MEE Question 4

A builder constructed a vacation house for an out-of-state customer on the customer's land. The house was completed on June 1, at which point the customer still owed $200,000 of the $800,000 contract price, which was payable in full five days later.

On June 14, the basement of the house was flooded with two inches of water during a heavy rainfall. When the customer complained, the builder told the customer, "The flooding was caused by poorly designed landscaping. Our work is fine and fully up to code. Have an engineer look at the foundation. If there's a problem, we'll fix it."

The customer, pleased by the builder's cooperative attitude, immediately hired a structural engineer to examine the foundation of the house. On June 30, the engineer provided the customer with a written report on the condition of the foundation, which stated that the foundation was properly constructed.

Unhappy with the conclusions in the engineer's report, the customer then hired a home inspector to evaluate the house. The home inspector's report concluded that the foundation of the house had been poorly constructed and was inadequately waterproofed.

On July 10, the customer sent the builder the home inspector's report with a note that said, "Until you fix this problem, you won't get another penny from me." The builder immediately contacted an attorney and directed the attorney to prepare a draft complaint against the customer for nonpayment. Hoping to avoid litigation, the builder sent several more requests for payment to the customer. The customer ignored all these requests.

On September 10, the builder filed suit in federal district court, properly invoking the court's diversity jurisdiction and seeking $200,000 in damages for breach of contract. The customer's answer denied liability on the basis of alleged defective construction of the house's foundation.

Several months later, the case is nearly ready for trial. However, two discovery disputes have not yet been resolved.

First, despite a request from the builder, the customer has refused to provide a copy of the report prepared by the structural engineer who examined the foundation of the house. The customer claims that the report is "work product" and not discoverable because the customer does not intend to ask the engineer to testify at trial. The builder has asked the court to order the customer to turn over the engineer's report.

Second, the customer has asked the court to impose sanctions for the builder's failure to comply with the customer's demand for copies of all emails concerning construction of the foundation of the house. The builder has truthfully informed the customer that all such emails were destroyed on August 2. This destruction was pursuant to the builder's standard practice of permanently deleting all project-related emails from company records 60 days after construction of a project is complete. There is no relevant state records-retention law.

1. Should the court order the customer to turn over the engineer's report? Explain.

2. Should the court sanction the builder for the destruction of emails related to the case, and if so, what factors should the court consider in determining those sanctions? Explain.

4) Please type your answer to MEE 4 below

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When finished with this question, click Â to advance to the next question.
(Essay)

======== Start of Answer #4 (734 words) ========

MEE Question Four:

(1) Yes, the court should order the customer to turn over the engineer's reports because they are discoverable and not otherwise protected by a privlege or by the Federal Rule of Civil Procedure (FRCP).

The issue is whether expert reports completed prior to trial can be protected from discovery request orders, when those reports contain otherwise discoverable information.

Under the FRCP, the first question is always whether the information sought to be discovered is relevant or potentially relevant to an issue or claim that could be raised at trial. Once satisfied with that, the next question is whether the discovery request is unduly burdensome, disproprorinate, or a means by which a party is harassing another party. These two steps are satisifed, then the information is generally discoverable and next question is whether another rule would prevent discovery. In certain situations, expert opinions are shielded from general discovery unless the requesting party can show extenuating circumstances. One such rule to expert opinions from experts who

will not testify at trial *if* the opinions are given in anticipation of litigation.

Here, the engineer's report qualifies as generally discoverable information and does not qualify as non-testifying expert opinion, and thus the court should order the customer to turn over the report. The engineer's report is highly relevant to a central issue in the pending litigation, namely whether the builder made a mistake in building the house (i.e., whether the builder breached). The request is not too broad or burdensome either, as based on the facts, its appears that the request for the report was specifically made. Thus, the question turns on whether the opinion can be shielded from discovery as an non-testifying expert opinion. The engineer's report was preformed well in advance of trial and well in advance of the expectation of litigation. The engineer was not providing trial strategy or anything similar to that. Because there was no anticipation or thought of litigation at that point and no trial strategy etc., the court will require the customer to turn over the report.

(2) This a close call, but the court likely should sanction the builder in some way.

Under the FRCP, sanctions for the destruction of evidence are not specifically enumated or listed, but courts generally have the power to sanction parties who ignore hold requests and destruction evidence (spoliation laws etc.). Courts typically consider several facts when making this determination, including: (1) the timing of the destruction (before trial, after trial); (2) how related the evidence is to the anticipated claims in litigation; (3) whether the destruction was intentional or in bad faith, and whether the destruction was according to a document retention plan; and (4) whether

the destroying party has notice of pending litigation.

Weighing these factors, the court will likely find that the court should sanction the builder. First, the timing of the destruction slightly weighs in favor of not sanctioning. The destruction here occurred *prior* to the complaint being filed. This means that no formal legal steps to initiate a lawsuit had occured which tends to show that sanctions are inappropriate. Second, this evidence is highly relevant and probative of potential issues that will be litigated in the case. The evidence concerned internal emails by the builder about the foundation, the central issue at trial. This weighs in favor of sanctioning. Third, no evidence exists that would tend to show bad faith in this destruction. Though courts generally say as a general matter destruction according to a document retention plan is "intentional" in a broad sense, the destruction here was on time (60 days from completion, June 1, was August 1) according to the company's internal retention plan. This weighs in favor of not sanactioning. Finally, however, the builder was clearly on notice that these emails would be relevant. The final correspondence between the builder and customer, prior to suit, occurred on July 10, *before* destruction, at that point the customer notified that they were done paying. At that point, the builder knew litigation was likely. This conclusion is reenforced because the builder itself initiated litigaiton, not the customer. This leads one to wonder whether the builder destroyed the evidence prior to filing suit on purpose. Waiting for the document-retention date to pass, destroying the evidence, and the filing suit.

Weighing all of these factors together, the court will likely determine that some sanctions are appropriate in this case.