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MESSAGE FROM THE CHAIR ELECT

Take to the Road

By James S. Schenck, IV, [Conner Gwyn Schenck PLLC](#)



If you have heard the ending of this column before, I apologize. I have told the story many times. It starts with a busy young provincial lawyer in a provincial capital trying to assure some degree of civility, efficiency and fairness on various public construction projects. The work is demanding, all consuming. It is hard to get away from the to-do list. It can be thankless (not many invitations to wear a gold hardhat at the ribbon cutting).

What's more, the firm will not pay for conferences or out-of-town CLE. Still, some pretense is found to push back from the desk, head out of town to a big city, and see what other construction lawyers are doing. It turns out there are a lot of construction lawyers in the land, and most of them are friendly. Intuition hints that there are intriguing professional opportunities on the road.

The planning (which eventually becomes a ritual) starts with brochures and registrations, travel reservations, and notes to friends to schedule time together. When it is time to leave, a couple of bags are packed, there is a drive to the airport, and then onto a plane. Taxi to the gate, take a taxi to a nice hotel, check in, and then seek out the registration desk. The first few times it is a little awkward, and a bit lonely. After a few trips, though, even before checking in there is usually a familiar face in the lobby. After a few more trips, an opportunity presents itself to do something personally and professionally rewarding. You're hooked, and the trips become a habit. Add another regular Forum program attendee. *Read more...*

REPORT OF THE FORUM NOMINATING COMMITTEE

LAW STUDENT WRITING COMPETITION



In January the Nominating Committee met in accordance with the Forum Bylaws, and on January 25, 2011 reported to the Chair of the Forum that they intend to move for the election of the following individuals at the next Annual Meeting:

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On the heels of a successful 2010 Law Student Writing Competition, the Forum announces that the Competition will be repeated in 2011. The Competition is open to all law students in good standing and attending an ABA accredited law school in 2011. [Read more...](#)

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In 1986 the staff of the Forum began keeping a list of past national programs. The first meeting on the list is the 1987 Mid-Winter meeting in New York, "Revolution in Construction Industry Insurance and Surety Law: Current Developments and Trends." Since 1987, there have been over seventy Forum national programs in cities all across the country, Canada and Puerto Rico. The Forum was organized in the late 1970's. The history of meetings held in the Forum's first ten years is slowly disappearing in the mists of time. Maybe we can do a little work to save that history.

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For now, never mind. That 1987 Mid-Winter meeting was the first of many for at least one young Forum member. It was memorable. A blizzard hit during the afternoon, and most of the attendees wound up snow-bound in New York for days. The same blizzard trapped their families in their homes all along the east coast, some with infants or other dependents. They have not forgotten it, either. Undeterred, many of the people at that program have become serial attendees. It is not unusual to meet devotees who have attended twenty, thirty, forty or more programs. One wonders who holds the record.

As an educational organization for construction lawyers, the Forum deftly blends programs, publications, and a human network. Despite all the energy devoted to books, journals, on-line services, special programs, referral lists and other endeavors, however, most of the Forum's fuel is still spent on its three national programs. The programs consume the most staff and volunteer time and most of the Forum budget. The national programs are where relationships are formed and ideas born. Frankly, there is no Forum without them.

The Forum program formula has changed little over the years. First, in the winter there has been the joint meeting with the Fidelity and Surety Law Section of TIPS in New York, like that one in 1987, or occasionally San Francisco. Then the Forum has convened its Annual Meeting and conference in the spring. The Annual Meeting has been followed by a conference in the fall.

For each program, presenters are recruited who agree to write scholarly papers, show up early, rehearse, and lecture for an hour or so, usually with no compensation other than a nice dinner. The Forum's leadership schedules a host of meetings. Add a nice lunch and a festive reception and that is a program. This formula is resilient because it seems to have been successful. Attendance has grown over the years. The course evaluations are almost always favorable. We repeat what works. There have been some changes over the years, but the basic format, a live program in a city center, is still the norm, with an occasional resort city thrown in the rotation.

Those of us who are hooked on Forum programs love the format. We leave Forum programs a little wiser, and professionally rejuvenated. That said, only a fairly small percentage of Forum members are hooked. There are about six thousand Forum members. Regular program attendance is less than ten percent of the membership. A large percentage of Forum attendees are repeat attendees. One can view that as good and bad. Repeat attendees reinforce the notion that we produce good programs. It also means, however, that the same ten percent of our members are the ones attending the programs. Where are the other members?

Forum programs do not draw a large number of younger lawyers. Some members believe that younger lawyers do not value live programs, preferring on-line programs and other distance learning modes. Maybe so, but the young lawyers who attend Forum programs seem to embrace them, sitting attentively through the sessions and then heading out into the city with friends in search of a good restaurant and the whole range of human companionship. Let's face it, for all of us, and particularly young lawyers, particularly with the relentless work loads some of them have, Forum programs provide a little rest and relaxation in the middle of the

busy spring and fall work seasons. Who does not welcome that? Sitting through a webinar is no substitute.

Admittedly, though, attending a Forum program is expensive, and it takes effort, particularly in the busy spring and fall work seasons. Perhaps we ought to make our programs as accessible and affordable as possible, to include as many of our members as possible. Perhaps our members want to come together in person with colleagues, consultants and experts, and lawyers from other parts of the country, but have limited time. Perhaps they want to get away and learn, be inspired and refreshed, but have limited funds. (And perhaps someone just spent three years litigating a case in Las Vegas and does not want to go back for a conference, but what is one to do?) Access to programs, particularly for younger or newer construction lawyers, was the impetus for the Forum Regional Programs. Those programs have been successful. But there is nothing quite the same as attending one of the national programs.

In case you have not noticed yet, [Andy Ness](#) has been nominated to serve as Chair-Elect of the Forum from 2011-2012, and [Will Hill](#), [Chris Montez](#), [Aaron Silberman](#) and [John Vento](#) have been nominated to serve as the next four Governing Committee members. The formal election for these positions will be held at the [Annual Meeting in Scottsdale](#). These five people have the task of mapping the course of the Forum's programs from the Fall Meeting 2012 to the Annual Meeting 2013. Soon they will be selecting Program Co-Chairs, picking locations and venues, and setting the themes for those programs. Yours truly and [Eddie James](#), [Susan Fisher Stevens](#), [Art Brannan](#) and [Kerry Kester](#) are wrapping up the same process for the meetings in 2011 through early 2012. Our program chairs are now in the saddle and the programs are coming together well. We hope you will attend them.

Program planning leads to much reflection about our program formula. We truly do obsess over program dates, locations, venues, schedules, topics, speakers, social events, cost, and on and on. It would be very helpful if you as members and potential attendees would share your thoughts about what you would like from the programs. Mainly, we want to know what will get you there. If you have ideas about ways to improve the programs, make them more accessible, make them more inclusive, or just make them more fun, please let us know. Send an email to any of us or to [Amanda Raible in the ABA office](#). Write a letter. Post a comment on [the Forum's LinkedIn site](#), or whatever. We want to know what will get you to push back from the desk, buy a ticket and join us.

Paraphrasing a comment [Bob Rubin](#) made to me years ago (when in a weak moment I was complaining about how difficult it is to volunteer time), our service to our professional associations is what makes the practice of law bearable (or enjoyable, or congenial, or pick your adjective). May we all aspire to be as professionally gracious and graceful as Bob, and may we all have the opportunity to attend many Forum programs. I hope to see you at one soon. I will probably be there.

Jim Schenck is a partner at Conner Gwyn Schenck PLLC in Raleigh, North Carolina. He has served the Forum in many positions including the Governing

Committee and is the Chair-Elect of the Forum.

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Fits and Starts: EPA Encounters Difficulty in Regulating Stormwater Runoff From Construction Sites

By [Edward B. Gentilcore](#), and [L. Evan Van Gorder](#), [Duane Morris, LLP](#)



In an effort to prevent environmental problems associated with stormwater runoff from construction sites, the [United States Environmental Protection Agency](#) ("EPA") created new effluent limitation guidelines ("ELGs"), which were to be integrated into National Pollutant Discharges Elimination System ("NPDES") permits.¹ These "Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category; Final Rule"² ("Guidelines") establishing the new ELGs were to be broken into two main components: (1) best management practices; and (2) the highly controversial numeric effluent limits. After receiving numerous legal challenges to these new ELGs, however, the EPA filed an unopposed motion for partial

vacature of the Guidelines, which was subsequently granted on August 24, 2010.³ Moreover, on January 4, 2011, the EPA stayed the numeric limitation after admitting that it miscalculated the stormwater runoff limit.

The controversy surrounding the Guidelines involves the creation of specific numeric effluent limits (i.e., stormwater discharge restrictions). While previous EPA regulations required non-numeric, performance-based ELGs, the new Guidelines would create a maximum daily average discharge limit of 280 Nephelometric Turbidity Units ("NTU") for each discharge point on a construction site (e.g., basins, channels, pipes, etc.). See [40 C.F.R. 450.22\(a\)](#). In short, if the Guidelines go into effect, a permittee would be required to sample and monitor stormwater discharges in order to comply with the average daily numeric limit.

By way of background, in December 2009 the [Wisconsin Builders Association](#) and [National Association of Home Builders](#) (collectively, "WBA-NAHB") filed petitions for review of the Guidelines. Soon after, in April 2010, the Utility Water Act Group

("UWAG") and the **Small Business Administration** ("SBA") filed similar actions of their own. Among other things, each of these actions challenged alleged deficiencies in the data EPA used to support its decision to adopt the 280-NTU effluent limit. Additionally, the WBA-NAHB alleged that the EPA failed to consider certain site-specific characteristics, in particular, the impact of the numeric effluent limit on cold weather sites and small sites. Similarly, UWAG alleged that the EPA also failed to consider the impact of the Guidelines on specific linear gas and electric utility projects (i.e. power lines).

After reviewing the dataset underlying the 280-NTU limit, the EPA concluded that it did, in fact, improperly interpret the data. As a result, the EPA now believes that it lacked adequate data to support the 280-NTU effluent limit. The United States Court of Appeals for the Seventh Circuit thus remanded certain portions of the Guidelines back to the EPA so that the EPA may reexamine the 280-NTU effluent limit "through a narrowly-tailored notice-and-comment rulemaking and, if necessary, revise that portion of the limit before proceeding with its defense of the [Guidelines]."4

Even though, for now, the ELGs are officially placed on hold, each state that has been authorized by the EPA to administer its own NPDES program may create their own, more stringent ELGs. For example, Maryland has already publicized its intent to adopt the Guidelines into its state permits immediately despite the fact that its current general construction permit program does not expire until 2013. Similarly, Pennsylvania's regulations require the implementation of Post-Construction Stormwater Management ("PCSM") plans, which, as written, appear to apply in perpetuity. Simply put, PCSM plans must include, among other things, an analysis demonstrating that the post-construction site will not adversely affect nearby bodies of water and identify long-term maintenance activities.

Nevertheless, while authorized states are required to incorporate the new Guidelines into any reissued construction stormwater permit, the EPA has advised that the states need not incorporate the 280 NTU effluent limit into their permits. Instead, the EPA encourages states that were working to promulgate their own numeric limits (approximately 16 states in 2010 to 2011) to withhold such rulemaking until the EPA has acted.

Ultimately, the EPA seeks to propose a revision to the current numeric ELGs within the next few months and to take final action by May 30, 2011. Upon taking final action, EPA anticipates that the revised numeric limits will go into effect by the end of June 2011. As for the pending litigation in the Seventh Circuit, it is being held in abeyance by the court until after the EPA concludes its scheduled May 30, 2011 rulemaking.

Conclusion

Given this flurry of activity on both the federal and state level, as well as in the courts, it can be expected that there will be significant changes in the permitting process associated with the management of stormwater runoff from construction sites. Accordingly, contractors with projects that are suspected to be subject to these regulations must consult with local permitting authorities to confirm the criteria they are to follow and by which their performance will be measured on the ELG

scorecard.

Notes

1. Under Section 402 of the Clean Water Act, NPDES permits are required for stormwater discharges to surface waters from construction activities if the stormwater leaves the construction site through a "point source" and reaches surface waters either directly or through storm drainage. A "point source" is a natural or human-made conveyance of water through such things as pipes, culverts, ditches, catch basins, or any other type of channel.
2. See [40 C.F.R. Part 450](#), published at 74 Federal Register, No. 229, pages 62966-63-058 (Dec. 1, 2009).
3. See *Wisconsin Builders Assoc., et al. v. E.P.A.*, No. 09-4113 (7th Cir. August 24, 2010).
4. See *Wisconsin Builders Assoc., et al. v. E.P.A.*, No. 09-4113 (7th Cir. August 13, 2010).

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THE CORPORATE COUNSEL BRIEF

Learning from Each Other

By Charles W. Cobb



The conflict was evident to me. Outside counsel sat at the table with the top company people and the project team leaders. What should we do? Outside counsel said – let it go. The facts and the law are on your side but the costs of prevailing were too high. The costs for attorney fees, for time spent gathering evidence of events, and the time spent responding to requests from a litigious opponent, the lost future work from this customer

– all supported the advice to let it go. I knew that attorney would have benefitted financially from a donnybrook. I have favored that attorney ever since he gave the advice we both knew was right.

As sole in house counsel I had the same responsibility to husband resources as all the other departments had. When budgeting for outside legal expenses for an upcoming year, I was aware that my estimate would be analyzed together with my salary. A proposed budget with legal costs listed as an open drain would not be well received. Just as with lawyers in law firms, the question sitting on top of any legal expenditure was – to whom will that cost be billed? There were expectable occurrences to budget for, where limited engagement, rifle-shot expertise would be needed – OSHA contests, subcontractor bankruptcy flaps, proposed modifications to indemnity text, some union employment matters.

Owner contract negotiation legal work had to be handled internally since there was no way to know how much appetite any particular owner had for negotiation. A few volleys across the net where each side appreciates the other's needs, would be ideal. Some owners however, particularly those represented by lawyers who mistake negotiation for litigation, revisit each clause and phrase with the focus of a Talmudic scholar. Paying by the hour for that kind of detailed textural analysis could eat much of the construction management project fee. Some elaborate negotiations failed to lead to agreements. If outside counsel had been engaged, the attribution of such fees to gouge the marketing budget for projects not won, would have met with

howling resistance.

When the outside counsel relationship is good, teaching and learning flow two directions. Legal expenditures can be for the greater good of the company but few company insiders will start with that assumption. Outside lawyers will need to know the clients' decision maker's predispositions in order to be able to pitch the need for spending money on legal disputes while showing the costs are not more than necessary. If the magnitude of the legal cost is unquantifiable, the argument for incurring the cost will be resistible.

For the real ugly, big money disputes where intraparty communication is eroding, outside counsel can be a crucial member of the company team particularly in framing the issues in dispute. Good outside counsel, like a good mediator, needs to be able to read people. As outside counsel is gathering the facts of the conflict, people giving the story will be aware they could have acted differently and will often offer a predictable self-exculpating version of events. Wise outside counsel will let the internal personnel dynamics play out. Included among those dynamics are the consequences from the fact that in house counsel probably did not budget with the CFO for a high cost legal rock fight.

For outside counsel the question "How did this happen?" is asked only in the service of the question "Where do we go from here?". Outside counsel should confer with in house counsel to divine the best definition of winning. A valuable service from outside counsel is helping in house counsel to determine a strategy to sell internally this version of winning.

People who have experienced litigation as parties, upon reaching the end, never say – even when they prevail completely – that was an excellent and satisfying process.

Charles W. Cobb was Corporate Counsel for Boston based construction manager William A. Berry & Son, Inc. for eight years and after its acquisition, Division Counsel for Suffolk Construction for one year until late 2010. He is a member of the Steering Committee of Division 11 – Corporate Counsel.

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Gaining Virtual Steam: BIM Transforms Design, Construction and Facility Management

By [Justin L. Weisberg](#), Arnstein & Lehr LLP



Over two decades ago, developments in computer technology allowed design professionals to develop three dimensional virtual models used as tools to express a project in a more realistic medium than traditional two dimensional drawings. Subsequently, advances in computer technologies provided for the development of sophisticated models that could be used as a medium of communication to integrate the efforts of the

Owner, Designer, and Contractor. Today, design professionals are not limited to three dimensional models of a project that can generate two dimensional drawings automatically, but instead design professionals are collaborating with Owners and Contractors to develop more sophisticated models that allow for virtual construction and also provide for the storage and use of significant amounts of project information. The development of these virtual project information tools is known as Building Information Modeling ("BIM"). The advantages obtained from the use of BIM technology are quietly revolutionizing methods of design, construction, and long-term building management.

BIM has been defined as *"a digital representation of physical and functional characteristics of a facility. As such it serves as a shared knowledge resource for information about a facility forming a reliable basis for decisions in its life cycle from inception onward."*¹

Recently, governmental organizations have required the use of BIM on public projects either on a project-specific basis by some organizations or by regulation promulgated by a government agency. At a breakfast presentation jointly sponsored by the ABA Forum on the Construction Industry [Division 3/Design](#) and [Division 10/Legislation and Environment](#) at the Forum Fall 2010 Meeting, two architects,

who have been significantly involved with governmental development of BIM requirements, provided a status of BIM requirements on public projects. Charles Matta, Office of the Chief Architect of the ("OCA") of the U.S. General Services Administration ("GSA") discussed federal BIM requirements for projects commissioned by the GSA. Finith Jernigan, is a practicing architect, technical consultant to the state of Wisconsin for the creation of the Division of Building, BIM Guidelines, and author of the book, "BIG BIM little bim." He discussed recent regulations promulgated by the State of Wisconsin. Both speakers discussed their experiences in the implementation of BIM processes on several projects. The results from their pilot programs indicated that the benefits realized from BIM include increased construction efficiency and long-term building cost savings. Industry organizations are also participating in how BIM is evolving the process of design and construction. The Association of General Contractors ("AGC") is also developing a comprehensive multi-unit series of courses on the use and implementation of BIM. Last fall, the AGC unveiled a course and materials on contracting and risk allocation for project participants. This article will address BIM from each of these perspectives.

Federal GSA BIM Program

Charles Matta discussed the evolution of the GSA's use of BIM and findings from a pilot program that the OCA is currently administering to study potential cost savings and efficiencies that can be gained through the use of BIM technologies on certain federal projects.

3D geometric models are the geometrical representation of building components and typically serve as an aid for design, construction, and coordination. 4D models (3D + time) include information concerning product phasing, tenant sequencing, and construction scheduling. BIM includes not only 3D geometric models but also a wide range of information on building elements and systems.²

3D, 4D and BIM can assist the OCA in reducing inefficiencies and lost opportunity costs by providing processes that influence a project earlier in the project delivery phase. The use of BIM is also anticipated to reduce cost overruns and claims by improving the quality of the design product. The OCA has drafted BIM contract language for the purpose of introducing 3D-4D-BIM requirements into ongoing projects in accordance with GSA procurement requirements. The OCA is in the process of issuing standard requirements for 3D-4D-BIM solicitation and scope of work, which reference the GSA BIM Guide and define the required deliverables.³

The OCA is investigating the use of BIM for the following areas:

1. Spatial program validation to model and analyze the design with respect to space;
2. 4D phasing to efficiently communicate project phasing to all stakeholders;
3. 3D imaging for acquiring building spatial data in three dimensions with high fidelity and low processing time;
4. Energy performance and operations using BIM technology to provide space-based energy models as compared to traditional zone-based energy models; and
5. Circulation and security design validation to automate the process for

checking compliance of the design with top priority circulation requirements.

The OCA has implemented the use of 3D scanning to allow for better as-built drawings and documentation of existing conditions.⁴

The OCA has recognized that an important aspect of governmental BIM requirements is the use open standards that promote maximum interoperability between software applications used by participants in the project delivery process. IFC (Industry Foundation Class) specifications define the content and structure for BIM exchange between software applications and participants in a building project. The IFC specifications are intended to facilitate a vendor-neutral format to enable interoperability between a wide array of application types used in the building industry.

The OCA initiated a pilot program that had completed 10 pilot projects as of the date of the overview. The use of BIM in the pilot projects provided a number of benefits, including: (1) Contributing towards the development of an optimized construction schedule; (2) Improving as-built documentation and providing major design savings through the optimization of a mechanical system design; (3) Uncovering design errors and omissions; and (4) Improving the means of communications between project stakeholders.

Spatial validation is used to assess design performance in regard to spatial requirements. The use of BIM allows a design team to efficiently and accurately assess design performance in regard to spatial requirements in accordance with complex space standards and regulations. The GSA has required a BIM Spatial Analysis on all major project design concept submittals since fiscal year 2007.

Wisconsin Requirements

The State of Wisconsin, Department of Administration, Division of State Facilities ("Wisconsin") released a report on the current state of BIM technologies in June 2009. The Wisconsin Report recognized that, while non-farm productivity in the United States has increased over the last 40 years, construction productivity has actually declined.⁵ Recognizing the cost and necessity of obtaining, storing, and retrieving information over the life of a facility, the Wisconsin Report identified potential advantages that can be obtained from the use of BIM technologies through the life of a facility. The continuous project life-cycle includes the following elements: (1) Operating/Facility Management, which is usually the longest duration, highest risk phase in terms of costs; (2) Planning, which is usually the shortest duration and the highest risk in terms of the costs of finding information or moving forward with missing information; (3) Design; and (4) Construction.

During the design process, the implementation of BIM technology allows the designer to provide the Owner with better decision-making information much earlier in the design, thus reducing the need for costly changes later in the Project. Consequently, the design services are reallocated to shift a greater portion of the design services towards activities that occur earlier in the design process.

BIM tools applications provide advantages to the contractor including clash detection, cost and schedule management, improved efficiency for offsite fabrication, laser scanning to confirm as built drawings, and the use of GPS for

component tracking. When the BIM design development model is handed over to the contractor for development, the models can be used to detect hard clashes, such as a clash between a duct and a beam, and soft clashes, such as a door swing. The use of BIM Models to schedule construction activities allows schedulers to visually plan and communicate activities in the context of time and space. Incorporating productivity information into the model allows the scheduler to determine time-space conflicts before the conflict occurs on the project site.

The nature of BIM, which allows a single model to be transmitted between the designer, contractor, and owner, and allows each participant to develop and utilize the model, promotes a change in the relationships between the participants towards a more integrated process. For projects utilizing BIM technology, the use of traditional un-amended contracts will not provide for the changes in responsibilities between the parties.

The requirements promulgated by Wisconsin require BIM to be utilized on new projects with funding in excess of \$2.5 million, all projects for additions and alterations in excess of \$2.5 million in funding where the new addition costs are greater than fifty percent of the subject project, and all construction projects in excess of \$5 million in funding⁶. Architects and Structural Engineers are required to use one or a combination of the following authoring software programs to create the project model: (1) AutoDesk, Revit Architecture, Structure, and MEP; (2) Bentley Architecture; (3) Graphisoft ArchiCAD; (4) Nemetschek AllPlan; and (5) Tekla Structures. The models are to include all geometry, physical characteristics, and product data needed to describe the design and construction work. Mechanical, Electrical, Plumbing, Fire Protection, Civil Engineers, and Specialty Consultants are required to use BIM authoring software or specialty 3D software capable of interfacing with the model by the Architect and Structural Engineer. Similar to the model provided by the Architects and Structural Engineers, the MEP, Civil, and Specialty models are required to include all geometry, physical characteristics, and product data needed to describe the design and construction work. The Designer is required to submit the final model in its native application format and IFC with the project closeout documentation.

The AGC Manual on BIM Contract Negotiation and Risk Allocation

In Fall 2010, AGC released the Manual for Unit 3 of its BIM Education Program entitled "[BIM Contract Negotiation and Risk Allocation](#)" (the "Manual"). The Manual was developed in association with the AGC's one-day course on BIM Contract Negotiation and Risk Allocation. The Manual discusses possible constraints to consider, including collaboration, interoperability, and granularity. Recognizing the lack of consideration of the use of BIM in traditional contracts, the course and the Manual reference the BIM Addendum developed by [ConsensusDocs](#) and the AIA E-202, both of which were developed to address contractual issues relating to the use of BIM in a collaborative environment.⁷

The Manual provides an overview of BIM terms, contract delivery methods as they relate to BIM, and the related issues concerning the use of BIM, including collaboration and risk allocation. The Manual instructs on the development of a BIM Execution Plan and on important contract terms to facilitate the execution of a project utilizing BIM. The Manual also reviews intellectual property rights, including

patent, trademark, and copyrights, and possible provisions that allow the parties to share in the development of the model while providing for use of the model by the Owner. The Manual also reviews insurance and surety issues to be considered in association with a project utilizing BIM.

Conclusion

As design professionals, contractors, and owners learn to utilize the 3D-4D-BIM technologies, they are learning ways to maximize the advantages of these powerful tools for the recognition of information that historically would not have been available until much later in the planning, design, construction, and management process. Through experience, parties are realizing the advantages these new technologies offer and are adapting processes and contracts to take advantage of BIM technologies available to the design and construction industry. Over the past few years, government organizations have been developing standards and requirements relating to the use of BIM technologies. New contract provisions have been created by design and construction organizations to reflect a more collaborative approach that facilitates the use and development of the BIM product by all parties in the process. The quiet development of requirements, processes, contract provisions, and courses reflects the quiet transformation of project development as a growing number of industry participants utilize BIM technologies.

Justin Weisberg is a partner in Arnstein & Lehr's Chicago office. He is also chair of the firm's Construction Practice Group. Mr. Weisberg's background includes experience in engineering and registration as a professional engineer, giving him insight into many issues encountered during the design and construction process. His e-mail address is jlweisberg@arnstein.com.

Editor Kristine A. Kubes is principal of the Kubes Law Office, PLLC, in Minneapolis, MN. She serves as Chair of the Forum's Division 3/Design and as public member and Chair of the Minnesota State Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geo-Science, and Interior Design. Her email address is kristine@kubeslaw.com.

Notes

1. Report on the current state of BIM technologies and recommendations for implementation ("BIM TRI"), Section 1.2.1, Wisconsin Department of Administration (June 17, 2009) [Quoting National Institute of Standards and Technologies, 2004].
 2. GSA BIM Guide Series 01, Section 1.1, Office of The Chief Architect, GSA, (2007).
 3. *Id.* at Section 1.4.
 4. *Id.* at Section 1.4 and 1.5.
 5. BIM TRI, Section 1.1.1 [Quoting Stanford University, Center for Integrated Facility Engineering Study, 2007].
 6. Building Information Modeling (BIM) Guidelines and Standards for Architects and Engineers, State of Wisconsin, Department of Administration, Division of State Facilities, Page 1 (July 1, 2009).
 7. Unit 3: BIM Contract negotiation and Risk Allocation — Participants Manual, Section 1-8, AGC of America (2010).
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Report of the Forum Nominating Committee



In January the Nominating Committee met in accordance with the Forum Bylaws, and on January 25, 2011 reported to the Chair of the Forum that they intend to move for the election of the following individuals at the next Annual Meeting:

To serve as the next Chair-Elect of the

Forum: **Andrew D. Ness** from Washington, D.C.

To serve as members of the Governing Committee for three-year terms beginning in 2011:

- **William M. Hill**, Boston, MA
- **Christopher D. Montez**, Dallas, TX
- **Aaron P. Silberman**, San Francisco, CA
- **John S. Vento**, Tampa, FL

All of these individuals meet the requirements of the **bylaws**, and all of them have agreed to serve if elected. These nominees will be presented to the Forum's membership for election on April 14, 2011 at the **Forum's Annual Meeting in Scottsdale, Arizona**. The Nominating Committee members appreciated the opportunity to undertake this important task for the Forum.

James S. Schenck, Chair

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Wave of the Future: Forum Podcasts



Dave Owen of ImageServe recently agreed to answer some questions about the Forum's effort to produce and distribute podcasts on topics of interest to the Forum membership. Dave is an IT consultant to the Forum who works with Forum members [Dan McMillan](#), [Deborah Bovarnick Mastin](#), [Buzz Tarlow](#) and [Cathy Shanks](#) on developing podcasts for the Forum.

Q: Dave, tell us what's going on with podcasts in the Forum.

Dave: There are 2 main types of Podcasts we are doing. One is the live recording of lectures such as Division Breakfast Meetings at Forum conferences. The second is podcasts that are in interview fashion on particular subjects of interest such as Green Building.

Q: Why podcasts? What's unique about the format?

Dave: Podcasts are convenient. They have become popular in recent years for distributing specialized information in a format that is easy to use. Some people listen to podcasts on a web site and some download them to a portable device for listening in places like a car or working out. Also, we publish our podcasts in the [iTunes Search Engine](#) which is the largest search engine for free podcasts on the Internet. Hopefully, more people find out about the Forum from our iTunes podcasts.

Q: How long has this project been in the works, and what's involved in developing the program?

Dave: We have been organized for about two years and have recently ramped up our efforts. You will be seeing more Forum Podcasts soon.

Q: How can I download and listen to a Forum podcast?

Dave: Here is a Web Site address to listen to Podcast Greetings from each of the

12 Forum Divisions on a Web Site:

<http://www2.americanbar.org/Forums/Construction/Pages/Divisions.aspx>. Also, you can go to iTunes, select the [iTunes Store](#) and search on "Construction Forum."

Q: *Are you looking to upload and distribute podcasts prepared by Forum members? If so, what do the members need to know about formats, topics, length, style, etc.?*

Dave: Yes, we love to showcase Forum members. Just contact us with a topic and we will work with you to determine the logistics. Don't worry, we handle all the technical details.

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SPOTLIGHT ON THE FORUM DIVISIONS

Division 3: Focus on Design

By [Kristine Kubes](#), Chair

[Division 3/Design](#) provides practical knowledge concerning the problems and needs, risks and rewards, and duties and liabilities of each of the parties involved in the design process, with particular emphasis on design delivery and implementation, construction project development, and project economics and financing in both the public and private sectors.

The bulk of the Design Division's activity grows out of its monthly telephone conferences, which occur on the first Tuesday of each month at 10:00 a.m. CT. All are welcome. Its next monthly call will occur Tuesday, April 5, 2011.

A focus for the Design Division is outreach and education. To that end, the Division holds breakfast meetings at each of the three Forum Meetings. Each breakfast meeting offers a substantive presentation of interest to members of the division and the Forum as a whole. In the last year, Design has presented "BIM in the Fourth Dimension: Legislative Implementation" at the Fall 2010 Meeting, and "Blast-Resistant Tower Design: One World Trade Center at Ground Zero" at the 2011 Mid-Winter Meeting. On Friday, April 15, 8:00 a.m. at the 2011 [Forum Annual Meeting](#), the Design Division will host members of the design team who contributed to the historic Hoover Dam and the remarkable new bridge that crosses it.

Quarterly, the Design Division holds a hot-topic conference call on emerging or developing issues related to design. The next Hot Topic Call will be Tuesday, May 3, 2011, 10:00 a.m. CT, entitled, "Get on Board: Legal Issues Surrounding High Speed Rail." Join the Design Division for a dynamic panel discussion of the current trends of High Speed Rail projects in the United States, including legal considerations from financing, oversight, and liability.

Division 3/Design welcomes all Forum members to join its working group, its activities, and its benefits of fellowship, service, and education. For information, please contact Kristine Kubes, Division Chair, at 612.333.3262 or

kristine@kubeslaw.com.

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SPOTLIGHT ON THE FORUM DIVISIONS

Division 9: Specialty Trade Contractors and Suppliers

By [Nicholas D. Siegfried](#) and [Joseph C. Kovars](#)

Division 9 is the Specialty Trade Contractors and Suppliers division. We have a great group that enjoys each other's company and shares timely and valuable information useful to our law practices. Here are some of the things we have been up to in recent months and the things we plan to do this season.

Social Media & Division 9

Division 9 is now on LinkedIn! In order to facilitate communication between Division 9 members, Division 9 has created a LinkedIn Group Page. This [LinkedIn Group Page](#) will allow Division 9 members to receive updates of upcoming events and opportunities. It will also allow members to post topics, questions or issues for which other members can respond and exchange ideas, such as legal research issues, expert witness recommendations, mediator/arbitrator experiences, etc. To join us on LinkedIn, follow [this link](#), or conduct a group search for "Division 9".

Recent Programs

Division 9 has enjoyed the benefit of some great educational programs within its monthly conference calls and Division 9 breakfast meetings. In December, 2010, John F. Ashley of Encore Discovery Solutions gave a very informative seminar on what every practitioner should expect when it comes to electronic discovery. The focus was on how to manage e-discovery for smaller cases or smaller clients. In January, at the Forum's Mid-Winter meeting in New York City, Division 9 teamed up with [Division 11/Corporate Counsel](#) to host a breakfast program on "Subcontractor Pass Through Claims." The program was moderated by Aaron Silberman, immediate past chair of Division 9. Most recently, at the February conference call, Bob Cox spoke about "Building Information Modeling (BIM) and Subcontractors." BIM is a cutting edge technology rapidly gaining currency in the construction industry. BIM presents a new set of legal issues to consider for our clients.

Upcoming Programs

Division 9 is gearing up to produce a breakfast program with [Division 1/Dispute Avoidance and Resolution](#) called "Desperate Litigation Measures for Desperate Times." This program will take place at the Forum's [Annual Meeting](#) in Scottsdale, Arizona in April. It will surely be a very entertaining session as the panelists will be discussing new and inventive claims being brought by practitioners in this economic climate. For our March teleconference, we plan to hear from the American Subcontractors Association concerning hot pending legislation and recent cases affecting subcontractors.

New Book Project

Division 9 is embarking on a book project concerning legal principles involving subcontracting. The project is still being organized and this is the perfect time for you to get involved. Please e-mail Aaron Silberman, asilberman@rjo.com, or Joe Kovars, jckovars@ober.com, to express your interest.

Join Us

To join Division 9/Specialty Trade Contractors and Suppliers, simply send an e-mail to the Chair, Joe Kovars, jckovars@ober.com. See for yourself why our motto is "Things are Fine in Division 9!"

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FROM THE FORUM YOUNG LAWYERS SECTION

Sustainable Building Goals and Project DestinyUSA: A Case Study to Advocate a Better Balance between Revolutionary and Achievable

By [Melissa A. Orien](#), [Holland & Hart](#)



Possibly the biggest green-building project gone wrong has arisen with a developer that may be penalized \$2.3 million by the IRS for allegedly failing to incorporate required green building measures into a project that received tax-free financing for construction. Any failure in this project may signal an underlying judgment error in the government-provided financing that funded

it. The questions becomes: Are goals incentivized by tax-free financing more likely to be achieved by funding projects that set achievable goals rather than the lofty ambitions of projects like [DestinyUSA](#)?

Project Description. The project, [DestinyUSA](#), was a proposed 4.5 million square feet of retail and entertainment space in Syracuse, New York that was to be powered entirely by renewable resources.¹

Green Bond Requirements. The project received \$228 million in tax-free Green Bonds and the tax-exempt status saved the developer an estimated \$120 million on the Project. The Green Bonds program was created under the [American Jobs Creation Act of 2004](#) to promote "environmentally friendly development" and focus on reclaiming brownfields.²

Project Parameters. The Internal Revenue Code specifies criteria for a project to be eligible for the tax-free bonds, including the following:

- at least 75 percent of the square footage of commercial buildings that are part of the project is registered for [LEED certification](#);
- the project includes a brownfield site (as defined under CERCLA);
- the project receives state or local government resources of at least

\$5,000,000; and

- the project includes at least (a) 1 million square feet of building or (b) 20 acres.³

Alternative Energy Requirements. The application for the bonds must include information regarding alternative energy, including:

- a comparison of electricity consumption compared to a conventional project;
- emissions reduced compared to coal generation;
- amount of solar generation capacity; and
- fuel cell energy generation.⁴

Jobs Requirements. As the bonds were created under a jobs initiative, the project must provide permanent employment of at least 1,500 full time equivalents and construction employment of at least 1,000 FTEs.

Certification Requirements. The DestinyUSA developers have a month-end deadline to certify to the IRS that green building promises were met, including the following:

- 45-megawatt electricity generating plant running on "biofuel" from soybean, old and recycled cooking grease;
- 290,000 square feet of solar panels on roofs;
- fuel cells to make 7 megawatts of electricity; and
- LEED certification.

If the IRS determines that the project failed to comply with sustainability requirements (none of which the project currently appears to have complied with), the developer may be assessed a multi-million statutory fine.

Lessons Learned. While this project appears to have not measured up to its promises, this case study has led to speculation as to whether the requirements under the Green Bonds measures were in fact ever achievable. Any fall out from this project still remains to be seen, but a project with such a high profile will inevitably lead to scrutiny of the project itself and the larger goals for sustainable development. Perhaps this project is a signal to legislators and industry that developing realistic and achievable sustainable goals may be a more productive path toward revolutionizing the building industry than projects with goals that may not (and arguably cannot) be achieved. In some cases, baby-steps lead to progress, more quickly than uncertain leaps.

Notes

1. Rick Moriarity, "Faded 'Green' Promises Could Cost Destiny USA Millions," Syracuse.com, February 20, 2011.

2. See Section 701 of the American Jobs Creation Act of 2004 Pub. L. No. 108-357.

3. IRS Code Section 142(l)(1)

4. IRS Code Section 142(l)(4)(B)

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The 2011 Forum Annual Meeting Will Be Held in Scottsdale, Arizona

[Rhonda Caviedes Marshall](#) and [Wm. Cary Wright](#), Program Co-Chairs

[Richard J. Tyler](#), Governing Committee Liaison



The Forum invites you to spend time learning new skills and perfecting old ones during the **2011 Annual Meeting** in a setting that rivals paradise - The Fairmont Scottsdale Princess - a lush oasis in the desert. A spectacular program, "I Can See for Miles: Cutting Edge Tools for the Construction Practitioner," awaits you. Whether your construction practice is litigation or transactional, this Program will help you hone your skills with advanced legal tools presented by an outstanding line-up of speakers drawn from the legal profession, the judiciary, and the construction industry.

Your legal toolbox will overflow with the latest and greatest tools of our trade that you will pick up from this two-and-a-half day Program. Plenary sessions and workshops will equip you with the cutting edge tools you need to handle ubiquitous electronic discovery issues from inside the courtroom and on the job site; develop drafting skills that protect your client's privileges; negotiate, draft and administer litigation consultant contracts;

advise clients venturing into electronic project management; understand and utilize effective tools and techniques for selecting juries; present evidence whether on a flip-chart or with electronic and digital bells and whistles; create and maintain a solid diversity program in your practice; and address ethical issues that face the bench and bar in the age of social media.

If such an incredible program is not enticing enough, there is more! You will not want to leave this fabulous southwestern venue, which offers so much to see...for miles, and miles, and miles! The Program's schedule allows attendees, families,

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and guests time to experience the Valley of the Sun—an eclectic mix of art galleries, museums, desert gardens, specialty retail and fine dining complement this top [tier golf destination](#). Experience a jeep tour through the scenic desert, take in a baseball game at the [Arizona Diamondbacks'](#) stadium, explore [Sedona](#) and the [Grand Canyon](#), or simply relax at the award-winning world-class [Willow Stream Spa](#). You will also have an opportunity to "give back" to our host community by participating in a trail restoration service project at Scottsdale's [McDowell Sonoran Preserve](#), the largest urban preserve in the country that is home to stunning geological formations, lush cacti forests and diverse wildlife.

We are excited about sharing with you another memorable Forum experience at the fabulous [Fairmont Scottsdale Princess](#). Please join us at this ultimate desert resort for advanced construction CLE, superior industry networking, and fabulous activities.

Volunteers Needed

For those attending the Annual Meeting, why not volunteer for a short shift at either the Publications or Division Signup table, or agree to be a liaison for a First Time Attendee? Just send an email indicating your willingness to volunteer to mmenicucci@hardhatlaw.net (FTA liaison), cpatterson@zdlaw.com (Publications) or gcashion@smithcashion.com (Division signup). All are a great way to meet new people and expand your personal network.

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MESSAGE FROM THE EDITOR

The Stork Doesn't Deliver Construction Lawyers

By Jeffrey R. Cruz



Where's the incubator for the next generation of skilled construction lawyers? Our first answer might be: our law firms – that's where we take in young legal minds, introduce them to the practice of construction law, connect them with clients and mentor them to proficiency and beyond. Or we might conclude: the Forum – that's where we provide opportunities for fledgling construction lawyers to broaden and deepen their knowledge of

construction law. But our Young Lawyers are already fully formed professionals by the time they sign up with the Forum. The true incubator is run by the professors who teach construction law in our law schools, and undergraduate and graduate programs in engineering, architecture, construction management and other disciplines. Long time Forum member [Lawrence Melton](#) chairs an [ad hoc Professional Education committee of the Forum's professors](#), and we met at the Midwinter Meeting in New York City to network, share ideas, and plan future collaboration. I'm planning to have Lawrence tell us more about his committee's activities in a future issue of *Under Construction*.

The Forum recently got a unique opportunity to look through the window of that incubator, tap the glass and wave at our future colleagues. The Publications Committee organized and sponsored a Law Student Writing Competition and the results are in. The sub-committee running the competition, chaired by [Marilyn Klinger](#), includes Forum members [Julie Sneed Mueller](#), [Daniel Terrell](#), and me, along with ABA Law Student liaisons Dan Garcia and Nathaniel Jaye. Our Competition judges are Forum members [Arlan Lewis](#), [Suzanne McSorley](#), [John Ralls](#) and [Fred Wilshusen](#).

Congratulations to the finalists and winner:

Winner

Elsbeth England, University of Virginia Law School, "The Government Upgrades the False Claims Act: Implications for Federal Construction Contracting"

Finalist

Matt Reardon, University of Virginia Law School, "Understanding the Liability and Damages Issues of LEED Certified Projects"

Finalist

Wesley Sawyer, University of Virginia Law School, "CGL Occurrences."

Elsbeth England will be recognized at the [Annual Meeting in Scottsdale, Arizona](#) in April.

Many thanks to Marilyn's subcommittee, the judges and the Publications Committee for their efforts to make this year's Law Student Writing Competition a resounding success.

Over two decades ago, I learned about the existence of construction law as a specialty practice only by chance. During my first year in law school, a classmate saw a posting on the career center's bulletin board. (Back then a "posting" meant using a thumbtack, not a mouse. Before that, it probably involved a post). It was for a first-year summer position at Postner & Rubin, a small, highly-regarded construction law firm. My classmate thought I might be interested in the job because she knew I had grown up in a family-owned construction company. She was right.

Construction law as an area of legal practice is now also an area of learned study. Forum members and many others are doing their part to bring construction law to the schools. The Forum's [Construction Law textbook](#) is selling well in a challenging economy. Talented young construction lawyers are taking flight and joining the profession every day. Let's hope their travels lead them to nest in the Forum.

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ABA Forum on Construction

Annual Meeting Apr. 14-16, 2011
Scottsdale, AZ more info...

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The 2011 Law Student Writing Competition



On the heels of a successful 2010 Law Student Writing Competition, the Forum announces that the Competition will be repeated in 2011. The Competition is open to all law students in good standing and attending an ABA accredited law school in 2011.

Students may submit articles on any topic related to construction law. The format of the articles should resemble the articles published in either of the Forum's two publications, *The Construction Lawyer* ([law journal format](#)) and *Under Construction* (newsletter format with articles of 1000-2000 words including endnotes).

Senior ABA Forum members will judge the submittals. Criteria for selection include creativity, clarity and precision of writing, strength of argument, novelty of subject, and quality of research. Watch for future announcements of the complete 2011 Competition rules and prizes.

Submissions from the Competition winner and finalists will be considered for publication in either *The Construction Lawyer* or *Under Construction*.

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