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**2024 Surety Bonding and Construction  
Risk Management Conference**

# **The Best Evidence: The Real Time Project Record**

THIS PAPER WAS WRITTEN IN CONJUNCTION WITH A BREAKOUT  
SESSION AT AGC'S 2024 SURETY BONDING AND CONSTRUCTION  
MANAGEMENT CONFERENCE

**Paper Title:**            **The Best Evidence: The Real Time Project Record**

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**Session Title:**        **Nothing Wins Like a Real Time Project Management Record**

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## **The Best Evidence: The Real Time Project Record**

After nearly 30 years as a litigator specializing in representing General Contractors and Construction Managers in complex business disputes, I have lost count of the times one of my hearing witnesses has told me, after the trial, some version of, “I will never build a project the same way again.” This exclamation is in response to the witness, typically a project manager, assistance project manager or a project executive, testifying for the first time and having been surprised by the level of detailed information they were required to master, the degree of scrutiny and challenge to every bit of evidence presented, the amount of preparation and analysis required to testify effectively, and how nerve wracking it can be to be a witness required to tell the project story on direct exam and then being cross-examined by the other side’s lawyer.

The “lesson learned” is that, having gone through this experience for the first time in their careers, they are going to be far more diligent and thoughtful in the way they: draft letters, emails and notices; prepare daily reports and meeting minutes; inquire through RFIs; write monthly reports, schedule updates and narratives; write in PCOs and COs; document costs; and generate other “routine” project records. Each of them learned, through first-hand experience, the critical importance of the real time records they or their teams prepared often years before the trial.

It has also become apparent that while construction firms often provide a wide variety of training to their staffs, they do not often give them practical guidance about how to prepare their project documents effectively. Almost all could benefit from some guidance and insight into how the documents they prepare daily on their projects are used as evidence in disputes so that they can more effectively prepare them in real time.

While a philosophy lesson may not be an intuitive training tool for construction professionals, an effective first step in teaching a project team how to make a better record is to provide some basic insight into rhetoric, the classic art of persuasion. They need to appreciate that among the purposes of the records they create is to persuade their readers, and possibly mediators, judges, arbitrators, and juries, to the rightness of their positions. And they need training in how to go about making a persuasive record. As far back as Plato and Aristotle, philosophers have studied how to persuade and focused on three fundamental components: *Logos* – the logic of the argument; *Pathos* – the emotional appeal to the audience; and *Ethos* – the credibility of the speaker.

### ***Logos*: Logic of the Argument:**

Knowing your audience is fundamental. Understanding that there are multiple audiences for every project record is often a key revelation to a project team member who has never before been involved in a dispute. It is obvious that a letter written to an owner or a subcontractor is being prepared with them in mind. It is less intuitive that the same letter also needs to be written with the intent that it be understood by a judge, jury, mediator or arbitrator, possibly with no construction industry knowledge, reviewing it as evidence possibly years after it was drafted.

Project communications and records should lay out clearly concerns, issues and the factual and contractual basis of a contractor’s claims. They should explain, with detail and

context. Take time to explain how the issue of concern is presenting a challenge to your company's ability to perform. Emphasize cause and effect: "We are unable to advance the underground piping work because we are waiting for the design to be finalized. This is going to impact our ability to progress any of the following work because nothing can proceed until the underground work is completed." Be sure to highlight delay and cost implications.

Instruct that when drafting any communication of importance, it is often worthwhile to have a colleague review your draft with a critical eye, asking is all the information presented in a way that drives to the desired logical conclusion? Advise them to put themselves in the position of a non-expert reader, unfamiliar with the project and ask if I were that juror, could I understand the point from the information included? Focus on what may be missing from and what may be extraneous to the logic of your presentation.

### ***Pathos* – the emotional appeal to the audience:**

Emotional appeal, in the construction dispute context, rarely equates to being a tear-jerker. Rather, project communications need to have the right tone so that they resonate with addressee and the judge, jury or arbitrator. They need to be clear and understandable and include sufficient context for the years-removed layperson to understand them. Even experienced project team members often express concern that if they write a claim notice letter, they are inherently creating an adversarial posture with their clients or trade partners. But a notice or claim letter does not have to necessarily be a hot stick in the eye. They could express concern, exhibit an appropriate level of urgency, emphasize a desire for collaboration by offering help and suggestions for solving the problem at hand and might, in appropriate circumstances, ask the other party for help in solving the problem. A well crafted, properly toned communication can check all the contractually required boxes, and still demonstrate your company's professionalism and desire to participate in avoiding and solving problems.

Deliberately considering the proper tone for the communication, and then giving thought about how to express and convey that tone is the *pathos* part of the persuasion equation.

### ***Ethos* – Witness credibility = expertise + trustworthiness:**

In most dispute hearings, live witnesses must present and explain the evidence to the deciders (judge, jury, arbitrator). It is in this context that these rhetorical concepts merge in practice. Advocates work hard when considering how to make their witnesses credible, through a combination of demonstrating their expertise and trustworthiness. An effective real time project record helps a witness, a project manager, for example, demonstrate their personal and their company's expertise and professionalism. The details that should be contained in the letters, emails, meeting minutes, and other records, reflect positively (or perhaps negatively if missing or wrong) on the insights the witness brings to bear. An effective notice communication, employing the proper tone of concern and desire for collaborative problem solving, can demonstrate expertise by having provided early warning of an impending potential problem and suggestions about how it could be avoided with the counter-party's effective action. A series of letters, emails, daily reports, meeting minutes, schedule narratives, and other relevant records, all harmonized in their content and messaging, creates a layered record promoting

credibility. They allow lawyers to argue, “look how many times my client wrote to the defendant about this very issue. My client was trying to avoid this problem. They were doing their job, bringing their expertise and experience to bear, looking down the road and bringing to the defendant’s attention that collaborative action was required to prevent a delay and extra cost.”

Trustworthiness of a witness is also promoted by an effective real time record. Testifying at a hearing can be an intense, stressful experience. Construction industry professionals do not typically choose this career because they want to be public speakers or cross-examined by lawyers. Signs of normal nervousness, such as stiff body language, dry mouth, or perspiration can be perceived as shiftiness or hallmarks of untrustworthiness. Recalling details on the fly or relaying a series of long-passed events clearly and concisely while under the scrutiny of the witness stand can be difficult for even comfortable public speakers.

A good written project record can help make a poor witness good and a good witness great. A direct examination by the lawyer for the witness’s company, the goal of which is to tell the story of the case effectively, is far easier for the lawyer and the witness when the examination can use the contemporaneously generated project records as a script-guide. “Mr. Smith, please read to the jury the first paragraph of the delay notice letter you wrote to the project’s owner on March 4, 2019.” “Now, please explain why you wrote what you wrote.” “Why was it important?” “What kind of help were you asking the owner’s designer to provide in this letter?” “Explain why you wrote this follow up letter.” And so on.

Contrast that kind of testimony with the witness not having such a real time record on which to rely. The witness, with minimal prompting from counsel, will have to be prepared to essentially tell the critical aspects of the story from memory. Having the record to rely on helps put the witness at ease, is a tool to prompt recall and additionally has the credibility benefit of permitting the witness to testify that “we told them this at the time, right here in writing.”

### **The Persuasive Triangle:**

*Logos, Pathos and Ethos* are the three classical parts of the persuasion triangle. Together they promote credibility and, above all else, credibility is the key to winning. Real time project records, that are strategic, effective, story-telling, written with the proper tone to evoke an appropriate reader-response, that crescendo over time, build a layered credible record and act as critical and effective evidentiary tools. They demonstrate that the arguments being made at the trial or arbitration hearing are not made up after the fact, but rather were genuine. They demonstrate a company’s and its employee’s awareness, competence and caring. They deprive the other side of claims of surprise, prejudice and avoid defenses like waiver. These same records make the evidentiary presentation far easier for lawyer and witness, promoting credibility and giving those deciding the case tangible evidence for them to review while deliberating that resonates with critical case themes. The effectively and strategically prepared real time project record is among the most effective tool for winning a case. Take the time to train your people so they appreciate the importance of the documents they prepare daily on their projects, and to give them the practical guidance they need to up their game.