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Construction Schedules as Sword and Shield: A Litigation-Informed Perspective

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Construction Schedules as Sword and Shield: A Litigation-Informed Perspective

The Schedule: More Than a Management Tool

A project's schedule is not just a chart of dates and activities—it is the living record of a project's progress, the backbone of claims, and the shield against disputes. Courts and arbitrators rely on CPM schedules to establish causation, entitlement, and quantum.

For lawyers and construction professionals, understanding how to wield the schedule as both sword and shield is essential. The schedule, especially when managed using the Critical Path Method (CPM), becomes the primary evidence for answering the central questions in every schedule-related dispute: did a particular event actually delay the project's critical path; if so, which party caused the delay; and is that delay independent or concurrent with delays caused by others. The concurrency issue typically dictates whether: time extensions only are to be granted, in the event of concurrent delay (excusable delay); or, in the event of an independent delay, both time extensions and compensation are to be granted (excusable and compensable). Once delay and responsibility is established, the schedule is used as a basis to quantify the compensation to be granted, if any.

For general contractors and construction managers, quantum often means multiplying the daily burn rate of general conditions/general requirements by the number of days of

excusable/compensable critical path delay. For owners, it may mean liquidated damages or actual costs (including potentially consequential damages, unless waived). For trades, costs for extended performance may include extended general conditions and requirements costs, labor and material escalation and lost productivity.

Building a Persuasive Record

Despite their reliance on CPM schedules, judges, arbitrators, and juries are rarely experts in scheduling. The technical logic ties that make sense to a scheduler can be opaque to a layperson.

This is why every schedule update should be strategically viewed as serving a dual purpose: it is both a management tool and part of the real-time evidentiary record that should be thoughtfully and strategically developed. The real-time record—monthly updates, narratives, letters, emails, notices, daily reports, meeting minutes, RFIs, and cost records—forms the tapestry of evidence that helps the fact and expert witnesses tell the story of the project if there is a dispute. It is effective and persuasive storytelling that wins delay cases, not technical scheduling jargon that most people not steeped in the industry will never fully understand.

The most compelling advocates, fact and expert witnesses in litigation are those who can integrate the project record into their analysis and testimony. Forensic scheduling divorced from contemporaneous documentation is rarely persuasive. When the expert must reconstruct missing narratives or repair a poor baseline, credibility suffers. The goal is to build a record that is both operationally sound, legally defensible and most importantly strategically advantageous, from the start.

This is not an easy challenge. Because a real time record can only be created in real time during the project, to do so effectively requires that those living and working the project day to day appreciate how disputes are litigated and how the real time record they create can be used strategically to advance and to defend against schedule-related claims. None of this is intuitive and a deliberate, considered approach, and often training for project teams, is necessary for it to be done effectively.

Contractual Traps and Negotiation

The process starts with the knowing and negotiating the contracts – both those upstream with owners and downstream with subcontractors. The body of the prime contract, its general conditions, riders, exhibits, and especially the specifications, often contain scheduling provisions that can become traps. We see more frequent employment of schedule-related clauses that used to be atypical; float ownership clauses, for example, may assign all float to the owner, complicating delay analysis. Clauses providing that the contractor gets neither money nor a time extension for concurrent delays can radically limit the contractor's entitlement to extensions, increasing exposure to damages. Strict waiver language may mean that even minor procedural missteps—such as missing a notice deadline—can forfeit an otherwise viable claim.

Other common traps include mandates for recovery schedules even when the contractor is not at fault for the delay, logic restrictions that ban open ends or limit lag use or impose other restrictions

on the schedule structure, constrictive activity duration caps, and owner approval requirements for baselines and updates, at times tied to an owner right to withhold all payment until it approves of the contractor's schedule.

This can create a troubling Catch-22 for the contractor: the schedule it believes honestly reflects owner-caused delay is rejected by the owner, contractually entitling the owner to withhold payment otherwise due, and the owner insists that the contractor submit a recovery schedule that indicates the project is not actually being delayed or which only reflects a recovered schedule, before it will accept it and fund payment. If the contractor stands its proper ground and takes the position that the schedule reflects the reality and that the contractor is entitled to a time extension (and possibly additional compensation), it knows it will not get paid and it will have to essentially finance the project, risk being defaulted if it cannot continue to perform due to financial constraints, and pursue its claim rights. That is obviously not an enviable position to be in. But the path of least resistance alternative, submitting a schedule that falsely masks the delays or which implies that the contractor will fund recovery of the schedule, results in the contractor making a project record that undercuts its own entitlement. Deep tactical and strategic analysis and some hard business decisions are often required to navigate these challenges.

Time Impact Analysis (TIA) deadlines may be short and unforgiving, and resource or cost loading requirements can add significant administrative burden. These provisions, if not negotiated or managed carefully, can turn the schedule from a management tool into a weapon wielded against the contractor.

Negotiation is key. Where burdensome requirements cannot be removed, they must be operationalized. Enter each project with a deliberate strategy for schedule-related claims evidence. Train project teams to understand notice requirements, update cadence, and the importance of cross-referencing schedule impacts to field documentation. Establish a central index for project records, linking schedule updates to RFIs, notices, daily reports, and meeting minutes. Weaving all of these threads together permits the storytelling tapestry to be a strategically advantageous one.

The Importance of a Credible Baseline

The baseline schedule is the foundation of the entire record. It must be credible, with all activities logically linked and constraints used sparingly and explained. Improper logic leads to misleading float and false critical paths. A poor baseline not only undermines the project's management but also damages credibility in litigation. If the expert must clean up the baseline before performing impact analysis, it invites attacks on the contractor's diligence and professionalism, even if the analysis result is genuine and meritorious.

Strategic and Timely Updates

Regular, timely updates are essential. Each update should be treated as both a management and litigation document. Updates must abide by the contract's timing mandates, providing contemporaneous evidence rather than retroactive explanations. The narrative accompanying each update should explain what changed, why, who is responsible, and how the change affects the

critical path and float. Cross-reference impacts to RFIs, notices, and meeting minutes, to build the schedule case with both the schedule analysis and the supporting documents that demonstrate credibility.

A particularly effective approach is the two-step impact and mitigation analysis. First, show the unmitigated delay impact—how owner or third-party actions have affected the critical path. Then, present mitigation separately, making clear that mitigation of owner-caused delay is aspirational, not guaranteed. If mitigation involves costs, such as overtime or resequencing, document them and request both time and money.

Contractors often neglect to preserve their claim rights by omitting to make the explicit, and typically required, statement that it is entitled to a time extension and additional compensation. The contractual notice provisions often require both – notice that the delay has occurred, coupled with the express ask by the contractor that it is seeking time and/or money as a result. Any time a contractor is providing any kind of notice to an owner, especially when it involves delay, it should be consciously evaluating whether one or both of the time and/or money considerations are in play and be deliberate in documenting that you are seeking whichever, or both, may be appropriate.

Using Updates as a Vehicle for Notice

Contractors often overlook the opportunity to use their monthly schedule update narratives as effective notice compliance instruments. By adding a “Notice/Impact” section to each update, explicitly asking for time and money where appropriate, and referencing related correspondence or other project records supporting the claim, contractors can often satisfy contractual notice requirements. Consistency across the update narrative, notice letters, and other potentially related documents like RFI’s, TIA’s, and claims logs is crucial and the various contractor employees developing these documents should deliberately and consciously coordinate to ensure that they are strategically developed and not done as a matter of rote routine.

Field records—RFIs, delay notices, daily reports, and meeting minutes—provide the evidence backbone for schedule impacts. Cross-reference schedule impacts to RFI submission and response dates, notice letters, and impact discussions in daily reports or logs. Embed references and narrative citations directly into the update summary. A schedule without field documentation is just data; a schedule with supporting records is persuasive proof.

Managing Constraints and Risks

Constraint logs are another valuable tool. They track unresolved prerequisites—design deliverables, permits, approvals, long-lead procurement—that block progress. By identifying and aging constraints, linking them to schedule activities and float consumption, and tying them to notices and meeting minutes, constraint logs translate abstract logic delays into concrete impediments that non-experts can understand when they are used as trial evidence. They become incredibly useful testimony guides.

Imagine the testimony from a Project Manager laying the foundation for a delay claim due to an owner's lack of design decision making, employing the Constraint Log as a real-time generated document now used as a guide for the critical testimony:

Q. Mr. Project Manager, please explain to the Judge what this document is we are looking at and what purpose it served during the project?

A. Your honor, when I realized that these issues we have been discussing relating to how we were not getting final design information from the owner and its designers, were likely to have real impacts on our ability to timely progress the work, I created this 'Constraint Log.' On the log I identified every design-related impediment we were tracking, and for each one I made a dated entry: every time we raised the issue with the owner in a weekly meeting or in a notice or an email or otherwise, explaining the issue and how it was threatening to or was actually impacting our ability to perform; each time some response was received and when we responded to it with further inquiries or info, if needed; and so on tracking each related event until the issue was resolved. I also indicated in the log and in our notices to the owner the time and cost impact concerns along the way and the ultimate analyzed time and cost impact we are seeking as a result of each issue in this case.

Q. Please explain to the Judge how often the evolving constraint log and the issues tracked on it were discussed with the Owner?

A. Every week at the weekly OAC meeting we went through the log and discussed each issue and how it was causing us to be delayed and we published the log to the Owner every week at the meeting.

This kind of impactful storytelling, using the real time record in conjunction with the expert analysis testimony to follow to explain in greater detail how each critical path impact actually delayed the project and quantifying days of delay and translating those into dollars, can be some of the most compelling testimony possible.

Construction managers must also manage upstream and downstream risks. Updates should distinguish owner-caused from subcontractor-caused delays, document subcontractor delay management and recovery, and align subcontractor schedules with the master CPM. Activity codes can isolate subcontractor-caused delays for quantification, and clear documentation can prevent the appearance of concurrency between owner and subcontractor delays.

Intentional pacing—slowing or resequencing work to pace owner-caused delays, to avoid stacking trades, unsafe conditions, or rework—must be documented and explained in real time. State why pacing occurred, show that it was proactive management, and tie it to evidence such as RFIs,

meeting minutes, and constraints. This helps rebut concurrency arguments and demonstrates diligence.

Practical Do's and Don'ts

Practical do's and don'ts abound. Save every live .xer file (native P6 schedules), use Primavera P6 for complex projects, and establish a legitimate baseline before mobilization. Call in experts early to guide record-building. Don't stop updating mid-project, waive time or money inadvertently in change orders or lien waivers, or use boilerplate language that undermines your claim. Owner approval processes for baselines and updates must be documented and managed. Throughout, plain-language narratives are essential. Judges, arbitrators, and jurors are not schedulers. Pair graphics with words that provide context and detail, explain why issues matter, show time consequences, and connect to money. Maintain a collaborative tone, coupled with clear warnings about impending impacts and requests for decisions.

The Power of Storytelling

Decision-makers respond when the record shows timely warnings about design or owner-driven changes, requests for design schedules to integrate into work planning, and regular meetings where schedules were displayed and extensively discussed. When these elements appear throughout the contemporaneous record, judges often adopt the narrative of diligent contractor or construction manager facing owner-controlled impediments.

Ultimately, the construction schedule can and should be more than a planning tool—it is a persuasive instrument that shapes outcomes. By treating every update as an evidentiary document, grounded in contract awareness, contemporaneous notice, and plain-language storytelling, construction professionals create a record that helps judges, arbitrators, and juries understand not just the logic ties, but the human story of cause, effect, fairness, and responsibility. In doing so, they protect entitlement, quantify damages credibly, and position the project for success in both project delivery and dispute resolution.

This approach, rooted in practical experience and years of dispute-informed strategy, can be a boon to those faced with the daunting challenge of effectively and efficiently making or defending against schedule claims.