

The Litigation Survival Kit

Where there's construction, there's litigation....

BY PAMELA J. SCHOLEFIELD, P.E.



The construction industry is—and always has been—a hotbed of litigation. This is an unfortunate aspect of construction in the U.S. Once a construction dispute starts to snowball, it tends to take with it any and all persons who touched the project—including the architects and engineers. In some cases, an engineer is a willing participant as an expert witness. Those types of cases bring lucrative pay and minimal risk to the engineer. But, in most cases, the engineer is forced in as a party to the case, or as an eyewitness on behalf of his or her employer because of the engineer's participation in the project.

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These latter types of cases may put your job, or even worse, your reputation and license at risk. And, though the engineer may ultimately be found not liable for the problems that caused the dispute, it is almost a guarantee that the road will be rough and loaded with traps for the unwary.

In order to think like a lawyer, and be ready to deal with potential construction litigation, there are some practical tips that I've derived from my unique experience as a PE who happens to be a practicing construction law attorney.

The Engineer's Legal Obligation to Others

Regardless of the type of project—a custom home, commercial building, wastewater treatment plant, power distribution system, or a highway system—there are three common levels of participation: owners, design professionals, and builders/contractors. What tie them all together are the contractual relationships and legal obligations between the parties. A successful project is the result of each of the three

participants bringing a high-quality service to the mix. From the overall project standpoint, each player's input has a direct effect on the other two. A quality owner is well funded and has a solid overall project concept. A quality designer creates well thought out, detailed, and buildable plans. And a quality contractor builds per plans and specs efficiently using the highest trade standards. Having just one of the three players not perform as expected can doom the project.

Many engineers don't realize that they may have a legal obligation to the contractor to provide accurate, buildable plans despite not having a direct contractual relationship with the contractor. But, even without this

liability, the reality is that if the contractor sues an owner for bad plans and specs, expect the owner to turn around and sue the engineer. Once someone has lost money on a project, they look for any potentially deep pocket to pick from.

It is tremendously helpful to have a good contract with the obligations of the engineer spelled out in unambiguous detail and clear indemnity provisions. Get an attorney to review the contract terms and obligations and have them modified as needed before the contract is signed. But, the strengths and weaknesses of your contract often don't surface until a dispute is already in the making after the project begins. Don't let your actions—or inaction—during the project lead to your demise.

Warning Bells

The first clue that something may be going wrong is that one of the parties starts documenting everything. Many contractors are notorious for providing notices that something may be wrong and may cause a delay or added cost. You can't fault them

for that because with larger private projects and nearly all public works projects, the construction documents often include very strict requirements for the contractor to provide notice of any problems. But, warning bells should go off when these notices start appearing regularly—or start appearing right at the beginning of the project. Don't ignore them. Investigate and respond in writing. This may seem obvious, but it never ceases to amaze me that many people don't bother to confirm conversations or decisions when dealing with such problems. The age-old disease of "selective memory" becomes epidemic when a project starts going downhill.

He (or She) With the Best Documentation Wins

With the ease of e-mail, there is no excuse for not shooting off a quick e-mail to confirm an oral decision about how to handle a situation that is presented at a meeting or during a teleconference. Don't rely on requests for information and requests for proposals to document the whole story. There are too many decisions and agreements made on the fly, at job site meetings, and in teleconferences that are not tied to a specific RFI or RFP. These decisions and agreements may end up being critical pieces of evidence if a project is delayed, built wrong, or costs more.

It is very important to remember when sending e-mail to avoid making personal opinions, such as the state of the project or frustrations with workmates. Your personal opinions often become your professional opinions through the eyes of opposing parties. Don't expect privacy, and write as if your e-mail will be reviewed by a judge. No sarcasm, no derogatory remarks, no slamming the owner or contractor, and—above all—no admissions that you, or anyone who works with you or for you, have done anything wrong! These rules should apply even to your own internal e-mail. We have seen how internal e-mail provides the "smoking gun" that wins or loses a case.

Even beyond e-mail and written communications, think before you speak as well. The rules for e-mail should also apply to any oral communication or conversation you have with anyone throughout the project. You are a professional and should conduct yourself accordingly.

The Best Defense Is a Good Offense

The bottom line is that a good defense begins with a good offense. And, you may find yourself taking the stand and answering questions about the project two or three years after the project's completion. Knowing this now may make your life easier when you are testifying. So, at a minimum, you should adopt the following standard procedures for doing business:

1. Document all meetings and then forward to all attendees for review. If you are an attendee and you receive meeting minutes that you believe to be incorrect, make your changes known in writing and forward to all attendees.
2. Document all informal meetings, such as jobsite walks or impromptu discussions. All you may need is a simple e-mail summary of what was discussed.
3. Keep a paper copy of all electronic correspondence. Don't delete e-mail before printing out copies.
4. Take plenty of photos when you walk the site and note the dates when taken. Copy them to CDs for archiving.
5. Promptly handle requests for information. Keep an accurate and updated RFI log detailing the date you received the request and the date you responded to the request.
6. Promptly turn around submittals. Know any time limit requirements in your own contract for submittal reviews. Keep an accurate and updated submittal log detailing the date you received the submittal and the date you returned the submittal.
7. Date stamp all correspondence you receive, from any source.
8. Document communications with equipment engineers, utility personnel, suppliers, consultants, and others.
9. Document all attempts at communications. Use a phone log for conversations and sent and received voice messages. Set your fax machine to print out confirmations and keep failed fax transmissions or returned e-mail deliveries.
10. Document the dates that plan revisions are issued and request a delivery receipt from all recipients. Require that all revisions on plans be noted and clouded in. If you are doing the revisions, be sure that all revisions are noted and clouded to avoid any confusion.
11. If appropriate, keep a daily jobsite journal with as much detail as possible.
12. Document and retain all calculations used for the project, not just engineering calculations but also labor, material, or downtime estimates.

Some of you may think that all this is overkill for smaller projects. But, believe me, you're going to wish you had done

this if you're ever caught in the middle of a construction lawsuit, regardless of the project's value. Plus, the better the documentation you have, the easier it is for an attorney to represent you. Making your attorney's job easier will reduce your legal bills in the long run. And, most people find that litigation creates quite a bit of unwanted personal stress. So, the better your defense, the less stress you will suffer as you wind your way through the long process of litigation. While these actions will not make litigation enjoyable, at least you will know you are in the best possible position to defend yourself when needed.

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