

Finally, charges must be supported by competent evidence and set forth the applicable law.

All this being said, merely following the requirements of Rule 51 will accomplish little without well drafted jury instructions. Jury instructions explain the law to non-lawyers, so it is essential that lawyers draft accurate and clear instructions. To this end, it is helpful to keep in mind some very basic considerations. Because the instructions will be delivered by the judge, the instructions should be framed in neutral language. The instructions should also be organized in light of the rules of the jurisdiction. So, for example, if the jurisdiction permits the jury to have a copy of the instructions, the instructions should be organized so that they are visually clear. Model jury instructions should also be adjusted to reflect the facts of the case at bar.

Jury instructions occupy a significant role in construction litigation in which the jury must grasp not only difficult legal concepts, but also complicated factual scenarios. Construction lawyers and judges must provide jurors with the legal guidance to find their way through the thicket of prime contracts, subcontracts, owners, architects, and plans and specifications. With this in mind, the rest of this article focuses on how some of the most common construction related claims can be effectively captured by jury instructions. The model jury instructions attached as appendices provide clear and balanced instructions for presentation to juries in construction litigation. These instructions supply the framework around which lawyers can present and develop their own instructions to fit their cases, so that juries in construction cases will be able to understand more fully the law that they must apply to the facts.

III. MODEL JURY INSTRUCTIONS

Jury instructions must, of course, be based upon the law applicable to the facts and claims at issue. Many state bar associations have published model jury instructions that provide

guidance for basic contract and tort claims. Similarly, good summaries of relevant law may be found in the various Restatements and in case law. In general, however, these types of publications are only the start in the search for information and helpful instructions in construction litigation. They typically do not address the many legal theories and nuances found in a complex construction dispute.

In 2001, the Construction Litigation Committee of the American Bar Association published *Model Jury Instructions: Construction Litigation*, which is a set of comprehensive instructions devoted to issues and claims found in construction disputes. I was the principal author of that publication, although I received tremendous assistance and advice from several other experienced, well-respected construction attorneys.

The Model Instructions are divided into ten chapters, each with many instructions and citations. The instructions are party-neutral and are designed to tell a jury what must be proved to prevail on claims and defenses. Although far from exhaustive, they do cover most of the common construction related claims and are a starting point for case-specific instructions. The ten chapters are broken out as follows:

Chapter One provides jury instructions related to the fundamental elements of the typical construction claim founded on breach of contract. These instructions also address the doctrine of promissory estoppel, which can provide a basis of recovery in instances where the requirements for the formation of a contract have not been met.

Chapter Two addresses the contractor's pre-bid obligations, including the contractor's obligations to follow prescribed bidding instructions, report obvious or patent ambiguities in the contract documents and conduct a reasonable site visit or investigation before bidding. The

instructions contained in this chapter also discuss the effect of the contractor's compliance or non-compliance with its pre-bid obligations on the contractor's right to recover.

Chapter Three addresses issues of contract avoidance embodied in the principles of mutual and unilateral mistake. The instructions related to unilateral mistake are specifically tailored to the construction bid process where the contractor refuses to perform services for the Owner for the sum stated in the bid.

Chapter Four provides instructions related to the implied duties and obligations of the parties to a typical construction contract. The breach of these implied duties and obligations might provide a basis for obtaining additional compensation or a justification for construction delays or deficiencies, or provide the owner with an independent claim for damages.

Chapter Five provides several instructions related to claims for extra work. These instructions address the significant legal issues related to the owner's right to issue change orders and order extra work, the contractor's ability to receive additional compensation for such work, and the amount to be paid for the work.

Chapter Six is dedicated to issues related to the jury's ultimate determination of contract performance or breach. The instructions contained in this chapter revisit the concepts of express and implied contractual obligations addressed in earlier chapters and develop these issues in the warranty context.

The instructions in Chapter Seven continue to explore alternative theories of liability to the traditional claim for breach of contract, including third-party beneficiary, quasi-contract, negligence, negligent misrepresentation and fraud. Such theories are often invoked to overcome the requirement of privity of contract.

Chapter Eight provides instructions related to the liability of the design professional, including most of the elements of an owner's claim against the design professional. The instructions in Chapter Nine address some of the most common defenses invoked by the owner and contractor in construction disputes. Chapter Ten addresses issues of damages, including standards of proof and the requirements of causation and foreseeability.

IV. REPRESENTATIVE AND SUPPLEMENTAL INSTRUCTIONS PROVIDED IN THE ABA MODEL JURY INSTRUCTIONS – ADDRESSING NEW CHARGES AND DEVELOPMENTS

The following are explanations for the underpinnings of some of the instructions, the support for the instructions, and how they can be modified to fit case-specific scenarios. We attempted to pick topics that are instructive and representative of how construction-specific jury instructions can be used to both develop a litigant's discovery and trial preparation, and how those concepts can be conveyed to the jury. We also attempted to suggest new instructions on spoliation of evidence and the fiduciary relationship potentially created on projects involving construction managers. Both of these topics are the subject of much recent litigation. These authorities are representative only, however, and do not purport to be a complete statement of the law in all jurisdictions.

A. Spoliation of Evidence (Appendix A)

Spoliation is the destruction, or significant and meaningful alteration, of evidence. When evidence is destroyed or damaged, regardless of the intent when destroying the evidence, the responsible party is potentially open to a charge of spoliation of evidence. In construction cases, spoliation typically occurs when construction materials or evidence is discarded, covered over or destroyed as a result of repairs, rework, testing or for other reasons or circumstances.

Frequently, parties are required to retain damaged materials, or the evidence thereof, when

buildings are damaged, beset by fire, or when construction site accidents occur. Owners and/or construction firms may be required at law, or may be asked by construction participants, to forego repairs or construction work until proper inspections can occur. If they fail to do so, they may be open to a charge of spoliation of evidence critical to a plaintiff's or defendant's case. In addition, the construction practitioner must also be aware of spoliation issues arising from the destruction of electronic documents, such as e-mail, transmittals, etc.

Spoliation issues reach the jury in two ways: (1) when the court has already found that one of the parties is responsible for spoliation of evidence and the court instructs the jury that it may take an adverse inference because evidence has been altered or destroyed; or (2) the jury is asked to decide whether a party has spoliated evidence.

1. Court Imposed Sanctions – Adverse Inference Instruction

In many spoliation contexts, the court is asked to decide whether spoliation has occurred in motion practice prior to or during trial. A court finding evidence of spoliation has the option to grant the sanction of an adverse inference instruction with respect to the destroyed evidence and the jury will be instructed accordingly. Across jurisdictions, however, courts disagree over the level of culpability required to sustain a sanction for the destruction of evidence and the practitioner must be careful to craft instructions that incorporate the local law on this issue. *See* Drew D. Dropkin, *Linking the Culpability and Circumstantial Evidence Requirements for the Spoliation Inference*, 51 Duke L.J. 1803, 1805 (2002).

A party bringing an action alleging injury due to a defective product has an absolute duty to preserve the product for defense inspection. *See e.g., Bowman v. American Med. Systems, Inc.*, No. CIV. A. 96-7871, 1998 WL 721079, at *3 (E.D. Pa. Oct. 9, 1998). The duty arises “as soon as a potential claim is identified.” *Baliois v. McNeil*, 870 F. Supp. 1285, 1290 (M.D. Pa.

1994). When the claim is a subrogation matter, knowledge of a potential subrogation claim is sufficient to impose a duty to preserve evidence. See id.

In *Baliois*, the plaintiff's insurance carrier had ordered a fire scene destroyed two months after the fire occurred. *Id.* at 1288. The plaintiff and its carrier were in control of the fire scene, and the carrier had identified one of the defendants as a potential subrogation target before authorizing the destruction of "indisputably relevant evidence." *Id.* at 1290. In holding that the insurer and the insured were subject to sanctions, the court noted that while the scope of the duty to preserve evidence "is not boundless," at a minimum, "an opportunity for inspection should be afforded a potentially responsible party before relevant evidence is destroyed." *Id.* at 1290.

The "obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation." *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998). Although notice is most commonly found to exist after the filing of a complaint, courts also have found that a party has notice of its obligation to preserve evidence "when a party should have known that the evidence may be relevant to future litigation." *Kronisch*, 150 F.3d at 126; *see also Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001).

In addition, if a plaintiff has retained counsel knowing that litigation may commence, the plaintiff's fault is particularly evident. *See Bowman*, 1998 WL 721079, at *4 (holding that plaintiff bore some degree of fault in the loss of the product, even though the plaintiff had asked his doctor not to discard the product, noting that the plaintiff had counsel prior to its destruction); *Austin v. Nissan Motor Corp., U.S.A.*, CIV. A. No. 95-1464, 1996 WL 117472, at *2 (E.D. Pa. Mar. 12, 1996) (holding that plaintiffs were at fault where they had retained counsel before the spoliation and were therefore aware that any potential lawsuit would revolve around alleged defects in the discarded driver's seat); *Tripp v. Ford Motor Co.*, No. CIV.A. 95-2661, 1996 WL

377122, at *2 (E.D. Pa. July 3, 1996) (holding that the plaintiffs were at fault, but did not act in bad faith, where they had retained counsel before the spoliation occurred).

The greater the control over the product at issue, the greater the level of fault in the subsequent destruction of that product. *See e.g. Howell v. Maytag*, 168 F.R.D. 502, 506 (M.D. Pa. 1996) (holding that the plaintiff had an affirmative duty to give the defendant the opportunity to conduct an investigation before destruction of the fire scene where plaintiff had control of the property and plaintiff could have given defendant notice of a potential claim); *Tenaglia v. Proctor & Gamble, Inc.*, 737 A.2d 306, 308 (Pa. Super. Ct. 1999) (upholding summary judgment for the defendant when the plaintiff had sufficient control over the product at issue and could have ensured that it was preserved but neither requested that it be saved or attempted to save it herself); *Troup v. Tri-County Confinement Systems, Inc.*, 708 A.2d 825, 827 (Pa. Super. Ct. 1998) (holding sanctions appropriate where plaintiff had control over roof trusses but failed to preserve them so that defendant could conduct an investigation).

Some jurisdictions grant an adverse inference instruction where a party merely negligently permitted destruction of documents or things. Courts typically require some level of culpability by the spoliator, such as a showing that the spoliated evidence once existed and is related to the case and that the spoliating party have actual or constructive notice that the evidence could be needed for litigation. In *One Beacon Insurance Company v. Broadcast Development Group, Inc.*, 147 Fed. Appx. 535 (6th Cir. 2005), the jury was instructed that it could draw an adverse inference in a case involving the collapse of a broadcast tower under construction. The contractor's affiliate, Central Tower, designed the tower and manufactured its component parts. *Id.* The focus of the post-collapse investigation initially centered on guy wires that had not been anchored by a subcontractor's employees. *Id.* Later in its investigation,

however, the subcontractor learned that faulty welds holding flanges to the tower legs may have been at fault. *Id.* By that time, however, the subcontractor had been removed from the job site, portions of the tower that were buried as a result of the collapse were covered over, and most of the remaining tower pieces were destroyed as scrap. *Id.* at 538. In addition, the contractor retained one of the broken tower legs for 13 months and then destroyed it, as well as a report by its quality control supervisor critical of the welds was also destroyed. Both of these important pieces of evidence were withheld by the contractor during discovery.

At trial, the subcontractor's experts opined on the faulty design and manufacture of the welds, but only as to pieces of the tower not involved in the collapse because those were the only pieces available to them.

The Sixth Circuit affirmed the trial court's jury instruction in accordance with Kentucky law, which requires only negligent destruction of evidence that is "relevant to an essential element of an opposing party's case." *Id.* at 540. The court found that a genuine question existed as to whether the contractor/manufacturer's destruction of the evidence was negligent, and thus it was appropriate to instruct the jury that "if they find that the destruction was at least negligent, they may infer that the missing evidence would favor the non-spoiling party." The spoiling party must have been on notice "of the item's possible relevance to litigation." *Id.* at 542. The court held that the manufacturer was on notice of the parts' potential relevance to the litigation because it knew during manufacture that the welds may have been defective. *See also Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 75 (S.D.N.Y. 1991) (holding that "this sanction should be available even for the negligent destruction of documents if that is necessary to further the remedial purpose of the inference.

It makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently.” *Mosaid Tech. Inc. v. Samsung Elec. Co., Ltd.*, 348 F. Supp. 2d 332, 338 (D.N.J. 2004) (holding in case involving destruction of e-mails that negligent destruction of relevant evidence can be sufficient for an adverse inference instruction).

Appendix A provides a suggested form of instruction based upon the negligent spoliation of evidence. Other states use a number of factors in determining whether a spoliation sanction or an adverse inference instruction is warranted. For example, in 1898, the Pennsylvania Supreme Court discussed the spoliation doctrine as follows:

The spoliation of papers and the destruction or withholding of evidence which a party ought to produce gives rise to a presumption unfavorable to him, as his conduct may properly be attributed to his supposed knowledge that the truth would operate against him. This principle has been applied in a great variety of cases, and it is now so well established that it is unnecessary to do more than state it.

McHugh v. McHugh, 186 Pa. 197, 201, 40 A. 410, 411 (1898). The spoliation doctrine emanates from the “common sense observation that a party who has notice that evidence is relevant to litigation and who proceeds to destroy evidence is more likely to have been threatened by that evidence than is a party in the same position who does not destroy the [evidence].” *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 78 (3d Cir. 1994). Therefore, a plaintiff who brings an action alleging injury from a defective product “has a duty to preserve the product for defense inspection.” *Id.* at 79.

The Third Circuit in *Schmid* adopted a three part test to determine the appropriate sanction for the spoliation of evidence: “(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) the availability of a lesser sanction that will protect the opposing party’s rights and deter future

similar conduct.” *Id.* at 251; *see Schroeder v. Department of Transportation*, 551 Pa. 243, 252, 710 A.2d 23, 27 (1998).

Some courts are cautious in granting an adverse inference instruction for negligent destruction of evidence and require some extrinsic evidence that the destroyed evidence would have been unfavorable to the spoliator in order to balance the evidentiary violation with the penalty. *Turner*, 142 F.R.D. at 77 (holding that no adverse inference instruction was warranted absent any extrinsic evidence to show that the destroyed evidence would have been unfavorable to the spoliator).

Other jurisdictions require a heightened level of culpability before permitting an adverse inference instruction. *See, e.g. Aramburu v. The Boeing Co.*, 112 F.3d 1398 (10th Cir. 1997) (requiring showing of bad faith to justify adverse inference instruction for spoliation of evidence) (*BCE Emergis Corp. v. Community Health Solutions Of Am., Inc.*, 148 Fed. Appx. 204, 218 (5th Cir. 2005) (requiring bad faith or bad conduct by the spoliator for adverse inference instruction).

The Second Circuit has observed bluntly that “[t]he law in this circuit is not clear on what state of mind a spoliator must have when destroying [evidence].” *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107-08 (2d Cir. 2001). New York courts, however, have found that a showing of gross negligence is sufficient to justify sanctions at least as serious as an adverse inference. *See Residential Funding*, 306 F.3d at 108; *Golia*, 2003 WL 21878788, at *9-11; *Barsoum v. New York City Housing Auth.*, 202 F.R.D. 396, 400 (S.D.N.Y. 2001).

Generally, a party seeking sanctions for spoliation has the burden of proving three elements: (1) that the spoliator was obligated to preserve the evidence; (2) that the spoliator acted culpably in destroying the evidence; and (3) the evidence would have been relevant to the aggrieved party’s case “in that a reasonable jury could conclude that the evidence would have

been favorable to the [aggrieved party].” Riddle v. Liz Claiborne, Inc., No. 00 Civ. 1374, 2003 U.S. Dist. LEXIS 14327, at * 3-4 (S.D.N.Y. Aug. 19, 2003).

The case of *Henkel Corp. v. Polyglass USA, Inc.*, 194 F.R.D. 454 (E.D.N.Y. 2000) is instructive. In *Henkel*, plaintiff property owner brought suit for damage its warehouse sustained in a fire that originated in the roofing material manufactured by the defendant. Prior to bringing suit against the defendant, however, the property owner photographed and removed fire debris from the scene. *Id.* at 455. Once the litigation had commenced, the defendant’s expert was unable to conduct an inspection at the scene and draw conclusions regarding the cause of the fire. *Id.* at 455-56. Defendant, therefore, moved to preclude the property owner from providing evidence at trial as to the cause and origin of the fire as a sanction for spoliation of the evidence. *Id.* at 454. The court agreed that the property owner’s removal of fire debris before it brought suit against the defendant was highly prejudicial to the defense and constituted spoliation of evidence, but found that the proper sanction for such conduct was an adverse inference charge instructing the jury that it could infer from the property owner’s removal of the fire debris that the evidence from the fire scene would have been unfavorable to the property owner. *Id.* at 457.

A specific intent to hinder the litigation process is typically not necessary because “[s]poliation may be inferred where the party has destroyed the documents *intentionally* or *negligently* despite a duty to retain them.” *Byrnie*, 243 F.3d at 109 (emphasis added).

The aggrieved party must usually demonstrate that the documents were relevant to the claims or defenses in the case. Courts must not “hold[] the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed evidence.” Kronisch, 150 F.3d at 128. Rather, a party may establish relevance by demonstrating that “the evidence in the case as a whole suggests that the documents would have helped [the party] support [its claims or

defenses].” *Byrnie*, 243 F.3d at 109-110. *See also Saul v. Tivoli Sys, Inc.*, No. 97 Civ. 2386 (DC) (MHD), 2001 U.S. Dist. LEXIS 9873 (S.D.N.Y. July 17, 2001) (holding that an instruction was appropriate although the exact content of destroyed e-mail files was unknown).

The suggested instruction on spoliation at Appendix D incorporates these concepts using a “negligence” standard. It can be adapted to incorporate the heightened standard of some jurisdictions. Furthermore, there is a split among the Federal Circuit courts over whether state law or federal law governs spoliation sanctions in diversity cases. Some circuits hold that federal law governs spoliation sanctions as an evidentiary issue, although state law frequently forms the standards employed by a federal court. *Flury v. Daimler Chrysler Corp.*, 427 F. 3d 939, 943-44 (11th Cir. 2005) (citing 4th Circuit and 5th Circuit case law in support of application of federal law for spoliation standard). Other circuits invoke state law for spoliation standards. *See e.g. Nationwide Mutual Fire Ins. Co. v. Ford Motor Co.*, 174 F.3d 801, 804 (6th Cir. 1999) (applying Ohio state law). Again, this disparity in standards highlights the need to consult local standards before a practitioner sets about drafting jury instructions.

2. Independent Cause of Action for Spoliation Against Third Parties

While the majority of jurisdictions do not recognize this tort, several jurisdictions recognize some form of independent tort cause of action for spoliation of evidence. Spoliation tort claims across these jurisdictions vary widely in what is required and who can be held liable. Some states also recognize causes of action for intentional spoliation. The tort is also referred to as intentional interference with prospective civil action because the destruction of evidence hampers or prevents a plaintiff from bringing a claim. *See Intentional Spoliation of Evidence, Interfering With Prospective Civil Action, As Actionable*, 70 A.L.R. 4th 984.

Some states recognize the tort based upon a mere showing of negligence or recklessness.

In Florida, for example, the elements of this tort are:

(1) [the] existence of a potential civil action, (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action, (3) destruction of that evidence, (4) significant impairment in the ability to prove the lawsuit, (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages.

Continental Ins. Co. v. Herman, 576 So.2d 313 (Fla.App. 3 Dist. 1990).

Alabama considers this claim as a traditional negligence claim but with a shifting burden.

Once the plaintiff has established that the third party had knowledge of the underlying action or potential action, that the third party assumed control over the evidence, and that the lost or destroyed evidence was “vital” to his claim in the underlying action or potential action, a rebuttable presumption arises in favor of the plaintiff.

Smith v. Atkinson, 771 So. 2d 429, 435 (Ala. 2000). The burden then shifts to the spoliator to prove that the “plaintiff would not have prevailed in the underlying action even if the lost or destroyed evidence had been available.” *Id.*

Illinois law is interesting. It defines spoliation as an “intentional or unintentional actions [that] destroy or damage evidence.” 2 NICHOLS ILL. CIV. PRAC. § 30:123. The court in *Boyd v. Traveler’s Insurance Co.*, 652 N.E.2d 267, 270 (Ill. 1995), held that a claim for negligent spoliation could be stated under existing negligence law. *See also Thomas v. Bombardier-Rotax Motorenfabrik, GmbH*, 909 F. Supp. 595, 587 (N.D. Ill. 1996) (noting that Illinois courts alternatively will focus on egregiousness of conduct, state of mind, or prejudice). Although Illinois did not recognize a separate tort action for negligent spoliation, the Boyd court held that such a claim may be heard “concurrently with the underlying suit on which it is based.” *Id.* at 271. Before Boyd, the Northern District of Illinois set forth elements to plead an intentional

spoliation cause of action. *See Mohawk Mfg. & Supply Co. v. Lakes Tool Die & Engineering, Inc.*, 1994 WL 85979 at *1 (N.D. Ill. 1994) Those elements are (1) existence of a potential civil action, (2) the defendant's knowledge of the potential action, (3) destruction of relevant evidence, (4) intent, (5) a causal connection between the destruction of evidence and the plaintiff's inability to prove the lawsuit, and (6) damages. *Id.* *See also Broadnax v. ABF Freight Systems, Inc.*, 1998 WL 140884 (N.D. Ill. 1998) (citing *Williams v. General Motors Corporation*, 1996 WL 420273 (N.D. Ill. 1996)).

When spoliation raises an inference that the evidence would have negatively affected the spoliator's defense or cause of action, Illinois courts may apply an adverse jury inference instruction as outlined in the Illinois Pattern Jury Instructions: Failure to Testify or Produce Evidence. ILL. PATTERN JURY INSTR. CIV. 5.01 (2000 ed.). *See Rupert v. Ryan*, 683 N.E.2d at 175 (stating that the Illinois Pattern Jury Instructions should only be used as originally worded where they correctly and accurately charge the jury). The jury instruction says in pertinent part that:

If a party to this case has failed to offer evidence within his power to produce you *may* infer that the evidence would be adverse to that party if you believe each of the following elements: (1) the evidence was under the control of the party and could have been produced by the exercise of reasonable diligence; (2) the evidence was not equally available to an adverse party; (3) a reasonably prudent person under the same or similar circumstances would have offered the evidence if he believed it to be favorable to him; and (4) no reasonable excuse for the failure has been shown.

ILL. PATTERN JURY INSTR. CIV. 5.01 (2000 ed.) (emphasis added). The failure of a party to produce physical evidence within his control creates a presumption that the evidence, if produced, would have been adverse to him. *Beery v. Breed*, 36 N.E.2d 591 (2d D. 1941). The innocent party must satisfy all of these criteria to benefit from the jury instruction. *Pietrzak v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 670 N.E.2d 1254, 1260 (Ill. App. Ct. 1996). The trial

court has discretion in issuing this instruction and will face reversal only if it abused that discretion. *Id.* at 1260. *But see Cleveringa v. J.I. Case Co.*, 595 N.E.2d 1193, 1211 (Ill. App. Ct. 1992) (pre-Boyd case arguing that adverse inference instructions should only be given where the requested evidence actually exists but is not produced; if the requested evidence has been completely destroyed and no evidence exists, the adverse inference instruction is not given).

A note of caution: the practitioner must consult local standards for third party claims and the nuances of those causes of action in any given jurisdiction.

B. The Total Cost Theory of Damages (Appendix B)

The total-cost theory of recovery is designed to compensate the plaintiff where it is difficult or nearly impossible to quantify the individual impact of each event causing the plaintiff's loss. Under the total cost method of determining damages, the payments received by the contractor are subtracted from the total costs incurred by the contractor in performance of the work, with a markup for overhead and profit. This approach permits the contractor to recover all of the costs incurred on the project and assumes that, but for the breach of the owner, the contractor would have made a profit, that the contractor's bid was perfect, that all recorded costs were reasonable, and that the contractor was blameless. *See Geolar, Inc. v. Gilbert*, 874 P.2d 937 (Alaska 1994); *see also United States ex rel. Taylor & Polk Constr. v. Mill Valley Constr. Co.*, 29 F.3d 154 (4th Cir. 1994).

The jury instruction suggested in Appendix B comes from the ABA Model Instructions and assumes that the total-cost approach is a potentially viable method of calculating damages in the subject jurisdiction. Generally, courts may apply the total-cost method where: (1) the nature of the particular damages makes it difficult to determine them with the normal degree of requisite certainty; (2) the plaintiff's original bid was realistic; (3) the claimed actual costs of the

plaintiff are reasonable in light of the work done; and (4) the plaintiff was not itself at fault for the interference. *See, e.g., In re Meyertech Corp.*, 831 F.2d 410, 419-20 (3d Cir. 1987); *John F. Harkins Co. v. School Dist.*, 313 Pa. Super. 425, 460 A.2d 260 (1983); *Highland Constr. Co. v. Union Pacific R.R.*, 683 P.2d 1042, 1046-47 (Utah 1984).

As a general rule, however, courts will not accept the total-cost method where alternative means of calculation are available or where the claimant is responsible for some of its excess costs and the claimant has not made an effort to segregate those costs from the claim. Courts view this approach with caution and accept it as a last resort. As the U.S. Court of Federal Claims stated, this method "has never been favored by the court and has been tolerated only when no other mode was available and when the reliability of the supporting evidence was fully substantiated." *Meva Corp. v. United States*, 206 Ct. Cl. 203, 511 F.2d 548, 558 (1975) (quoting *WRB Corp. v. United States*, 183 Ct. Cl. 409, 426 (1968)). Courts disapprove of the total-cost approach because the combination of assumptions justifying it are seldom realistic.

In order to assert a "total cost" claim without any such deductions or credits, a claimant generally has to prove that its bid was accurate, that all of its costs were reasonable and that it was not responsible for its excessive costs. *See Wolff & Munier, Inc., v. Whiting-Turner Contracting Co.*, 946 F.2d 1003, 1010 (2d Cir. 1991). This usually includes proof of the claimant's percentage of liability for excess costs or delay damages and apportionment of those costs and delay damages. *See id.* (citing *Columbia Asphalt Corp. v. State*, 70 A.D.2d 133, 136-37 (1st Dep't 1979)). Mere guess work or speculation will not support any claim for damages. *See 25 Fifth Ave. Mgt. Co. v. Ivor B. Clark, Inc.*, 280 A.D. 205, 208 (1st Dep't 1952) *aff'd* by 304 N.Y. 808 (1952) ("The fact of damage must be susceptible of ascertainment in some manner other than mere conjecture or guesswork."); *see also Berley Indus., Inc. v. City of New York*, 412

N.Y.S.2d 589, 591 (N.Y. 1978) (“recovery will be limited to damages actually sustained ... Speculation or conjecture will not suffice.”)

As a result of these limitations, the “modified total cost” approach attempts to account for the problems courts have noted with the total cost approach. Under the modified total cost approach, the contractor's total cost is adjusted by subtracting the costs that the contractor incurred as a result of the contractor's own acts or omissions. Typically, adjustments are made for errors in the bid, costs that were not reasonably incurred, and costs for which the contractor is responsible. *See Glasgow, Inc. v. Dep't of Transp.*, 529 A.2d 576 (Pa. Commw. 1982); *Bagwell Coatings, Inc. v. Middle South Energy, Inc.*, 797 F.2d 1298 (5th Cir. 1986).

C. The Owner’s Warranty Of The Accuracy Of Plans And Specifications (Spearin Doctrine) (Appendix C)

The owner's implied warranty of the accuracy of plans and specifications, otherwise known as the *Spearin* doctrine, is necessary because even the most exhaustive construction contracts may not expressly allocate the risk of loss for defective, incomplete or contradictory contract specifications and drawings. *See* Kevin C. Golden & James W. Thomas, *The Spearin Doctrine: The False Dichotomy Between Design and Performance Specifications*, 25 PUB. CONT. L.J. 47, 48 n.3 (1995).

The *Spearin* doctrine allocates the risk to the provider of the specifications, the owner, and excuses the recipient contractor for increased performance costs caused by defective specifications. In other words, if the contractor is required to follow the owner's design specifications, the contractor is not responsible for the consequences of defects in the plans and specifications. The warranty will apply if the contract specifications can be characterized as design specifications rather than performance specifications.

The rule was recognized as “well settled” in the landmark case of *United States v. Spearin*, 248 U.S. 132, 135-36 (1918) in which Spearin, the contractor, entered into an agreement with the Government to build a dry dock at the Brooklyn Navy Yard in accordance with plans and specifications provided by the Government. *Id.* at 133. Although Spearin complied with all of the specifications, work concerning the relocation of a sewer caused it to burst, flooding the dry-dock. *Id.* The Government insisted that responsibility for remedying the condition belonged to Spearin, and when Spearin refused, the Government annulled the contract. *Id.*

In an opinion holding that Spearin was entitled to damages as a result of the Government's breach of the implied warranty of the accuracy of plans and specifications, Justice Brandeis stated the rule that:

[I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, check the plans, and to inform themselves of the requirements of the work . . .

Id. at 136 (citations omitted).

The model jury instruction in Appendix C tracks Justice Brandeis's statement of the law.

The jury instruction also incorporates the doctrinal wrinkles that have developed in light of *Spearin*. For example, even in the absence of fraud or negligence, the owner is required to reimburse the contractor for any increased costs caused by defects in the design. The exception is that a contractor's negligence or failure to follow the specifications will preclude application of the implied warranty. *See McGuire v. United Brotherhood of Carpenters & Joiners*, 50 Wash. 2d 699, 712, 314 P.2d 439 (1957).

Moreover, to receive the benefit of the application of the implied warranty of specifications, the contractor must reasonably rely on and comply with the plans and specifications. *See Al Johnson Constr. Co.*, 854 F.2d 467, 470 (Fed. Cir. 1988) (stating that “the restriction of the implied warranty to those who have fulfilled the specifications, or tried and failed to do so because of the defects themselves, has strong policy behind it that would not be served by allowing the implied warranty to run to one who has not done what he contracted to do and fails to satisfactorily explain why not.”). Furthermore, the rule allocates the risk to the owner even when the contractor is an expert in the relevant area. *See Canuso v. Philadelphia*, 326 Pa. 302, 192 A. 133 (1937).

Also, even where a contractor merely passes on the design documents to a subcontractor, the contractor, as the warrantor, can be held liable for breach of the implied warranty, especially if the contractor vouches for the adequacy of the plans and specifications. *See APAC Carolina, Inc. v. Town of Allendale*, 41 F.3d 157, 164 (4th Cir. 1994) (holding contractor liable to subcontractor for breach of implied warranty of specifications where it furnished plans to subcontractor and represented to the subcontractor that the plans were documents the subcontractor “could build by”). Finally, where the parties expressly allocate the risk, the implied warranty of design specifications will not apply. *See Rhone Poulenc Rorer Pharms. v. Newman Glass Works*, 112 F.3d 695, 697 (3d Cir. 1997) (holding that a subcontractor's express warranties that glass work would be "free from faults and defects" trumps the implied warranty that the glass specified in the contract was adequate for use).

The threshold consideration regarding the application of the *Spearin* doctrine is whether the plans and specifications in question carry an implied warranty. The creation of the warranty hinges on whether the disputed specification is a design specification or a performance

specification. The warranty will apply if the specifications can be characterized as design specifications. The warranty will not attach if they are characterized as performance specifications because performance specifications place the responsibility for choosing the materials and means to meet the objective of the contract on the contractor.

The next two sections concern the rules for distinguishing between design and performance specifications. These distinctions are also explained in Appendices D and E. Given the significance of the distinction between design and performance specifications to the application of the *Spearin* doctrine, counsel should focus on crafting jury instructions out of these rules early in the case both to guide the development of the relevant facts during the discovery phase of the trial and to facilitate the jury's determination of whether the specification at issue is a performance or design specification. Whether the warranty attaches is usually case-dispositive for the litigants, and therefore these jury instructions can have a significant impact on the litigation. See Kevin C. Golden & James W. Thomas, *The Spearin Doctrine: The False Dichotomy Between Design and Performance Specifications*, 25 PUB. CONT. L.J. 47, 49 (1995).

1. Design Specifications (Appendix D)

Where a contract contains design specifications, the owner implicitly warrants that the methods and materials designated by the specification will produce an acceptable result if the contractor properly follows them. See *M.A. Mortenson Co. v. United States*, 40 Fed. Cl. 389 (1998). The model instruction reflects the well-settled understanding of design specifications as articulated by courts. See App. D. Design specifications “describe in precise detail the materials to be employed and the manner in which the work is to be performed.” *Dillingham Constr., N.A., Inc. v. United States*, 33 Fed. Cl. 495, 500 (1995) (quoting *Blake Constr. Co. v. United States*, 987 F.2d 743, 745 (Fed. Cir. 1993); *Thermacor v. United States*, 35 Fed. Cl. 480 (1996).

The contractor is not permitted any discretion in performing work pursuant to design specifications, but must follow them as one would a roadmap. *See id.*

A contract may often contain design specifications, performance specifications, or some mixture of both. *See Utility Contractors Inc. v. United States*, 8 Ct. Cl. 42, 50 n.7 (1985). Thus, courts must sometimes determine whether the specification is a design or performance specification. The determination of whether a provision is a design or performance specification requires an analysis of the specificity of the contract provisions and surrounding circumstances to determine how much discretion was afforded to the contractor. For example, in *Dillingham* the United States Court of Federal Claims considered whether certain electrical specifications were performance specifications, as the plaintiff contractor argued, or were design specifications, as the Government contended. *Dillingham*, 33 Fed. Cl. at 500. The court followed the rule that the obligations imposed by the specifications determine the extent to which the specification should be characterized as a design or performance specification; to determine what obligations the contract imposes, the court must look to the specifications themselves. *Id.* at 501. Because the electrical specifications at issue in *Dillingham* were so detailed in their description of the allowable types of "raceways" and "conduit supports," the court found that the specifications were design specifications. *Id.* at 501. The less discretion the contractor has to select the materials and methods of performing and accomplishing the work, the more likely it is that the specifications are design specifications.

Where the owner exercises a great degree of control over the project, the specifications will be characterized as design specifications, and the contractor may not be responsible for deficiencies or defects in the final project if the design documents were followed. For example, in *Dep't of Transp. v. W.P. Dickerson & Son, Inc.*, 42 Pa. Commw. 359, 363, 400 A.2d 930, 932

(1979), the court found that where the Transportation Department provided the contractor with specifications relating to all materials to be used in the construction of concrete beams, dictated the procedure and composition for mixing the concrete, described the tests to be run on each batch, and prescribed the conditions under which the beams could be poured and cured, the contractor had little, if any, discretion in constructing the beams. Thus, the court found that the specifications were design specifications. Generally, the more detailed the specifications and the greater the degree of control over the project by the owner, the less discretion is afforded the contractor, and the more likely it is that the specifications are design specifications.

If the contractor does not follow the contract terms or specifications, the contractor will be responsible for the defects in the construction, even if the owner exercised some control over the project. *See Stabler Constr. v. Dep't of Transp.*, 692 A.2d 1150 (Pa. Commw. Ct. 1997). But, the fact that the contractor cannot follow the specifications precisely does not, by itself, suggest that it is a performance rather than a design specification. *See Blake Constr. Co. v. United States*, 987 F.2d 743, 746 (Fed. Cir. 1993), *cert. denied*, 510 U.S. 963, 114 S.Ct. 438 (1993), *aff'd without opinion*, 29 F.3d 645 (Fed. Cir. 1994) (holding that the mere fact that the specification for a construction project could not be performed precisely does not, by itself, indicate that it is a "performance" specification and not "design" specification).

Often specifications contain both design and performance requests to be satisfied by the contractor, like "performance acceptance tests." Courts have found that unless the contractor has the discretion and ability to perform the work to satisfy the performance acceptance tests, that these aspects of the specifications may constitute impermissible exculpatory provisions. For example, in *W.H. Lyman Constr. Co. v. Village of Gurnee*, 84 Ill. App. 3d 28, 38 403 N.E.2d 1325, 1332 (1980), the Appellate Court of Illinois found that a provision in a contract between

the contractor and the Village regarding infiltration limits for a sewer project according to which the Village assumed no responsibility for the contractor's failure to meet the limits, impermissibly shifted responsibility for the adequacy of the plans to the contractor "without providing the contractor the corresponding benefit of having something to say about the plans which he is strictly bound to follow." This exculpatory provision violated the expressed public policy of the State, that the party supplying the plans and specifications which the contractor is required to follow is responsible for defects that result from the specifications absent any unconsented to deviations by the contractor. *See id.* Other courts also have refused to give effect to similar provisions. *See Chantilly Constr. Corp. v. Dep't of Highways and Transp.*, 6 Va. App. 282, 291, 369 S.E.2d 438, 443 (1988); *Fruin-Colnon Corp. v. Niagara Frontier Transp. Auth.*, 180 A.D.2d 222, 585 N.Y.S.2d 248 (4th Dep't 1992).

Most construction contracts contain clauses under which the contractor warrants its construction materials against defects. In such cases, owners sometimes successfully argue that the contractor's express warranty against material defects overrides the owner's implied warranty of design specifications where the product fails. For example, in *Rhone Poulenc Rorer Pharm., Inc. v. Newman Glass Works*, 112 F.3d 695 (3d Cir. 1997), the court, applying Pennsylvania law, held that the contractor's express warranty that the work would be "free from faults and defects," trumped the owner's implied warranty of design specifications. In other words, the court found that the parties expressly allocated to the contractor the risk of defective specifications. But, in *Trustees of Ind. Univ. v. Aetna Cas. & Sur. Co.*, 920 F.2d 429 (D. Ind. 1990) (*overruled on other grounds*, *Watson v. Amedco Steel, Inc.*, 29 F.3d 274 (7th Cir. 1994)), the court found that the contractor's express warranty that the bricks used in the project would be free of defects did not

override the owner's implied warranty of design specification that the type of brick specified in the contract would be suitable for the project.

2. Performance Specifications (Appendix E)

In contrast with design specifications, performance specifications require the contractor to produce a specific result without specifying the particular method, means or products used to achieve that result. Under a performance specification, only an objective or standard of performance is set forth, and the contractor is usually free, within reason, to choose the materials, methods and design necessary to meet the objective or standard of performance. *See J.L. Simmons Co. v. United States*, 412 F.2d 1360, 1362 Ct. Cl. (1969); *Blinderman Constr. Co. v. United States*, 39 Fed. Cl. 529 (1997).

The essence of the difference between design and performance specifications, then, is that performance specifications are satisfied at the discretion of the contractor, while design specifications are satisfied at the discretion of the owner. For example, where a defendant owner has provided design specifications and drawings, and the plaintiff contractor persuades the owner to change them in accordance with the contractor's judgments, the contractor, by such an exercise of discretion, assumes the risk that performance under its proposed specifications may not be successful. *See Aleutian Constr. v. United States*, 24 Ct. Cl. 372 (1991). The effect of performance specifications, therefore, is to allocate the contractual risk of nonperformance to the contractor.

If the contract affords the contractor discretion to exercise his ingenuity to achieve a standard of performance, then it allocates the risk of non-performance to the contractor and the *Spearin* doctrine will not apply. Again, this determination is often case dispositive, so jury instructions in this area are extremely important. The model jury instructions at Appendix E

effectively capture the basic rules regarding design and performance specifications. But, the instructions should be supplemented, if necessary, to reflect the unique facts of the case at hand to guide counsel's development of the case and the jury's determination of whether a specification is a design or performance specification.

D. The Potential Fiduciary Relationship Between The Owner and The Construction Manager (Appendix F)

A construction manager “can mean anything from an owner’s agent functioning in a fiduciary relationship and compensated with a lump sum fee for managing the project to an independent contractor who contracts with subcontractors and suppliers, self-performs work and guarantees a maximum price for the project.” Gregory M. Simonsen, *Now you See It, Now You Don’t: Road Side Warnings To The Hocus Pocus World Of Construction Management*, 6 Utah Bar J.15, 16 (1993). Therefore, in certain circumstances, a fiduciary relationship will be established between the construction manager and the owner. If litigation ensues, the appropriate instruction will be essential to informing the jury of the applicable elements and the shifting burden of proof in a breach of fiduciary claim.

A fiduciary relationship is generally “characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other.” *Dunham v. Dunham*, 528 A.2d 1123 (Conn. 1987) (discussing that a fiduciary relationship could be found to exist between brothers where a younger brother consistently placed trust and confidence in the other brother, as an attorney).

Of course, a fiduciary relationship automatically arises as a matter of law from particular relationships, such as attorney-client and principal-agent. *Ransom v. A.B. Dick Co.*, 682 N.E.2d 314, 321 (Ill. App. 1997). However, a fiduciary relationship may also arise from the special circumstances of the parties’ relationship, such as when one party justifiably places trust in

another, resulting in the latter gaining superiority and influence over the former. *Id.* In general, this “second type” fiduciary relationship is determined by factors that include a disparity in the business experiences between the parties, as well as the amount of trust the “servient” party entrusted to the “dominant” party. *Id.*¹ This type of fiduciary relationship is sort that owners and construction managers can contract for or may develop over time. In fact, the AIA121/CMC and AGC Document 565 (Owner-Construction Manager Agreements) specifically state the following:

The Construction Manager accepts the relationship of trust and confidence established with the Owner by this Agreement, and covenants with the Owner to furnish the Construction Manager’s reasonable skill and judgment to cooperate with the Architect in furthering the interests of the Owner. The Construction Manager shall furnish construction administration and management services and use the Construction Manager’s best efforts to perform the Project in an expeditious and economical manner consistent with the interests of the Owner.

Whether or not it is in the owner/construction manager context, a fiduciary relationship is:

. . . founded upon trust or confidence reposed by one person in the integrity and fidelity of another. It is said that the relationship exists in all cases in which influence has been acquired and betrayed. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in, and relies upon, another.

Rose v. Simms, No. 995 CIV 1466, 1995 WL 702307, *1 (Nov. 29, 1995 S.D.N.Y.).

The plaintiff in *Rose* hired a construction manager to be his agent for the construction of his custom-built residence. *Id.* at *1. The construction manager had promised that he would work solely for the owner and would not be beholden to particular work crews, giving him, he claimed, the independence to emphasize price and quality when hiring subcontractors, and preventing the subcontractors from “padding costs, cutting corners and covering up mistakes.”

¹ On the other hand, an arm's length business relationship does not create a fiduciary relationship. *American Model Home Corp. v. Resource Mortg. Capital, Inc.*, 173 F.3d 423, (4th Cir.(Va. (C.A.4 (Va.),1999).

Id. The plaintiff filed suit upon learning that the construction manager had knowingly awarded contracts without competitive bidding and at inflated prices. The plaintiff also alleged that the construction manager had failed to disclose his financial interest in one of the contractors he hired. *Id.* at *2.

While the defendant contended that plaintiff's allegations constituted merely claims for breach of contract, the court held that breach of fiduciary duty is independent of contractual duties, explaining the difference:

The existence of a fiduciary duty is not coterminous with contractual obligations, but rather, depends upon an analysis which focuses upon whether one person has reposed trust in another who thereby gains a resulting superiority over the first, or whether a duty has been imposed as a matter of social policy.

Id. at *9. Other courts have held similarly when drawing the distinction between duties under a contract and those imposed in a fiduciary relationship: That is, “the larger social policies embodied in the law of torts” rather than “the terms of the contract,” are what underlie [plaintiff's] breach of fiduciary duty claim. *Bohler-Uppenheim America v. Ellwood Group, Inc.*, 247 F.3d 79, 101 (3d Cir. 2001).

Developing instructions that highlight the distinctions noted above will be critical to a jury's understanding of these elements in making its determination. Once the fiduciary relationship is established, the plaintiff must also set forth sufficient evidence that the fiduciary duty was breached by the defendant. This element is satisfied by proving the defendant failed to fulfill the fiduciary duty between the parties.

Once plaintiff establishes these two elements, the burden shifts to the defendant to prove the breach of the fiduciary duty did not cause plaintiff's damages. *Bohler*, 247 F.3d at 101 (“Pennsylvania law shifts the burden onto the fiduciary to prove that a transaction is fair and not

fraudulent when the fiduciary acts to benefit himself while in the fiduciary role.”). In other words, once the elements of duty and breach are established by the plaintiff, the defendant must, in the context of a trust for example, “sort out and account for those assets as he was in the best position to know” about them. *Clancy v. Coyne*, 244 F. Supp. 2d 894, 897 (N.D. Ill. 2002); see also *Hoselton v. Mezt Baking Company*, 48 F.3d 1056 (8th Cir. 1995). The defendant may also meet the required burden by demonstrating that the one to whom the duty was owed had full knowledge of and approved the transactions in question. *Testa v. Roberts*, 542 N.E.2d 654 (Oh. App. 1988).

The construction practitioner must take care that the instructions describe not only the elements listed above but also explain the burdens placed upon each party at each critical point across the timeline of the jury’s determination. Suggested sample instructions that incorporate these requirements are provided in Appendices F and G.

IV. CONCLUSION

Clear and effective jury instructions can help jurors better understand the key concepts underpinning construction litigation. Moreover, effective jury instructions will promote the development of counsel’s case during the discovery phase and in the preparation of the evidence to be presented at trial as well as provide the court with an opportunity to understand fully counsel’s legal theory of the case. The model jury instructions referenced here hopefully contribute as a starting point in these respects. Counsel should tailor the model instructions to fit the facts of their case and the law of the jurisdiction.

APPENDIX A – Spoliation of Evidence

You have heard that in presenting this case, the [spoliator] did not preserve certain materials that [the other party alleges] relate to the [claim, defense or damage it claims to support]. The general rule is that where evidence that would properly be part of a case is within the control of, or available to, the party whose interest it would naturally be to produce it, and that party fails to do so without a satisfactory explanation, you may draw the inference that, if produced, it would be unfavorable to that party.

Applying that general rule to this case and to the [spoliator's] failure to produce these materials, you must decide (1) whether the materials were relevant to this case, that is, that they should have been recognized as bearing on an issue that you will be deciding; (2) that the materials were within the [spoliator's] control and that the materials could have been produced or maintained by the exercise of reasonable care and diligence; (3) that a reasonably prudent person under the same or similar circumstances would have offered these materials into evidence if it believed that they would have been favorable to it; and (4) that the [spoliator] unreasonably disposed of or lost the materials before the [other party] had an equal opportunity to inspect them and has not offered a reasonable excuse for failing to preserve the materials.

If you find these four factors, then you may draw, but are not required to draw, the inference that, if the materials had been preserved for inspection and use by the [spoliator], that evidence would have been unfavorable to the [spoliator].

APPENDIX B

Section 10.07

Total Cost Theory of Recovery

In a construction case such as the one before you, a plaintiff who seeks recovery from a defendant must link, or tie, its damages to specific breaches of contract, and it must prove its damages with a reasonable degree of certainty. Here, the contractor admits that it cannot link specific damages to specific breaches of contract and that it cannot prove its damages with a reasonable degree of certainty. The contractor may still be permitted to calculate its damages, however, under what is known as a “total cost” theory. To recover any sums under the total-cost theory of damages, the contractor must prove by a preponderance of the evidence each of the following: (1) that the nature of the particular losses it suffered makes it impossible to attach a dollar figure to determine them with a reasonable degree of certainty; (2) that the contractor’s bid for the contract was both a realistic and accurate bid when made; (3) that the contractor’s actual costs spent on the project were reasonable under the circumstances; and (4) that the contractor was not responsible for its additional costs to complete the job due to its own delays and mismanagement. If the contractor fails to prove any one of these elements by a preponderance of the evidence, then you may not award the Contractor damages. If the contractor has proven these elements, then you may award damages calculated by the difference between the Contractor’s actual costs on the project, plus a reasonable amount for overhead and profit, less what it has been paid so far on the contract.

APPENDIX C – Owner's Warranty of Accuracy of the Plans and Specifications (*Spearin Doctrine*)

If you find that the contractor is bound to build according to plans and specifications prepared by the owner, then the contractor is not responsible for the consequences in the defects in the plans and specifications. In the construction industry, an owner implicitly warrants that if the contractor complies with the plans and specifications furnished to it, which have proved to be defective or insufficient, the contractor will not be responsible to the owner for loss or damage that results solely from the defective or insufficient plans. The owner's responsibility to provide accurate plans and specifications is not overcome by general clauses in the contract requiring the contractor to visit the site, check the plans, and/or inform himself of the requirements of the work. If the specifications are faulty and unreasonably delay completion, a breach of contract results, which may entitle the contractor to additional compensation.

If you find that the contractor followed the plans and specifications prepared by the owner and was not negligent in doing so, you should not find the contractor liable for any resulting deficiencies caused by the defective plans and specifications.

The implied warranty of accuracy and completeness of the detailed design documents can be extended from a contractor to a subcontractor, even though the contractor simply passes on the design information received from the owner.

The rule, however, is not applicable when plans and specifications are not followed by the contractor or there is negligence on the contractor's part in failing to follow the plans and specifications. So, if you find that there is an express warranty by the contractor that the contractor has agreed that it is responsible for the sufficiency in the plans and specifications to result in work that is without defects, the contractor has assumed the risk of any defects in the plans and specifications.

APPENDIX D – Design Specifications

In this case, the owner claims that the construction work done by the contractor was defective and deficient because [state the nature of the claimed deficiency]. The contractor responds that, with respect to the claimed deficiency, it was merely following the detailed specifications stated in the contract and that any deficiency is the responsibility of the owner who prepared the specifications.

Design specifications are terms in the contract from the owner to the contractor that describe in detail the materials to be employed and the manner and method in which the construction work is to be performed. When working with design specifications, the contractor has no or very little discretion to deviate from the specifications in the manner, method, or materials to be used but must follow them as one would a road map.

The contractor may avoid responsibility for the defective or deficient performance of the work if it proves that it was contractually obligated to perform the contract in accordance with the designs specified in the contract, that it had either no discretion or very little discretion in choosing the materials and methods employed to accomplish the work, and that the defect or deficiency in the work was a result of the owner's specifications. However, if the contractor fails to adhere to the contract terms or specification, then the contractor is responsible for defects or problems in the construction.

APPENDIX E – Performance Specifications

In this case, plaintiff [owner] claims that the defendant [contractor] breached the contract because the work did not comply with the performance specifications in the contract.

Performance specifications are provisions of a contract from the [owner] to the [contractor] that set forth some objective standard to be achieved by the [contractor] in the performance of the work, and the [contractor] is expected to exercise its skill and judgment in selecting the means, methods, and /or equipment to meet the contract standards. Your determination of whether the provisions at issue here constitute performance standards should be informed mostly by your determination of which party selected, or under the contract should have selected, the materials and means used to perform the contract to meet those objective standards. If the contractor had the responsibility to select the materials and means to meet the contract standards, you should find these provisions to be performance specifications. If the owner selected the materials and means, however, these provisions are not performance specifications.

It is the owner's burden to prove that the contract provisions are performance specifications.

APPENDIX F – Breach of Fiduciary Duty

[The Owner] claims that the [construction manager] violated what is called a fiduciary duty or fiduciary obligation that the [construction manager] allegedly owed to [Owner], and that the violation of that duty cause harm and damage to the [Owner].

A fiduciary duty is an obligation to act in the best interest of another party. For instance, a corporation's board member has a fiduciary duty to the shareholders, a trustee has a fiduciary duty to the trust's beneficiaries, and an attorney has a fiduciary duty to a client.

A fiduciary obligation exists whenever one person, the client or [Owner here], places special trust and confidence in another person and relies upon that person, the fiduciary [here the Construction Manager], to exercise his discretion or expertise in acting for the client; and the fiduciary knowingly accepts that trust and confidence and thereafter undertakes to act in behalf of the client by exercising his, the fiduciary's, own discretion and expertise.

Of course, the mere fact that a business relationship comes into being between two persons does not mean that either owes a fiduciary obligation to the other. If one person engages or employs another and thereafter directs or supervises or approves his actions, the person so employed is not a fiduciary. Rather, as previously stated, it is only when one party provides, and the other accepts, a special trust and confidence involving the exercise of professional expertise and discretion that a fiduciary relationship comes into being.

When one person does undertake to act for another in a fiduciary relationship, the law forbids the fiduciary from acting in any manner adverse or contrary to the interests of the client, or from acting for his own benefit in relation to the subject matter. The [Owner] is entitled to the best efforts of the fiduciary [Construction Manager] on his behalf and the fiduciary must exercise all of the skill, care and diligence at his disposal when acting on behalf of the client.

A person acting in a fiduciary capacity is required to make truthful and complete disclosures to those placing trust in him, and he is forbidden to obtain an unreasonable advantage at the latter's expense. The fiduciary relationship imposes a duty on the agent that the agent, within the limits of the agency, deal fairly and honestly with its principal and imposes the responsibility to disclose any conflicts between the agent's interests and the principal's interests which might make the agent act in its own best interests at the expense or to the detriment of the principal.

It is for you to determine whether a fiduciary relationship existed between the [Owner] and [the Construction Manager], as agent. If you find such a fiduciary relationship, it is up to you to find whether the [Construction Manger], as the

agent, violated its fiduciary duties to deal fairly and honestly with [the Owner], by [list allegations], or to disclose to [the Owner] the [Construction Manager's] relationship with [third party with potential conflict of interest]. However, the [Construction Manager] had no duty to disclose matters within the knowledge of [the Owner].

APPENDIX G – Rebuttable Presumption Shifting Burden of Proof for Breach of Fiduciary Duty

You are instructed that once plaintiff [the Owner] establishes the two elements of the existence of the fiduciary duty and its breach, this creates a rebuttable presumption that the breach of the [Construction Manager's] fiduciary duties caused the [Owner's] damages. A rebuttable presumption is a legal rule based upon experience or public policy and established in law to help the jury decide the case. It provides a legally recognized connection between a proven fact or facts and a presumed fact. In other words, if fact A has been proven, the law provides that this proof serves as a basis supporting the presumption that Fact B exists.

Therefore, if [the Owner] has proven to you that the [Construction Manger] has breached its fiduciary duties owed to the [Owner], and that the Owner has suffered harm or damages, then this raises a presumption that [the Owner's] damages were caused by the [Construction Manager's] actions in breach of its fiduciary duty. This presumption is rebuttable, meaning that it shifts the burden of proof to the [Construction Manager] to prove that the breach of the fiduciary duty did not cause [the Owner's] damages.

If the above requirements are met, you must determine whether [the Construction Manager] has proven that its actions in breach of the fiduciary duty did not cause [the Owner's] damages. If you find that it has proven that its actions did not cause [the Owner's] damages, then you must find for [the Construction Manager]. If you find that [the Construction Manager] has not proven that its actions did not cause [the Owner's] damages, then you must find for [the Owner].

If you should find that [the Owner] is entitled to a verdict, you may award [the Owner] only such damages as will reasonably compensate for such injury as you find from a preponderance of the evidence that [the Owner] has sustained as a proximate result of the acts of [the Construction Manager].