

## **PROJECT DOCUMENTATION – JUST DO IT!!**

In our experience, litigation is terribly expensive - and, in many cases, unnecessarily so. In later posts, we'll talk about alternative dispute resolution (ADR), negotiation, and other techniques, but today we'll talk about one of the largest single expenses involved in litigation: finding and vetting evidence to support your cause.

In suits alleging negligence in the performance of construction services, or breach of contract, the proof is in the pudding. Well-drafted documents and well-kept, comprehensive records are the strongest weapons available to each party. The following practices and procedures can be vital to a company's policy and procedure to keep litigation costs manageable.

### Original Project Estimate and Cost Repairs

1. Put all agreements for the performance of a job in writing, and state with particularity the scope of services, products and/or material to be charged, each party's responsibility to the other, and any responsibilities assumed by either party toward any person not a party to the contract for services. This includes creating written contractual arrangements with owners, architects, contractors, subcontractors, or materialmen. It is surprising how often construction industry veterans enter into loose oral arrangements with providers of other services. The architect, engineer, or other prime professional is still responsible to the client for the services provided by these consultants, but the professionals' responsibilities to each other are unclear and may even be unenforceable.
2. Obtain a clear statement concerning the job site, specifically the legal description. This may come in handy later when attempting to collect payment.
3. Avoid any statement that can imply that you have responsibility for the work of any entity that contracts directly with the owner, or is otherwise unaffiliated with you. Do not accept or pay for reports which should be addressed to and paid for by any other party. Write nothing indicating that any other companies, even subcontractors, are your agent or representative in the performance of their services or that you have any control or supervision over them.
4. Write nothing that implies that you have the right to hire, supervise, or discharge an on-site representative whom the owner pays, unless you are obligated by contract to employ such a person at your own expense, or are otherwise obligated by contract to hire, supervise, or discharge that on-site representative.
5. Recognize that the courts treat all specifications from an architect's office to have been written by the architect, just as if he or she had set down and written them all from "scratch." Be sure to clear up any ambiguity in these documents for the welfare of the job as a whole. If it comes to it, the confusion may be construed against the architect - or you - in court.
6. Document the owner's decision on bonds and insurance, if applicable. If the project is a public one in Louisiana, there may not be a requirement for a bond provided by either the owner or the general contractor. If the owner elects for reasons of its own to not require surety, to require only specific insurance coverages, or to not avail itself of any other safeguard, make sure to affirm the owner's election in writing and be prepared to take other steps to insure payment.
7. Document the transmittal of scopes, revised scopes, material information, change requests, and any other relevant project information to all parties to the contract.
8. Notify the owner or upstream contractor in writing of any recognized increases in cost estimates and the reasons behind them, and obtain the owner's or upstream contractor's written agreement to proceed.

### Construction Phase

1. Keep a record of all visits to the site. At a minimum, record the date, the reason for the visit, and what was accomplished. Good judgment might call for the recording of additional details. Thus, when asked what you did to protect the owner or upstream contractor from deficiencies in the work of any particular partner, you can speak in specifics rather than generalities.
2. Notify the owner and/or upstream contractor in writing, with supporting detail, of your acceptance or rejection of any additional work or material request when more than trivial cost is involved.
3. Take pictures. For documentation purposes, photographs are worth more than a thousand words!
4. Communicate in writing to all parties any newly discovered fact that might call for a change in the plans, specifications, and costs.
5. Get in writing your directions from the owner or upstream contractor concerning the performance or non-performance of work which is essential to substantial completion of the project when, in the architect's opinion, the work or progress is not in compliance with the contract.
6. Inform, in writing, the owner and any other person who has a contractual right to notice of any serious untoward development. Be sure that problems are noted in the Daily Project Reports, usually kept by an owner's representative.

#### Post Construction Phase

1. Invite, in writing, the participation of all parties in final inspections.
2. Request, in writing, written acknowledgment of payment in full for their services from each downstream party
3. Obtain the owner's written acceptance of the work as substantially completed.

#### All Active Phases

1. Make a written memorandum of any telephone conversation and conference in which matters of more than passing importance are discussed, information imparted, or directions given.
2. Confirm in writing decisions reached in the course of conversations and conferences.
3. When writing anything remember that someday your writing may fall under the eyes of the hostile, the ignorant, the professionally knowledgeable, a jury of nonprofessionals, or a judge who is a layperson. Make your communications as clear and simple as possible to avoid confusion.
4. Keep in good order only one set of relevant project information—including all contracts, plans, specifications, correspondence, reports, and memoranda—and follow a consistent policy for record management and storage. In most cases it is wise to maintain records for at least as long as any applicable statute of repose.

#### Closing Phase

1. Follow your company's storage procedure. If your company doesn't have a storage procedure, get one!
2. Whatever the procedure, back up your documents electronically, if possible. Make backups of the electronic storage periodically.
3. Keep electronic copies, or their backups, for at least 10 years - the likely maximum amount of time for a claim to appear. You wouldn't want to destroy a backup and then need it a year later!

How does this practice benefit me?

1. To have to “put it in writing” will cause you to stop and think. It will clarify what you are doing, and why. This will make your product and/or services better.
2. There will be tangible evidence of your thought and work in the event of any claim or controversy. Possession of these documents may be enough to prevent a lawsuit, or to encourage a negotiated settlement between the parties outside of a courtroom.
3. In the event you are forced into a lawsuit, those writings are potentially admissible in evidence as proof of what was said and done, even when those who participated cannot remember, seek to misrepresent the facts, cannot be found, or have died. Employees leave, or sometimes can't remember specifics. Documents can exist in perpetuity in perfect clarity.

[Ed's note: This post liberally borrowed from [here](#), though changes were made as we saw fit for audience, content, and other reasons.]

For Louisiana specific advice, or a documentation procedure tailored to your benefit, contact us at [www.myconstructlaw.com](http://www.myconstructlaw.com), [alan@myconstructlaw.com](mailto:alan@myconstructlaw.com), or at 877.370.7373. Our attorneys are licensed in Louisiana.