



Commercial Construction Litigation: Understanding How to Parlay Technological Advances Into Efficient Dispute Resolution

It's no secret that commercial construction traditionally has been subject to the landmine of potential litigation. Payment disputes, delays, defaults, defects, safety issues, injury claims and other issues have kept owners and contractors awake at night for many years.

The cost of litigating these disputes has always been a significant concern, in part because commercial construction projects naturally generate an overwhelming amount of documentation. The evaluation of such documentation routinely increases legal expense, given the time and effort necessary to identify every factually important detail. We're all too familiar with the sight of mountains of legal documents detailing every nuance of a construction project at depositions, hearings and trials.

However, the explosion of technological advances in the past few years makes it clear that we will soon be "the paperless generation." The construction industry has benefited significantly from these advances—perhaps more than any other industry. Smartphones, iPads, hosting sites, drones and Building Information Modeling (BIM) are just some of the tools that now are used to coordinate complex construction information and ensure proper documentary tracking of important construction issues.

BIM is a prime example of the most useful technological advances. As we know, BIM converts two-dimensional plan sheets into three-dimensional models and then integrates those model sheets in a manner that allows the viewer to see how various construction disciplines, such as structural, mechanical, electrical, plumbing and architectural, interact with one another. Proposed design changes can be quickly incorporated into the model to see if they work and to determine the potential schedule and cost impact (commonly known as BIM 4D and 5D, respectively).

Such technological advances should help cure litigation cost woes, shouldn't they, by allowing less room for error or design/field miscommunications? Not necessarily. The opportunity for litigation still abounds. According to a recent ALM Marketing Services survey, today's commercial construction professional is still worried about the same types of disputes that have been a concern for many years, including payment claims, schedule delay impacts, subcontractor defaults, defective construction and construction site injuries.

Nevertheless, doesn't the paperless generation at least promise the opportunity to investigate project disputes more efficiently than in years past? Indeed it does. Instead of manually flipping through dozens of binders to collect important data, we can now conveniently access flash drives and virtual depositories (Dropbox). We can use scanning technology, optical character recognition and a variety of software programs and applications—all with a few keystrokes. This is the promise of the paperless generation: virtual instant access to necessary information.

However, the paperless generation promises something else as well: the ability to instantly record any important information at any time. Whereas project superintendents only used to document field observations and changes through a manual Daily Report, now they can record some of that information much more easily through a text message, a short email or a pdf attachment.

As a result, even though we now have an increased ability to access data, we also have an

increased ability to generate data. For example, imagine a picture puzzle with 50 fairly well-defined pieces. Now imagine the same picture puzzle with 500 highly detailed pieces. The picture may be the same, but the way you put it together is not.

Therefore, within the litigation context, today's commercial construction professional needs to engage firms that can properly piece together the construction puzzle: firms that are technically experienced and technologically savvy; firms that can ensure streamlined, efficient and focused document investigation; firms that implement upfront safeguards and contingency plans in order to minimize litigation costs. In short, today's construction professional needs firms that can fully take advantage of the paperless generation, without falling prey to its potential cost potholes.

Progressive firms, particularly those formed since the 1990s, understand the paperless generation. They operate without physical libraries in favor of virtual online libraries. They spend time at construction sites or other remote locations to collect data as efficiently as possible with notebooks, tablets and smartphones. They understand how to access an ever-increasing amount of generated data.

Law firms that properly leverage technology and related tools are positioned to more efficiently resolve disputes by achieving greater speed and accuracy in organizing facts. The result is streamlined litigation at a manageable cost.

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