EFFECTIVE DISCOVERY IN CONSTRUCTION ACCIDENT LITIGATION

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I. PRELIMINARY NOTE

To effectively represent a party in construction litigation, one must be familiar with and understand the construction process. Because construction litigation often involves multiple parties with several theories and numerous defenses, the cases are complex and extremely time consuming. Successfully litigating a construction case requires, at a minimum, knowledge of the roles and relationships that exist among the parties at a construction project. A strategy needs to be defined early and quickly in order to best direct your efforts to secure the necessary documents that are needed to develop your case. Without a well defined and organized discovery approach in construction cases, invaluable evidence will never be uncovered or, alternatively, you will be overwhelmed with an endless amount of meaningless documents.

Tailoring your document inquiry to evidence you will need to establish a tortfeasor's culpability will enable you to efficiently handle your case. The focus in construction litigation is not necessarily the quantity of documents obtained during discovery, but the quality in terms of the value they add in developing your case. There will be at least four occasions when you will need to sit down to review, digest and analyze the materials obtained. Initially, it is when the documents are first obtained during discovery. The second time will be when you are preparing for the deposition(s) of the individual(s) named in those documents or who have prepared them. The third opportunity will be when you decide what documents and information you will need to send to your liability expert for his review in preparation for his report. The last time will be when you begin your trial preparation. Knowing what you need will, therefore, cut down measurably on unproductive time spent on your case. A systematic organized approach with

discovery will control litigation expenses for your client. There is no substitute for hard work. It is you, the person responsible for handling the file, that must take the time to read the documents in order to understand how they can best be used in your case.

II. CONSTRUCTION PLAYERS AND THEIR ROLES

Depending on the complexity and magnitude of a construction project, there are a number of fairly classical organizational inner-relationships. While the number of players will vary, the core group generally consists of the property owner, architect or design engineer and a prime contractor.

A. Owner/Developer

This is the entity for the genesis of construction projects. Courts generally refer to owners by two categories: (1) an in-possession owner or (2) an out-of-possession owner. In the latter, a developer may retain an architect to prepare the necessary plans to develop or build a structure for the property. With an owner-in-possession, there usually will be a project leader or manager assigned by the owner to the project. This position is responsible for acting and dealing with both the architect/engineer and prime contractor. Other responsibilities may include preparing or reviewing any owner specifications as well as reviewing and/or approving drawings prepared by the architect/designer. Project leaders are also expected to attend progress meetings held for the particular project.

In some situations in which there are multiple projects occurring simultaneously, an owner may have its own construction division which will consist of personnel from various departments of its organization. For example, in a facilities upgrade or expansion project, it is not uncommon for the owner to have its own employee engineers work with the architect/engineer and prime contractor to achieve the owner's goals for the project. These

individuals can also function as owner on-site representatives who will have daily contact with the prime contractor and architect/engineer in such critical matters as utility shut downs. On-site owner representatives usually report to the owner project leader.

Occasionally, an owner will have its own safety personnel at the construction project to enforce any safety guidelines that may have been issued by the owner for the prime contractor and subcontractors. Owners expect all contractors to comply with OSHA regulations as they have an ongoing concern that any work performed might endanger its own employees, staff, visitors and other personnel who may be on the property for furtherance of the owners' business.

B. Architects and Design Engineers

These design professionals are retained directly by the owner to prepare the necessary drawings and specifications for the project. They are essentially charged with the responsibility of preparing all the technical information that is necessary to prepare a bid package for contractors invited to bid for the project. This generally will involve preparing a project manual that will contain all the necessary structural, mechanical, electrical and other engineering studies necessary for the preparation of all shop drawings, details and specifications required for the project.

Once the construction commences, design professionals will continue to work closely with both the owner and prime contractor on reviewing and approving the endless field changes that occur after the start of the construction process.

A design professional may also take the responsibility of preparing minutes for regularly scheduled construction meetings with itself, the owner and prime contractor.

C. Prime Contractor

Often referred to as the "general contractor", this entity is responsible for implementing and executing the actual construction work for the project.

Mistakenly, the prime contractor is often referred to as both a construction manager and general contractor. The critical distinction between these entities is that a construction manager (CM) usually does not perform the construction work. It is retained to act on the owner's behalf to manage and administer construction for the project by coordinating work to be done and keeping the project within budget. A CM does not contract with or hire the subcontractors. The general contractor (GC) will have its own general labor force performing work at the construction project. The GC is also responsible for hiring and subcontracting work to various building trades that are necessary to complete the construction project. It serves as a supervisory role on a construction project with emphasis on coordinating and scheduling the various phases of the construction project and scheduling the delivery of materials necessary for the project.

Historically, single general contractors generally completed large construction projects. A project manager controlled the entire construction process from the development of the bid or work packages through the execution of the work by directly hiring subcontracted building trades. As projects became more complex, owners began employing construction managers to coordinate and oversee the work being performed by several general contractors especially on simultaneous projects. A CM is expected to ensure that the project is built to the specifications provided by the design professional.

Both CM and GC are responsible for defining safety practices and the means and methods to be implemented in the execution of the work for which they are responsible and to ensure that the work force follows those practices. Usually, a CM and GC will have its own safety program that is designed to meet or exceed federal, state and local regulations. There are

many construction projects in which a specific site safety program is prepared for each project. This may be done as a joint effort between the owner and CM/GC.

The size and budget of a project will determine the number of personnel assigned to it. Normally, there is a project manager who has overall responsibility for the project. On some unusually large jobs, there will be general superintendents. Normally, there are superintendents who work daily with the building trades in a supervisory capacity ensuring that the work is done to project specifications. In some projects, assistant superintendents are utilized.

On projects in which the GC will have its own labor force, foreman provide the initial level of supervision. Foremen will schedule the number of laborers needed for the job. Foremen will generally review the quality of work performed by their workers.

For many larger size projects, the CM/GC will have a safety director whose primary purpose is to implement the safety program. The safety director will chair regularly scheduled safety meetings and prepare safety meeting minutes. The safety director will review reported accidents and mishaps on the job regardless of whether they are reportable injuries. Their responsibilities include performing regularly scheduled safety inspections and working with loss control companies and liability insurance carriers to correct unsafe working conditions and minimize potential accidents.

On large complex projects running simultaneously, the CM/GC may also assign a safety coordinator. The safety coordinator will be a liaison with the owners' representatives and his or her own safety director to ensure the implementation of the safety programs created for the projects. On large projects, the GC/CM will have designated on-site safety representatives whose purpose is to walk the sites daily that they are assigned to observe unsafe working conditions and unsafe work practices. They are empowered with the responsibility of rectifying

any potential hazards discovered on the job site. The on-site safety representatives will also have regularly scheduled contacts with foremen of subcontractors for compliance with tool box meetings required of contractors on the job site.

D. Subcontractors

Hired by the GC, subcontractors supply the labor, tools and equipment to complete the work as scheduled and to the defined project specifications. They are responsible for ensuring that the craftsmen they employ are technically and physically capable of performing the assigned work. The working foreman is usually responsible for direct supervision of his craftsmen.

III. THE CONSTRUCTION TIME LINE

Every construction project begins with an individual who serves the role of the originator for a construction project. It can be a developer who has a concept for undeveloped property. An originator can also be a owner employee who identifies a need for expansion or modification to an existing facility (i.e., facilities upgrade). The originator's concept may also be the result of a feasibility study done by a consultant.

The project concept is then generally presented to an architect or engineering design group for development. This is necessary because most concept originators lack the technical background to confirm their conceptualized project.

The architect or engineer will develop a project or design. This invariably involves preparing a project work plan or project manual that will contain preliminary costs and scheduled estimates for the work as it is understood that will be undertaken for the project.

These design professions will define the configuration and components of the anticipated construction project through preparation of plans and specifications. The design professionals will meet regularly with the owner's representative(s) in order to get feedback and input from the

owner so the project goals will be achieved. Afterwards, a final schematic planning design phase review meeting will be held with the owner for it to sign off for the project.

A bidding package is then put together by a procurement group. The bid package will consist of the scope of work, construction drawings and specifications. Once this is assembled, an invitation to bid notice is sent out to prospective contractors with a date setting forth a pre-bid meeting.

At the pre-bid conference meeting, the prospective bidders are introduced to the owner representatives and design professionals. The purpose of the pre-bid meeting provides prospective bidders with a understanding of the scope of work to be considered and any criteria specific to the work to be done. A question and answer session is held that offers the opportunity for the contractors to raise questions and clarify any issues that they might have with regard to the work for which they are bidding.

After the bids are finally submitted, they will be reviewed and evaluated. Contracts are then awarded.

The next step is a pre-construction conference. This meeting is held with the contractor's supervisory personnel who are expected to carry out the work depending on the project. The objective of the meeting is to establish if the contractor has a clear understanding of the contract and the scope and nature of work to be performed as well as any owner expected regulations and procedures for it to follow. The contractor's safety program and job-specific hazards and job safety requirements may also be discussed at this time.

Generally, before the start of any construction work, there will be a general work site and hazard communication briefing. This involves explaining job site rules and regulations and general hazards and special emergency response requirements for the work site. The necessary

permits are obtained. All heavy equipment, such as manlifts and cranes, are inspected for serviceability to ensure that they are in good operating condition and are safe. Tools and equipment are similarly inspected for serviceability and safety. The construction schedule is reviewed also at this time.

Once work commences and depending on the work to be performed and the length of the contracted service, the CM/GC will hold progress meetings to discuss and review work that has been completed and problems arising from it as well as anticipated work to be done. During the construction phase, CM/GC will attempt to keep, if possible, work done in accordance with the construction schedule. Invariably, field change orders are issued as well as extra work orders for work that was not part of the initial contract.

Periodic inspections and audits will be done by the design professional or owner representative to ensure that work is being done to project specifications. In some projects, the owners reserve contractually the right to stop work if they determine that the work is not being done according to approved plans and specifications. In some situations, an owner is empowered with the right to have its own work force inspect, modify or change some of the work that is done. It is the owner that must be satisfied with the end product.

Prior to beneficial use or occupancy, there will be a preliminary or initial punch list inspection done and report prepared. The purpose of this is to ensure that all work that was done was done according to the project specifications or in compliance with field change orders.

A follow-up or final punch list inspection is done again for the purpose of making sure that the items noted on the initial punch list have been rectified and corrected.

The last phase of the construction project after satisfactory completion of the work is a contract close out meeting. This is done to review performance and discuss any close out issues and comments.

IV. ESSENTIAL CONSTRUCTION DOCUMENTS

A. Early Planning, Strategizing and Pre-Suit Investigation

The foundational building blocks in a construction case are documents. Construction documents provide litigants with a real concrete time line from project conception to start up or occupancy. They are the heartbeat of any case. Construction documents will give a litigant what he or she needs to know to develop a case. Through documents, a litigant will learn the identity of key individuals or players who are on the job site as well as what problems, safety or otherwise, that occurred during the construction project. However, one does not need to wait until a lawsuit has been filed to begin to gather documents and materials. Below are some of the resources available:

1. Dunn & Bradstreet Reports. For every potential entity that will be named as a party in your lawsuit, obtain a full D&B report. It will provide you with organizational information about that particular company. A list of names of officers is also provided in these reports. In each report, there is a section that deals with litigation in which the company has been sued.

2. Company Web Sites. As part of its marketing efforts, virtually every company has a web site boasting the services that it provides. The company's web site may provide a list of other projects in which it was previously involved.

3. Court Web Sites. Many county and federal courts can provide you electronically with docket entries of all cases in which an entity has been named previously as a party in a

lawsuit. From this, you can also find the disposition of those cases. You will also be able to obtain the address of the attorneys representing the parties in the previous litigation.

4. OSHA Requests. In many construction accidents, OSHA will have done an investigation. Under the Freedom of Information Act, you can get a copy of the OSHA investigation that may have been done in your client's accident. If you have a particular entity in mind and are aware of OSHA violations at a particular construction site, you will be able to get OSHA's files for the site inspections it has made and citations that have been issued.

5. Plaintiff's Employer/Subcontractor. With most accidents, an accident report is prepared by the injured worker's foreman. By writing to the employer, you can obtain not only the accident report, but any investigation it may have done into your client's accident. You also should obtain the injured employee's personnel file from his employer. Payroll records, time cards and slips are also available if needed.

6. Local Union. In some situations with union construction jobs, a union rep for the job may have kept a list of safety complaints for hazardous conditions discovered and reported on the job site. The local union may also have documentation as well about the accident. The union can certainly provide you with information for the damages portion of your case such as documentation on its fringe benefit package provided to its members. You can obtain a local's health and welfare plan, pension funding, wage scale and other important information to develop your damages.

7. Attorney Networking. Attorneys who have handled construction cases before will keep a data bank of documents that they feel can be used for future reference purposes. Contact other attorneys who have handled construction cases that either involve the same issues you expect to have or have litigated with some of the entities who will be defendants in your case.

Obtain from your colleagues pleadings, depositions and other documents that may be helpful in your case.

8. Visit The Accident Site. If at all possible, visit the construction site especially if it is shortly after the accident in order to document by photograph or videotape the conditions as they existed. Construction conditions are transitory and change as additional work is done.

9. Workers Compensation Insurance Carriers. In response to work-related accidents, many workers compensation carriers will initiate their own investigation to determine whether they may have a subrogation interest if the accident was caused by a third-party (another subcontractor), equipment, tools or machinery with which the injured person was using. Surprisingly, some workers compensation carrier investigators are at the job site on the day of the accident and are able to secure valuable information such as taking photographs and securing statements from witnesses to the accident.

You should also not neglect to obtain a copy of the workers compensation file on the injured employee. The file will provide you with medical records, wage documentation and other information to help you evaluate the extent of your client's injuries.

10. Statementizing Witnesses. While the accident and events are fresh in witnesses minds, it is important for the development of your case to obtain written statements to lock in a witness' recollection of events. This is especially true since after a project is completed, witnesses may become difficult to locate and track down.

11. Potential Defendants Liability Carriers. Just as the injured worker's employer will notify its workers compensation carrier of an accident, both subcontractors and contractors on the job site that were some way involved in an accident or feel that they have potential exposure will report the incident and a claims file will be set up. You may not have the same

degree of success in obtaining records from a liability carrier for a potential defendant as you would from a workers compensation carrier seeking subrogation, but the liability carrier may be willing to exchange documents with you if it feels that the focus of your inquiry or theory is not against its insured, but other entities on the job site.

12. General Contractor/Construction Manager. Strategically, you may decide that you will not want to name a CM/GC as a defendant in your lawsuit. If you are candid with what you are seeking from it (example: construction contracts, accident report, subcontractor reprimands and warnings), you may find that the CM/GC is willing to provide you with the requested documentation especially since it realizes that it will have to be produced eventually later in response to a subpoena.

13. City/Township License & Inspection Departments. It is wise to contact local code enforcement authorities to secure both application for permits and permits issued for a construction project. This is particularly true in facility upgrades that may tie into municipal utilities.

14. Consultant Experts. Consider retaining an expert who may refer you to additional pre-suit documents that you can obtain which you may not know about.

15. Technical Construction Safety Resources. If you have not done so, you should as soon as possible obtain a copy of the OSHA regulations, relevant ANSI standards and applicable BOCA National Building Code. Other helpful resource materials include the following:

(a) Manual of Accident Prevention in Construction by the Associated General Contractors of America, Inc.

(b) Occupational Hazards of Construction by Janet Bertinuson and Sidney Weinstein

(c) Fundamentals of Fall Protection by Andrew Sulowski (1991)

(d) Construction Safety Planning by David M. MacCollum

(e) Construction Safety Management (Second Edition) by Raymond E. Levitt and Nancy M. Samuelson

(f) Professional Liability of Architects and Engineers by Harrison Streeter (1988)

(g) Construction Accident Litigation by Dwight G. Conger (1990)

B. Contractual Documents

At the core of every construction case is the contractual undertakings of various parties who participated in the construction project. At the earliest opportunity, you must obtain a copy of the contracts between the owner and design professional, owner and CM/GC and contractor and your client's employer/subcontractor. However, make sure that you obtain a complete copy of the entire contract including all exhibits, schedules, lists and riders. Most CM/GC contracts will incorporate as part of the contract the AIA document General Conditions of the Contract for Construction. Also, most of these agreements will contain Supplemental General Conditions as well. An itemized list of drawings and production schedule will be attached as well. The CM/GC contract is a blueprint of what the owner expects the CM/GC to do for this project.

The contract between the owner and design professional is helpful because it will itemize the latter's responsibility during the design and development phases and construction document and construction phases.

The contract between the contractor and subcontractor is generally set forth with specificity as to the scope of work that is to be done. The contractor's safety policy and safety program is also incorporated and made part of the contract requiring the subcontractor to comply with all aspects of the contractor's safety program in addition to any of its own safety programs.

Contractually imposed upon all contractors is strict compliance with OSHA regulations.

To ensure that subcontractors strictly adhere to OSHA regulations, they are contractually required to submit a Safety Task Analysis or Job Hazard Analysis as commonly known by

OSHA. This requires that a contractor be notified in advance of any unusual or dangerous work that has potential for a severe injury or death.

C. Technical Documents

The items listed in this subsection are those that an expert can best help you in understanding to get a handle on things:

1. Project Work Plan/Project Manual. In this manual, you will find detailed specifications prepared by the design professional. Project materials for the job site are described and selected.

2. Drawings. Normally part of the project manual drawings will graphically show the design of the project. Invariably, because of changes or alterations made in construction, "as built" drawings will later be prepared. It is important not only to obtain the original design drawings, but also the "as built" ones to determine field variations made from the original ones.

3. Bidding Documents. This is the package of materials that is put together by the design professional for the prospective contractor bidders. Multiple sets of these bidding documents are kept and can be obtained from the design professional, owner and successfully bidding contractor and subcontractor.

D. Conference Meeting Minute Reports

During the design and construction phase, periodic meetings are routinely held. Minutes are transcribed from these meetings for future reference. Meetings are generally divided into two sections, one for old business, which is reviewing what work that has been done (or in the process of being done) and new business which will discuss scheduled work which is anticipated to be done in the near future. Minutes are important because they will usually list names, job

titles and organization affiliations of all the attendees. There will also be a chairperson for the meetings who will sign off on them.

The following are some of the normally held meetings for construction projects:

- Initial or start up meeting between owner and design professional.
- Schematic design phase review meeting.
- Schematic design document phase meeting.
- Bid document review meeting.
- Construction costs estimate meeting.
- Pre-bid conference meeting.
- Start up or kick off meeting.
- Job status conference meeting.
- Progress meetings.
- Safety meetings.
- Weekly toolbox contact meeting.

Generally, all meetings will be dated and numbered for easy tracking.

While safety issues can and often do come up in many of these meetings, particular attention should be directed to a careful review of safety meetings, toolbox contact meetings and weekly progress meetings. The safety meetings are usually chaired by the safety director or safety coordinator. They will discuss safety violations and safety infractions. Safety minutes reflect unsafe conditions that had been discovered and reported by any of the building trade laborers. These minutes also reference OSHA visits at the job site. Recommendations are normally made to culpable subcontractors as to how to rectify the safety hazards (i.e., installation of toe boards for scaffolding, use of fall protection).

Weekly progress meeting minutes enable the reader to get a good feel for the flow of work during the project. These minutes will reflect who is working where and who is doing what. They will also reflect problems encountered for some of the work that was done. Toolbox contacts are initiated weekly by the subcontractors' working foremen. The toolbox topics, however, usually have been determined in advance by the contractor who will also require that the foremen provide to each attendee a hand out that summarizes the topic that was discussed.

E. Progress Work Documents

Before the start of every construction project, a time line progress schedule is issued that provides a flow chart for what work is to be done sequentially on the project and the subcontractor scheduled to do the work. There are estimated starting and completion dates. Invariably, because of expected delays with delivery of materials or unanticipated prolonged adverse weather conditions, these progress schedules are not strictly followed.

Required of both superintendents and subcontractors' working foremen are the submission of Daily Field Reports. The subcontractors' Daily Field Reports will provide a description of a nature of work that is being done and its location. Man power and hours worked will also be contained in the report. Superintendents' Daily Field Reports will list the areas and subcontractors that he has been supervising. These field reports will also describe the status of work so that it can be accurately reflected at the weekly progress meeting.

To graphically document work that is done, many contractors and owners will have weekly progress photographs and videotapes done that show the condition of work at a particular point in time. this can prove to be valuable evidence for your case.

Another document that will surface during the construction phase is extra work or change orders. Sometimes, subcontractors are asked to perform additional work that is outside the scope

set forth in their subcontract. Any work that is regarded as not part of the original contract must be authorized and approved by the contractor. This is usually accomplished by the issuance of an extra work order. Similarly, when changes are required and it arguably falls within the scope of work undertaken by a subcontractor, a change order is issued. As with the Daily Field Reports, the nature of the work performed will be described along with the number of personnel needed to accomplish it.

F. Organizational Flow Chart

Because of the multitude of employers at a multi-tier work place, the chain of command or hierarchy is not always immediately known. To provide everyone with an understanding as to the proper channels of authority, an organizational chart is generally made part of the construction contract. Some organizational flow charts will have both the name and job title of the individuals.

G. Safety Materials

Virtually, every contractor and subcontractor will have its own written safety policy and safety program. Owners will review a contractor's safety program and accident history before deciding whether it wants to retain its services. Contractors, too, will require of subcontractors proof of their own safety program.

In most contractor/subcontractor contracts, the GC will contractually require that the subcontractor follow the GC's safety program. The GC safety program is attached as an exhibit to the contract.

Safety programs will provide an itemized list of requirements that must be followed when working at a construction project. Procedures and guidelines will be issued for the investigating

and report of accidents, wearing of protective equipment, housekeeping and safe erection and safe use of scaffolds, ladders and other construction equipment and tools.

Safety programs will require that each subcontractor designate a responsible employee, which may be the foreman, who will be in charge of his employer's safety program.

To minimize the potential for accidents, many construction projects will have an inspection redundancy system. Subcontractors are required to submit daily or weekly safety inspection reports for areas where they are working. Contractors will perform their own safety inspections based on a check-off list by subject matter (example: housekeeping, personal protective equipment and scaffolding) or may be a blank form divided by floors or project area in which unsafe conditions and hazards are observed and recorded.

These safety inspection report check-offs are compiled along with the safety meeting minutes from which monthly safety data summary reports are created. This document is important because it will review, among other things, safety related incidents and contacts, accidents during the preceding month, toolbox contact attendance submittals and safety data compliance logs.

In case of repeat violators, confirmation correspondence may exist from the general contractor alerting the subcontractor of repeated warnings given and suggested abatement methods to correct the unsafe conditions.

Depending on the comprehensiveness of a contractor's safety program, you may discover a list of all expected tool box meeting topics with handouts.

H. Folders/Files

Construction projects generate a seemingly endless amount of paperwork. Most of the correspondence is boxed in storage for archiving. This is where you will find most of the

obscure paperwork such as letters and file memoranda. Because of the voluminous nature of the documents processed and handled on a construction project, contractors have good indexing systems in which folders/files are created for every subcontractor, vendor or any other entity that the contractor deals with during the course of the construction project.

V. TRADITIONAL DISCOVERY TECHNIQUES

What you put in your complaint will shape what you need to obtain in discovery. What counsel for defendants are willing to produce in discovery will be determined, in part, by allegations contained in your complaint and theories alleged.

Since there are many documents to which you will not have access to until you file your complaint and engage in formal discovery, it is recommended that you draft a carefully worded complaint. You need to be able to plead viable causes of action that will withstand preliminary objections or demurrers. However, there is no requirement that you plead every minute factual detail. To do so may tip your hand too early before you know what the documents will disclose that you anticipate receiving.

For this reason, it is important to gather enough factual information and evidence to support your allegations so that suit can be filed. File your suit well before the statute of limitations so that in the event other parties are joined by the defendants or other culpable parties who are identified during the course of discovery, you will have ample opportunity to amend your complaint to include these new defendants.

A. Interrogatories

Many attorneys view preparing case related interrogatories to be unproductive. They mistakingly believe that since it will be opposing counsel who assists his client in preparing responses that nothing drastically meaningful will come from the answers. Do not take this part

of discovery lightly. In construction cases, well prepared and pointed interrogatories can negate certain defenses that have been raised. Likewise, since interrogatories are party admissions, the unsuspecting defendant that is trying to figure out whether his client is going to be the target or focus in your case, may make an early admission in the initial discovery. Take the time and prepare well thought out penetrating interrogatories. Avoid boilerplate interrogatories.

Secondly, despite your best pre-suit investigation, you may not know who are all the players or entities that may have had some involvement in contributing to your client's accident. Interrogatories will enable you to flush out the inner-relationships among the various contractors and subcontractors at the construction site where your client was injured. Interrogatory answers reveal names and job titles of individuals whose depositions you will need to take in your case. These discovery responses will also help you prepare for requesting additional documents that were not produced by defendant in its initial response.

B. Request For Production Of Documents

It goes without saying that the more specific you are with your request, the more likely you are to get it.

An all inclusive request will normally get you an objection. Definitely review what documents and information you are able to obtain pre-suit in your investigation. To the extent that titles or names of documents are mentioned or listed in your pre-suit materials obtained, then specifically refer to them when preparing your request to produce.

Similarly, if the documents that you have are incomplete, then make sure you request the full and complete set at the earliest opportunity available. Do a check list of what has been turned over by the defendants. It may be that the document you have requested exists, but it simply cannot be found or located presently.

Once you have received the documents, carefully review them because it is very likely that additional documents will be referenced in those that have just been produced.

C. Record Subpoenas

Take advantage of this discovery tool. There are many entities that are both directly and indirectly involved in construction projects. Not all of these entities will be parties in your litigation. For those non-party entities that are reluctant to produce documents voluntarily, then issue a records subpoena. If necessary, take the deposition of the custodian of records. Generally, your client's employer will not be a party to the lawsuit because of the immunity afforded under the workers compensation act, however, this is one of the first non-parties you should serve with a records subpoena.

D. Depositions

Depositions are an integral part for proving your case. Historically, depositions have been regarded as a vehicle to "discover" facts and information to prepare or defend your case. While it is inevitable that during a deposition you will uncover information that you were previously unaware of, you cannot let this be the primary reason for taking a deposition.

Like construction documents, depositions provide building blocks for your case. They should be used to shape and create evidence that supports your theory. Normally, depositions will be scheduled after you have reviewed documents that had been produced by defendants during discovery. Before taking a deposition, a list of objectives should be made as to what you expect to elicit from the deponent and how it will help your case. Since you will already have reviewed the documents produced and in all probability will be using some as exhibits during the deposition, you should have a strategy for each deponent. How is this witness going to help me out? What is it that I hope to get from this witness by taking his deposition? What essential

elements for any of my causes of action will the deponent provide? Are there any defenses that have been raised that the deponent will help defeat? For example, in a case in which the statutory employer defense has been raised, you may consider taking the deposition of plaintiff's foreman to establish that the general contractor had subcontracted the entire job and never was at the job site from day one.

Of course, theories of liability often dictate who you need to depose. If the thrust of your case is a claim against another subcontractor for improper scaffold assembly, then the deposition of the safety director of the CM or GC becomes critical to your case. At the deposition of the safety director, you will in all likelihood obtain evidence that the CM/GC had a safety program that was part of the subcontract with the defendant subcontractor. The safety program was reviewed in detail with the subcontractor at the pre-construction kick off meeting. In the contractor's safety manual, there was a section that itemized provisions from OSHA regulations and ANSI scaffolding standards for safe erection.

Another individual commonly deposed in construction cases is the on-site safety representative or safety coordinator. Aside from implementing the CM/GC's safety program, these individuals walk the project daily inspecting it for hazardous working conditions. In their inspection "walk thrus", most safety representatives will complete a safety inspection check list which will provide you with different approaches on how to use it. A safety inspection check list report can be used during the on-site safety representative's deposition to establish the frequency of them, the detail of inspections, designated areas of inspection and items or things expected to be checked during the inspection (example: housekeeping, material storage and protective equipment).

Occasionally, issues will arise where there is a dispute as to what subcontractor was responsible for creating an unsafe work condition. Depositions of assistant superintendents or superintendents are helpful in this regard. These individuals have the responsibility of supervising the work of the various building trades. They should know who was scheduled to work and who did what. Supervisory personnel are required to submit Daily Field Reports that provide an evidentiary tool for nailing down tortious conduct of a particular subcontractor.

While project managers may not have the level of daily interaction with the building trades that assistant superintendents and superintendents do, they are responsible for keeping the project on schedule and within budget. They interact with owners' representative(s) and design professional(s) on issues including changes, modifications and additions made on the construction project. Project managers are responsible for approving extra work orders for work that may be outside of the contracts.

In projects involving facility upgrades or renovations, there usually will be an owner-in-possession defendant. In these types of cases, an owner may have its own construction department (electricians, plumbers, etc.) retain a portion of the work for itself. Alternatively, the owner may be involved in the review and approval for requested utility shutdowns and work permits. The owner's project manager may provide important evidence on the level of involvement and participation that the owner had with the construction project.

If your case involves issues based on improper or unsafe design, the deposition of a design professional will be important to establish the process by which the specifications were developed and created for the project.

E. Request For Admissions

While time consuming to prepare, request for admissions are an effective way to narrow issues in a case. They serve a number of purposes. Request for admissions enable parties to stipulate as to the authenticity of documents and records. They can also be used as a basis for reading to the jury undisputed or stipulated facts. This saves time and expense in calling several additional witnesses to establish agreed upon facts. The request for admissions can also be used to establish a disputed issue of material fact that may be necessary to avoid a motion for summary judgment (example: control or occupancy by general contractor). Regardless of your reason for using this form of discovery, you should be careful in preparing and organizing your admission requests making sure that they are factually accurate and concise.