WREN
WESTERN REAL ESTATE NEWS
APRIL #2-1999
VOL. 358-8

Contact: Jeffrey Weinstein, AIA
1875 Century Park East, Suite 920
Los Angeles, California 90067
(310) 203-2220

Common Sense Strategies for Avoiding Construction Litigation

A Construction Manager Who Doubles as an Expert Witness in Litigation Gives an Insider's View on How to Avoid the Courtroom

by Jeffrey Weinstein, AIA

In our current climate of economic prosperity and rising real estate values, the prevalence and usefulness of construction litigation may be on the wane. Much of the litigation and expert opinion in recent years has resulted in unrealistic repair schemes for the sole purpose of producing a settlement among parties to the litigation. When a plaintiff expert recommends a "remove and replace in its entirety"[1] scenario (for example, arguing that all exterior stucco must be demolished and reinstalled due to a lack of expansion joints), the defense expert frequently advocates a more modest "fix what's broken" scheme to provide a minimum repair at the lowest cost. This process consumes considerable time and resources, and creates a difficult environment in which to craft a settlement. More often than not, neither party is pleased with the outcome; unreasonable plaintiff positions often result in settlement amounts ranging between 15 to 25 percent of the claim amount.

Sophisticated owners, developers, contractors, architects and others realize that these disputes can be avoided – or minimized – by employing several key strategies in the early stages of a project. These strategies involve equal parts of technical expertise and management/ communication skills. While technical expertise is certainly important in the construction industry, if organizational sense and communication skills are lacking, the potential for misunderstandings, disputes and subsequent litigation is increased. Here then, in two parts—the management process and construction process—are tips for avoiding construction litigation.

The Management Process

1. The key players on a construction project may include the owner, architect, engineer, contractor, construction manager, inspector, and primary vendors. It's important to view these players as your partners, and to make an effort to understand their respective positions during the contract negotiation phase. The American Institute of Architects (AIA) has defined "partnering" to describe this concept succinctly:

"The idea of partnering is a simple one. The parties agree to do two things: (1) Jointly confront and manage the risks involved in creating a project and (2) establish and promote a nurturing partnership environment... It is intended to open up communication, to establish a shared project culture (without regard to organizational boundaries), and to set the stage for problem-solving rather than litigation."

2. Remaining flexible and accessible allows the partners to view changes as opportunities for mutual benefit. Changes are inevitable in construction, whether they're design changes initiated by the owner or field changes due to unforeseen condition. In a flexible environment where communication is a top priority, dealing with unexpected change can be a group effort, thereby minimizing finger-pointing and blame. Trust is key to open communication.

3. Prioritize goals to specifically meet the project schedule and budget. Define your mission, gather information and learn as much as possible about a given subject before proceeding. Example: rather than accept prior reports on asbestos content of exterior stucco, have the stucco tested by an independent testing laboratory unassociated with abatement contractors.

4. Hire a construction manager (CM) to better articulate the owner's goals and to facilitate the contractor's work. A CM who's been involved in construction litigation as an expert witness understands the issues, and knows what to look for during design and construction to avoid legal action later. The CM represents the owner, and should possess the ability to inter-relate the multiple contracts and interests of the various parties (partners).

5. Make trust and communication your most important asset when building relationships and establishing the project team. The bidding period provides an excellent opportunity to do this by testing the project drawings and specifications as well as each partners' knowledge and willingness to work together. Lack of teamwork results in an incomplete scope of work, poor coordination of contract documents and change orders that could have been avoided earlier in the development process. Example: by anticipating the potential need for additional work and incorporating appropriate unit costs, the construction agreement can reduce the delay and impact of negotiating change orders.

The Construction Process

Following is a list of defects most commonly cited in construction litigation cases. By monitoring construction of these building components and communicating effectively with partners, these issues can be properly resolved during the construction process:

1. Shear wall nailing. Typical defects with shear walls include using box nails instead of common nails, driving nails too close to the edge of the plywood panel, spacing nails too far apart, and allowing the nail heads to fracture the surface of the plywood.

2. Fire-stop construction. Firestopping and draftstopping, in the form of blocking and/or other approved firestopping materials (including mineral wool and glass fiber insulation) is required between floors, at concealed spaces such as soffits, and at 10-foot intervals along the length of walls between living units. Openings around pipes, ducts, chimneys, etc. between floors should be firestopped with non-combustible materials. Walls having parallel or staggered studs for sound transmission control shall have fire stops of mineral wool or other approved non-rigid material.

3. Inspect weather-resistive barrier or "weather envelope" to ensure that the individual components have been adequately lapped ("weatherboard fashion") and integrated with the flashings around windows, doors, and all exterior openings.

4. Inspect stucco to ensure that the installation meets the 7/8" code-required thickness, correct jointing and weep screeds, and proper finish appearance.

5. Inspect below-grade waterproofing to ensure that the materials installed on subsurface walls and the system designed to carry water away from the substructure has been installed and is functioning properly.

6. Inspect roof repairs, sheet metal flashings, skylights and clerestories for proper installation and water tightness.

7. Monitor levelness of floors (identifying conditions of excessive slope or deflection) and interior quality standards (fit and finish).

8. Acoustical considerations involving party wall construction, lightweight concrete elevated slabs, and drywall ceilings mounted on resilient channels all improve sound privacy between neighbors. The size/ span of floor joists also impacts sound transmission.

Success in construction always depends on cooperation, and cooperation can best be achieved when the participants trust each other and are free to communicate as needed. If the partners are proactive and view challenges as opportunities for advancing or achieving the project goals, they can resolve conflict in a collaborative environment. Because construction involves constant change, a goal-oriented team approach relying on careful planning, technical coordination, human resources and monetary incentive provides the surest way to successfully complete a construction project and avoid the courtroom. ●

Jeffrey Weinstein, AIA, is a Los Angeles-based construction manager and architect who provides expert witness and construction claim consulting services for CCL Pacific Corp in Century City, California.

[1] *M. Callahan and L. Connell, Jr., Construction Defect Claims and Litigation (1995)*