

FACTS MATTER

Documentation 101

why documenting the project really matters

By Christopher S. Drewry

Sometimes disputes are simply unavoidable. Whether addressed at the project level or through litigation, construction disputes often involve a series of interrelated, complex issues and multiple parties. Regardless of setting, good documentation plays a significant role in the effective and timely settlement of disputes. Yet too often a lack of proper documentation throws a wrench in the works and undermines the party's position.

What is "documentation?" For our purposes, documentation references the detailed written and photographic history of a construction project. Documentation takes the form of anything tangible that serves as a record of what existed, happened, did not happen, was represented, or was said during the life of the project. Note, the word "tangible" is key. Intangibles (i.e., recollections, conversations, etc.) are not documentation.

Project documentation includes what is referred to as "the Contract Documents." These include the Owner-Contractor Agreement, the General Conditions, the Special or Supplementary Conditions, the Specifications, the Drawings, the Addenda, and project Change Orders. For project field performance issues, and project closeout, the focus is on field documentation. That

is, the documentation that takes place from the point in time when the project physically begins. Examples include schedules, project meeting minutes, emails, daily logs/reports, and progress and cost reports. This field documentation is critical to every project.

ESSENTIAL DOCUMENTATION

The basic purpose of documentation is to provide written evidence of what actually occurred, was represented, or was said on a construction project. In other words, a record of who did what—including when, why, and how—and a summary of important circumstances surrounding the event.

The primary use of the documentation is to inform someone of what happened or is happening on the project. Documentation may also help others to interpret cost reports from the project—to analyze significant variances from expected costs, to understand whether the project is on budget and on schedule, and to incorporate into a company's cost database for estimating future projects.

A secondary use for documentation of the daily events and details of the project is to substantiate and prove changes and claims and allow recovery of damages for the contractor. To prove a point and "win" a claim, a contractor must be able to present facts and figures which support its claim position.

Documentation preserves and records such facts.

The reality of conflict over construction changes and litigation over construction disputes is a good basis on which to analyze the quality of the field documentation. If the field documentation is insufficient to prove the party's case in an arbitration hearing or before a judge, the documentation is inadequate. It also will be inadequate for clearly and accurately communicating actual performance to company supervisors.

REQUIREMENTS FOR GOOD DOCUMENTATION

Accuracy. Write down the facts the way they occurred. If facts are misstated in one instance, the other parties (or a court, jury, or arbitrator) may conclude that you have misstated them throughout the documentation. The best approach is to record everything as accurately as you can—the good, the bad, and the ugly.

Objectivity. State the facts in an unbiased way. If you are documenting a claim, tell it the way it was. Resist the urge to play armchair lawyer or color the facts to your benefit. The truth is always better.

Completeness. Keep track of the day's events. When an item that should be documented arises, immediately write it down.

The information can be transferred later to the appropriate company form, but the important thing is to always carry the pad and pen (or electronic equivalent) to make certain nothing is forgotten or lost. If your company provides a form for certain kinds of documentation, fill it out completely. Assume that every item on that form has a useful purpose.

Uniformity. Record all matters in a systematic manner, both precise and consistent. Document each field directive, order or communication with the project architect or engineer in the same, systematic manner. Avoid the temptation to cut corners when documenting directives or orders that may not require additional time or money.

Credibility. Do your documentation in such a way that other project parties, your company supervisor and any judge, jury, or arbitrator will believe that the documentation was reported in a timely and unbiased manner. This usually means not to worry about crossing out or misspelling words, or the coffee stains on the daily reports. Records that look too good often lack credibility. Just do your documentation according to these six basic principles, make sure it is legible, but otherwise do not worry about how it looks.

Timeliness. Complete your documentation during the day, every day. Do not put it off until tomorrow. Do not leave a jobsite until the daily paperwork is finished.

WHAT TO DOCUMENT (OR WHAT NOT TO DOCUMENT)

Some project management personnel are uncertain about what to document. The easiest answer is to document everything. Do not try to determine what is important and what is not. Often, the most important item is something thought at the time to be very insignificant. Avoid the temptation to document only those events that may be involved in a change or claim. Do not put your company in the position where it cannot submit a claim because necessary supporting documentation is unavailable or insufficient.

Remember Murphy's Law, that if something can go wrong, it will! In documentation, this means it is wise to assume: (a) the item or occurrence that

appears to be the least significant item or occurrence in the situation may well become the most important item to document; and (b) the item or occurrence you fail to document will become the item that you, your supervisor, or your company's attorney will wish most that you had documented. It is much better to follow your company's documentation policies or practices to the letter. You simply cannot know what will be important later, so be sure to document everything now.

Additionally, documentation must convey facts. Do not fill out reports with opinions; do not offer gratuitous remarks; and do not attempt to place blame. Avoid including guesses or theories on why something happened. Such comments add nothing to the facts and may come back to haunt you.

Similarly, do not go back and modify existing project field notes! Get it right the first time. If you learn or remember new information later, even the next day, put that new information in a later report, and explain that you just remembered it, or someone brought it to your attention, or provide some other reason. Once you finish your daily documentation, let it stand. Documentation that looks altered lacks credibility.

CLOSING THOUGHT

Finally, remember that documentation must cover any potential dispute or claims that may be made. It is just as likely that your documentation will be needed to dispute claims made against your company. Your documentation practices should also anticipate any potential claims by suppliers and subcontractors, or other contractors on site with whom you have no contract. ■

about the author

Christopher S. Drewry is a partner with the law firm of Drewry Simmons Vornehm, LLP, in Indiana (www.dsylvlaw.com), where he focuses his practice on construction law and litigation, as well as labor and employment law and litigation. Chris is the immediate past chair of the Construction Law and Litigation Committee of the International Association of Defense Counsel, and he can be reached at cdrewry@dsylvlaw.com.

SEEKING A SOLUTION?
LET MCS BE YOUR RESOURCE.
Go to mcsmag.com for solution-based articles with insight from industry experts.

MODERN CONTRACTOR SOLUTIONS