

# Tips for Contractors at All-Party Inspections in Construction Lawsuits

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If you are a contractor that finds him or herself on the receiving end of a lawsuit for a construction project in which you were involved, you will almost certainly be asked to attend an inspection of the property before the case goes to trial or arbitration. Most often, you will be accompanied by an attorney as well as an expert witness hired by your side; but, there are rare instances in which the logistics cannot be worked out to have all involved persons attend. Regardless of who attends such an inspection, the potential exists that a contractor's words or actions at the inspection could result in further damage to his/her case. While not a fully comprehensive list, the tips presented here should help to avoid any instances in which your case is damaged by your presence at an inspection.

**1. Keep all thoughts to yourself and your attorney/expert.** Unless you are talking about your kids or your golf game with others at the inspection, do not even put yourself in the position where it would be possible for opposing parties or counsel to obtain information from you that would put you at a disadvantage. And, keep in mind that this tip speaks to non-verbal communication as much as it does to your spoken words. For instance, while whispering to your attorney, be careful not to point to a gutter that you installed that looks as if it was sloped the wrong way and has been overflowing. A comment on it will surely appear in the plaintiffs' expert's revised report whether or not he/she had already noticed that defect.

**2. Do not be adversarial.** As hard as it may be due to the personal and emotional nature of a lawsuit against you, adversarial behavior at an inspection should always be avoided. Too often, snide or back-handed comments between parties can lead to arguments in which too much information is transferred – to the benefit of the attorneys or other bystanders in attendance. Cases are not decided or settled at the inspection. The time and place for such behavior is during settlement discussions or in the courtroom – and such arguments should only pass between the parties' attorneys in those venues. By practicing good self-control and attending an inspection with a 'fly-on-the-wall' mindset, you will be sure not to do harm to your case.

**3. Keep your camera, notebook, etc. in the car.** Any information you gather at an inspection during litigation is discoverable according to the applicable Rules of Civil Procedure; in other words, it must be provided to all other parties in the lawsuit. This goes for *all* photographs and potentially any and all notes or dictated messages that you create while in attendance. Not only does the recording of such information tend to relay your thought process to other parties and violate Tip No. 1, above, but this action by you is also unnecessary since your expert(s) will typically handle the task of collecting appropriate information. In almost all cases, those experts are better trained and equipped to collect the proper data without doing further harm to your case.

**4. Come prepared.** Proper preparation for an inspection is dependent mainly on which stage in litigation it occurs. But, a few things can always be done to ensure that you and your attorney and/or expert get the most out of the inspection. First, ask your attorney for any expert reports or other descriptions of claims being made that might relate to work that you performed or were responsible for. Then, after reviewing that information, be sure to give your attorney any

relevant knowledge you have relating to your work that he/she might not be able to decipher by reviewing the case materials alone. Such a discussion prior to the inspection helps to avoid a situation where a conversation is forced to occur during the inspection and in front of others. This, again, helps to avoid violating Tip No. 1, above. This discussion also allows for a smoother process when discussing the impression of the inspection with your attorney/expert after the fact.

**5. If you are unsure about what to do, ask your attorney.** It is obviously not possible to predict and prepare for all events that may transpire during an inspection during construction litigation, so the best and final tip is to emphasize that you trust your instincts if they tell you that you are facing a choice of acting in a way that will potentially harm your case. In such a situation, take a step back and consult with your attorney about what to do – all the while being sure to keep the conversation out of ear- or eye-shot of the others attending.

Following these tips and keeping an open line of communication between you and your attorney will give you a far better chance that an inspection during construction litigation is as productive, efficient and non-damaging as possible.

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