August 2007

The newsletter of the ABA Forum on the Construction Industry

UNDER CONSTRUCTION

Ten Industry Transformational Trends

By Patrick J. O'Connor
Faegre & Benson LLP

As I prepare to step down as editor and welcome my replacement, Jeff Cruz, I want to use this opportunity to explain why the next ten years will be the most exciting time to practice construction law in a generation. The next decade will bring great change to the industry we serve – significantly more transformational than the rebirth of the design/build delivery system or the rise of CPM scheduling.

Revolution Redux

The forces driving change are rooted in a growing realization that current practices fail all major stakeholders in the AEC industry. Owners pay more and wait longer than they should; contractors earn less money and bear more risk than they should; designers struggle to find rewarding work for reasonable remuneration; and the public receives projects that consume more resources than they need and become obsolete before they should.

In the last 40 years, all major U.S. industry sectors have seen productivity gains with the exception of construction. Whereas, manufacturing has become 100% more productive since the early 60s, the construction industry has actually become less productive. Something is fundamentally wrong – the industry is broken. Yet, for the first time, there is a growing consensus that this is the case. More importantly, this is occurring at a time when tools and technology are evolving that can meaningfully influence transformational change.

As lawyers, we stand in a unique position to assist out clients as they navigate through these heady waters. Now is the time for our profession to get involved – embrace change – and lead, rather than follow, the necessary transformation of this vital industry.

Over the next decade, the following ten industry developments are likely to transform our clients' businesses and quite possibly our own. I have set out related concepts in parentheses for those caring to search the internet on one or more of these topics:

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IN THIS ISSUE

2007-2008 Chair-Elect and Governing Committee Members Announced

At the Annual Meeting in Puerto Rico, the Forum elected:

Robert J. MacPherson as its Chair-Elect

L. Franklin Elmore, L. Tyrone Holt, Jennifer A. Nielsen, and Patrick J. O'Connor as new Governing Committee Members.

Announcement of 2007-2008 Division Chairs

Danny G. Shaw, Division 1; R. Harper Heckman, Division 2; Richard J. Tyler, Division 3; Kerry L. Kester, Division 4; John Clappison, Division 5; Michael A. Cable, Division 6; Terry J. Galganski, Division 7; John S. Vento, Division 8; G. Edgar (Eddie) James, Division 9; Christopher D. Montez, Division 10; Susan Fisher Stevens, Division 11; Daniel S. Brennan, Division 12.

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MESSAGE FROM THE **CHAIR** ELECT

Robbie MacPherson, Chair-Elect

Construction and Lawyers and Rock 'N' Roll

By Robert J. MacPherson
Thelen Reid Brown Raysman & Steiner LLP

On June 29th of this year Apple's iPhone went on sale. In many places people waited on line for days to be the first to get the much-hyped device. I was not one of them. It's not that I don't think it is a good product; it clearly is based on the reviews I've read. I just don't think I need an iPhone. Of course, two years ago I didn't think I had any need for a Blackberry and it was just last year I got an iPod, which now has over 3200 songs and counting.

I didn't get the iPod because I am crazy about technology. I got it because I am crazy about rock 'n' roll. I can carry my entire song library with me wherever I go and I can add new music with a mouse click. Of course, the personal downside is that it is so easy to buy new music; I am spending far more than I ever did on tunes. The communal downside is that the local record store I used to visit almost every Saturday seems like a lonely place when I do get there. But the more I use the iPod, the more I like what it does to enhance an experience that gives me such great pleasure, listening to music.

The more I take advantage of what the Forum has to offer, the more I like what that does to make me a better construction lawyer.

Technology is rapidly changing the way structures are designed and built and altering the basic legal relationships upon which the practice of construction law is based. Alliance Contracts, Collaborative Contracts, Lean Construction and BIM are terms few of us had heard, much less understood, less than three years ago. By tomorrow, they will be part of a construction lawyer's everyday experiences.

For all the good it offers, technology creates its own unique set of problems and challenges. Electronic creation and transmission of information is extremely efficient, but has only added to what was already the high cost of litigation with the advent of so-called "ediscovery" rules. Litigation, arbitration and mediation are all impacted, for better or worse, by technology. For example, it is now much easier then ever to do detailed research into the background of potential arbitrators and mediators. That can help finding the right neutral for a particular dispute, but may also provide the information used to disqualify a neutral or challenge an award because of a perceived conflict not disclosed by the neutral. Have you "Googled" yourself recently? You may be surprised by what comes up.

While it is an exciting time to be a construction lawyer, it can also be somewhat daunting. I was just getting used to 8 tracks when the shift came to cassettes. Before long all my records were replaced by CDs. Is a digital collection of songs still an "album"? Although I don't have that answer, I do know the Forum is a resource you can rely on to help you with the transition from yesterday's issue involving differing site conditions to tomorrow's involving ownership of the design generated after the engineer's BIM model is altered when the contractor adds fabrication and erection data.

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Construction and Lawyers and Rock 'N' Roll

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The Forum offers you the power of its "Programs, Publication and People" as a way to keep up with changes that seem to come with increasing speed and frequency. The Forum's Programs are unmatched when it comes to stimulating speakers presenting law review quality papers on cutting edge issues. Our program on October 25 and 26 in Newport, Rhode Island, *Another Perfect Storm,* will look at managing the risks of a construction project, from conception through project completion, and will feature topics as diverse as electronically managed construction projects and False Claims Acts. If you can't make it to Newport, consider joining us on November 8, 2007 in Atlanta, Chicago, Los Angeles, Seattle or Washington DC, when the Forum will present *Sticks and Bricks, Learn The Construction Process From The Pros*. This one day program features engineers, architects and contractors explaining how buildings get built, from foundations to roofs.

The Forum's Publications include *Under Construction*, and *The Construction Lawyer*, periodicals sent to every Forum member, and over 20 books on a wide range of topics from the basics such as *Fundamentals of Construction Law* to more focused titles like *Forms & Substance, Specialized Agreements for the Construction Project*. Future books in the works include a Construction Law Glossary, International Construction Law, False Claims Acts, a book of construction law checklists and a casebook for use in law schools.

The Programs and Publications would not be possible without the Forum's People, over 6000 dedicated construction lawyers. That is our strength and the Forum is committed to making sure each and every member has the opportunity to experience what the Forum has to offer and to participate in a way that suits their individual needs. The Forum has been working to expand those opportunities by increasing the activities of the Forum's Divisions, offering regional programs and lunchtime teleconferences on a regular basis. Recordings of the teleconferences are available on the ABA's Webstore in CD and podcast formats. (I have not purchased any podcasts yet. For now, I want to keep my material on risk allocation separate from my Allman Brothers).

The Forum website and, in particular, the Division pages offer an incredible amount of information related to the practice of construction law, all at no cost to Forum members. I invite you to visit those pages and to participate in the open Division conference calls, the idea breeding ground for future programs and publications. Information on when those calls are held and the topics can be found on the Division pages.

I'd be interested in hearing where you think the Forum should be devoting its energy. You can reach me at rmacpherson@thelen.com or 212-895-2113. Song suggestions are also always welcome. ♦

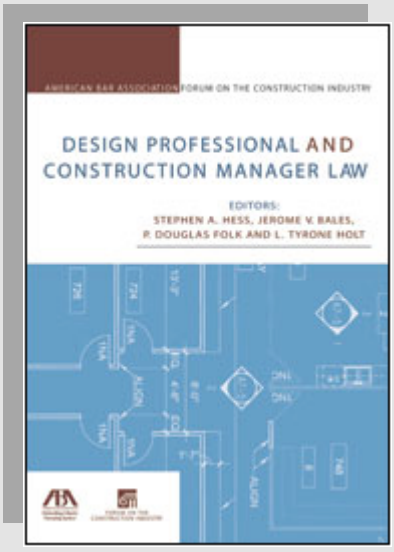
Design Professional and Construction Manager Law

Stephen A. Hess, Jerome V. Bales, P. Douglas Folk and L. Tyrone Holt, Editors

This book addresses the roles and responsibilities of design professionals and construction managers, from the contracting and pre-construction stages through litigation and dispute resolution. Focusing on both the similarities and differences between these practices, the book contains chapters and practice pointers on:

- State regulation
- Contractual responsibilities from pre-design through completion
- Tort liability
- Design-build projects
- Professional liability insurance
- Subcontractor arrangements
- Damages and remedies
- Alternative dispute resolution
- Litigation

Because intellectual property rights are unique to design professionals, a separate chapter considers their ownership and protection rights in the work product.



2007, 680 pages, 7 x 10, paper, ISBN: 978-1-59031-786-0
Regular Price: $189.95
Forum on the Construction Industry Member Price: $159.95
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Ten Industry Transformational Trends

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1. Sustainability – The A/E profession is beginning to embrace the concept that design must take into account broader interests so as to reduce global warming and conserve scarce resources (*see also,* Green Design, LEED certification).

2. Integrated Project Delivery – Design and construction is too fragmented. Delivery approaches that break down separate responsibility silos in favor of cross-disciplinary cooperation promise greater efficiency (*see also*, Integrated Practice).

3. Building Information Modeling (BIM) – This technological innovation is an enabler to greater collaboration among the design and construction disciplines. Virtually building a structure before actually building it reduces design conflicts, RFIs, and disputes (*see also*, Virtual Design and Construct, Interoperability, and Parametric Modeling).

4. Modularization – Technologies like BIM permit greater reliance on dimensioning information, which, in turn, allows for more construction to occur off-site where greater efficiencies can be achieved (*see also*, pre-fabrication).

5. Globalization – The flattening of world economics presents immense challenges for the AEC industry. The rise of China as a major global presence (and growth of Chinese construction companies) creates competitive challenges for domestic players and further burdens already constrained resources (*see also*, commodity price escalation, outsourcing, and AEC industry consolidation).

6. Work Force Constraints – The AEC industry suffers from severe labor shortages – at both the top (professional and managerial) and bottom (unskilled labor). Current immigration policy complicates an already bleak picture. Moreover, the face of the industry's workforce is changing, with foreign-born workers, many of them Hispanic, entering the industry. This places a premium on developing strategies for effective communication.

7. Organic Dispute Resolution – The AEC industry continues to be plagued by disputes and inefficient mechanisms for resolving controversy. While mediation has proven somewhat effective, it usually occurs after the parties have expended considerable resources disputing their differences. Arbitration has become more cumbersome and litigation is often worse. In general, disputes arise too often and are resolved too late. A more organic process is needed; where most disputes are resolved close in time to their origin by persons most knowledgeable about the circumstances.

8. Lean Construction Techniques – Applying proven manufacturing efficiency principles of "just-in-time" delivery and Toyota management practices to cut waste and redundancy in the construction process holds great promise for enhanced efficiencies.

9. Alliance Arrangements – While a form of integrated project delivery, the alliance contracting model is sufficiently novel to merit separate mention. By closely aligning all major project participants' interests in shared outcomes rather than individual gains, greater collaboration is achieved resulting in better project outcomes.

10. Rational Risk Allocation – The AEC industry has grappled with fashioning coherent risk allocation models. Contract forms developed by industry organizations have helped, but dislocations still exist. There is a growing awareness that risk and reward must balance. ♦

Author's Note

A few weeks after I wrote this article, the I-35W Bridge in my home town, Minneapolis, collapsed. This tragedy brings into stark relief another important point: Our aging infrastructure is under stress and in the next decade much attention must be paid to keeping our built environment functioning and safe. We, as advisors to the construction industry, have a unique opportunity to play a vital role in this important work.

Editor's Goodbye

It has been a pleasure to serve as Editor of Under Construction for the last three years. I'd like to say that it was hard work and the Newsletter couldn't have been published without my diligent efforts, but that would be a gross overstatement. In reality, I played only a limited role, and much credit must go to my Associate Editor, Morgan Holcomb. In addition, the Newsletter would not have reached your doorstep without the fine efforts of Barb Nallick (who worked with me after hours on many occasions to put the Newsletter in its final form using skills that I can only begin to comprehend). In addition, Alanna Sullivan, of the ABA staff has been instrumental in keeping me informed of all important announcements of which you, as readers, need to be aware. Of course many thanks must go to the numerous authors who committed their time and expertise to this Newsletter. Kudos to you all. I will miss you and as the song goes, "What a long, strange trip it's been" — but a delightful one nonetheless.

Conflict Between Implied Contractual Obligations And The Written Word: Is the Spearin Doctrine All That It Was Cranked Up To Be?

By Patrick A. Devine, Esq.
Schottenstein Zox & Dunn Co., LPA

The Ohio construction attorney is sitting in his office when a contractor client calls with a problem. The contractor had been awarded and commenced performance of a $20 million dollar general construction contract by a major state university for the construction of several buildings. It was a typical design-bid-build project for which the university supplied the plans and specifications that the contractor was obligated to follow. The exterior work went well enough, but when the interior work started, numerous omissions, inaccuracies and conflicts were discovered in the design documents.

The contractor explained to the attorney that it had submitted over seven hundred requests for information (RFIs) to the university's architect. There were a thousand revision drawings issued by the architect to clarify or correct defects in the original plans. According to the contractor, it became nearly impossible to overcome the frequent disruptions caused by the excessive number of errors, omissions, and conflicts in the design documents. After the contractor fell behind schedule, the owner terminated the contract for default, replaced the contractor and assessed liquidated damages. The replacement contractor completed the project six months beyond the contract completion date.

The contractor asks the attorney how it can recover its extra costs for delays attributable to the inaccurate and inadequate plans issued by the university.

To the attorney, his client's tale of woe appeared at first blush to fall within the boundaries of the well-known *Spearin* doctrine – that the owner impliedly warrants the adequacy of the plans and specifications it gives to the contractor, when the owner makes affirmative representations regarding the nature of the work. *United States v. Spearin*, 248 U.S. 132, 39 S.Ct. 59 (1918). The attorney felt confident that an Ohio court would find that, because of this implied warranty, the contractor had a right to expect complete, accurate and buildable plans. Furthermore, he believed, the contractor should be able to recover its damages resulting from the university's failure to meet its implied warranty as to the accuracy and completeness of its plans. Unfortunately for the Ohio construction attorney, *Spearin* and its Ohio progeny were not going to blaze a clear path for the contractor to recover its delay damages.

In April 2007, the Ohio Supreme Court refused to apply the *Spearin* doctrine to a contractor's claim for delay damages for the numerous omissions, inaccuracies, and conflicts in design documents for a public building construction project. *Dugan & Meyers Constr. Co., Inc. v. Ohio Dept. of Adm. Servs.* (2007), 113 Ohio St.3d 226. Was the Court's limitation of *Spearin* to soil conditions cases, making it more difficult for contractors to recover damages for deficient plans and specifications, as earth shaking as it seemed to Ohio construction lawyers?

The decision has raised anew the question of when does a claim for damages due to faulty plans and specifications come within the familiar principle of construction law succinctly stated by Justice Brandeis in *United States v. Spearin:*

> "Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered [citing cases]. Thus one, who undertakes to erect a structure upon a particular site, assumes ordinarily the risk of subsidence of the soil [citing cases]. But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications [citing cases]."

United States v. Spearin (1918), 248 U.S. 132, 39 S.Ct. 59.

The Ohio Supreme Court accepted jurisdiction of Dugan & Meyers' appeal to address the question of the parameters of the *Spearin* doctrine in Ohio, particularly in the context of written contract provisions regarding notice and no-damage-for-delay clauses. Relying on *Spearin*, Dugan & Meyers argued that a contractor could recover damages for delay or increased cost to perform resulting from the owner's breach of its implied warranty that the plans are buildable, accurate and complete. But the Ohio Supreme Court distinguished *Spearin* as a case involving the existence of a site condition that precluded completion of the project, from a case involving damages resulting from delay in a project due to design changes. The Court said that in Ohio, the *Spearin* doctrine has been applied to hold that the government impliedly warrants the accuracy of its affirmative representations regarding site conditions. The Court refused to extend *Spearin's* application from site condition cases to cases involving delay due to design changes.

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2007 BIM/VDC Use Survey Open

In last December's Newsletter we published an article on how Building Information Modeling (BIM) is changing the Industry. BIM is in its infancy. A number of Industry organizations are trying to track how BIM is being utilized and what benefits are being realized. Forum members are encouraged to send this Newsletter to their clients so they might participate in the BIM Survey.

The 2007 CURT-CIFE Building Information Modeling/Virtual Design and Construction (BIM/VDC) Use Survey is open and online at http://cife.stanford.edu/. The Construction Users Roundtable (CURT) working with the US General Services Administration (GSA) has contracted with Stanford University's Center for Integrated Facility Engineering (CIFE) to gather information documenting and supporting the business case for the implementation and use of BIM/VDC. The survey is intended for both current BIM/VDC users and those interested, but not currently using BIM/VDC. For current users the survey has 51 questions and takes approximately 15 minutes to complete. If you are not a current user the survey is shortened to 11 questions. CURT intends to provide summarized results to numerous industry organizations and publications.

The survey offers "confidentiality" as an option. However, in an effort to gain more in-depth information on successful implementation of VDC and BIM throughout our industry, interviews and site visits are being conducted with the approval of the individual, or company being asked. CIFE researchers are contacting users directly. The research team is spearheaded by the Process Transformation Committee of CURT. If you need further information regarding this initiative, please contact CURT via email at construction-users@curt.org

Conflict Between Implied Contractual Obligations And The Written Word: Is the Spearin Doctrine All That It Was Cranked Up To Be?

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In the Ohio Supreme Court's view, an express contract provision addressing a contractor's remedy for changes to the plans overrides the *Spearin* doctrine. Citing one of its earlier decisions, the Supreme Court said that the *Spearin* doctrine does not invalidate an express contractual provision: "Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered (citations omitted)."*S & M Constructors, Inc. v. Columbus* (1982), 70 Ohio St.2d 69, 75, 434 N.E.2d 1349, quoting *Spearin*, 248 U.S. at 136, 39 S.Ct. 59. In the *Dugan & Meyers* case, the contract contained procedures to be followed for project delays, and also included a no-damages-for-delay clause which limited the contractor to an extension of time as the sole remedy. The contractor waived any claim for extension of time or for mitigation of liquidated damages by its failure to request an extension of time within ten days after the occurrence of a qualifying event.

Although the Ohio legislature has since made no-damages-for-delay clauses void and unenforceable when the delay is caused by the owner, the contract clause was enforceable at the time Dugan & Meyers entered into the contract with OSU. Emphasizing the effect of contract provisions allocating responsibility among the parties, the Ohio Supreme Court said that "[i]n order to hold in favor of Dugan & Meyers, we would need, first, to find that the state had implicitly warranted that its plans were buildable, accurate, and complete, and second, to hold that the implied warranty prevails over express contractual provisions." The Court declined to do so, and thus, in essence held that a no-damages-for-delay clause trumps the *Spearin* doctrine. The Court relied on a 1942 Supreme Court of Washington decision for the proposition that the existence of multiple errors and omissions in the plans does not relieve the contractor from a no-damage-for-delay clause. The decision in the Washington case does not mention the *Spearin* case and, in fact, frames the issue somewhat differently:

> "The decisive question in this case, therefore, is whether, under a contract containing such a provision [a no-damages-for-delay clause], the contractor should nevertheless be permitted to maintain an action against the owner for breach of contract, upon a showing that the work was retarded and rendered more difficult and expensive because of failure on the part of the supervising architect to make necessary corrections in the plans and specifications in a timely manner."

Ericksen v. Edmonds School Dist. No. 15, Snohomish Cty. (1942), 13 Wash.2d 398, 125 P.2d 275, 278.

The Ohio Supreme Court in *Dugan & Meyers* concluded that the enforceable no-damages-for-delay clause made irrelevant the cause of the delay, i.e., excessive errors, omissions and conflicts in the plans and specifications. According to the Court, the record evidence failed to show that the plans were unbuildable or otherwise inadequate to accomplish the purpose of the contract. The court noted that even if the plans needed more changes, the contract's provisions for changing the plans had to be followed.

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Conflict Between Implied Contractual Obligations And The Written Word: Is the Spearin Doctrine All That It Was Cranked Up To Be?

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After the *Dugan & Meyers* decision, Ohio construction attorneys perhaps must now treat as a defensive weapon, as opposed as an offensive weapon, the rule in *Spearin* that if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. In other words, after giving the owner notice of the defective plans, the contractor may have no choice but to attempt to build according to the defective plans. See *Dravo Corp. v. Municipality of Metropolitan Seattle*, 79 Wash.2d 214, 221, 484 P.2d 399 (1971) (the *Spearin* doctrine is "a defensive weapon, not a weapon of offense").

Although the Ohio Supreme Court's treatment of the *Spearin* doctrine may change what some Ohio construction lawyers have thought the *Spearin* doctrine meant, in many states, *Spearin's* application is most common when the public authority has issued plans and specifications with inaccurate or misleading information regarding site conditions, or where the public authority withholds critical information. See *Jasper Construction, Inc. v. Foothill Junior College Dist*, 153 Cal. Rpt. 767, 91 Cal. App.3d 5 (Ct. App. 1979) (recovery cannot be maintained for incomplete or defective plans unless the defect consists of intentional concealment or positive assertions or misrepresentations of material facts which prove to be false). These courts' emphasis upon the government's representation of a material fact which is false is in accord with the principle of contract law expressed in *Spearin.* Even Justice Brandeis appeared to have limited somewhat his view in *Spearin* when he wrote, five years after *Spearin*, "the contractor cannot be relieved from an obligation deliberately assumed" in the absence of a "finding of mutual mistake, or of fraud, misrepresentation, or concealment on the part of the government…" *Robinson v. U.S.*, 261 U.S. 486, 490, 43 S.Ct. 420 (1923). ♦

Don't Miss Two Exciting Opportunities to Learn About the 2007 AIA Documents!

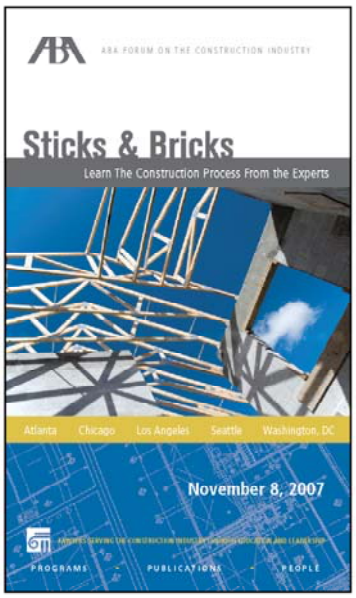
The first program will be held on January 31, 2008 at the Sheraton New York Hotel in New York, NY.

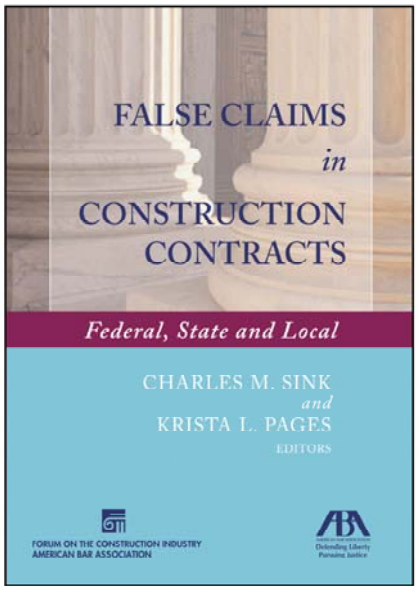
A repeat performance will be held on February 7, 2008 at the Westin Riverwalk Hotel in San Antonio, TX. Please mark your calendars!

Sticks & Bricks

Regional Program

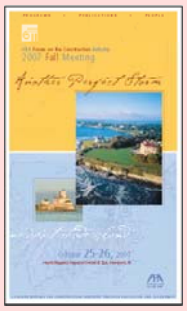
November 8, 2007





New Publication!

Join Us in Newport, Rhode Island For Our 2007 Fall Meeting!



WHEN: October 25-26, 2007

WHERE: Hyatt Regency Newport Hotel & Spa
One Goat Island
Newport, Rhode Island 02840
For hotel reservations, call the Hyatt at (401) 851-1234
Or The Hotel Viking at (800) 556-7126 or the Newport Marriott at (800) 228-9290

TITLE: Another Perfect Storm

TELL ME MORE: At our 2007 Fall Meeting, we set sail in beautiful Rhode Island and navigate the stormy waters encountered in managing the risks of a construction project. Some of the topics covered by the presentations include the electronically managed project (electronic design tools and workrooms, dedicated project websites, and building information modeling); managing the risk and liability for construction administration by design professionals and agency construction managers; the practical use and implications of incentive and disincentive clauses during construction; the cumulative effects of requests for information, change order requests and change directives; claims brought under the civil and criminal False Claims Acts; the disruptive effect of contract defaults during construction; the surety's role in completing a troubled project; and ethical considerations in multi-jurisdictional international practice.

We look forward to seeing you in Newport. For more information, the conference brochure is available at

www.abanet.org/forums/construction/featured_program/home.html.

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August 2007

Lawyers Serving
The Construction Industry
Through Education and Leadership

American Bar Association
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