



You may have a great case but you have to prove it - by Andrew Richards and Erik Ortmann

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Andrew Richards

Erik Ortmann

Parties in litigation often believe that they should win their case simply because they are right. However, being right is not as important as what you can prove. Many times a court will not hear the merits of a case for several years after the dispute arises. For that reason, it is important for litigants to make a “paper trail” of evidence to support claims when disputes arise.

During trial, either the judge or jury must determine the credibility of witnesses and, as the trier of

fact, they are free to give oral testimony as little or as much weight as they determine appropriate. Often years have passed between a dispute arising and witnesses' trial testimony. As a result, a witness may not remember the facts as well as they did when the dispute arose. To best present a case, and combat or augment testimony, there is no evidentiary substitute for contemporaneous records kept in the ordinary course of business when the dispute first arose. For these reasons, a well paper-trailed case is frequently the primary reason why a litigant wins their case.

The foregoing certainly rings true in construction litigation. A typical construction litigation may involve claims for contract balances, extra work, delay, back charges for unperformed/improper work, mechanic's liens, and bond claims. These types of claims are fact intensive and usually require significant testimony. For this reason, we constantly remind our clients to record the site and the progress and quality of work through photos or video before a dispute arises and prior to a contractor leaving a project. It is equally important to follow contract notice and claim documentation requirements and to provide requisite emails, letters and other documents/information supporting the party's position and basis for claims and defenses. This type of documentary evidence is crucial for example when there is a termination of a contract. Such cases often require details regarding, among other things, compliance with the contract, facts of the default, and the timeliness, quality, and percentage of work complete. A party needs to show why the termination was either proper or wrongful. It would be difficult for a witness at a trial years after the termination to clearly and convincingly support claims or defenses related to default and damages without a visual and documented record made at the time the events occurred. Contemporaneous, supporting videos/photographs, written notices (letters and emails) used at trial and admitted into evidence are effective in defeating unsupported oral testimony from the other side and supporting your side's testimony. Such records are often viewed as most reliable by the trier of fact, particularly since they were generated at the time the events were unfolding.

Often a client's case rests on the testimony of a non-party. For example, when a general contractor and subcontractor find themselves in a dispute a representative of the owner on the project may testify. That owner's representative has no "dog in the fight" necessarily and the trier of fact will give that witness's testimony great weight. However, the trial attorney must be ready for the likelihood that the witness may not recall certain facts several years after the dispute arose. In that case it is important to use documentary evidence to refresh that witness's recollection or even be admitted as a business record itself. In addition to lacking recollection of past events, some witnesses may not be available to testify. Having documentary evidence prepared by that witness in the past might salvage what that witness would have testified to, provided that the documentary evidence can be admitted as a business record at trial.

Overall, documentary evidence is crucial at trial to detail events/circumstances and support a party's position in disputes that often occur several years before the trial begins. Judges and juries almost always give contemporaneous documentary evidence greater weight than uncorroborated oral testimony at trial. The best way for a litigant to prepare for trial is to create a paper trail - noticing, recording, and documenting the facts/damages and supporting the litigant's position in real time well before the dispute goes to a lawsuit and trial. If the litigant waits until the lawsuit starts to make a record and gather evidence, that litigant will be at a disadvantage in the case and at trial.

Erik Ortmann is partner, vice-chair of construction practice, and Andrew Richards is a co-managing partner – Long Island office, chairman of construction practice group at Kaufman Dolowich & Voluck, LLP, Woodbury, N.Y.

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