

EFFECTIVE PROJECT DOCUMENTATION

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To ensure timely, favorable and just resolution of preserve and be able to present detailed factual evidence. You will find that legal procedures identified with any design or construction case are basic and uncomplicated: the court will determine damages by applying a few principles to the facts. Your assembly and proof of facts, called documentation, will be critical to your case.

Because documentation is so important in negotiation of claims before trial and as evidence in the legal process, this paper will provide you with some suggestions and criteria for developing a cost-effective-documentation system. You will also read about some recent court decisions, and you will be able, once you've read this article, to evaluate and improve how you document.

This paper will describe ways you can avoid pitfalls in documentation as well. For example, you will learn to solve problems concerning when and why to document. In addition, this paper will operate on two (2) assumptions: (1) you practice some documentation tasks and (2) you can improve your documentation system.

The method in this paper will be to present you with: (1) theoretical aspects, including working definition of documentation, (2) tasks involved in documenting information, (3) requisites of a useful documentation. system, (4) legal rules of evidence that relate to documentation, (5) types of your construction contract disputes and claims, you must documentation, and (6) discussion of how to evaluate and improve your documentation system.

A. WHY DOCUMENT?

Documentation provides you with a way to improve on your memory and a way to prove your case. Despite your brain's enormous storage and recall capabilities, you forget

information over time. For example, can you recall what you were doing two (2) years ago today? Can you recall the exact cost of the options on the last automobile you purchased?

Documentation has been defined as "the collection, storage, and dissemination of recorded information in an integrated system for efficient use and easy accessibility." More specifically, documentation is your detailed biography of a construction project. Think of it as procedure for recording and authenticating real world events for selective retrieval at a later time. Think of it as your bridge between the time period in which your claim occurs and the time period, years later, when you negotiate your claim or take it to court.

You can divide your documentation procedures into two (2) sub-procedures, (both are discussed as problem areas in this paper). First, you must know what you should document and what will likely be of value to you alter on. This is fairly easy and will be discussed alter. Second, you should be able to obtain necessary information. The cliché "it is easier said than done" applies to construction documentation.

Documentation will provide you with written evidence of administrative decisions, incurred costs, submittals, quality control, and the many activities associated with fulfilling contractual responsibilities and enforcing contractual rights. Documentation will provide your lawyer with the materials he or she needs to negotiate and to use as evidence in court.

B. WHAT'S INVOLVED IN DOCUMENTATION?

You will better understand the documentation process and what to document, including how to evaluate and improve your system, if you divide documentation into a number of tasks. One way you can divide these tasks is:

- (1) Recognition, Collection and Recordation

- (2) Reporting, Distribution, and Transmission
- (3) Initial Use
- (4) Storage
- (5) Retrieval.

The first stage, recognition, collection and recordation, is the most vital stage in your documentation process. Without it, the others will be moot. In this stage you will evaluate all real time events, will select those that appear to be of future value and will commit them to a permanent record.

The second stage, reporting, distribution and transmission, occurs when you send documents or information to other parties.

The third stage, initial use, in some cases may be optional. You may not want to review all documentation coming in from the field in the office. What you do not review, send directly to storage.

In the fourth stage, storage, you file information so that you can retrieve it later.

In the fifth stage, retrieval, you should be able to reverse your storage process.

Consider an example: the Inspector's (or Superintendent's) Daily Diary. First, because of experience, training or guidance, via a form, inspectors will recognize information they are to collect and record. Some examples of information they might document are: numbers of machines on the project site and numbers of machines operating, descriptions of what each machine does and how it operates, lists of who is working and what they are doing. Second, inspectors will send the form through established channels to superiors and possibly to, others as well. Third, after reviewing the documents, superiors may make initial use of the information. They may take remedial action recommended or indicated by the diary. Fourth, after superiors

make these decisions, the documents will normally go into a project file--in chronological order. If your system is working properly, everyone will know that the document is in the file and can be quickly retrieved if needed in the future.

C. WHAT MAKES A GOOD DOCUMENTATION SYSTEM?

Your documentation system should be easy use, efficient, and effective. One way to make your system easy to use is to make the tasks of recognition, collection, recordation, reporting, distributing, transmission, initial use, storage and retrieval as easy to accomplish as possible. Those responsible for documentation will be able to do satisfactory jobs if you do not make their work unnecessarily difficult with, for example, hard to use forms and unintelligible instructions. Notice that the contractor's daily report form included at the end of this article makes use of headings and provides writing space for all possible information.

Your documentation system should also be efficient. It need not be overly time consuming. Although documentation will take some time, you will want look for ways to economize your effort and entries. Later in this paper you will learn about ways to aid your documentation system.

In addition, your system should be effective. In order to be effective, as mentioned in the beginning of this paper, your system must be able to be used as evidence in a court of law. As evidence, your system must be:

- * accurate
- * objective
- * complete
- * uniform
- * credible

* admissible as evidence.

Next you will learn what makes your documentation system admissible as evidence. Make sure you write down all true facts. Records that are truthful, accurate, and complete can aid your case in negotiations and in court. Records that are not can be used against you. If you keep daily business records, you have some special obligations. For example, if you testify in court that an event occurred on a particular day and that event is not described in your daily records, the court may rule that the event-did not occur.

D. WHAT MAKES A SYSTEM ADMISSIBLE AS EVIDENCE?

While you should not enter into contracts sure that you will have to litigate a matter concerning performances, you cannot assume that it will never happen. Accordingly, you need some knowledge of rules of procedure and evidence, which may relate to documentation. These include discovery and rules of evidence.

1. DISCOVERY

Once you are involved in litigation (or in some states even before action begins), you can probably get information about the existence of the other party's documentation. You can also obtain access to the documentation itself. (See, for example, the Federal Rules of Civil Procedure. These apply in Federal Courts.) Your objectivity, mentioned earlier as requirement for evidence, becomes very important in this context. Subjective opinions, for example, "stupid foreman", will cast doubts on your credibility.

If the party in discovery, based on what your documents report, sees that facts favor you and that documents tend to support your position, the party in discovery may suddenly become more amenable to settling with you.

2. RULES OF EVIDENCE

You will also want to understand that "ground rules" are fundamental to litigation. These rules, called rules of evidence, are what a court follows in deciding what evidence may be seen or heard (and therefore considered) by juries or judges. These limits on admissibility have an important underlying purpose--assurance of trustworthiness and credibility.

One perpetually troublesome area of evidence admissibility for contractors has been hearsay. Hearsay can be loosely defined as evidence based on a witness' repetition of what he or she has heard others say and not on his or her personal knowledge of the evidence. It is second hand--what a witness says he or she heard another person say.

Generally, American courts rule that hearsay is not admissible. However, there are numerous exceptions to this rule. Two (2) important exceptions for your construction litigations are (1) "recorded recollection" and (2) "Records of regularly conducted activity". The federal rules defining these terms are:

(5) **RECORDED RECOLLECTION.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly.

(6) **RECORDS OF REGULARLY CONDUCTED ACTIVITY.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness.

(7) **ABSENCE OF ENTRY IN RECORDS OF REGULARLY CONDUCTED ACTIVITY.** Evidence that a matter is not included in the memoranda, reports, records or data compilation, in any form, of a regularly conducted activity, to prove the non-

occurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

In addition, to other criteria for evidence, you should also consider the importance of authentication and identification. Your authentication of documents is a prerequisite to their admissibility. While authentication does not by itself establish genuineness, it's normally considered complete when you, as a witness, state that the document is genuine.

Another evidentiary issue you will want to consider is the content of written documentation. Naturally, you should have your original available, but in most instances you may submit duplicates--unless genuine question as to their authenticity is raised.

Many recent court decisions describe the importance of documentation as evidence. As you read through these examples, note the following:

- * The most important documents you can keep in the daily report;
- * Daily reports cannot be prepared after the fact;
- * Daily reports can be used as evidence because they are not prepared especially for litigation but for the efficient and effective running of a business;
- * When daily reports satisfy statute requirements, they can be used as evidence--even if the person who prepared them is not present or available.

One example of the importance of daily records and of a subcontractor's loss of claim for labor and materials furnished to a prime contractor is *Hallmark Builders, Inc. v. L. L. Anthony*, 547 S.W.2d 681 (Texas App., 1977). At the trial the court learned that the subcontractor kept records of material used each day in a notebook that he kept in his truck. The subcontractor testified that when he completed a job he or - his secretary would prepare invoices

and destroy his notebook. These invoices did not list dates that certain items had been furnished. The court would not admit the invoices as evidence because they were summaries, not actual records, and because they were prepared several months after a completed job.

A decision that is even harsher toward the contractor and that specifically describes the importance of complete daily records, is the result of *Ray D. Lowder, Inc. v. North Carolina State Highway Commission*, 26 N.C. App. 622, 217 S.E. 2d 682 (1975). The contractor in this case sued the state to recover for significant overrun on road bed undercut requirements. The contractor offered a great deal of evidence at the trial to support his claims for increased costs (for such items as extra equipment rental, extra labor and extended performance time). He used daily diaries, payrolls and job cost records to prepare a compilation, but the daily diaries equipment were being used and which were broken down. Neither did the diaries report, what workers did. The diaries contained only the number of pieces of equipment and workers at the project site.. The court took great pains to explain the prerequisites for implementing the "business entries" exception to the hearsay rule:

Had the daily reports not been incomplete, we might not express reservation about the finalized report It is not our intention to require copious entries in business records. But we are of the opinion that entries should be so complete and in such detail as to indicate that they are reliable and accurate. To report that 36 machines are on a job site on a given day is unsatisfactory. It would be better practice to report not only the number of machines on the job but also the number of machines operating, the task each performs, and the length of time each operates. The product of that kind of record keeping is more likely to bear the earmark of reliability

The court found that entries must be original, made in the regular course of business, made contemporaneously with the events recorded, and must be the personal knowledge of the person making them. The court went on to state that systematic checking by

businesses along with regular and continuous record keeping as well as the experience of business in relying on their entries are reasons why such entries have traditionally been recognized as being usually reliable. In this case, however, the court felt that the original daily reports were incomplete and that the contractor prepared a report for use only in litigation four years after the fact. "It simply is not the product of an efficient clerical system that has been made in the regular course of business."

The kinds of information your records provide are important to your case because normally a plaintiff or claimant has the burden of proving his or her damages. In *Huber, Hunt & Nicholas, Inc. v. Moore*, 67 Cal. Appl. 3d 278, 128 Ca. Rptr. 603 (1977), a contractor sued the city and county of Fresno and an architect for increased costs allegedly incurred in constructing the Fresno Civil Center. Among the evidentiary issues was one relating to proving damages. In essence, the contractor attempted to use his computer printouts to show the total cost of completing the project. He compared this to the bid cost and argued that the difference constituted his damages. The records did not segregate the items for damages from normal costs, and the contractor's effort to get the court to accept the total cost measure was unsuccessful.

When you prepared your documents "is also significant to the court. The court denied an architectural firm recovery for services allegedly performed due to inadequate records in the case of *Harper, Drake & Associates, Inc.. Jewett & Sherman*, 49 Wis.2d 330, 182 N.W.2d 551 (1971). The firm sued the owner for services rendered. For a variety of reasons, the owner had asked the firm to stop work on the project after it was about one-third complete. The firm had done that portion of the work under oral agreement. The Supreme Court of Wisconsin affirmed the trial court's rejection of a written summary of hours allegedly spent on the project. The summary had been compiled about a year after the firm had stopped working on the project.

The summary was supposedly based on project hours compiled from appointment calendars. While the testifying principal has his appointment book two months before the trial, he did not produce it at the trial. He stated that it had been lost and that he presumed it had been destroyed. The mysterious disappearance of the appointment book and the fact that the compilation summary showed two hours work on the first two days and four hours on the other forty-seven days raised serious questions about the accuracy of the exhibit. Like the Hallmark Builders case, this one emphasizes that records should not be prepared after the fact.

E. HOW CAN YOU DOCUMENT?

Now that you are familiar with what to document and why, you can consider ways to document. Your documentation system will probably include two types: (1) written and (2) graphic. In this section you will learn about: types of written documentation, types of graphic documentation, and aids to your documentation system.

1. WRITTEN DOCUMENTATION

You may use written documentation in a variety of forms. First, as mentioned before, you may want to use the inspector's or superintendent's daily diary. This is the most widely used form of written documentation. Typically, it is a preprinted form. You can record basic project information, daily conditions and daily occurrences on it. (See contractor's daily report form at the end of the article). Without daily reports you may not know what claims exist or might exist, you may learn about claims but can do nothing about them or you will be unable to prove them.

Second, you will want to use project correspondence. While you may argue that projects are not built with paper and that there are too many "paper wars" going on, you will want to write down all essential information.

Third, you may want to use the informal "memo file", recording phone and other oral conversations. In addition to providing you with useful internal reference, such notations may be admissible as evidence. The recent Michigan case of *Central Fabricators, Inc. v. Big Dutchman*, 247 N.W.2d 804 (Mich. 1976) explains why. This case involved a building frame manufacturer who had sold some allegedly defective frames to the defendant, who, in turn, refused to pay. To support his claim of defect and to justify his refusal to pay, the defendant/customer attempted to have a phone conversation memo admitted as evidence. The memo was between the Manager of the manufacturing firm and the Vice President of the customer firm. The Vice President sent a copy of the memo to the other party. While the memo seemed to be hearsay, the defendant/customer argued that it should be admitted as a business records' exception to the hearsay rule. The court held that the memo was not within the exception because the defendant/customer could not establish at the trial that the corporation made a practice of having its employees record the substance of all phone calls. The court strongly suggested in its opinion that had this been done it would have ruled differently.

2. GRAPHIC DOCUMENTATION

Graphics will also be an important part your documentation system. Construction documentation, as in many other situations, the old cliché "one picture is worth a thousand words" applies. Photographs and movies of site conditions and various construction operations can help you reconstruct factual situations at a given point in time. Make sure, however, that your photographs are promptly identified by date, name of photographer, orientation, and subject.

One fascinating case involved an unreasonable owner's use of photography. The owner had his photographers taking pictures of the contractor's work forces. This owner required

so much photography and asked for it over such a long period of time that it intimidated the contractor and drastically affected his productivity. While the contractor provided the court with good records, he could only prove cause by providing photographs of the photographers!

F. AIDS TO DOCUMENTATION

You can develop a number of aids to documentation that will reduce the amount of time you spend recording information. One aid to documentation is portable cassette tape recorders. With recorders you can identify information and can transcribe it later on. (Do not however, throw away the tapes.)

Two-part-hand-written speed memos are another aid. You can initiate them and transmit them easily. They also provide you with a follow-up device. Form letters can also aid the documentation process. You can initiate necessary written correspondence with a collection of form letters. Form letters you may want to consider using are:

- * Notice of Mistake in Bid
- * Request for Time Extension
- * Notice of Changed Site Condition
- * Notice of Defective Specs
- * Notice of Suspension of Work
- * Notice of Inspector Ordered Change
- * Notice of Engineers Ordered Change.

Owners you are working with might use form letters for the following:

- * Request for Verification of Bid
- * Denial of Time Extension
- * Grant of Time Extension

- * Denial of Changed Site Condition Claim
- * Change Order
- * Suspension Order
- * Rejection of Work

To repeat: the goal is to allow you to initiate letters as quickly as possible. If you have to draft an entire letter each time an event occurs, you will find it more difficult to get started and to get letters written. This form letter may be filled in with pen or pencil. There is nothing major about the typewriter. The typewriter can actually cause you to lose your authenticity. Keep in mind that writing letters is a way to bridge the past with the present. Your letter can be your memory of an action taken years before.

G. HOW CAN YOU EVALUATE AND IMPROVE YOUR DOCUMENTATION SYSTEM?

You can evaluate and improve your documentation system if you will consider several criteria. In the last section you learned ways to direct and control your documentation system. To implement a good documentation system, you must first, plan your system. Good documentation is not an accident. Devise a plan which identifies responsibilities and which allocates resources for written and graphic documentation.

Second, once you have plan, organize. Assign responsibilities, based on your plan and your staff's capabilities.

Third, consider your staff. While you need no additional staff, you must impress on them the importance of documentation. Train them in documentation techniques and standards. Your lawyer's ability to negotiate or to win in court depends on you--and on them.

Directing and controlling, planning, organizing and staffing will help but will not ensure that your documentation system is providing results that meet your firm's objectives. Accordingly, performance, and direct remedial action and corrections as soon as they become necessary.