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Dear Readers,

Featured in our Spring 2011 issue of *Solutions* is a primer from Joe Barra to consultants, design professionals, attorneys, and claims specialists testifying as expert witnesses. In addition, Elizabeth Cunha examines a recent Connecticut Supreme Court opinion giving important clarifications of the notice requirements associated with bringing claims against the State of Connecticut on public works jobs. Finally, Keane Aures examines the reliability of a delay expert's testimony when a detailed CPM analysis has not been done, as recently analyzed by the Eighth Circuit Court of Appeals.

With each issue of *Solutions*, we aim to keep you informed of legal developments impacting the design and construction industry. We welcome feedback and encourage you to suggest topics you would like to see covered in future issues.

[Peter E. Strniste, Jr.](#)
Editor

ARTICLES

So You're Going to Be an Expert Witness...

By [Joseph A. Barra](#) and Lawrence Feldman

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Introduction

Lawsuit (n.) a machine which you go into as a pig and come out as a sausage.—Ambrose Bierce, The Devil's Dictionary

For many professionals, involvement with the legal profession has a somewhat negative connotation. Lawyers have the potential to cause you and your clients significant aggravation and to generate litigation, which is costly in terms of both time and money. At the other extreme are engineers and scientists who make their living as expert witnesses and have adapted their personal and professional lives to the chaotic, unpredictable world of litigation support.

For most of us, litigation cases comprise only a small part of our workload. Some of us like this kind of work in relatively small doses, enjoying the challenges involved; others participate

reluctantly, primarily to help a good client out of a jam or to come to the defense of a colleague. The intent of this article, and the companion piece which will appear in the June issue of Insights, is to provide the occasional expert witness, and more particularly those who have not yet had the pleasure of this experience, with some insight into the issues and processes involved. While the focus is on the engineer or scientist as expert witness, some of the ensuing discussion may also apply to those unpleasant situations in which professionals or their companies are the defendant in litigation.

Click here to read the full article, [So You're Going to Be an Expert Witness](#).

Supreme Court Clarifies Notice Requirements for Claims on Public Works Projects

By [Elizabeth K. Cunha](#)

In December 2010, the Connecticut Supreme Court released [C.R. Klewin Northeast, LLC v. State of Connecticut](#), clarifying what constitutes proper notice under Connecticut General Statutes § 4-61. Readers may recall that § 4-61 opens the door (by waiving sovereign immunity) to allow public works contractors to bring actions against the State for disputes arising from construction contracts. However, contractors must follow certain notice requirements to take advantage of this right, and the contents of the notice are not clearly delineated in the statute.

In this recent case C.R. Klewin (Klewin) entered into a contract with Connecticut's Department of Public Works (DPW) to construct the New Resource Learning Center and Lowe Building at Manchester Community College. While performing the contract, Klewin encountered numerous delays and changed conditions that caused it to incur additional cost. Klewin's first request for payment was by letter to the DPW's bureau chief. After numerous attempts to obtain compensation, Klewin remained unpaid.

Click here to read the full article, [Supreme Court Clarifies Notice Requirements for Claims on Public Works Projects](#).

Critical Path Analysis Not Necessary to Establish Compensable Delay

By [Keane E. Aures](#)

Construction attorneys often ponder what level of expertise courts will require of expert witnesses testifying in support of delay impact claims. One question the Eighth Circuit Court of Appeals recently addressed is whether critical path analysis by an expert is a prerequisite to the recovery of delay damages. In [Weitz Company v. M.H. Washington](#) (8th Cir. 2011), the Court of Appeals upheld a District Court's decision to admit expert testimony in a delay damages case, where the expert did not perform a critical path baseline analysis prior to assigning activities to the critical path. In doing so, the Court set a threshold for a scheduling expert's testimony that should not be overly burdensome to future litigants.

The [Weitz](#) decision allows construction attorneys broad latitude in presenting expert witnesses in delay claims cases, as long as the expert can demonstrate a logical bridge between the facts of the case and the analysis. In [Weitz](#), the Court of Appeals determined that a District Court trial judge may admit the testimony of a witness whose knowledge, skill, experience, training, or education merits expert status if (1) the testimony assists the trier of fact in understanding the evidence or in determining a fact at issue; and (2) the evidence is relevant and reliable. The Court reasoned that if the trial judge is satisfied with the expert's knowledge, skill, experience, training, or education, and the expert's testimony is reasonably based on that

expertise, a court does not abuse its discretion by admitting the testimony, and the factual basis of the testimony goes to the weight of the evidence.

Click here to read the full article, [Critical Path Analysis Not Necessary to Establish Compensable Delay](#).

FIRM NEWS & NOTES

At the Podium

Construction Partner [Joseph A. Barra](#) spoke at the "3-in-1 Overview: How New Regulatory Changes May Affect You!" event on March 10, presented by the International Facility Management Association of Boston. His topic was the Commonwealth's new Prompt Pay Law.

Construction Partner [Martin A. Onorato](#) presented a program on the important fundamentals of construction law in Connecticut on March 14 to the Hartford chapter of The Construction Specifications Institute in Rocky Hill.

Land Law Partner [Brian W. Blaesser](#) recently spoke in Chicago at the 2010 Greenbuild International Conference, Generation Green: Redefining Our Future, the U.S. Green Building Council conference dedicated to designing and building environmentally friendly buildings and green communities. His presentation, "Drafting & Negotiating Green Building Provisions in Design/Construction Contracts and Leases," was part of a series of legal panels offered to attendees for the first time at Greenbuild.

[Dwight H. Merriam](#) and [Brian R. Smith](#) of the firm's Land Law Section spoke at the Connecticut Bar Association's fifth annual Property Rights Seminar, organized and moderated by Mr. Merriam. Mr. Smith spoke about the Branford, Connecticut, eminent domain cases, the most important eminent domain cases of last year in the state. He tried the winning cases with Steven Humphrey, of counsel. Mr. Merriam spoke on recent national developments.

Construction Counsel [Peter E. Strniste Jr.](#) served as a panelist for a roundtable discussion of legal issues facing retail owners and contractors at the 2011 Commercial Construction & Renovation Summit on April 13 in Braselton, Georgia.

Construction attorneys [Joseph A. Barra](#) and [Elizabeth K. Cunha](#) will cohost the Construction Management Association of America Webinar entitled "The Seven Common Mistakes of CM Practice, the Contract Provisions That Apply, and the Insurance Policy Designed to Address Them" on April 21.

Construction attorneys [Gregory R. Faulkner](#) and [Alexandria E. Baez](#) will present at the May 12 Associated General Contractors of Massachusetts 2011 Regional Law Series at the Carriage House at Forest Park in Springfield, Massachusetts. The presentation will provide an overview of the different protections and incentives available to owners and contractors when choosing between cost-plus fixed price contracts. Special attention will be given to liability and responsibility, cost control, changes, and claims management.

Construction Counsel [Peter E. Strniste Jr.](#) will serve as the moderator for a discussion at the Defense Research Institute's Fidelity and Insurance Roundtable on May 13 in Chicago, Illinois. The group's discussion will focus on the defense of subdivision maintenance bond claims in today's postresidential housing bubble.

Construction Partner [Martin A. Onorato](#) will moderate a panel discussion at a program of the Connecticut Building Congress entitled "Meet the Architects" on May 10. The panel will focus on the status of economic recovery, major market drivers for projects, and regional trends in design.

Construction Partner [Joseph A. Barra](#) will chair the May 26 Massachusetts Continuing Legal Education program titled Construction Law & Litigation: Practical cutting-edge tips and trends for the experienced construction lawyer.

Construction Partner [Gregory R. Faulkner](#) will take to the podium at the 2011 National Association of College and University Attorneys annual conference, to be held in San Francisco, California, from June 26 to 29. He will present on the topic of risk transfer and assignment issues in contracts. NACUA, founded in 1960-1961, educates attorneys and administrators on the nature of campus legal issues and provides continuing legal education to university counsel.

In Print

Construction Partner [Joseph A. Barra](#) coauthored the article "Are You Ready for the New Massachusetts Prompt-Pay Act?," published in the Winter 2011 edition of the Construction Management Association of America's New England chapter newsletter.

Construction Chair [Dennis C. Cavanaugh](#) coauthored the chapter "Performance Bonds and Contractor Default Insurance" for the book *Construction Insurance: A Guide for Attorneys and Other Professionals*, published April 2011 by the American Bar Association's Forum Committee on the Construction Industry. The publication is considered the handbook for construction lawyers written by practitioners with considerable experience in construction and insurance.

The American Bar Association recently published real estate litigation and title insurance Counsel [Danielle Andrews Long](#)'s casenote "Massachusetts Court Ruling Calls into Question the Validity of Many Foreclosures." Ms. Long observes that assignments of mortgages in Massachusetts to foreclosing banks can no longer occur after the foreclosure, which has been common practice, even if the notes for these mortgages have already been transferred into trusts for which the foreclosing banks are the servicers. Assignments do not have to be recorded prior to foreclosures, but they must exist. The Massachusetts Supreme Judicial Court ruled that securitization documents alone were insufficient without an executed assignment to foreclose on property. This ruling questions the validity of thousands of Massachusetts foreclosures.

In Attendance

Robinson & Cole was a sustaining member sponsor of the April 7 Massachusetts Building Congress breakfast program. The program, held at the Boston Convention & Exhibition Center, featured guest speaker Governor Deval Patrick.

Construction Counsel [Peter E. Strniste Jr.](#), who serves as treasurer of the Connecticut Surety and Fidelity Bond Association, a chapter of the American Surety Association, will attend the 2011 Transportation Construction Coalition Fly-In to Washington, D.C., to meet with Connecticut's legislators and to discuss issues facing the construction industry in Connecticut.

Robinson & Cole was the title sponsor of the Connecticut Building Congress/American Institute of Architects Joint Industry Dinner held on March 3 at the Rocky Hill Marriott. Construction attorneys [Martin A. Onorato](#), [Gregory R. Faulkner](#), and [Joseph A. Barra](#) attended.

Of Note

Robinson & Cole real estate Partner [Carla M. Moynihan](#) is a new lecturer on law at the New England School of Law. Ms. Moynihan joined the school's adjunct faculty for the spring 2011 semester. She is teaching contracts drafting.

[John A. Poakeart](#), counsel in the firm's Environmental and Utilities Practice Group, was appointed to chair the Communications Committee of the New York City Brownfield Partnership. The Brownfield Partnership is a voluntary association of groups, such as environmental consulting firms, property developers, and community-based groups, involved in brownfield projects in New York City whose mission is to provide leadership to the brownfield community throughout the city. As chair, Mr. Poakeart oversees the group's marketing and outreach activities, including development and maintenance of its Web site, participation in industry events, and communications with current and prospective members, government agencies, and community groups.

Real estate counsel [Candace M. Cunningham](#) was named president of Connecticut chapter of Commercial Real Estate Women-The Real Estate Exchange for 2011. Ms. Cunningham has been a member of The Real Estate Exchange for over 14 years and has served on several committees, including as chair of the program committee and as a member of the membership committee, the Blue Ribbon committee, and the Developer's Showcase committee.

For more information, please contact [Dennis C. Cavanaugh](#), Chair of the Construction Law Practice Group, in our Hartford office at dcavanaugh@rc.com.

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