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How Better Daily Reports Put Construction Attorneys and Experts Out of Work



By Ted Bumgardner

One thing that has certainly changed over the 30 years that I have been providing expert witness analysis and testimony on construction disputes has been the size of the files we work with. The unit of measure for case documents has evolved from the Banker's Box to the Gigabyte—truckloads of yesterday's Banker Boxes if printed out. The quality of the information, however, doesn't necessarily improve with the quantity of information. It just makes the job of finding the critical information more difficult and time consuming without advanced eDiscovery tools.

Yet, even with all of the technology available today, one source of information—the contractor's daily report—remains one of the most critical sources of information when it comes to understanding retrospectively what actually happened on a project.

The information contained in the daily reports from the field is typically considered credible, since it is presumed to be (1) generated contemporaneously with the actual work, (2) to present an unbiased view from the perspective of the field superintendent, and (3) formulated well before any attorneys have the chance to influence perception of the subject event.

Daily Report Technology is Only Part of the Solution

All this being said, we see a wide range in the quality and content of field daily reports. On the weak end of the spectrum, we find reports with hand-scratched notes that are barely legible, inconsistent, and offering little value to the process of understanding the reality of the project. On the strong end of the spectrum, we see the use of voice-to-text technology, word search capabilities, and photos inserted alongside links to critical documents of the day.

When big dispute arises, the contractors who have invested in the best technology for their field documentation will likely save considerably more money in litigation expense and claim effectiveness than they spent in their daily report apps and project management platforms.



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But, even with the best daily report software, templates and other tools, **the documentation is only as good as the documenter's understanding of what's critical to document.** The best way to think about “what should I document?” is to start by reverse engineering the claim process.

A contractor's entitlement to a claim is based to a large extent on whether the event giving rise to the claim was “reasonably anticipatable.” A contractor is generally responsible for all work reasonably inferred from the project documents, including the contract and all documents referenced in the contract. Generally, a contractor cannot be held responsible for the things that are not reasonably anticipatable or that are “unforeseen or unforeseeable.” Thus, the concept of “reasonable anticipation” is critical to sorting out claims.

The practical problem we often see with contractors' documentation practices is that the superintendent in the field—the person who is filling out the daily reports—doesn't know exactly what the estimator and/or project manager in the office was thinking when the estimate was generated and the contracts were negotiated with the owner and the subcontractors.

That is why the foundation for good field documentation must first start with a very vivid and clear understanding by the field superintendent and field management team of what was reasonably anticipated by those “in the office” before the contract was ever executed.

Helping Field Management Achieve Solid Documentation

Before the work in the field ever starts, I urge the project team to spend sufficient face-to-face time, going over every line item of the estimate and activity

in the schedule, in order to transfer every aspect of “reasonable anticipation” to the field management team. They should think through every aspect of the project and focus on identifying actions by other parties that the contractor is relying on for the successful performance of the project.

Next, the field management team should document—in writing to the owner—all of those critical things that the contractor is reasonably relying on from the owner, as well as the owner's design consultants, who are not under the contractor's control. Likewise, the field management team should document to the subcontractors and vendors those critical things that the contractor is reasonably relying on from them. Then, the superintendent and field management team should strive to record every event that deviates from that reasonable anticipation, no matter who makes the deviation, in their daily reports.

As a construction expert tasked with sorting out claims well after the fact, I would advise contractors who want to avoid claim disputes, or who want to make sure they are in the best possible position to prevail when a dispute arises, to make the following their mission:

Strive for timely written notification of any substantive deviation from reasonable anticipation, backed up by good, accurate and unbiased contemporaneous field documentation.

If contractors do this, their jobs will run much better, they will be far more profitable, and construction attorneys and experts (like me) will all have much less work—all noble objectives.

Ted Bumgardner is founder and chairman of Xpera Group. He can be reached at tbumgardner@xperagroup.com.

CASE FILES

Subject Federal Breach of Contract & Delay Claim Resolution

Client Kevin Cauley, Partner
Schwartz Semerdjian Cauley & Moot, LLP
San Diego, CA

Expert Ted Bumgardner



Kevin Cauley

Kevin Cauley has been representing clients in construction law and defect cases for more than 20 years. He has been calling on the expertise of Ted Bumgardner for a great many of those years, dating back well before the founding of Xpera a decade ago.

Most recently, Cauley and associate Kristen Bush brought in Bumgardner for a federal court case he was working on that involved breach of contract and delay claims for a federal project at the U.S. Army base in Monterey, CA.

Cauley's firm was retained by the plumbing subcontractor for the project, who was suing the general contractor and surety bond firm, claiming they had not been paid in full. The general contractor contended that Cauley's client had breached their contract, did not complete the work, and that they had to make repairs to defective work. The general contractor filed their own delay damage claim against the plumbing contractor, seeking \$2.5 million in damages.

Bumgardner was brought in as an expert witness to counter the general contractor's delay claim.

"The challenge for any case of this nature is how to communicate effectively with the jury," said Cauley.

"We had very dry material, talking about scheduling and the plumbing aspects of the project, in order to determine whether the plumbing contractor was responsible for all of the delay or if the general contractor brought the delay on itself."

Fortunately for the client, breaking down highly technical data and presenting it to a jury as simple common sense is Bumgardner's specialty. He was able to take the material, which included a lot of trade terminology, hard-to-understand graphs and complex schedules, and translate it into something that was clear and understandable for the jury.

"This case had plenty of fireworks," said Bumgardner. "The general contractor's delay expert opined that the plumbing contractor was responsible for 120 days of delay, while it was my opinion that other issues, unrelated to plumbing, were in fact the cause of the delay."

Those in the industry know that many claims settle before reaching the trial stage, in large part due to legal strategies and negotiation tactics by the attorneys on behalf of the parties. In the lead up to the trial, the opposing counsel tried a "Hail-Mary" strategy.

"Opposing counsel made a motion to exclude my testimony, which doesn't happen often to experts," said Bumgardner.

"It was denied, and so the case went to trial. In the end, the jury agreed with my analysis and ruled in the plumbing contractor's favor. I congratulate Kevin on this favorable verdict for his client."

"Ted's testimony and presentation graphics were very effective in helping the jury make their decision," said Cauley. "As a result, the general contractor received zero from the jury for their delay claim, which represented the majority of the \$2.5 million claim. We were very pleased with the successful outcome for our client."

Congratulations, team!

To learn more about Xpera's construction forensics and expert witness services, contact Ted Bumgardner at tbumgardner@xperagroup.com or Brian Hill at bhill@xperagroup.com.



Strategic Design

How architects can utilize market research to ensure project success

By Justin Cox

Architects design places where people live, work and play, but their creative process isn't done in a vacuum. It relies on input from the developer and other stakeholders, as well as their own design knowledge and experience. However, for a building project to be financially successful, it must also meet market demand. To achieve that, the architect needs solid design direction with specific project requirements.

This design direction typically comes from the owner/developer team. Yet, in plenty of cases, the requirements are either unclear or are not based on solid due diligence. According to McGraw Hill Construction's SmartMarket Report, *Managing Uncertainty and Expectations in Building Design and Construction*, "Unclear project requirements at the outset is identified by all [Owner Architect Contractor] parties as the top driver behind owner-driven changes." As we know, those changes can become quite expensive, especially when they occur during construction.

To help clear up this uncertainty, Alan Nevin, Xpera's director of market research and valuations, is often called in by either the developer or architect to prepare a market strategy study for a project. He has performed over 1,000 of these studies throughout California and nationally, and one common scenario he sees is that the architect was instructed to begin designing the project before conducting any market research.

"I have worked with numerous architects on multi-family project designs over the years, and unfortunately, by the time I am called on for a market study, the project is usually well into the design stage," said Nevin. "As a result, I am typically handed a set of schematics, complete with floor plans, square footages, unit mix, amenities and parking. This approach is really counter-productive and causes the team to miss out on a tremendous opportunity to ensure a more successful project."

Nevin has found that for multi-family projects, the architect has often not received specific design direction from the developer, nor has the developer retained counsel on project details. Most of the time, the developer's direction to the architect is simply to optimize the property for maximum floor area ratios (FAR), height limits and the least onerous parking requirements. Architects do their best to address the needs of the client based on this general direction, but, more often than not, their research doesn't go deep into real estate economics.

That's where Xpera can help. Nevin routinely tracks projects coming out of the ground in California's major active markets, such as downtown San Diego. He keeps an active record of what stage the projects are in, along with their FAR, unit sizes and mix, and parking ratios. Nevin says, "What we've found recently is that downtown San Diego has a wide range of multi-family and mixed-use projects with the same unit ratios and sizes. Yet, it is impossible that the entire market wants the same product."

There are plenty of reasons for these copycat developments. One is that they are following past successes. Another is that they are trying to minimize San Diego's development fees, which are mostly calculated per dwelling unit.

But if all developers provide design direction that calls for optimizing development costs with the same unit mix and sizes, the incoming supply of apartment/condo products will inevitably become mismatched with market demand.



Economically, this forces developers into a game of chicken (also called hawk-dove in game theory), which means some projects will underperform financially when the target market segment is tapped out.

“Needless to say, I take a different perspective,” said Nevin. “The key focus of our development strategy studies is to determine the depth of the market and simultaneously determine niches in the market that have not been filled.”

When Xpera is asked to perform a market strategy study, our goal is to help provide a solid sounding board for the architect’s own design research, as well as a cornerstone for the developer’s due diligence for seeking construction financing.

This comprehensive, data-driven strategy results in the developer producing a more unique and exciting product to the market and ensures that it will be met with a favorable reception. Importantly, the product will not be a copy of every other project, helping it maintain its optimal position in the market. We know that renters and buyers will respond more favorably to new product with creative plans.

Nevin’s strategy studies have helped some of California’s leading architects take a stronger leadership role in developing their projects’ design direction, including Joseph Wong of JWDA in San Diego.

“Alan provides invaluable marketing strategy to the design team from the outset of a residential project,” said Wong. “His development insight and market research give a big-picture overview that fortifies the economics, targets future residents, and strengthens the design and the site development.”

The goal of Xpera’s development strategy studies can help ensure the most appropriate product hits the market, resulting in a project that sells out or rents up faster. By reducing turnover and allowing vacant

Market Research Reports vs. Development Strategy Studies

What’s the Difference?

Most market feasibility reports include lots of statistics on the economy and market, likely all computer-generated, followed by brief conclusions and a summary of project recommendations.

What is inevitably missing is the most critical element—the strategy and analysis that connect the statistics and provide sound real estate development recommendations.

That’s where Xpera shines.

units to be absorbed quickly, developers will be able to optimize revenue, and hopefully further spur the housing production that California so urgently needs.

To learn more about Xpera’s development strategy studies, visit www.xperagroup.com/services/market-research or contact Alan Nevin at anevin@xperagroup.com.

California Closes Condo Balcony Inspection Gap with **SB 326**



When we first reported on **SB 721, California's balcony bill** requiring inspection of Exterior Elevated Elements (EEEs), the draft included condos and other “common interest development buildings.” That provision was removed, however, in an amendment before it was signed into law.

Now, a **second balcony inspection bill** closes that gap. **Senate Bill 326** specifically focuses on common interest development buildings. While the bill requires inspections of EEEs, it goes further than that, dramatically impacting both reserve studies as well as construction defect litigation.

Last year's SB 721 affects a major portion of California's 2.8 million apartment units—specifically those in buildings with three or more multifamily dwellings. Its younger sister bill, SB 326, will make an even bigger impact, affecting over 52,000 common interest developments, which comprise nearly a quarter of the state's housing (6 million+ units).

The Community Association Institute of California has come out in support of the bill, which CAI-CLAC had a hand in crafting, according to public statements by its PR Chair. That lobbying effort makes the new law a different beast.

Laying the Groundwork for Construction Defect Litigation

Unlike the previous bill, SB 326 has a more rigorous inspection protocol:

- ▶ The inspector must be either a licensed structural engineer or architect.
- ▶ The bill requires inspecting a “random and statistically significant sample” of EEEs (95% confidence, error margin $\pm 5\%$).
- ▶ The bill defines the inspection process more explicitly, including defining the term “visual inspection” and permits the inspector to use professional judgement to conduct further inspections.
- ▶ The written report must be stamped by the inspector.

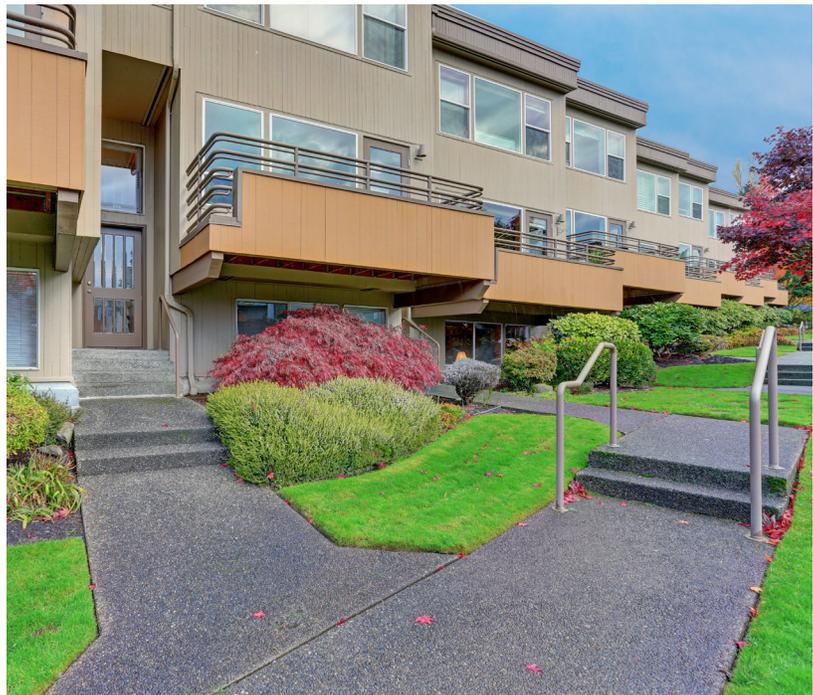
One might wonder why CAI would support a bill with much more rigorous and expensive inspection methodology. However, in construction defect litigation, the gold standard for evidence is a statistically significant sample inspected by a licensed architect or engineer.

In addition to inspecting EEEs, another major change implemented by the bill is that no HOA governing documents can impose preconditions or limitations to the board's authority to commence and pursue legal proceedings against the developer or builder.

It also nullifies any existing terms in associations' covenants, conditions and restrictions (CC&Rs).

The rationale behind nullifying CC&Rs comes to light by reading the bill analysis documents. When creating an HOA, developers have typically laid the groundwork for the association's future self-governance, and often they write CC&Rs that prevent or severely limit HOAs from taking certain legal actions against the developer. These measures include binding arbitration or other alternative dispute resolution requirements or allow the developer and/or its appointees to influence votes or other actions that could lead to litigation against them.

While the bill helps associations take action against shoddy construction, it unfortunately becomes another reason for developers and builders to avoid new condominium construction—one of the “missing middle” housing types California desperately needs.



Raising the Bar in Reserve Studies

Condo HOAs in California have to follow the Davis-Stirling Common Interest Development Act. One of the major components of that law is Civil Code Section 5550, which mandates conducting a reserve study every three years.

SB 326 states that the EEE inspections are to be done once every nine years, and that the inspection report must be incorporated into the reserve study. The report includes detailed information of each inspected element's condition, expected future performance and remaining useful life, and repair/replacement recommendations.

By incorporating the EEE report into the reserve studies, the consultants who perform them will have access to high-quality information to more accurately estimate the total annual contribution to repair or replace balconies, stairways and other exterior elements.

Keeping Tabs

While the governor's ink on the law is still wet, Xpera Group will continue to closely analyze the details and implications with this new balcony law, as we have done with SB 721.

Since developing our Balcony Assurance service, we have been working closely with many proactive HOAs and condo owners in Southern California and the Bay Area, including some who already anticipated the impacts of SB 326. We look forward to helping others achieve compliance with both of the new laws.

For further information, contact Brian Hill at bhill@xperagroup.com

Service Spotlight: CUSTOM HOME QUALITY MANAGEMENT

Building envelope and waterproofing consulting for complex, luxury residential projects

Great rooms with giant aquariums serving as walls or floors. Revolving circular driveways, 60-car cylindrical parking garages and three-story pools. A party house with a retractable roof so that guests can dance under the stars. Homes the size of shopping centers, built into the side of a cliff or the top of a mountain. There is no “typical” assignment for Xpera’s **Stephen Wilson**.

There is one constant, however. No matter how crazy and extravagant the design, it can’t leak, especially when millions of dollars are at stake.

Wilson has been serving in the trenches — in some cases, quite literally— for 37 years. From his early days as a tradesman installing roofing and sheet metal, to running his own general contracting firm, to serving as a testifying expert in construction defect litigation cases, to providing building envelope consulting and quality assurance services, he has seen it all when it comes to waterproofing challenges.

Wilson has been part of the Xpera team since Day 1 back in 2009. These days, he finds himself consulting on **ultra-high-end custom home projects** ranging from Southern California to Nova Scotia, but with the heaviest concentration in the elite communities of Los Angeles and Santa Barbara.

“If the owner can dream it, they will ask someone to build it — and they won’t let a little thing like water stand in the way,” said Wilson. “The architect will be tasked with taking all these elaborate design features and requirements and finding a way to make them all work together so that they not only meet the owner’s aesthetic visions, but also function properly and will stand up to the elements over time. That’s where we come in.”



Home in Malibu, CA, designed and built by Marmol Radziner

Ensuring Quality in Luxury Home Construction

With a clientele based on long-term relationships and word-of-mouth from architects, waterproofing manufacturers or owner’s representatives, Wilson provides **building envelope consulting and as-needed quality assurance observation services** for homes ranging from 5,000 to 30,000 square feet. The scope of his work varies by project, but typically falls into three main categories:

► Design Services

Coordinating with the architectural team to review all drawings and provide waterproofing recommendations; consulting with the client regarding potential manufacturers, materials, methods and systems; and providing specification recommendations and assistance in the design of the building envelope systems.

► Construction Document Services

Coordinating construction documents with the architectural team; and reviewing and rendering professional opinions as to the accuracy of submittals for the building envelope by the contractor or subcontractor regarding compliance with the contract documents, codes or industry standards, and manufacturers’ installation instructions.

► Construction QA/QC Services

Providing documentation, including on-site field inspection reports and photographs, throughout the construction phase of the project and advising the client of any observed non-conformance issues.

Wilson focuses on the entire building envelope for the project, from below-grade waterproofing to roofing and everything in between. He looks at the complex intersections of all the different building materials and systems, looking for points that could leak if not detailed or executed precisely right.

“There is simply no point in investing millions — and in some cases, tens or even hundreds of millions — of dollars on a home only to be faced with devastating failures in the materials or systems a few years down the line,” he added.

Waterproofing Challenges with “Green” Homes

Another challenge Wilson is faced with these days is related to the green building movement. He explained that architects are increasingly trying to have their luxury products reach the prestigious LEED certification. Part of that process involves integrating more environmentally friendly materials into their projects. Unfortunately, many of these newer, greener materials are not yet time-tested, so it's still unknown exactly how they will perform long term.

The untested materials issue is similar to what the industry faced in the 1970s with the introduction of new VOC (volatile organic compound) restrictions.

“We were told that we could no longer use some of the chemicals that bonded best with different components,” said Wilson. “Everything had to be water-based, which was obviously very difficult to come up with when you're dealing with waterproofing systems.”

Unfortunately, adapting to VOC restrictions resulted in a lot of building failures while the industry figured out new reliable solutions. According to Wilson, as the industry now navigates the uncharted “green” waters with natural and recycled materials, it will be critically important for the design team to do their due diligence, to determine exactly how their design and specification decisions will impact the overall integrity of the building envelope over time.

When asked about some of the biggest challenges he comes across from a waterproofing standpoint, Wilson cites elements such as rooftop pools or green roof systems, where gardens and even trees are planted above living spaces.

“These systems are challenging enough to build properly in temperate regions like Southern California, since you have to account for things like soil depth and root systems potentially tearing up waterproofing membranes,” said Wilson. “But, when you try to take these concepts and apply them to a home overlooking a ski resort in Utah, where you have to also accommodate 10 feet of snow, it's a whole other animal. You just can't afford to get the details wrong.”

The risk associated with new materials is compounded by the fact that many of the luxury home features we encounter are custom-designed and manufactured and may need to comply with more stringent building code requirements.



Home in La Jolla, CA, designed and built by Marmol Radziner

Successful Collaborations

One of Wilson's long-term clients is Los Angeles-based Marmol Radziner, a unique design-build practice led by architects. Since its inception in 1989, the firm has developed a reputation for innovative design and precision in applying construction standards.

“Steve and I have been working on complex custom home projects for over 20 years,” said Construction Director R. James Dunne.

“When I joined Marmol Radziner in 2008, we called upon Steve to help refine our waterproofing systems and specifications. Marmol Radziner homes typically integrate brick, stone, wood, metal, glass and plaster with vegetated roof systems. An integral part of our team, Steve provides design assistance for waterproofing systems that are compatible with these materials. Steve's onsite inspection process is thorough and invaluable. He works closely with our construction teams to ensure that subcontractors adhere to the manufacturer's recommended installation procedures. When it rains, I feel confident that our projects are fully protected because of Steve's expertise.”

Xpera appreciates the opportunity to contribute our expertise to the success of these ambitious projects. Because, regardless of its size or value, every owner deserves the peace of mind that comes with a well-built, water-tight home.

To learn more about Xpera's building envelope consulting services for custom homes, contact Stephen Wilson at swilson@xperagroup.com.

Notable Forensic Architect Bruce Bergman Joins Xpera Group



Bruce Bergman, AIA

Xpera Group is pleased to announce the recent addition of **Bruce Bergman, AIA**, to our Construction Consulting and Real Estate Advisory division. He brings with him over 34 years of experience as a licensed architect, with most of the past 23+ years cultivating a successful forensic architecture practice.

A graduate of the highly regarded architecture program at Cal Poly San Luis Obispo, Bergman also had the opportunity to participate in a summer design program at the Ecole des Arts Americains in Fontainebleau, France. He has worked with a veritable Who's Who of architecture firms in the Southern California region, including KMA, SGPA, Stichler Design Group, Rob Wellington Quigley and Carrier Johnson + Culture.

Bergman's career has centered around three primary areas: forensic architecture, risk mitigation and sustainability. As a forensic architect, Bergman has played an influential role in the investigation and assessment of many high-profile, and sometimes precedent-setting, cases. With a commitment to giving back to the architecture profession, he has provided coaching, mentorship and consulting for architecture firms on professional practices, standard of care and the latest trends impacting risk mitigation. An early proponent of green building practices, Bergman brings a unique perspective to the world of sustainability, and has volunteered hundreds of hours of his time to various community-oriented projects.

With Bergman joining the Xpera team, we are able to expand our service offerings to include forensic architecture and green building risk mitigation.

Bergman will continue to provide coaching and consulting services to other architects, especially for contract administration during the construction phase, and will also lend his expertise to our Balcony Assurance and Property Condition Assessment services.

When he's not actively creating solutions for complex design and construction problems, Bergman enjoys traveling and surfing around the world with his wife Liz, and spending time with their three adult sons and one granddaughter. The rest of the time, you can likely catch him surfing along the California coastline.

Welcome aboard, Bruce!

Land Development Expert **Bill Kennedy Joins Xpera Group**



We are proud to announce that **William Kennedy, CPA**, one of California's leading land development consultants, has joined the ranks of Xpera Group.

Kennedy has held leading roles in managing a number of highly complex large-scale projects for national and international firms, lenders and top real estate developers over the course of his 25+ years in the industry. His work has spanned both public and private market sectors, including The Department of the Navy, BCED Development, Lewis Group of Companies and more.

Kennedy has led development teams on a dozen residential and mixed-use master-planned communities, encompassing over 35,000 houses, rental units and retail/commercial properties. He had a hand in creating communities such as Scripps Ranch (San Diego), La Costa (Carlsbad), Shadowridge Country Club (Vista), Lomas de Yorba (Yorba Linda) and The Resort (Rancho Cucamonga), to name just a few.

"We are pleased to have Bill join us," said Xpera President Steve Grimes. "He brings a wealth of knowledge and experience to our Real Estate Consulting Services group."



William Kennedy, CPA

"I have known Bill for 30 years and can attest to his remarkable knowledge of land development and planning in California," said Alan Nevin, director of market research and valuations. "He has seen it all and done it all. His background as a CPA adds substantially to his ability to analyze the realities of real estate development."

Now, as part of the Xpera team, Kennedy will be providing land development consulting services to clients, as well as offering expert witness services to the legal community.

To learn more about Xpera Group's Real Estate Development support services, contact Brian Hill at brian@xperagroup.com.



Xpera Presents QA Framing Seminar

Building a high-quality home doesn't happen by accident. It takes an entire team of skilled professionals, both in the planning room and in the field, working together to craft a structure that will last for generations.

When most people think of construction, they visualize the wood framing of the building. Acting as the skeleton of the structure, the quality of the rough frame affects many other aspects of the building, including MEP systems, interior finishes and the building envelope. A critical mistake with this core structure can have a rippling effect on the entire project.

To help our homebuilder clients achieve their quality goals, Xpera Group has developed a continuing education training course focused on residential framing practice, based on our decades of experience in the field.

On behalf of one of our builder clients, **Quality Assurance Director John Kyrklund** recently led a Framing Module seminar to a packed room of superintendents at Simpson Strong-Tie's Factory and Training Center in Riverside, CA.

The course touched on many aspects of wood-framed construction, with the goal of helping new superintendents with framing terminology and industry best practices, while also building on the knowledge base of experienced superintendents.

Some of the topics covered included:

- ▶ Balloon framing
- ▶ Engineered wood types

- ▶ Use of ties, straps, hangers and other hardware for load and non-load bearing walls
- ▶ Blocking techniques and requirements for framed openings and structural areas (doors, windows, corners, shear walls and roofing)
- ▶ Roof truss terminology

Xpera enjoys these opportunities to deliver extra value to our builder clients and to fostering a team-wide commitment to quality—the cornerstone of an effective quality assurance program.

To learn more about this and other continuing education offerings by Xpera, please contact John Kyrklund at jkyrklund@xperagroup.com or Steve Grimes at sgrimes@xperagroup.com.



Xpera Group

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