

THE THEATRE OF CONFLICT IN CONSTRUCTION LITIGATION

AN EDITORIAL BY THOMAS F. PETERS, P.E.

Ask anyone who has had the great misfortune of being cast as a player in a hotly contested construction dispute and they will likely tell you that the litigation of project dispute had as much to do with the presentation of compelling theatre as it did with the analysis and assessment of technical and contractual minutia.

After all, consider the context of the dispute. The percipient parties have likely invested multiple months or even years of their careers attempting to manage a disputed project to their commercial advantage. Why? Because in the construction industry, your reputation is often measured by your ability to successfully mount an attack on, or survive an attack by, an opposing party. Once you are attacked—or worse yet, defeated—by an opposing party, the complex and often convoluted nature of construction-related disputes can make it extremely difficult to salvage your professional credibility and authority.

Consider the cost of doing battle. Have you ever added up the probable cost of an all-day mediation attended by multiple parties? While the cost of mediation may be economical compared to the cost of litigation, the price of such sessions can still be staggering.

Given the cost of admission to the Theatre of Conflict, you had better be right. If you are not right, you had better be rich. There is an old saying amongst yachtsmen: “Sailboat racing is like standing in a cold shower tearing up one-hundred dollar bills.” Construction conflict is not much different. The expensive and time-consuming nature of construction-related disputes makes it exceedingly difficult to protect your bottom line once you have engaged your opponent in mortal combat. Nonetheless, admission to the Theatre of Conflict remains the hottest ticket in town. Most case calendars indicate that we line up years in advance to stage our production and litigate our conflicts.

In their new roles, the players become litigants and are subjected to grueling document discovery and often hostile cross-examination by opposing counsel. Frequently, the combatants dig in with great stubbornness. Each party proceeds with passion and is certain that they—and no one else—will be vindicated by the terms of the contract. They retain experts to validate their instincts and communicate their findings to triers-of-fact with conviction and absolute confidence.

Both plaintiff and defendant are equally capable of spinning

a tragic tale, so rich and thick with conflict that even William Shakespeare would be envious. The scene, the players and the quarrel often make for spellbinding drama. Frequently, the heroes and villains in a construction dispute look as though they have just been selected right out of central casting.

The development of conflict has been recognized for centuries as an essential ingredient in any dramatic production. Shakespeare knew it. Contemporary filmmakers rely upon it. Politicians get elected on it. Mediators, lawyers and experts in the construction industry make a living on it.

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Conflict, however, is not a cause, it is simply an effect. While the root cause of conflict can be debated for eternity, consider the seven deadly sins depicted in *The Tragical History of Doctor Faustus*, by the English dramatist, Christopher Marlowe (1564-1593). In this classic literary work, Marlowe depicts Faustus as a man who has executed a contract with Mephistopheles, a devil, to give up his soul. Mephistopheles provides Faustus with an animated depiction of the seven deadly sins:

- Pride
- Covetousness
- Wrath
- Envy
- Gluttony
- Sloth
- Lechery

You may recognize several of these little gremlins in your current construction dispute. The fact is the construction industry can be intensely adversarial and these very human conditions are capable of generating and exacerbating profound conflict between the parties to any construction contract. No matter how hard we try, we have been unable to remove the potential for conflict from the table.

As a result, the construction industry has sprouted thriving sub-industries that rely entirely upon inter-party conflict for

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their very existence. One of my colleagues—who makes his living as a claims consultant specializing in the negotiation of project disputes—recalled being concerned that the development and use of ADR (Alternative Dispute Resolution) would render his profession as a claims consultant obsolete. Of course, it did not. He then observed the development and use of Partnering and wondered if this innovation would throttle back the claims industry. But that has not happened either. Then he observed the emerging popularity of Alternative Project Delivery Methods. The proponents of Design-Build and CM-at-Risk were prophesizing that claims would be a nuisance of the past. As it turns out, they were wrong, too. Claims consultants are as busy today as they have ever been in the past.

Construction disputes were likely as common a thousand years ago as they are today. I cannot help but recall a Gary Larson *Far Side* cartoon that depicts a castle wall, a crew of workers digging a trench *inside* of the castle wall and a caption that states: “Suddenly, a heated exchange took place between the king and the moat contractor.” We fought then. We fight now. It is a natural extension of the commercial construction process.

Resolution of project disputes in the construction industry is often difficult to achieve. Conflict between parties may be fueled by complex legal and technical theories requiring expert analysis and evaluation. Ironically, construction conflicts are often advanced long after the disputed event has transpired and with different versions of actual events. One would think the parties could at least agree on what it was that has already transpired!

While the claims industry has made significant progress in recent years attempting to standardize forensic analyses, consistency among practitioners has been elusive. To this day, even the most seasoned forensic experts frequently ascribe to vastly divergent opinions regarding the nature and appropriate use of methodologies used to communicate the anatomy of a dispute. Forensic experts routinely struggle with this professional paradox. They are retained to develop supportable and understandable analyses based on criteria and methods that are often without consensus among industry professionals or based upon printed authority. Further, these methodologies are not typically included in university curricula or state board examinations for professional engineers. Frequently, the expert is pointed to the universe of project data and then expected to retire to the seclusion and

dark mystery of its Black Tent to perform the analysis and test the results.

Despite the expert’s best efforts, complex work product is frequently not well understood by the party that engaged the service. Even legal counsel is often beguiled by the cryptic nature of the expert’s methods and findings. The expert understands that its analysis may be widely disputed by opposing experts performing contradictory analyses. Ironically, these divergent analyses are based upon the same subsets of facts. While divergent expert opinions may appear to exacerbate rather than extinguish conflict, most experts would agree that persuasive presentation of credible analyses is vitally important to the equitable resolution of conflict.

Despite the Theatre of Conflict that appears to be pervasive in this industry, I believe we are as optimistic today about our potential for success as we were the day we entered this profession. Why? Despite the inevitable battles over technical and contractual correctness, we celebrate our latest project win as though none of this conflict will ever appear again. We will exceed anticipated profit. We will accelerate the schedule. On *this* project, we will surely hit our mark.

Next the lights dim, the curtain rises and the show begins.

About the author

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