



**John C. Livengood**

## The New AACEI Recommended Practice for Forensic Schedule Analysis (Part 1 of 2)

By John C. Livengood

In July 2007, the Association for the Advancement of Cost Engineering International (AACEI) published the first American effort at a “how-to” manual on Forensic Schedule Analysis, the Recommended Practice for Forensic Schedule Analysis (RP/FSA). The RP/FSA document is the result of four years of intense collaborative activity involving dozens of experts and lawyers in the field.

Forensic Schedule Delay Analysis is a separate but related discipline to typical schedule analysis. Typically, large construction projects and most major programs of all types use prospective (forward-

looking) scheduling to plan the work. In the case of major construction projects, this can result in Critical Path Method (CPM) schedules that have tens of thousands of activities, all with separate and independent durations and logical relations to other activities. Prospective schedule analysis has proven so effective in assisting the administration of construction projects that schedule expertise was also applied to retrospective analysis of planned and actual events on a construction project. This retrospective analysis is used to assist managers, and ultimately litigators, in identifying delays, causes of delays, responsibility for delays,

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## Emails, E-Discovery, E-Gads! The Landscape Has Changed

By Sarah Michaels Montgomery



**Sarah Michaels Montgomery**

The article “Electronic Discovery in Construction Litigation,” published in July 1998, leads with the line “Although the Federal Rules of Civil Procedure have contemplated discovery of electronic data since 1970, many lawyers are only now awakening to the benefits and risks of such discovery in litigation.”<sup>1</sup> Ten years later, the statement remains largely true except for the fact that the Federal Rules of Civil Procedure now require parties to engage in discussions regarding electronic discovery (e-discovery), treating electronically stored information (ESI) as evidence that must be preserved and produced

in civil litigation. This article briefly addresses the technical revolution occurring in the construction industry and how, in light of that revolution, e-discovery will increasingly become a part of construction litigation.

### The Construction Industry Is Going Digital

Construction projects generate a plethora of documents including architectural drawings, bids, schedules, to change orders, to purchase orders, to field

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Message from the Cochairs



Charlotte Wiessner



Patrick J. Greene

We present the current issue of Construct! at the end of an extremely active year for the committee and at the beginning of an exciting year ahead. Indeed it comes at the end of four years of growth and excellence presided over by our longtime cochair, Jim Landgraf, who moves on to become cochair of the Distance CLE committee of the Section of Litigation.

At the Section Annual Conference in Washington, D.C., (April 17-19) the committee participated with the Real Estate Committee in the presentation of a timely program concerning the meltdown of the mortgage and real estate markets and its effect on construction contractors.

presence of public-private partnerships.

At the Forum on the Construction Industry's Annual Meeting (April 24-26) in La Quinta, CA, the committee presented the program "Utilizing and Responding to TROs and Other Litigation 'Fast-Track' Processes" and a substantive breakfast program on experts and e-discovery.

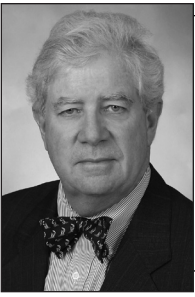
And at the ABA Annual Meeting in New York City (August 7-12), we presented a substantive breakfast on the use of graphics evidence in the trial of complex construction cases, with a Civilian Board of Contracts appeals judge and chief litigation counsel for the U.S. General Services Administration as panel members.

In addition to the programs, we published four editions of Construct! We are currently soliciting proposals for the theme of the winter edition. If any of you have theme or article ideas, please contact David Kurtz at dkurtz@bakerdonelson.com.

Looking ahead to the future, we have agreed to cosponsor the Forum on the Construction Industry's annual winter meeting beginning in Bonita Falls, FL, on January 15-16, 2009. This program was previously cosponsored by TIPS and has been extremely successful for the Forum, drawing about 600 attendees. The two-day program is entitled "Critical Insurance and Litigation Insight: Coverages, Disputes,

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The Spring 2008 issue of this newsletter mistakenly identified one of the authors, Edward B. Gentilcore, as a partner at Meyer Unkovic and Scott. He is in fact a partner at Duane Morris LLP. We apologize for the error.



# Bonanza for Bond Claimants? Surety Industry Seeks to Stem the A312 Bleeding

By Daniel E. Toomey

**Daniel E. Toomey**

Last year, the American Institute of Architects (AIA)

issued its latest iteration of its construction forms. In addition, the Association of General Contractors (AGC) issued a competitive set of documents known as the Consensus Documents.

However, recent recommended revisions to the AIA's A312 Payment Bond may be flying under the radar as a result of a spate of decisions jeopardizing long-held assumptions regarding a surety's rights and duties under this widely used form. In addition, a Florida decision affecting sureties' rights under the A312 Performance Bond may recommend changes to that form as well.

Unchanged for 24 years, the A312 has been under siege for the last 5 years, during which courts in a number of jurisdictions have forfeited the surety's rights to defend against payment bond claims for failure to comply with the bond form's time requirements, and deleted a surety's right to receive notice of an intent to default a subcontractor. With some irony, they did so by harmonizing language from the subcontract's default termination clause with the notice provision of the A312 Performance Bond.

As a result, the surety industry has been forced to recommend important changes in language of the payment bond form while not, as yet, seeking changes in the performance bond language. And in the meantime, there are extraordinary opportunities and dangers for owners, contractors, subcontractors, sureties, claims representatives, indemnitors, and the attorneys who represent them. On May 27, 2008, the AIA and surety organizations announced recommended changes to the A312 Payment Bond to neutralize the effect of the recent decisions.

But because this case law is relatively recent, sureties may be slow to react to the recommended changes, and there are many unchanged existing A312 payment and performance bonds out there. For a finite period of time, construction and surety attorneys need to examine the language of their bond forms for the opportunities and potential dangers presented.

## Recommended Changes to the A312 Payment Bond

The AIA and the surety industry representatives said on May 27, 2008, that these recommended changes were an "interim response to surety concerns that the Payment Bond has been incorrectly interpreted in the courts," promising to work with "organizations representing owners, contractors, subcontractors, and other potential bond claimants to review fully and overhaul as necessary both A312-1984 Performance Bond and Payment Bond and A310-1970 Bid Bond." Suzanne Harness, AIA managing director and Contracts Documents' counsel, noted, "[i]t was important to us to address the sureties' concerns as promptly as possible, but not to substantially revise the bond without the input of owners and claimants."

This news release contained a document entitled "Amendment dated May 21, 2008, to A312-1984 Payment Bond." The problem was, as the text accompanying the amendment put it:

Recent state and federal court decisions have . . . held that sureties that do not send an answer to the [Payment Bond] claimant within 45 days have waived the right to subsequently dispute claims. As a result, several national surety companies have refused to issue payment bonds without significant modifications

to the language of A312-1984. Those modifications are not consistent nationwide and may alter the rights and obligations of the claimant and surety.

The amendment was described merely as a "stopgap measure," to meet "immediate surety concerns" to be followed by a more "comprehensive revision." In addition to lengthening the surety response time from 45 to 60 days, the recommended changes suggest adding a new Section 6.3, as follows:

§ 6.3 The Surety's failure to discharge its obligations under this Section 6 shall not be deemed to constitute a waiver of defenses the Surety or Contractor may have or acquire as to a claim. However, if the Surety fails to discharge its obligations under this Section 6, the Surety shall indemnify the Claimant for the reasonable attorney's fees the Claimant incurs to recover any sums found to be due and owing to the Claimant.

The AIA refused, however, to adopt the industry's additional request to require claimants to furnish written support for the claim, leaving the existing requirement that they merely provide a statement of the claim "with substantial accuracy." Moreover, these revisions do not affect the A312 Performance Bond language, but the AIA and the surety industry clearly intend "to review fully and overhaul as necessary both A312 Performance and Payment Bond and A310-1970 Bid Bond," as stated in the news release.

Interestingly, the surety industry has had more success with The Engineers Joint Contract Documents

Committee (EJCDC) by simply deleting the 45-day response requirement from their almost identical form.

How did these changes come about, and what are the opportunities and corresponding dangers available to both payment bond claimants and obligees under the unchanged A312?

### Florida Cases Create a Precedent and Follow the Recent Trend

Two recent Florida cases (one federal and one state) handed significant victories to a performance bond obligee and a payment bond claimant, casting in doubt long-accepted A312 bond rights and defenses.

#### *Court rules that subcontract language trumps bond language*

In *Dooley and Mack Constructors, Inc. v. Developers Surety and Indemnity Company and Buildtec Construction Group, Inc.*,<sup>1</sup> the Third District Court of Appeal held that despite the language of the A312, the performance bond obligee, Dooley and Mack Constructors, Inc. (D&M), had no obligation to notify the surety of its intent to default terminate its bonded subcontractor and could complete the work of the defaulted subcontractor, recovering the extra costs of the work under the bond.

The appellate court reversed the trial court's ruling that D&M's failure to notify the surety—as per the A312 Performance Bond—rendered the surety's obligation under the bond “null and void.” Instead, the court determined that certain language in D&M's subcontract was “incorporated” into the bond, and that it therefore trumped the notice requirement.

The court read the subcontract language and the language of the bond together as affording the contractor “the option, but not the obligation, to notify the Subcontractor and the surety of its intent to default terminate,” or simply “to declare the Subcontract breached and take charge of and complete the Performance of the work.” If D&M chose the latter option, it could complete the work itself *without* jeopardizing its right to recover under the bond.

Moreover, D&M's choice of this option subjected the “surety, and any bond,” to “all losses, damages, and expenses, including attorney fees and costs incurred in the prosecution or defense of any action, suit, or arbitration incurred by or resulting to the Contractor on the above account.” The court of appeals held that the subcontract and the bond had to be read together to create this “option.” In doing so, the appellate court

## A window of opportunity exists for obligees to write clauses into their contracts and subcontracts similar to that of *Dooley and Mack*.

directed the trial court to enter a summary judgment for D&M on liability with the amount of damages the only thing left to be determined.

Thus, by merely adding language materially similar to that contained in the D&M subcontract, the notice requirement of the A312 can be avoided and the surety can be vulnerable to the extra amount needed to complete, subject to the surety's defenses of failure to mitigate or unreasonableness of completion costs.

The *Dooley and Mack* decision was not without its critics, and the extent to which other courts will follow it is unknown. One panelist dissented,

accusing the majority of “seizing upon an obscure provision of the subcontract, not signed by the surety, to afford Dooley and Mack a remedy not contemplated either in the default provision or in the bond” and converting the “bond into an insurance policy.” The dissenter argued that the subcontract language did not “supplant the notice provisions or any other provision of the Performance Bond.”

The surety has filed a petition for certiorari with the Florida Supreme Court, which has not acted as of the writing of this article. If the writ is denied, or other courts follow the *Dooley and Mack* case, the surety industry may feel the need to request the AIA for changes to the A312 Performance Bond form too. In the meantime, a window of opportunity exists for obligees to write clauses into their contracts and subcontracts similar to the D&M subcontract.

#### *District court enforces notice of claim requirement*

The Florida Federal District Court is the most recent court to require sureties to comply literally with the A312 Payment Bond requirement to conduct and conclude investigations of payment bond claims in 45 days.<sup>2</sup> That court granted a payment bond claimant summary judgment on a more than \$700,000 claim because of the surety's failure to meet the 45-day deadline, holding that this failure constituted a waiver of substantive defenses.

J.C. Gibson Plastering Co. (Sub) was a subcontractor to XL Specialty Insurance Company's (Surety) principal, Auchter Company (Prime), on a housing project. Sub claimed that Prime had failed to make its Final Payment and on February 9, 2007, sent written notice to Prime and Surety, and per the A312's Paragraph 4.1 merely stated its claim with “substantial accuracy.” Three days later, Sub sent Surety a detailed letter describing its claim and its legal basis therefore.

A312 Paragraph 6.1 requires a surety to send an answer to the claimant “within 45 days after receipt of the claim”; state the undisputed

amounts; provide the basis for challenging any amount; and, under Paragraph 6.2, pay or arrange for payment of any undisputed amounts.

Less than two weeks later, but still within the 45-day period, Surety wrote Sub requesting copies of all of the cost records supporting its claims and advising that it had copied Prime to determine its position. On March 20, Sub sent receipts that Surety received the following day, still within the 45-day period.

On April 3, seven days after the 45-day period had expired, Sub wrote Surety claiming a breach by Surety to respond within 45 days of receipt of Sub's claim; it filed suit the next day. Surety immediately wrote Sub contending that the 45-day period did not begin to run until it had received the cost records on March 21; Surety wrote again on April 5 stating that there was a "legitimate dispute" regarding Sub's claims that Surety did not have to resolve and that the Sub needed to deal with the Prime directly. Surety also timely answered Sub's lawsuit and counterclaimed on the issue of its obligations under the bond.

The court granted Sub summary judgment, finding no material issues in dispute and resolving two issues in Sub's favor: that Surety had materially breached Paragraph 6 of the Payment Bond by failing to comply with the 45-day response requirement; and this breach *precluded* Surety from contesting Sub's claim. The court also determined that the notice of claim was sufficient as a matter of law if it stated the amount of the claim with "substantial accuracy," and was sent to the surety and the owner. In reaching this conclusion, the *Gibson* court relied heavily upon the recent case of *National Union Fire Insurance Co. v. Bramble*.<sup>3</sup> The *Bramble* court had based its reasoning on three factors: The surety had a greater obligation under A312 Paragraph 6 to state the basis for disputing any portion of the claim, the failure to enforce this requirement would render the paragraph "nugatory," and its purpose was so that claimants did not have to "absorb their risk of nonpayment over a protracted period."

Notably, the *Gibson* court determined that surety contracts were analogous to insurance contracts requiring that they be strictly construed against a surety and in favor of the claimant, and rejected as immaterial the argument that without a proof of loss, the Surety did not have sufficient information to verify the claim. It also refused to consider a March 30 letter from Prime's counsel sent to Sub disputing the claim be-

## If the Florida Supreme Court refuses to address *Dooley and Mack*, the surety industry will likely look to revise the Performance Bond language.

cause it was not from Surety and did not state the amounts in dispute. Additionally, the court rejected Surety's contention of "no harm, no foul," declaring that delay was sufficient harm.

Finally, *Gibson* also rejected the holding of an unpublished Massachusetts opinion, *Methuen Construction Co. v. Austin Co.*,<sup>4</sup> that the surety's failure to comply with 45-day obliga-

tion did not constitute a waiver of its defenses or an acknowledgment of the claim. The *Methuen* court stated:

This court declines to follow *Bramble* for two reasons. First, the court in *Bramble* addressed the relevant language of the bond agreement "according to the rule applicable to insurance contracts" *Bramble*, 879 A.2d at 108. In Massachusetts, however, it is clear that surety bonds are not insurance.

Second, given the nature of large construction projects, it is logical to treat [the surety's] January 15, 2004, letter requesting an Affidavit of Claim as an indication that [the surety] had not accepted and was disputing *Methuen's* claim. . . . Further, if the surety paid the claim without fully investigating, it would be liable to its principal.

Finally, this is not a case where the surety completely ignored the subcontractor's Notice of Claim. (Slip op. 3-4.)

In distinguishing *Methuen*, the *Gibson* court relied on yet another decision by the U.S. District Court that had rejected the *Methuen* rationale,<sup>5</sup> holding that the surety's failure to adhere to the 45-day response requirement constituted a waiver of defenses and acknowledgment of the claim, under "the plain language of the [surety] contract."

### Holdings Could Enhance Rights of Obligees and Bond Claimants

With three separate jurisdictions interpreting the 45-day response requirement of the A312 identically, there is little wonder that the surety industry sought "interim" "stopgap" revisions to the bond form. If the Florida Supreme Court refuses to address the *Dooley and Mack* case, the surety industry will likely look to revise the Performance Bond language too.

While these holdings may seem to be a panacea for payment bond claimants, the rulings create dangers for others, particularly principals

and indemnitors of those bonds. Under the guidance of the *Gibson, Bramble*, and *Casey* cases, alert payment bond claimants are in a position to circumvent otherwise legitimate defenses of primes and owners by prompt filing of their claims only against sureties and then pouncing when sureties respond too late.

Will the surety's failure to meet the bond's 45-day response requirements insulate its principals and indemnitors from their obligations under the surety's general indemnity agreement (GIA)? On the other hand, the *Methuen* court said, "if the surety paid the claim without full investigation, it would be liable to its principal." The surety would seem to be in a catch-22.

Perhaps they can cut this knot by putting the onus on its principal and indemnitors. Arguably, as soon as the surety receives a notice of claim, it should require its principal to explain specific amounts of the claims in dispute, the factual and legal basis for withholding, and the amounts not in dispute. Taking this approach one step further, the surety might even say that if this is not done

within the 45-day window, the surety will merely pay the claim and seek indemnification.

### Conclusion

Drafters of construction contracts or subcontracts would do well to incorporate the language like that contained in the D&M subcontract, giving them the option to either complete the work or call on the surety. With only one decision supporting this view thus far, however, obligees may find it too risky to opt not to notify the surety and risk letting the surety off the hook. In addition, there is nothing to prevent a surety from adding its own language to the A312 Performance Bond (assuming it has the choice) with language such as "Notwithstanding any language contained in the subcontract, notice to the surety of intent to default terminate, as well as the preservation of the surety's rights provided by this bond in the event of a declaration of default, shall be a condition precedent to any obligations of the surety hereunder."

The AIA's adoption of "stopgap" revisions clearly indicates that the recent spate of decisions has set us in

uncharted waters. We can expect a fair amount of legal activity on these once "settled," but now turbulent, questions.

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### Endnotes

1. *Dooley and Mack Constructors, Inc. v. Developers Surety and Indemnity Company and Buildtec Construction Group, Inc.*, 972 So. 2d 893 (Fl. Ct. App., 3rd Dist., 2007), *rehearing denied*, 2008 Fla. App. LEXIS 2630 (2008), *writ of cert. pending*.

2. *J.C. Gibson Plastering Co. v. XL Specialty Ins. Co.*, 2007 WL 2916399 (M.D. Fla. 2007).

3. *Nat'l Union Fire Ins. Co. v. Wadsworth Golf Construction*, 863 A.2d 347 (Md. Ct. Spec. App. 2004), *cert. granted and affirmed*; *Nat'l Union Fire Ins. Co. v. David A. Bramble, Inc.*, 388 Md. 195, 879 A.2d 101 (2005).

4. *Methuen Construction Co. v. Austin Co.* (Mass. Sup. Ct. Sept 1, 2006).

5. *Casey Industrial v. Seaboard Surety*, 2006 U.S. Dist LEXIS 78416 (E.D.Va. Oct.25, 2006).

## Business and Commercial Litigation in Federal Courts

EDITED BY ROBERT L. HAIG



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# Hurry Up and Wait: TROs and Other Emergent Relief

By Aaron P. Silberman

**Aaron P.  
Silberman**

It's a Friday afternoon. You've put out all the fires.

Everything is under control. Your mind is already on the weekend, with your body soon to follow, when the phone rings. You answer.

The caller says, "This is Jane Doe at ABC Construction." (You worked with Jane and her company in defending against a subcontract mechanics lien foreclosure a few years ago.) Jane skips the pleasantries: "We bid on the city's big new civic center project last month and received notice a few days ago that the city intends to award the contract to our competitor XYZ. We haven't seen XYZ's bid, but we can't believe they could beat our price unless their bid didn't comply with the city's requirements."

"When does the notice say the city will award to XYZ?" you ask, trying to sound calm.

"Monday," Jane responds. "And we know from our discussions with the city that the notice to proceed will be issued immediately upon award."

Goodbye, weekend. Hello, emergent relief.

## Logistical and Strategic Issues

One of the first questions a lawyer faces when confronted with a client issue that may require emergent relief is what kind of relief may be available. This may depend on the type of issue the client faces, what any relevant contracts provide, and applicable law.

For example, in public construction contracting, federal and most state and local agencies have administrative bid protest procedures that disappointed bidders must follow before they may seek court relief. Bid protests are often akin to emergent relief, with extremely short filing deadlines, summary proceedings, and quick resolutions. Once a bid protest

is decided, the losing side may then seek emergent relief in court.

Other types of issues may arise after a construction contract is already in place and may be governed by the contract's dispute procedures and other provisions. For example, the owner may face irreparable harm where a contractor threatens to abandon the job. Whether the owner in that circumstance could seek emergent relief, such as a temporary restraining order (TRO), in court may depend on (a) whether its construction contract requires submission of such disputes to alternative dispute resolution (ADR), and (b) the law in the applicable jurisdiction about courts' ability to issue emergent relief notwithstanding mandatory ADR contract clauses. If the contract or applicable law allows a court action, then other contract provisions may dictate venue and choice of law.

Finally, if a party can go to court for emergent relief, the relief available may vary depending on which court (or other tribunal) has jurisdiction. Procedures vary between federal and state courts. On federal projects, disputes brought against the United States under the Federal Contract Disputes Act must be brought in either the Armed Services or Civilian Boards of Contract Appeals (CBCA) or the Court of Federal Claims (COFC). Unlike federal district courts and state courts, those tribunals have no authority to issue injunctive relief, including TROs. However, disputes between or among prime contractors, subcontractors, and suppliers on federal projects are generally governed by state law and not subject to CBCA or COFC jurisdiction.

## Gathering information

Perhaps the greatest challenge in obtaining emergent relief, especially in factually complex matters (as

construction disputes usually are), is obtaining sufficient information to prove that your client meets the legal requirements for emergent relief. Typically, this will require showing both some degree of likelihood that your client will succeed in its claims at trial and that it will likely suffer irreparable harm if the requested relief is denied.

Your first source of information is your client. In a procurement dispute, your client usually can provide the solicitation, prebid submission communications (such as bidder questions, agency clarifications, and bidders' meeting agenda and minutes), and the notice of award. Your client will less likely have other key documents, such as the proposed awardee's bid and the agency's scoring documentation. In a contract dispute, your client will be able to provide you the contract itself and perhaps relevant correspondence and other documentation. Your client will also be able to get you in touch with key employee witnesses.

Where a public entity is involved, whether as the owner, administrative decision maker (e.g., the entity that makes contract awards or decides protests), or regulator (e.g., licensing boards, environmental agencies, permit issuers), documents may be available through public records laws. Federal agencies are subject to the Freedom of Information Act, and every state has its own similar law. Although these laws generally will not require the public agency to make the requested documents available in such a short time frame, you may be able to negotiate expedited disclosure where the request is narrow and specific. In some circumstances, the public agency may be willing to produce documents without a formal public records law request.

Other relevant information may be publicly available without any need for a public records law request. Relevant licenses and permits may be available at a public agency office or online. Many other types of information are available online (though some only for a fee), such as standard commercial specifications and public entities' solicitation documents, standard terms and conditions, and specifications.

One last potential avenue for obtaining critical information is discovery. This will not be a viable option where the emergent relief is needed in a matter of days. Nor is discovery available in administrative proceedings, such as bid protests. To obtain expedited discovery in court actions, a party typically will have to file a complaint and apply for a court order allowing early discovery. Such a request should be supported by detailed affidavits and should be limited to only the most critical information and the least intrusive means of obtaining it.

#### *Preparing your client's application*

Regardless of the context and applicable law, the burden on a party seeking emergent relief is high. The challenge is exacerbated because the facts are often complex, time is always short, and the judge's attention even shorter. To meet this challenge, there are some rules you should live by:

- **Keep it simple.** If at all possible, avoid complicated fact statements or legal arguments, even if they are relevant or right. Most judges have difficulty grasping construction issues in cases in which they have limited time to understand them. On a TRO application, the judge is not going to have the time or inclination to become an expert on the factual or legal issues you raise.
- **Always be mindful of the applicable standard of review and elements of proof.** Many court decisions on applications for emergent relief begin and end with the standard of

review. Are you challenging an administrative decision that is due some deference? If so, you must be candid about that and adequately address it. As for the elements of proof, applicants often spend too much effort showing likelihood of success and too little showing irreparable harm.

- **Rely heavily on affidavits.** Don't argue the key points—prove them.

## Avoid complicated fact statements or legal arguments, even if they are relevant or right.

- **Guide the court to the important documents and key parts of those documents.** The documents will often be complicated, especially for a judge with no background in the dispute (and often little experience in construction generally). Make it easy for the judge by describing in your briefs what parts of the documentary evidence the judge really needs to look at and why.
- **Do everything you can to provide notice to all concerned parties.** Provide a detailed affidavit showing the notice you gave and, to the extent that you were unable to do so, the unsuccessful efforts you made.

A party seeking emergent relief should also be prepared to address whether the court should require a bond as a condition for granting the relief. You should research applicable law to determine the likelihood the court will order a bond. Does the applicable statute make a bond mandatory or discretionary? While most jurisdictions require a bond for preliminary injunctions, they usually do not require them for TROs (due to their short duration). You should determine the likely amount of a bond, if required, which will typically be tied to the damages other parties would likely suffer if the TRO were granted in error. You should have your client contact its surety and be prepared to get a bond immediately after the TRO hearing, in the event the court requires it.

#### **Construction Contexts**

Emergent relief is sought, and sometimes obtained, in a wide variety of construction contexts. For example, TROs are often sought to challenge initial public approvals of construction projects based on alleged violations of permitting, zoning, and similar legal requirements.<sup>1</sup>

TROs to stop construction based on environmental challenges are also very common. Construction and post-construction building use may impact air and water quality, animal and plant habitats (including those of endangered species), and wetlands, and may involve handling and disposal of hazardous wastes.<sup>2</sup> Similar concerns may arise concerning construction impacting historic preservation or Native American sites.

Community and neighborhood concerns, such as increases or disruptions in traffic, noise, and blight, also often motivate TROs to block construction.<sup>3</sup>

In public construction, disappointed bidders, taxpayers, and public interest groups often seek TROs to prevent contract awards made in alleged violation of competitive bidding laws.<sup>4</sup> Such litigation frequently follows unsuccessful administrative challenges such as bid protests. It also may follow after a public owner

directs that a contractor perform out-of-scope work that would constitute a cardinal change, or terminates a contractor and attempts to engage a replacement contractor without putting that work out for competitive bidding.

TROs are also sought for consumer protection to prevent ongoing or repeated fraud, unlicensed contracting, and unfair competition.<sup>5</sup>

Though less common, in extreme circumstances, project participants may obtain TROs to enjoin other participants from conduct likely to cause irreparable harm. Examples might include projects in which two parties disagree over precautions necessary to ensure the safety of workers during construction or of building occupants after work is completed. And, although a TRO will usually be denied to prevent a party from abandoning its work or to require its return to the site—due to the difficulty of proving irreparable harm—a party may be able to obtain such a TRO in extraordinary circumstances.<sup>6</sup> One example could be an instance in which a subcontractor is threatening to remove key materials or equipment from the site.

The above examples are far from exhaustive. Emergent relief has been

sought in countless other contexts involving construction, such as TROs to halt or prevent alleged infringement of intellectual property rights in project designs; violations of labor laws or union agreements; wrongful revocations of licenses, prequalifications, or building permits; spoliation of evidence; and misuse of or absconding with funds.

### Conclusion

Things can happen very quickly on construction projects. From the time the very first approval is sought to the demolition of the work at the end of its useful life, emergencies may arise. When they do, you may get that call (not always late on a Friday afternoon, though it may seem that way), and, when you do, you will need to be ready to act fast.

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*Aaron P. Silberman is with Rogers Joseph O'Donnell in San Francisco, California.*

### Endnotes

1. See, e.g., <http://solanosgotit.blogspot.com/2007/09/benica-council-oks-first-street.html>; [www.redorbit.com/news/business/870917/new\\_power\\_plant\\_in\\_yaphank\\_on\\_hold\\_construction\\_of\\_caithness/index.html](http://www.redorbit.com/news/business/870917/new_power_plant_in_yaphank_on_hold_construction_of_caithness/index.html);

[www.kitchendemocracy.com/Berkeley/Student\\_Athlete\\_Center/article](http://www.kitchendemocracy.com/Berkeley/Student_Athlete_Center/article); [www.ebdailynews.com/article/2007-8-24-eb-uc-suit](http://www.ebdailynews.com/article/2007-8-24-eb-uc-suit).

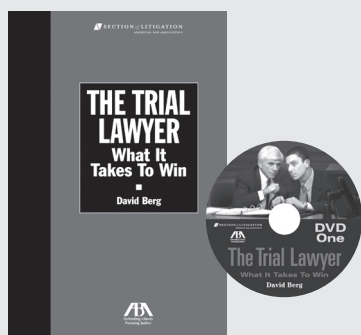
2. See, e.g., [www.kitchendemocracy.com/Berkeley/Student\\_Athlete\\_Center/article](http://www.kitchendemocracy.com/Berkeley/Student_Athlete_Center/article); [www.ebdailynews.com/article/2007-8-24-eb-uc-suit](http://www.ebdailynews.com/article/2007-8-24-eb-uc-suit); [www.npr.org/templates/story/story.php?storyId=15198528](http://www.npr.org/templates/story/story.php?storyId=15198528); [www.stltoday.com/stltoday/news/special/srlinks.nsf/story/8A2C4A80CAF752B1862572F40079EB28?OpenDocument](http://www.stltoday.com/stltoday/news/special/srlinks.nsf/story/8A2C4A80CAF752B1862572F40079EB28?OpenDocument); [www.durangoherald.com/asp-bin/article\\_generation.asp?article\\_type=news&article\\_path=/news/07/news071215\\_1.htm](http://www.durangoherald.com/asp-bin/article_generation.asp?article_type=news&article_path=/news/07/news071215_1.htm).

3. See, e.g., [www.kitchendemocracy.com/Berkeley/Student\\_Athlete\\_Center/article](http://www.kitchendemocracy.com/Berkeley/Student_Athlete_Center/article); [www.ebdailynews.com/article/2007-8-24-eb-uc-suit](http://www.ebdailynews.com/article/2007-8-24-eb-uc-suit); <http://lysiak.blogspot.com/2007/11/vitos-v-z-suit-driven-from-court.html>; [www.nytimes.com/2007/07/07/nyregion/07postal.html?\\_r=1&oref=login](http://www.nytimes.com/2007/07/07/nyregion/07postal.html?_r=1&oref=login).

4. See, e.g., [www4.vindy.com/content/local\\_regional/296091840222684.php](http://www4.vindy.com/content/local_regional/296091840222684.php); [www.startribune.com/local/11594391.html](http://www.startribune.com/local/11594391.html).

5. See, e.g., [www.oag.state.ny.us/press/2006/nov/nov09b\\_06.html](http://www.oag.state.ny.us/press/2006/nov/nov09b_06.html).

6. See, e.g., [http://kansascity.bizjournals.com/kansascity/stories/2007/08/20/story5.html?jst=s\\_cn\\_hl](http://kansascity.bizjournals.com/kansascity/stories/2007/08/20/story5.html?jst=s_cn_hl).



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## The New AACEI Recommended Practice for Forensic Schedule Analysis (Part 1 of 2)

Continued from page 1

and allocation of damages. This is now referred to as Forensic Schedule Delay Analysis. The RP/FSA recognizes that the level of detail needed in Forensic Schedule Delay Analysis is often greater than that needed in prospective schedule development.

As with many new specialties, it has taken decades to develop a vocabulary and set of common understandings of the purposes and methods of Forensic Schedule Delay Analysis. Consider the various names of methodologies as we have known them in the recent past. A partial list of methods includes Time Impact Analysis, Time Impact Evaluation, Impacted As-Planned, Fragnet Analysis, Collapsed As-Built, But-For Analysis, As-Built Less Delay, As-

Planned v. As-Built, Planned v. Actual, As-Planned v. Update, Windows Analysis, Contemporaneous Period Analysis, Update Analysis, Month-to-Month, Global Impact Analysis, Isolated Delay Type Analysis, and Total Float Management Analysis. The plethora of names and methods did little other than confuse people in the industry.

With that as background, the AACEI undertook the task of developing a Recommended Practice. The RP/FSA is divided into five major parts: Organization and Scope, Source Validation, Method Implementation, Analysis Evaluation, and Choosing a Method. The breadth and depth of the topics discussed in the RP/FSA preclude a detailed discussion here. This article details three of the RP/FSA's sections.

### Section 1—Organization and Scope

The first section of RP/FSA provides a detailed introduction to its concepts and structure. It includes paragraphs that identify the major ideas that form the basis of the RP/FSA and states that "The desired objective of this Recommended Practice is to reduce the degree of subjectivity involved in the current state of the art."<sup>1</sup>

This section describes that the RP/FSA is developed around "basic protocols" and "enhanced protocols." The basic protocols describe a set of steps that form the basis of each methodology. The protocol does not describe them as a minimum, but failure to address all the basic protocols could result in a failed methodology. The enhanced protocols generally provide more accurate analysis, but they require more work and often more data. Again, the development of two protocol levels allows the expert the flexibility to choose the protocol that best fits available resources.

### Section 2—Source Validation

Section 2 of the RP/FSA concerns the accuracy and usability of the four major sources of schedule information used in forensic analyses: the baseline schedule, the updates, the as-built schedule, and, the impact/delay events. The Recommended Practice's

## The Major Characteristics of the RP/FSA

### Single Coordinate Vocabulary

The first major concept is that the RP/FSA deals only with forensic or retrospective delay analysis. While there is overlap between prospective and retrospective analyses, their objectives are fundamentally different. Moreover, because of the extraordinary number of methods, subvariations, and names thereof, the RP/FSA has chosen to abandon the current vocabulary. While it will take several years for this new vocabulary to catch on, the use of a new vocabulary will clarify the exact methodological characteristics and largely eliminate some of the current name problems.

### Organization of a Coherent Taxonomy

Like zoological taxonomy, which groups similar living things, the taxonomy inherent within the RP/FSA provides a structure that identifies the similarities and dissimilarities of the methodologies. A secondary feature of the taxonomy is that one name describes only one methodological process. Thus, the taxonomy provides distinction and name differences to the different variations of any specific methodology.

### Step-by-Step Instructions

The RP/FSA contains detailed step-by-step instructions on how to perform the eight different methods of schedule delay analysis. The development of a single consensus approach to each method should reduce subjectivity in forensic analyses.

### Detailed List of Advantages and Disadvantages

The RP/FSA has a complete listing of advantages and disadvantages but does not recommend any single methodology as best or even preferred under certain circumstances. The reason is that even after four years of development, the group that developed the RP/FSA concluded that every methodology had its own advantages and disadvantages and that many factors—including quality of data, available analysis time, and budget—are all considerations in choosing a method. One of the important factors and advantages of the new RP/FSA is to allow transparency regarding the choice of method.

### Daubert and the RP/FSA

It seems inescapable that the RP/FSA will have an impact on *Daubert* challenges against forensic schedule delay experts. While these challenges have met with very little success to date, the development of the RP/FSA may change that; the exact contours of that impact will only be evident in the upcoming years. However, it seems likely that the RP/FSA will assist courts in distinguishing "junk science" methodologies and accepted methodologies correctly performed. Further, it would assist courts and opposing counsel in disqualifying "renegade experts."

basic assumption is that “Any analysis method, no matter how reliable and meticulously implemented, can fail if the input data is flawed. . . . The best accuracy that an analyst can hope to achieve is the faithful reflection of the facts as represented in contemporaneous project documents, data, and witness statements.”<sup>2</sup>

#### *Baseline schedule*

The RP/FSA recognizes that while the ideal baseline schedule for forensic purposes meets a host of defined qualities (the RP/FSA identifies nine), it may be fundamentally different from a schedule needed for managing a project. Noticeably absent is one of the first and most fundamental questions attorneys ask about the baseline schedule: Was it approved? The RP/FSA does not mention this as a criterion because it has nothing to do with the functionality of the schedule—rather that question deals with the schedule’s legal standing. The RP/FSA addresses the validity of the baseline schedule in a series of recommended steps to make an otherwise “impossible” schedule into one that actually functions and represents, to the best of the analyst’s capability, what the contractor intended when it developed the baseline schedule.

#### *As-built schedule*

The RP/FSA recognizes that the baseline schedule and the as-built schedule are the two most important schedules in a forensic analysis. Further, the RP/FSA accepts that no as-built is ever perfect. Addressing this inherent imperfection, the RP/FSA does stray into the legal field when it suggests that the safest course in the analysis is to “call all uncertainty in favor of the adverse party.”<sup>3</sup>

Two major alternatives are offered for the development of an as-built. The first is the easiest and most obvious—take the last fully progressed update, and verify the dates through the critical path, near critical paths, and a random 10 percent sample of activity dates. The RP/FSA takes the position that if the date is within one day of that shown by other independent sources, the date is accurate. The

second method for the development of an as-built is the “from scratch” procedure. For this procedure, it is recognized that a continuous single source for information is the best and most reliable, usually the contractor or owner’s daily reports.

#### *Schedule updates*

The RP/FSA contains a detailed guide to checking and verifying the update history of a project. While not

## Development of two protocol levels allows the expert the flexibility to choose the protocol that best fits available resources.

all forensic methods require updates (simple as-planned v. as-built among others), the RP/FSA recognizes that the updates can be useful in the eventual analysis of events on the project, regardless of the forensic method used. Unfortunately, many projects never develop a complete set of status updates. The RP/FSA therefore includes a detailed set of suggestions on how to fill in missing data or missing updates. In this context, the RP/FSA recognizes that the analysis could use “hindsight” in this process—after all, he or she knows what actually had happened. Alternatively, the analysis could use

“blind sight”—essentially pretending they are standing in the place of the project scheduler at the time the update was to be prepared. The RP/FSA takes no position between these two practices.

#### *Impact/delay events*

The RP/FSA takes the position that “delay” is a factually neutral term: either an extended duration of an activity or the prevention of the start of an activity in relation to its predecessor. The RP/FSA also distinguishes activity delays from project delays; not all activity delays are critical path delays. The RP/FSA carefully avoids the issue of entitlement, although recognizing that it is vital to the resolution of most disputes.

#### **Section 3—Method Implementation**

The Method Implementation section of the RP/FSA provides the how-to steps for eight different methods of forensic delay analysis, providing both minimal and advanced techniques, and discussing their strengths and weaknesses. In doing so, the RP/FSA warns: “The user is reminded that the focus of this Recommended Practice is on procedure as opposed to substance. Adopting a method and using the recommended procedures do not, on their own, assure soundness of substantive content.”<sup>4</sup>

#### **Observational Methods**

The RP/FSA makes a primary distinction between the Observational Methods, those that use the CPM logic but do not recalculate schedules, and the Modeled Methods that use the CPM logic and recalculate the schedules based on analysis by the expert.

#### *Observational/Static/Gross*

This method uses the logic of the baseline CPM schedule, does not recalculate the schedule, and is done in a single overall period. The reader probably knows this methodology by its better-known name: As-Planned v. As-Built. This basic methodology, probably the first and most simplistic forensic method, compares the

planned and actual progress of the job. No correction is made in the plan to reflect changing site conditions, although obviously the actual As-Built schedule reflects adjustments the contractor made in performance as the project advanced.

#### *Observational/Static/Periodic*

This method differs from the previous one only in that the analysis is done in separate time periods. This means that the measurement of delay can be more closely matched to events on the project with the hope of identifying a causal link between the impacting events and the delays.

#### *Observational/Dynamic/As-Is*

This method is another cousin of the As-Planned v. As-Built, but with advances that make it one of the most accurate and widely used methods, regardless of whether it is called As-Planned v. As-Built, Windows, or Contemporaneous Period Analysis. By performing an As-Planned v. As-Built analysis in separate time periods, the most fundamental problems with the earlier methods is removed. One of the great advantages of this method is that it can readily identify mitigation and acceleration as well as concurrency and pacing. The major disadvantage concerns the method's inability to distinguish contractor mitigation (logic changes) from contractor acceleration (increased manpower, equipment, or materials).

#### *Observational/Dynamic/Split*

This method is virtually identical to the Observational/Dynamic/As-Is method, except that this one allows the analyst to distinguish between schedule recovery due to logic changes and true acceleration measures.

#### *Observational/Dynamic/Modified or Re-created*

This method seems to be very similar to the previous two methods. This method reflects the common problem that updated schedules are not prepared or properly maintained, and describes how to "fill in the blanks." The RP/FSA notes, with some understatement, that the method "is per-

ceived to be an after-the-fact analysis that fails to consider logic changes. . . [or] . . . contradicts logic changes."<sup>5</sup>

#### **Modeled Methods**

Modeled Methods of forensic delay analysis require a functioning and accurate CPM schedule.

#### *Modeled/Additive/Single Base*

This methodology is commonly known as an Impacted As-Planned Schedule.

## The biggest problem of the methodology is that it has been widely rejected by courts.

It uses a single baseline schedule and inserts impacts or fragnets of events to model the net effect of these impacts on a project's completion. Experts sometimes call this methodology a Time Impact Analysis (TIA), but giving it such a title is incorrect and misleads the reader into believing that actual events are fully considered.

The method requires the analyst to develop fragnets or parts of a CPM schedule and insert them into an existing baseline schedule by modifying the underlying logic to incorporate the change. This method is widely used by contractors and schedule experts. Its advantage is that it is easy to understand, but its disadvantages can be fatal to its use. First, the method generally does not consider the contractor's own problems or mistakes. Second, it can only reflect the impacts selected, so the analyst may either intentionally or unintentionally modify the list of

impacts. Third, this method does not address either concurrency or acceleration very well. Finally, the biggest problem of the methodology is that it has been widely rejected by courts.

#### *Modeled/Additive/Multiple Base*

This methodology, known as TIA or Time Impact Evaluation (TIE) is perhaps the most widely known forensic methodology due to its required use in many government contracts. Another common, but incorrect, name is Windows Analysis. This method generally requires a reasonable and correct baseline, coupled with rational and proper periodic updates. Like the previous methodology, fragnets must be developed for each impact. The development of these fragnets is therefore extremely important. Further, fragnets are usually developed for all or most delays, regardless of the perception of responsibility.

Proper use of this method will result in arguably the most accurate identification of delay in a project. This method is, of course, subject to manipulation in both the updating of the schedule and the development of the fragnets. Such manipulation can be unintentional and exceedingly subtle; therefore, it is sometimes overlooked. Concurrency, pacing, and acceleration are all identifiable through this method or with some slight adjustment. However, like all other methods, the as-built critical path cannot be identified through this CPM-based process. Because schedule software can only identify prospective critical paths, the TIA updates by necessity identify the projected critical path rather than the as-built critical path. The projected critical path identified by the TIA updates does provide strong guidance to the analyst in the identification of the as-built critical path.

#### *Modeled/Subtractive/Single Base*

This method is one of the most complicated methods described in the RP/FSA. These complications have made this method subject to shortcuts that have seriously impaired the perception of it as a reasonable and viable methodology. It is commonly known as a Collapsed As-Built or But-For Analysis.

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This methodology takes a completed as-built, along with its implied logic, and subtracts impacts and events from the last to the first identified delay. This methodology does not clearly identify the as-built critical path, nor does it readily permit a “forward-looking” critical path. This method is intuitively easy to understand and explain, and can be performed without either a baseline schedule or any updates. However, it is perceived as a pure after-the-fact reconstruction and, admittedly, requires significant expertise.

### Conclusion

In the paragraphs above, I have identified some of the issues associated with the methods in the RP/FSA. The RP/FSA takes almost half of its 105 single-spaced pages to describe these eight methods, so the reader is advised to look at the RP/FSA to gain a more detailed understanding of the methodologies. In the second of this two-part article, in the next newsletter, I will discuss the RP/FSA’s treatments of some of the issues common to all forensic schedule delay methods: concurrency; pacing; the critical path; float and acceleration; as well as the issues to consider when selecting a method.

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*John C. Livengood Esq., AIA, PSP, CFCC, is associate vice president of PinnacleOne Construction Consultants in Washington, D.C.*

### Endnotes

1. *Forensic Schedule Analysis 8* (Assoc. for Advancement of Cost Eng’g Int’l., Recommended Practice No. 29R-03, revised June 2007), available at [www.aacei.org/technical/rps/29R-03.pdf](http://www.aacei.org/technical/rps/29R-03.pdf).
2. *Id.* at 18.
3. *Id.* at 21.
4. *Id.* at 31.
5. *Id.* at 58.

### Emails, E-Discovery, E-Gads! The Landscape Has Changed

*Continued from page 1*

reports, and the list goes on. Most of these documents are created using computers; however, the construction industry has, until recently, steered clear of reliance upon digital files for “fear of inaccuracy, misuse, and liability.”<sup>2</sup> Before 2007, the only copies of data furnished for a project that could be relied upon were paper or hard copies.<sup>3</sup> Because of the technical revolution taking place within the construction industry today, continued reliance upon hard-copy documents no longer makes sense. Computer-Aided Design (CAD) and Building Industry Modeling (BIM) are replacing, or at least supplementing, the traditional blueprint. New project-management software permits the digitization of a project from design to completion. One such product, Projectmates, is an online collaborative tool that allows an entire construction project to be managed over the Internet

(e.g., electronic bidding, requests for information (RFIs), portfolio reports, pay applications, purchase orders, subcontracts, parts orders, invoices, change orders, bulletins, scheduling, budgets, punch lists, submittals, and bid documents).<sup>4</sup> In recognition of the changing landscape, the American Institute of Architects (AIA) issued two documents in 2007 to “facilitate the full integration of digital data in the communications and work product of a project”: AIA Document E201-2007, Digital Data Protocol Exhibit, and AIA Document C106-2006, Digital Data Licensing Agreement (2007 AIA Documents).<sup>5</sup>

The 2007 AIA Documents require construction lawyers to understand their clients’ data and information systems in the same manner as all lawyers must now understand their clients’ data and information systems under the e-discovery rules.<sup>6</sup> For example, the Project Protocol Table contained in E201 requires the parties to make the following designations for the transmission and receipt of digital information:

### E-Discovery and the Rule 26(f) Conference

The 2007 AIA Documents and the Electronic Communications Protocol Addendum are a valuable source for litigators preparing to discuss the following topics during the Rule 26(f) conference:

- Preservation of electronic evidence (file types, file formats, and location of active, archived, and backup computer files; suspension of automatic/routine destruction)
- Scope of e-discovery (identification of key custodians, hardware/operating systems, and software applications in use; file-naming and storage conventions, network configuration)
- Privileged and confidential documents (proprietary/confidential information, exchange of source code, inadvertent production, claw-back nonwaiver agreements, protective orders)
- E-document production (production format, exchange of metadata, nonstandard file types)
- Expert reports (electronic documents reviewed by testifying experts, prior versions of expert report, expert emails, metadata)
- Chain of custody/security issues (search methodology, third-party vendors, authentication, encrypted files, forensics, law firm protocol for securing ESI, destruction of ESI after litigation ends)
- Cost of e-discovery (reasonable budget, not readily accessible data, cost-shifting)
- E-discovery schedule (how much data at issue, how much time to review, rolling production)

- Digital data (types of electronic documents covered by the agreement)
- Data format (software application and version in which documents will be transmitted)
- Transmission method (via electronic mail, attachment to email, CD, web posting)
- Permitted uses (read-only, distribution, alteration)

This table will be of great assistance to litigators, because the e-discovery rules require parties to disclose, without awaiting a request, a “description by category and location of” ESI to be used in support of any claim or defense. Fed. R. Civ. P. 26(a)(1)(B).

E201 does not address some important issues such as data transmission or conversion errors, security, destruction/retention of digital files exchanged, or data administration. These issues should be addressed, with particular attention paid to how long the digital information will be retained by the recipient and in what format, as well as when digital information will be destroyed and how that will be accomplished. Agreements regarding the exchange of confidential digital files should include provisions about the destruction of ESI stored online, nearline, or offline in archives and on backup media.

Another form issued in September 2007, ConsensusDoc 200.2, Electronic Communications Protocol Addendum (ECPA), addresses data administration. Under the ECPA, the parties designate permitted file formats, hardware and operating system requirements, software requirements, transmission requirements, security requirements, translation requirements, and test protocols. Under the ECPA, only “Electronic Communications prepared in the format and transmission methods identified . . . shall be relied upon.” ConsensusDoc 200.2 (1.2). Each party also designates an IT administrator; the IT administrators of the owner, architect, and contractor comprise the IT management team; and the IT management

team selects a webmaster.<sup>7</sup> A detailed ECPA will give litigators valuable insight into the ESI important to the project and should help narrow the scope of e-discovery if litigation later ensues. Accordingly, business lawyers and litigators should review digital data agreements in order to address potential e-discovery issues before an agreement is executed.

Computer illiteracy is also no excuse.<sup>8</sup> Because of the changing

## Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.

landscape, business and litigation construction lawyers will increasingly face e-discovery.

### Understanding the Process of E-Discovery

E-discovery is, simply, the discovery of computer files in litigation. It is estimated that 93 percent of ESI is never printed to paper, and only 7 percent of information created, used, or generated by businesses exists in paper form. In a recent comparison of ESI and hard-copy documents relevant to

a construction case, only 25 percent of the email communications had been printed to paper.<sup>9</sup> Failure to discover computer files, therefore, means missing much of the evidence. Under the developing case law, in-house and outside counsel must understand their clients’ data and information systems to identify, locate, and preserve ESI potentially relevant to the case, or face severe sanctions.<sup>10</sup> The duty to locate and preserve relevant ESI cannot be delegated.

[I]t is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched. This is not to say that counsel will necessarily succeed in locating all such sources, or that the later discovery of new sources is evidence of a lack of effort. But counsel and client must take some reasonable steps to see that sources of relevant information are located.<sup>11</sup>

The process of e-discovery is roughly analogous to the process employed in traditional paper discovery. What is different is the nature of the document involved. Hard-copy documents, unless damaged or destroyed, are tangible and static. Electronic documents, on the other hand, are virtual (0s and 1s) and constantly changing (often without any user input). Hard-copy documents are also straightforward. What you see on the printed page is what you get. What you see on the printed page may not be accurate or true, but it is still what you get. Electronic documents are more like containers. Information associated with an electronic file, known as metadata, is a part of the electronic document and often unseen by the user. Metadata contains some useful information about an electronic document—such as the author, date created or modified, date sent if an electronic message—but primarily metadata’s usefulness is in its assisting the computer to locate, search, sort, and retrieve electronic files. Metadata is

discoverable if relevant and not privileged. Metadata is vital to managing voluminous amounts of ESI in e-discovery.

Generally, the e-discovery process can be broken down into six steps.<sup>12</sup>

**STEP ONE:** Identify relevant data sources. Here, the lawyer asks “who,” “what,” and “where.”

Who are the key participants in the project? What software and hardware are being employed? Where are sources of potentially relevant ESI? IT personnel and key custodians must be consulted to answer these questions.

**STEP TWO:** Preserve relevant data. Instituting a “litigation hold” for relevant documents is familiar to litigators. As previously discussed, it is not sufficient merely to notify custodians of the duty to preserve.

**STEP THREE:** Collect and process data. ESI that has been preserved must be collected. Standard file types such as Microsoft Office files are processed and converted to a standard format, typically TIFF (tagged image file format) with associated metadata and text

extracted for loading into a review database. Nonstandard file types, such as CAD files or files created by proprietary software, cannot be processed and must be produced natively.

**STEP FOUR:** Filter data. During the filtering process, limiting parameters, search criteria, and filtering techniques are applied to the ESI to reduce the amount of data that must be reviewed by attorneys.

**STEP FIVE:** Search, retrieve, and analyze data. The processed ESI is loaded into a review database, along with images of hard-copy documents, which have been OCR’d.

Documents stored in the review database can be electronically annotated, redacted, stamped confidential, withheld as privileged, and accessed by all.

**STEP SIX:** Produce data. Once the documents have been reviewed, documents marked relevant and not privileged can be produced electronically by exporting the files from the review database into a production load file for delivery to opposing

counsel or experts. A privilege log can be created contemporaneously with the review and produced electronically as well.

### **Avoiding Common Pitfalls**

Parties and lawyers get into trouble in e-discovery when they do not understand the technology applicable to the case, or how that technology is treated under the e-discovery rules and emerging case law. Four common pitfalls in e-discovery can be avoided.

#### *Failure to institute a compliant litigation hold for ESI*

Because electronic files can be altered, moved, deleted, and sent with the stroke of a key (or the click of a mouse), once litigation is reasonably anticipated, parties and their counsel must act quickly to identify sources of potentially relevant ESI and preserve potentially relevant files. It is not sufficient to send a letter to the client or key custodians notifying them of the duty to preserve evidence. As previously discussed, counsel must take reasonable steps to ensure compliance.

#### *Failure to properly preserve or collect ESI*

Counsel cannot delegate to individual custodians the responsibility for preserving and collecting their own electronic documents. Nor should counsel expect the client’s IT personnel to understand how to preserve and collect ESI as evidence. Unless the client has purchased e-discovery software and trained its IT professionals to preserve and collect ESI as evidence, counsel must oversee the preservation and collection process. Unless agreed to by opposing counsel, never open electronic documents, print them to paper, or scan them and deliver them as PDFs. See Advisory Committee Notes to Fed. R. Civ. P. 34 (searchable information must be produced as ordinarily kept).

#### *Failure to use or leverage technology*

Lawyers accustomed to litigating with hard-copy documents often request that a “working copy” of key electronic documents be printed to paper, even if the documents are

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The Construction Litigation Committee will be cosponsoring the Midwinter Meeting with the ABA Forum on the Construction Industry. This year’s two-day program is entitled “Critical Insurance and Litigation Insight: Coverages, Disputes, and Tactics for Survival.” The program will present a series of detailed plenary and workshop sessions focusing on the role of insurance issues, claims, and disputes in construction litigation.

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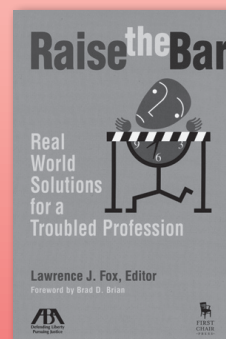
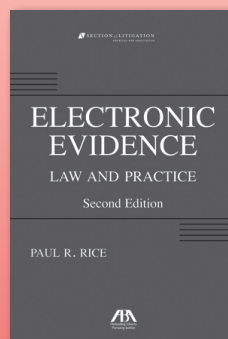
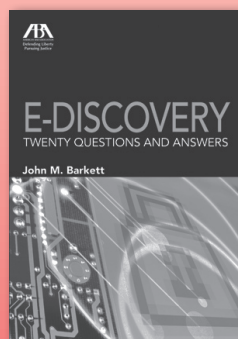
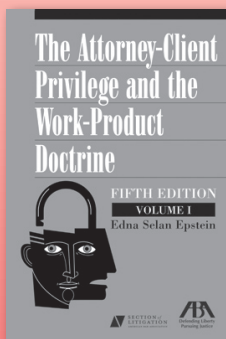
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stored in a review database. The lawyer operating under this “paper paradigm” will be no match for a “techno-savvy” opponent. While the paper paradigm lawyer is reviewing printouts, the tech-savvy lawyer is reviewing associated metadata fields, learning where the document came from (file path and computer), who authored the document, how it was organized (file name), when it was last revised or printed, and who received a copy via email and when. While the paper paradigm lawyer is scribbling comments on sticky notes and attaching them to key documents—notes that will be forgotten and buried among the sea of paper—the tech-savvy lawyer is making electronic comments about key documents into the review database for access by the entire team. The best trial lawyers are masters of the evidence in their cases. It is impossible to master the evidence in an e-discovery case without learning and understanding technology implicated.

### *Failure to take advantage of the Rule 26(f) Conference*

Counsel must seize the opportunity afforded by the Rule 26(f) Conference to narrow the scope and thereby lower the cost of e-discovery. Counsel must be prepared to discuss the amount of data involved, software or hardware issues, production format and delivery method, inadvertent production of confidential ESI, e-discovery schedules, and security. Importantly, because the e-discovery rules treat ESI as a “document,” counsel should also reach agreement as to whether ESI created by, viewed or accessed by, or delivered to testifying experts (including emails) will be exchanged, and if so, in what format. Counsel can, and probably should, agree to exchange only final expert reports in hard-copy format.

### **Conclusion**

As the construction industry goes digital, so will the construction law practice. Rather than resisting technology, construction lawyers should embrace it. Knowledge of computers will translate across almost every aspect of clients’ business and litigation concerns. Understanding clients’ information

systems requires one-on-one meetings with upper management and IT personnel, a tour of the data center, and sitting with employees at their workstations to see how they are using the company’s technology. This kind of “face-time” is also a great way to build strong client relationships and market one’s firm.

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### **Endnotes**

1. Zovickian, Stephen & Howard, Geoffrey, *Electronic Discovery in Construction Litigation*, 18-JUL Construction Law 8 (ABA Construction Lawyer 1998).

2. Noble, Christopher L., *The AIA’s New Digital Data Documents, The 2007 AIA Documents: New Forms, New Issues, New Strategies* (ABA Forum on the Construction Industry/TIPS Fidelity & Surety Law Committee 2008), at 3.

3. *See id.* at 4 (citing and quoting Standard General Conditions of the Construction Contract published by the Engineers Joint Contract Documents Committee, EJCDC Doc. C-700 (2002 ed.)).

4. *See* www.projectmates.com (last visited April 21, 2008).

5. Noble, C., *supra* n. 2, at 6.

6. This paper is not intended to address the 2007 AIA documents. For a good discussion on this topic, see Note 2.

7. Noble, C., *supra* n. 2, at 12. For a good discussion on the ECPA, *see id.* at 11–14.

8. *Martin v. Northwestern Mutual Life Insurance Co.*, 2006 U.S. Dist. LEXIS 2866 (M.D. Fla. Jan. 19, 2006) (rejecting plaintiff’s claim of computer illiteracy as “frankly ludicrous”).

9. *See* *Managing and Litigating the Complex Surety Case* (ABA 2d ed. 2007), Ch. 8, Ashcraft, Howard, W., Jr., *Deciding to Litigate: A Practical Guide to Electronic Discovery in Construction Disputes*.

10. *See, e.g.,* *Zubulake v. UBS Warburg LLC* (Zubulake V), 229 F.R.D. 422 (S.D.N.Y. 2004) (awarding sanctions for defendant’s failure to implement compliant litigation hold for ESI, resulting in \$29.1 million jury award).

11. *Id.* at 432 (emphasis in original).

12. *See id.*

### **Message from the Cochairs**

*Continued from page 2*

and Tactics for Survival.” The program will present a series of detailed plenary and workshop sessions focusing on the role of insurance issues, claims, and disputes in construction litigation.

We also will be presenting the plenary program “When ‘Green’ Turns to ‘Red’ and LEEDs to a Summons and Complaint: Potential Liability on Green Projects” at the 2009 Annual Meeting of the Forum on the Construction Industry on April 16–18, 2009, in New Orleans, LA. We have also proposed programs for the Section of Litigation Annual Conference to be held in Atlanta on April 29–May 1, 2009.

We expect to continue improving our website with the addition of useful new content and the expansion of existing features. Notable features added in the last year include useful articles, news features, and links. If you have an article, a news piece, or links to submit for our website, please contact Tina Paries at tparies@BTlaw.com or Ray Garcia at r\_garcia@garciamilas.com.

This level of activity is only possible through the tremendous efforts of our membership and, especially, our subcommittee chairs. We should be especially grateful for the untiring work of the chairs of our program subcommittee, Charlotte Wiessner and Drew Williams, and the editors of *Construct!*, David Sweitzer and David Kurtz. Charlotte has, of course, moved up to cochair of the committee. David Sweitzer has moved on as well. We wish to thank Charlotte and David for their excellent work. We also invite those of you who are interested in serving on the program and publications subcommittees to step up and volunteer your services.

We are an equal-opportunity committee and welcome the participation of all our members. We especially encourage the involvement of the newest members of the profession—our young lawyers—who have grown up with the technologies that some of us older lawyers view as alien and whose fresh ideas will help all of us confront the emerging issues these new technologies represent.



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