

I N S I D E T H E M I N D S

Construction Law Litigation Strategies

*Leading Lawyers on Analyzing the Basis of a Dispute,
Preparing for Trial, and Understanding Construction Laws*



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The World of the
Construction Attorney:
The Good, The Bad, and
The Lawyer

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Much of the time of a construction lawyer is spent assisting clients in finding solutions to the many problems that befall the typical construction project. These problems range from simple contract preparation and negotiation to the more fact-intensive work of constructive defect litigation, surety claims, liens, and payment issues. Each construction project, no matter how complex or simple, involves the same basic issues:

- What is the scope of work that the parties agreed to?
- What documents or plans define the scope of work?
- How is the contractor to be paid for his work?
- How can the owner be assured that the contractor is doing the work properly?
- What is to be done when there are issues or problems with respect to any of the above?

The job of the construction attorney is to help chart a course through this minefield and ideally resolve issues without judicial intervention.

Construction attorneys provide the greatest benefit for their clients through early involvement in the construction process. Working with the client at the inception of the project, as opposed to only getting the call when problems arise, allows the client and the lawyer to work together toward common goals. Furthermore, when problems do arise in the construction process, time is almost always very critical. Having the attorney involved in the early stages removes the potential for added delay associated with the attorney's learning curve about the particulars of the project.

Components of Construction Law

The three primary construction issues that I deal with in my practice are:

- Construction defects frequently manifested by water intrusion and mold
- Construction delay claims
- Construction "work arounds"

The first two are rather straightforward and easy to comprehend; however, the term “work arounds” is a more nebulous concept intended to apply to the myriad of construction problems running the gamut from small disputes associated with changes in the work to full-blown default where one party refuses to continue to honor the contract. Changes in the work are typically handled through a process known as “change orders.” These arise in situations where the parties must modify the contract to address additional work outside the scope of the original contract, or address plan deficiencies or changed site conditions or any other situation in which one party is claiming that the scope of the work has now changed to such an extent that a change to the contract (i.e., extra compensation or decreased compensation) must be agreed to before the new, extra, or changed work will continue. Most contracts have specific language to address the procedure that must be followed if a contractor or owner seeks a change in the work. For example, a typical change order clause will read as follows:

CHANGES IN WORK

7.0 General: Within the general scope of the Work, COMPANY may make changes in the Work under any Work Order, by altering, adding to, or deducting from the Work. If such changes do not affect CONTRACTOR’s costs to carry out the Work as originally described, such changes shall be performed by CONTRACTOR without change in the Contract Sum. If such changes affect CONTRACTOR’s costs, then upon mutual agreement there shall be an adjustment to CONTRACTOR’s compensation pursuant to Paragraph 7.5.

* * *

7.5 Change Order: If any change in the work required by COMPANY or proposed by CONTRACTOR and accepted by COMPANY results in an adjustment in the compensation and/or Work Schedule, then upon COMPANY’s acceptance of CONTRACTOR’s proposal with respect to adjustments in the compensation and/or Work Schedule, such change in the Work and adjustments in the compensation and/or Work Schedule shall be confirmed by a written notice and confirmation by both parties. However, no decrease or increase in the Work Schedule or compensation

shall be enforceable or valid, or binding, unless the specific increase or decrease is set forth in a written change order signed by both parties prior to performance of the work.

At a minimum, all change order clauses should include:

- A clear understanding between the parties as to what will and will not constitute a change in scope. Just because the contractor failed to take into account a certain soil condition will not justify a change unless the contractor can show that both parties believed and relied on there being some other soil condition at the time of the original contract and that the actual soil condition has substantially changed the scope of the work.
- Additionally, a change order must ensure a clear understanding of how a request for a change order is to be handled. Generally, construction projects are time sensitive endeavors. The parties, especially the owner, does not want his project halted every time the contractor claims he is entitled to a change order because some slight deviation or change is required from the plans. Many construction contracts require that the owner's consultant or architect act as a type of arbiter to determine what is and what is not appropriate for a change order. If there is a dispute, there is usually a mechanism agreed to in the contract to handle this without the contractor having to walk off the job, such as: For example: Change Order Disputes: If there is no agreement on the amount of the adjustment or the applicable compensation for any changed condition, or if, because of attendant circumstances, there is insufficient time to negotiate such adjustment, then such changes shall, upon COMPANY's order, be performed by CONTRACTOR as Extra Work, in accordance with the rates established in the executed Work Order or, if no such rates exist therein, in accordance with CONTRACTOR Schedule of Rates. Attached as Appendix C to this article is a listing of various change order provisions from various standard form contracts.

With respect to construction defect claims, most of the work of the construction lawyer is dedicated to working with various experts from several specialties to study a building or a design to analyze and determine the cause and scope of the defect. In many cases, water intrusion is present and mold is almost always an issue. More recently construction clients involved in the defense of a typical water entry construction defect case are finding themselves embroiled in a related personal injury suit being brought by the building occupants seeking damages allegedly caused by exposure to mold or sometimes the more general name “sick building syndrome.”

From my perspective, construction law can be broken down into several different yet overlapping segments. These are contract negotiations and preparation; liens and security interest to secure payment; constructive defect litigation; construction delay litigation; and personal injury litigation involving construction defects. Each segment has many subparts. For example, the contract negotiation and preparation segment includes subsets involving those issues unique to public projects versus private projects such as competitive bidding and debarment issues. Included in the lien and security segment would be a subset for those issues unique to bonding, from all perspectives: the owner, contractor, subcontractor, material man, etc. Is the bond a statutory or conventional bond? Are the bonding company and the bond itself sufficient? Are the bonding company's obligations coextensive with that of the contractor—namely, can a bond legally limit its liability for only two years after substantial completion whereas the contractor's exposure is statutorily set at five years?

My work in these five major areas can be broken down as follows:

1. Contract Negotiation: I negotiate and prepare the terms and conditions used in the owner/architect contract from the perspective of the owner. Areas of interest are the architect's duty to mediate as opposed to arbitrate; the limit of the architect's insurance obligations; the extent of the architect's site visits; and the scope of his work in that regard. We also negotiate and draft the terms and conditions for contracts between contractors and owners. General issues in these documents include the scope of work, time for completion, payment terms, dispute resolution mechanism, etc.

2. Liens: In almost all cases, clients are concerned with lien periods and bonding requirements because of a third party's ability to impose a cloud on the title of the owner's property and to sue the owner directly where a contractor has defaulted on a subcontract. At the outset of a project, we try to work with the client to identify the relevant critical dates that apply, such as substantial completion, termination or abandonment, when the lien filing period will commence or expire, and when suit to enforce the lien must be filed, and give advice as to how best to protect a lien ranking so that the client's claim might be paid prior to someone else's claim.¹

For example, under Louisiana law, for a private project, a subcontractor or material supplier has both a claim and privilege against a private owner for the amount of the subcontract. In other words, even though there is no privity of contract² between the owner and the subcontractor, the subcontractor still has a right to make a claim directly against the owner, and can enforce that claim through a judicial mortgage on the property being improved by the project. However, in order to be entitled to assert the claim and the privilege, the subcontractor must adhere to certain statutory requirements; namely, he must timely file his statement of claim and privilege in the mortgage records of the parish where the property of the owner is located. Additionally, to preserve his claim he must file a

¹ "Lien ranking" is a term used to denote the sequence that the court will follow in paying creditors. The holder of a valid first mortgage will generally be paid first out of the proceeds of any sheriff's sale of the property. With construction liens this is particularly important. The "first mortgagee" needs to make absolutely certain that there are no building materials on the lot before he funds the loan. If the materials are on the lot prior to the recordation of the mortgage, the Materialmen's Lien will outrank the mortgage. Louisiana Law, like most states, has a statutory scheme that sets out the various lien procedures and ranks of each.

² "Privity of contract" means a direct contractual relationship between the parties. For example the owner contracts with the general contractor. Here the owner and contractor have "contractual privity." The general contractor then subcontracts with a subcontractor. Again the general contractor and the subcontractor have "contractual privity." However, the subcontractor is not in contractual privity with the owner, therefore the subcontractor cannot sue the owner for breach of contract. Nevertheless, Louisiana's private works act, La. R.S. 9:4801, allows the subcontractor to assert a claim directly against the owner if certain steps are followed.

lawsuit against the owner within one year of filing the statement of claim or privilege.

The owner, on the other hand, can avoid this personal liability and judicial mortgage if he requires his general contractor to post a suitable bond, and the bond is attached to and filed with the contract in the mortgage records. The job of the attorney at this stage of the proceeding is to assist the client in making sure that the statutory requirements are met, and that steps are taken to protect the interest sought to be protected. This area of the law is certainly a trap for the unwary, as the statutory requirements are “strictly construed” and are full of complicated and frequently changing provisions.

For example, many homeowners hire a contractor for a relatively small modification to their home. In some cases, there is not even a written contract between the owner and the contractor. Under this scenario, if the contractor buys materials, incorporates them into the owner’s home, and never pays the vendor for the materials, the owner may ultimately be liable directly to the vendor. This is particularly harsh when the owner has paid the general contractor, thinking that the contractor was paying his subcontractors and suppliers. Unfortunately, all too often that is not the case. The owner finds himself in the difficult position of having to pay twice and then seek reimbursement from the contractor.³

To avoid this pitfall, the owner should have required the contractor to have a written contract and a bond of good and solvent surety. If the owner files the contract and the bond in the mortgage records of the parish (Louisiana equivalent of county), he/she will not be subject to claims or liens being filed by those parties who are not in contractual privity with him/her.

3. Construction Defect Litigation: At this stage, we generally have exhausted all efforts to resolve the matter out of court. Our focus now turns to identifying all facts needed to either prove or disprove

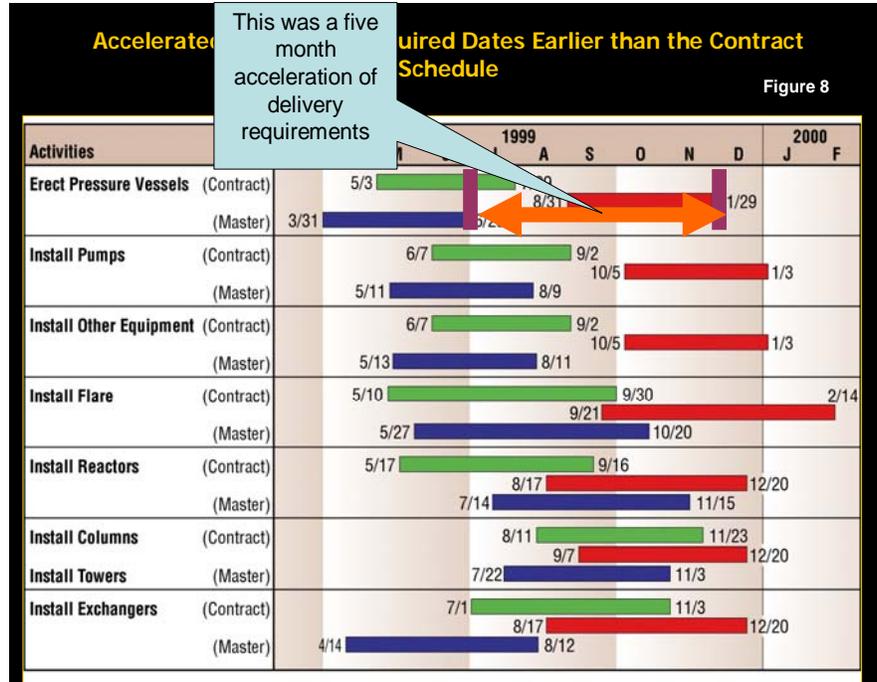
³ Under Louisiana law, if a contractor is paid by the owner and fails to pay its subcontractor, it is a crime.

the existence of a construction defect. In almost all cases the primary focus will be on the plans and specifications and any changes issued thereto. Occasionally, the inquiry will not be related to a deviation from the plans and specs, but will instead involve poor work practices. This type of litigation relies heavily upon the work of experts, and for that reason is often very time consuming and expensive. Typical areas of expertise of retained experts include, but are not limited to, architecture, mechanical engineering, electrical engineering, structural engineering, heating and ventilation, roofing, building cladding, glazing, flashing, masonry, construction sequencing, and other trades or professions involved in the building process. When the construction defect leads to personal injury litigation in the form of indoor air quality claims such as mold or “sick building claims,” the areas of expertise required expands exponentially. These cases, in addition to all of the above noted fields of expertise, also involve toxicologist, epidemiologist, immunologist, allergist, pulmonologist, neuropsychologist, psychiatrist, neurologist, mycologist, pathologist, industrial hygienist, and mold remediation experts, air modelers, and others. Needless to say, construction defect litigation is expensive, lengthy, and highly specialized.

4. Construction Delay Litigation: Again, at this stage efforts to resolve the problem out of court have failed. This type of case involves the use of construction sequencing experts and economists. The claim generally states that the owner or contractor did or did not do some portion of its agreement, which has now delayed the completion of the job. The extended time of the job is costing extra money in interest payments or job overhead, for which one party is seeking reimbursements.

With the advent of very sophisticated computer time management software which tracks the critical path of construction, most complex construction jobs are organized by task or trade and keep very detailed job records, document expenses, and anticipate profit margins per trade or by job sequence. Additionally, the critical path software programs are deceptive programs which lend themselves to potential abuse of the delay claim. First, the programs depict the logical work flow in a graphical

representation. The argument for delay is very much like the domino theory—one delay up the chain delays the whole project. This is not always so. Construction sequencing experts study and go behind the graphical representations to evaluate if one delay really delays the other parts of the project because of the ease of movement of budgeted expenses from one task to another along the project sequence.



To properly defend a delay claim, one needs to be prepared to go behind the accounting and budgeting methodology of the opponent. Again, this is a hugely expensive and time-consuming process. The construction sequencing expert and the economist spend countless hours reviewing job records, project files, e-mail, original budgets, original proposals, and track all of this throughout the project to see if in fact items originally budgeted at one stage of the project were properly charged against that phase of the work. This is an incredibly meticulous and laborious process literally involving the actual review of thousands and thousands of pages of project file documentation and electronic data. However, claims for delay are often so large that the

cost of defense is justified. Additionally, the construction delay claims and construction defect claims are not mutually exclusive. It is very common to find allegations of construction defects and delay claims in the same case.

Types of DELAY Damages Typically at Issue

- ✓ Loss of productivity
- ✓ Increased home office overhead
- ✓ Loss of profit
- ✓ Increased cost & expense
- ✓ Acceleration damage
- ✓ Interest

5. Personal injury litigation involving construction defects: Many of these suits involve the hot topic of mold and the oft overused term “sick building syndrome,” and whether or not mold or mycotoxins actually cause any serious injury. The present state of medical science does not deny a possible association between mold exposure and the exacerbation of asthma or hay fever-type symptoms; however, the more serious claims of neural or central nervous system damage and immunological damage have not been generally accepted in the scientific community.⁴ With that said, to defend a

⁴ See, “The Medical Effects of Mold Exposure” position paper of the American Academy of Allergy, Asthma & Immunology (AAAAI), J. Allergy Clinic Immunology, Vol. 117, No. 2, 2005

mold case one needs to be prepared to confront the experts that go against current scientific and medical opinion. Again, this is an expensive and time-consuming endeavor.

Financial Implications of Construction Law

The financial implications of construction law vary, depending on which side you are on. From the perspective of the owner, the issues are always the same. The owner wants his job done:

- a) Properly – In accordance with the plans and specifications
- b) On time – By the time agreed to in the contract
- c) Within budget – For the amount of money the parties agreed to at the outset of the job

The construction lawyer's ability to add financial value to a project stems from assisting the owner in drafting a contract with the contractor and the architect which ensures that everyone clearly understands the scope of work—in other words, the plans and specs are clear, and a mechanism exists to answer questions from the contractor in a timely and definitive manner. In addition, the critical nature of the time of completion must be explained and understood by all parties; a definite date and criteria established for when the job will be considered finished; and if required, the contract must contain liquidated delay damages that will begin to accrue should the contractor not complete the job in a timely fashion. Liquidated damage clauses are used to take the uncertainty out of each side's exposure for possible breach. Instead of having to prove actual damages at trial, liquidated damages act as a predetermined measure of damages usually calculated on a per day basis. In negotiating for a liquidated damage clause, both sides must understand the basis for the proposed measure.

See also, "Committee on Damp Indoor Spaces & Health, Board of Health Promotion & Disease Prevention," Institute of Medicine at the National Academies. *Damp Indoor Spaces & Health*. Washington, DC. The National Academies Press, 2004.

See also, "ACOEM Council on Scientific Affairs. American College of Environmental & Occupational Medicine position statement. Adverse health effects associated with molds in the indoor environment." Elk Grove Village, IL, ACOEM, 2002.

The owner's attorney strives to identify the hidden cost of construction—that is to say, those costs over and above the actual cost of the contract for the owner. The owner's attorney must try to anticipate what the owner's damages will be should the contractor default and then try to fashion a remedy in the contract which will provide a strong incentive to the contractor not to default through the imposition of liquidated damages should the default nonetheless occur. The contractor will likewise want to anticipate his entire overhead and costs associated with an owner delay or breach. Also, the contractor may want to counter a liquidated damage clause with a bonus clause for early completion.

Let's face it—trying to sit down with either an owner or a contractor prior to the start of construction to discuss what his damages would be in the event of a default is, at best, an exercise in extreme pessimism. However, just like the life insurance salesman or the estate planner, many times the role of the construction attorney is to discuss and plan for the worst. Identifying and negotiating for a realistic liquidated damage clause is a necessary part of the process. The owner needs to consider such items as interest charges, overhead, insurance premiums, the costs of his own staff overseeing the project, etc. All of these items and others are calculated based on the owner's estimated costs up to the date the project is scheduled for completion. If possible, you estimate what the anticipated per day cost of the owner is for the construction phase of the project. If the contractor does not complete the project on the date agreed in the contract, the owner will then have to continue to experience these construction phase costs for longer than he originally expected. These "per day" costs are one element of liquidated damage calculation.

The other component is the profit the owner would have received from use of the building if built in a timely fashion. This, by nature, is a more speculative process of estimation. Nevertheless, the additional construction phase cost plus the lost estimate profit are calculated on a per day or per month basis to form the basis for the liquidated damage negotiations for the contract at the start of the job.

The contractor, on the other hand, has different concerns. When we represent the contractor we must understand what the risk is to the

contractor should the owner default or should there be an unexpected change in the scope of the project, bad weather, or any other event which might make it less probable that the contractor will be able to finish the job on time and within budget.

In that regard we look very carefully at the scope of work definition. In many cases, the architect reserves the right to determine the questions relating to his plans. If the contractor disagrees with the architect, he may be faced with little recourse unless there is a mechanism in the contract to timely challenge the otherwise omnipotent standing of the architect. This is also true with respect to lump sum or unit price contracts.

Furthermore, should the disputing parties seek to account for future unexpected events at a later date, care must be taken to ensure that the contract language, when needed, will not itself lead to litigation. For example, assume the parties agreed to a unit price contract for direct cost and a lump sum price for all indirect cost. However, in the event there were increases in the anticipated scope of work—i.e., direct man hours—the parties agreed to a mechanism to adjust the “lump sum” for indirect cost. The mechanism was an “equitable adjustment.” The problem is that the term “equitable adjustment” is not defined in the contract, so the parties will in all likelihood be forced to litigate to determine what was meant by the term “equitable adjustment.”

Such litigation often eats up the contractor’s profit through substantial attorney’s fees and court costs. So the moral of the story is that while spending time with the attorney at the beginning of a job may seem like an expense with no real return, in this case, the failure to define certain key terms like “equitable adjustment” early on would cost both the owner and the contractor much more in the long run than would have been spent putting together a proper contract.

Avoiding Trouble: Get Expert Advice Early On

Indeed, the biggest mistake that I see clients make in the realm of construction law litigation is not seeking expert advice early on in a project. A lawyer does not drive a nail or pour a yard of concrete, so in the world of

the typical contractor, a lawyer's time at the start of the project is not considered a value-adding event. Not that many lawyers complain about that situation (the reluctance of owners and contractors to use a lawyer at the beginning of a job usually results in more business for the legal profession). However, the fact remains that a skilled construction lawyer can help identify those areas that are potential areas of conflict. At the start of the job, the owner and the contractor are usually happy and cannot wait to work together. However, the honeymoon usually ends relatively soon and communication lines between the owner and contractors generally begin to fail. This occurs for several reasons: the owner perceives the contractor is not progressing fast enough, the contractor feels the owner's representation is beginning to "nitpick" the job, the owner is refusing change orders, the owner's designers are late with shop drawing approvals, etc. The role of the construction lawyer at the beginning of the project is to identify those areas in which trouble may arise and develop a plan of action to address the trouble, or at least develop a mechanism by which the issue can be resolved in a timely fashion. Waiting until a problem arises and tempers flare is not the best course of action. The best time to address these problems is during contract drafting to ensure clear lines of communication are contractually spelled out.

Documentation

Another area clients seem to have trouble understanding is the importance of thorough, consistent, and complete documentation. If I had to describe a recipe for construction litigation, it would be the following:

- a) Start with two really good friends who have worked together for a long time, have known each other for years, and trust each other implicitly
- b) Add to that a history of other jobs
- c) Add to that a new project which is complicated and/or has a compressed time for completion

Inevitably, these two longtime friends will rely on a past practice, a head nod, an assumption, or some other less than formal agreement which will result in huge and costly problems for the project—problems which will actually be magnified by the emotional issues

related to former friendship between the parties. The best way to avoid this scenario is to commit all agreements to writing, and make sure that you do not commit to do something unless you are certain the other side understands the scope of your commitment and the corresponding payment obligations. The best way to ensure common understanding between the parties is to put it in writing. The contract almost always has language to the effect that “this agreement represents the total agreement between the parties and cannot be modified except by written documentation signed by both sides.” If the contract has this type of language, the lawyer has done his job. It is now up to the owner and the contractor to educate their field representatives on the need to commit every agreed upon change to writing in the form that is required under the contract. Sometimes the contract requires very specific forms to be completed, other times it can be any writing. The point is this—those with authority to bind the owner or the contractor need to know and understand the requirements of the contract. This is why it is so important for the construction lawyer to know and understand his/her construction client’s business. The attorney must know enough to tell his client that he/she would like to speak to the superintendents or foremen to make sure they understand the contract. As set out below, it is not at all difficult for the attorney to determine who he needs to speak to. A few moments at a job site with the construction crew will help the lawyer understand much more about construction law than can ever be taught at law school.

What is the formula for litigation?

- Great relationship at start of job
- + Mutual trust and respect
- + Prior good relationship between the parties
- + Time is of the essence
- = Willingness to overlook contract formalities

Successful Strategies

In order to be successful in one's role as a construction attorney, it is important to understand your client's business. To be in a position to advise and assist clients with construction-related issues, it is necessary to understand the unique aspects of each client's business and the business environment that they operate within.

It is not acceptable to simply sit in your office. The construction attorney needs to visit a construction site, speak with the project superintendent, and get to know on a firsthand basis what it is like to be a project superintendent—to pour a concrete slab, run electrical cable, fill out daily logs, etc. Getting to know the client's business and its employees on a personal basis is extremely helpful. When litigation arises, it will be these same employees who are being deposed, and it will be these same people that you will need as your witnesses.

Issues that Lead to Litigation

If the issue is easily identifiable and/or the cause of the problem is obvious and apparent, most construction-related disputes can be resolved outside of the litigation process. Unfortunately, this is rarely the case. Due to the sheer number of parties involved in the typical construction project and the interplay that exists between each, it is often very difficult to identify what component of a building system has failed, and even harder to determine whether it was a design error, a construction error, or a product defect.

For example, if a building experiences severe cracking in its slab and walls, along with movement of cabinets, what is the owner to do? Certainly he will contact his builder, but the builder may not be at fault. The cause could be improper design of the foundation; improper geotechnical analysis of the soil; improper construction of the slab; deficient strength in the concrete of the slab; or a combination of any of the above. Each of these design professions or trades will not want to accept fault until it is proven that the cause of the problem was, in fact, their work. In many cases, the mechanism for determining fault is the litigation/arbitration process.

Key Participants

Typically, construction litigation involves owners, insurers, architects, architect sub-consultants, engineers, design professionals, bonding companies, general contractors, subcontractors, suppliers, and product manufacturers—all of the people involved in a construction project. The construction process can give rise to litigation at all stages of the process; therefore, every party to the process is a possible plaintiff or defendant, depending on what the issue may be.

For example, at the start of the job the owner contracts the architect to help with the conceptual design of the project. The owner is satisfied with the concept and authorizes the design stage to commence. The architect then hires several sub-consultants to assist in the design. These include geotechnical, mechanical, structural, and electrical engineers. The architect uses the expertise of these professionals in preparing the design drawings

for the owner. If there are errors in these documents, the architect is usually responsible for this.

Depending on when the error is found, architectural design errors can be among the most costly to remedy. Design errors frequently give rise to litigation instituted by owners against architects. The owner is usually not certain at the start of litigation if the error is truly and solely a design error or a combination of design and construction error. Thus, owners often want to make a claim against the architect and the contractor in the same proceeding. This rarely occurs, however, due to mandatory arbitration language in the architect contract that often precludes joinder of third parties in the arbitration, forcing the owner to fund a two tract litigation—one in arbitration against the architect and one in litigation against all other potentially responsible parties.

Indeed, one of the major drawbacks to the use of arbitration with contractors was the inability to join the contractor arbitration with that of the architect, forcing the owner to fight on two fronts, with the possibility of inconsistent results. This paradox may soon be eliminated, however, by virtue of recent changes in the American Institute of Architects (AIA) standard form of agreement relating to the design build projects, which now allow the joinder of third parties.

Unique Aspects of Construction Litigation

The main difference between construction litigation and most other forms of litigation is the number of possible claims and counterclaims that all relate to the same operative facts. For example, an owner discovers that water is leaking onto his carpet every time it rains and is damaging the underlying sheet rock. The owner sues the architect for defective flashing design of the windows; the general contractor for poor workmanship (tort) and for breach of contract; the contractor's performance bond; the flashing subcontractor under a theory of third-party beneficiary; and the manufacturer of the window. The architect's contract requires arbitration, so the owner is forced to proceed against the architect in arbitration while continuing the rest of the case in court.

The contractor in turn files suit against his framing contractor; his exterior waterproofing contractor; his masonry contractor; and his roofing subcontractor. During the case it is often difficult to determine who is on whose side, because it seems like everyone is suing everyone else. Depending on the issue being explored at the moment, the owner and contractor may be 100 percent aligned or 100 percent opposed.

Stages of a Construction Litigation Case

Here are six stages of all major construction litigation cases:

Stage One: Initial Client Consultation

A construction client usually knows what he wants when he contacts a lawyer, but he does not know how to get it: “I have been sued, please defend me;” “I haven’t been paid for this job, can you help me file a lien;” or “My roof is leaking and I am tired of getting the runaround from my contractor.”

The initial stage of client consultation is a two-part process. First, the lawyer must listen *to* what the client is saying; second, he must listen *for* what the client is not saying. Just because the client calls knowing what he wants does not mean that it is the lawyer’s job to just give him that. The initial stage of the litigation process is the most important with respect to the relationship that is going to govern the attorney-client relationship throughout the case. If the lawyer is just a “yes” man at this first meeting, it will be very difficult for him to be anything other than that as the case progresses.

The initial meeting should be spent allowing the client to vent. Make a list of all the documents that will be needed in the case. If the case involves a lien question, I ask the client to bring his contract, invoices, and correspondence to our first meeting. If it is a construction defect case, I want to see all of the plans and specs, change orders, and demand letters. Next, try to gain a thorough understanding of the issues. At the end of the meeting, repeat the client’s position back to him so that he or she will know that you truly understood what they were saying.

Then, in a tactful and professional way, begin the job of lawyering. Work with the client to analyze the situation. Is litigation the best way to go? Do we really have a case? What can happen if we do file a suit? What are the seen and unseen costs of litigation? Has the client thought about how much time will be required of him and his staff in answering discovery requests and being deposed? Has he thought about negative business consequences that might be a consequence of litigation such as the loss of other clients who don't want to do business with active litigants? Are there alternatives to litigation that might resolve the situation more economically? If, after all of this dialogue has occurred, the correct, unemotional answer to solving the problem continues to be litigation, proceed to stage two in the litigation process. If not, assist the client in resolving the matter outside of the litigation arena. Such assistance may be as simple as calling the other side or the other side's lawyer to set up a meeting to discuss the problem. I do not think the public has an accurate understanding of the role of the attorney in this context. Those in the legal profession are called many things, litigators, lawyers, advocates, barristers, but above all we are counselors. It is in the role of counselor that most matters are resolved without judicial intervention.

I consider this the most important stage in litigation. The lawyer needs to counsel the client and to make certain that he understands that litigation is a fluid, rapidly changing environment with no guarantees. A very wise mentor of mine once told a client, "If you ever walk into a lawyer's office and he tells you that you have a case that can't be lost, get up and walk out—because he's both an idiot and a liar!" It is imperative that the client understands the risks and the benefits of litigation, and has realistic expectations for each stage of the process.

The biggest hurdle with new clients is getting to know their business and getting to a level in the relationship where they truly believe that you know their business almost as well as they do. To overcome this, you must spend time with the client and his employees. You don't charge for this interview time; you do it to help you be a better lawyer for this client.

Stage Two: Pleading Stage

During this stage, you must review all of the relevant documents that exist on the project; speak to the people who have knowledge of the events; and review the law so that your client's legal position can be set forth in clear, accurate, and supportable terms.

Contract Documents



- ✓ The Contract
- ✓ The General Conditions
- ✓ Plans and Specifications
- ✓ The Construction Schedule
- ✓ The Bid Proposal
- ✓ Qualifications from Contractor
- ✓ Amendments or Addenda
- ✓ Letters of understanding
- ✓ Email and other correspondence?

There is nothing worse than filing a pleading that you cannot prove. Spend time at the beginning of the case to develop your own facts. Do not assume that you will be able to prove something just because your client said it was so. The client may be telling the truth, but keep in mind that it is your role as the lawyer to take the truth and develop the facts necessary to have that truth put into the form of admissible evidence at trial. The law has very specific requirements for what constitutes admissible evidence. It is well beyond the scope of this chapter to discuss what constitutes admissible evidence; suffice it to say the law has a very specific set of rules designed to

keep information out of court unless the information is established as being authentic and relevant to the facts at issue.

The information that is most helpful to my client at this stage and throughout litigation is his project file. I try to work with my clients to make certain that they instill in their employees the importance of proper file management and file documentation. After these meetings, document review, and legal research, the lawyer begins the process of crafting a legal complaint which sets out the factual basis supporting the legal relief he is seeking. Examples of such complaints are attached in Appendix D.

Stage Three: Experts

The use of expert witnesses has become a mainstay in modern litigation. Construction litigation is certainly no exception. Experts should be retained very early in the process to assist the attorney in developing his case. I have retained experts even prior to the pleading stage when particularly complex construction defects are in play. Construction litigation utilizes experts from many different fields including architects, water envelope specialists, mold remediation specialists, structural engineers, HVAC engineers, roofing experts, geotechnical experts, masonry experts, electrical engineers, construction sequencing experts, economists, and etc. Depending on the issues involved, it is not uncommon to employ several experts for any one case.

Stage Four: Discovery

This is by far the longest and most costly stage of the litigation process. It is during this stage that each side gets to “discover” what the other side is going to say at trial. Generally this is accomplished through the propounding of interrogatories (written questions); request for production of documents; request for admissions; and depositions.

Many clients get frustrated during this stage of a case, due to the breadth of what must be told to the other side. The scope of discovery is very broad. A party is allowed to make inquiries about any area that is relevant to the facts at issue in the case or any area that is calculated to lead to the

discovery of relevant admissible evidence. In other words, the question need not be aimed at seeking relevant information; it only has to seek information that might *lead* to the discovery of relevant evidence. Of course, attorney-client privilege may be raised as an objection to any discovery request, if the request seeks protected information. The attorney-client privilege will protect from disclosure any communications by and between the client and his attorney in which the client sought or obtained legal advice or counsel. As a general rule, almost all communication with the attorney is privileged, including letters, e-mails, phone calls, and conversations.

Unfortunately, clients make the most mistakes during the discovery stage. When the other side asks for documents, in many cases clients either do not understand the need to make a complete response, or worse, they do not *want* to respond completely. I spend a lot of time with my clients to make sure that they do not fall prey to this mistake. Unfortunately, I also spend a lot of time forcing the other side to properly comply with my requests.

The best example of lazy responses is electronic discovery responses. It is often very easy to cross-examine a respondent and have them admit that even though I asked for all of their e-mail, all they did was ask the people in the field to copy the current outlook folders to disks. Generally, no effort was made to search backup disks, system servers, or home computers. This results in the filing of a motion to compel and often places them in a bad light in the eyes of the judge. The judge's perception of the witness is very important down the road when credibility calls will have to be made at trial.

Electronic Discovery



➤ What is discoverable?

- Electronic Data
- Everyone's hard drive
- Online Data Storage
- Off-line Data Storage
- Fixed Drives
- Programs and Utilities
- Logs of internal system modifications

Examples of typical requests for production in construction cases are attached in Appendices E and F.

Stage Four Trial

The trial stage is the part of the process that most people are somewhat familiar with. When a movie or television portrays the work of an attorney, it is typically in a courtroom setting. However, the actual trial stage begins well before the start of the trial. The lawyer should have begun to develop his theme of the case at the very first meeting with the client. This theme will have been changed, modified, and massaged throughout the discovery process and at this stage should be firmly in the background of all that is done to prepare the evidence for presentation to the judge or jury. So what is a theme? There are two well-known authors in the field trial advocacy—Professor Thomas Mauet and James McElhaney. Each author has written extensively on theme development and its context within the theory of the case.

Good themes are based on the universal truths about people and events we learn during our lives. Good sources of themes are the great works of literature, religious classics such as the Bible, and popular sayings that are part of everyday speech. Thomas Mauet, *Trial Techniques* (5th ed. 2000), page 63.

“[F]ocus your side of the trial—and all of its individual parts—on the moral imperative, the wrong that needs to be set right. This is another way of describing what you do when you plan your theory of the case, how you pick the themes that support that theory, and how you decide which facts and witnesses are really important to proving your case and which ones you are better off without.” James McElhaney, *McElhaney’s Trial Notebook 144* (4th ed. 2005) page 46.

The trial stage involves the study and organization of all of the discovery documents produced and received, and all of the deposition testimony taken. You must decide what witness you will call and what documents you need to establish as proof for your side of the case. You must anticipate evidentiary challenges to the witnesses and documents, brief the law, and be prepared to argue for the admissibility of all of the evidence you need to prove your case. Similarly you must be prepared to cross-examine the other side’s witnesses and be prepared to object to improper or inadmissible evidence. Again this requires research and briefing for any unique or complex issues prior to court.

Time must also be spent with the witness and experts, preparing them for trial. The exhibits that you are going to introduce through their testimony must be discussed with the witness to make certain that they are prepared for the questions that you will ask of them at trial. If the case will be tried to a jury, the lawyer will also be required to prepare jury charges for submission to the court. These are statements of the law relating to the case that each side will ask the court to read to the jury prior to deliberation.

In addition to the above, the attorney must also study and have a total command of the facts, prepare an opening statement, and be prepared to give a closing statement at the end of the trial.

Needless to say, by the time the parties arrive at the courthouse for the start of the actual trial, most of the tedious, laborious, difficult work of the lawyer is done. All that is left is to try the case. Incidentally, that is why settling cases on the courthouse steps seems to make so little sense. So much time and energy has already been expended. If the desire to settle is truly based on the need to avoid needless litigation as opposed to an admission of liability then why not do it well ahead of the massive expenditure of legal fees in the weeks and months immediately prior to trial?

The trial itself is generally broken down into four phases: Opening statements, plaintiff's side, defense side, and closing statements. When there are multiple parties involved, these stages become somewhat more complicated. For the purposes of this discussion, we will confine the discussion to simple two-party litigation.

In the opening statement phase, each party is given an opportunity to explain the facts of the case to the judge or jury. The parties are not allowed to argue or try to persuade at this point, but rather are limited to laying out the table of contents, so to speak, of what their case will be.

The Plaintiff's Side

The plaintiff, as the party actually bringing the suit, gets to put on his case first. This is because the plaintiff in a civil case has the burden of proof and must prove each element of his case by a preponderance of the evidence to prevail. In other words, the plaintiff must prove that it is more probable than not that each element of his case occurred the way he claims. After the plaintiff calls each witness, the defendant has the right to conduct a cross-examination. After the cross-examination, some jurisdictions allow a redirect examination. After all of the plaintiff's witnesses have been called, the plaintiff will formally announce to the court that he "rests his case." If the defendant believes that the plaintiff failed to prove one or more of the essential elements of his case, the defendant will move for what is sometimes referred to as a "directed verdict." In laymen's terms, "directed verdict" means that the plaintiff failed to carry its burden of proof and there is no need to even hear any of the defendant's witnesses.

Defense Side

The defense will call its witness. The plaintiff will have the opportunity to cross-examine them and in some jurisdictions a redirect is allowed. At the conclusion of the defense side of the case, the defense will announce “the defense rests.”

Closing Statements

This is often the most dramatic part of the trial. Certainly Hollywood often portrays it as such. In truth, this is the part of the case in which the lawyers weave the facts and law of the case into their themes and theory, and actually argue the case to the jury. Again the plaintiff argues first, then the defense, and then the plaintiff gets a rebuttal. Again the plaintiff gets to go first and last because he has the burden of proof.

Verdict Stage

If the matter was tried to a jury, after the closing arguments conclude the judge reads the jury charges to the jury and the jury retires to deliberate. Once a decision is reached the jury returns, gives its decision to the judge, the decision is read, and the court is adjourned. If the matter was tried to a judge, after closing arguments the judge will generally either take the matter under advisement and adjourn the court or retire to his chambers before verdict.

Appellate Stage

Although not mentioned above, one of the most crucial tasks of the trial attorney during the actual trial phase of the case is to ensure that the court transcript has a complete record of all of the events. If an attorney does not timely object during the trial to the introduction of a piece of evidence then he may not raise that issue on appeal.

If a litigant believes the trial court committed an error during the trial or if he believes that the jury’s findings were manifestly erroneous and not supported by the evidence, the party can appeal the trial court’s ruling. This

is one area in which Louisiana law is fundamentally different from that of the other states. Louisiana appellate courts have complete appellate review of facts and law, whereas the other states have appellate review of errors of law only.

In an appeal, the entire trial court record complete with all of the exhibits are typed, copied, and sent to the court of appeal. The party appealing the trial court decision is required to specify precisely what errors are claimed to have been made. The party bringing the appeal is called the appellant. The party responding to the appeal is the appellee. The appellee is entitled to file its own brief countering the arguments of the appellant.

Generally, appeals are heard by a three judge panel. There is no testimony allowed. The lawyers appear and argue the case to the panel of appellate judges. The record is strictly limited to the contents of trial court record. After arguments are heard the court adjourns and several weeks later a written opinion is released either reversing the trial, affirming the trial court, or remanding the matter back to the trial court for further deliberations.

The Lawyer's Role: Be Prepared

All construction litigation involves several key questions: What is the scope of work? What is the time for completion? What was agreed upon as the payment for timely completion? Was the scope of work done? Was more work done for which extra compensation is owed—or was less done? Was there defective work?

Prior to the litigation stage—usually during discovery—I begin to play a strong devil's advocate role, so that I can see how the client reacts to strong counter arguments to the best parts of his case. I want to be the one to find the weaknesses in my own case, so that I can develop the proof necessary to fill in the gaps. If the proof is not there, I need to be able to advise the client about any potential weaknesses, so we can evaluate the need for a modification to our evaluation of the case. It is much preferred that the client be an integral part of this process, as opposed to me just showing up at his office one day and telling him or her that I think the case is no longer as good as it used to be.

The biggest mistake an attorney can make is being unprepared. Construction law requires the lawyer to get his hands dirty. The lawyer must dig into the plans, meet with experts, learn the language of construction, understand the engineering, and understand not only that something does not work but *why* it does not work.

This is a daunting task. The construction lawyer must be able to match wits with architects, engineers, geotechnical soils experts, and other professionals, so as not to be bamboozled by their unique jargon. On top of this, the lawyer must know the law, and how to put all of this technical jargon and knowledge into a tight cohesive theory that matches the facts that support the position of the client. I know of no way to do this without a tremendous amount of preparation.

The Contract, Local Laws and Dispute Resolution

The form of dispute resolution that is chosen depends, in large part, on the contract between the parties. If the contract calls for arbitration, it will usually specify that the parties agree to submit their disputes for resolution pursuant to the American Arbitration Association Rules for Construction Cases. The contract will also usually specify which state's laws will apply. If the contract is not subject to arbitration, it will generally specify that the parties agree to be bound by the laws of a particular state.

The laws that are most important in a construction litigation dispute vary, depending on which interest you are aligned with. As an owner, the time period within which you are allowed to institute a claim would be very important. As a builder, the lien periods would be important for maximizing your leverage against the owner or protecting your owner from downstream claimants. As a public builder, you must be very aware and familiar with the provisions that specify how public jobs are bid and awarded, and the lien periods associated with public works. These laws, especially those that relate to public works, are strictly construed and must be strictly followed.

Litigation vs. Mediation/Arbitration

Construction law has changed in many ways in recent times. Years ago, there was a huge push towards arbitration. In my experience, clients were very disenchanted with the process; they believed that at the end of the day, the arbitration process was really just a Solomon's sword approach to solving a very real problem: why pay thousands of dollars to an arbitrator who was just going to split the deal right down the middle? To avoid this feeling of helplessness, clients began moving towards mediation as a form of dispute resolution because they felt it gave them more control over the settlement process. Unlike an arbitration, in a mediation it is the client who controls when to settle a dispute and at what cost or gain.

Today, the trend remains somewhere in the middle. Litigation is still used as a last resort and is seen as the most risky of the three primary forms of dispute resolution. Construction cases are often complex and time consuming, and for that reason are not viewed as jury-friendly cases. The complexities of expert testimony are thought to be so high-tech that no judge or jury will be able to understand the case and reach the right decision.

However, having tried several arbitrations, I am not at all convinced that anyone in that forum will be any more successful at judging a case if the experts do not speak a language that can be understood by the common man. Whatever my beliefs, the fact remains that current trends continue to place construction cases in all three forums: mediation, arbitration, and the trial court. It is really just a function of the intentions of the parties at the time of the contract that largely determines this outcome. The choice of mediation, arbitration, trial court or a combination of all three is fodder for the negotiation table at the start of the project.

Whatever forum is used for resolution of the dispute once an agreement is reached, you must make sure that all of your client's claims have been satisfied to your client's satisfaction, and that you have an agreement in such a form as to be enforceable in a court of law should the other side ever renege on the deal. Depending on the particular jurisdiction, this could require an authentic act, notarial statement, a written and signed agreement,

an oral statement made in open court, or any other statutorily required condition for enforcement. You must also make certain that any and all claims that have been brought, or could have been brought, against your client are being dismissed. If your client is to receive a money payment, or if the agreement is for the other side to do a certain act, you make certain that definite dates are given for that performance.

Financial Considerations

In my experience with construction litigation, there is no such thing as an average legal fee; each case stands on its own guided by its own unique circumstances. Large and complex construction design defect cases are document intensive and involve the use of dozens of expert witnesses. These cases last years and are extremely expensive. On the other hand, the typical lien case involving the filing of a lien for non-payment of building materials or subcontractors might be resolved relatively quickly and inexpensively. The vast majority of construction cases fall somewhere in between. Almost all construction cases are handled on an hourly basis.

For an owner, the loss of a construction case is devastating. Not only does he have a building or structure that is not functioning properly, he is left with attorney's fees to pay, and must still pay to have the building repaired. For the contractor, insurance is often available; however, insurers continue to aggressively resist construction defect claims, arguing the "your work" exclusions preclude coverage. These are specific exclusions in a commercial general liability policy that deny coverage for any claims that arise out of damage by the contractor's work. Although there is a recent judicial trend to expand such coverage, insurers continue to resist such claims vigorously. Bonding companies will also respond on behalf of contractors, but unlike insurers, the bonding company is entitled to always seek to recoup the payments back from the contractor. In other words, the bonding company pays the owner for the contractor's default and then sues the contractor to get its money back.

A Positive Result

A positive construction litigation result, in my mind, is any result which gets my client back on track with the business plan that he had prior to the construction-related problem that brought him to my office. If the result of the matter is such that my client can no longer do what he originally wanted to do, then we have not achieved success.

The goal, of course, is to have all clients 100 percent satisfied with the outcome; however, that is an unreasonable definition of a successful result. Sometimes, the client's emotional investment in litigation is so great that anything other than total devastation of the adversary is anti-climactic. However, while the client may not be ecstatic with the result, if it is one that allows him to continue forward with his business or personal goals basically unaffected by litigation, it is still successful. He may not have crushed his opponent, but the result of litigation is positive if his life or business will continue basically on par with his pre-litigation plan.

Someone once said a good settlement is defined as an agreement that leaves neither side happy but both can live with it. I have to add this caveat: to settle a case on the courthouse steps—which seems to be the preferred choice for most insurance companies—is a waste of time and resources, and rarely leads to a positive result for the insurer. As stated above, by that time huge sums have already been spent in preparing the case for trial. By that time, it is usually the insurer that ends up paying more to settle the case than it could have weeks earlier.

In order to achieve a successful result, lawyers have to remember that they are not in their element in a construction setting. They should not speak in legalese; they should speak firmly and directly—and never say anything unless they know what they are talking about.

The successful construction litigator must study the facts—not just from his/her side of the story, but also from that of the opponent. The best way to gain confidence and instant recollection of the facts and theories of your case is to critically study your arguments from the eyes and ears of your opponent. The only way to step into the shoes of your opponent is to know

his case inside and out. In this manner you will be able to defend your own arguments and defeat those of your opponent before the trial even begins. If you find you cannot do this, perhaps you should re-evaluate your settlement posture.

David Nelson is a partner in the Baton Rouge office of Kean Miller. He joined the firm in 1985 and practices in the litigation area with special interest in construction and toxic tort litigation including most recently mold litigation. Mr. Nelson represents construction clients in a wide variety of construction disputes including litigation, contract negotiation and interpretation, arbitration and mediation, lien rights and remedies under the Public Works Act and the Private Works Act, performance, payment, bid and retainage bond rights, and liability and responsibility issues.

Mr. Nelson represents engineers, contractors, industrial concerns, building owners, architects and engineers in a wide variety of matters including improper construction and design issues. He has handled significant cases for Credit Suisse First Boston, , BASF Corporation, Arkel Construction Company, The Louisiana Municipal Association, The Louisiana Association of Educators, The Rapides Regional Medical Center, ARCO, Nalco Chemical Company, DSM Copolymer, and Albertson's. Mr. Nelson has particular expertise in construction law issues relating to building cladding issues, water intrusion, and corresponding damage claims including "toxic mold" claims.

Mr. Nelson also represents many petrochemical companies in cases involving alleged exposure to various chemicals and toxic substances. He has handled and continues to handle several matters for DSM Copolymer, Inc., Air Liquide America, Amitech, Ltd, Nalco Chemical Company. He also represents many industrial clients in the defense of toxic tort cases alleging personal injury in connection with chemical exposure.

Mr. Nelson is a member of the Baton Rouge, Louisiana State and American (Litigation and Insurance Defense Sections) Bar Associations, the National Organization for Lawyers of Education Associations, and the Louisiana Association of Defense Counsel.

Mr. Nelson earned his B.S. from Louisiana State University in 1982 and his J.D. from the LSU Law Center in 1985. He is a graduate of the Masters Advocacy Program at the National Institute for Trial Advocacy (1992) and is a faculty member

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