

NEWS & INSIGHTS

Documenting construction claims and disputes

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When litigating or negotiating construction disputes and claims, a common flaw for either the claimant (or the defendant) is the failure to properly document the claim and place the other party on notice. This issue can arise in various forms. Here are some of the common ones.

Contractual clause requiring notification. Some contracts require claims to be raised in a timely manner. For example, it is common to require change order work to be notified within a specified time period. Some contracts also require disputes or claims to be raised within a specified time period. Failing to satisfy the contract terms for timely notification could be fatal to your claim or defense.

Interpretation of the contract. Sometimes the core issue in dispute is the interpretation of the contract. For example, under the contract, was the per unit price for excavation a classified or unclassified unit price? If you intend to argue that the contract required a certain type of pricing, then you should act in accord with that belief while the project is ongoing; or be prepared to explain the discrepancy. All notifications and records on the project should be in accord with the stated belief as to the contract interpretation.

Common sense notifications. Even if a contract term does not require notice on an issue, the failure to give notice could undermine your claim or defense. At trial, the judge or jury may ask themselves: “If this issue was so important and resulted in so much hardship and costs, then why wasn’t it mentioned via email or in writing?” Point being, if there is a pending claim, it’s best to identify it and document it in writing.

You will need evidence to prove your case. Determining “admissible evidence” versus “inadmissible evidence” can be difficult, even for lawyers. Regardless, evidence is necessary for proving your case, and a lack of evidence weakens your case. If the facts can be photographed or videotaped, then do so. If your business has a regular course of recordkeeping for its projects, then, include any notations, reports, meeting minutes, etc., on the project and make sure that these documents identify any issues of importance.

Notifications may be required to preserve evidence. Occasionally, the evidence at issue is scheduled to be destroyed. For example, deficient work might be scheduled for repair in the future. Or perhaps the deficient work is going to be covered by other trades, and therefore rendered inaccessible. If there is a problem with the work, it is best to document and evidence the problem before it is destroyed or covered. This means not only documenting it for your own purposes but also notifying the other party of the issue. And when you notify the other party, do it in writing. Even if the contract does not require it, by putting it in writing, even a simple email, it creates a paper trail—i.e., documenting the claim.

Seek legal counsel

Documenting claims and defenses is an important aspect of project administration. The documentation then becomes crucial evidence for negotiating or litigating the dispute. It is wise to seek advice from your attorney and, potentially, your insurance broker/agent when determining the best methods for documenting evidence of a claim or defense.

Saxton & Stump attorney [Ron Pollock](#) is available to discuss claim documentation and how our [Construction Law](#) group can assist when construction litigation arises.

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