

# Construction Newsletter

[Presented by the Law Offices of Ashley A. Baron]

## Legal News for Construction Industry

### The Anatomy of a Construction Dispute

So when exactly does a construction dispute start? Whether advising the owner/developer, the design professionals or the prime contractor, I have always believed that disputes start at the negotiation phase of the job. When the parties come together everyone has expectations, the owner may want Neuschwanstein Castle the design professional puts the dream on paper and the prime wants a new project and knows he won't get it if he explains to the owner that Neuschwanstein Castle (like the original) will bankrupt the owner long before completion and may not be functional.

Misunderstanding starts the Project down a hazardous road that can and often does end in litigation, which may be a little better than the mysterious death that King Ludwig II suffered when he ran out of money and his parliament refused to continue funding the Neuschwanstein Castle, but not much. While the beginning of any project is filled with excitement, commitment and promises, the place where the completion date is approaching and the project is not going to be completed on time, the funding is expended but the project is not near completion, the change orders begin to mount up and the finger

pointing begins is where the reality of the dispute becomes evident.

So how do the parties avoid ending up in court? Investigation is the first key to staying out of court. If the owner has built something before the design professional and the prime should be talking to the people who worked on those projects to find out if he has unrealistic expectations, cash flow problems, disputes over change orders etc. If the owner is using the design professional or prime for the first time then he should be finding out from other projects they worked on what problems came up and make sure he is not being glad handed and told what he wants to hear up front only to end up with a project that stops dead in the water when cost overruns shut the project down. This is true even on projects where the parties have worked together before. Circumstances change, new management is put in place, money is tighter and these factors can lead to Court.

The contract is the most critical item in keeping you out of litigation and/or insuring that if you end up there you have a good case. On large projects I am always amazed at how cavalier the parties are about drawing up a contract. One or both have a "standard form contract" they like to use. The owner usually presents it to the prime and the design professional and with a few minor modifications it is signed. The contract is supposed to

document the deal struck between the parties after they have negotiated all the key points. The "standard form contract" does not represent the deal struck and often is so long, verbose, contradictory and poorly written that none of the parties really knows what they agreed to until years later when they end up in a dispute and a litigation attorney asks them why they signed this if they agreed to something totally different.

Owners want their contract, design professionals like the AIA standard form and the prime wants the job and is usually optimistic that things will work out and he will get paid. All of them should take a long hard look at what they are agreeing to do, how much it should cost and when it should be completed and those terms without a ton of boilerplate from lawyers thrown in should be the crux of the  
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thrown in should be the crux of the contract. Just because a contract has 60 pages does not make it good. When a contract is long and convoluted it guarantees that when there is a dispute there will be contradictions and interpretations that will cut both ways. Clear, concisely written contracts go a long way in preventing a dispute from surfacing.

So, the project gets started and shortly thereafter, an issue or change arises. How do you handle it so that there is no dispute potential in the future? Most design professionals or prime contractors just deal with it, make the change, adjust the plans, make it work in the field and discuss it orally with the owner in their weekly meeting, if at all. But, what should be done before anything in the field is done is look at what the contract says about handling the issue. Does it require notice in writing of the issue or change and a response by the owner? Will there be a delay if the procedures are followed? Who will be held responsible for the cost of the fix or change? Parties should stop and find out what the contract provides and follow its provisions unless there is a significant risk of danger to people or the project.

Once the proper procedure is complied with it should be documented in an e-mail or some other form of written communication confirming how it was handled and what ramifications result (i.e. additional cost, lost time, changes in other parts of the work necessitated by the adjustment). All too often because the proper procedure under the contract is not followed the parties do not have a clear understanding of what took place and do not know what the ramifications are or who is going to pay for the issue or change. When there is confusion there is a potential lawsuit in the works. Failing to follow the contract provisions also evidences abandonment of the contract which can potentially be bad for any of the parties thereto.

It is important when looking at the contract to get a clear interpretation of what should be done. All too often a party will take the most favorable provision of the contract and try to strain a twisted interpretation out of it for their own benefit. If the contract is clearly written and not a jumble of inconsistent provisions there should be a clear cut plan for handling issues or changes. Do not try to avoid responsibility or try to lay the blame elsewhere when the contract is clear, it will not play well before a judge or other trier of fact. If the contract is unclear, negotiate a fair settlement of the issue at the time it arises and do not avoid it and leave it for discussion at the end of the project when memories fade and other problems may have arisen.

When you document what needs to be done or confirm what will be done, be clear and concise. Do not admit that you or someone that works for your company did something wrong. Do not include personal opinions, state facts and write as if everything you say therein will later be needed to prove to a trier of fact that you did the correct thing under the contract. However tempting it might be to include digs or derogatory statements, refrain from doing so. They do not help and can later hurt you.

You must also watch how you document these issues or changes internally. Your employees in their daily logs or meeting minutes should act as though everything contained in those documents will later be used against your company. It does no help you if your superintendent's writing is so poor that no one can read it but the superintendent. The inside joke contained in an internal document may lead to a large problem during any potential litigation or settlement efforts. What was intended as a joke can backfire and later cause another party to spend any sum not to have to pay your company because of the ridicule.

Likewise, all meetings between the parties or walk throughs where anything of substance is discussed and/or decided upon should be documented in a chronological log. Many times parties recall conversations two or three years after the fact quite differently. When a log is kept it keeps the facts straight and also lends credibility to the recollection of the party that has kept the log of what was said and decided upon. Any decision of major importance should be documented and forwarded to the other parties as confirmation of that decision.

Contrarily, if you receive e-mails or other correspondence that are not accurate from one of the other parties you should immediately respond in writing correcting the misunderstanding. While it is so easy to pick up a telephone and discuss the misunderstanding it is not wise to do so because the telephone conversation unless confirmed in writing will not be proof later on as to the correction of the error.

You should also keep hard copies of all the e-mails of any significance because as we all know e-mails get lost or deleted, computers go down and servers crash. One responsible managing individual from each entity should be the designated person to receive and send written communications to the other parties. Above all, if an issue appears to arise that can not be resolved legal counsel should be consulted immediately for advice on how to proceed. We now have both Orange County and Park City Offices. Ashley Baron, a U.S.C. undergraduate and law school graduate, has been a lawyer for the past 29 years. Ms Baron has tried over 100 cases. For further information contact us at (714) 974- 1400 or e-mail us at [ashleybaronesq@yahoo.com](mailto:ashleybaronesq@yahoo.com). You can now also go to our web site [www.ashleybaron.com](http://www.ashleybaron.com) to read more about our firm or view our most recent newsletters.