

CONCEPT TO COMPLETION

A Practical Guide to a Claim Free Practice
In Design and Construction
Presented By

THE CONSTRUCTION LAW GROUP at Lee & Associates, LLC,
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Each year about this time, (and throughout the year as the spirit moves us) The Construction Law Group at Lee & Associates, LLC attempts to bring you up to date on recent developments within the firm as well as within areas of the law that may have an impact on your practice. In the past this annual update has been well received and has sparked occasional lively discussion regarding some of the topics. Again this year, as in the past, we welcome your feedback. We have expanded our distribution list this year so if this is your first year to receive our annual practice guide (or one of the irregular updates) --- Welcome.



About the Firm For many years (more than we care to count), most of you knew us only by the name of Lee & Associates. In recognition of our specific focus on the representation of the design and construction communities and our strategic alliance with The Construction Law Group in Vancouver, British Columbia, the firm has changed its name to "The Construction Law Group at Lee & Associates, LLC". We look forward to continuing our decades of service to architects, engineers, contractors and project owners involved in design and construction. We welcome the opportunity to share our experience and vision with you. Our firm members have not only significant experience in the law but are also experienced in design and construction with practical hands on experience in construction, training in architecture, licenses to practice engineering, and masters level degrees in business administration and environmental science.

CONSTRUCTION LAW GROUP MOVES TO NEW OFFICES AT 1444 BLAKE STREET



Our residence in what is now known as "LODO" (which was then a neighborhood "in transition" known only as lower downtown Denver) commenced in 1976 when we joined Bill Muchow, Dayl Larsen and George Haller in a newly renovated building at 1725 Blake Street. Those of you who recall lower downtown Denver in those days, remember what it was like. We are proud to continue our residence in lower downtown Denver (n/k/a "LODO") having recently joined friends and fellow attorneys in a new building constructed by Spectrum General Contractors at 1444 Blake. Stop in and see us. The coffee is always on.



Recent News and Events Occasionally, inquiries are made regarding our experience in environmental law. We are pleased to have on board Gary Kuhn. Gary received his BS in environmental science followed by his Master of Studies in Environmental Law from the University of Vermont. We're not certain of this but Gary leads us to believe that Vermont is the leading environmental studies school in the country.

Brian Samuels has followed his book on construction law published a few years ago by McGraw Hill with a new publication co-authored with Doug Sanders entitled "Practical Construction Law". Doug, Brian and Byrum are already hard at work on a soon to be published second edition.

Once again this year, Byrum Lee was honored to be named one of the top construction lawyers in the United States. The prestige of this honor is aptly illustrated by the fact that Byrum was one of only three lawyers in Colorado to be selected for this honor.

In addition to his continuing presentation of local continuing education seminars on construction law topics, Byrum was honored in December of 2006 to be included on the faculty for the prestigious Construction SuperConference in San Francisco, California. His topic: "Much Ado About Daubert." You can read a brief summary of the United States Supreme Court case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993) in one of the following sections. For those of you who do any expert witness work, this case is a must read.

Also in December, 2006, the Real Estate Law Section of the Colorado Bar Association invited Byrum to address its monthly meeting on the subject of the Colorado Construction Action Defect Reform Act. Byrum chose to title his presentation "CADRA -- Panacea or Pain". If you would like a copy of the seminar handout that covers the history and application of this important legislation, let us know.

Starting with its first edition several years ago, Byrum was the editor and author in chief of a chapter entitled *Liability of Architects and Engineers* published in the *Colorado Practitioners Guide to Colorado Construction Law*. Starting with the 2005 edition he was honored to author a new introductory Chapter addressing the *Methods of Project Delivery*. Let us know if you would like more information on his coverage of these important topics. The 2007 updates will be released within the next few months. In addition to supplements for the two chapters Byrum has authored in prior years, he has been requested to prepare a "Glossary of Construction and Construction Litigation Terminology" for the 2007 edition. If you would like copies of these important Chapters please forward a request to bcl@lee-law.com.



HARD HAT CASE NOTES

Interesting Cases Handled During 2006 This year presented a wealth of interesting cases with novel issues. Although we strive to protect our client's confidentiality, at your request we will be pleased to provide you with greater detail on the facts and law controlling these cases and their importance. Our effort herein is simply to alert you to some of the decisions or trends as they appear from our practice over the past year or so.

[Assignment of Design Responsibility to the Contractor](#) In a case The Construction Law Group tried to a jury, the plaintiff had experienced movement of its commercial building due to excavation of an adjoining property for construction on that lot. The design engineer included on the plans a note stating that shoring of the excavation and protection of adjoining property was the contractor's responsibility. The plaintiff alleged that it was below the standard of care for a licensed professional engineer (or architect) to assign design responsibility to any party other than another licensed architect or engineer. The plaintiff presented a compelling case that went to the jury. However, the jury found that the statute of limitations had acted to bar the case and thus never reached the question as to whether it was below the standard of care to assign shoring and excavation responsibility to the contractor without also requiring a PE's seal.

[Practice Tip](#) It is probably just a matter of time before a case that is presented on this theory succeeds. Where the responsibility for design is within an area that requires that it be accomplished by a licensed design professional, the assignment of that responsibility should specifically require that the design be accomplished by a licensed design professional.

[Conversion of Termination for Cause](#) A very dissatisfied project owner recently requested The Construction Law Group to assist in re-writing its standard construction contracts. After construction of a recent project faltered then stalled, the owner acting on the advise of its design team terminated the contractor for cause. It was later determined that the termination was not proper. Owner contracts prepared by the Construction Law Group include a provision specifying that if a termination for cause is found to be improper, it is automatically converted to a termination for convenience. The inclusion of such a provision avoids the harsh result presented to us by this unhappy owner.

[Practice Tip:](#) Every termination clause should be carefully reviewed to determine if it should include a clause providing that if a termination for cause is found to be invalid it will be converted to a termination for convenience.

[Arbitration of Design and Construction Claims](#) During 2006, CLG was presented with three separate cases in which a project architect was subjected to a demand for arbitration pursuant to the Arbitration Provision of the AIA B 141 Owner Architect Agreement. In each case either the sole allegations or the vast majority of the allegations related almost entirely to claimed errors or omissions of the architect's engineering consultants. The standard AIA arbitration provision prevents any other entity from being joined as a party to the arbitration. As a result, all issues cannot be resolved in a single proceeding presenting the specter of multiple proceedings in different forums with potentially inconsistent results.

[Practice Tip:](#) Where standard form AIA contracts are used, consider revising the standard clauses in the Owner Architect Agreement, the Architect Consultant Agreement and the construction contracts to allow joinder of all parties required for complete adjudication of all issues. Since all of the AIA contracts include non-joinder clauses, if the desired effect is to be realized all of the contracts by and between all of the project participants must be revised in the same manner. In a subsequent section of this Practice Guide, comments on modifying the standard form AIA contracts address this same issue.

[Entran II Opt-Out Verdict](#) The Construction Law Group recently represented a family who had defective Goodyear Entran II radiant heat hose in their home. Due to the substantial size of the home and the correspondingly large cost of remediation, the owner, on the advice of the Construction Law Group, decided to opt out of the Goodyear Entran II class action settlement. After a trial to a jury, judgment has now been entered in excess of \$1,300,000.00 with an additional \$297,000 awarded for the costs associated with preparing and presenting the case. To the best of our knowledge, this is the largest single-family opt-out Entran II judgment entered to date. We would like to give special acknowledgment to our experts, without whom we would not have achieved this result: Dr. John Moali of Exponent in Palo Alto, California, Dr. Channing Robertson of Stanford University, Stanford California, William Kimball, P.E., now retired from McFall, Konkell & Kimball, n/k/a MKK Consulting Engineers, and Robert Pratt of Demand Construction Services in Centennial, Colorado. Great job guys and thanks.

[Architectural Copyright](#) As many of you are aware, the CLG has been heavily involved in representing a few select clients in the Las Vegas area over the last 5 or 6 years. In a case arising out of a residential subdivision in Las Vegas, *LGS Architects, Inc. v. Concordia Homes of Nevada*, United States Court of Appeals for the Ninth Circuit, No 04-16677 (9th Cir. 2006), the Court ruled that the owner had exceeded the scope of its license to use copyrighted architectural plans. The Court issued a preliminary injunction prohibiting the owner's continued illegal use. The opinion contains an instructive summary of copyright law as applied to design instruments. The license agreement under consideration was based on the language of the AIA B 151 Standard Form of Agreement Between Owner and Architect for Housing Services.

[Practice Tip:](#) The CLG does not recommend the use of AIA standard form agreements and contracts without careful adaptation to each project and the needs of the parties. However, this case demonstrates one of the values in using standard form language; specifically, the predictability that arises out of case precedent interpreting the AIA provisions. The Ownership and Use of the Architect's "Instruments of Professional Service" is an area that frequently requires modification in the standard form Owner Architect Agreement. These changes should be made cautiously to avoid the loss of valuable rights for the designer while continuing to insure appropriate usage rights for the owner.

RECENT DEVELOPMENTS AND TRENDS



Employment of Illegal Aliens The construction industry in Colorado and elsewhere has seen recent increases in enforcement of federal law prohibiting the employment of illegal alien workers. The Immigration Reform and Control Act of 1986 (IRCA) requires that employers hire only individuals who may legally work in the United States. This includes United States citizens and nationals as well as citizens of other nations that are in the United States legally. Employers who violate the IRCA may be subject to civil and criminal penalties.

According to Executive Order 12989, contractors who violate immigration laws by employing illegal aliens are barred from federal contracts. The Order specifically prohibits federal contracting agencies from contracting with employers who are not in compliance with the Immigration and Nationality Act. It was the Order's finding that contractors who employ illegal aliens have a less stable and dependable workforce. Violation is cause for a contractor's debarment for one year with successive one-year debarments for continued violation.

Effective January 1, 2007 a Colorado law requiring employers to "affirm" the legal status of their employees became effective. As of this writing, the means and methods of making this affirmation remain shrouded in obscurity.

Arbitration The first version of AIA documents that lawyers at CLG recall working with were the 1976 editions. Since at least that time, the AIA contract documents have required arbitration under the American Arbitration Association ("AAA") rules. The AIA in a marked departure from tradition in its recent design-build contract documents now allows the parties to the contract greater flexibility in determining the appropriate forum for dispute resolution by simply checking a box indicating whether they wish to select litigation or arbitration.

We understand that the AIA Documents Committee may also be considering a revision that would allow appeals of arbitration awards in excess of \$500,000.00.

CLG has seen several attempted modifications of the AIA arbitration provision. Some good. Some not so good. Many architects and engineers upon the advice of their insurance representatives began modifying the AIA arbitration clause as printed in the B 141 by simply changing a portion of the clause so that instead of reading that all disputes "shall" be decided by arbitration, the clause provided that disputes "may" be decided by arbitration. CLG believes this change to be ineffective and ambiguous and recommends that the practice be discontinued in favor of a more specific revision.

Another commonly encountered change gives one party (obviously, usually the party that has written the contract) the exclusive option of selecting whether a matter will be submitted to arbitration or litigated. CLG believes that such clauses are unenforceable and does not recommend them.

Daubert The year 2006 saw an increased interest in so-called *Daubert* hearings and the increased application of *Daubert* challenges to expert testimony in construction cases. The case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993) established the authority to challenge an expert's scientific methodology and bases for opinion in science-

based and product liability cases. Until recently, we had seen very limited application in the construction practice arena.

Several years after *Daubert*, the Supreme Court decided the case of *Kumho Tire Co., Ltd. v. Carmichael*, 526 US 137 (1999) and in so doing expanded the gatekeeper role of the trial court in allowing or rejecting expert testimony. It is now well established that it is the responsibility of the court to fulfill its role as "gatekeeper" in order to prevent "junk science" from being presented to the jury or serving as the basis for a decision in any case.

A "*Daubert*" challenge to an expert's report and opinions is intended to test the admissibility of the expert's report which must meet the following criteria.

1. The expert's methodology has been tested.
2. The methodology has been subjected to publication and peer review.
3. There is a known or potential rate of error, and
4. There is a general acceptance of the methodology in the legal community.

As *Daubert* challenges increase, we should see a reduction in the use of unqualified, unprofessional experts who lack a true scientific and professional basis for their opinions. At the same time, the need to insure that every expert report is capable of surviving a *Daubert* type challenge demands increasing vigilance from legal counsel and client representatives.

Preservation Of Evidence Once a notice of claim is received by a design or construction firm (or any other entity), that party has a legal obligation to preserve all project records. Once a claim is actually filed, all non-privileged files must be made available for production to any party involved in the litigation.

Remember also--each copy of a document that has hand written notations, marginalia or other individual markings or entries (even highlighting) is considered a separate original document and must be preserved for production just as if it were a discrete, new document.

The American Bar Association's Civil Discovery Standards provides:

10. The Preservation of Documents. When a lawyer who has been retained to handle a matter learns that litigation is probable or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents and of the possible consequences of failing to do so.

This duty to preserve evidence arises **automatically** and **immediately** upon learning of a claim or the potential for a claim even if no formal claim or lawsuit has yet been filed. The obligation to preserve documents is triggered by the mere notice of a claim.

Courts appear increasingly willing to impose sanctions on a party for "spoliation of evidence" as the result of lost or misplaced documents. Where they can establish that the documents "disappeared" after there was notice of a claim, or even a reasonable suspicion that a claim was likely, the sanctions can be severe up to and including issue preclusion.

In the event you suspect a claim may be brewing, begin the process of document preservation and contact legal counsel.

Electronic Files And Electronic Discovery A party's duty to preserve potentially relevant documents, described in ABA Standard 10, applies not only to paper files but also to information contained or stored in any electronic medium or format, including a computer word-processing document, storage medium, spreadsheet, database and electronic mail.

Evidence that is stored electronically is often destroyed in the normal course of business as a result of routine document destruction practices or through automatic computer processes. This may include the periodic deletion of e-mails, recycling of back-up tapes and the overwriting of residual data. Courts have shown little reluctance to find bad faith and impose sanctions where evidence is destroyed after notice of a claim even where the destruction was the result of a mere failure to interrupt and countermand usual and customary document retention or destruction policies, including automatic computer deletion or dumping.

Changes to the Federal Rules of Civil Procedure When the Federal Rules of Civil Procedure change, changes to the Colorado State Court Rules are never far behind. The Rules of Procedure in the Colorado Court system, as well as the courts of most other states, closely track the Federal Rules on most topics. While the Colorado Rules have not yet changed to follow the lead of the Federal Courts with respect to electronic discovery, we can expect such in the near future. Effective December 2006, the Federal Rules of Civil Procedure now incorporate new, dramatic and sweeping rules pertaining to electronic discovery. For your own protection assume that every key stroke made on the keyboard of every employee's computer will be subject to discovery even if the entry has been "deleted", "overwritten" or otherwise revised or modified. CLG recently prepared a request, which the court granted, ordering the sheriff to seize the hard drives of every computer within the offices of a recalcitrant party which was resisting electronic discovery. Electronic discovery is here and it is at times burdensome. However, the penalties of ignoring it far outweigh the burdens of complying.

EFIS Litigation Continues Most are by now familiar with the wave of lawsuits relating to synthetic stucco, which is widely known as EIFS (Exterior Insulation Finishing System). By some estimates as much as one half of all new residential construction over the past 5 years has incorporated EIFS. Fortunately, with a climate that is not conducive to condensation and moisture retention, Colorado has been spared the brunt of this damage and the ensuing litigation which has generally included the builder, the designer and the EIFS manufacturer. One of the latest trends in EFIS litigation appears to be the potential liability of real estate agents for selling homes that were built using EIFS without disclosing the risks known to be inherent in EIFS systems. These cases allege that the sellers' agent knew or should have known about the existence of EIFS, and that the agent failed to disclose its alleged defects to the buyers.

Insurance Changes in the availability of insurance for both the design and construction community continue with little of promise of improvement. Premiums continue to rise and incidence of denials of coverage and cancellations following the presentation of a claim also remain on the rise, particularly for construction contractors.

Once considered a viable option on many projects, the availability of project specific insurance has retrenched to the point that it has virtually disappeared. The former DPIC (now XL), which was once the undisputed leader in the area of architect's and engineer's project specific insurance has ceased writing project policies entirely.

According to the 2006 ACEC Professional Liability Insurance Survey, the St. Paul Travelers has now achieved a #3 position in market share and has received the highest satisfaction ranking (95%) for its pre-claim and claim handling services in its architect and engineer insurance errors and omissions program. In addition to the other outstanding carriers for which the Construction Law Group continues to provide defense representation, CLG is proud to continue its relationship with the Travelers Professional Liability Insurance Program. Congratulations to our

long-time friends who have assembled this outstanding team at Travelers including William Demmon, Laura Guagliardo, John Droutsas and David Rusnock.

[In Closing](#)

It is not an every day occurrence for matters involving design and construction to reach the United States Supreme Court. However, if the case of *Phyllis J. Outlaw v. Airtech Air Conditioning and Heating and GDS Associates*, United State Court of Appeals for the District of Columbia, No 04-7059 (decided June 24, 2005) is any indication, architects, engineers and construction professionals may have an ally on the land's highest court in the form of Chief Justice John Roberts. While sitting on the D.C. Circuit, now Chief Justice Roberts wrote an opinion affirming a summary judgment that had dismissed claims by an owner alleging defects in her HVAC system. The basis of the ruling was the owner's failure to establish the necessary causal connection between her numerous complaints regarding the performance of the HVAC and any defects in the plans. The opinion has some choice language, certain now to be used more widely given Judge Roberts' position as Chief Justice. If you would like a copy of this interesting and we hope prophetic opinion, please let us know.

[Privacy Policy](#)

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