

## 12.2: Documentation and Records

### Key Words and Concepts

- The “put-it-in-writing” rule
- Definition of documentation
- The value of good documentation
- Hearsay
- Job records exception to hearsay rule
- Conditions for introduction of job records
- Letters of transmittal/submittal
- Letters of dispute or protest
- Confirmations and meeting minutes
- Routine job records
- Contractual notices, orders, or directives
- Personal diaries
- Job document matrix

Previous chapters have been replete with references to the importance of well-kept job records in preserving the contractual rights of all parties to the construction process. Another name for well-kept job records is “good documentation,” the subject of this chapter.

### Documentation

Good documentation on a construction project does not just happen. It is the result of careful preplanning and a concerted effort at all levels of the field organization. It also requires constant application of the “put-it-in-writing” rule.

#### “Put-It-in-Writing” Rule

The “**put-it-in-writing**” rule is one of the cardinal rules of good contract administration, if not *the* cardinal rule. It is much easier to state than to implement. Self-discipline and strong work habits are required to detail in writing the thousands of daily occurrences on an active construction job, even though you may know that the potential value of such writings far outweighs the effort required to produce them.

Events should be recorded at or shortly after they occur, not at some later time. Anyone with construction experience knows how intense daily activity can become and how difficult it is to take the time to make a written record of something that has just occurred. Often, this is just not possible at the moment, but it ordinarily can be done at the end of the day or at least by the end of the following day. Even records prepared within a week of the event are more valuable than no records at all. One useful technique is to dictate into a hand-held recorder kept constantly nearby, replacing the tape at the start of each new day. The information from the previous day’s tape can be transcribed by an office associate or stenographer into a daily job diary, a permanent written record. Once transcribed, the tape can be reused on the third day. Such daily records are detailed and extremely valuable for later reference. Writings prepared later than a week or more after the event have little or no value as a job record. By this time, they are more “recollections” than records.

The writer vividly recalls the usefulness of this type of record keeping on a tunnel project executed by his company in the mid-1970s. The project consisted of two parallel soft-ground, shield-driven tunnels under compressed air for a subway project in Baltimore. The schedule required two headings to be driven simultaneously, three shifts per day, five days per week. Each of the three shifts was supervised by a “walker”—a tunnel superintendent—who reported to the general tunnel superintendent. The general tunnel superintendent’s home was in southeastern Washington, D.C., a 75-minute drive from the jobsite. His practice was to arrive at the job early in the morning prior to the end of the graveyard shift so that he could visit each heading during that shift and talk to the graveyard walker. He remained on the job throughout the day shift and stayed long enough into the swing shift to observe conditions in both headings and to talk to the swing shift walker. For this reason, the general tunnel superintendent was intimately familiar with the details of the work in each of the two headings for each of the three shifts of the day. He then dictated the events of the day into a hand-held recorder while waiting in traffic between Baltimore and Washington on his trip home, completing the dictation on the reverse trip from Washington to Baltimore early the next morning. On reaching the jobsite, the cassette for the previous day’s activities was given to the project secretary in exchange for a clean cassette. The secretary typed the

dictation each day and returned the copy to the general tunnel superintendent who edited the typed record, making any necessary corrections.

A major differing site condition was encountered during the project, which resulted in a claim for additional compensation and contract time that was litigated before the Maryland Board of Contract Appeals. During the three-week hearing, both the Transit Authority and the contractor almost totally relied on the contractor's job records, including the daily reports resulting from the general tunnel superintendent's dictation. Although the language in these reports was sometimes quite colorful, the reports proved invaluable in securing a successful board ruling.

### What Is Documentation?

Written work products that are mere recitations or summaries written long after events occur are often incorrectly represented as documentation. Such written work products may be useful as effective tools of persuasion in a dispute resolution proceeding, but they are *not* documentation. Contemporaneous written records of the facts themselves *are* documentation, but the recitations and summaries are not.

Written opinions of persons who were not present at the events in question also do not constitute documentation, no matter how experienced and knowledgeable the persons may be. Such expert opinions are important and useful in successfully resolving disputes and may be heavily relied upon by courts and arbitrators, but they are not documentation.

**Documentation** consists of the writings or records of persons who were present at events, written at the time or shortly after the time of the event. In many instances, it may be the only evidence in existence that reveals what actually occurred.

### Value of Good Documentation

**Good documentation is invaluable** in resolving misunderstandings before they escalate into disputes. One party to a misunderstanding may have an incomplete or incorrect picture of the facts of an event or occurrence on the project. Good documentation of the true facts in the possession of the other party is very effective in clearing up the misunderstanding, thus avoiding a potential dispute before it starts.

If a dispute does arise that cannot be resolved short of litigation or arbitration, the party that can produce carefully prepared authentic job records supporting its position usually will prevail. The litigation or arbitration usually occurs sometime after the completion of the project involved. The actual participants in events, such as the engineers, foremen, and superintendents who were assigned to the project are often not available to testify because they have been transferred to other work, have left the employ of a party to the contract, or even, in some instances, have died. The existing job records, properly prepared by these persons, usually may be introduced and accepted as valid evidence of what actually occurred on the project without the necessity of the person who created the records appearing in court and personally testifying.

The home office principals of the parties involved, such as owners and company officers, usually are more readily available to testify, and they may be knowledgeable about what occurred on the job because their subordinates orally reported events to them at the time. However, they are not permitted to testify about what occurred or did not occur on the job because they were not there; and oral statements made to them by their subordinates are **hearsay**. Hearsay is a communication that is secondhand. The person "knows" some fact only because someone else told it to them, not because the person was present at events and knows the fact to be true on the basis of firsthand knowledge. Since these persons are not allowed to testify, the presentation in court of good documentation of events may be the only way to prove what actually occurred.

### Exceptions to the Hearsay Rule

Although hearsay generally may not be admitted as evidence in court, there are certain exceptions. One such exception important to the construction industry is that, subject to certain rules, **construction job records (which are hearsay in written form) are usually permitted to be introduced and accepted as evidence**. The federal rules for acceptance of job records as evidence are quite broad, with the result that the records will be admitted if they can be authenticated as genuine. Some state jurisdictions are more restrictive, but properly authenticated job records will generally be admitted.

### Conditions for Introduction of Job Records

In most cases, satisfaction of the following **conditions permit the introduction of job records** as evidence in court:

- It must be established that the persons who prepared or originated the records were actually present at the events covered and were in a position to have accurate knowledge. For instance, no one could reasonably argue that a crew foreman's signed and dated time card was not prepared by a person who was present on the job and who had accurate knowledge.

- The records must have been prepared in the normal course of business—that is, it must be shown that the records are of a type that would normally be prepared under the circumstances existing at the time of preparation. For instance, foreman’s time cards, project daily progress reports, and accident reports are all clearly the type of documents routinely prepared in the normal course of the business of construction companies. Other examples are daily diaries, weekly and monthly cost reports, force account records, tax returns, material delivery tickets, records of work quantities measured for payment, and so on.
- The records must have been prepared at the time of events, or reasonably soon thereafter.
- There must be no suggestion or intimation that the records were prepared for the specific purpose of use in litigation. Such a suggestion impugns the objectivity and believability of the records.

## Typical Job Records

By way of example, the following is a discussion of 20 typical construction job record documents. Each document is intended to serve specific purposes. To be certain that these purposes are served, each must be carefully drafted and must contain certain necessary elements. The specific job records are:

1. Letters of transmittal
2. Letters of submittal
3. Notice of claim for constructive change
4. Notice of claim for constructive suspension
5. Notice of claimed delay
6. Request for time extension
7. Notice of acceleration
8. Notice of differing site conditions
9. Letter requesting information/interpretations
10. Letter disputing instructions/interpretations
11. Letter advising proceeding under protest
12. Confirmations of instructions or agreements
13. Minutes of meetings
14. Project daily reports
15. Force account time and materials records
16. Cross-sections and other records of work performed
17. Foremen’s daily time cards
18. Material delivery tickets
19. Contractual notices—that is, NTPs, notice to correct deficiencies, notices of suspension, termination, and so on
20. Personal diaries

For discussion purposes, it is useful to consider these types of documents in a series of six closely related groups.

### Letters of Transmittal and Submittal

The first group consists of **letters of transmittal** and **letters of submittal** (documents 1 and 2). Both are similar in that each is a cover document for some other document of importance, such as a contract, purchase order, subcontract, drawings, schedules, and the like. Each of these documents has two aims: to establish a record of precisely what was transmitted or submitted and a record of the date that the transmittal or submittal was made. It is not difficult to understand the importance of both of these pieces of information with regard to the liability question if, for example, a series of concrete footings, poured according to superseded construction drawings, had to be demolished and repoured. Were the footings wrongly poured because the owner’s engineer failed to transmit the revised drawings to the contractor? Or was it because of poor drawing control by the contractor, who left the revised drawings rolled up in the corner of the job trailer and poured the footings according to the original drawings? The letter of transmittal of the revised drawings, if properly drafted, will settle this question.

Letters of submittal differ from letters of transmittal in one important way. Letters of transmittal do not imply or state that an approval is required or sought, whereas letters of submittal do indicate a request for approval. Both usually require an acknowledgement of receipt. Letters of transmittal are typically used to send drawings, specifications, prime contracts, purchase orders, subcontracts, change orders, certificates of insurance and similar documents, whereas letters of submittal are used to send material samples, shop drawings, proposed CPM schedules, proposed methods or procedures for carrying out the work, and the like. Preprinted forms for both letters of transmittal and letters of submittal are in common use today.

## Letters of Notice

The second group consists of the typical contractor notices required by the “red flag” clauses of most construction contracts. All of these (documents 3 through 8) contain the same two basic elements as the first group—that is, they describe or identify an event or subject to which the notice pertains, and they establish a date of record that the notice was given. In addition, in each case, the contractor is taking a position. Therefore, each document should contain an additional element, stating the contractor’s position and the basis for believing that the position is correct. In addition to the three preceding elements, the notices in this group should contain other elements, depending on the specific notice. For instance, the notice of acceleration (document 7) should make clear that the contractor is accelerating construction operations and expects to be paid the extra costs of the acceleration. Similarly, the claim for constructive change (document 3), the claim for constructive suspension (document 4), the claimed delay (document 5), an independent request for a time extension (document 6), and the notice of differing site conditions (document 8) should all make the contractor’s position clear and that additional time and money are being requested.

## Letters Requesting or Disputing Instructions or Letters of Protest

The third group consists of a **letter requesting information or instructions** (document 9), a **letter disputing or taking exception to instructions previously furnished by owner or engineer** (document 10), and a **letter advising that the contractor is proceeding under protest** (document 11). The two elements of identification and establishment of a date of record are required as for all the other documents. In addition, document 10, which disputes instructions or interpretations, should explain that a dispute exists and the reason that the instructions or interpretations have been disputed. The letter advising proceeding under protest (document 11) must make clear that a dispute exists, that the contractor is proceeding under protest, and that additional time and money are expected.

## Confirmations and Meeting Minutes

The fourth group includes **confirmation of instructions or agreements** (document 12) and **minutes of meetings** (document 13). Both possess the two elements of identification and establishment of a date of record and, in addition, contain an element that confirms an understanding of a conversation, meeting, or instructions received. Such letters can relieve the recipient from the necessity of replying by indicating that if no advice to the contrary is received, the understandings stated in the letter or meeting minutes will be regarded as correct.

## Routine Job Records

The fifth group—daily reports (document 14), force account records (document 15), cross-section data and other measurements of work performed (document 16), daily time cards (17), and material delivery tickets (18)—all share a common attribute. They are all forms of **routine job records** required to operate the project. Their purpose is to record facts about what has occurred. There are only two elements: recording facts and establishing the date that the facts were recorded.

## Contractual Notices, Orders, or Directives

This class of project documents includes the more formal type of **notice, order, or directive**, required by the contract to be given by the owner or construction manager to the prime contractor, or by the prime contractor to subcontractors. Such things as notice of award of contract or subcontract, notices to proceed, stop orders, cure notices (order to remedy defaults), suspension of work or acceleration directives, and termination notices (document 19) are all included in this category. Although less frequent than other job documents, their importance is obvious. They should be drafted with great care and must contain some mechanism to establish the fact and date of delivery.

## Personal Diaries

Many construction executives and managers maintain **personal diaries** (document 20) on a routine basis, entering facts about important meetings or events shortly after they occur when recollection is fresh. Such diaries are highly regarded as probative evidence in construction disputes, provided the entries are factual and not unduly editorialized.

The writer maintained this type of daily diary throughout his contracting career. These diaries repeatedly were effectively used in dispute resolution, including use as trial exhibits in court and in hearings before administrative boards. However, such diaries must be factual, inasmuch as they are subject to discovery during litigation. For this reason, some in the industry do not keep diaries because they regard them to be a two-edged sword. However, the writer’s experience has been that the benefits to be gained in maintaining a detailed diary far outweigh the drawbacks. On one occasion, the writer’s original diaries were subpoenaed by the federal government as evidence in a criminal trial involving other parties and were not returned for a number of years. These

experiences should make clear the importance that courts, arbitrators, and other dispute resolution bodies place on this type of record.

### Job Document Matrix

The relation of the various necessary elements just discussed to the documents themselves is represented diagrammatically by the **job document matrix** shown in Figure 21-1.

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### Conclusion

Most construction documentation, particularly correspondence, is generated during the “heat of battle” on active construction projects. There are usually two sides to every issue, and each person’s view of the situation will be highly influenced by “where he or she sits in the stadium.” The purpose in writing a letter to an opposite number should not be to vent one’s spleen, but by being factual and professional, to convince the other of the correctness of one’s position. Unfortunately, much actual construction correspondence overlooks this simple truth.

### Questions and Problems

1. What is the cardinal rule of good contract administration? At what point should the rule be exercised to result in good job documents?
2. Does the term *documentation* include recitations or summaries of events written after the fact? Are later written opinions of qualified construction experts considered to be documentation?
3. Why are good job records useful in construction litigation?
4. Why are home office principals often not permitted to testify in court about events that occurred on the project?
5. What is *hearsay*? Does the hearsay rule usually apply to construction project records?
6. What are the four requirements that must be met before project records may be presented as evidence in court?
7. What is the difference between a letter of transmittal and a letter of submittal?
8. What ten separate elements of various project documents are discussed in this chapter?
9. What is the general purpose of construction correspondence dealing with disputed matters that is so often overlooked in practice?

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