



ACCoLades

*Collegiality Newsletter of the
American College of Construction
Lawyers*

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PRESIDENT'S UPDATE

As most of you know, we lost another of our long-time colleagues since the last ACCoLades newsletter: Jesse ("Barry") Grove passed away August 10. Barry was a past president of the College and was recognized by the members of our profession as a preeminent member. I had the good fortune to work with Barry on ADR assignments and came to know and appreciate him through our collaborative efforts. The College was well represented at his funeral. We shall miss seeing him at the annual meetings.

John Heisse and the other members of the Membership Committee reported on the results of their strenuous candidate vetting process at our Denver Board meeting in early August. I am pleased to report that the Board elected nine new

Fellows, including an honorary Fellow. No objections were received from current Fellows within the 30-day period following notice of the voting results. The new Fellows have now been notified of their election - we look forward to seeing them at the Tucson meeting. Meanwhile, please express your congratulations to those you know.

Development of the Tucson meeting program is virtually complete and on-schedule. Kathy Barnes, the Program Chair, has assembled informative and interesting topics for presentation at the plenary and committee sessions. Likewise, spouses' activities have been planned with very helpful feedback from those who plan to participate. Donna, Bill and Missy very much appreciated the feedback received on the survey

for Saturday afternoon activities and we have selected two desert-themed excursion venues for those who do not plan to play golf or tennis ... or otherwise hang around the resort.

The Annual Meeting brochure is expected to be available by mid-November. As in the past, you should promptly make room reservations at the Lowes Ventana Canyon Resort as soon as possible to avoid last minute booking issues and frustration.

Charles Sink reports that the summer issue of the Journal was mailed on time and work has already begun on the winter edition. Other fellows are now assisting Charles with the expectation that he will be able to "retire" soon. Once again, please express your appreciation to Charles for his dedicated efforts over the past few years.

John Heisse has selected Charleston, South Carolina to be the site for the 2021 Annual Meeting on March 18-21. Make sure to reserve the meeting dates on your calendar.

Our next Board meeting is scheduled for November 15-16 in Austin. If you have an item you wish the Board to consider at the

meeting, please drop me a note and we'll place it on the agenda.

- *Dave Lane, President*

FUTURE MEETINGS OF INTEREST

HOLD THESE DATES for future ACCL Meetings:

31st Annual Meeting
February 20-23, 2020

The Loews Ventana Canyon Resort
Tucson, Arizona

32nd Annual Meeting
March 18-21, 2021

Charleston, South Carolina

COLLEGIALITY CORNER

Robbie MacPherson - I was named by Best Lawyers as the Newark, NJ 2020 Construction Lawyer of the Year. When asked what my favorite Jersey law is I replied "That's easy. The law that makes pumping your own gas illegal."

Allen Gibson - Wendy and I would like to thank all of the concerned Fellows and spouses who checked on us during the recent visit by Hurricane Dorian. Fortunately, the storm stayed far enough offshore and the highest surge was at low tide so Charleston was spared any significant damage. All is well here!

Howard Ashcraft - Best Lawyers selected me as Construction Lawyer of the year for San Francisco. Makes you wonder, doesn't it...

George Pierson -



Only three days after joining Lookaway Golf Club, Sheri won the women's club championship! She won despite it being her first ever competitive tournament and playing with her mother's 17 year-old clubs - clubs that her mother used to win her own club championship!

On the mergers and acquisitions front, Sheri and I got married at our home in New Hope, PA on July 20th! Fellows may remember

my rather public proposal to Sheri at the Vinoy in St. Petersburg - one which, fortunately for me, she accepted enthusiastically. Sheri was absolutely stunning and as you can see by the photo, I wasn't letting her get away! The party that followed was amazing as witnessed by several Fellows. The honeymoon is still pending.

Finally, it was announced that effective Sept 30, I will retire as CEO of Kleinfelder. I will still remain as Chairman of the Board, as well as sit on other Boards and consult. With the newfound schedule flexibility, perhaps we can now book that honeymoon!

Roy Mitchell - Lois Dokken and I had a wonderful cruise through the inside passage of Alaska via Juneau in August and enjoyed observing (and hearing) glaciers calving, local villages en route and lots of majestic scenery. It is shocking how few glaciers there are left at this point and how rapidly they continue to diminish.

Joe McManus - On August 1, my partners and I from McManus & Felsen LLP joined our ACCL Fellows Cary Wright, Luis Prats, and George Meyer at Carlton Fields in the Washington, DC office as shareholders. I had

encouragement and inspiration from Mike Nuechterlein, warm support from Patricia Thompson, and divine guidance from our former President Bert Grandoff.

Bill Geisen -



The circle of life continued in our neck of the woods with the August 2nd birth of Sandy's and my second grandson, Calvin, or as I call him, "Cool Cal." Of course, I hope that he is Coach Cal's protégé. In the words of Elton John, this circle of life, exemplified in Calvin's birth, is a wheel of fortune, a leap of faith, a band of hope.

George Meyer - On behalf of the Construction Documents

Committee I'd like to offer the below article by Mike Loulakis. Mike was on a panel at the 2019 Annual Meeting that was put together by the Construction Documents Committee. The panel's topic was to discuss one sided contracts and whether they have an adverse impact on project success. Mike prepared a short summary of his thoughts regarding that panel discussion. I think it is an excellent summary of many of the thoughts and considerations expressed during that program.

Musings on One-Sided Contracts

Michael C. Loulakis

I had the pleasure during the 2019 Annual Meeting to provide my perspectives on a subject upon which almost every construction lawyer has strongly-held views – one-sided contracts and their potential adverse consequences. Strongly-held views is an understatement. For every person who insists that a contracting approach is absolutely right and appropriate, it seems that someone else is there to argue that the contracting approach is absolutely wrong and immoral. This "debate" over one-sided contracts has been going on for decades. Perhaps even more challenging is that the industry doesn't even have a consensus on what constitutes a one-sided contract or an onerous contract provision.

This was clear at the Annual Meeting, when I polled the audience for its views on No Damages for Delay clauses. I asked those Fellows representing general contractors whether they thought this was an

unreasonable clause for owners to include in their contracts with general contractors. Almost everyone in the room raised his/her hand. I then asked that same group of Fellows whether they thought this was an unreasonable clause for general contractors to include in their subcontracts. Predictably, almost every hand went down. Objectively, how can this be? A No Damages for Delay clause is either unreasonable or it's not. The answer really shouldn't be dependent on who is advocating for the use of this clause in its contracts. Or should it?

The fact of the matter is that most of us in the construction industry aren't objective in how we look at the reasonableness of contract clauses and risk shifting in contracts. We would like to think that we frame the question as, "what's in the best interests of the industry or project?" But inevitably we frame the question as, "what's in the best interests of my company or my client." As a result, I find the question of "what is a one-sided contract?" to be a fake question. The assessment of whether a contract is one-sided or a clause onerous seems to be determined purely from the eyes of the beholder. When viewed by the party in a "power position," – e.g., owners in their dealings with contractors and contractors in their dealings with subcontractors – it is appropriate, necessary and normal to shift substantial risk downstream. After all, he who has the gold rules. But when viewed from the subordinate party in the relationship, those risks and contract terms are considered horrible, onerous and unreasonable. Until, of course, the time comes when the "subordinate party" becomes the "power party" and shifts those same risks and contract terms to its downstream contractors (i.e. the show of hands in the No Damages for Delay discussion).

How can it be that such smart and experience people in the industry – clients and their

lawyers – come to see these issues so differently? Some of my random thoughts:

- Accepting longstanding federal contracting principles as being right and fair. We are creatures of our education and experience, and came to learn that federal construction contracts were reasonably balanced. While this led us to a remedy-granting provision like the Differing Site Condition clauses, it also led us to remedy-restricting provisions that shift risk to contractors. Think about whether these provisions make commercial sense on non-federal construction projects. Why should a defective termination for default be converted to a termination for convenience? Why should the costs incurred under a suspension of work not have a profit markup?*
- Accepting standard form language as being balanced and appropriate. Most standard form construction contracts have a reasonable degree of balance, and we tout this as we use them. But take, for example, the language in some standard form contracts that says a contractor does not get damages for delays caused by events beyond the control of both parties (e.g., weather, government actions). Why is this fair? Every day on a project site costs the contractor money. Objectively, is this really a risk the contractor should bear?*
- The "greater fool" theory. "Every other contract has this approach, so why should we change it here?" "Yes, I know that this is shifting the risk to the contractor, but the market will tell us if we are too far, or they'll just price the risk." How often have I heard this on my major design-build and P3 projects? And it is hard to argue against, as it always seems that someone will take the risk in these deals. But sometimes we have to do the right thing and protect the industry from itself. I am writing these thoughts early in*

August, 2019, after just seeing both Granite and Fluor take huge write-offs for some major civil infrastructure projects that went bad. Each company is undertaking a reassessment of their role on megaprojects and risky projects. Skanska went out of the P3 market earlier this year. This is a major setback for the industry. Yet those advocating for the "greater fool" theory might say, "let market forces weed out the weak."

- The need to win and look strong and tough. How many of our clients praise us to others by saying, "My lawyer writes really fair and commercially balanced contracts!" But how many of our clients compliment us by saying, "My lawyer wrote a wicked tough contract that totally protected me!" Who is considered the better lawyer? Lawyers are competitive and want to win. Left to their own nature, clients often are the same way. Writing a one-sided contract to protect a client's position is not that hard, but can accomplish the "win and look strong and tough" goals. Writing a commercially balanced contract is much harder and requires a certain amount of finesse and thoughtfulness. It also requires telling the client why its assumption of some risks is in the best interests of the client and project. Is it worth doing so, or are we better off just writing that tough contract and being the "hired guns" that some of our clients expect?

One of the things the panel was to have done during the program was discuss what could the industry do to improve this situation. We didn't really have too much time to address this at the Annual Meeting. But here are a few thoughts:

- Truly understand the business of our counterparts and communicate this to our clients. It is amazing how little owners know about the business of contractors, and specifically how they work for such small

margins. The owner ultimately gets a completed, functioning asset that will have a long useful life. Contractors are getting paid for delivering the asset, and then moving onto the next job. There is no question that owners are in a better position to assume major risk than contractors. The ROI may go down a bit, or there may be political fallout from overruns, but the owner has the asset. A huge hit to a contractor on one bad job could put it out of business. Contractors need to think about the same thing in flowing down risk to their subcontractors. How can it be that the weakest balance sheets on the project carry the greatest risk?

- Evaluate whether the onerous contract will be enforced as written. Many Fellows are involved as neutrals in dispute resolution. Will they really enforce the clause? Will they find public policy reasons and exceptions to work around it? One thing that we Fellows know well – the words in a construction industry contract do not always mean what they say, and may not be enforced/interpreted as written. Might a more commercially balanced contract have a better chance of being enforced.

- Consider using carrots over sticks. The construction industry does a poor job with incentives. Sure, bonuses for early completion or sharing savings are routine. But what about behavioral incentives? How often do we think about using those in our contracts, and what effect might that have on ultimately getting what our clients want? Award fees at the federal government have a long and positive history – maybe we should be thinking about those instead of how to just shift contractual risk away.

My final thought, which I expressed during the Annual Meeting session, is this. I was asked by an owner client to give her a really "owner-friendly" EPC contract as a starting

point for her drafting and consideration. Even though I represent only owners, I really don't have such a document. My files had several EPC contracts that I had already negotiated and executed with various EPC contractors. I stripped out the names of the parties and gave her one of those. In reality, at this point in my life, I find it very hard to distinguish between a "contractor-friendly" and "owner-friendly" contract. Will an "owner-friendly" contract have shorter notice requirements? Will it shift all risk of site conditions to the contractor? Will it impose the risk of consequential damages on the contractor? Maybe. But is the owner better off by getting these types of things? I don't think so. Won't a sophisticated contractor object to these things? Yup.

So, as you try to answer the question of what you consider to be a one-sided contract, maybe you can take one of the contracts you have for your "power position" client and see what you would change if you were now representing a client in the "subordinate" position. How different would it really be? How different should it really be?

Ava Abramowitz - The ABA Dispute Resolution Section (DRS) has just published *Negotiation Essentials for Lawyers*. Two chapters will ring bells with our colleagues – Chapter 13 "Modern Consultative Sales Theory" by me and Chapter 53 "Pre-Dispute and Pre-Escalation Techniques to Improve New Business Relationships" by our own Jim Groton, Andrea Schneider, and Chris Honeyman. If you are already an ABA member, you can buy it at a discount. Better yet join the DRS

and get an even better discount. Regardless, when you are enjoying the articles 😊 😊, enjoy the book. Andrea and Chris, the book's and my favorite editors, outdid themselves on this one. There's a lot of good stuff therein.

Chris Noble -



This summer Chris and I spent nearly three months in a coastal Maine town where we used to have

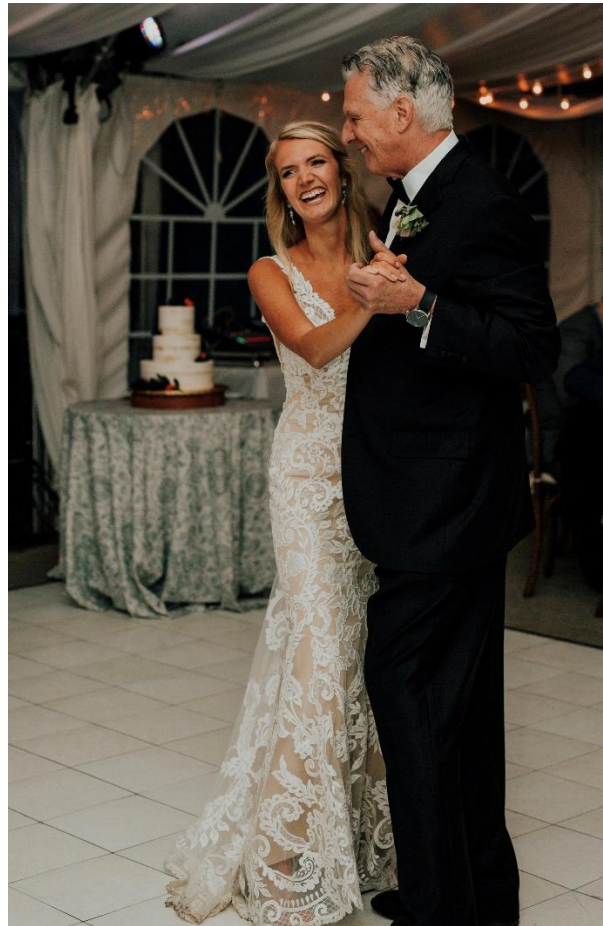
a house (my partners called it the firm's "Main(e) Office") rehearsing and performing the roles of Mr. and Mrs. Van Daan, who shared more than two years holed up with the Frank family in their "secret annex" in Amsterdam. "The Diary of Anne Frank" was a production of the New Surry Theatre, one of three active theatrical companies on our little peninsula. We had a sold-out three-week run, importing as many audience members from Massachusetts as we could convince to make the six-hour drive to see a community theatre show. They were tremendously moved by the powerful play, but were disappointed when, as they said, they "didn't recognize us." In early September, we followed up this wonderful experience by visiting the Anne Frank House in Amsterdam to see for ourselves what our characters must have gone through in real life.

Kenneth Kupchak - Patty and I will be representing the Friends of Hakalau Forest NWR at the National Wildlife Services Regional Annual meeting of Western Region Refuge Friends groups, scheduled for Alaska in September 18-20, 2019.

Howard Ashcraft - I have been elected into the National Academy of Construction and

will be inducted on October 24 in Nashville. I can't remember whether I also reported that I'm co-leading the Commercial Leadership module of the MSC in Major Programme Management at Oxford. I'm about to get 60 assignments to grade....

Bill Franczek -



I am pleased to announce the marriage of my daughter Kaitlyn to Danny Mathieson. Kate and Danny have been together for 8 years, and finally decided to tie the knot at a ceremony in the Blue Ridge

Mountains in Virginia. They had a wonderful honeymoon trip to Paris and then a safari in South Africa. Kaitlyn is finishing her last semester in a Master's Program in Civil Engineering at Virginia Tech, and Danny teaches technology at a local middle school and coaches the cross county team there. For the near term they plan on staying in Blacksburg VA, until job opportunities bring them somewhere else.

Roberto Hernández Garcia - I am the managing partner of COMAD, S.C. and was named '*Mexico's leading construction specialist*' by Legal 500 2020.

The article also states: "COMAD, S.C. is a highly regarded firm with plenty of experience advising contractors and sponsors on major infrastructure projects. Despite its relatively small size, with its particular expertise in construction matters, the firm has been involved in numerous major projects, including advising New Mexico City Airport project manager, Parsons International, prior to the mega-project's cancellation. The team is also representing Ferrocarril Interurbano, the contractor responsible for the track and supply of trains for the Mexico - Toluca railway project.

Eulalio Hernández and Maria Isabel Rodriguez are also both experienced in the sector."

EDITOR'S NOTE

Here we are beginning another fall season. I hope that each and every one of you enjoyed a happy and healthy summer. It has been a wonderful summer season here in Montana. We have narrowly avoided any serious fires and the weather has been delightful.

I hope you'll enjoy another issue of ACCoLades. It was fun putting it together.

Very best regards.

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