

Development of a Topics Course for Construction Law

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The Cal Poly Construction Management program is designed to prepare students heading into the construction industry for daily management tasks. With construction comes many legal aspects integrated into a project's operations. Though the curriculum includes a contract law course, a gap exists with a minimal number of classes that address the array of legal matters the construction industry must be versed in. Working with faculty member, Thomas Kommer, J.D., there is a need for a course that expands on these varying legal topics. In order to determine the specific topics that would impactfully benefit and educate Cal Poly Construction Management students, interviews were performed with both construction and legal professionals. Once the topics were established, literary reviews were performed to define the topics and benefits of adding this to our curriculum. This paper identifies the benefit from a topics course that dives deeper into construction law topics including real property law, professional licensing and insurance law, tort law with respect to negligence and willful conduct, labor law and employment law, and criminal law.

Key Words: Construction Law, Project Management, Legal, Preparation, Advanced Course

Introduction

After taking the course CM 334 – Construction law, a required class for the completion of my Cal Poly Construction Management degree, I found the desire to learn more about legal matters and how they relate to the construction industry. Other required courses for the construction management degree offer condensed lessons on legal matters. These courses include Bus 207 – Business Law and Cm 443 – Management of the Construction Firm. These courses focus more on the contractual legal processes for construction projects and businesses. By only teaching contract law it does not properly cover the entirety and importance of the relationship between law and construction. By teaching more legal topics that are relevant to construction it will prepare students better to enter into their management positions. With how prevalent legal issues are in the construction industry, there should be an additional course to cover all the important legal areas. The importance of understanding the legal side of construction is stressed in the book titled Smith, Currie and Hancock's Common Sense Construction Law: A Practical Guide for the Construction Professional. "Individuals in management and supervisory positions in the industry must be cognizant of what the law requires of their

companies and personnel and what they can expect and require from others” (Kelleher, 2014). This topics course would enable students to learn more about the legal processes and issues that arise during projects and when dealing with daily management practices in construction. The class would offer lessons on the background and practical uses of the additional legal topics that they may encounter in the real world.

Literature Review

For construction management students to be fully prepared for the real world they need to learn about topics and scenarios that they may encounter during their careers whether that be long-term or day-to-day. With many standard business dealings come legal issues or aspects that influence construction projects. Students in construction management should have the option to learn the basic rules and responses for major legal topics that they will encounter in their careers. To create a topics course that best prepares students for the legal dealings of a construction career, five of the most pertinent topics that are not adequately taught to students in Cal Poly’s Construction Management curriculum were established. After defining these five topics, investigations show how these topics will benefit students when entering the construction industry.

Real Property Law

Real property law is defined as land and the buildings on it. This legal principle governs who may own and use the land in question. Real property law is seen primarily in the pre-planning stage of construction but can also be encountered during the construction phase. General contractors will need to be prepared for land ownership disputes that may involve their owners. During the preconstruction phase, this topic comes up with the required purchase of land or disputes relating to previous owners, deeds, zoning, or other issues before construction may start. Construction managers should be able to go into a project confident about the property that they are to build on to not provoke any future disputes (Budde, 2019). Another important consideration of real property law is understanding the mineral rights of a specific property or any servitudes, rights-of-way, or other encumbrances that are related to construction work. Construction management students would benefit from a basic knowledge of this legal principle to help them know exactly what they should be looking for during their due diligence of a new project. Gail Kelley, author of Construction Law: An Introduction for Engineers, Architects, and Contractors, also describes property law as, “Certain aspects of property law, such as easements and zoning regulations, can have a significant impact on a construction project...Property law also encompasses issues related to the transfer of title to land and buildings. When a project runs into financial problems, the relative priority of those who have claims on the title to the property may determine who gets paid.” (Gail, 2012). This is extremely important for management to understand since it has such a big effect on the financial outcome of the project.

Professional Licensing and Insurance Law

Professional licensing is an evolving trend that is becoming very popular for construction managers. Gregory Starzyk JD., author of Construction Law: Contracts, Risks and Regulations, defines the topic and establishes the importance of professional licensing when stating, “Professional licensing spans the licenses for engineers, architects and even construction managers. Geographical locations have

different laws governing construction projects and the working professionals that are required to be licensed for the job. One benefit to becoming a contracted licensed professional means that a contractor can enforce their own contract in a court of law” (Starzyk, 2015). With the evolving trends in licensing, it would be beneficial for students to understand licensing options and to appreciate how licensing influences their projects. Construction management students work with architects, engineers, and even licensed construction managers on many of their projects. It’s very helpful to know which different types of projects require certain licenses and what those licenses entail.

Risk is an inherent part of any construction project. Managers must be able to understand the ways to mitigate these risks. A very big part of this risk management comes in the form of insurance policies. “Insurance is a crucial consideration in construction project planning of means of covering losses and minimizing disputes among the parties on a project” (Kelleher, 2014). As project managers plan and review the project risk management methods, it is important to understand the policies that they are contractually required to obtain and the insurance policies that the contractor may require others to obtain. Insurance law is a very prevalent legal concept that is seen in majority of construction contracts. Construction management students will encounter multiple contracts throughout their careers that will include insurance provisions. Students should be able to discern what types of insurance they are required to have for a job as well as know the unspoken insurance rules that may accompany certain projects. Students would benefit from understanding various policies such as: commercial general liability, workers compensation, builders’ risk, automobile insurance, errors and omissions, and professional liability insurance.

Tort Law with Respect to Negligence and Willful Conduct

Construction projects are notorious for producing accidents or injuries to people and property. With this comes the commonality of lawsuits and liability issues. Page Keeton, author of Prosser and Keeton on the Law of Torts, defines this topic as, “Laws of tort include claims where a party suffers harm to personal, property or financial interests. A tort is a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages” (Keeton, 1984). Negligence is defined as the failure to provide the care for or behaving in a way that a reasonable person is expected to. Negligent claims can play a big part in recovery situations where there was no privity of contract or when the contract may not apply for other reasons. Nate Budde helps reiterate the importance of this topic when he states, “Negligence as a theory of recovery against the project architect or engineers (design professional) is important for contractors because their lack of contractual privity with the design professional makes a breach of contract action impossible” (Budde, 2019). This needs to be understood by project management to ensure that they are always covered and do not end up being held liable for negligence. Contractors can be held liable for negligence that results in injury to third parties whether that be due to unsafe construction methods while the work is in progress or defects in the completed structure. This is important to understand since these issues can arise even after the contracting team has final completion of a project. Managers should be aware of the consequences and how to prevent negligent claims from happening.

Labor Law and Employment Law

Employment law covers all the laws, regulations, and mandates regarding the employer-to-employee relationship. Pulled from the graduate-level course chapters in Starzyk’s book, he stresses the importance of employment law by stating, “Project managers need to understand the basics of

employment law so that they can recognize situations that raise legal concerns, make informed field judgments, and know when to call lawyers” (Starzyk, 2015). Another form of employment law that Starzyk mentions managers will come across is the manager’s accountability for human resource management at the construction site. (Starzyk, 2015). It is also important for project managers to understand the local and state regulations that govern their construction site. “Industry professionals are required to be familiar with regulations dictated by the United States Department of Labor, California Employment Development Department, California Department of Labor Standards Enforcement, and California Department of Industrial Relations among others” (T. Kommer, Personal Communication, December 7, 2021). This stems from the rules and regulations enforced by the Occupational Health and Safety Administration or OSHA (Federal) and the California Department of Safety and Health or CAL OSHA (State). OSHA is a large regulatory agency of the United States Department of Labor created to ensure safe and healthy working conditions for workers. These agencies create standards and regulations that all US businesses must abide by in their offices or on jobsites. With the overwhelming abundance of safety risks on a construction site, OSHA regulations are a huge part of the management factors for the project team. Regulatory compliance or compliance with government law is a necessity on a construction jobsite.

Other labor law focuses on laws related to unions, collective bargaining, and any issues related to organized labor unions. These legal aspects are commonly seen in project requirements with unions and varying types of workers. Some projects may have requirements for certain percentages of workforces that must be used on a project. This can be seen in the contract and can also be a local mandate, so it is necessary to be understood since it can have a huge impact on whether the project team is complying with local regulations. Labor agreements can be complex to understand with many different provisions included but students should be able to interpret the basic agreement. Starzyk mentions that labor agreements commonly have no-strike and no-lockout provisions. Starzyk defines a strike as “an orderly, planned refusal of employees to work at a particular site, sometimes authorized by a vote among union members” (Starzyk, 2015) and “A lockout is a refusal by an employer to allow workers to work at the jobsite.” (Starzyk, 2015). Project managers need to be aware of the different provisions in their contracts since labor disputes are a commonality in the construction industry.

Criminal Law

Many people do not correlate construction with criminal law, but it does have a very big role in the relationship between construction and the law. Criminal law proceedings can make or break companies and the persons responsible. It is important for companies and managers to take preventative measures to protect against criminal proceedings. Students should understand the basic risks and regulations that go along with construction and how each tier of the different construction companies can be held liable for criminal wrongdoing. According to Law firm, Graf Von Westphalen, “Criminal law can be seen in construction in many circumstances like endangering construction, environmental crimes, violations of the law on temporary employees, and off-the-book work” (Graf Von Westphalen, 2021). Students should be aware of the different criminal legal proceedings due to the enormous effect they can have on a company or even themselves.

Contrasting University Construction Law Curriculum

The construction management major has been a growing trend for universities in the United States. Looking at other universities with construction management undergraduate programs as well as

graduate-level programs, there are some differences in what they include in their construction law course curriculum versus Cal Poly's construction law course curriculum. Columbia University's M.S. program for Construction Administration was ranked the number one of twenty-five best master's programs in construction management by Great Business Schools. (Construction Administration Curriculum & Courses, 2021). The course curriculum for their "Legal Issues in Building Construction" includes courses on the proposed topics of professional licensing, insurance law, and proponents of labor and employment law. The California State University of Chico is also a well-known undergraduate construction management program in the United States. They have an advanced course called "CMGT 462 Construction Contracts" (Current Course Offerings – Construction Management, 2021). This course teaches construction law on contracts with a review of the current contracting systems and documents utilized for construction contracts. The course overview states that the course examines and analyzes the US Department of Labor Laws and the California Labor Code as these laws pertain to construction labor contracts, employment regulations, workers' compensation, and safety. (Current Course Offerings – Construction Management, 2021). Arizona State University has an online Master of Legal Studies in the construction law program. This course curriculum offers elective courses including "Property" which explores indicia of ownership, found property, estates, landlord-tenant relationships, nonpossessory interest in property, nuisance and more. (Arizona State University, 2021). Another elective course offered is "Tort Law" which covers the legal protections of personality, property, and relational interests against physical, economical, and emotional harms (Online Master of Legal Studies in Construction Law, 2021). Reviewing other top construction management programs curriculum shows that Cal Poly would benefit from adding an advanced course that incorporates more topics than just the law of contracts.

Methodology

The first step to determining the benefits and need for a topics course that dives deeper into construction law topics was preliminary interviews. These preliminary interviews were conducted with professors and legal industry workers who have experience in dealing with construction or real estate and law. These preliminary interviews helped determine which specific legal topics would be the most beneficial to the students in Cal Poly's Construction Management Department. Once the topics were established, a literature review was conducted to review and research the legal definitions and scenarios of these topics. The research looked at how the topics will pertain to students and their future careers. Using the topics listed prior, sources were analyzed for relevant information as well as the credibility of the source. In conjunction with this literature review, interviews were conducted with company executives, lecturers, and legal industry workers. All forms of research focused on the topics of real property law, professional licensing and insurance law, tort law with respect to negligence and willful conduct, labor law, and criminal law.

Analysis

Preliminary Interviews

To determine the most specific legal topics that Cal Poly Construction Management students would benefit from learning the most, interviews with industry professionals and educators were crucial. The

research started with preliminary interviews of two legal professionals and a former Cal Poly Construction Management professor for Construction Law. Preliminary interviews were conducted with Special Master, Mediator, and Arbitrator, Anne Goyette; Real Estate Lawyer and Partner at DLA Piper LLP, Jim Anderson; and Retired Professor and Author, Gregory Starzyk, JD. Goyette based her opinions off personal experiences as a special master having worked with many construction company disputes. Goyette stressed the importance of insurance law and understanding how to protect one's business and projects. Anderson gave a great insight on what real property law entailed and the importance of knowing the legal precedents behind zoning and government regulations for construction projects. Finally, Starzyk has an array of knowledge on the overall subjects of construction law and is well versed in what the construction management department teaches since he wrote the coursebook for CM 334 – Construction Law. He talked about wanting to update his coursebook with all the new regulations and recent cases. Starzyk also mentioned the evolving trend of professional licensing and how he thought this would be very beneficial for construction management students to learn since this will be very prevalent in our future careers.

Interview Testimonials

After establishing topics to be taught in the proposed class more industry professionals were interviewed for their opinions on the benefits of these subjects for students entering the construction industry. Interviews conducted with Daniel Knight, Cal Poly Construction Management Lecturer and Construction Attorney & Expert Witness; Former CEO, Kevin Albanese, President and Chairman of the Board for Joseph J. Albanese and Attorney of Law; Charles Muttillio, President at Morley Builders; and Neeka Nazhand, Project Engineer at Devcon Construction Inc. These interviews were semi-structured and more conversational to avoid any unbiased responses.

Daniel Knight, Construction Law Lecturer

Daniel Knight is currently a lecturer at Cal Poly University, teaching construction law and construction accounting as well as being an invited Adjunct Professor at the San Luis Obispo College of Law teaching construction law and legal research. Knight is also a Construction Law and Construction Defect Attorney in California and licensed contractor. In addition, Knight acts as a consulting expert witness and litigation expert witness in construction-related engagements. Talking to Knight was very enlightening with his experience in both construction and law in addition to being a current lecturer of the curriculum of the topics proposed for this senior project course.

Interviewer: Of five topics mentioned for this class which one do you deal with the most often?

Daniel Knight: "At my law firm we deal with insurance all of the time. Not even 50% of what we teach in CM Law covers the insurance issues that we deal with daily."

Interviewer: Do you think this class would be beneficial for students in the construction management program?

Daniel Knight: "Absolutely. I think you are on the right track with this class... One way to get more enrollment interest would be to cross-list this with the business school. The business majors are always trying to get into CM 334 but never can since it is impacted with CM students. This topics

course can be a segway for business students interested in law school...This class can also help with students who are on the fence about going to law school after graduation.”

Neeka Nazhand, Devcon Construction Inc Project Engineer

Neeka Nazhand is currently working as a project engineer with Devcon Construction and has worked in the construction industry for a total of five years. Nazhand is a graduate of the Cal Poly Construction Management Department. Most recently, Nazhand worked in San Jose, California on an immense commercial office building project. Being a Cal Poly Construction Management alumnus as well as being at an entry-level management position, her opinions were very valuable on the incorporation of an advanced construction management topics course.

Interviewer: How often do you see different legal aspects in your day-to-day job?

Neeka Nazhand: “In a way we deal with it a lot but more behind the scenes. I think about our contract and how we have this legally binding document that we are basing the entire project off. So that is where it comes into play every single day. Same with labor and liability. With a crew of people doing physical labor onsite, we have to follow a lot of important laws. I would say another thing with that is important is safety and all of the different OSHA rules and laws we have to follow.”

Interviewer: Do you wish you learned more about certain areas of insurance law or labor law before you got started or do you think you were able to adequately understand it once you got into the field?

Neeka Nazhand: “I think it would have been helpful to have more knowledge and classes about it. It could put you one step ahead with having more knowledge about what is going on around you and with your work.”

Interviewer: If you were to take a topics course at Cal Poly which topics do you think would have helped you the most now that you are in the industry?

Neeka Nazhand: “I think the labor and employment law would be really beneficial with the safety and OSHA regulations. It would be helpful to know about this because we would not be able to do what we needed to do without labor and all of the laws surrounding it.”

Charles Muttillo, Morley Builders President

Charles Muttillo is a Cal Poly Construction Management alumnus and the current president of Morley Builders. Morley Builders is a full-service general contractor that provides preconstruction, general contracting, construction management services, and self-performed structural concrete services in Southern California. Charles started his career as an intern for Morley builders in 1985 and has made his way up to top management positions with a total of thirty-six years in the construction industry. A transcript of the interview is as follows:

Interviewer: From your experience when did you start dealing with the legal side of construction? Was there a time you wish you knew more about the legal sides of it?

Charles Muttillo: “There was a point in time that I toyed with the idea of going to law school, but life got in the way. I think having a basic understanding of these different ideas would have been very

helpful. We went from a privately held company to a 100% employee-owned company and that whole transition was a huge undertaking. The only way we got through it was with multiple people with different legal expertise in different areas. Also, if you think about the law profession there really isn't a lawyer that is an all-around specialist. I think being able to understand the who, what and when of questions to ask would have been very helpful."

Interviewer: In your opinion do you think the topics that I went over would be too advanced for a student of my age and expertise to be learning right away?

Charles Mutillo: "No, I think you could have a lot of fun with a class like this. I think you could bring in various experts and perspectives to talk about these topics. For example, you could take two weeks and focus on the AIA documents and then bring in a general contractor who gives the class examples of challenges they had. Then bring in a subcontractor that talks about, from their perspective, a challenge they had...and an owner representative, and then an insurance company to say how that works. I think it would be especially beneficial if there are real-world examples. I know that's what we do our classes on [Morley Builders]."

Kevin Albanese, JD., Former Joseph J. Albanese Company President

Kevin Albanese is a Santa Clara Undergraduate and Law School alumnus and former president of Joseph J. Albanese Subcontracting Company, with a total of twenty-seven years of experience. Joseph J. Albanese is a family-owned Bay Area subcontractor that provides demolition, grading and paving and concrete-related services. Kevin Albanese now works at the Family Business Institute as a management consultant helping families navigate their business and establish business plans. With Kevin's experience in both law and construction, his opinions were very helpful, as well as course topics he thought were the most beneficial to him from his law school curriculum.

Interviewer: After hearing about the background of my senior do you have any ideas from your experience with Albanese and working in law, of some topics that you think would be the most beneficial for students to learn?

Kevin Albanese: "I'm looking through the classes I took in law school, so here are some topics:

1. I would say in property a subset of property would be title. I would talk about mechanics liens and how that works. Mortgages are really important. The reason why mortgages are important is from a time when we [Joseph J. Albanese] were on a job and the job ended up going bankrupt. With a general contractor, if you start construction on a job before they record a mortgage, the contractors have priority over the mortgage. I think you want to understand that and the general idea. Also, acquisitions and the basics surrounding that.
2. In torts, I would talk about the negligence standard. Strict liability, product liability, and how that works. That covers a lot of the tort area.
3. I think you could touch on fraud. You could talk about criminality in the context of people getting hurt on a jobsite. How to discern when it goes from negligence to criminal.
4. I think employment law and labor law would be huge. Employment law is going to transcend everywhere. Labor law is important when in a high-density union environment. The amount of people that are involved in collective bargaining and organized labor that doesn't have a clue is astonishing.

5. I wish I could have taken a class on insurance law during law school. A general insurance class would have been very beneficial. You are absolutely 100% on point.
6. One other thing, I would do a section on contractor's license law. That is a huge area of, believe it or not, litigation but also high-risk litigation. If you're wrong, you could lose everything. You could also call it professional licensing and broaden it. You could do contractors licenses, surveyors licenses, architect/engineers and what they all can do. Another thing is you could also add in parts about how to manage lawyers or a legal team. Just questions to ask because it's so esoteric. I definitely think you're on to something and you can put together a great curriculum."

Interviewer: Were there any other classes or topics that you wish you learned more about in law school?

Kevin Albanese: "Yes, the one area/class that didn't fit into my schedule at Santa Clara was more insurance law classes. It would be good for project managers to understand the different coverages. You have general liability, professional liability, pollution, workers compensation, directors and officers, builders' risk, etc. There are all sorts of different policies that protect certain interests and it's good to have a working knowledge of what those are. Owner-controlled insurance programs are big now and they have a lot of pitfalls that you really need to know about and what's going on there. I think that would be a really good topic."

Further Research

The research done for this project focused mainly on the benefits of implementing an advanced topics course for students enrolled in Cal Poly's Construction Management Department. Since the confirmation of legal principles that the construction management department curriculum does not cover, a future senior project can dive deeper into these specific topics to create a course curriculum. The course can be designed to designate two weeks per topic with the general background of the topic for the first week and then a case study for the second. A future student can design power points that cover the basic principles of each topic as well as find case studies that relate to each topic. Students can also research different course books that would incorporate all these different topics.

Conclusion

Construction will always be intertwined with the legal system. The legal system is one of the backbones of the construction industry from a legally binding contract for every project to insurance coverage policies to protect companies from financial destruction. For students to be fully prepared for their new careers in the construction industry, Cal Poly Construction Management students should receive an education on all of the legal aspects that they will encounter in their careers. Although contract law is covered in the CM 334 – Construction Law course curriculum the addition of a topics course that explores other legal areas would benefit students and their future careers. The most important legal topics encountered in the construction industry in addition to contract law are real property law, professional licensing and insurance law, tort law with respect to negligence and willful conduct, labor law and employment law, and criminal law. Industry professionals that teach or

practice law and hold management positions in the construction industry share the belief that Cal Poly Construction Management students would benefit from an advanced construction law topics course teaching more comprehensive legal ideas that will be encountered in future careers. Each individual, when interviewed, mentioned the importance of having a basic understanding of all the potential course topics and how they have all come across situations that involved these legal areas during their careers. The Cal Poly Construction Management Department is one of the top undergraduate programs in the country for construction management and is well known for the technical preparedness of their students when entering the construction industry. Incorporating an advanced topics course for construction law in the Cal Poly Construction Management curriculum would only benefit students and help solidify their knowledge and understanding of the industry.

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