

Navigating the Best Evidence Rule, by Andrew Richards, Esq., published by STA, Legal Log, 2-2024

Maintaining construction project records including emails, contracts, change and extra work documents, etc., is incredibly important if you are in the unfortunate situation of having to litigate breach of contract.

The Best Evidence Rule provides that a witness cannot give testimony at trial concerning the contents/information contained in a document that the parties know exists, but which is not offered into evidence at the trial. Once the document is admitted, the witness may his/her understanding of the terms of the document and give parole evidence testimony (evidence not within the four corners of the document) relevant to a dispute regarding the terms of the document.

For example, many trials concern extra work claims. The project personnel who discussed and negotiated extra work claims often testify at trial years after the dispute arose. A project manager may specifically recall documents that transpired by the parties such as a signed change order or an email that confirms acceptance of the proposed change order. The project manager will not be allowed to testify as to what he/she remembers were the terms of the document unless it is offered as evidence at the trial. This, of course, increases the likelihood that a witness' testimony is accurate without memory lapses and prevents a witness from outright lying.

For another tidbit of the rules of evidence, many clients ask if we need to have our subcontractors and suppliers appear at trial to have the court admit their bills into evidence so that we can prove payment or an outstanding obligation. The answer is no. Courts will accept the invoices and bills received by a contractor from its supplier or subcontractor, and presume that the information contained in them is true, if the documents are received in the regular course of business and kept in the ordinary course of business. In addition, over the last few years, many courts have admitted documents into evidence if the documents were produced in discovery.