

THE IMPORTANCE OF PROPER DOCUMENTATION PROCEDURES

By ROY J. COOPER, P.E.

I have an 8-year-old son with quite an imagination who excels at active play. One of his loves (when he does slow down) is watching a Star Wars movie. He knows every character, planet, movie scene and, of course, weapon type. He has light sabers of the various characters, a Darth Vader costume and all the movies. I rarely watch a movie of any kind; however, because of my son, I have managed to see all of the six Star Wars movies over the course of the past couple of years — in 10-minute increments. One thing that strikes me is how the presence of a sith (a really evil guy who wants to destroy good) causes an imbalance in the force and threatens good throughout the galaxy. The entire universe gets turned upside down, physically and psychologically. Equally as striking are the efforts that the good guys, the Jedi, take to try to eliminate a sith.

It reminds me of issues that lead to claims on construction projects. The word “claim” on a construction project is like the word “sith” in the universe of Star Wars. One thing is certain: like a sith, issues on construction projects will come and they can turn a project upside down both physically and emotionally. A question I would ask is: “How are you preparing to react when it looks like a sith is coming to your project?”. Fortunately, there are actions you can take at the onset to protect yourself.

“The word ‘claim’ on a construction project is like the word ‘sith’ in the universe of Star Wars.”

This article focuses on the importance of documentation and practical practices that will help you when a claim is coming into your universe.

Later in the article, I will review some pointers for making project documents more effective. Before that, we need to discuss the importance of proper documentation procedures. Just in case you need convincing, keep in mind that if a dispute goes all the way to litigation, every scrap of paper from the project will likely be read. Regardless of whether you’re a contractor, owner, or engineer, you want to know that you’ve put the right things down on paper to present the factual events of the project during any dispute resolution process.

Good documentation just doesn’t happen by accident. Left to our own devices, many of us probably think we have better things to do than write down what the weather was that day, fill out the shop drawing log, or dare I say, update the schedule. After all, there’s a project to build. However, it only takes one time in litigation to change that mindset. In addition, the reality of a dispute resolution forum is that who’s right and who’s wrong may not determine who wins the case. It can come down to who can present the best documents to support their case.

Documentation at Every Project Level

Here’s a typical claim scenario: An issue arises on a project. A couple of meetings take place and the positions are laid out. Resolution doesn’t occur and tempers may flare. So what happens next? Usually, a letter-writing campaign ensues. The Engineer and the Contractor start carefully crafting correspondence. Every word is painstakingly reviewed. It turns into a he said/he said situation. Sometimes, the letters are even reviewed by counsel (a good idea, by the way, if the stakes are high and relations strained). Well-crafted letters are a vital part of the project record, especially during litigation. However, consider for a moment the project participants who wrote them and for what purpose. Then ask, will claims notice and response letters be taken as sole source gospel or as an accurate portrayal of the events of the project, or will they be viewed as each side posturing in anticipation of litigation.

Remember that in litigation, every document could be read. That means not only the letters, but the meeting minutes, foreman’s reports, inspection reports, shop drawing logs and, of course, the emails. A review of meeting minutes, emails and daily reports prior to disputes reveals how the parties were interacting with each other before tensions rose. Regular project documentation, such as meeting minutes and daily reports also generally contain the thoughts and mental impressions of the parties as they were coming to their minds. The thoughts of the inspection staff and foremen in the field may play just as important a role in a dispute as the carefully crafted letters. Because of this, every form of project documentation, from high-level letters to daily reports, should be drafted professionally. Therefore, it is vital that every project participant be trained to create factually correct and professional documentation.

Good Documentation Practices

Obviously, this topic is not rocket science. However, if you ever get into litigation, you will understand its importance. So, here are some practical things to consider to improve your documentation.

In my career, I’ve read thousands of daily reports, meeting minutes and letters. I’ve got to admit, some of them have been pretty comical. I’ve seen some pretty creative analogies and insults hurled. These types of documents may be fun to read, and may even make the authors feel better because they’ve gotten something off their mind. However, remember, every project document may be read by someone. It’s important that project documentation provide facts and not opinions or observations about someone’s mother.

Think of the old cliché, “timing is everything.” It’s true in the case of project documentation. It’s important that project participants be timely with all forms of correspondence. Read the contract and abide by what it says

THE IMPORTANCE OF PROPER DOCUMENTATION PROCEDURES

(PAGE 2)

regarding issuance of meeting minutes, RFIs, shop drawing reviews, notice of claims and associated responses.

For some reason, people will put something in an email that they would never say to someone's face or put in a letter. The truth is that you should be just as careful with what you say in email as you would in any other type of documentation. Email is just as admissible as any other form of documentation. Email also has this weird way of showing up in the strangest places. The landscape of litigation and electronic document discovery is constantly changing. I'm not going to cover it here, but it's important to know the latest rules and make sure that your firm is up to date.

Here's one more tip that may sound simple: Understand what you get. Let's face it, we all can't know everything. Construction projects can be complicated. Disputed issues usually are. I've seen plenty of cases where complicated CPM schedules were submitted by a contractor and the owner did not review and comment simply because there was no understanding of what was submitted. This obviously creates all kinds of problems during the project and all the way through litigation. I encourage you to seek an explanation if you don't understand or don't have time to review the correspondence.

Conclusion

Hopefully, I've provided you with a taste of the importance of good documentation. The good thing about what we've explored is that documentation practices are relatively easy to improve. I would encourage you to improve your own documentation practices in one or more of the areas we explored in this article. If that doesn't work, I can always send my son over with a light saber the next time you're faced with pending litigation.

ABOUT THE AUTHOR

Roy J. Cooper, P.E. is Associate Vice President for PinnacleOne and leads the Construction Claims Services in the eastern United States. Mr. Cooper's 20 years of construction experience includes consulting to sureties dealing with troubled projects and the analysis and review of complex construction claims from the beginning stages through trial support and expert testimony. He has also been a successful project superintendent and engineer on high profile projects where he was responsible for all aspects of construction. In addition to his practical hands-on knowledge of construction principles and management and how they related to distressed projects, Mr. Cooper has a B.S. in Civil Engineering from Michigan Technological University and a Masters in Business Administration from the University of Connecticut.

AACEI SURVEY INVITATION

Over the past 25 years, as a part of our commitment to our clients, our staff has been active in professional organizations to advance the overall quality of claims and schedule analysis services. In furtherance of this commitment, two of our senior staff - Lee Schumacher, P.E., PSP (Hartford) and John C. Livengood, Esq., AIA (Washington D.C.) have assisted the Association for the Advancement of Cost Engineering International (AACEI) in the preparation of The Recommended Practice of Forensic Schedule Analysis (29R-03).

In June, 2007, the AACEI published the first American effort at consolidating and organizing the various schedule delay methodologies - The Recommended Practice of Forensic Schedule Analysis (29R-03). This comprehensive document is now being referenced in expert reports and legal proceedings. The Recommended Practice (29R-03) is available free online from the AACEI (<http://www.aacei.org/technical/rp.shtml#29R-03>).

Presently, the AACEI is conducting a survey to ascertain the industry's awareness and familiarity with the Recommended Practice. We invite and encourage you to participate in that brief survey. If you have any questions about the Recommended Practice, Mr. Schumacher (860-704-6100) or Mr. Livengood (202-669-1360) will be happy to assist you.

Take Survey

If the above link does not work, please copy and paste the following address into your Web browser:

http://www.surveymonkey.com/s.aspx?sm=KoKtGRovLvAxpXoyi7Wmg_3d_3d

DISCLAIMER: THE OPINIONS AND INFORMATION PRESENTED HEREIN ARE THOSE OF THE AUTHOR ONLY AND ARE PROVIDED WITH THE UNDERSTANDING THAT THEY ARE GENERAL IN NATURE AND DO NOT RELATE TO ANY SPECIFIC PROJECT OR CASE. BECAUSE EACH PROJECT AND CASE IS UNIQUE, THE OPINIONS AND INFORMATION PRESENTED HEREIN CANNOT AND SHOULD NOT BE CONSTRUED AS BEING RELEVANT OR TRUE FOR ANY INDIVIDUAL CASE. BE AWARE THAT PROFESSIONALS MAY DIFFER IN THEIR OPINIONS AND SHOULD NOT BE DISCREDITED IF THEIR OPINIONS ARE DIFFERENT FROM THOSE EXPRESSED HEREIN.