# *Why Everything You Learned from Law & Order won't help you win your professional malpractice case!*

## *(and, the step-by-step guide to a construction lawsuit)*

*By Melissa Dewey Brumback*
*Modified from original, published 9 part series on www.ConstructionlawNC.com*

**Secret confession time here**: I *love* my Law & Order. And while I've been known to suffer through SVU or, God forbid, Criminal Intent, it's the original Law & Order (with uber-cool Detective Lennie Briscoe and the always wild-eyebrow of Jack McCoy) that really makes my day.

Some clients wonder why I like to watch a legal show on television after a day of practicing law. The answer is because the real world of law is nothing like that on shown on TV. Things happen so fast and so amazingly on the show, it is fun way to wind down the day.


On Law & Order, a subpoena is issued for bank documents, and, faster than you can say, "cha-chunk", the documents are rolling through the office. Court cases are wrapped up in neat tidy 60 minute packages (including time for discovering the real killer). The lawyers get to ask unfair questions—make self-serving testimony and arguments to the jury—and it doesn't matter, because they are on the side of truth, justice, and the American way. Law & Order is many things, but an accurate representation of a court case, it is not.

**What does this have to do with YOUR court case? Everything. Sure, you expect your construction case will be different from a "sexy" homicide case, but are you really prepared for just how different it will be? How long**

**it will take? The delays, stalling, and prevarication the other side will be allowed? Probably not. Until now.**

Over this paper, I plan to walk you through a "typical" construction defect lawsuit—from the first initial phone call from the project manager that something might be amiss, to the dreaded yellow paperwork delivered by the Sheriff (if you are really lucky), the famed "courthouse steps" settlement discussions, and even the angst-producing knock on the jury room door announcing a verdict.

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## Is there a dead body in your future?
## The first sign of trouble on the construction project.

Nobody dies in a construction dispute. At least most of the time!

However, just as the usual "thunk-thunk" chord in Law & Order warns the viewer that something is awry, there **are warning signs that your construction project may be under similar dire straights**. You should recognize these signs for what they are—early-warning lawsuit detection devices. Signs that a lawsuit may be in your future include:

1. The **"everything has gone wrong" situation**. This one is fairly big and obvious, but it bears mentioning. If the project is delayed, over budget, and there are signs that the owner is looking for someone to take the fall, watch out.
2. Much more subtle, but equally troubling, is the **"start acting squirrely" syndrome**. If you have always had a good working relationship with the general contractor, but suddenly he is aloof, watch out. If the owner is usually friendly and free with the flow of information, and he suddenly begins to clam up, be concerned.
3. The **"let's document everything" protocol**. Now, as a lawyer, I feel duty bound to tell you that I think documenting everything is best management practice. However, I do know that most *normal* folk don't usually behave this way 24/7. So, if you are on a project where a contractor likes to write letters to the file almost as much as he does change order requests, be leery. Could be he just listens well to his lawyer's proactive advice to document everything. Or, could be he is preparing a case from the get-go to claim design failures, construction administration delays, and the like. How to tell the difference? Often, you can only go with your gut. But take note—is Mr. Letter Writer documenting everything, or just items that might be considered "blame-able" ?

4. The **"I'm confused" RFI king**. Similar to #3 above, but more specific, the confused RFI king always seems to need clarification or further information about your design. The requests for information flow so fast, you may have trouble responding timely. This may be part of the plan. Or, it may simply be a numbers game— either the contractor is asking RFIs to buy time on the project (often on a case with strong liquidated damages provisions), or he wants to later be able to point out the "excess number of RFIs" to prove "bad design."


Photo (which is not of a *real* dead body) (c) garlandcannon.

**Now that you've caught the whiff of trouble brewing, how do you stop it before the dead body smell takes up residence in your car?** Observe, document, and respond in kind.

If you are dealing with an RFI king, respond timely, and **note when the RFI is asking for information that is readily available on the plans.** You might even consider keeping your own running log of questionable RFIs, so you can readily show your lawyer, and a future jury, that although there may have appeared to be a large number of RFIs on the project, the fact was that most of them (X percentage) were questions about something that the contractor should have already known if he had reviewed the plans.

If you have a "document everything" guy on your hands, respond in kind. You should be doing this anyhow, of course, but if you have someone that is especially prone to documenting everything, **you need to be extra vigilant that he is not stating anything that is untruthful**, that the documentation is complete, and that any time you get a document that doesn't completely tell "the truth, the whole truth", that you supplement it with your own documentation accordingly.

If you have a squirrely acting client, you might consider just politely confronting him to ask if anything is going on. It could be something that has nothing to do

with the project – internal politics, personnel crises, etc. In which case, you will find that out. If there is something more sinister afoot, you can probably determine that as well. The key here is to ask whoever you are (or had been) close to, and **to ask them off the record, in person**. You can learn a whole lot through non-verbal body language. If you find out, directly or indirectly, that there may be a claim afoot, then you can proceed accordingly.

If the project has gone to hell in a handbasket, there is not a whole lot you can do, other than to keep ensuring that you and your team are meeting all contract requirements. Part of this should include documentation for the eventual lawsuit, if it comes to that. You might also **contact your lawyer or insurance company for assistance behind the scenes**—something called "loss prevention". Remember, reporting the dead body is the first step to clearing the air. It's the cover up that usually gets folks in trouble.

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## The police are at the door!
## Service of the construction lawsuit on your company

The police? Yes, that's right. **If you are sued, at least in North Carolina, you may find Mr. Policeman (or Ms. Policewoman) at your door**. There are several ways that you may find out you or your company are being sued, but undoubtedly seeing the Sheriff at the door is the most nerve-racking. Heck, we have Sheriffs in our law office occasionally to serve papers, and the sight never fails to startle *me*. So be forewarned—the first you find out that there is a lawsuit may be when Johnny Law himself comes knocking.


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While unnerving (as it is often meant to be by the party suing you), rest assured that all the Sheriff will be doing is identifying you and handing you papers showing you've been sued. The Sheriff doesn't actually have to hand *you* the

papers personally- in fact, depending on if and how you are incorporated, he may be handing them to your spouse, another adult that resides in your house, your business partner, or an officer or manager of your professional association. While the Sheriff is not supposed to leave papers with a mere employee, that can and does happen as well.

**The Sheriff is not the only way you can be sued**. You can also get a certified mail package—you know, the type that requires you to go sign for it at the post office. Or, you may get a Fed Ex package. If you are being sued in federal court, or you know the lawsuit is coming, you may not get anything, as it may all come to your lawyer instead.

What should you do if you do get the lawsuit (called the ***Complaint***)? **First, run, do not walk, to your insurance carrier and/or lawyer**. Do not pass go. This should be the first thing you do. If you don't have a lawyer, but you have insurance, your agent should be able to help you report the claim, and a lawyer will be assigned to you by the insurance company. If you have a lawyer, you can report to him/her, and ask the lawyer to make the claim on your behalf to your insurance company.

Remember, however, that you need to report it as soon as you can. **In state actions in North Carolina, you have 30 days from receipt to respond. In federal actions, you have 20 days.** There are certain rules concerning weekends and governmental holidays that change these deadlines at times. But the important thing to remember is that you must respond, timely, or you can end up with a judgment entered against you in default. So, when you report the lawsuit, the first thing your agent or lawyer will want to know is **the date you (or someone connected with you) *first* received the Complaint.**

If you report the claim and do not hear back? ***Follow up***. Never assume that an email went through or that the person you called isn't on vacation or in the hospital. Make *sure* that you speak with your agent and/or lawyer personally and that they know when you were served.

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## You have the right to an attorney (but one will not be appointed for your construction lawsuit)

Every criminal worth his salt knows that he has the right to an attorney. What about in construction law? Not so much. **You do have the *right* to an attorney; however, you do not get one for free.** Do you *need* an attorney? Not necessarily. Then again, I prefer not to pull my own bad teeth, but hire a professional to do it for me. Maybe you prefer the string-tied-to-a-doorknob method. Not me.

Photo (c) Dawn Hudson.

In some situations, actually, you *do* need an attorney. Any natural person can represent himself in court, fool or not. However, if your company or professional association is sued, a company employee cannot represent that company *pro se*. That is, unless you have a licensed attorney on staff, you must hire a lawyer to represent your company.

There are two general ways that attorneys can be retained to defend you in the construction lawsuit—**either your insurance carrier can hire them, or you can**. This is one of many, many reasons to have **errors & omissions** insurance.

If you have E&O insurance and are sued for professional malpractice or negligence, then your attorney will be hired and paid for by the insurance company. You simply report the claim to your agent, and the insurance company will tell you who it has hired to represent you. Nice, yes?

If you do not have insurance, then you must hire your own attorney. How do you figure out who to hire? The simple answer, of course, is to simply hire me! (kidding). You will want to do some due diligence - ask for referrals, find out what types of attorneys in your area handle construction disputes, and talk with some potential attorneys. Important questions to consider include:

- **Experience in construction disputes.** You don't want a personal injury attorney who "dabbles" in construction – you want someone who does a lot of it. In some states, there may be special certifications of construction lawyers; however, in North Carolina there is not any such designation at this time. But the attorney should make construction law a regular part of his/her practice.
- **Knowledge of the design professional's role.** Some lawyers and law firms mostly represent subcontractors in lien claims. Others represent owners & bankers. Some focus on general contractors. And yes, others (including yours truly) tend to represent design professionals. All things being equal, it is helpful to have someone in your corner who understands your industry, your industry's jargon, and your industry's practices.

- **Defense mindset.** Often, if you have found someone who meets the first two criteria, you will have found someone that has a defense mindset. However, this is not always the case. Some lawyers and firms tend to consider themselves plaintiff's law firms; others consider themselves defense law firms. If you have been sued, you obviously want someone who is of the defense mindset. You can usually tell who these lawyers are based on their affiliations—for example, they tend to be members of their state civil defense attorneys network (in NC, the NC Association of Defense Attorneys), or they are members of a national network such as the Defense Research Institute. In contrast, a plaintiff's attorney will more likely be a member of the Academy of Trial Lawyers, Advocates for Justice, or the like.

**If you already have a lawyer who you feel confident in, and who is qualified, can you get your insurance company to pay for him/her to defend you?** Sometimes. You usually have some say in who is retained to represent you—for example, the right to request new counsel if you don't like "the buffoon" they hired on your behalf.

If you have a lawyer preference, you can ask (but not demand) that the insurance company retain your lawyer in the lawsuit against you. Your lawyer may need to agree to certain compensation, reporting, and other rules to be considered by the insurance company. After all, they will be footing the bill.

Sometimes, you may find that your preferred attorney is already on the "qualifying" or "panel" counsel list of the insurance company, which makes it easy, and much more likely, that the insurance company will grant your request. Remember, though, Jack McCoy and Lennie Briscoe didn't ask to get to work together, they were just assigned to do so. So it may be with you. Regardless of who is your lawyer, read (or re-read) this excellent article on how to be an effective construction client.

Regardless of who represents you and/or your company, keep in mind that your attorney is *your* attorney, regardless of who is paying. Anything you say to your lawyer must be held in confidence, and your lawyer is there to represent *your* interests. **Be honest with your lawyer, respond to his/her communications promptly, and work together**. Construction lawsuits are usually messy, but at least there is no funeral to deal with!

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## Paperwork, and more paperwork: Discovery in the construction lawsuit

In Law & Order, things happen fast, and there is always a smoking gun paper to be found by the lawyers over a night of eating cold Chinese food. Yes, well-about that. In the construction world -not so much.

Depending on the size of the project, there may be massive amounts of paperwork involved. **Think about every email, of every employee who touched the project, from initial proposal through final punch list**. Add in the change order logs, pay applications (with backup), submittals, shop drawings, project correspondence, drawings, specifications, diaries, meeting minutes, daily reports, site inspections, etc—and you can begin to visualize the problems that the magnitude of documentation creates. Naturally, in the age of electronic data, digital cameras, and cloud computers, the issue of quantity is even more magnified.

Photo (c) Veronica Robbins via CC.

Now, let's discuss the *discovery* process in a construction lawsuit—that is, what the other side can ask for, what you must give, and how the process works. Then I'll detail a few recommended practices to put your firm in the best position possible if and when it has to deal with the information overload of a construction lawsuit.

### What is "discovery" in the legal world?

*Discovery* is the all-encompassing term for means and methods to get information necessary to prosecute or defend a lawsuit. The main written discovery consists of ***interrogatories*** and ***requests for production of documents***. Interrogatories are written questions that you (with the help of your lawyer) must answer about the project. Requests for production, on the other hand, are requests made for documents that may, or may not, be relevant or

admissible. Inevitably, in one form or another, your entire project files need will likely need to be produced to the other side.

**Be aware: things that you may not consider part of your firm's project files may still be demanded.**

- Does anyone at your company keep an old-fashioned pocket calendar, filled with a mixture of both business items and personal information? It can be demanded in the discovery process.
- Does your company conduct internal post-mortem meetings to discuss ways to improve on future problems and what went wrong on this one? Discoverable.
- Does one of your employees have a personal relationship with an employee of the general contractor, such that they **send good-natured barbs and sarcastic comments** about the project or project personnel to one another? Yep- you guessed it—discoverable.

Each and every document, paper, back of envelope note, or personal diary entry can be demanded. Scary prospect, right?

**What can you do to limit the embarrassment and lessen the pain?**

To lessen the pain, be sure to adopt some best management project and personnel practices, including:

- **Consistent intake methods.** Every employee who brings in work should know to find, modify, and use the Firm's contract and/or form proposals. Educate both your employees and your clients on the importance of having good, written contracts and proposals, and procure them in a uniform and systematic way. There should also be a follow up procedure in place, in case a signed contract or proposal is not obtained. One suggestion I have made previously: do not open a new client or matter number to bill against until the contract is in place.
- **Management of rogue employees.** Ideally, don't let any employees only use their hard drive. If you can't achieve that level of cooperation, at least insist that documents be copied over to the Firm's computer system on a regular basis, and at least weekly.
- **Decide on Firm-wide file management.** Everyone on your staff should be filing everything the same way, whether in paper records or in email folders. As noted in my post on how to smartly handle project documents, all communications should be in one place, preferably in a chronological order. Failing that, a master chronological file could be kept for future reference. You also must decide whether and which emails

need to be printed and/or saved, and institute a standard policy Firm-wide for those as well.

- **Create a Problem file(s).** If problems in certain areas arise, maintain a separate file and/or e-folder for all documents relating to that area. Who knows, one of those may end up being the smoking gun that makes your case.
- **Use a separate Legal file, if necessary.** Related to the problem file, if you get any legal help or help from your insurance company, create a new "Legal" file for legal issues, communications, and the like. Do NOT keep this file with the other project files. Ideally, all legal files should be kept in a different location/drawer/desk/office to prevent inadvertent disclosure in a lawsuit.

**And, the #1 Rule relating to document best practices?**

- **Follow the Grandma/Newspaper rule.** That is, instruct your employees to be careful in what they say in any forum– website, newsgroup, email, etc. Before sending off any questionable communications, each employee should ask himself: **How would my grandma feel if she read my message in the newspaper?**

If he feels comfortable that the message wouldn't make Grandma hold her head in shame, then and only then should he press "send".

While you don't need to know all the details of how to answer discovery unless and until you've been sued, if you follow these document best practices, you will be far ahead of the curve should you have to defend yourself in court.

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## Being deposed—not just for dictators! Depositions in the construction lawsuit

My husband always finds it amusing when I talk about going "to depose" somebody. He wants to know just exactly what sort of *coup d'etat* I am planning. Despite the awkward language, the deposition process is not *supposed* to feel like water boarding, although if you don't know what to expect it can be more miserable than truly necessary.

Simply put, a deposition is **a chance for the other side's lawyer to make you answer a whole bunch of questions (some relevant, some seemingly irrelevant) under oath**. That is, first you put your hand on the Bible and swear (or affirm) to tell the truth, the whole truth, and nothing but the truth. In reality, depositions serve a variety of purposes– they educate the lawyers about the

facts of the case, they give a preview of how you would "present" to a jury (i.e., would a jury like and believe you?), and they can be used to position a case for certain later dispositive motions (that is, summary judgment– see below).

Photo modified from image (c) by Johnny Berg.

**While no deposition is ever a picnic, knowledge is power!** Remember these simple rules to make it through the day relatively unscathed:

- **Ask for enough information & time with your lawyer to be prepared.** You may think you know all the facts of your construction project, since you've lived it, but it is always recommended to take some time both to review key project documents and to discuss expectations (and possibly role-play) with your lawyer. Find out if your deposition will be video taped or not. Find out if you are supposed to bring (or not bring) any documents with you. Discuss how long the deposition will likely last, and then double or triple that time. (Lawyers are notoriously optimistic when it comes to time estimates!). Ask your lawyer how you should dress. Remember that part of the deposition is the other side "sizing you up," so please, don't show up dressed for a day at the beach or the club!
- **Remember the cardinal rule of depositions: always tell the truth.** Now, while you do not have to go out of your way to volunteer where you may be at fault, you do have an obligation to answer the questions posed. There are various ways to handle incomplete or unclear questions. Sometimes, while not required, it can help position a case for settlement if you go in depth to explain your reasoning, rationales, and the like. Other times, that may not be wise. Find out your lawyer's preference and strategy ahead of time. Remember, though, an ideal deposition is boring, more boring, and then over. ***Never try to "win" your case in deposition– it can't be done***.
- **Remember that the opposing lawyer is not your enemy, and not your friend.** Do not let them get you angry or excited. Remember that even things discussed "off the record" can later be used to find out information

"on the record". From the moment you enter the building, remember that off-hand comments can sometimes sink your case. Don't discuss your testimony in an elevator, a bathroom, or hallway, unless you are *sure* that no one from the other side is present.

- **Don't treat the deposition as a marathon.** You will get tired. You will get frustrated. You will lose your patience and think that Shakespeare's Dick the Butcher was right when he said the first thing they should do is to "kill all the lawyers."[1] Regardless, remember that you do get certain rights as a deponent. For one thing, if you need a break, you can take one (so long as there is no pending question that has been asked). If you need to take a stretch, you can. If you need some water, you can get it. Remember this power, and (responsibly) use it as necessary. Don't let fatigue cause you to make important errors– take the breaks you need to give fresh, clear, and correct testimony.

A day in the park it is not; however, with these tips your experience "being deposed" may go just a tad bit smoother.

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## Mine is better than yours!
## Battle of the experts in the construction lawsuit

Eventually, most construction lawsuits of any size involve hiring experts to review the project. These experts then usually issue an opinion as to whether or not you, as the design professional, violated the professional standard of care for architects or engineers working on a similar project in a similar community.

If the case proceeds to trial, all sides will have their own expert(s), with rare exceptions. Thus, **the "battle of the experts"** begins. That is, a jury will have to listen to your expert, their expert, and the juror's own common sense, and try to make out who is correct. **As with most things, there are probably valid points made by all of the hired experts** (that is, of all the reputable ones, at any rate). If a case gets to trial, you can be sure of it.

[1] Ironically, this often mis-understood quote, from Shakespeare's King Henry VI, is actually a tribute to the importance of lawyers. Shakespeare's quote was acknowledging that **the first thing any potential tyrant must do to eliminate freedom is to "kill all the lawyers."**

Photo (c) Sias van Schalkwyk

Hiring an expert to support your position can be a scary prospect. You will essentially be paying (or having your insurance carrier pay) to **have a competitor look over all of your work with a fine-tooth comb and 20/20 hindsight**, to see if he can concur that your design met the standard of care. Your attorney should work with you to get a good, solid professional peer retained as your expert; however, if you have any suggestions of who to use (or, who you do *not* wish to use), make those opinions known. It is important to hire someone who is impartial about the outcome of the case, but you will not be required to hire your worst enemy/competitor.

Another protection that is built into litigation, is whether or not the expert's opinion will ever see the light of day. If the expert cannot support your position, he will be designated a "consulting expert" and his opinions will remain only between you, your lawyer, and the expert. Assuming the expert does support your position, he will be designated as a "testifying expert," at which point the other side can look at his records and notes, read any written reports he generates, and take his deposition.

Hiring an expert doesn't have to be an arduous process, but work with your lawyer to get someone you respect on your side of courtroom.

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## Can't we all just get along?
## Mediation and settlement of the construction lawsuit

At some point during the lawsuit (usually, but not always, after expert reports are produced), your lawyer may tell you the case is going to mediation. In fact, **in North Carolina, all Superior Court cases are ordered into mediation**, though the timing is usually left to the lawyers.

**What is mediation?**

Quite simply, mediation is a process in which the parties, their insurance representatives, and their lawyers get together to discuss trying to settle the case. The process is usually fairly informal, fast, and, often effective.

Photo (c) cobrasoft.

**How is mediation different from arbitration?**

In arbitration, you present your case to a one or three person "panel" of arbitrators. Witnesses are sworn in, evidence is presented, and, ultimately, the arbitrator(s) decide who wins, who loses, and what amount of damages should be paid.

In mediation, however, there is no "decision maker," and the only way your case will be resolved is if you agree to having it resolved. In other words, **you have much more control** over the outcome.

**Technically, how does a mediation work?**

Mediations are all unique, but in general, most start out with a "general session" in a large conference room in which all parties (lawyer, parties to the lawsuit, and insurance reps) are present. The mediator, usually another lawyer who is not involved in the case, will present opening remarks, explaining that he/she is not there to decide anything, the ground rules for the day, and how he handles confidential information.

Then, the mediator asks each lawyer to state his case. The party who brought the lawsuit always goes first, and they state how the project started, why they sued, and why they believe they are entitled to damages. **This can range from a 5 minute speech from their lawyer to a full-blown 2 hour multi-media**

**(read: powerpoint) presentation**, including remarks from retained experts. I've seen both, and everything in between.

Following the plaintiff's presentation, the other parties will be asked to state their case (i.e., their defense, and any counterclaims), and why they believe they will prevail at trial.

After all of the lawyers have had their say, the mediator will generally allow any parties to speak if they wish to. Discuss this with your lawyer ahead of time, but the default is to simply bite your tongue, keep your mouth shut, and wait until "private session" to have your say. **No architect or engineer ever made things better by arguing during the opening general session**.

**What are these "private sessions" of mediation all about?**

After the opening session, the mediator will divide the parties into different conference rooms. Sometimes, parties whose interests are closely aligned may be in the same room, at least for part of the day. For example, if an architect and his engineer are united in their defense, they may want to spend part of the private sessions together.

The mediator will then practice "shuttle diplomacy". That is, the mediator will talk with each party privately, playing devil's advocate, discussing case outcomes, and, ultimately, passing offers to settle back and forth among the parties.

**How do the offers of settlement work?**

The settlement offers are highly case-dependent, and can vary throughout the day depending on how the mediator likes to work and how much leeway the attorneys give him. Usually, he starts with the plaintiffs to find out **what amount of money, short of the full amount claimed, they would accept to walk away** from the lawsuit.

Then, the mediator talks with the defendants (and third party defendants) about how much money they would be willing to pay to be done with the risks and unknowns of a jury trial. Conditional, confidential, and other offers are sometimes employed. If they are, the mediator will discuss the process with you at that time.

**Why should I pay money? My design was good and I haven't done anything wrong!**

At some point during the day, you *will* end up saying this. It will seem extremely unfair that you are being asked to pay (or have your insurer pay on your behalf) for someone else's problem or mix-up. However, **ultimately you will**

**have to make a business decision** about how much time and effort your Firm wants to spend on taking the case to a jury. If the case settles, you free up the time you would otherwise spend in depositions, meeting with your lawyer, talking to experts, and reviewing documents. Depending on the scope of the project and the lawsuit, this could be hundreds of man-hours. Further, at the end of the day, you end up risking bad publicity and an adverse judgment that will affect either your bottom line or your insurance premium.

**Are you saying I have to settle?**

No, absolutely not. Sometimes, the plaintiff has such a crazy demand, that you are better off taking the case to a jury. Other times, the evidence is so much in your favor that it doesn't make sense to settle. Usually, however, the case is more nuanced, and so you need to discuss the evidence, and your chance of a successful verdict, with your lawyer on a case by case basis.

**My case was "impassed" at mediation. What does this mean?**

If the mediator concludes that the parties are too far apart to settle, at some point he will declare an impasse. If this happens, everyone shakes hands and goes home.

What happens next is that the lawyers may continue to talk over the next month or so to see if there is any chance at all for settlement, and at the same time begin or continue their preparations for a trial. Just because a case impasses at mediation, doesn't mean it can't or won't settle.

**Cases can settle right up and through trial**, until the jury comes back with a verdict. Obviously, the sooner a case settles the better, as you will have spent less time and money on trial preparation. However, do not give up all hope of settlement simply because of a mediation impasse. **(After all, Lennie Briscoe never gave up, did he?!).**

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## Pull on your jeans:
## Time for some Legal Wrangling

Your lawyer has told you that your case might be heard on legal issues alone, before a judge. Or he's mentioned that he is filing a motion for "Summary Judgment". What, exactly, does that mean? To understand summary judgment, it is first necessary to understand how a typical case is heard.


In a case that goes to a jury trial, it is in fact the jury, not the judge, who decides the case. The judge handles order in the courtroom, the admissibility of evidence or witnesses, and other legal issues. But at the end of the day, the factual issues (that is, was your plan defective? If so, what if any damages did that defect cause?) are decided entirely by the jury. Most of the time.

**So what's this thing called "summary judgment"?**

Sometimes, there are no real factual issues in dispute. In that case, the judge can decide the matter on the legal issues alone. For example, if you are sued after the expiration of the statute of repose, and there is no debate about when you last performed professional services on the project, then your lawyer can bring a motion to have the judge decide the case in your favor purely on that legal issue.

Most construction cases, however, are not so clear cut factually. However, you can still have a judge decide a case on summary judgment if the disputed facts, taken in the light most favorable to the other side, still show that you should win.

**What happens when you file for a summary judgment hearing?**

Either side can file a paper called "Motion for Summary Judgment". This is usually done during or after discovery, as factual issues are determined and the list of truly disputed items is narrowed. Both sides have an obligation to present evidence as to why/why not the judge should grant the motion. Evidence can include affidavits (including your own and that of your expert), discovery responses, deposition testimony, and documents produced in discovery.

**How does the judge decide?**

The judge is required to take the factual evidence in dispute, and assume that the non-moving party's version is correct. For example, let's say you are moving for summary judgment based on the statute of repose. You claim that you last

performed work more than 6 years before the lawsuit was filed. If the other side has some evidence that work was done later than you claim, then that is a dispute of a material fact. The judge will have to assume that the other side's date is correct, and deny the motion for summary judgment on those grounds.

If, however, the disputed facts are not **material** (that is, not crucial to the deciding law), then the judge does not need to even consider them. And no one can rely on bare assertions of fact (of the "nuh-uh" variety): they have to produce some evidence of their position.

**How will we know if we won or lost?**

This varies from judge to judge. In general, unless the case is clear cut, the judge will want to take the case "under advisement". What that means is that the judge is going to review the presented materials, make a decision, and then call the lawyers to tell them how he/she has ruled on the motion.

**What does it mean if we lose summary judgment?**

If you are asking for summary judgment and lose (and in close calls, expect to lose as judges prefer that cases go to a jury), then the denial of your motion for summary judgment means that the show goes on. Discovery can continue, and the case will be prepared for trial.

Of course, just because mediation has impassed and summary judgment has failed does not mean there *will* be a trial. Many cases continue to be negotiated and settled "on the courthouse steps". Literally, sometimes.

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## Ask not for whom the bell tolls: it tolls for thee!
## The construction trial

The time has come. You've been sued. Suffered through discovery. Talked about the project under oath til your throat turned raw. And responded to the umpteen million request from your lawyer. You've engaged experts, second-guessed your work, and looked at copies of legal documents that made your head spin. Now, at long last, you will have your day in court. Or will you?

**When will your case be heard?**

Your trial date is a moving target, at least in North Carolina. Depending upon the county or jurisdiction the lawsuit is filed in, you are probably looking at your case taking from 1 year (for a small homeowner lawsuit) to 2 or 3 years for very complex cases. This is one reason why court ordered mediation is required in all Superior Court cases in North Carolina. It is also why most construction lawsuits do settle– at some point– prior to trial. Some cases settle, literally, on the courthouse steps (or in the courthouse conference room). Others settle during trial itself. But if you find yourself settling at the last minute, you will have spent the time and money for trial preparation for naught. A somewhat bitter pill to swallow.

**What is involved in trial preparation?**

Expect to review many documents relating to the project all over again with your lawyer(s), even if you've previously discussed them. Expect to spend time with your expert(s) discussing your plans and design intent. Expect to have some mock testimony sessions with your lawyers and others on their team. Mostly, expect a lot of aggravation. Trial preparation takes time. A lot of time. While much will be done by your construction lawyer, you will need to be actively involved.

**How does the trial work?**

The trial itself is probably the closest to a Law & Order scene that you will experience. But don't expect Jack McCoy (or Perry Mason) moments. Very little happens in a trial that is completely unexpected.

If the trial is a jury trial (and most are), your lawyers will **question the potential jury pool** to try to weed out folks that have predisposed themselves to one side of the case. The other side will do the same. The result, ideally, is a group of disinterested, neutral folks that will decide your case.

After jury selection, **opening statements** are given. These are speeches given by the lawyers to forecast the evidence that will be given to the jury.

The, the plaintiff (that is, the party suing you) will be told to call its first witness. The plaintiff will proceed to call witnesses to the stand to testify. The order that they are called in is up to their lawyers, and different lawyers have different strategies for deciding which witnesses they call first, middle, and last.

With each witness, the plaintiff's counsel will ask open ended, non-leading **direct examination** questions. After that, your counsel will ask leading questions on **cross examination** aimed at poking holes in the other side's case, and establishing your own case theory.

After the plaintiff has presented its case and rests (and following some procedural motions at that point), the roles are reversed, and your lawyer will conduct direct examination, while the plaintiff will cross examine witnesses.

There are often **legal sidebars** during a trial, where the lawyers approach the judge and whisper about legal matters. If extended debate on something is needed, the jury will be excused. While you will not be invited to the bar to talk during sidebars, your lawyer can tell you what was discussed and how it effects your case.

At the conclusion of all evidence, the jury is given a set of legal **jury instructions**, and the lawyers present their **closing arguments** as to why their position should prevail. Then, you wait. And wait. And wait, until the jury reaches a verdict. The jury foreperson will read the verdict into the record.

**What happens after trial?**

Depending on the trial results, one side may ask the judge to set aside the verdict (called a j.n.o.v.), which is rarely granted. Whoever has lost may decide to notice an appeal of the verdict. Appeals must be based on legal errors that the judge made during trial. An appeal can take years, and the end result can be

the same (that is, the verdict is upheld), overturned (set aside), or remanded for a new trial. Yes, that's right: you can be forced to re-try your case.

Is all lost, then, if you lose the jury verdict? No; definitely not. No one likes to spend time and money on appellate briefs. So, even though the case is over, the parties may *still* negotiate a settlement. Be aware, however, that you will have a judgment "on the books" against you if the jury found that way, and that can affect your credit ratings. However, the judgment will also be rendered "satisfied" if you settle (or pay it off), which generally helps re-establish your good credit rating.

***That's it!*** *You now know just enough about the construction trial process to be dangerous! I've obviously had to condense many details in this article, so if you have any questions or want me to expand on any area, drop me a note.*