



# UNDER CONSTRUCTION

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### MESSAGE FROM THE CHAIR-ELECT

## Defining the Terms “Construction Lawyer” and “Diversity” — They’re Connected

By [George J. Meyer](#), Carlton Fields, P.A.



I know some of you are asking yourselves right now, in what possible way can diversity be connected to how we define who is a construction lawyer? Putting aside the fact that we are lawyers and therefore able to argue the connection between any two items, regardless of how disconnected they may appear, I believe I can show you a real connection between those two

terms.

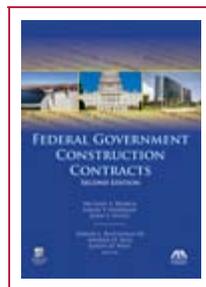
Because the Forum is a place for all construction lawyers to gather and share experiences and ideas, let’s start first with answering the question, “who is a construction lawyer?” I once heard a lawyer say that unless your practice is focused on construction litigation, you aren’t a real construction lawyer. Of course, such a narrow definition would leave out the thousands of lawyers whose practices are focused primarily on construction transactions. Are those transactional lawyers any less of a construction lawyer simply because they have chosen to assist their clients with their business transactions, as opposed to working with them only on litigation and other disputes (especially when, from the client’s perspective, such disputes are hopefully rare and far between)? [Read more...](#)



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By [George J. Meyer, Carlton Fields, P.A.](#)



I know some of you are asking yourselves right now, in what possible way can diversity be connected to how we define who is a construction lawyer? Putting aside the fact that we are lawyers and therefore able to argue the connection between any two items, regardless of how disconnected they may appear, I believe I can show you a real connection between those two terms.

Because the Forum is a place for all construction lawyers to gather and share experiences and ideas, let’s start first with answering the question, “who is a construction lawyer?” I once heard a lawyer say that unless your practice is focused on construction litigation, you aren’t a real construction lawyer. Of course, such a narrow definition would leave out the thousands of lawyers whose practices are focused primarily on construction transactions. Are those transactional lawyers any less of a construction lawyer simply because they have chosen to assist their clients with their business transactions, as opposed to working with them only on litigation and other disputes (especially when, from the client’s perspective, such disputes are hopefully rare and far between)?

There are also those who say in order to be a true construction lawyer you must be doing both construction litigation and construction transactions. But again, doesn’t that definition leave out all those lawyers who specialize solely in construction litigation or construction transactions? Surely a strong case can be made that all three of those above-noted types of lawyers are construction lawyers.

But what about other types of lawyers, who have significant roles in the successful running of a development, design, construction, subcontracting or supplier firm, can they also be considered a construction lawyer? For instance, do we say the in-house labor and employment lawyer for a large construction firm, who handles all of the company’s OSHA issues, work permits, employee documentation, safety and drug-free work site programs and other safety and employment related issues associated with safely and successfully completing construction projects, is not a construction lawyer and there is no need for him or her to be a Forum member?

What about the outside corporate counsel who helps his or her design and construction clients set up their partnerships, joint ventures and corporations and assists them with their day-to-day business administration matters, including permitting and licensing - is there no place for them in the construction industry and in the Forum? What about the environmental lawyer who works with the developer and designer in acquiring all of the necessary permits required for the commencement of construction and then provides assistance when compliance with those construction permits becomes an issue? Is the governmental lawyer who specializes in Federal or State design and construction contract procurements any less a construction lawyer? What about the tax lawyer who provides advice concerning the thorny sales and use tax issues that can arise on a construction project, or the antitrust lawyer who provides advice concerning to what extent pricing information may be shared? In the age of fraudulent claim prosecution in the construction industry, is the criminal lawyer who specializes in the defense of such actions not a construction lawyer from the Forum's perspective?

It seems to me all of these lawyers bring something of importance to the Forum. They all are providing services that are absolutely necessary and required today for the successful business operations of our construction industry clients. Accordingly, I believe we would do a great disservice to our clients and the Forum by narrowly defining who is a construction lawyer. Without the diversity noted above, we couldn't provide the full coverage of services our construction industry clients require, demand and deserve.

In similar fashion to the diversity that is required in order for us to fully service our construction industry clients, diversity is equally important and necessary to the Forum for servicing its membership. See, I told you I could connect these two terms.

We like to say the great strength and success of the Forum is the direct result of the excellent programs, publications and networking opportunities the Forum makes available to its members. However, if you stop and think about it, I believe what really underlies and is the basis for the Forum's strength and success is the depth and breadth of experiences each of its members bring to the Forum. Since that depth and breadth of experiences cuts across all gender, racial, ethnic, age, economic and geographical lines, the greater the diversity in our membership, the greater the depth and breadth of experiences the Forum will have to draw upon. I for one would not be interested in participating in an organization where the membership was made up by individuals who all had the same limited experiences and backgrounds that I have. Not only would such a situation definitely generate a very boring group of people, but obviously there would be no way for me to learn and grow from my interaction with the other members of the group. There is a saying which I think very aptly applies here: "If you always do what you've always done, you'll always get what you've always got." So if you want something more than what you've already got, you'll have to at least interact with others who have done or are doing something different from you.

In recognition of the importance of diversity to the Forum, [Adrian Bastianelli](#), the Chair of the Forum, has established a new Diversity Committee. The Co-Chairs for that Committee are [Lizz Patrick](#) and [Larry Harris](#). That Committee has been

charged with the responsibility of helping the Forum to develop and execute a plan to improve and expand the Forum's diversity at all levels. As part of that assignment, the Committee will be helping the Forum to establish procedures and protocols that will ensure the continual updating and implementation of the Forum's diversity plan into the future.

To kick off their efforts, the new Diversity Committee held a planning retreat after the San Francisco Mid-Winter Program. One of the fundamental questions that was asked at the beginning of the session was, "why does the Forum want diversity?" The general consensus of the group was that diversity is an essential element to the continued strength, growth and effectiveness of the Forum. In other words, promoting and encouraging diversity is very much in the self-interest of the Forum.

The scope of the strategic and implementation plan being developed by the Diversity Committee is intended to effect greater diversity at all levels within the Forum. The Forum leadership agrees that diversity efforts must be directed at all levels of the Forum, not just membership. Besides looking to increase diversity among its general membership, the Forum also is seeking to expand diversity within its programs (attendees and presenters) and publications (authors and editors), as well as within all levels of Forum leadership, including Division Steering Committees, Standing Committees, Governing Committee, and Forum Officers.

If you are interested in assisting the Committee in these diversity efforts, I urge you to contact the Committee's Co-Chairs at [ipatrick@patricklawgroup.com](mailto:patrick@patricklawgroup.com) or [harrisld@gtlaw.com](mailto:harrisld@gtlaw.com). There is a lot of work for the Committee to do and I'm sure your assistance and input will be much valued.

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## EDITOR'S NOTE

# Gradual Intentional Acceleration

By [Jeffrey R. Cruz](#), Editor



The concern over sudden and unintended acceleration has dominated recent headlines, but here at Under Construction, it's been a pretty smooth ride. This time last year, you held in your hands a paper version of *Under Construction*, delivered by the U.S. Postal Service. Today, you are scrolling through the new electronic format of Under Construction on your computer

screen or handheld device, and you received the newsletter by email. But, for those of you who have been reading your newsletters online for the past several years, this doesn't seem to be very cutting edge.

At the Forum, the economics of printing and mailing a newsletter to the membership and a desire to exercise greater environmental responsibility, among other factors, eventually came to outweigh our nostalgia for paper and our comfort with the old format. In the spirit of gradual and intentional acceleration, we are preserving *Under Construction's* original look and feel and we are moving cautiously but ever forward on the issues of advertising, embedded video and podcasts.

The Forum owes special thanks to Russell Glidden, Elmarie Calungaguin and Sonya Taylor at the ABA for designing and producing our new vehicle. Enjoy your first spin around the block. By the time of our next issue, that new vehicle smell will be gone.

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## Stimulus Bill Provides Risk and Reward for Contractors

By [Howard Rubin](#), Littler Mendelson, P.C.



Designed to help power the American economy out of its worst recession in decades, the American Recovery and Reinvestment Act of 2009 (ARRA), also known as the Stimulus Bill, provides \$787 billion in funding for job creation and preservation, largely in the construction industry. Of note for the construction industry, the ARRA provides the following funding:

- Transportation: \$49.3 billion, including: \$29.5 billion for bridge and highway construction; \$6.9 billion for mass transit programs; \$8.8 billion for high-speed rail development; and \$1.8 billion for airport improvement projects.
- Energy & Technology: \$29.8 billion, including: \$11 billion for electric grid improvements; \$7.2 billion to expand broadband Internet service; and \$5 billion for energy efficiency grants to homeowners.
- Federal Facilities: \$29.6 billion, including: \$5.6 billion to the General Services Administration to renovate federal government buildings; \$7 billion to the Department of Defense for military housing and facilities; and \$8 billion for public housing programs.
- Environmental and Water Infrastructure: \$21.4 billion, including: \$5.6 billion for the Army Corps of Engineers and Bureau of Reclamation; \$7.4 billion for clean water programs; and \$7.8 billion for environmental cleanup programs.
- Public School Facilities: \$8.8 billion in grants to states for the construction and renovation of public schools.

With private projects still few and far between, many contractors are considering for the first time whether to compete for federally funded contracts, and others are increasing the amount of work they perform under such contracts. The federal contracting process can be intimidating, however, and applicable laws daunting, especially those centered on labor and employment issues. What is more, the federal government is now taking a more aggressive approach toward enforcement of labor and employment laws on federally funded projects. To this end, the Department of Labor plans to hire more than 650 enforcement officers over the next two years to ensure that federal labor and employment laws are not being violated generally, and specifically by companies receiving the benefit of federal stimulus

funds.

Successful companies will not only position themselves to compete for federal stimulus dollars, they will also avoid the regulatory pitfalls that come with the territory of contracting on federally funded projects. All federally funded projects under the ARRA are subject to federal laws related to: (1) wages and benefits; (2) labor unions; (3) equal employment opportunity; and (4) immigration. This article provides a brief overview of issues related to these areas of law. <sup>1</sup>

### **Wages & Benefits**

As a general matter, the ARRA requires contractors to pay prevailing wages on projects funded in whole or part by federal stimulus dollars. As it pertains to construction contracts, the Davis-Bacon Act governs the payment of prevailing wages.

The Davis-Bacon Act's prevailing wage requirements apply to federal construction contracts if: (1) the federal government or the District of Columbia is a party to the contract; (2) the contract is for the construction, repair, or alteration of a public building or public work within the United States; and (3) the contract value exceeds \$2,000.<sup>2</sup> In addition, the Davis-Bacon Act's prevailing wage requirements apply to projects funded or enabled by federal grants, insurance, loans, or loan guarantees.<sup>3</sup> For example, they would apply to a highway construction contract entered into with a state that receives grant money for that project through the Federal Highway Administration.

If the prevailing wage requirements of the Davis-Bacon Act apply, the prime contractor and all subcontractors on the project must pay prevailing wages to all "laborers" and "mechanics" employed on the "site of the work."<sup>4</sup> The terms "laborer" and "mechanic" include those workers whose duties are manual or physical in nature, as distinguished from mental or managerial.<sup>5</sup> The term "site of the work" is defined as "the physical place or places where the building or work . . . will remain; and any other site where a significant portion of the building or work is constructed, provided that such a site is established specifically for the performance of the contract or project." This definition is construed to include job headquarters, tool yards, batch plants, and borrow pits that are part of the site of work, provided that they are dedicated exclusively, or nearly so, to the performance of the contract or project, and are adjacent or virtually so to the site of the work. <sup>6</sup>

As to what constitutes a "prevailing wage," the U.S. Department of Labor considers a wage prevailing in a local market if that wage is paid to more than 50 percent of the laborers or mechanics in a particular classification of work.<sup>7</sup> There are two types of Department of Labor wage determinations: "general" and "project." A general wage determination reflects the prevailing wage in a specific geographic location.<sup>8</sup> Applicable general wage determinations are available online at [www.wdol.gov](http://www.wdol.gov). When the Department of Labor has not established a wage determination for a certain geographic area, it will issue a project wage determination, which expires after 180 days.<sup>9</sup>

The obligation to pay prevailing wages also requires the contractor to provide specified benefits, benefits of an equal value, or payment for the equivalent cost of

the benefits. Benefits that may be included in a prevailing wage determination include medical and life insurance, retirement benefits, disability and sick leave insurance, vacation and holiday pay, and apprentice training.<sup>10</sup>

Contractors working on projects subject to state prevailing wage laws should exercise caution, as state prevailing wage determinations may differ from those made by the U.S. Department of Labor, and state prevailing wage requirements may also differ, particularly in the area of benefit plan requirements.

### **Labor Unions**

Contractors competing for federally funded projects must also carefully consider federal contracting laws that govern the labor/management relationship. Notably, in a marked departure from the policies of the previous administration, President Obama has signed four Executive Orders that provide tools for labor organizations to fulfill the administration's objective of increasing unionization of federal contractors.

### **Executive Order 13494 – Economy in Government Contracting**

This Order prohibits federal contractors from expending federal funds to persuade their employees to exercise or not exercise their right to organize and bargain through a representative of their choice. Prohibited uses of federal funds include, but are not limited to, those related to:

- Preparing or distributing persuader material;
- Hiring or consulting legal counsel or consultants for reasons of persuasion; and
- Holding meetings or planning sessions regarding persuasion during work hours.

Carrying out union avoidance activities is not completely forbidden, but contractors must ensure that they account for the funds used for such purposes separately from "allowable" expenditures submitted to the contracting agency for reimbursement, and are able to demonstrate that federal contracts were not the source of those funds.

### **Executive Order 13495 – Non-displacement of Qualified Workers Under Service Contracts**

This Order requires that covered contracts contain a specific provision granting employees of a federal contractor that loses a service contract the right of first refusal for employment by the successor contractor. The successor contractor may not hire new employees, other than management or supervisors, until all employees of the previous contractor have been offered employment. The successor employer must pay the employees at least the same wages and fringe benefits value provided by the predecessor's collective bargaining agreement.

### **Executive Order 13496 – Notification of Employee Rights Under Federal Labor Laws**

This Order requires federal contractors to inform their employees of the employees'

right to organize or refrain from organizing under the National Labor Relations Act.

### **Executive Order 13502 – Use of Project Labor Agreements for Federal Construction Projects**

This Order grants executive agencies the authority, on a project-by-project basis, to require contractors on federally funded construction projects over \$25 million to sign a project labor agreement.

#### **EEO and Affirmative Action**

The Office of Federal Contract Compliance Programs (OFCCP), an agency within the U.S. Department of Labor, enforces equal employment opportunity regulations that apply to government contractors, including contractors on ARRA-funded projects. Such regulations require equal treatment of women, minorities, veterans, and the disabled, and in certain instances, affirmative action plans.<sup>11</sup> The only penalty the OFCCP may levy against a non-compliant contractor is the ultimate sanction of debarment. It cannot impose direct monetary penalties or fines, but can obtain monetary remedies for employees damaged by unlawful discrimination.

A company contracting or subcontracting to perform construction work in excess of \$10,000, which is paid in whole or part with funds obtained from the federal government or borrowed on the credit of the federal government, is subject to the OFCCP's jurisdiction and regulations.<sup>12</sup> As it pertains to the ARRA, the OFCCP has released a directive setting forth procedures that substantially increase the likelihood that contractors on ARRA-funded projects will be audited, and audited with a heightened degree of scrutiny.

#### **Immigration**

Federal contractors are at a heightened risk of being selected for government audits or investigations related to the legal status of their employees, and should carefully review their I-9 compliance.

In addition, effective September 8, 2009, certain federal contractors are required to use E-Verify, an Internet-based system that allows participants to verify the identity and employment eligibility of their newly hired employees. A prime contractor is required to use E-Verify only if: (1) the E-Verify requirement is specifically included in a new contract or modification of an existing contract; (2) the contract includes some work in the United States; (3) the contract has performance terms of 120 days or more; and (4) the contract is valued in excess of \$100,000. In addition, prime contractors subject to E-Verify must require subcontractors performing work in the United States in excess of \$3,000 to use E-Verify.<sup>13</sup>

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1. For a more detailed examination of the ins and outs of labor and employment laws implicated by federal construction contracting, especially in the context of the ARRA, see *An Employment Law Guide for Federal Contractors in the Wake of the American Recovery and Reinvestment Act of 2009*, Littler Report, Aug. 2009, available at <http://www.littler.com/PressPublications/Pages/LittlerReport.aspx>, ©2009 Littler Mendelson, P.C. Excerpts are reprinted here with permission.

2. 40 U.S.C. § 3142(a).

3. 29 C.F.R. § 5.2(c).
4. 40 U.S.C. §§ 3141 *et seq.*
5. 29 C.F.R. § 5.2(m).
6. 29 C.F.R. § 5.2(l).
7. 29 C.F.R. § 1.2(a)(1).
8. 29 C.F.R. § 1.5.
9. 29 C.F.R. §§ 1.5(b), 1.6.
10. 29 C.F.R. § 5.2(p).
11. 41 C.F.R. pt. 60-4.
12. 41 C.F.R. § 60-4.1.
13. Exec. Order No. 13,465, Amending Exec. Order No. 12,989, 73 Fed. Reg. 33,285 (2008); Employment Eligibility Verification, 73 Fed. Reg. 67651 (2008).

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## Preserving Evidence with 3D Laser Scanning

By [Jim Wiethorn, PE](#), Haag Engineering Co., and [Chris Zmijewski](#), Stantec



The site of a construction accident is often chaotic, with rescue workers, police, OSHA, and others making their way onto the scene. Between this response and the subsequent clean-up process, a good deal of potential legal evidence moves, changes, or otherwise disappears before investigators can make some headway into what caused the accident. A new surveying tool, however, is helping forensic engineers and legal teams preserve the scene and its evidence so that detailed and accurate data can be used in the causation analysis rather than relying on photographic evidence and field measurements alone.

### How Does It Work?

Three-dimensional, high-definition laser surveying (3DLS) uses laser scanning technology to remotely measure spatial data. The surveys involve collecting horizontal and vertical location points by reflecting light off of objects in a matrix and using that information to calculate the positions of those points on the objects' surfaces. The point cloud data provides a highly detailed, three-dimensional representation of ground surfaces, structures, facilities, and anything else in the scene, which can then be processed in various fashions depending on their intended use.

This kind of data can be of great value for forensic and legal purposes. Animations and modeling can help reconstruct a scene, but laser surveying uses exact, geopositioned field data. With laser surveying, all of the spatial relationships and conditions of the scene appear exactly as they did in real life. Dimensions, elevations, depth, length, size, and spacing of evidence no longer require photographic interpretation.

Laser scanning offers a number of other benefits for forensic engineers and legal teams:

**Speed.** Laser scanning involves very little equipment—the scanner and a lap top. That means a crew of one or two people can get to the scene and set up very quickly. This rapid response prevents the opportunity for changes to the site that a

longer delay might allow. In addition, the scanning itself can take as little as a few hours to a few days to complete, depending on the scale of the site. Using traditional survey methods, crews often spend up to two weeks on field measurements, plotting out a grid and measuring data points by hand. Because that process is so time consuming, survey crews are often forced to focus only on critical areas and items rather than capturing the entire scene.

One example in which the speed of laser scanning proved to be crucial was the failure of a levee in Fernley, Nevada in January 2009, which forced nearly 3,500 people to evacuate the area. A survey crew was able to get there by the next day to begin collecting the topography and other site data needed to help determine the cause and circumstances of the collapse. Using 3DLS, the crew was able to develop plans and cross sections of the levee within days.

**Preservation of evidence.** The speed with which laser scanning equipment can detail an accident site is crucial to preserving potential evidence for the ensuing legal case. When cranes collapsed in New York City and Miami in 2008, investigators using 3DLS were able to quickly scan the scene and begin piecing elements together before the clean-up effort got under way and those details were altered. At a power plant in Missouri, OSHA had roped off the scene of a crane fatality, which prevented forensic teams from entering the area. The scene was scanned from beyond the tape, collecting data and producing images before the first person entered the site. These scans can accurately document pre- and post-accident conditions, and produce a reliable foundation to support the admissibility of any evidence based on them.

**Accurate spatial relationships.** The data produced by 3DLS is so accurate that investigators are able to clearly determine where all components of a site were located after the accident as compared to where they were before. With traditional site investigations, forensic engineers photograph all angles of the site and piece them together to recreate the position of the elements along with field measurements. But because each photograph is separated and slightly distorted from the next, interpretation is still necessary. That guesswork is eliminated with 3DLS as the spatial relationships are exact and can be rotated to view angles from every possible vantage point.

In a large mining conveyor belt accident investigation south of Philadelphia, for example, one of the big questions was what a crane operator could see from his point of view on one of the towers. Photos could capture the conveyors and traditional survey methods could reproduce point elevations, which investigators could use to try to reconstruct the scene. But introducing these assumptions left room for questions and did not take all of the distractions in that view into account. The team decided to scan the site, resulting in a 3D image of the entire scene that could be rotated from any view. Once CAD drawings of the crane itself were incorporated, the team could essentially “sit” in the crane operator’s seat and “see” what the operator could and couldn’t see at the time of the accident.

**Mechanism of failure.** Having access to these kinds of vantage points allows investigators to work backwards to determine the order of failure, or what happened to the structures as they collapsed, all the way back to initiation. In a crane

collapse, for instance, 3D scans and CAD drawings can be combined to determine where the structures and components were located at certain points along the timeline and where and how they hit other objects. Even more important is the ability to use the recreations to confirm or disprove conditions others may claim.

When called for, 3DLS also allows forensic teams to digitally reintroduce previously removed objects, which can help recreate circumstances more accurately than photos or modeling alone. In one of the New York crane collapses, for instance, pieces of the crane fell into an adjacent condominium building. The pieces had to be removed quickly so although the survey team wasn't able to scan them on the site, they scanned them in a warehouse and placed them back into the as-built scene. While this is similar to photographic recreation, scanning provides a much more accurate representation of each element, making the resulting model or simulation more reliable and persuasive.

**Flexibility.** What's especially useful about 3D laser scanning is that data can be adapted into many different formats depending on the end user's needs and resources. The 3D scans can be converted into 2D drawings compatible with CAD systems, or 3D models for presentations in mediation, arbitration and litigation. The scans themselves can be viewed by a jury just as a photo would, providing not only the location points of traditional survey but also the visuals a jury or attorney looks for.

### **Legal Lasers**

Laser scanning is indeed proving to be an extremely useful tool for legal cases, including everything from crane collapses to explosions and fires. Scans can show burn and debris patterns, the conditions of walls and facades, and other potential evidence for these often complex types of cases. In complex property damage and construction accident cases, quick response time and reliable preservation of evidence are often crucial issues. 3D laser scanning is another useful tool in the construction lawyer's toolbox.

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*Chris Zmijewski is a principal and practice leader of digital imaging and mapping for Stantec's survey and geomatics division. Jim Wiethorn is a failure and damage consultant with Haag Engineering Co. in Houston.*

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## Report of the Nominating Committee

The Nominating Committee of the ABA Forum on the Construction Industry convened at the Forum's Mid Winter Meeting in San Francisco, CA in January 2010, and selected nominees for Chair-Elect and for Governing Committee Members. The nominees are:

### For Chair-Elect:

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

### For Governing Committee Members:

[Arthur D. Brannan](#), DLA Piper, Atlanta, GA

[G. Edgar James](#), Polsinelli Shughart PC, Kansas City, MO

[Kerry L. Kester](#), Woods & Aitken LLP, Lincoln, NE

[Susan Fisher Stevens](#), Sprint Nextel Corp, Overland Park, KS

In accordance with the Forum's *by-laws*, the nominations will be presented to the Forum membership for a public vote on April 22, 2010, as part of the Forum's Business Meeting, which will be held in conjunction with its Annual Conference in Austin, TX.

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