

Paper Title:
Basic Training – Operational Risk Management Fundamentals

Teacher's Edition Power Point Accompaniment

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**Basic Training – Operational Risk Management Fundamentals;
*Teacher's Edition Power Point Accompaniment***

By: Gregory H. Chertoff, Esq., Partner Peckar & Abramson, PC

Why This Program? The Pareto Principle (a/k/a the 80/20 Rule, the Law of the Vital Few, or the Principle of Factor Sparsity):

The Pareto Principle, named after economist Vilfredo Pareto, holds that for many events, roughly 80% of the consequences come from 20% of the causes.

While no scientific study (at least none I'm aware of) supports the application of this principle to risk management by GCs and CMs, my 25+ years of experience dictate that it holds true for construction disputes. In almost every significant dispute I've been involved in, and there have been many hundreds, my clients have spent significant legal expense fighting about, and have won or lost cases over, a handful of basic issues that typically have little to do with the merits of the actual claims. Parties can invest tremendous resources developing evidence and arguing about issues such as:

- whether a claim was properly preserved or waived either through a failure to provide contractual notice or because of waiver language in lien waivers or change orders;
- working through dozens or hundreds of individual change order disputes, no one of which would be worth engaging a lawyer to address, but the accumulation of which drove the parties to loggerheads;
- whether a subcontractor was terminated properly pursuant to the applicable contract procedures;
- making up for a poor real-time record by attempting to gather bits of evidence spread throughout a project's millions of documents to substantiate a claim; and
- how to reasonably prove damages long after the fact when the required, and available, information was not deliberately segregated and documented in real time.

If project teams on the front lines, many of which have never been involved in a legal battle, and even fewer of which have ever seen how it plays out at arbitration or trial, had a better insight into how costly and time consuming, and potentially how outcome determinative, these basic issues could be, there would no doubt be far fewer disputes. Those that remained would be more efficiently resolved, with better outcomes for those entities that gained the strategic advantage by having addressed these issues in real time during the project. Those in-the-know could make their cases cleaner and clearer, could focus their resource investment on other parts of the case development and could gain strategic advantage because of their adversary's failures to do likewise.

These are the 20% of the causes that experience dictates, with relatively little effort, could meaningfully improve 80% of the consequences.

Why is This Program Structured This Way? Short Answer – You are Busy.

Given that this program is being presented, in the first instance, to a group of General Counsel, I do not expect it to be informing most of you of any breakthrough legal insights. Rather, the intent is to give you a tool to take back with you to facilitate your efforts to train those in your organizations who need it the most on how to spot these issues, and if not to resolve them, to at least know when to call for help from those within your company that do.

While most General Counsel I work with could make a program such as this, often a better one tailored to their individual company's issues and culture, because of the scarcity of the scarcest resource – time – I find that many have not done so.

So I have, hopefully in a thoughtful, engaging and practical way. I give it to you without copyright or claim, to do with what you will. Ignore it, use it as-is, modify it to suit your company's needs and, importantly, to address the law applicable to the jurisdictions in which you operate. It is necessarily generic in its nature and appropriate tailoring is likely required and would certainly be helpful.

My hope is that it will make your lives easier, help you better train your people and avoid some legal expense or exposure for your organization.

A live PPT copy of the program will be made available to you. Feel free to download it and make use of it.

I welcome any feedback you are willing to provide so that I could improve upon this model and this program. Please give me the benefit of your thoughts.

Format: A Slide-by-Slide Teacher's Edition

On the following pages, correlated to the power point slide deck, I provide my suggested thoughts and talking points, again for you to consider and do with as you feel appropriate for you and your company.

SLIDE 1: DISCLAIMERS



- This slide is self-explanatory and can be eliminated if you give this presentation to your organizations.

Notes

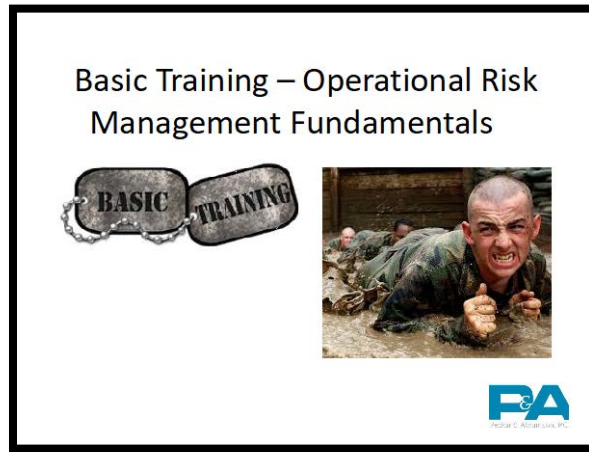
Slide 2: Presenter Info



- My information. Feel free to delete this slide or make it your own. You need not give me or my firm any credit if and when you present this program to those within your organization. However, please do not present it to others outside of your company.

Notes

Slide 3: Presentation Title




- Address Pareto Principle concept and the goals of the program:
 - To give some insight to those on the front line regarding how things they deal with every day, often without much thought, can become issues of major significance and expense in a legal battle;
 - Don't hope to make them into lawyers or experts in anything to be discussed;
 - If they come away from this program with some improved ability to spot the issues to be discussed in the program in real time so that they know they should be reaching out to the company's resources for help in addressing them – that's a home run.
- Consider asking for a show of hands from the audience:
 - How many of you here have even been involved in a legal dispute on one of your projects?
 - How many have seen or participated an arbitration or a trial?
- Explain that without that experience, they cannot be expected to have an in depth understanding of how what they do during the project can help or hinder how the legal battle plays out often some years later.
- Thus, one of the key goals of this program is to give them insight into how lawyers argue about things and prove things so that their day-to-day actions can be informed by that knowledge.
- Emphasize that there is really only one chance to make a strong evidentiary record in real time – while the project is ongoing. After-the-fact efforts, while they may be perfectly accurate, are never as credible as those made in real time, are often very expensive to make (requiring experts and analysis), and they are not going to have the same impact on a judge, jury or arbitrator as a real time effort.

Notes

Slide 4: The Topics (An Overview of What's to Come)

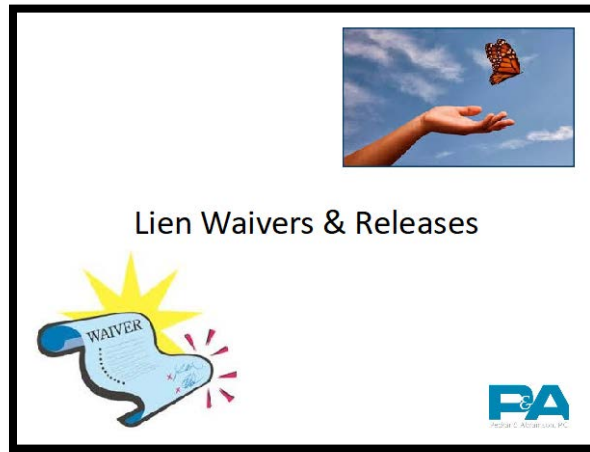
The Topics

- Progress Payment Lien Waivers & Releases
- Change Order Management
- Subcontract Claim Triage
- Subcontract Default Strategies
- How to Make a Record
- Documenting Your Damages



Notes

Slide 5: Lien Waivers and Releases (Topic Heading) (Slides 5 – 17)





- **CRITICAL NOTE:** Certain jurisdictions have statutorily required lien waiver forms that cannot be varied. This program as drafted on this topic does not address these unique jurisdictions, but rather assumes that it is to apply to a jurisdiction where the parties can use any form of lien waiver.
- If you are in a jurisdiction with a statutory lien waiver form mandate, ensure that you either exclude this topic or, better, modify it to suit your jurisdiction.

Notes

Slide 6: What Are They?

What Are They?

- A “Waiver” and a “Release.”
 - The party giving is “waiving” and “releasing” rights it has.
 - You are giving something up!
 - It’s important to know ***exactly*** what is being relinquished!
 - READ THE DOCUMENTS!
 - Lawsuits won or lost one these **ALONE!**



- A basic overview of why these documents are legally significant;
- Many project team members view these as mere “boiler-plate” forms;
- Many have never read one – they just collect them and throw them in a drawer;
- The goal here is to emphasize that, to lawyers in a legal battle these are critical tools in the legal tool box and that what they say, or don’t say, has real legal significance.

Notes

Slide 7: Receipt v. Line in the Sand





- Explain there are generally two types of lien waivers/releases

Notes

Slide 8: The Receipt Lien Waiver/Release

The Receipt

- Waiving and releasing
***“to the extent of
payment received.”***
- Very LIMITED waiver.
- Merely acknowledging
payment received.





- Releases and waives claims “to the extent of payment received;”
- Thus, it is like a receipt – a mere acknowledgment of payments actually made;
- Very limited in its waiver scope.

Notes

Slide 9: The Line in the Sand

The Line in the Sand

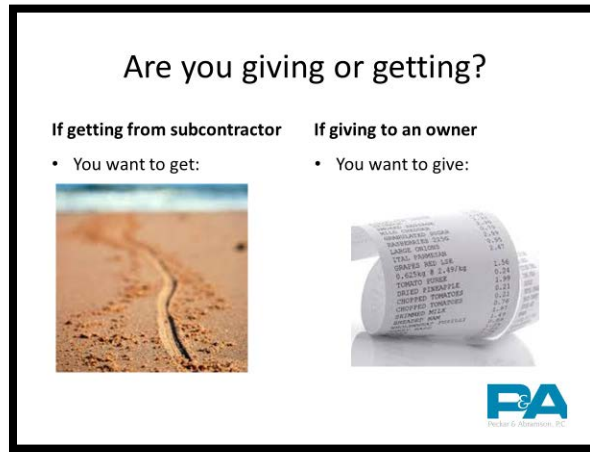
- Waiving and releasing ***“all claims through the date of ...”***
- Very BROAD waiver.
- Giving up all rights through the indicated date – not limited to extent of payment.



- In contrast to the receipt, it is a very broad waiver’
- Waives “all claims through the date of...” – could be date of the waiver/release document’s execution, or through a pay period, or some other identified cut off;
- Very broad waiver of rights for anything that happened to the party giving it through the cutoff date.

Notes

Slide 10: Are You Giving or Getting?





- This is a prime example of how a GC/CM, in the middle of a contractual chain, has to evaluate issues differently depending on whether it is looking upstream (to the owner) or downstream (to subcontractors);
- The analysis and goals are often the reciprocals of each other depending on which way you are looking;
- If getting a waiver/release from a subcontractor, you want it to be as broad as possible, so the sub is giving up all of its rights and claims and giving you the broadest possible protection, so you want a “line in the sand;”
- By contrast, if you are giving a waiver/release to an owner, you want it to be as limited as possible, so you are preserving rights to the extent possible, so you want to give a “receipt.”

Notes

Slide 11: Did You Read Your Contract?

Did you read your contract?

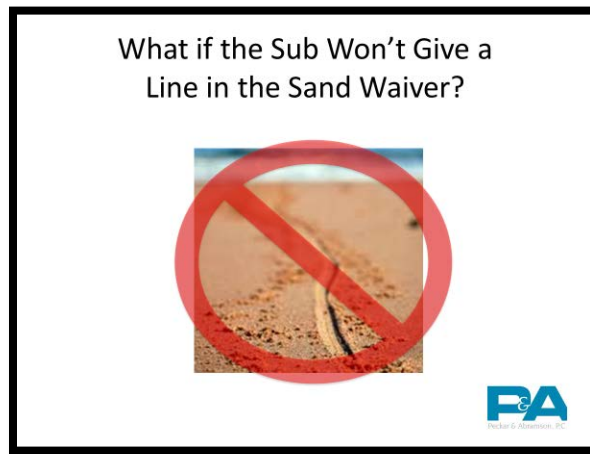
- Does your owner contract have a lien waiver/release form as an exhibit?
 - Negotiate now!
- Does it require you to give the same form to the owner that you get from the subs?
 - Resist!
- Does your subcontract dictate a form?
 - It should!



- Contracts sometimes dictate, up front, the form that is required, typically as an exhibit;
- Those negotiating contracts have to review and understand what is being required;
- If your owner contract requires a “line in the sand” form, negotiate that form up front:
 - Explain how it does not work in practice;
 - “Owner, there are sure to be pending change orders every month that are in process. If I have to sign this ‘line in the sand’ form, I would be giving up my rights to things we are still negotiating. I don’t think that’s what you intend and you must understand I can’t agree to that;”
- Consider having your subcontract include a “line in the sand form” requirement.

Notes

Slide 12: What if the Sub Won't Give a Line in the Sand Waiver?



Notes

Slide 13: Fall Back Position Animation Graphic




- What if your owner resists giving you a “receipt” type form either during contract negotiations or during the course of the project?
- What if your subcontractor raises these issues with you, as you have or would raise them with the owner?
- There is a typical, and generally accepted, fall back option.

Notes

Slide 14: Specific List of Reserved Claims

Specific List of Reserved Claims

- Waiving and releasing “all claims except those listed on Exhibit A to this waiver/release...”
- Advantage – reasonable position
 - Not holding hostage money due for a complete waiver.
- Burden on waiving party to make sure it is disciplined in creating the list.
- Forces issues to be identified and promotes resolution and limits scope of disputes.



- Give a modified “line in the sand,” which gives up all claims, “*except those listed ...*”
- Pros and cons to this approach:
 - Pros: It is a reasonable position for both sides – party giving waiver has to identify what it is preserving, but it should know; the party getting the waiver does not hold sums otherwise due hostage for getting a waiver of things the other party should be able to continue to pursue;
 - Forces issues to be brought to a head and, hopefully, resolved promptly;
 - Cons: The burden is on the waiving party to make sure it creates a comprehensive list and that it keeps it updated and complete with every payment application. If you fail to include claims on the list, it will be even harder to argue that you did not waive them.

Notes

Slide 15: Lien Waiver and Release Red Flags



- Key things to be aware of and look out for.

Notes

Slide 16: Red Flag List



- When getting lien waivers/releases from subcontractors, look at them carefully immediately upon receipt;
- Look for unexpected mark ups, like an “*” with notes, or efforts to include reservation of rights language not printed on the base form:
 - Often see this with respect to general conditions claims, or cumulative impact claims, or a unilateral attachment of a list of reserved claims;
- Make sure the form is properly and completely filled out:
 - Often see them incomplete or just plain incorrect – that leaves room to argue about what their effect should be and possibly renders them unenforceable. At the very least it is counterproductive to the goal – it leaves room for things to fight about, where the intent is to create a black and white line in the sand with nothing to argue about;
- Make sure it is properly signed and notarized (if required) and all other aspects of it are properly completed.

Notes

Slide 17: Call in Reinforcements



- The chorus theme of this presentation – project teams are not expected to become masters of these strategic issues, but they are expected to be able to spot the issues sufficiently to call in those who are, including:
 - Higher level management;
 - Risk Managers;
 - In-house lawyers;
 - Out-house lawyers (usually last resort and only with appropriate approval).

Notes

Slide 18: Change Order Management (Slides 18 – 28)



- Next topic – Some basic strategies for addressing change order claims, whether you are the party making them or the party receiving them.

Notes

Slide 19: Not Fine Wine/Don't Let Them Fester



- Contractors are terrific at kicking the can down the road and not dealing with change claims in real time, letting them pile up;
- It is understandable – you don't want to get diverted from the job of building your project, squabbling about a long list of changes, so they get pushed to the end of the job.

Notes

Slide 20: The Change Order Rock Pile



- And that's why we often see the "change order rock pile" as part of a dispute;
- The list of 10, 50 or 100+ individual change order/back charge/scope disputes, which include some issues in the hundreds of dollars, some in the few thousands, and some that could be of very substantial values.

Notes

Slide 21: Resolve Change Order Issues Early

Resolve Change Order Issues Early

- Typical sub lawsuits involve many disputed change orders.
- Most, individually, not worth a legal battle.
- Collection of many small disputes is very costly to fight.
- Push hard for resolution, even if not a perfect solution.
- The compromise of resolution is often less costly than the fight.





- Most of these, in isolation, would not warrant an investment of legal dollars to get to resolution – the legal cost often outweighs the amount in dispute;
- But pile them all up and, amalgamated, they can be big dollars;
- But understand, it often takes lawyers just as long to analyze and build a case around a \$5,000 issue as it does a \$50,000 or \$500,000 issue – fact gathering, legal analysis, searching records, arguing and proving an issue – the effort to do it well is often the same regardless of the value of the underlying claim;
- So AVOID THE ROCK PILE;
- Push hard for real time resolution, even if not perfect;
- Appropriate compromise is often less costly than the fight.


Notes

Slide 22: Resolve Change Order Issues Early (Con't)

Resolve Change Order Issues Early

- A pile of change order disputes gives the subcontractor ammunition to claim **you** breached by not paying, and frustrated their ability to perform, excusing their breaches.





- An additional strategic consideration to weigh in the balance:
 - A pile of unresolved change orders can give a subcontractor arguments that you starved it for cash flow, or breached your contractual payment obligations, hurting its ability to perform;
 - This can be used to try to justify its bad performance and excuse its breaches;
- Not suggesting that you give in to every subcontractor change order claim, or agree to pay for things that are not meritorious;
- Suggesting you give the pros and cons of each approach serious consideration as you decide how to deal with these issues in real time;
- And that you recognize the red flag of these starting to pile up into the rock pile so that you can call in reinforcements or at least make deliberate, strategic decisions about how best to proceed.

Notes

Slide 23: Success/Failure




- Following are some strategic considerations for each potential outcome – for when you are resolving a change order claim or for when you try but cannot do so.

Notes

Slide 24: Success – If you CAN resolve a change order claim

If you CAN Resolve a
Change Order Claim

- Get the full benefit of change order closure!
- Ensure the resolution is **fully** documented.
 - With complete explanation and details of the scope resolved.
 - Resolve **all** cost implications.
 - Expressly address **all** schedule impacts.
 - Expressly address **all** impacts and inefficiencies.



- Make sure you really get it resolved by documenting it so that you enjoy the benefits of complete closure. Don't leave unintended loose ends;
- Document fully:
 - Complete, clear explanation of what was resolved;
 - Make sure all costs implications are addressed and all further rights of recovery are waived;
 - Make sure all schedule impacts are addressed and all further rights to additional time are waived;
 - Make sure all impacts and inefficiency claims are addressed and all further rights (including cumulative impacts of how all of the changes aggregate) are waived.

Notes

Slide 25: Change Order Waivers

Change Order Waivers

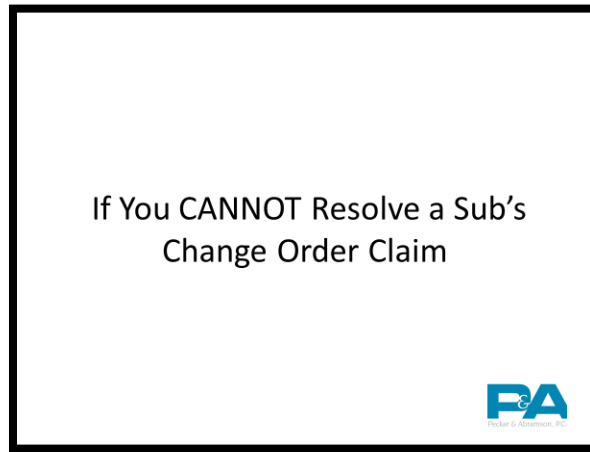
- Get a **COMPLETE** waiver
- *All* Direct Costs
- *All* General Conditions
- *All* Time Adjustments
- *All* Impacts to productivity and efficiency



- Use the “line in the sand” lesson in the change order waiver language;
- Wrap up all the foregoing factors clearly and expressly in final closure.

Notes

Slide 26: Failure – If you CANNOT resolve a Sub’s change order claim



- Need a strategy for the fight that will come later.

Notes

Slide 27: Take the Credibility High Ground




- Cases are won primarily on credibility – of the witnesses, of the record made in real time and of the perceived legitimacy of your positions;
- You want to demonstrate that you acted in good faith at all times;
- You want to show the judge, jury or arbitrator that you were substantively correct and that you were open and honest with your sub as to why you were legitimately denying their claim.

Notes

Slide 28: If you CANNOT resolve a Sub's change order claim

If You CANNOT Resolve a Sub's
Change Order Claim

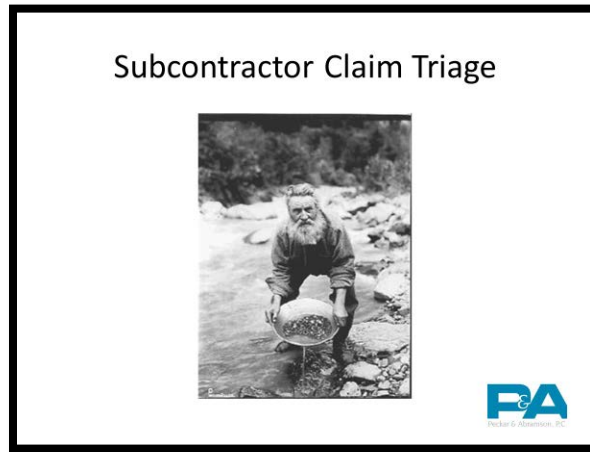
- Send the sub a well-documented, real time, record of your rejection, with a **complete** package of support for your position:
 - Documents and a **narrative** demonstrating the work was in-scope, for example.
 - References to contractual bars to entitlement.
 - Challenges to sub's support (or lack thereof).



- Make a clear and positive record in real time (the only chance you have to do so) of your position:
 - Go on record with your denial;
 - Document it with a narrative;
 - Use your good contract provisions (if you can);
 - Challenge the sub's position, support (or lack thereof);
- No one size fits all – but think about how a judge, jury or arbitrator, a few years from now, will look at the positions you took and inform your strategy from that perspective.

Notes

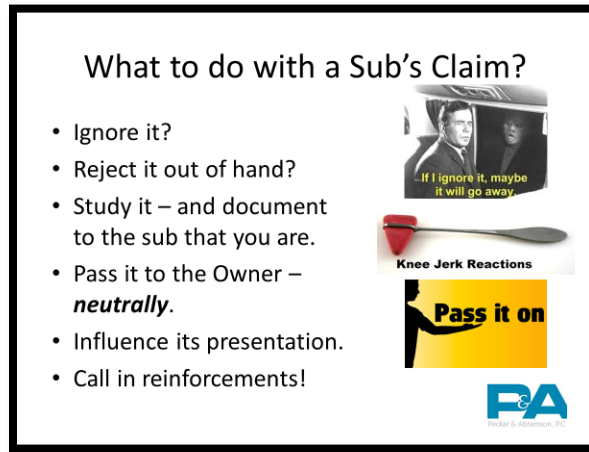
Slide 29: Subcontractor Claim Triage (Slides 29 – 31)



- Different contractors react to a subcontractor claim submissions differently;
- Your company may have an established protocol with which you should comply;
- If a sub submits a “formal” claim document, especially one that looks like they had help from a claims or schedule consultant and/or from a lawyer – that’s a significant red-flag situation that should be dealt with strategically;
- Often, however, I see project level people reacting to a sub claim on an ad hoc basis, with emotional investment that clouds their dispassionate judgment.

Notes

Slide 30: What to do with a Sub's Claim?



- Ignore it? A common response I see. Throw it in a drawer. Take weeks or months to even acknowledge its receipt, let alone to meaningfully and strategically respond:
 - Not a good approach;
 - Think of the record you are making by ignoring it;
 - The sub gets to argue that you acted in bad faith;
 - That you left it in limbo;
 - That you led it to believe, by default, that it would be approved;
 - That you prevented it from mitigating its damages because you did not even tell it what you thought of its position;
 - Or many other bad, or bad appearing, consequences.
- Reject it out of hand? Another common response I see – the knee jerk denial:
 - Not a good approach;
 - What if it has merit in whole or in part – you lose credibility;
 - You miss opportunities to deal with it strategically;
 - You miss the chance to give a meaningful, considered, well-reasoned denial based on analysis.
- ***Sometimes (but by no means always)*** -- a good approach is to pass it up to the Owner, ***neutrally.*** “Hey, Owner, Sub XYZ has submitted this claim to us contending that the late issuance of design changes and design information made its work more costly and run longer. We have not yet analyzed it, but are passing it on to you for your prompt review so that you can conduct your own assessment without delay.”
- ***Sometimes (but by no means always)*** -- a good approach is to engage with the subcontractor to try to influence the way it is presenting its claim to promote your chances of getting the owner to approve and fund it. “Hey, Subcontractor, you seem to be claiming that our company caused all these delays. The reality is that these issues have their genesis in owner/designer problems. Let us share some information with you so you can understand the facts to, possibly, facilitate us presenting this to the Owner so that we can both be compensated for this fairly.”

- ***No one size fits all approach*** – these are often complicated situations requiring sophisticated, nuanced, strategies.
 - **Call in the reinforcements!**

Notes

Slide 31: Call in Reinforcements Graphic (for emphasis)



Notes

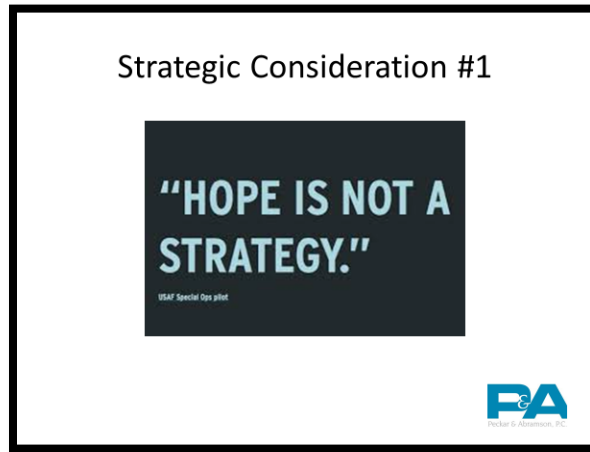
Slide 32: Subcontractor Default – Have a Strategy (Slides 32 – 43)



- This is another big deal that I often see given short strategic shrift – to significant client detriment.

Notes

Slide 33: “Hope is Not a Strategy”



- You really need a plan if you are going to default and/or terminate a sub.

Notes

Slide 34: Defaulting/Terminating is Complicated & High Stakes – Graphic



Notes

Slide 35: The Risks

The Risks

- If you don't do it right
(*procedurally* &
substantively)
 - **YOU** are in breach!
 - You don't collect damages
 - You pay damages to the subcontractor!



- If you don't do it right – you are in breach;
- You don't collect your damages;
- You risk paying damages to the subcontractor!
- Procedural & Substantive Default Correctness Issues:
 - Must get both right to win (and to avoid losing)
 - Procedural – dot all the contractually required “i’s” and cross all the “t’s”;
 - Substantive – must prove that the sub was *actually* in default of its contractual obligations;
 - More on how to do this effectively later in the presentation;
- If you don't win ***both categories*** of arguments – you can lose your case and you can be found to have been in breach.

Notes

Slide 36: Start the Process Early!






- There is a lot to consider when defaulting a sub – don’t rush it;
- I often get a call from a client along the following lines: “I need your help drafting a default and termination notice. This sub has been failing for months and I can’t wait any longer to replace them. I need them off the job TODAY!”
- Right there – you are setting up for failure;
- I understand there can be a lot of pressure to go, go, go;
- But two years later if your company is paying the subcontractor damages and not collecting damages – people are going to rethink whether it was a good idea to rush.

Notes

Slide 37: Follow Procedure!

Follow Procedure!

- Failure to follow subcontract procedures means **YOU (probably) BREACHED THE CONTRACT!**
- Notices
- Time periods
- Opportunities to cure (even if you think impossible)
- Method of delivery



- Procedural – must follow all of your subcontract’s requirements to the “T”;
- If it says 2 notices 7 days apart, delivered via certified mail, to John Smith and Mary Jones on pink paper in 30 point type with a smiley face and a gold star – that’s exactly what you have to do!
- Almost every subcontract, and the law in many jurisdictions, requires that you give a sub notice of its failures *and an opportunity to cure*:
 - Do that – even if you think the circumstances make it impossible for the sub to cure in the time allotted;
- Don’t prejudice your position through impatience or sloppiness;
- Don’t add to the things you are fighting about if they can be avoided by dotting “I’s” and crossing “T’s;”
- Many subcontracts require a multi-step notice of default and termination process;
- At a minimum, these requirements must be respected or you risk being found in breach for a **procedural** failure.

Notes

Slide 38: You Better See it Coming!





- So, what should you be on the lookout for as subcontractor default red-flags so you can start planning and strategizing early so as not to be caught off guard?

Notes

Slide 39: Subcontractor Default Red Flags

Subcontractor Default Red Flags

- Not performing
- Not showing up for meetings
- Lack of communication
- Not ordering long-lead items (check on them!)
- Materials not showing up on schedule
- Going on the offense – claims/change orders
- Calls for money from lower tiers
- Lower tier liens threatened or filed



- Run through list of red-flag warning signs;
- This list is certainly not exhaustive;
- The point is that the front line team should be trained to be on the lookout for signs of sub distress, whatever they may be and they should know to act on them promptly by calling in reinforcements.

Notes

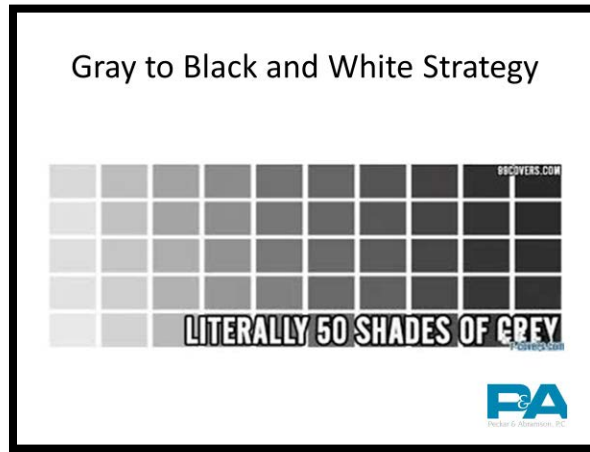
Slide 40: If you see the red flags



- Act swiftly & don't rest on your laurels;
- Now is the time to be thinking about how to:
 - follow your procedural requirements;
 - build a record of substantive merits.

Notes

Slide 41: Gray to Black and White Strategy



- The goal when properly setting up a subcontractor default/termination is to take what is often very gray, and easy and expensive to fight about and to make it as black and white as possible because that makes it more certain and less costly to prove.

Notes

Slide 42: Subjective v. Objective Bases for Default

Subjective v. Objective Bases For Default	
Subjective (Bad – Easy to argue about)	Objective (Good – Hard to Argue About)
<ul style="list-style-type: none"> • Opinions: <ul style="list-style-type: none"> – “I think,” “I believe,” “I know” • Predictions: <ul style="list-style-type: none"> – What may (or may not) happen in the future • Value judgments: <ul style="list-style-type: none"> – Is there “enough” of something 	<ul style="list-style-type: none"> • Historical facts: <ul style="list-style-type: none"> – Sub <i>didn't</i> bond off lien. • Did something already happen or fail to happen? <ul style="list-style-type: none"> – Sub already missed an established deadline. • Comparative checklist: <ul style="list-style-type: none"> – Sub agreed (in writing) to have 9, but only had 3 workers, <i>yesterday</i>.

- Explain how subjective things are hard to prove, leading to uncertain outcomes and significant expense while objective, check-list type things are easy to prove;
- The goal, again, is to use the real-time opportunity to make an **objective** record of the sub's defaults –
 - Develop real-time strategies to convert the subjective (gray) into the objective (black and white) ;
- Examples of Subjective things (Hard to Prove):
 - Opinions –
 - “I think, or believe, or know in my heart of hearts ... the subcontractor does not have enough manpower” -- a project manager's *subjective* belief is not proof that the sub is in default;
 - Predictions –
 - “I believe that *they were never going to hit the milestone deadline*” -- a project manager's *prediction* of what might or might not happen in the future can be impossible to prove. No evidence; not scientific;
 - Sub can just argue, “If you didn't terminate me, I was going to bring 30 more workers the next day to make up the time!” Or similarly claims about what the future might have held.
 - Value judgments –
 - “They did not have *enough* manpower to hit the deadline” -- a PM's subjective evaluation of how many workers, for example, were required, is setting up for a he-said-she-said argument without any objective way to establish who was right.
- Examples of Objective Things (Easy to Prove):
 - Historical facts –
 - The sub did not bond off its lower tier supplier's lien, despite the written demand per the contract that required the sub to do so two weeks ago.
 - An already established failure to meet a contractual deadline –



- The sub was required to finish Areas X and Y per their own schedule commitments and they missed the dates.
- Comparative checklist –
 - Sub agreed, in writing, to given manpower level, but did not honor the commitment.
- It is impossible to give every possible example of things that are subjective and strategies on how to try to make them objective. But project teams should be aware of these critical concerns so that they know enough to call in the reinforcements to help develop these kinds of strategies.

Notes

Slide 43: It cannot be rushed.

It cannot be rushed.

- Need to analyze the facts.
- Need to identify objective bases.
- Need to develop and implement strategies to make subjective objective.




- As you can understand, none of this can be done in an instant;
- So you have to start thinking and strategizing about these concerns as soon as you see a sub starting to falter.

Notes

Slide 44: Some Possible Approaches

Some Possible Approaches

- Get sub to agree (in writing) to fixed levels of manpower.
- Get sub to agree to fixed milestones.
- If sub asks for advance funding – get a quid pro quo – admission of default.
- If sub does not resolve lower tier liens – often objective default.
- Document
- Document
- Document
- Explain the prejudice



- Get sub to agree to objective commitments **IN WRITING**:
 - Manpower levels;
 - Milestones;
- If sub is asking for help (cash flow is typical) – and you are willing to entertain the idea – get something for it in return:
 - Admission of default or inability to perform;
 - Acknowledgement of sub’s financial inability to meet its obligations;
 - Whatever the situation may permit;
- Failing to bond a lower tier lien is often an easy black and white default;
- Whatever approach is taken – document, document, document it clearly:
 - Explain in the documentation how your company has been prejudiced by the sub’s failures;
 - Explain the hurt.

Notes

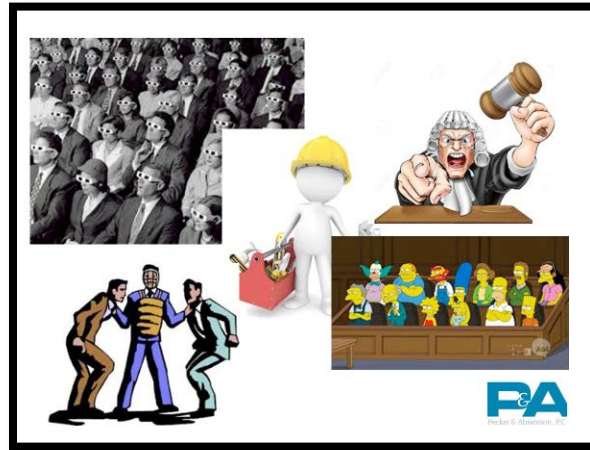
Slide 45: Making a Record



- Disputes are won or lost on the basis of building trust in the judge, jury or arbitrator – it is all about building credibility in your position;
- The best way to make your position credible is to document it in real-time, thoroughly and compellingly;
- And then being consistent with your position from start to finish;
- Following some basic tips can significantly improve your record making efforts.

Notes

Slide 46: Know Your Audience



- If you are writing a letter or an e-mail to someone, a subcontractor for example, the subcontractor is just one member of your ultimate audience:
 - Equally important audiences include (each on a click in the PPT) –
 - The Judge, Jury or Arbitrator who is going to hear the case and read that letter or e-mail 2 years from later.
- So – you must write your e-mails and letters with BOTH audiences in mind;
- Be clear;
- Be complete – take the few extra minutes to include relevant context:
 - When I first started doing this, before e-mail, if a Project Manager was taking the time to write a letter to a sub, it was a big deal. Now, with e-mail, people shoot first and think later;
 - Be disciplined in your communications – they are all discoverable;
 - Explain discovery and its scope, briefly;
- Relay this true story or adapt to your purpose:

“I had a case where one of the issues was whether my client, the CM, had timely rejected a sub’s claim. In meeting with my client’s PM, he assured me that the sub was wrong – he had an e-mail clearly rejecting the sub’s claim shortly after it was submitted. ‘Great,’ I said, ‘get me that e-mail right away.’ The next day he sent it to me, it said, ‘Joe, the thing we spoke about yesterday, the answer is no.’”

 - This story emphasizes how important it is to take a little extra time and include context for your ultimate audience – the judge, jury, arbitrator, adversary’s lawyer, etc.

Notes

Slide 47: Call in Reinforcements!



- Emphasizing that the front-line teams should remember this one key takeaway – they are not expected to be able to do this all themselves all the time. Ask for help.
-

Notes

Slide 48: Document Your Damages! (Slides 48 – 54)



- When you are making a claim, either against a defaulted sub, or against an Owner, or anyone else, you must be thinking, again in real-time, about how you are going to prove the other key element of your case – damages (the first being liability).

Notes

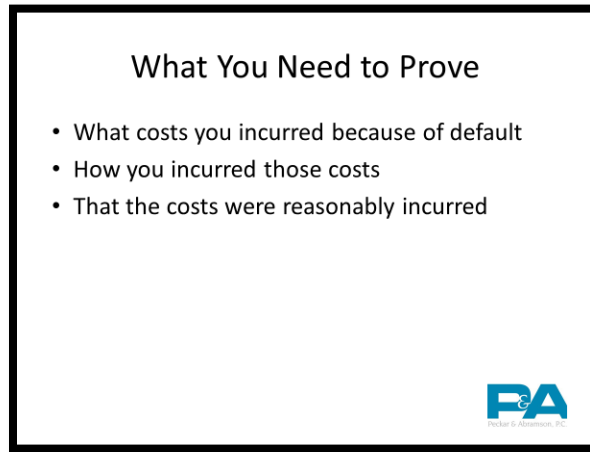
Slide 49: Have a Strategy!



- Here, too, it doesn't just happen on its own – you have to have a strategic plan in place in real time to make it successful.

Notes

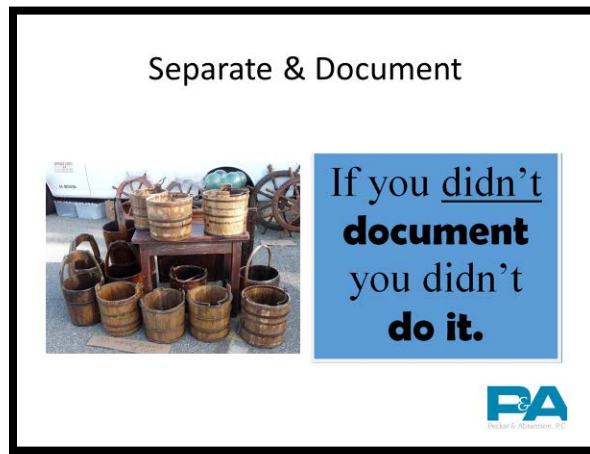
Slide 50: What u Need to Prove



- These are the three key things you are going to have to prove about your damages:
 - What costs were incurred because of the default;
 - How they were incurred;
 - That the costs were reasonable.
- With these goals in mind, you have to tailor a strategy to achieve them based on the specifics of your situation.

Notes

Slide 51: Separate & Document





- These are key words to remember when tracking damages.

Notes

Slide 52: As Many Buckets as Possible

As Many Buckets as Possible

- Not just one new cost code
 - Different costs will face different challenges
 - Tracking costs discretely provides flexibility when trying to tie costs to liability





- Don't just dump all the costs you are tracking into one code:
 - While it may seem burdensome at times, you want to keep track of things in as many different categories as possible;
 - This gives you strategic flexibility when it comes time to fight about these costs;
 - Different costs will be subject to different attacks by the other side;
 - If you have them in their own buckets, if you lose some arguments, you can contain the damage;
 - Detailed segregation of costs also promotes credibility.

Notes

Slide 53: Document Effectively

Document Effectively

- Credibility comparison:
 - real time v. after the fact
- Create short narratives
- Take many *effective* photos
 - Not just a few examples
- Take video
- Think about the audience




- Credibility Comparison – real time v. after the fact:
 - We’ve spoke about “real time” a great deal already, but let’s discuss why this is so important. Imagine sets of witness testimony at a trial:
 - Witness testifies as follows: “I kept track of my time spent managing this default every month. On the last day of each month, I looked back over the month and all the things I did and did my best to tally up the time I spent dealing with issues related to the default. I honestly believe I captured the time accurately.”
 - Witness testifies as follows: “Right after the default, I created a log to track the time I spent managing the default and at the end of every day, or at worst the first thing the next morning, I wrote down exactly what I did related to the default, segregated that time from my regular job responsibilities, and logged the time spent. I did this routinely, as a matter of practice.”
 - Both of the tallies could be the exact same number, and both could be equally correct in fact – but the second testimony is going to be far more credible and impactful than the first.

Notes

Slide 54: Prove Reasonableness

Prove Reasonableness

- If possible, competitively bid completion work
- Buy completion apples-to-apples
 - No extra or different work scope
 - If you can't – document and carve it out
 - Don't over-reach – giving things up creates credibility
- If not taking low-bidder, make a record as to why
- Schedule related costs require special attention



- Your damages claims are going to be challenged, so you need to be thinking strategically about how you are going to justify them years down the line;
- There is no one size fits all answer;
- The industry standard for reasonable costs is the competitive bid:
 - Some circumstances permit it, others do not, but at least consider it as an option;
- Don't mix up your issues – you need a clear delineation between the costs you are claiming as damages and those that would have been entitled the defaulted party to extra compensation;
- Don't over-reach – credibility is paramount; throwing in the kitchen sink costs more to fight about and, each time you lose an argument over something that's a stretch, you lose credibility and damage your stronger positions;
- Schedule claims are unique and complex – too complex to even give strategy pointers about in this presentation – just know that they require special attention from the outset.

Notes

Slide 55: Prejudice is the Flip Side of Notice:



- Every contract requires all kinds of notices:
 - Delay events;
 - Extra work;
 - Unanticipated conditions;
 - Time and money requests;
 - Etc, etc, etc.
- More cases are lost over a failure to give notice and more money is spent on lawyers trying to argue around a lack of good, written, notice, than on any other set of issues (in my experience);
- Why? Because contractors seem to be inherently scared of giving good, contractually compliant notices;
- Why? Because they think it is a declaration of war – because they don’t know how to do it with some finesse, because they have not been trained in the proper way to write an effective notice;
- How many times have we heard the “Honeymoon Excuse?”
 - “But we just started the job, we didn’t want the owner to think that we are a ‘claims outfit’ right out of the gate.”
- A notice does not have to be a hot stick in the eye;
- Rarely does a contract require a notice be declared in 50 point type with a specific contractual reference as a “NOTICE!!”
 - Although sometimes they do – and you should adhere to those obligations if they do;
- You can almost always include all the key things a notice requires while striking a tone of productive collaboration – that helps maintain relationships and it makes a much better, more helpful, record for the judge, jury, arbitrator later on:
 - Consider a tone like the following:
“Owner, we are very concerned about the fact that we are not receiving critical information from your design team timely. We sent RFI’s on X, Y, Z, 30 days ago, but have yet to receive a meaningful response. While we have been doing whatever we can to avoid an impact to the schedule

because of these issues, it is now becoming critical and is going to delay the schedule and cost more money if we don't get these responses within a few days, at the latest. We do not want this to be a problem and we ask for your help to get this on the right track. If there is anything we can do to assist in moving this along, please let us know – we want to be part of the solution, not the problem. We will continue to try to mitigate the impact of not having this information, but we are truly concerned that we are running out of practical work arounds. We are available for a call or a meeting, or any other participation that you think may help resolve this.”


- That is probably a contractually compliant notice, but it is not a stick in the eye;
- Also understand WHY contracts require you (or your subs) to give notices:
 - One reason is the “gotcha” – so if you don't comply, the other side can say you waived your rights;
 - Another is really legitimate (or will be argued to be so) – PREJUDICE – if you don't tell the other side that something they are doing or failing to do is hurting you, you are depriving them of the opportunity to do something about it;
 - “Judge, if they had only raised their hand and told me that they were not getting critical design information from my architect, I would have called him up, set up meetings, lit a fire under him right away! But they didn't even mention this to me until it was too late to help the situation.”
 - Remember – the flip side of Notice is Prejudice.

Notes

Slide 56: Key Takeaways

Key Takeaways

- Ask for help – early and often.
- No one-size-fits all answers.
- Awareness is critical for early action.
- Properly defaulting/termination is like building a project:
 - Requires expertise
 - Requires a strategy
 - Requires diligent implementation
- Call in the reinforcements!



Notes

Slide 57: That's All Folks!



Notes
