



# News & Notes

Collegiality Newsletter of the  
American College of Construction  
Lawyers

ISSUE 30, APRIL 10, 2015

## PRESIDENT'S UPDATE

I am thrilled to be writing you my first report as the President of the ACCL. This coincides with Buzz Tarlow's first issue as Editor of College News & Notes. Buzz has implemented some new, refreshing changes to the format of the Newsletter and we both hope that you appreciate this new approach.

Just over a month ago we were in Key Biscayne for a fabulous Annual Meeting put together by Pat O'Connor and his Program Chair, Jim O'Connor. Everyone in attendance agreed that the opening session was one of the best we have ever seen, and the program flowed well from there. Even the wind and temperatures did not dampen the spirits of those hearty golfers and sailors who enjoyed the great outdoors in Florida! That enthusiasm carried through to our Sunday morning discussion of the College's Strategic Plan. Pat O'Connor has agreed to continue to shepherd this project through to its completion. We will be reporting on the final version of that plan in the near future. Many thanks to all of you who provided meaningful input into this process to help us set the future direction of the College.

The work of this College for the next year began even before the Annual Meeting. All of our new committee Chairs and Vice Chairs are in place and they are already working on various initiatives. Anne Gorham, the Program Chair for the 2016 meeting at the Montage in Laguna Beach, has already been working with various committees and others to develop a program that will be just as interesting as our recent session. Although the Program is already well developed, please feel free to reach out to Anne directly if you have any special ideas.

As you know from a recent email, Deb Mastin has worked with the Chartered Institute of Arbitrators to schedule a special training program for education and accreditation in CI Arb. Fellows in the College are being given advance notice of this program to be able to take advantage of this unique opportunity. Many thanks to Deb for following up on a suggestion that came from our Practice Transition Committee.

Additionally, I want to give special thanks to Michele Less who spearheaded an effort immediately after the Annual Meeting to gather current email addresses for all of the spouses. Michele worked tirelessly to see this project through quickly so that our spouses can easily stay in touch in between our

meetings. The updated list has been sent to all Fellows and it will be available on the private side of our website for ease of future access.

The website is also in need of special attention this year. I am pleased to report that Steve Nelson will continue to serve as the Chair of that committee, assisted by Mark Heley as Vice Chair. They are already hard at work identifying areas of needed improvement and we plan to implement changes to the website before the end of this year. If there is something particular on your “wish list” for the website, please contact Steve or Mark.

One other special project that is already underway has been picked up by Josh Leavitt. He is following up on the work begun by Stan Sklar to make available to ACCL Fellows, at your expense, hard hats with the ACCL logo. You can expect to hear from Josh in the near future about this opportunity, so please respond to him promptly if you have an interest.

Finally, as we anticipate the spring thaw and warmer weather, I want to remind you that **New Member Nominations are due to Holt Gwyn by May 15, 2015**. As you know, this is one of the most important undertakings for the College every year. I encourage each of you to think about potential new members who will add to the richly diverse group of outstanding Fellows who are currently in the College.

I look forward to serving as your President. Please feel free to reach out to me at any time with any issues or matters of interest regarding the College.

- C. Allen Gibson, Jr., President

## FUTURE MEETINGS OF INTEREST

**HOLD THESE DATES** for future ACCL meetings:

February 18-21, 2016  
ACCL Annual Meeting  
Laguna Beach, CA



## Future Board of Governors meetings:

May 9, 2015 – Charleston, SC

August 29, 2015 – Jackson Hole, WY

November 14, 2015 – New Orleans, LA

## COMMITTEE REPORTS

**Practice Transition Group** – We respectfully submit this follow up on our meeting in Florida on February 19. I hope that the members of the group will become active in exchanging ideas.

For your information below is a list of the fellows who attended the Florida meeting and their E mail addresses. Not everyone interested in this group was able to attend the meeting so we encourage their addition to the group. The upside of the meeting was hearing and participating in the consideration of productive ideas while the downside is more E-mails.

Name	E-mail
Abernathy, Tom	teabernathy@smithcurrie.com
Alexander, Dick	d.ch.alexander@stoel.com
Beadie, Bill	wmbeadie@comcast.net
Gavin, Don	donald.gavin@akerman.com
Johannsen, Helmut	hjohannsen@fasken.com
Kirsh, Harvey	hkirsch@glaholt.com
Lane, Dave	dglane@lanelawservices.com
Lurie, Paul	plurie@schiffhardin.com
Marston, Don	donm@marstonadr.com
Mastin, Deborah	deborahmastin@gmail.com
Overcash, Allen	aovercash@woodsaitken.com
Ratterman, David	dratterman@stites.com
Seemann, Jr., Charlie	cseemann@dkslaw.com
Sklar, Stan	ssklaradr@comcast.net
Smith, Bob	robert.smith@akerman.com

The group discussed the following topics at the Annual Meeting:

CIArb training, looking forward to membership in the Chartered Institute of Arbitrators, the world’s leading professional membership body for arbitration and ADR.

Deborah Mastin reported that a proposed training session may occur at the JAMS office in Miami on October 29-31 with a final test on

November 1, 2015, leading into the International Chamber of Commerce Annual Meeting in Miami on November 1-3, 2015. Deborah has since followed up on the arrangements for this meeting by an email sent on March 25. The arrangements are also included in this issue of News & Notes under Deborah's name in the Collegiality Corner.

Arbitrators' and Mediators' liability insurance, particularly for independent practitioners. Stan Sklar has carried insurance through the ABA program and is familiar with it. Carl Ingwolson has investigated the policy and its cost in detail. Ava Abramowitz is also knowledgeable about the program.

Clerical support of independent practitioners. Stan Sklar also reported on the Regus organization he uses. Other digital paralegal services and virtual assistants were discussed at the meeting. Charles Sink provided additional suggestions regarding handling technology without the support of an IT department.

Pro-Bono Services: Community Engineering Corps (CE Corps). The three founding organizations of CE Corps are ASCE, AWWA and EWB-USA. Members volunteer their time and expertise to assist underserved communities (such as American tribal reservations) to meet their infrastructure needs and improve their quality of life. For information contact Jody K. Debs at [www.arcadis-us.com](http://www.arcadis-us.com).

Pro-Bono Services: Supporting charitable engineering and construction organizations. David Ratterman has done a great deal of exploration in this area and is knowledgeable about the national organizations that could benefit from such services. Larry Schor suggested work through the U.S. Department of State, USAID and United Nations.

Pro-Bono Services: ACCL sponsored educational programs. By taking advantage of the knowledge and experience of ACCL members, it has been suggested that the ACCL

consider sponsoring local educational programs for younger engineers and contractors. Such a program would be jointly sponsored by local organizations such as chapters of the AGC, AIA and ASCE. Speakers would have their travel expenses reimbursed.

Individual Pro-Bono activities: A number of individual suggestions were made including serving on professional licensing board (Richard Alexander) to limited free arbitration and mediation services for consumers and home owners (Mabry Rogers).

We should also consider a statement of the general purpose and objective of this group. One possibility is that the purpose of the Practice Transition Group is to encourage senior ACCL members to experience more pleasant and productive lives through opportunities that are better for them and the construction industry. These purposes and objectives are not simply related to a once a year program but are to be considered and implemented throughout the year.

In addition to encouraging amendments to our general purpose we also encourage suggestions on how we might function effectively as a group. Following are some ideas on that matter:

- We not only encourage contributions of ideas but consider how to implement them. That is, without fresh ideas from the members of the group we have no effective purpose.
- Ideas may serve either or both of two purposes: (i) concepts that the ACCL should as an organization act upon and implement; and/or (ii) acts that individual fellows should be encouraged to take to their personal benefit as well as to serve the objectives of this group.
- We need thoughtful ideas and experiences from members of the group with as much detail as possible each of which they are to

share with everyone in the group by E-mail.

- Each major idea will be considered and tested by the group and if it attracts enough support we will as a group attempt to implement it.

Please give these thoughts some consideration and contribute your suggestions of how this group might function effectively. We are all busy and the question before us is whether through this group we can make a collective and meaningful contribution to everyone without unnecessary use of time and energy.

Best Wishes, Allen Overcash



**International Committee** -- The international committee presented a panel including recently retired judge Sir Vivian Ramsey, Doug Jones, OA, who just stepped down as head of the Chartered Institute of Arbitrators, and John Hinchey on the topic of dispositive motions and emergency relief in international construction arbitrations. Our key points were these:

1. Dispositive motions: Sir Vivian mentioned that in almost every arbitration under FIDIC terms the tiered dispute resolution clause, making senior representative's meetings followed by mediation a mandatory condition precedent to the jurisdiction of the arbitrators, there would be a preliminary motion by one side or the other to knock out the whole arbitration on this ground. By and large if the facts supported the failure to comply with a condition to jurisdiction, the whole arbitration was dismissed "without prejudice". Sir Vivian referenced s. 67 of the FIDIC forms of contract.

Doug Jones saw dispositive motions in international construction arbitrations as a process issue: a way to engage in

early debate with counsel over key issues in the case. He recommends requiring the parties to brief in 5 pages or less each issue either side they think might be a dispositive issue. The tribunal would then consider all of these at an early stage and make their decision as to which of these (if any) warranted full argument and possible summary disposition. While it is rare that issues are directed to be fully argued summarily, at least the parties are forced to turn their minds to possibly fatal aspects of the case.

John Hinchey talked about the Federal Arbitration Rules, and the CPR guide, sharing Doug Jones's view that a preliminary conference to at least raise possible dispositive motions was a good idea, and would be received favourably by most international construction arbitrators.

2. Emergency relief: As to emergency relief, Sir Vivian pointed out that the idea of making an Award of any kind on an emergency basis was fraught with enforceability problems. However, particularly where there is a Mareva type situation, these can be lessened by seeking "directions" in the form of a procedural order and not some form of interim award. This procedural order may be quite explicit, such as saying something like "if you don't secure and provide access to damages documents within 30 days, we will exclude that evidence and schedule a hearing on damages, with the strong possibility that claims for damages not proven at that hearing will be dismissed."

Everyone was of the view that parties have just scratched the surface of the powers open to arbitrators on an emergency basis. Receiverships and receiver/manager appointments are theoretically possible. Sir Vivian pointed out that receivership had

always been specifically enumerated as a possibility in the U.K., just that no-one had used it yet.

Considering the early hour, the session was well attended and well received.

Best regards, Duncan Glaholt



**Plenary 3 Report** – At the Annual Meeting this year, a plenary session was devoted to contract documents, specifically AIA Document A201-2007 (the General Conditions for the Owner-Contractor Agreement). A new edition of A201 is scheduled for release in 2017. Deborah Griffin and Buck Hinkle offered conceptual and textual modifications that Owners and Contractors would like to see in the 2017 edition. The plenary session also included remarks by Ken Cobleigh, AIA’s Managing Director & Counsel. Ken distributed a survey soliciting comments from the College. – Buck Hinkle



**Contract Documents Committee** -- Building on the Plenary Three presentation regarding the next iteration of the AIA A201 General Conditions, Ken Cobleigh of the AIA outlined what the AIA does to develop new editions and documents and described the highlights of the AIA’s new 2014 Design-Build Agreements. After that, Clark Davis, Principal Consultant at Cameron MacAllister Group, Timothy Twomey, Senior Vice President and General Counsel of RTKL Associates, Inc., and Stephen Jones, Senior Director of Dodge Data & Analytics presented the results of a study on Managing Uncertainty and Expectations in Building Design and Construction. This study looked at the perceptions of owners, architects, and contractors on the causes of uncertainty, performance expectations and metrics, and opportunities for performance improvement.

Regards, Peter C. Halls



**Public Contracts Committee** -- The 2015 Public Contracts Program featured well-received presentations from Michael C. Loulakis, “Public-Private Partnerships: A Review of the Key Concepts.” Michael informed the Fellowes of recent developments in P3 contracting and touched on infrastructure financing and key commercial and legal issues involved in this delivery model; Joe West updated the group on the increasing intensity with which the government and *qui tam* relators pursuing FCA matters and recent legal developments; and John P. Ahlers spoke on the new USDOT roles pertaining to Disadvantaged Business Enterprises. Larry Schorr, also provided the Public Contract Section with some insights on the case of interests to the group.

Regards, John P. Ahlers

## COLLEGE NEWS

**Committee assignments** – The Annual Meeting this past February was a fun time for all Fellowes with the different committees presenting on interesting topics from the world of Construction Law.

Included below are the committee and task force assignments for the 2015-2016 year.

Documents – Peter Halls (Chair) and Buck Hinkle (Vice-Chair)

Insurance – Dean Thomson (Chair) and Lee Shidlofsky(Vice-Chair)

International – Duncan Glaholt (Chair) and Jack Tieder (Vice-Chair)

Alternative Dispute Resolution – Deborah Mastin (Chair) and Bruce Shreves (Vice-Chair)

Public Contracts – John Ahlers (Chair) and Joe West (Vice-Chair)

Membership – Holt Gwyn (Chair), Robyn Miller, George Pierson, Larry Baker, and Terry Brookie

Officers and Governors Nominating – Pat O'Connor (Chair)

Bylaws/History/Archives – Terry Brookie (Chair) and John Hinchey (Vice-Chair)

Education/Professors – Michael Holden (Chair) and Richard Smith (Vice-Chair)

Hot Tips – Ty Laurie (Chair) and Bill Geisen (Vice Chair)

In-House Counsel – Jody Debs (Chair) and Robyn Miller (Vice-Chair)

Practice Transition – Allen Overcash (Chair) and Alan Harris (Vice-Chair)

Website – Steve Nelson (Chair) and Mark Heley (Vice-Chair)

Assistance to Developing Nations – Larry Schor (Chair); Ben Shapiro (Vice-Chair)

Diversity Initiative – Rick Lowe (Chair) and Kathy Barnes (Vice-Chair)

College News and Notes – Buzz Tarlow (Editor)

Journal – Doug Oles (Editor)

If any of you out there were either missed or have an interest in being more involved with one of these committees, please contact Allen anytime.



## COLLEGIALITY CORNER

Fellows from around the country have written in with the following stories about their recent or upcoming adventures:



**Larry Harris** - Effective December 31, 2014 I retired from the active practice of law. I am no longer a partner or employee of Fox Rothschild, however the firm has generously offered me space in their DC office . Accordingly, I work from there a day or two a week and carry on my arbitration and mediation practice from home. All is going well, I am working about as much as I want to and enjoying it. The firm also continues to allow me to use their conference space for hearings. Can't wait until the warm weather comes so that I can continue "practicing" golf.



**Wendy Kennedy Venoit, Robert Preston Brown, Larry Harris, A. Holt Gwyn, Albert Bates, Jr., and Paul Bruno** – We recently presented on topics concerning construction litigation and arbitration related matters at the Keeping Arbitration Lean conference on March 27, 2015 in Santa Monica, California.



**Wendy Kennedy Venoit** -- As of March 24, 2015, I will be the new Vice President and General Counsel of Suffolk Construction Company in Boston, MA.



**Robbie MacPherson** played a real, *not* air, guitar on "Everything That Touches You" at the Twilight Concert in Rumson New Jersey on March 7. The Concert raised \$30,000 this year for the Aids Resource Foundation For Children. Next year will be the 20th Twilight Concert. Robbie's brother Jeffrey, a real musician, is one of the organizers and MC which may explain how Robbie got to play. [www.twilightconcert.org](http://www.twilightconcert.org)



**Michael Tarullo** - My wife, Katja, and I are moving back to Kentucky taking up residence just outside of Louisville. I will continue my practice in Ohio, commuting to Columbus every week. It could not be any more difficult than living in NJ and working in NYC, could it? Felt the need to be closer to our

grandchildren, don't want to miss that experience!



**Ron Martell** -- At long last my 454-page book *Showdown in the Pacific War: Nimitz and Yamamoto* is complete, published, and listed at BarnesandNoble.com and Amazon.com. *Showdown* is a history of the antecedents to the Japanese attack on Pearl Harbor and details the battles of Coral Sea, Midway, Guadalcanal and beyond, ending with the assassination of Admiral Yamamoto in April 1943. It is both detailed and easy to read. If you would like any more information please email me at [rmartell5@hotmail.com](mailto:rmartell5@hotmail.com).



**Deb Mastin and Allen Overcash**— Here is some information about the CIArb Accelerated Route to Fellowship Programme that the Practice Transition Group wrote about in their report.

The ACCL Practice Transition Committee has concluded that it would be valuable for ACCL Fellows who are interested in shifting their legal practices towards international arbitration to receive training and accreditation by the Chartered Institute of Arbitrators, a non-profit based in London. The CIArb was chosen by the Practice Transition Committee because of the rigor of its training protocol and the international recognition of its accreditation program. On its website, the Chartered Institute of Arbitrators (CIArb) describes itself as "a leading professional membership organization representing the interests of alternative dispute practitioners worldwide. With over 13,000 members located in more than 120 countries, CIArb supports the global promotion, facilitation and development of all forms of private dispute resolution." The CIArb offers several levels of membership; Member, Associate, Fellow, and Chartered Arbitrator.

The CIArb offers, from time to time, a course it calls the "Accelerated Route to Fellowship Programme," which "is designed for experienced dispute resolution practitioners looking for international recognition for their skills. This course is a two-day program followed by a written examination, and, for those who pass the course, a peer assessment.

The ACCL has reached out to the Chartered Institute of Arbitrators, which has agreed to schedule an "Accelerated Route to Fellowship Programme" at the JAMS office in Miami on October 30, and 31, 2015 with an exam on November 1, 2015 for the convenience of those who cannot travel to Europe. This course will be limited to 28 registrants and will open to the public. As an added attraction, ACCL Past President John Hinchey has been engaged as one of the trainers for the Miami course, a role that he has taken several times in the past.

Because the course was instigated by the ACCL, the ACCL Fellows are being given advance notice of the course, before it is posted on the CIArb website, and registration opens. The cost for the course is expected to be about \$2,150. The ACCL is providing notice of this course as a benefit to interested ACCL Fellows; ACCL is not sponsoring and will not share in any revenues from the course. Deb Mastin will circulate a notice when the details are set, and when the CIArb has opened on-line registration on its website. You may contact her if you have any questions.



**Ken Kupchak** -- This isn't legal, but Mother Nature sure does pretty well as a design builder...



Like you have never seen it. We will be reforesting at 6,000ft. on Mauna Kea this weekend with an overnight stay. Also reforesting at 4,000 ft on Mauna Loa's Kahuku Ranch on March 20. And hiking to 7,700 ft elevation on Mauna Loa on March 19 at Aina Po. This is one fascinating Island.

*Aloha, Ken*



**Stuart Sobel** -- In March, 2015, along with the Honorable John Thornton, Judge of the Complex Business Division of the Miami-Dade Circuit Court, I presented a paper on Expert Opinion Testimony in Florida – Navigating the Minefield to the Florida Construction Law Institute in Orlando, Florida.



**Val McWhorter** – I was elected to the Board of Directors of The Beavers at its January 2015 Annual meeting. The Beavers is a social, honorary organization formed, organized and managed by the construction companies and individuals who are or have engaged in heavy engineering construction. The Beavers was founded in 1955. For those of us in Heavy Construction, this is an honor, especially for lawyers who are admitted in very limited numbers. To others, it may seem a bit weird.



**Don Gavin** -- Since the first of the year, Irene and I have kept up a rather fast pace with work, meetings and travel. I sit on several Arbitration Tribunals and Panels: ICC, ICDR and AAA, and get called on as a Mediator and for client work. The majority is International Construction and sometimes is derivative of US Government contracts domestically and abroad. These government related disputes usually involve prime-contractor subcontractor or joint venture issues. Irene is the Arts Coordinator at a Northern Virginia Community Center and arranges for, juries and hangs art shows and has her own busy schedule.

Then there are the Professional Meetings such as the ACCL in Key Biscayne, the ABA Public Contract Annual Procurement Institute and Counsel Meeting in Annapolis, the CIArb "Future of Arbitration" in Hong Kong, and the IACL Annual Meeting in Hong Kong, all of which I have already attended/or spoken at. Upcoming this Spring is the IBA ICP Working weekend in Mexico and the CCCL Annual meeting in Washington. I am speaking at the CCCL.

Trying to balance between these demands we shared Irene's birthday in January with our grown sons and family in LA, and participated in an a American Ceramic Circle (I am a Past President) Ceramic Study Tour in Mexico (Mexico City, Puebla, and Oaxaca). Miriam our dog had a successful operation on a paw, and we shall shortly be off to Philadelphia for a visit with Irene's family. Occasionally we stay home for antique shows or music concerts, as we shall this weekend (March 28 & 29).



**John P. Ahlers** -- I published an article with Lindsay Taft of our firm in the February 2015 Northwest Lawyer entitled "Swinging Deals – Should Cranes Swing Agreements Cost Money," not a piece about married couples' night life in Seattle but instead an article dealing with the over fifty tower cranes that currently regale the Seattle skyline and whether neighbors' nuisance rights have to be settled as part of the developer/general contractor's use of tower crane arms that cross property lines.





## NEWS FLASH ...

Just in time for April 1.....

### O'Connor To Author Vast New Treatise: *O'Connor on Law*

Feeling constrained by the narrow scope of *Bruner & O'Connor on Construction Law*, treatise co-author **Pat O'Connor** has announced plans for an entirely new multi-volume set of books bearing the working title *O'Connor on Law*.



Explained Pat: “The assistance I’m receiving in updating *Bruner & O'Connor* is freeing me up time to pursue my true passion: writing on legal topics at even greater length. I’ve often felt that many areas of

the law have not been covered adequately. For example, *Prosser on Torts* is only four volumes, and the font is ridiculously huge! With *O'Connor on Law*, my ambition is to give every area of modern American jurisprudence the voluminous treatment it deserves.”

Preliminary estimates put *O'Connor on Law* at a minimum of 40 volumes, with plans to release at least one, possibly two, volumes per year, starting in 2016. O'Connor revealed the subtitle for Volume I: *From Abatement to Aviation*. West Publishing has not yet confirmed its support for the endeavor, as questions remain about whether the business of legal publishing will still exist by the time the book is completed.

### EDITOR’S NOTE

This my first issue of College News & Notes. I gratefully acknowledge all of the hard work that past editors have done including but not limited to our current president who was an

editor for many years and my immediate predecessor, Alec Moseley.

Please continue to send to me at [itarlow@lawmt.com](mailto:itarlow@lawmt.com) any contributions or updates and I’ll see that they get into the next issue. My very helpful assistant Sarah is great at assembling News & Notes and you can contact her at [sarahj@lawmt.com](mailto:sarahj@lawmt.com). If you will copy both of us on your email then the odds of your entry making it to News & Notes will be substantially increased. Let me add, on a personal level, that the ACCL is the best organization of its type in the world and it’s an honor to have an opportunity to serve and be involved a little.

*John H. “Buzz” Tarlow*

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