

# OSBORN

## LITIGATION STRATEGIES IN CONSTRUCTION DISPUTES: BEING COST EFFECTIVE AND WINNING

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### Why Excellent Inhouse Counsel Facilitates Cost Effectiveness And Winning

"Cost effectiveness and success in the resolution of construction disputes is determined by a recipe" Mr. Osborn said, "The recipe is different for each dispute because the characteristics and ingredients of each construction project and the participants and their quality vary widely. It is clear that the quality of inhouse counsel significantly affects the cost and success of the dispute resolution."

Protracted dispute resolution has a severe negative impact on the client, it is expensive and it creates a negative impression of the outside counsel managing the dispute resolution process. When the dispute resolution process stalls, costs get out of hand and the client's staff and resources are strained; no matter how successful the ultimate result, failure to reach a prompt closure on the construction dispute costs extraordinary and derails productivity of client staff. Excellence of inhouse counsel is appropriately measured by the ability to reach prompt and favorable resolution before significant legal fees and personnel resources are expended.

The following are some of the reasons that inhouse corporate counsel are so well positioned to be effective in managing construction disputes:

1. **Inhouse Counsel Knows the Client.** Decision-makers, budget, priorities, staffing, corporate hierarchy and most importantly - how to get things done - are uniquely within the knowledge of the inhouse counsel.
2. **Inhouse Counsel Knows What Lawyers Do.** Specifically, inhouse counsel knows what resources are needed to get the point across: (a.) expert witnesses; (b.) video tapes; (c.) models; and (d.) engineering or accident analysis.
3. **Communications are Streamlined.** The presence of inhouse counsel with the confidence of the client's senior staff, eliminates 2 major gaps: (a) the need to educate the senior staff; and (b) the need for the senior management to "look behind" outside counsel's advice, its ramifications to the company and the options available.

4. **Inhouse Counsel Can Help With Specific Legal Issues.** Inhouse counsel can truly help within specific legal issues. Very often inhouse counsel has drafted the construction contract and has been consulted during the construction project. Specific industry guidelines will often be known to inhouse counsel. This will help contain costs and will provide an advantage in dealing with opposing outside counsel.
5. **Facts, Documents, Financial Analyses.** Where to find them and how to gather them is often difficult unless inhouse counsel has been involved with the process. For example, the records needed for the preparation of internal overhead projections as a part of a damage calculation in construction litigation can be very inaccessible without inhouse personnel assisting in gathering the information and stressing the urgency for doing so. Inhouse counsel is uniquely positioned to be the "point person" in gathering and interpreting this complex array of documentation and data because inhouse counsel is in a position to know the intricacies of the business and the impact attributable to not having space turned over to it after a construction or renovation project.
6. **Preparation of Witnesses For Deposition or Trial Testimony.** The intricacies of the personality of the client's personnel are impossible to assess on short notice. Inhouse counsel can tell who to consult and who to call as a witness. More importantly, inhouse counsel can suggest who not to call as a witness. Many of our favorable construction dispute experiences have been attributable to knowing which witnesses not to call during the litigation process. Only inhouse counsel really knows, and inhouse counsel can level with you while you avoid stepping on any corporate toes.
7. **Knowing Where To Get Settlement Authority.** You have decided that it is important to take a shot at settlement early on - you have been hired by a member of the project team who have briefed you on the facts. The members of the project team are advocates ... they have no fault for the fact that the project was delayed and cost more; the problem was caused by other participants on the project; we need to fight against the culprit; where do you go for an objective view? To an effective inhouse counsel, is the answer. An inhouse counsel with good judgment wants outside counsel to thoroughly and creatively explore settlement downsides as well as upsides ... and to settle before resources are burned, including outside counsel and expert witness fees and the company's resources when extensive depositions are taken and travel, copying and database costs are undertaken.
8. **Knowing How To Prepare a Realistic Litigation Budget.** Inhouse counsel knows that doing a good job requires spending money on legal fees and that a well reasoned and benchmarked litigation budget are essential to success in going forward with the litigation or to reaching a favorable settlement.
9. **Familiarity With Creation of Business Strategies.** Inhouse counsel know business strategies and how to translate settlement values versus the upside and downside in going forward with litigation or arbitration.
10. **Reforms can Be Implemented.** Inhouse counsel can implement reforms. This is especially significant when outside counsel expects to continue to represent that client. Why learn the same lesson numerous times. Inhouse counsel can be the catalyst in bringing about reform by marshaling inhouse resources to assist in implementing change.

## What Inhouse Counsel Does – Specifically – To Help With The Construction Dispute: The Major Hotel Renovation

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The major hotel renovation project is a good example of a construction dispute in which a lot of money is at stake. It is clear that if project problems delay the opening of the hotel, significant revenues will be forfeited. The construction or renovation contract must take this into account at the outset so that, if there is a dispute, or an unanticipated condition encountered, the parties will have guidance on resolution. The converse is also true: if the architect or contractor are delayed by the owner, their costs may be significant. Suffice it to say that getting to the bottom of the problem, at the earliest stage possible, is essential. A realistic view of the facts and practical views toward resolution are essential ingredients.

Inhouse and outside counsel – as a team – are in a good position to reach a prompt realistic and practical resolution by doing the following:

1. **Full Development of the Facts:** Interviewing the witnesses and looking at the site are an excellent first step.
2. **Full Inventory and Review of Documents:** Review of every shred of paper is essential, including the plans and specifications, job meeting minutes, correspondence, shop drawings, schedules, photographs and all documents in possession of the client and in the possession of third parties such as the architect, construction manager, engineer, and others.
3. **Evaluation of the Quality of the Witnesses:** Your client's witnesses, the adversaries and those of third parties; details of the testimony, the factual probity and the credibility are all important.
4. **Clear Definition of the Desired End Result:** Without a clearly defined goal, the construction dispute resolution process is guaranteed to be protracted and expensive. The key is to "get in and get out fast." Inhouse counsel is in an excellent position to facilitate this process and must assess the client's needs and assist in obtaining outside counsel's authority to settle.
5. **Analysis of Liability (Likelihood of Success) and Magnitude of Damages:** Realistic analyses take a lot of work because these analyses involve interviewing witnesses, analyzing documents and attempting to see the overall picture with objectivity rather than the advocacy which ordinarily permeates the construction dispute resolution process.
6. **Inhouse Session to Achieve Consensus on Settlement:** Getting all of the decision makers into the room at the same time, to be briefed and to attain information from them is extremely important. Settling on a future strategy or on a settlement amount is difficult. Letting the parties each speak up and air their views, interact and brainstorm solutions sets the stage for clarity.

Even if consensus is not achieved on the first attempt, the framework for ultimate settlement can be crafted at this point. Inhouse counsel is in the best place to work as the catalyst to make sure that this happens.

7. **Introduction to Friendly Third Parties:** It is important to understand that the objective facts are available on a construction project – very often the facts are best developed through talking

- with somewhat independent third parties rather than through working exclusively with your client's witnesses. Architects, engineers and scheduling or costing consultants often provide valuable and realistic information.
8. **Develop an Interactive and Adjustable Budget:** The litigation and settlement projections and budget must be developed with the idea that they may need to be changed as additional facts are found or the evaluation of success changes. The use of spread sheets and data bases make re-evaluation easier.
  9. **Determine Which of the 10 Most Deadly Construction Sins Your Client has Violated:** Inhouse counsel can be invaluable in helping to assess, early on and objectively, the mistakes of which the client is guilty.
  10. **Stay Focused-Keep the End In Mind:** Inhouse counsel with a full understanding of the litigation and arbitration process knows that non-binding ADR is the best method of resolving the construction disputes. Understanding the value of early mastery of documents, witnesses, strategies, and cost-benefit analyses is essential successful outcome. Knowing the strengths and weaknesses of your case early, and in detail, is a lot of work and up-front expense.

## Conclusion

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Litigation must be a tool toward favorable settlement. Getting an accurate and realistic view of the case at an early stage is essential to being cost-effective and winning. Being passive and simply letting the process "play out" is not an option- it is simply too expensive the result too unpredictable.