

Circling the Wagons: Practical Steps for Scheduling Professionals to Consider When Schedule Risk Grows into Litigation Risk

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What are we going to cover?

- **Planning:** Litigation, like construction, requires advanced planning
- **No Attorney No Privilege:** everything you say, email or text, will be used against you
- **Attitude Adjustment:** You are no longer part of a team with a shared goal
- **Death by E-Mail:** Get control of your communications or you will pay the price
- **Build a Record:** You must build a favorable paper trail, preserve evidence and avoid devastating admissions
- **Skeletons in Your Closet:** Understand the mistakes that have already been made and evaluate how they will impact claims and defenses
- **Contract Provisions:** Mandatory notice requirements and waiver provisions may be traps waiting to spring on you

You Need to Plan...Not Pretend

This is not your first rodeo – you can see that this project is going to end badly

Your entire career is dedicated to planning ahead

- Do not turn you brain off now
- Do not assume the lawyers will work this out later
- Do not pretend that this is not your problem
- Do not let this troubled project become a claim disaster which will haunt your years to come
- Get to work and get out ahead of this...



No Attorney No Privilege

- Delay and impact claims are driven by information and documentation
- Until you have an attorney involved you have virtually no ability to protect either
- Just assume every word you type and every document you create is being posted on social media for the world (and the company that is going to sue you) to see

No Attorney No Privilege

- Attorney's are terrible people who want to charge you excessive and unjustified fees...right???
- The whole basis of this presentation is that there are things you can do even before an attorney gets involved.
- **HOWEVER**, the earlier you involve counsel the better, and the protection of the privilege is only one of many benefits.



Attitude Adjustment

- We are not in Kansas anymore
- The cooperative, team driven, “win-win” approach to construction that has served you well over the years needs to be set aside
- The owner or contractor you will be litigating against may have already adopted a new attitude even if you do not know it yet



Attitude Adjustment

- The goal of finishing the project as quickly and efficiently as possible is no longer your only (or perhaps even the most important) goal
- You have already acknowledged that your project is in trouble and the fallout is going to be costly, perhaps millions of dollars or more
- Start thinking strategically and embrace the tools you will need to protect your company



Death by E-Mail

It is essential that you take control of all lines of communication

- E-Mail is often the primary means of documented communication
- You must, must, must take control of e-mail communication
- External **and internal**
- Admissions, infighting and unprofessional communication utterly destroy your potential claims and defenses

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Deadly Internal E-Mails

The private admission: It's good to admit when you are wrong, but not in an e-mail.

“We really caused a mess for ourselves on this one Jim. We were way off on the estimate and have been digging out of a hole from day one.”

Jumping the gun on the project port-mortem: Save the soul searching for later.

“Our team has identified a number of areas where we failed to either properly plan our work or to execute effectively. Attached is summary of our findings.”

Deadly Internal E-Mails

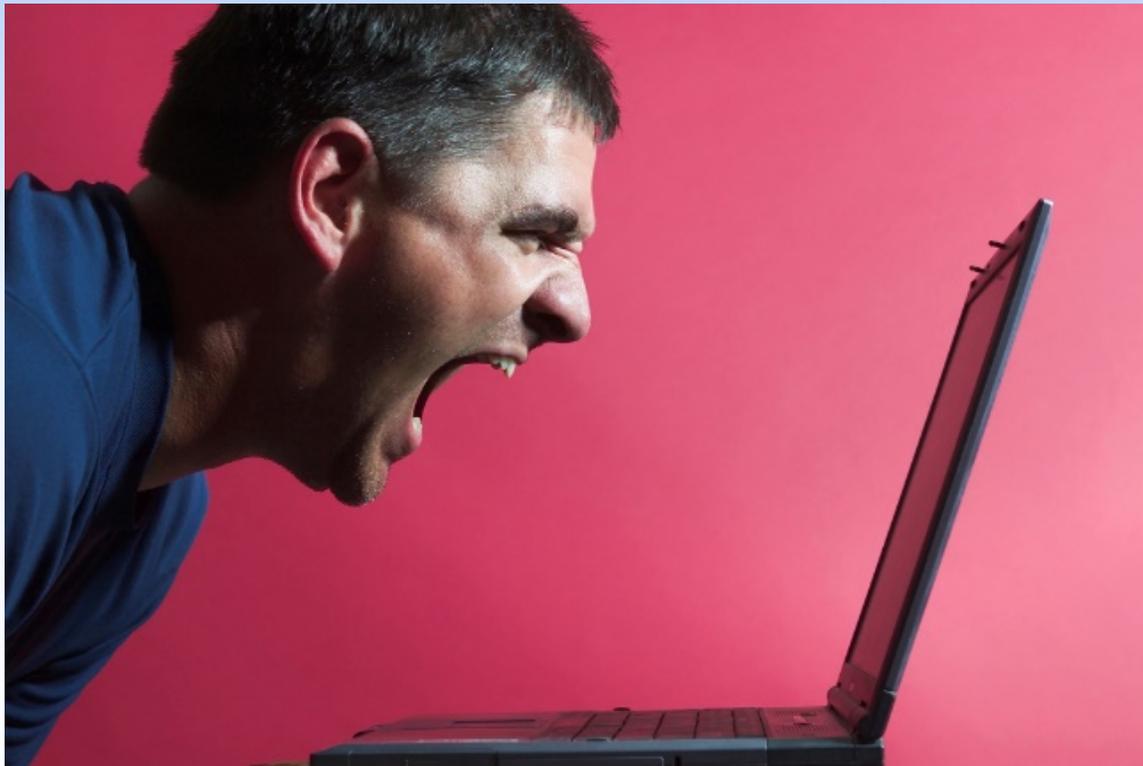
Pointing the finger of blame: Someone on our team is at fault, but it's not me.

“Don't look at the bid team for this one Bob. If your pipefitters had kept a reasonable pace we wouldn't be in this mess.”

The angry rant: The vicious cousin of finger pointing that makes everyone look bad.

“Phil couldn't run \$% @+ resurfacing crew if his life depended on it. What idiot put him on a big project like this. He !&%\$ every job he touches.”

Don't Be This Guy



Claim Killing External E-Mails

Taking blame to keep the peace: If we own up to our faults, they will too...right?

“We know that we were part of the problem on the cooling tower and we just didn’t have the crew we needed on the duct work, but we are committed to making this right.”

Spilling your guts: If you need to beg for help, pick up the phone

“Hey Frank, we really screwed up on the ordering for his boiler project. Can you try to rush the remaining panels? We need to try to get this thing back on track.”

Claim Killing External E-Mails

The flamethrower: An unprofessional and explosive attack that makes you look nuts.

*“I have had enough of your \$!#% supervisor changing the schedule at the last second and then trying to blame my team. If your PM wasn't such a *&%! we...”*

Failing to respond to a misstatement:

You didn't object so it must be true...

Lock Down All Communications

E-Mail is just the beginning...all lines of communication must be controlled

- Get your management team up to speed and on board with the plan
- This is not optional or intermittent
- Establish who will be your points of contact
- Put the other side on notice of who can speak for the company
- Correct the other side immediately every time they deviate
- Correct you own team immediately every time they deviate
- Do not let misinformation or ambiguity linger

Preserving Evidence

You want to do this

You are legally obligated to do this



Preserving Evidence

- Failing to preserve records can lead to a legal presumption that the information contained in those records would be adverse to your position
- This may depend upon what duties you had to preserve records and/or your knowledge of a likely claim (and the state law that applies)
- Someday, a jury may be getting this instruction from the court on “spoliation of evidence”



Preserving Evidence

A typical spoliation instruction in Florida:

“If you find that ABC Construction lost, destroyed, mutilated, altered, concealed or otherwise caused certain project documents to be unavailable, while they were within its possession, custody, or control; and those documents would have been material in deciding the disputed issues in this case; then you may, but are not required to, infer that this evidence would have been unfavorable to ABC Construction. You may consider this, together with the other evidence, in determining the issues of the case.”

Preserving Evidence

- Recent opinions of the Florida Supreme Court have followed the lead of Federal Courts and have held that a duty to preserve can be triggered merely by the fact that a party “reasonably anticipates litigation”

League of Women Voters of Fla. v. Detzner, 172 So.3d 363 (Fla. 2015)

- There is no requirement that you have contractual duty to preserve documents or have been put on formal notice that a party intends to file a law suit

Preserving Evidence - Paper

- On site project files
- Home office project files
- Bid documents and plans
- Journals kept by your supervisors and foreman
- Handwritten notes and revisions on printed documents
- Time Sheets and Sign-in Sheets
- Printed planners and calendars
- Printed Photographs
- Printed schedules and release logs
- Paper invoices and receipts



Preserving Evidence – Digital

- E-mail (company and private)
- Computer files (servers and local hard laptops/drives)
- Digital bid packages
- Drop Box and other file sharing sources
- Texts
- Digital photographs
- BIMs and other computer models
- Cost and schedule tracking programs and data files
- Schedules, revised schedules and as built schedules
- Social media posts and updates



Preserving Evidence

Litigation Holds and Record Retention Policies

- One of the first things attorneys do is instruct clients to put a “litigation hold” on all potentially relevant documents and files
- You do not have to wait for your attorney
- Your company may have records retention policies which will result in the automatic destruction of critical evidence
- Remember that “spoliation of evidence” jury instruction ...

Building A Record

Memories fade

Witnesses fall apart on the stand

Juries think company witnesses are liars

**DO NOT RELY ON EMPLOYEES RECOUNTING
CONVERSATIONS WHERE CRITICAL INFORMATION
WAS PROVIDED OR DECISIONS MADE**

**EVERYTHING (that is good for your side) MUST BE
CONFIRMED IN WRITING!!!**



DANGER



DANGER

Building A Record

- Document what happened...but so much more
- Causation and Cost are always the key issues in delay and impact claims
- Remember your new attitude and your new goals
- Take your documentation to the next level

Building A Record

WHAT happened

WHY did it happen

WHO provided instructions or made decisions

WHERE on the project did it occur

HOW will this financially impact your company

WHEN did you first warn/predict that this would happen



Building A Record

To: Jim

From: Veronica

Re: Delay in Phase 4 Duct Installation

Veronica,

Bill's crew was unable to complete the Phase 4 duct installation today. This is a main duct coming off of the north side of the cooling tower. The coating sub had not completed its work on the nearby pipe and we could not access the area. See the attached picture. I advised last week that the coatings crew appeared to be behind schedule and this was going to be a problem. I was assured by you then and as late as yesterday afternoon that the area would be clear. Our crew of 4 lost roughly 90 minutes while they were reassigned. If these issues continue we will be unable to build out the Phase 4 duct in one pass as planned and bid.

Building A Record

Immediately document live conversations and events with e-mails

“As we just discussed outside the trailer ...”

“Please keep in mind what Bob just said at the team meeting...”

“As you requested this morning, here are the”

“We will proceed as instructed, but as I stated, I see an issue with...”

“Please note that we had 24 extra man hours last night because...”

“As I predicted, our team was unable to complete the”

Skeletons in the Closet

- Remember that crew shortage in August which set your schedule back three weeks?
- Do you recall Barry sending one of those flame thrower emails we discussed?
- Perhaps your failure to order sufficient materials before the project started caused some delays out of the gate?
- How about that scope of work bid mistake...



Skeletons in the Closet

- As much as you would like to simply “clean out your closet” it does not work like that.
- Identify skeletons with actual schedule and cost impacts
- Understand how those skeletons might interact with larger issues driving your claims or defenses
- Pretending your team was perfect is not helping the situation

Skeletons in the Closet

- Do not underestimate the skeletons that make your team look bad even if they had no “real” impacts
- Judges, jurors and arbitrators are just people. Remember...no one likes or trusts this guy ...



- If your servers are littered with “flamethrower” emails you have a skeleton

Contract Provisions

We are now sailing dangerously close to the rocky shoals of “The Law”

- Many construction professionals have a working knowledge of contract provisions and what they typically require of their company
- This is not a typical project...this is a slow motion train wreck
- If your thinking about how contract provisions may impact your potential claims and defenses you probably need a lawyer

That being said, here are just a few examples of provisions that may come into play...

Contract Provisions

Notice Requirements

- Many contracts contain provisions requiring parties to put each other on notice of delays, impacts and claims within a short period of time
- Failure to provide the required notice, within the required timeframe and in the right form may result in the loss of a claim or defense

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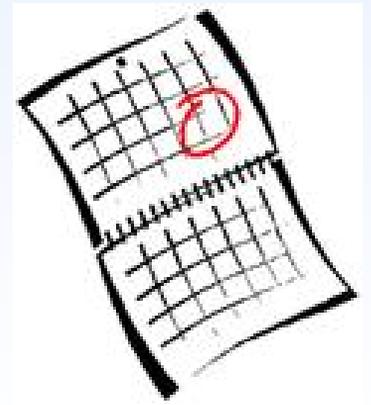
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Contract Provisions

Waivers

- Accepting payment for certain work may constitute a waiver of your right to later assert a claim related to that work
- In certain instances expressly notifying the other party of the claim or reserving your rights to bring a claim may be enough to avoid a waiver
- Contracts and state law vary
- Do not fall prey to the waiver trap



Contract Provisions

Change Order Procedures and other “Technicalities”

- Your contract may spell out precisely how change orders are to be submitted (as well as other procedures)
- Early on, no one may have cared whether procedures were precisely followed
- Those days are over
- You need to know how it is really supposed to be done



Contract Provisions

Uh...we may have made a few mistakes

- Your past sins may be forgiven through waiver or “course of dealing”
- But they may not
- Time to call a lawyer



Conclusion

While you are alone in the wilderness and without the guidance of counsel – circle the wagons because the attorneys are coming!!!



Conclusion

- Adjust your attitude and understand your new project “goals”
- Assume every communication will be handed over to the other side
- Lock down email and all other lines of communication
- Preserve all forms of evidence
- Build a record and create a paper trail to substantiate your claims
- Identify your skeletons and understand how they will impact your claims and defenses
- Beware of notice clauses and potential waivers and other traps

Questions from the Audience?

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