

Prolific Notetaking Translates to Solid Evidence

By James Ahlstrom and Jeffrey Stevens

Just as more driving increases your chances of a flat tire, a greater volume or years of experience in construction and development work undertaken by a company increases the chances of unfortunate and unpredictable lawsuits. If you are prepared for an undesirable and hopefully never-experienced flat – by having a jack and knowing where your spare tire is located – you will get back on the road faster. Similarly, there are some corporate habits and policies that will assist your company in more swiftly and successfully getting through any lawsuit. One of those key corporate habits is establishing a culture of notetaking and recordkeeping, particularly among day-to-day project managers, superintendents, and similarly situated employees. Such a habit triggers a hearsay evidentiary exception commonly used in lawsuits – Rule 803(6) of the Rules of Evidence, the so-called business records exception. For this exception to apply, and notes of employees to thereby have ultimate value in a lawsuit, this rule mandates the document must be determined to have been “kept in the course of a regularly conducted activity of a business” as a “regular practice of that activity”. In other words, you have to establish regular and systematic creation of note documents, not a random and haphazard practice across the company.

If you pass this threshold of admissibility, contemporaneous notes will be an invaluable aid in any lawsuit. Consider, as an example, daily, weekly, and monthly logs, journals, or reports on a construction project. If your company mandated its employees keep such reports, this hearsay exception to otherwise

inadmissible testimony becomes available. Detailed notes about when construction activities began or were addressed then are admissible for consideration by a judge or jury. In the prolific cases of delay claims, such notes can be critical to a case by establishing when activities first surfaced and the amount of time and effort spent addressing them.

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Moreover, the records and notes are available to a company even if the employee that prepared them no longer works there. That’s because Rule 803 is one of the hearsay exceptions that allows testimony from individuals even if they are unavailable to testify because they either have died or have moved out of state. Many times lawsuits take years to resolve and are occurring years after the real-time activities at issue. Thus, company practice should be not only to mandate notetaking but to take possession of all such notes from departing employees. These days notes can be taken on a smart phone, tablet, or other electronic device, or manually transcribed the old-fashioned way. The form of the note is not important; the regularity and established business practice of having such notes is the critical component underlying this evidentiary rule. As an additional tangential benefit, contemporaneous notes also will help in



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the discovery process of any lawsuit by providing a refresher for those involved on the job, particularly when the lawsuit occurs years later on a job itself that took years or several months to complete.

Just as you can call AAA to fix your flat, you similarly will be calling your lawyer to help you through any unfortunate litigation scenarios you are unable to avoid. Establishing the corporate habit of notetaking at all levels will provide your lawyer with the tools to fix your legal flat by giving him or her admissible documents addressing the issues in dispute. ■

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