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CONSTRUCTION LAW

Construction Injury Litigation: Paving the Road Through Discovery

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Special to the Legal

When conducting discovery in personal injury matters that arise from construction accidents, the discovery requests, like in other matters, dictate the documents received. However, the difference is that with a construction project, there are a number of documents, areas of inquiry, and file materials that are important in an attempt to establish your claims against the owner or various contractors, but if not properly requested, they may not be produced. If the request is too broad (i.e., the construction file), you will be faced with an objection that the request simply seeks every bill, receipt, invoice, subcontract, etc., and many documents that have absolutely nothing to do with the issues in your litigation. If the request is too specific, and if you do not ask for the materials the correct way, you may not receive them (i.e., produce JSAs; response “none”—unbeknownst to the requesting party, the contractor did not use JSAs, they used JHAs (see below)). When pursuing a premises liability case, motor vehicle accident case, a dog bite case, etc., the world of documents is much smaller and less particularized. However, there are a number of areas that should be explored in a construction accident case, depending upon the type of accident. The intent of this article is not to identify every single document, as the requests are case specific.



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Nevertheless, some documents should be requested in all cases, such as all contracts, subcontracts, scopes of work, change orders, safety manuals, accident reports, and photographs, while keeping in mind there are many, many more materials to request.

For example, you should request all building permits for a number of reasons. Oftentimes the building permit process has a certification section in which the applicant agrees to be bound by all applicable rules, regulations, laws, etc. Therefore, the applicant, at the outset, has agreed to be bound by OSHA and any other applicable rules and regulations. You will need the permits to know who the applicant was, as it is not always the owner or the general contractor but may be the particular subcontractor responsible for the specific work in issue.

Further, discovery through the building permit process may often reveal additional documents, plans, communications, etc., that might not ordinarily be produced

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otherwise. While you make the building permits part of your discovery requests, also reach out to the local building inspector’s office and obtain the job file for the project as well. The undersigned has seen more than one case, even very large \$100 million-plus projects, where no building permit was ever obtained. This, in and of itself, makes for some interesting discovery issues. It is also recommended the deed be obtained as many companies, especially on large projects, create a new company for ownership of purely that property.

There is an above reference to JSAs and JHAs. These stand for job safety analysis and job hazard analysis. These documents are important because they are prepared by a contractor in advance of a project or a portion thereof, in order to identify the potential hazards associated with the type of work that is being done or that might be encountered, and how those issues are to be remedied. They may be referred to as various names depending upon different contractors, but a general request for JSAs, JHAs, safety and hazard analyses, and the like, should cover it.

You will want to make sure you have all applicable safety manuals. Safety manuals can be general safety manuals within the company that explain, usually in a “CYA” fashion, how safe the company is and how it has a zero-tolerance policy for accidents. However, there may also be site specific safety manuals that have been hand-tailored for the project in issue. Oftentimes, as well, the general contractor will collect all of the safety manuals of the various subcontractors on the job. Obtain them all.

Even in situations where the various contracts and safety manuals are produced, you may not obtain the bid documents. The bid documents for a project may be important as they may identify the various discussions between the parties, especially on issues of safety and scope of work being bid upon. Was safety netting part of the scope? Was there dialogue or debate about who would provide a ground spotter?

Have you requested and obtained the pre-project safety orientation sign-in sheets? This becomes an issue if your client, or others on the job, have indicated that they did not attend the orientation. Again, this author has had multiple cases where the orientation sign-in sheets were reviewed with witnesses who testified that they did not sign-in, that the signature on the form was not their signature, and that they did not attend orientation. While this is not always an issue, it is something to keep in mind.

It is not uncommon for progress photographs to be taken. Naturally, if an accident happens, there may be specific photographs

of the area in issue. However, progress photographs may show a generally poorly run project, ongoing hazards throughout the project, and similar issues. Sometimes these photographs are taken in-house, and sometimes a separate company is retained. Subpoena them directly.

Request Toolbox Talks. Usually the contractors, on a weekly basis, will have a meeting to discuss the safety issues that are ongoing with the project. There will typically be a sign-in sheet. Some contractors do this on the day and at the time when paychecks are going to be handed out so they can ensure attendance. You may simply see random topics that are being discussed, or topics that are specific to issues that continue to arise at the project. The Toolbox Talk will have a sign-in sheet and the topic discussed.

There may be many variations of meeting minutes. You can obtain safety meeting minutes, project manager meeting minutes, owner meeting minutes, superintendent meeting minutes, etc. Request all meeting minutes. Again, not only will safety topics usually be addressed in these meeting minutes, but also project accidents and ongoing issues and problems.

In addition to the various safety meeting minutes that might exist, there may also be pre-meeting agendas which will outline the topics to be discussed. These, too, may address the various safety issues that are going on with the job, as well as injuries, and topics that are needing to be addressed at the project.

Request any file materials with regard to fines, fees, and sanctions issued to any subcontractors. Contracts usually have provisions for assessing fines, fees, and sanctions against subcontractors who do not comply with safety. Sometimes you will see that the general contractor and construction manager will issue such fines and fees for the simple stuff, like not seeing a hard hat being worn, but not for the safety issues that require more supervision and attention. See what the general contractor or construction manager issued fines for, if anything.

Certainly, any accident or incident reports with regard to the specific injury,

photographs, witness statements and other such documentation of the incident would be a document request must. Additionally, while these contractors will normally see each other on the job, electronic communication is much more common. Request emails, text exchanges, and any other form of electronic communication.

Most of the foremen on the job will maintain some form of a diary or daily construction reports. These will indicate where they are on a given day and a general summary of what the subcontractors are doing at that particular time. It may also identify the various individuals who are working in different areas of the building, providing information regarding necessary witnesses.

Maybe your accident occurred because there were too many trades working in the same area, and the job was not coordinated correctly. Request the original schedule of work as contemplated, but also the actual schedule to see if project delays caused issues with sequencing of trades.

There are a lot of records out there. If you simply ask for the construction file, you may be faced with an objection; however, if you do not request a specific document by name, you may never see it. It is important to talk the language of the contractors as well. It is not uncommon for an attorney who represents a construction company to allow the contractor to produce the documents, as opposed to the attorney reviewing the construction materials and identifying what is relevant. You will then be relegated to somebody reviewing the request and producing the specific document he or she believes is being requested. In these construction accident matters, the various documents may be the “smoking gun” you need, so it is important to make sure you specifically request them. ●