



News & Notes

Collegiality Newsletter of the
American College of Construction
Lawyers

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PRESIDENT'S UPDATE

Amazing Grace

As I prepare my update for this issue my hometown of Charleston, South Carolina is at the forefront of the national news. Everyone in Charleston will remember the horrific tragedy that occurred on June 17, 2015 for as long as we live. However, I am proud of our community and the way in which we have come together to show the world that there is far more love and respect for each other in this community than the perpetrator expected when he chose Charleston for his heinous crime. Much good will come out of this senseless act of violence and we pray that the example shown by the people of Charleston will provide a path for others to follow. Of all the commentary I have read about this event, and our community reaction, the following from an editorial in the Wall Street Journal seems to capture it best:

"The City's response gives hope to the idea that decent Americans can find their way past historic grievances and injustice to

embrace those of different races and backgrounds as neighbors and fellow citizens."

Now on to business: The College has accomplished much since my last report. We held a Board meeting in Charleston on May 9, 2015. (See below for a photo of the Board members enjoying a walking history tour of Charleston after the meeting concluded.)



At that meeting the Board adopted the recommendations presented by the *Ad Hoc* Long-Range Planning Committee. In addition to adopting the Strategic Plan for the ACCL, the Board also agreed to prioritize the Goals set forth in that Plan as suggested by the Committee. The three goals fall into the broad categories of Participation, Giveback and Scholarship. Following the Board meeting I reached out to the Fellows to solicit volunteers for the three new subcommittees of the Long-Range Planning Committee which will have primary responsibility for implementing these goals. We hope to have those committees fully staffed and working on our Strategic Plan in the near future.

The Board also reviewed the proposed annual meeting program for 2016 as presented by Anne Gorham. Although the program is well-developed, there was good qualitative input from the Board and the program continues to evolve to best meet the programming needs of the Fellows. Remember to mark your calendars for February 18-21, 2016 for our annual meeting at the Montage in Laguna Beach.

The other significant action by the Board at the May meeting involved approval of the proposal to substantially upgrade the ACCL website. Steve Nelson and Mark Heley are hard at work implementing their committee's proposal for website improvements.

Members of the College recently had an opportunity to respond to a request from David Ratterman on behalf of the Assistance to Developing Countries Committee for assistance regarding the massive earthquake in Nepal. Build Change, an organization with which we have worked in the past, reached out to us immediately after the earthquake. Under David's able guidance, we communicated with the College Fellows and received a quick response and substantial donations for this worthy cause. We continue

to explore other opportunities for involvement, but our response was swift and significant when Build Change reached out to us.

Finally, I was pleased to represent the ACCL at the Canadian College of Construction Lawyer's meeting in Washington, D.C. As most of you know, the Canadian College is as collegial as our group and the quality of their programming was excellent. There were a number of ACCL members in attendance and two of our Fellows, Doug Oles and Howard Ashcraft, were featured speakers at the CCCL program.

Our next Board meeting is August 29 where we will discuss the proposed new members recommended by the Membership Committee. After the Board's action, we will report to you the proposed nominees for your final approval. Please help that Committee by responding promptly if you are called about one of the proposed new members.

Many thanks to all of you who have reached out to me in the past two weeks. I very much appreciate the support and look forward to our continued good work in 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

March 16-19, 2017
ACCL Annual Meeting
Amelia Island, FL



Future Board of Governors meetings:

August 29, 2015 – Jackson Hole, WY

November 14, 2015 – New Orleans, LA



COLLEGIALITY CORNER

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



Harvey J. Kirsh – I have been selected as the recipient of the Ontario Bar Association’s Award of Excellence in Alternative Dispute Resolution. An Award Dinner is being planned for the Fall in Toronto.



Mike Tarullo - ACCL News (May 13, 2015) – (as reported by George Meyer) This morning Mike thought a new client was waiting to meet with him in a conference room at his office. When he walked in to the conference room, legal pad in hand, he was met by the leadership of the Central Ohio Builders Exchange who advised Mike that he has been selected as the organization’s Cornerstone Award winner for 2015. Mike is only the second attorney in the history of this organization to win this award (no, I was not the first). Mike was surprised and honored. I had the pleasure to be one of his three nominators. This is a great honor and a celebration will be held in the Fall to officially award him the Cornerstone Award. Mike’s e-mail is mtarullo@mcdonaldhopkins.com.

Feel free to share this good news with others. The more congratulatory e-mails he receives from his Forum family the better.



Wendy Venoit, John Hinchey and Sir Vivien Ramsey -- Members of the College, Wendy Venoit, John Hinchey, and Sir Vivien Ramsey

(along with Danielle Cole and Johnathan Rosshandler) recently presented at the ABA 2015 London Sessions in celebration of the Magna Carta anniversary. Their program, aptly titled “A Connecticut Yankee in King Arthur’s Court”, discussed the differences in the training and style of lawyering of U.S. and English lawyers, the stereotypes attributed to the two groups, and the commonalities between the two. It was a lively discussion, as you might imagine.



Judith Ittig -- I will be in Vienna, Austria in early July to judge an international mediation and negotiation competition sponsored by the IBA-VIAC. I recently completed the presentation of two webinars on the topic of the selection of neutrals. The webinars will be distributed by the American Arbitration Association to all its case managers throughout the AAA and will also be made available to neutrals and advocates.



Ava Abramowitz -- Ava Abramowitz reports that Neil Rackham and she spoke at the ABA's Dispute Resolution Section Annual Meeting, expanding on a 1978 Rackham paper entitled "The Behaviours of Successful Negotiators." Additionally, Ava was a guest speaker at the American Institute of Architects' Convention, joining a National Council of Architectural Registration Boards' panel on ethics in practice.



Alec Moseley -- After 37 years with the firm, Alec Moseley retired from Hand Arendall in Mobile on June 30, 2015, and he and Sue moved to rural Monteagle, Tennessee. Alec will continue to serve as an AAA arbitrator, but plans to spend a good deal of time in

ruminative pursuits. Alec and Sue would welcome a visit from any Fellows passing through the area.

New contact information is P. O. Box 1477, Monteagle, TN 37356, telephone 931-924-6291, email alec.moseley@gmail.com.



Josh Leavitt -- Hello from Chicago -- home of the newly crowned Stanley Cup Champion Blackhawks!

Josh Leavitt has been elected as the President of the Society of Illinois Construction Attorneys ("SOICA"). He also coordinated and emceed SOICA's Spring Event at the Pritzker Military Museum in Chicago at which the District Commander and Deputy District Commander of the Chicago District of the Army Corps of Engineers spoke about the role of engineers in the military.

In addition, Josh recently published and/or gave the following presentations:

- May 2015: published in Construction Executive magazine: "Practical and Legal Considerations of 3D Printing Technology"
- 2015: Lecture: "Negotiating Construction Contracts and Resolving Construction Law Disputes," presented to Advanced Real Estate Class, College of Law at DePaul University
- Feb 2015: Lecture "And You Thought You Were There to Fix Someone Else's Problems?," presented to Chicago Chapter of International Concrete Repair Institute
- Feb 2015: Lecture "Construction Sector Contracts", Negotiations and Dispute Resolution", presented to University of Chicago Law School Corporate Lab Series

Josh is currently working with Alec Moseley to plan one of the panels for the Forum's ADR Summit in the Fall. Josh Leavitt's oldest daughter (of three!), a rising junior at Scripps College in California, will be spending the fall semester abroad at Queen Mary College in London. His middle daughter attends the Medill School of Journalism at Northwestern and it turns out her freshman year roommate's mother worked as an associate for Ken Gibbs earlier in her career and spoke fondly of Ken.



Carl Ingwalson -- No adventures or achievements worth mentioning but we returned recently from a nice vacation:

Wilma and I flew to Barcelona in early May and spent several days enjoying the sights, food and culture of Catalonia. Most impressive was La Familia Sagrada designed by Antonio Gaudi where ongoing construction has an estimated completion date of 2026. From Barcelona we drove north to Collioure, France. The small coastal town was recommended by French friends and it didn't disappoint.

Next on the agenda was Carcassonne for three days. On the way we stopped at Château de Peyrepertuse, a ruined fortress and one of the so-called Cathar castles high in the Pyrénées. While in the area, we toured Carcassonne's medieval fortress (the second most visited tourist attraction in France), relaxed in a farmers market, and sampled wine in nearby Limoux.

Next came a drive along the Mediterranean coast by Cap d'Agde and three days at the Château des Fines Rôches in Chateauneuf-du-Pape, a visit to Avignon, and a drive along the local wine trail to the picturesque town of Séguret. We then spent one night in Lyon

where we had dinner at the home of French friends we hadn't seen in many years. The next day we drove to Paris, along the Champs Champs-Élysées, around the Arc de Triomphe, over to the Eiffel tower and then to a hotel. From Paris we flew to Scotland for a few days and a ride on the Falkirk Wheel. After six days, it was back to San Diego for Carl while Wilma stayed an extra week to visit with friends and relatives.



Paul Bruno - Article in "ENR Risk-Review"

Fluor's Paul Bruno: "How We Approach Risk Management" 06/30/2015 [By Richard Korman](#)



Fluor's Bruno said any risk can be tolerated if it is identified, mitigated and managed.

Fluor Corp.'s international portfolio and financial might would seem to dictate a conservative approach to design and construction. Few would be surprised, for example, if the company abided by the familiar concept that every project risk ought to be commensurate with potential reward.

As it happens, that isn't how Fluor practices risk management, said Paul Bruno, the company's managing general counsel. And he wants to dispel the old idea that risk should always equal reward.

"If it can be identified, managed and mitigated, any risk can be tolerated," he said. Exactly how Fluor does that was the subject of Bruno's keynote address at ENR's 3rd Risk Summit, in Dallas at the Marriott Los Colinas June 16.

It's hard not to take Fluor seriously on the subject. Despite the decline in energy prices, Fluor continues to post solid financial results. The company reported net income of \$720.74 million (available per common share) on revenue of \$20.7 billion in 2014.

Bruno started by dispelling the big myth of risk equaling reward. "Everyone makes the assumption that if the reward is sufficient, then it's worth taking the risk," he said.

That idea, he said, is often tied up with the concept of monetizing risks, such as putting a bigger contingency in a bid because skilled labor is short for a prospective new project. And when applied to worker safety such simplistic assumptions can lead to absurdities, about whether a very hazardous project or type of work should be undertaken, or to trying to assign a value to a human life.

Monetizing personal injury risk should be avoided at all costs, he said.

Instead, Bruno said, Fluor follows a process developed in the wake of the company's financial turmoil the late 1990s. In 2001 Fluor formalized the process and called it the company's business risk management framework (BRMF). It calls for Fluor to identify, measure, mitigate and manage all the risks on every project.

Monitoring Risks

After the risks are identified, Fluor assigns each a probability determined using typical a Monte Carlo method analysis. The risk-mitigation strategy is then designed. But then how do you monitor risk during execution? Bruno asked.

A key part of the framework involves keeping the project executive or project manager in regular contact with the project transactional attorney – the attorney most familiar with the project contract, or at smaller companies, the person who negotiated the terms – in touch so that they can interpret the contract.

"They (the transactions attorneys) are the best interpreters (of the contract) in terms of risk," he said. "Keep them engaged."

Fluor makes sure the project executive or a key manager speaks to the project transactional lawyer at least once a month; a key to managing and implements risk mitigation strategies and avoiding surprises for top management. By requiring regular communication, which can be built into a process and measured, Bruno said, human nature assures that it will get done. That way, Bruno said, potentially high-impact events with time-limits for notice, "something as simple as a notification of delay," can be promptly dealt with.

The risk control system will help win a better premium when buying coverage from

insurers – an important final step in a process when part of the risk is monetized. Insurers “will appreciate the processes and procedures you have in place and that will be reflected in the premium you are charged,” Bruno said.

Payment and Schedule

In addition to dispelling the simple idea of risk always equaling reward, Bruno said he is not a fan of some other common ideas about risk shifting via insurance and payment-related contract clauses.

The idea of shifting risk, he said, is not in and of itself wrong or destructive to the project fabric. “There’s nothing evil about this,” he said. “Once you identify what can be monetized or mitigated, and get everyone together to discuss these processes, and see where things fall out from the mitigated risk, the time has come to talk to an attorney about proper contract language.”

“Reading the contract can identify what can and can’t be shifted, and that helps in the decision-making process.”

Bruno said he isn’t a big fan of additional-insured clauses incorporated in many prime contract agreements.

Such clauses, while potentially helpful in tendering the costs of defense in a lawsuit, breed potential conflicts about strategy among defendants. Some who see benefit in settling a lawsuit will want to pursue that goal, while another company, possibly one concerned about its reputation, could decide it is best in the long-run to fight a claim.

Most risk-shifting, said Bruno, isn’t in the payment terms, although it certainly occurs there, but in the schedule-related and indemnity sections of a contract.

In particular, owners shift risk via clauses concerning sharing of schedule float that allow the owner to claim float in the schedule. “So pay close attention to the schedule clauses. Who controls the critical path? How often is the schedule updated?”

“That’s a hot one for many contractors.”

Fluor applies its business risk management framework no matter what kind of project it is building.

“You can make decisions based on what kind of project there is and as to whether you will accept more risk or not, or whether to get more coverage or a higher or lower self-insured retention,” but the basic-risk-identification and management process should not be different.

The basic goal is always the same: avoid bringing top managers surprises because “surprises are rarely a good thing.”



John McGuinn - I purchased a new electric car (Tesla S 70 D) when my 2001 Volvo died. Quite a thrill to drive. Elected not to even test drive the Tesla model that goes from 0-60 in 3.1 seconds, the fastest four door car ever built (or so they say) as I am too risk adverse.

I am currently organizing the first reunion of Bechtel Legal Department alumni in the Bay Area, set for later this month.

I am also helping to organize the 50th reunion this October of my law school graduating class at the University of Illinois in Champaign-Urbana.

As you get older, you spend more time on reunions, and memorial services – last week went to Portland, OR for the memorial service

for the first woman lawyer - 1973 - in the Bechtel Legal Department. The engineers and construction guys didn't much care for lawyers in the 1970s, so you can imagine how they felt about female lawyers. But Carol Emory handled them with grace and humor and superior intellect. A great lawyer and person.



John Hinchey -- My recent news is as follows:

On June 13, 2015: I spoke in London with Wendy Venoit at the Magna Carta 800-year Anniversary celebration, sponsored by the American Bar Association and various British groups, on a comparison of advocacy techniques between U.S. and U.K. lawyers. Topic: "A Connecticut Yankee in King Arthurs' Court".

On September 12, 2015, I will be speaking at a conference sponsored by the Chartered Institute of Arbitrators, at Keble College, Oxford England, on "Effective Management of an International Arbitration".



Deborah Mastin and Philip Bruner -- On October 28 and 29, 2015, Philip Bruner, Ken Roberts and Deborah Mastin will present JAMS first Dispute Resolution Board Training Institute at the JAMS offices in Miami, FL.

The JAMS DRB Training Institute is a 2 day advanced level educational event addressing the best practices of dispute board procedures in order to avoid, or to minimize, claims and appeals on large complex construction projects, and offers an interactive learning environment for all experienced ADR neutrals and advocates. The Institute is offered in cooperation with the Dispute Board Foundation, Inc. and ConsensusDocs.

On-line registration is available at <https://jamsdrbtraining.everbrite.com>. JAMS does not usually offer training events to folks who are not JAMS panelists, and the DRB Institute is a departure from JAMS usual practices.

EDITOR'S NOTE

I hope that all of you are enjoying a happy and healthy summer season. It is green and beautiful here in the mountains of Montana and the weather has been lovely. Please keep sending in your contributions. I continue to be amazed at the fantastically interesting endeavors of our fellows.

My best wishes to all of you.

John H. "Buzz" Tarlow

jtarrow@lawmt.com

406-586-9714