

Recording the Project

Construction projects generate paper. Lots of it. Two of the main reasons for this are:

1. In theory, it helps to make the job run smoother; and
2. Claims – properly documenting the project may help avoid claims and, if not, will help when bringing a claim or defending against one.

This paper will focus on the latter use of project records, which is where your focus should be when creating them in the first place. Every change to a drawing, every change to a schedule, every late delivery, every rain day, every difference of opinion or understanding on a project has the potential to result in a claim. A well documented project record should minimize the disputes between the parties during the course of construction. That, in turn, should help the job run smoother, thus meeting the objective of the first reason to maintain project records.

A good project record may not necessarily get your job done faster, cheaper, or more efficiently.¹ As a result, some contractors² do not devote the necessary resources to project records. Their focus each day is on the project task at hand: getting the last lift of dirt compacted before the rain hits, ensuring the concrete truck arrives just as the formwork subcontractor has finished its task, or putting out one of the other countless “fires” that arise each day on a construction project. The project superintendent is gets pressured to deal with the operational issues and finds little time left in the day to devote to project records: “Get the job done and then worry about the paperwork”. This is a mistake, which is repeated day after day, on project after project.

All claims arise out of basically the same thing: a “misunderstanding” between the parties. Sometimes that misunderstanding is innocent, and arises out of a genuine difference of opinion as to each parties’ rights and responsibilities under an agreement. Sometimes it arises because one party wants to take advantage of the other, or is perceived to be doing so by the other. And

¹ Conversely, failing to keep good project records almost guarantees problems during construction and during the ensuing litigation which will almost certainly arise.

² This paper will refer to contractors although, in general, all of the comments are equally applicable to owners. Thus, the word contractor could be read as synonymous with owner

sometimes it arises because one party has made a mistake and does not want to be saddled with the responsibility for it. However it arises, it has to be resolved.

By having a good project record, some disputes may be “resolved” by avoiding them in the first place or nipping them in the bud. For example, circulating updated schedules may avoid the stacking of trades and consequential claims for loss of efficiencies arising by not having a clear run at the work. Weekly meeting minutes may prevent misunderstandings as to what had been decided at the meeting, making sure everyone is pulling in the same direction as the project proceeds, with nothing falling between the cracks.

If the parties cannot settle their dispute, it gets decided by a judge³. Given the delays associated with the litigation process, the first day of trial may be two, three, four or even five years after the events giving rise to the dispute arose. The witnesses paraded before the judge will almost invariably be the project personnel involved with the project at the time.

Those people will have moved on to different projects, or even different careers altogether, by the time they are called into court. They will be asked to tell the judge, often in minute and exacting detail, what happened on a particular day at a particular time some two, three, four or five years previously. Then the lawyer for the other side will rise and grill them for hours (or days), challenging their recollection of what happened all those years ago. In the absence of complete and accurate project records, the witness will probably not be able to provide a truly accurate account to the court of what went on.

That is not to say that the witness is lying, or that the witness didn't pay sufficient attention to the details of the events as they were unfolding. The reality is that different people perceive the same event differently. They remember it differently, and they describe it differently when on the witness stand. A fact, an event, or a conversation which stands out in a witness' mind (or at least that is what the witness tells the judge) can be contradicted by a single document created at the time the events giving rise to the dispute were unfolding.⁴ 99 times out of 100 the judge hearing

³ If the parties choose to have their dispute settled by way of arbitration, the time frame may be shorter, but the issues are the same.

⁴ In the more than 15 years I have been practicing law, I have not had one case where a witness did not change his or her “story” after being shown a document which directly contradicted that witness' honestly held belief as to what happened.

the case will “prefer” the “objective” evidence contained in the project records over the recollection of a witness on the stand.

Once in the litigation stream you will have to produce to the other side all “relevant documents” in your possession or control. Virtually every “document”⁵ which gets created on a construction project could be, and likely is, relevant.⁶ Accordingly, make sure that the people doing the recording understand that every one of their records may one day be used in a courtroom and subject to scrutiny by a judge (and by a lawyer for the other side who will spend significantly more time studying some of them, and criticizing some of them, than went into creating them in the first place).

Keeping good project records, and keeping them well organized, will also cut down on your legal fees. If your lawyer is happy to see 5-10 banker’s boxes of unorganized, rag-tag project documents land on his doorstep, it may be time to find a new lawyer. Paying to have the lawyer’s office organize your files is not an efficient use of your money. Presenting the lawyer with the appropriate backup documentation she needs, organized in a manner that allows her to find them without having to go through mounds of other material, will more than offset the cost incurred in creating and organizing the project records in the first place.

Conversely, instructing your lawyer to bring a multi-million dollar delay claim on your behalf, and not having the proper backup documentation to support it, is a bit like instructing carpenters to build a wood framed house without using any lumber. It can be done, and it may stand up, but it is not terribly efficient or cost-effective.

⁵ The word “document” is given a wide interpretation and includes not only paper documents, but also photographs, telephone records, electronic files, e-mails, and objects such as samples, etc.

⁶ In British Columbia, the test for whether a document is “relevant” is very broad. A document is “relevant” and will be subject to review by the other side, not only if it would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must – either directly or indirectly enable either party to advance its own case or to damage the case of the other party . The phrase “directly or indirectly” is used because a document can properly be said to contain information which may enable either to advance its own case or to damage the case of his adversary, if it is a document which may fairly lead that party to a “train of inquiry”, which may have either of these two consequences. In a lawsuit, lawyers are charged with the responsibility of ensuring their respective clients have produced all relevant documents. You should work closely with your lawyers in dealing with document production issues.

In order to be effective, there must be a top-down commitment to keeping accurate and complete records from the very outset of a job (or even before commencing construction, as you will see later). Like insurance, in an ideal world you will never have to rely on your project records and you will resent having spent your “premium dollars” and having nothing tangible to show for it. Also like insurance, however, when you do need to rely on your project records you want to make sure that you get as much mileage out of them as possible.

The first, and most important, project record is the contract itself. Make sure you read it before the project starts. Provide a complete and accurate copy of the final version (not the bid version) of the contract to each of the project superintendents and make sure they read it before starting the job. Consider having a roundtable discussion to review the requirements and go over anything unusual, complicated or unclear. And, of course, keep a copy of the contract on site at all times.

During construction, the following types of document ought to be maintained, and are discussed in more detail below:⁷

1. Daily reports or diaries
2. Photographs and Video recordings
3. Meeting Minutes
4. Schedules
5. Drawings
6. Change Orders
7. Claims and Other Notices

⁷ Some of these documents may not be applicable to all projects. However, you should turn your mind to them all and make sure you will never need a particular project record before deciding not to maintain it.

8. Project Correspondence Files
9. Inspection Reports
10. Cost Accounting Records
11. Equipment Records
12. The Estimate/Bid File

Daily Reports or Diaries

- Quite possibly the most important document kept on the entire construction project.
- MUST be done daily, on each shift if multiple shifts.
- Will be produced in Court, so watch what you write.
- Detailed and complete (will be subject to cross examination – if not in the notes, probably did not happen).
- Short forms, acronyms alright to use.
- Accurate and unbiased recording of facts rather than opinions.
- Things to record:
 - o Persons on site (owners, consultants, inspectors, contractors, sub- contractors and others) and their activities.
 - o Statements by owners, consultants, inspectors, etc. (e.g. “Good job under these conditions” “Sorry for the delay in getting these drawings to you”).
 - o Inspection and test results, rejected material or workmanship, follow up required and timing of same.

- o Equipment on site, including hours worked, breakdowns, standby hours, load counts.
- o Weather and temperature, both a.m. and p.m.
- o Change orders, directives and site instructions received, whether oral or written.
- o Drawings received and any problems noted.
- o Major supply of materials.
- o Delays – cause and duration.
 - Problems with drawings, waiting for direction from owner/consultant, missing manpower, stop work orders, picketing, etc.
 - Steps taken to mitigate the delay.
- o Damaged work.
- o Accidents or other incidents.
- o Problems with employees or sub-contractors – building notice.
- o Trade talk – CBL's, suppliers going under, claims coming up.
- o If you are maintaining a more formal daily record, provide copies to the owner/consultant at the end of that day or first thing the next morning.

Photographs and Videotape

- Digital is cheap so take advantage of it. Every project supervisor should be equipped with digital camera and know how to use it. Store the images on a hard drive in folders by date initially. Backup to CD's.
- Use it everyday. Taking too many is better than not taking enough as often you won't know what is important until after it is gone. A camera sitting on the seat of the truck for most of a project is a terrible waste.
- Take even more shots of items in dispute. Different angles, different times.

- Date the photos (done automatically if digital) and record who took them. This can be done in the diary with a cross reference to file names/ranges.
- Video of operations that are unusual or not being carried out efficiently.

Meeting Minutes

- Take your own.
- Complete and accurate – if not in the minutes, probably not discussed.
- Minutes to note date, time and duration of meeting, attendees, name of person drafting the minutes and a circulation list.
- If drafting for the group, circulate them within 24 hours with a note asking for people to advise if any issue otherwise minutes will be taken as complete and accurate. Resolve any issue taken with the minutes immediately. Don't leave it until the next meeting.
- If getting them, review carefully and provide comment to the drafter/group if they are not complete or accurate – “close enough” is not close enough.
- An item stays on the agenda for every meeting until it is resolved. Note who is to do what to resolve the issue, and the timing for doing that. Note the ultimate resolution in a meeting minute.
- Meetings must reflect progress on the site (including length of delays and expected impacts even if not agreed) and documents tabled, including receipt of updated schedules and amended drawings.

Schedules

- Keep original project schedule and all amended/as-built schedules in a schedule file.
- If it is an owner supplied schedule, make sure you can meet it in every respect and advise if you cannot. Be realistic.

- If you are supplying the schedule, make sure you have confirmed with suppliers and subs their ability to meet your schedule before distributing it.
- If you get a schedule that shows you will be adversely impacted, give notice of that immediately.
- Distribute updated/amended schedules to everyone who could possibly be impacted by delays or sequencing issues, as well as owner and consultants.
- If there is slippage, make sure that is reflected in the schedule, with the cause shown.
- Highlight critical items and clearly show milestone dates of contractor, owner and all others.
- Show assumptions made in the schedule – no overtime, 2 shifts of 8 hours, no winter work, etc.
- Date each schedule and record the author.

Drawings

- Maintain transmittal records when sending out drawings, change orders, directives, etc.
- Date sent, how, by whom, date received, acknowledgement of receipt received.
- If getting drawings, record on the drawings the date received.
- Keep them organized.
- Compare drawings with last set to ensure all changes are noted and advise sender of any errors.
 - Don't proceed with the changes on a drawing unless they have been approved by the appropriate consultant.

- o In writing, immediately advise of impact of changes.
- Don't throw out your old versions.
 - o If dealing with electronic drawings, don't delete the old files or save over them.

Change Orders

- Keep them in a separate file (a tabbed three ring binder works well) along with the correspondence relating to each.
- Keep your numbering system in sync with the consultant if you can – 1=1 not 1=A, for example.
- Refer to the specifics of the change order/extra claim process in the contract and follow it.
- Get impacts from those below you and advise consultant/owner.
- Verbal change orders.
 - o Immediately confirm those back, in writing.
 - o Identify dispute over whether a change or not and if you cannot resolve that, decide whether you are going to do the work under protest and confirm that in writing.

Claims and other Notices

- Not all notices have to relate to actual claims. The reason to give a notice is that the conditions existing at the time create the potential for a claim. Giving notice allows the parties to take steps to either fix the problem or minimize its impact. • Know the notice requirements in your contract and follow them to the letter. The time frames provided in the contract are maximums – try to be more prompt if possible.

- Don't assume that you know the notice requirements in a particular document, especially the standard form contracts, just because you have worked with it before.
- Different notices may have different time frames. For example, in CCDC 2 a claim relating to unforeseen or concealed conditions must be made within 5 working days of first observance (GC 6.4) whereas a delay notice must be given within 10 working days of the start of the delay (GC 6.5).
- Give all notices in writing and be as detailed as possible. If it is not possible to give an accurate indication of impact or size of claim, say so.
- Keep a separate file for them.
- Create a flow chart that sets out the various notice requirements and post it on the wall of the site trailer.
- Keep a copy in the claims file.
- Don't rely on a comment made during a site meeting minute, even though it may have made it into the minutes, to be your notice.
- While the Judge can disregard the contract notice provisions by finding that the parties agreed to waive the notice requirements by their conduct, don't assume she will.

Project Correspondence Files

- Keep them well organized in chronological order with a separate file for each trade and supplier. Do not have loose papers stuffed into the folders – they will get lost.
- Do not ignore letters, reports, memos, etc., no matter how ridiculous. Promptly respond to them, in writing, if they invite a response, are inaccurate or are accusatory.
 - If If you do not respond, you will probably be taken to have agreed with their contents. This could be devastating.

- o If the letter is inflammatory or emotionally charged, respond with a fair, even-tempered letter. Don't get personal. Remember, these documents may be read by a judge some day, who will be deciding either for or against you.
- Keep fax transmission and all other transmittal records.
 - o A separate transmittal file works well.
 - o Don't send documents with a fax cover sheet that simply reads: "See attached." Instead, it should read: "Attached is a copy of Drawing 9904-A1, Revision 7, dated October 6, 2003. Please review immediately and advise by noon tomorrow if you have any questions or concerns."
- E-Mails.
 - o Are producible – How is it going to feel having your email read by the other party during the litigation process?
 - o "Delete" does not necessarily delete.
 - o Metadata creates a trail that may surprise you.
- Other electronic documents – your underlying electronic files will be producible in litigation. Therefore, don't create a document dated June 1, 2002 on January 2, 2003 and tell the other side you sent it to them 6 months ago.
- Keep your telephone bills – you may need to prove you made a phone call on a particular day to a particular number.

Inspection Reports

- Keep in a separate file.
- Review immediately upon receipt and respond, in writing, if you disagree.

Cost Accounting Records

- Keep them accurate and keep them current.
- Accurately code entries and use the same cost codes throughout job.
- The contract may require you to maintain certain cost accounting records and make them available to the consultant or owner (e.g. GC 6.3.4 of CCDC 2).

Equipment Records

- On some projects it will be important to maintain detailed equipment records being used.
- Include: used by whom, when, where, how long, doing what, and sometimes the operator.
- Downtime - Reasons for and duration.
- Major equipment moves.
 - o Distance and time taken, as well as method used.
 - o At whose direction was move made.
 - o Problems encountered.
 - o Effect on schedule/productivity, not only of the contractor moving the equipment but also on yours and that of other trades.

The Underlying Estimate File

- Critical in delay claims.
- Keep all prices received, written or verbal, even from those bidders whose price you did not carry.

- Intended method of carrying out the work and sequencing.
- Contingency factors – what went into a lump sum contingency factors.
- Representations or promises made by the other party, and assumptions made by you as a result.

The Electronic Age

- Some larger contractors, and smaller ones on larger projects, log the incoming and outgoing correspondence. Each document sent or received is assigned a sequential identifying number. For example, OWN1234 or CONTR4536.
 - Ideally the major players (owner, general contractor and consultant) will get together at the start of the project and agree on a numbering protocol. Each item of correspondence will bear the identifying number assigned to it by the author.
- A record is kept of each logged item, showing such things as the document ID number, date of the document, author, topic, etc.
 - Keeping those logs electronically, on a Microsoft Excel spreadsheet, for example, allows for easy searching and sorting of correspondence.
- Follow up letters and responses refer to the log file number.
- The idea behind it is to make it easier to track and locate particular documents from the 10's or 100's generated on a project each day.
- Consider scanning the documents and saving as PDF files.
 - Most new digital photocopiers have scanners built in.
 - The scanner must have a good automatic document feeder.

- o The actual paper document is filed in the normal course.
- A hyperlink can then be added to the Excel spreadsheet record so that when you have the spreadsheet on your computer screen, double clicking the hyperlink will automatically call up the image of the document on your screen.
- This makes reviewing the correspondence significantly easier. No longer do you thumb through various correspondence files looking for a particular document. No more lost yellow stickies.
- It sounds a lot more complicated than it is.
- PDF images of the documents can be emailed around for easy, and virtually free, distribution to others within and outside your organization.
- Can be loaded on a notebook so that those at the job site will have the same complete files as head office.

CONCLUSION

Like all things, if it is worth doing in the first place, it is worth doing right. Keeping project records is not sexy, or fun, or exciting. It is detailed work that requires a proper allocation of resources if it is going to be done properly. But keeping complete and accurate project records will pay off in the long run. Conversely, your choice not to do it could cost you a great deal of money. Murphy's Law will strike.

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