

# ACEC INSIGHTS

American Council of Engineering Companies of Massachusetts

March 2010

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

By Lawrence Feldman, Ph.D., LSP, GZA and Joseph A. Barra, Esq., Seyfarth Shaw, LLP



*This is part one of a two-part article. The second part will appear in the June issue of Insights.*

### 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.

### Being An Expert Witness

*An expert is one who knows more and more about less and less.* —Nicholas Murray Butler

An expert witness, unlike an “ordinary” or “fact” witness, is not limited in his testimony to what he has seen, heard, or done. An expert witness is retained to assist the trier of fact. To accomplish this goal, he must review, analyze and provide opinions on the data and other information available to the parties. As a general principle, an expert will be permitted to testify provided

that he possesses sufficient knowledge to be considered “expert” in the given subject matter of his opinion. The opinion will be admitted if it is considered reliable and not “junk science.” It is the trial judge’s duty to assess both of these threshold questions.

Jurisdictions differ slightly on the exact standard, but generally speaking, an expert’s opinion is to be stated “to a reasonable degree of professional (or scientific) certainty.” While stronger opinions are permitted (and welcomed by your attorney), do not stretch your opinion beyond your comfort level—remember that you can, and probably will, be cross-examined by opposing counsel. Accordingly, any weakness or hesitation in defending your opinion will certainly be exploited. Your credibility is essential; once you’ve lost it, you’ve lost all value to your client.

As an expert witness, you have a story to tell and, in essence, a lesson to teach. The expert witness’ story—her opinion—should have both a unifying theory and a coherent explanation of how the facts and data led to her opinion. In those matters that involve a “battle of the experts,” there will almost certainly be divergent approaches to the interpretation of these facts and to the interpretation of the inevitable gaps between the facts (e.g., it would have been nice to have one more boring or monitoring well in that particularly critical location, etc.).

The expert witness’ story—her opinion—should have both a unifying theory and a coherent explanation of how the facts and data led to her opinion.

### The Preliminaries

*How I did respect you when you dared to speak the truth to me!* —Anthony Trollope, *The Claverlings*

Assuming you are amenable to taking on this kind of work in the first place, and that neither you nor your firm has a conflict of interest with respect to the case, your first impulse on being contacted by an attorney to act as an expert witness is likely to be to accept the retention. Before doing so, however, you might consider taking the time to be reasonably certain that you will be

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One Walnut Street  
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Stantec Consulting Services, Inc.  
T: 978/692-1913, E: bob.dunn@stantec.com

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T: 781/278-3700, E: pmurphy@gza.com

Elena T. Bleakley  
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David A. Chappell  
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T: 508/481-7400  
E: dchappell@chappellengineering.com

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T: 617/482-1000, E: mhall@gza.com

David J. Hatem, Esq.  
Attorney  
Donovan Hatem LLP  
T: 617/406-4800, E: dhatem@donovanhatem.com

Ko Ishikura, PE  
President & Principal  
Green International Affiliates, Inc.  
T: 978/923-0400, E: ko@greenintl.com

Charles Russo  
Marketing/Communications  
VHB/Vanasse Hangen Brustlin, Inc.  
T: 617/924-1770, x1540. E: crusso@vhb.com

Alison Smith  
External Communications  
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Managing Partner  
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T: 617/406-4520  
E: cwaterhouse@donovanhatem.com

Susan Hartman D'Olimpio, IOM  
Association Manager  
The Engineering Center  
T: 617/305-4111, E: sdolimpio@engineers.org

If you would like to contribute an article to *ACEC/MA Insights* or have ideas for new topics, please contact Paul Murphy at 781/278-3700 or pmurphy@gza.com

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# The Rules of Business Have Changed (Maybe Forever?)

By Rich Friedman, President, Friedman & Partners



If you look hard, there are a few silver linings to this economic mess. Let's face it: many A/E/C firms were fat, dumb and happy, riding the wave of an almost insatiable demand for their services. It has not served them well.

Many firms had the luxury of saying no to prospective clients if they were too busy or if the project did not sound appealing. Some firms became lax and sloppy with internal processes, including tracking meaningful marketing and business development metrics and project profitability by project manager and client type. Holding staff accountable for achieving their goals was not always a priority either (if the firm even conducted regular reviews).

... in this extremely competitive environment in which clients have the pick of the lot, it's everyone's job to contribute, in some manner, to the firm's business development efforts ...

It was not uncommon to hear, "Why do we need to develop a marketing/business development plan, conduct business development training or seek to instill a firm-wide business development culture when we have more work than we can handle?"

Well, things have certainly changed! Here are just some examples:

- Everyone and everyone's mother have hired a "Director of Federal Programs" if they did not already have one.
- ENR top 50 firms are chasing small projects that they would have eschewed five years ago.
- Depending on the client sector, the number of proposals submitted for a given project has at least quadrupled. (I recently heard a story about a fairly small higher education rehab project in New York that drew more than 400 submittals.)
- Your typical mid-sized civil engineering/landscape architecture firm targeting residential and commercial developers, whose client base used to be 70% private and 30% public, is now 50/50 or even 30/70 because the cogs of private development have all but stopped turning the construction wheel.

Unfortunately, from what I have observed, although the market has changed, many firms' practices have not. For instance,

- It is still as difficult as ever to adhere to a thoughtful go/no-go process. As long as there is some senior-level proponent, the proposal group gets drawn into another exercise in throwing Jell-O against the wall and seeing what sticks. The rationale I have heard: "Opportunity cost, be damned! At least we're trying to make something happen."
- Firms are still basing their public relations strategy on the same boastful factual events: projects won, people hired and awards garnered rather than positioning the firm as an industry thought leader with respect to trends, challenges and opportunities.
- Firms have difficulty recognizing the importance of having every front-line employee able to coherently articulate the firm's differentiators and the benefits and value conveyed in working with the firm.
- Firms dwell on their percentage of repeat work as a differentiator that somehow sets them apart from competitors. Maintaining a high percentage of repeat clients is not unique; it is what is necessary to stay in business.

## How have the most successful firms adapted?

The most progressive firms have realized that in this extremely competitive environment in which clients have the pick of the lot, it's everyone's job to contribute, in some manner, to the firm's business development efforts, particularly project managers and other project personnel. Contributions should be:

- Customized to an individual's role, business development acumen and career juncture.
- Trackable through specific, quantifiable and measurable goals that are jointly developed between the employee and his/her supervisor during bi-yearly or yearly development discussions.
- Tied to a broader marketing and business development plan for a particular client sector, which should flow from the firm's strategic plan.
- Focused on high return on investment endeavors such as:
  - Leveraging the project delivery process to strengthen client relationships, build new relationships within a client organization and gather intelligence that will make your

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# Federal Contract Compliance—What You Should Know

By Robert J. Dunn Jr., Stantec and Robert L. Mullins Jr., Ph.D., PE, Stantec



*This is the second in a series of Insights articles focused on the special requirements and challenges of doing work in the US federal government marketplace.*



You have your first federal win and the contracting officer has sent you a document with page after page of contract clauses. Now what?

As engineering firms, we do a great job of preparing and providing technical deliverables (i.e., plans, specifications, design analyses, etc.). What many companies new to the federal marketplace do not understand, however, are the deliverables that are required by other contract clauses from the Federal Acquisition Regulations (FAR) and its many agency supplements.

Some contracts may contain over one hundred FAR clauses. It is important to know and comply with the substance of all the FAR clauses, especially since many contracts only refer to them rather than include full explanations. The text of all FAR clauses can be found at [www.acquisition.gov/far/](http://www.acquisition.gov/far/).

## Know the Code

In order to meet your contract requirements and to support your clients in their compliance and reporting efforts, understanding what is required can be just as important as meeting the technical requirements of your scope of work. The constituency for the non-technical deliverables is often different from your day-to-day technical manager or Contracting Officer's Representative (COR).

Following are some examples of FAR requirements that need to be met in order to successfully execute a federal contract.

**FAR 52.204-11—ARRA—Reporting Requirements.** The American Recovery and Reinvestment Act (ARRA) was conceived to stimulate the economy and create jobs. In putting together the legislation, President Barack Obama and Congress committed the federal government to increased levels of transparency as to who received the funding and how it is

spent. Transparency comes at a cost to the funds recipients who are required to report on funds received, work accomplished, and jobs created and/or retained, as well as a variety of other items.

The reporting is done through the [www.federalreporting.gov](http://www.federalreporting.gov) web portal. The data, once refined, are reported out through the [www.recovery.gov](http://www.recovery.gov) web site and are available to the public. The site provides help and offers suggestions to support users once they are on the site; however, it is important to be prepared and understand the nature of the required input items. To illuminate the need for preparation, for example, the web site requires the use of nine-digit ZIP codes. While it seems like a small thing, if you do not have the nine-digit ZIP code for a subconsultant, for instance, you will not be able to successfully complete your report.

Submitting the report is just a first step. After the data are input to the site, the agency is required to review, validate, and, if necessary, comment on your submittal. Some comments may require responses or revisions to your input. Agency personnel are available to provide feedback and answer questions, if needed.

**FAR 52.219-9—Small Business Subcontracting Plan.** Small businesses are critical drivers of the United States economy and are responsible for a tremendous amount of job creation. The federal government is committed to expanding opportunities for small businesses to grow and prosper in the marketplace. If you are a large business and receive a federal contract, there is a good chance that this clause will be included.

The subcontracting plan prepared in response to FAR 52.219-9 outlines the steps a large business must take to incorporate small business team members into the work. It also requires reporting by the large business prime consultant on how it is achieving the plan's goals. In addition, the clause requires the prime to flow down the same requirements to any business subconsultants or subcontractors that may be on the team.

In the past, reporting was done on Standard Forms (SF) 294 and 295. Today, the U.S. Small Business Administration's (SBA) eSRS system

is the reporting vehicle. SBA offers training on the system to help companies comply with these requirements.

**FAR 52.222-54—Employment Eligibility Verification.** In 2008, former President George W. Bush signed Executive Order 13465 that included an electronic employment eligibility verification policy for federal contracts. One goal of this policy is to ensure that the government contracts "only with providers that do not knowingly employ unauthorized alien workers and that have agreed to utilize an electronic employment verification system...." E-Verify is the system adopted by the government.

If this clause is included in your contract, you must enroll in the E-Verify program within 30 days, if you have not already done so. Next, you have 90 calendar days to begin using the system to verify the eligibility of your employees. As the clause states, you must verify this eligibility for "all new hires...who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire...." There is also a requirement to verify the eligibility of employees assigned to the contract. Similar to the small business subcontracting clause, there are flow-down requirements to your subconsultants and subcontractors.

## Conclusions

These three clauses are only a small sample of the many more contract compliance FAR requirements you will need to comply with and understand. As these examples suggest, in the world of federal contracting, it is not enough to provide deliverables that meet or exceed the client's expectations. Success also means meeting the multitude of administrative and non-technical requirements detailed in the FAR clauses included in your contract.

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*Robert Dunn is an Associate with the Environmental Infrastructure group of Stantec Consulting Services Inc. and Co-Chair of the ACEC/MA Communications Committee and Insights Board of Editors. He can be reached at 978/692-1913 or [bob.dunn@stantec.com](mailto:bob.dunn@stantec.com).*

*Dr. Robert Mullins is a Senior Principal in Stantec's Louisville, KY office and corporate Practice Leader for US Federal Contracting. He can be reached at 502/212-5010 or [rob.mullins@stantec.com](mailto:rob.mullins@stantec.com).*

## A SEAT AT THE TABLE

“A Seat at the Table” is designed to provide our ACEC/MA membership with direct insight into the wide range of endeavors, accomplishments and special activities undertaken by the many committees and task forces of ACEC/MA on its behalf. Remember, ACEC focuses on advocating laws, policies and regulations that improve the business environment and on helping member firms improve their business acumen, and can only be successful in this regard through an active membership. So come take “A Seat at the Table!”

### Private Sector Committee

By Heather Scranton, Haley & Aldrich and Christopher Nowak, PE, VHB



The Private Sector Committee (PSC) was established five years ago to develop and promote programs and activities that provide value to current and potential member firms that have some or most of their practice in the private sector. Member firms represented on the PSC include large, mid-size and small firms.



The PSC has a number of broad goals. Perhaps most important is the overarching objective of providing a forum in which private sector-related business issues and information can be discussed and exchanged about existing regulations, laws and pending legislation, market forces and trends, services procurement, and networking opportunities between member organizations. The committee also uses this forum to review and comment on the business aspects of pending regulations and legislation pertaining to the private sector. Some of this discussion is fostered through the programs developed, conducted by the PSC, while others stem from the liaisons the committee creates with other Massachusetts organizations that provide programs and business information pertaining to the private sector.

During 2009 and 2010, the PSC has been focusing efforts on a number of specific issues. First, the PSC is exploring to what extent the

American Reinvestment and Recovery Act, also known as the economic stimulus program, has been helping member organizations and their private sector clients access funding for certain public infrastructure improvements on or near private development projects. The PSC has contacted state officials seeking informal discussions and is conducting a survey of member firms.

Members of the PSC have also collaborated on issues of mutual relevance with the ACEC/MA Government Affairs Committee and Client Sector Committees (Environmental, Building Engineering, Transportation), including new state stormwater regulations, changes to plumbing and energy codes and greenhouse gas regulations.

The PSC has also sponsored several panel discussions on sustainable business practices and green initiatives within the profession and is continuing to focus on this area for ACEC/MA. In 2009, the committee hosted two roundtables on sustainability at The Engineering Center for member firms to address changing client expectations and the business adaptations required to evolve sustainable practices. The first was held in March and focused on how our member firms are “walking the talk” of sustainability (see the June 2009 issue of *Insights* for a recap of the session).

Member firms continued to explore current trends in the practice of sustainability and to

learn from one another at the second roundtable, held in November. Recognizing that sustainability is now integral to the practice of engineering, participants suggested a number of ideas for helping the engineering community further establish itself as a leader in sustainability issues. Considerable discussion centered on how to help members learn about and promote sustainable design practices beyond buildings projects, including infrastructure, energy and environmental remediation engineering. While there is great need to develop sustainable practices in non-building types of projects, firms also see a need for collaborative action to educate owners and the public on sustainability and to improve engineers’ capability to advocate for new or non-traditional approaches to achieve sustainability goals.

The PSC welcomes member comments on any of these issues and will continue considering recommendations on the ideas discussed at the roundtables. See the sidebar below for more details on these ideas.

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*Heather Scranton is a geotechnical Senior Engineer at Haley & Aldrich and is co-chair of the ACEC/MA Private Sector Committee. Heather can be reached at 617/886-7436 or [hscanton@haleyaldrich.com](mailto:hscanton@haleyaldrich.com).*

*Chris Nowak is a Project Manager at VHB/Vanasse Hangen Brustlin, Inc. headquartered in Watertown, MA and is co-chair of the ACEC/MA Private Sector Committee. Chris can be reached at 617/924-1770 or [cnowak@vhb.com](mailto:cnowak@vhb.com).*

### Sustainability Roundtable Ideas for Action

- Develop a “Sustainable Practices Improvement Program” for ACEC/MA member firms willing to adopt specified sustainable principles or goals in their member organizations.
- Establish a communication link and information exchange between ACEC/MA and the national ACEC Committee on Sustainability.
- Facilitate the documentation and sharing of important performance data and best management practices that member firms can use to help educate owners and the public about sustainable practices. Examples include lifecycle costs of energy recovery from solid waste management facilities (i.e., reuse of sludge as fuel) or stormwater reuse management practices.
- Continue to forge relationships with other groups and professional associations committed to sustainability to pursue areas of mutual interest and action.
- Working with the ACEC/MA Awards Committee, promote an ACEC/MA project and/or client award to recognize engineering achievements and client commitments that advance the practice of sustainability.

# Social Media and Networking: Connecting in the Digital Age

Tim Power, PE, Stantec



What is social media? How can it help generate business for an engineering company? ACEC/MA tried to answer these questions at the December Monthly Program.

Three speakers presented at the event, demonstrating techniques and strategies to consider, legal aspects to be wary of, and a new social media marketing program now under way.

Harry Gold of Overdrive Interactive gave an excellent presentation highlighting current social media outlets and marketing techniques. The most popular sites are Facebook, LinkedIn, YouTube and Twitter, but he highlighted many more that can be utilized.

The key point: Social media is about socializing. It is simply not enough to create corporate pages for these sites; it is about making and keeping an ongoing connection with your target audience, and having an on-line conversation. Just as a company tries to become known as an expert in a certain field by presenting white papers at technical conferences or getting published in trade journals, the same company can share examples of their expertise on a monthly, weekly or even daily basis through social media outlets. This helps to solidify their expertise with their audience.

Mr. Gold shared a case study of how his own company moved to the top of their industry by sharing a simple map of social media outlets. This map is quickly found in Google searches, and with proper tracking tools in place; it creates leads for his company. He left the attendees of the program with a challenge to “find your map.”

But as engineers, what is our “map”? What sort of information can we share with the public on

a regular basis that does not compromise our industry secrets? Do we share intricate design details that we spent hours developing for our latest project? Or do we have to limit ourselves to “best practices” that anyone in the industry already knows? It is a fuzzy line that, when crossed, could open a world of liability issues.

Damian LaPlaca of Donovan Hatem addressed some of these questions during his presentation, with copyright infringement being a top concern. When you post information on the Internet, it’s “out there” for the world to see. What is to stop someone else from using this information as their own? And what can you do to prevent it? In

Social media is about socializing. ...It is about making and keeping an ongoing connection with your target audience, and having an on-line conversation.

addition, if you did share an intricate detail from your latest project, does your client know? What does your original contract say about sharing this information? Damian’s best advice for any posting was, “if you don’t want your clients, competition, peers or your mother to see it, don’t post it.”

Questions like these abound about how to apply social media marketing to the engineering industry. Some, however, are not afraid to charge ahead. Matthew St. Pierre from Stacey DePasquale Engineering (SDE) shared how his firm is using Twitter. While their social media marketing program is still in its infant stages, they are one step ahead of many engineering firms. And in an age where the younger generation is always connected, SDE is putting itself in a great position to

become better known than their competition to this generation.

So, social media marketing, then, is just another tool available to help market your company. However, it is not hard to see how times are changing and these kinds of marketing efforts will continue to develop. Newspapers are quickly being replaced by blogs and news web sites. A 30-second, on-line, on-demand video, for instance, is a quicker, more direct way to hear about current events than waiting until the 7:00 nightly news broadcast. More and more professional societies are opting for email newsletters as opposed to paper copies.

Social media may only be another tool for marketing today, but tomorrow, it may be the only tool. As the younger generation begins to establish itself in the work force, these will be their top sources of information. Companies not using these tools could be labeled “old fashioned” or “behind the times,” labels any innovative engineering company would not like to see associated with their name. In addition, the fastest growing population to join Facebook today is not this younger generation—they are already there—it is the Baby Boomers generation, a telling clue about the growing acceptance of social networking.

So the question you should ask yourself now, and the one the speakers at this program really emphasized, is not “Should I start using social media?,” but “How can I use it?”

*Tim Power, PE, is a project manager and civil engineer at Stantec in Boston. He can be reached at 617/523-8103, [tim.power@stantec.com](mailto:tim.power@stantec.com) or by his LinkedIn account: [Timothy Power, PE](#).*

## The Rules of Business Have Changed *continued from page 2*

firm smarter and more focused in the business development process.

- Joining committees of professional associations where your target clientele congregate.
- Giving talks and workshops.
- Getting the firm’s name in print as a subject matter expert and thought leader.

Less time and effort should be invested in making cold calls, placing ads and going after project opportunities for which the firm has done a poor job of pre-positioning.

No longer can firms afford to rely solely on full-time business developers or those few people with the inherent gift of nurturing relationships. While it’s true that you may not want to send “Frank” to an evening networking event, that does not mean that Frank cannot hone his networking, client research and listening skills through training and mentoring.

Imagine the power of your firm’s business development army if, from the top down, you engaged all ground troops in the battle to win

work. The most successful A/E/C firms are already leveraging these challenging times to reshape (or establish) their firm’s business development culture.

*Rich Friedman is president of Friedman & Partners, a marketing and management consulting firm serving the United States and Canadian architecture, engineering, environmental consulting and construction industries. He can be reached at 508/276-1101 or [rich@friedmanpartners.com](mailto:rich@friedmanpartners.com).*

## Water Infrastructure Funding: What to Expect in 2010

By Marina Pereira, CDM



On February 24, 2010, ACEC/MA hosted a program titled “Water Infrastructure Funding: What’s in the Pipeline?,” which brought together federal and state officials to discuss the future of water funding in Massachusetts. Over 60 people from across the industry attended this event, held at the Westin Waltham Hotel. This program was moderated by the Massachusetts Water Resource Authority’s Chief Engineer Charles Button, who has over 40 years of experience in this sector.

Senator James Eldridge of the Middlesex and Worcester district was the first speaker of the night. Senator Eldridge discussed the recently created Water Infrastructure Finance Commission, to which he has been appointed chairman. The goal of this commission will be to try to find better ways to encourage communities to invest in and finance their water and sewer projects. Senator Eldridge took this opportunity to discuss creative ways to get financing to municipalities. The big question of the night was “How do we pay for this going forward without a possible second stimulus funding?” One aspect of the issue is clear: the connection between drinking water and the protection of water supply and distribution

will need to be more evident to the public through future educational programs.

Next, Ron Koontz, Area Loan Specialist from the US Department of Agriculture (USDA),

**The connection between drinking water and the protection of water supply and distribution will need to be more evident to the public through future educational programs.**

lighted up the room with news of Rural Water and Waste Program funding increases. Given the American Recovery & Reinvestment Act (ARRA), this year Massachusetts received six times greater state allocations than in the past. Mr. Koontz discussed grant eligibility, award determination, and the USDA’s application process, as well as successful joint efforts between this grant and State Revolving Fund (SRF) loans to provide funding to qualified projects. The presentation by Mr. Koontz can be viewed at [www.acecma.org/acecma/file/RKoontz.pdf](http://www.acecma.org/acecma/file/RKoontz.pdf).

Fittingly, the next speaker was Joseph Delaney, Deputy Director for the Division of Municipal Services with MassDEP. Mr. Delaney provided audience members with an overview of the

impact of ARRA funds, which contributed \$133 million funding to clean water projects and \$52 million funding to drinking water projects, with total project costs valued at over \$770 million. Audience members applauded Mr. Delaney when he mentioned the success of the ARRA program in Massachusetts. One of Mr. Delaney’s key messages in his presentation was the integral role that SRF will play in moving forward with state financing. The presentation by Mr. Delaney can be viewed at [www.acecma.org/acecma/file/JDelaney.pdf](http://www.acecma.org/acecma/file/JDelaney.pdf).

To provide a federal perspective of available funds, the final speaker was Diane S. Shea, the Director of Environmental and Energy Programs in the ACEC Government Affairs Department in Washington, DC. Ms. Shea noted ACEC’s top environmental priority is to “secure multi-year water infrastructure funding legislation.” Ms. Shea gave the audience insight into progress to date in Washington regarding Stimulus I and a possible Stimulus II/Jobs Bill, as well as other proposed legislation including HR 537-Sustainable Water Infrastructure Investment Act, HR 3202-Water Protection and Reinvestment Act and HR 2521-National Infrastructure Development Bank Act. Ms.

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## Project Manager Risk Management Training

By Joan DeLorey, RPLU, Ames & Gough

On March 10, 2010, the ACEC/MA Risk Management Forum presented a Project Manager Risk Management Training Workshop at the Westin Waltham. More than 50 people were in attendance. Mike Herlihy of Ames & Gough served as moderator and a speaker. He was joined by Anne Leifer of GEI Consultants, David Corkum of Donovan Hatem and Tom Mullen of Poole Professional. The speakers addressed four essential elements of successful project management: 1) client relationships; 2) receivables and scope management; 3) contract provisions; and 4) quality control.

Mike Herlihy pointed out at the beginning that out of a dozen common causes of project management failure identified by one insurer, five could be categorized as due to poor communication, four due to lack of project control, two for lack of documentation and one for failure to negotiate proper contract language.

Mr. Herlihy presented a chart that demonstrated how decisions made early in the project, particularly during design development, had the greatest impact in controlling project costs.

Anne Leifer shared her insight on ways to address and improve client payments. She discussed such tips as learning about your client’s accounts payable procedures so that you can follow them, asking early for payment on overdue invoices, and communicating regularly with your client to stay on top of payments. Ms. Leifer suggested considering “scope creep” your friend, not your enemy. As an example, she discussed how she was able to bill and collect for additional work on projects when the scope grew from owner changes.

Next, David Corkum discussed ways to negotiate key contract provisions. These provisions included payment, ownership of

documents, suspension provisions, standard of care, indemnification and limitation of liability provisions. According to Mr. Corkum, knowing which clients are “problem payers” will help you in the long run. He also recommended against “paid when paid” contract provisions for those serving as subconsultants.

Returning to Mr. Herlihy, the discussion then moved to controlling risk in planning and design. He stated that control was essential to project quality. QA/QC procedures have to be workable and easy to follow, otherwise they might not be followed when designing projects. Careful selection and oversight of subconsultants, including contract coordination, are critical to success. He provided examples of how a lack of oversight led to a multimillion

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## Update on State Ethics Reform and Lobbying Law

In early January, ACEC/MA hosted a program about the new state ethics and lobbying reform law that went into effect on January 1, 2010. During that program, Cheryl Cronin of Cronin & Leonard provided many useful insights into the new law and, in particular, discussed the potential need for members of various ACEC/MA firms to register as lobbyists with the state. The new law changes the definition of lobbying activities and includes many activities that some engineering professionals are involved in every day.

Since that time, ACEC/MA has been working with a coalition of nonprofit organizations to get clarification on the law from the State Ethics Commission. We expect to see more clarifications over the next few months. Meanwhile, we've posted two helpful memos provided by Robert Ruddock, Esq. of Smith, Ruddock & Hayes on the issues:

- For a detailed memo about the lobbying law in general, refer to [www.engineers.org/tec/file/MemoLobbyingRequirements%283-9-2010%29.pdf](http://www.engineers.org/tec/file/MemoLobbyingRequirements%283-9-2010%29.pdf)
- For a memo about volunteer leaders representing the interests of associations and other non-profit organizations, refer to [www.engineers.org/tec/file/MemoLobbyingGoodman.pdf](http://www.engineers.org/tec/file/MemoLobbyingGoodman.pdf)

The Secretary of State's office has additional answers to questions at [www.sec.state.ma.us/pre/prelob/lobfaq.htm](http://www.sec.state.ma.us/pre/prelob/lobfaq.htm)

The Mass. State Ethics Commission link to understand the changes to the State's Conflict of Interest law is [www.mass.gov/?pageID=ethh\\_omepage&L=1&L0=Home&sid=leth](http://www.mass.gov/?pageID=ethh_omepage&L=1&L0=Home&sid=leth)

## ACEC/MA Establishes Presidents Scholarship

### Recognizing Past Stewards, Investing in Future Engineering Leaders

As the American Council of Engineering Companies of Massachusetts celebrates 50 years as the voice of the local engineering industry, the Board of Directors is excited to announce the establishment of the ACEC/Massachusetts Presidents Scholarship. The Presidents Scholarship has been established on the occasion of our 50th Anniversary in tribute to the outstanding leaders whose stewardship has successfully guided five decades of accomplishment.

Marking this significant milestone in our history, 2010 will be a year of *"celebrating the past... projecting the future."* Key to the future will be the next generation of service-minded engineers. To help foster future engineering leaders, the Presidents Scholarship will be awarded to a

deserving student matriculating to or enrolled in an undergraduate engineering program or related field of study who exhibits outstanding leadership, service, scholarship and character, qualities emblematic of our past Presidents.

The scholarship will be administered through the ACEC/Massachusetts Education Corporation, a 501(c)(3) organization. If you would like to help endow the scholarship, tax-deductible donations can be made to the Presidents Scholarship Fund.

If you would like to learn more about the Presidents Scholarship or the Education Corporation, please contact Dave Young, ACEC/MA President, at 617/452-6544 or [youngdf@cdm.com](mailto:youngdf@cdm.com), or Abbie Goodman, ACEC/Massachusetts Executive Director, at 617/305-4112 or [goodman@engineers.org](mailto:goodman@engineers.org).

## Celebrate ACEC/MA's 50TH ANNIVERSARY!

Join your colleagues in celebration on the evening of **WEDNESDAY, JUNE 2, 2010** at the Westin Waltham

We will be  
**"Celebrating the Past...  
Projecting the Future"**

The evening will include recognition of past presidents and Fellows, as well as a preview of the future of the engineering and consulting industry and how things are going to be different going forward.

**Paul Zofnass**, President of The Environmental Financial Consulting Group (EFCG), will be our keynote speaker, giving us his perspective on the future.

EFCG is generally regarded as the leading business and financial advisory firm to our industry. Paul has been quoted over 100 times in ENR and other industry publications, sharing his thoughts and observations on the "engineering and consulting" (e/c) business. EFCG serves as a retained advisor to roughly 40 of the major e/c firms in this industry, and many of our peers. EFCG hosts the annual CEO Conference for the Engineering/Consulting Industry, in New York City, which brings together the heads of roughly 200 of the leading e/c firms from around the world. As part of this conference each CEO completes a detailed financial and operational survey of their respective firms, from which EFCG compiles the most complete database of business and financial metrics for this industry. Paul collates and analyzes that data and provides the participants and his clients with his observations, insights and overview for the industry and its trends, which he continues to update and will be sharing with ACEC/MA in June.

Paul is a *magna cum laude* graduate of Harvard College and an alumnus of both Harvard Law School and Harvard Business School. He began his career with four years at Citibank then moved to Oppenheimer, a major Wall Street firm, where he served as Managing Director in Investment Banking. He started EFCG in 1990.

## VISIT THE ACEC/MA UPDATED WEBSITE!

With the generous help of TEC staff, ACEC/MA has updated its website over the past few months. The site now has updated member firm information, news and event listings, committee information, and more.

If you haven't had the chance, take time to visit [www.acecma.org](http://www.acecma.org) and see what's new at ACEC!

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

*continued from cover*

able to support the client's position—i.e., that you will be able to deliver the opinion that the attorney expects. You may wish to review salient portions of the case file before taking on the assignment, or agree to only perform a preliminary assignment consisting of a review of the file and a conversation with the attorney outlining your impression of the case. This way if you need to exit the case gracefully, you can. Getting involved in a case in which you will be uncomfortable providing testimony is not going to help either you or your client in the long run.

Once you have accepted the case, your first written document will likely be a response to an expert interrogatory or the preparation of an expert report. The format of this document will likely be statutory or one of a few common templates specified by your attorney. Generally, you can expect the document to include the following elements: 1) a statement of who you are and your qualifications to be an expert witness in the case (including education, experience, special training, etc.); 2) your opinions in the case; 3) a discussion of how the facts and data in the case logically led you to your expressed opinion and any assumptions

you made in putting those facts together; 4) a listing of the reports reviewed, exhibits examined, site visits made, etc. that formed the basis of your opinion; and 5) a list of cases in which you have previously testified.

Of course, there are likely to be some "soft" spots in your report, as a few stray facts may not be completely aligned with all of the positions you've taken. However, you should still submit your report since you and your attorney recognize that no opinion is iron-clad; after all, that's why they're opinions. In any event, the hope is that your client's adversary fails to spot any such vulnerabilities.

With respect to this last item, note that opposing counsel is very likely to review your past testimony in similar cases to evaluate whether your position may have changed over time, or (more cynically) from client to client. To borrow from Ralph Waldo Emerson, a foolish consistency may be the hobgoblin of little minds, but inconsistency in professional opinions can lead to some very uncomfortable moments at deposition or in court.

### The Deposition

*You may my glories and my state depose,  
But not my griefs; still am I king of those.*  
—Shakespeare, *Richard II*

Months go by, during which you will probably forget most of the details of the case. And then one day your counsel calls to tell you that either by agreement or in accordance with the local rules, the parties are scheduling expert depositions and you should check your calendar for your availability. As you hang up the phone, you begin to experience some trepidation. You wonder, What will the deposition be like? What should I say? How will I prepare? What should I wear?

Some experts (and their lawyers) believe that your client's case can be won during this pre-trial exercise. That belief is largely false. In fact, this is one of several points during the course of the dispute where just the opposite is true. In cases such as professional malpractice disputes in which a plaintiff's *prima facie* case requires that an essential element be proven by expert testimony, cases can be lost when the methodology the expert used in developing an opinion fails to meet certain threshold standards of reliability and relevance.

The decision as to whether, or when, to challenge the admissibility of an expert's opinion is a strategy tested by a request to the judge, usually at the very beginning of trial. Because your expert report is fundamentally inadmissible at the trial as hearsay, it is your expert deposition transcript (coupled with your responses to any expert interrogatories) that will serve as the basis for opposing counsel's attempt to convince a judge to exclude evidence of your opinion. Thus, when preparing for your deposition, you and your counsel need to make certain that your opinions meet the threshold requirements of your jurisdiction.

As you prepare for your deposition, you should discuss the use of notes with your attorney. Some counsel prefer their witnesses to appear for their deposition "naked" (that is, without any written material). This is a strategy point. Some matters are sufficiently complex, making having some form of notes more practical. Bringing prepared notes may also help you feel more comfortable. However, be forewarned that in almost all situations, your notes will be discoverable, meaning the opposing counsel

## Water Infrastructure

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Shea also discussed the potential Water Resources Development Act wherein ACEC is seeking several policy changes, including replacing the current levee certification process with a risk-based approach to flood protection. The presentation by Ms. Shea can be viewed at [www.acecma.org/acecma/file/DShea.pdf](http://www.acecma.org/acecma/file/DShea.pdf).

The nation's and the Commonwealth's drinking water and sewage treatment systems need massive investments to protect public health and the environment. With the recent creation of the Water Infrastructure Finance Commission in Massachusetts and the help of local legislators, the USDA, MassDEP, the ARRA and proposed federal water infrastructure legislation, we can all work together to find solutions to these very important issues.

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*Marina Pereira, LEED AP, is a project engineer at CDM in Cambridge. She can be reached at 617/452-6360 or [pereinams@cdm.com](mailto:pereinams@cdm.com).*

## Risk Management

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dollar claim and how a lack of proper documentation led to the structural collapse of a wastewater treatment facility.

Tom Mullen discussed controlling risk in construction phase services. He presented an analysis that matched risk to particular phases of the work. The risk drivers that he identified as most important were communication, negotiation, contract terms, project team capabilities and client selection. Mr. Mullen provided an example of how proper documentation of an owner substitution saved one firm from a sizable claim. The session concluded with answers to questions raised by the audience.

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*Joan DeLorey is a Vice President and Partner with Ames & Gough and is located in their Boston office. Ames & Gough specializes in insurance and risk management for design professionals. She can be reached at 617/328-6555 or [jdelorey@amesgough.com](mailto:jdelorey@amesgough.com).*

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

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can ask to have a copy. Another factor to consider is the potential for videotaping. If opposing counsel is permitted (by agreement or otherwise) to videotape your deposition, your apparent reliance on written notes may convey the wrong image to the viewer.

The day of the deposition arrives and as the court reporter begins to swear you in, you feel butterflies in your stomach. Not to worry—chances are your adversary's lawyers are equally nervous because you know more than they do in this field of study. Remember, you are on your own home turf here. The "cramming" the opposition has done for this moment should be no match for your years of experience and education.

At this point, you should consider the various reasons why counsel wants to depose you in the first place. To the unsuspecting expert, the reason is simply because the attorney wants to learn what you intend to say. To believe that is the only reason, however, would be a huge miscalculation. In fact, there are several very important strategies that counsel may pursue during your deposition, and your ability to identify which strategy is being employed and appreciate the rationale supporting each tactic could mean the difference between a successful day and a disastrous transcript.

During the expert deposition, the most common goal of trial counsel is to memorialize the basis of your opinion so as to later attack one or more of these elements at trial. As any expert knows, an opinion is only as strong as the foundation upon which it is based. Thus, if your client's adversary can successfully negate an essential element supporting your opinion, your testimony will be reduced to a mere pile of rubble.

Another tactic employed by counsel involves your own credibility. Counsel will want to test

your bias by exploring opinions you have held in previous cases, what types of clients you have testified for in the past, what industries or professions you may typically represent, etc. To the extent applicable, counsel may also wish to address your competency to render an opinion on the subject matter. Questions following this strategy will focus on the relationship between your expertise and the issue you've been asked to comment on.

Another important strategy in expert depositions involves figuratively "freezing" the expert's testimony. The notion of locking an expert into a pre-defined storyline can be a useful tool when attempting to exclude any additional opinions (or the basis for same) that you may intend to offer at trial. Trial attorneys do not like surprises, and the advantage of being able to build a fence around the testimony of an adverse expert can not be understated.

Trial counsel may also wish to use your expertise to test the theory of its own expert. This technique can be useful in situations in which your client's adversary has a thin case and is looking to explore theories that you might likewise agree with. To the extent that opposing counsel can get you to agree with their expert's opinion, the basis supporting it or the methodology used to develop it, they are one step closer to persuading the trier of fact.

Sometimes, when your client's adversary has little intention of taking the case all the way to trial, counsel will simply use your deposition as a frontal attack to move the parties closer to settlement. This transparent technique will be obvious as counsel attempts to put key "sound bites" in your mouth.

During your deposition, you should nevertheless be prepared to respond to the typical array of

questions—not necessarily in what you would consider a rational order—from the deposing counsel. What opinions do you expect to present at trial? How did you reach them? What assumptions did you make in order to reach those conclusions? Why did you make those assumptions and not others? What facts or authoritative sources did you rely upon? Who provided you with materials to review? Did you ask for anything that you didn't receive? What facts or authorities did you consider and reject? Why? Are there other authorities in the field that have adopted your methodology? Who are they? Explain the approach that you used to address this issue.

Of course, as with any assignment, preparation is the key to confidence. Master the answers to these questions and you will convey the confident image that you were hired to exude.

In our next article, we will address the "trial" aspects of your commission, touching on the elements and tactics used in direct and cross-examination.

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*Larry Feldman is a Senior Principal working out of the Norwood and Boston offices of GZA GeoEnvironmental, Inc. His work is focused primarily on the assessment and remediation of sites contaminated by oil and/or hazardous material, and related litigation support. He is an appointee to DEP's Hazardous Waste Site Cleanup Advisory Committee, and is a frequent lecturer. Larry can be reached at 781/278-3807 or [lawrence.feldman@gza.com](mailto:lawrence.feldman@gza.com).*

*Joe Barra is a partner in the Construction Law Group in the Boston office of Seyfarth Shaw, LLP. Joe's practice focuses on construction and environmental law and represents design professionals, contractors, materials suppliers, owners (public and private) and others who work in the construction industry. Joe can be reached at 617/946-4890 or [JBarra@seyfarth.com](mailto:JBarra@seyfarth.com).*

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## Announcing a New Option Under the ACEC Retirement Trust

You and your plan participants need to know their retirement income is guaranteed. Prudential's innovative fund option, Prudential IncomeFlex® TargetSM, combines the desired features of defined contribution and defined benefit plans:

- Simplicity of a target-date fund
- Protection against market downturns for retirement income

- A "pension-like" guaranteed lifetime income stream
- Access to principal
- Simplified investing solution through the GoalMaker® asset allocation program offered by Prudential Retirement
- Oversight by the ACEC Board of Trustees

Prudential IncomeFlex Target is available to

ACEC Retirement Trust Plans beginning April 1, 2010. To learn more about the benefits of the ACEC Retirement Trust, contact Nancy Barrette of Wells Fargo Advisors, LLC at [nancy.barrette@wellsfargoadvisors.com](mailto:nancy.barrette@wellsfargoadvisors.com) or 800/521-9463.

For the promotional flier go to [www.acecma.org/acecma/file/ACECRTIncomeFlex.pdf](http://www.acecma.org/acecma/file/ACECRTIncomeFlex.pdf).

## NEW MEMBERS

### Hoyle, Tanner & Associates, Inc.

18 Lyman Street  
Westborough, MA 01580  
Phone: 508/366-0772

[www.hoyletanner.com](http://www.hoyletanner.com)

### Michael J. Schrader, PE

Senior Project Manager  
[mschrader@hoyletanner.com](mailto:mschrader@hoyletanner.com)

## UPCOMING EVENTS—SAVE THE DATE

### ACEC/MA 8th Annual State Markets Conference

Wednesday, April 14, 2010

Westin Waltham

[Click Here to Register Online](#)

### The Engineering Center 12th Annual Leadership Dinner

Honoring Michael S. Dukakis, Former Governor of Massachusetts

Wednesday, May 12, 2010

The Four Seasons Hotel, Boston

[Click Here for More Information](#)

### ACEC/MA Sustainability Program

Wednesday, May 19, 2010

Northeastern University, 1155 Tremont Street, Boston

[Click Here for a Registration Form](#)

### ACEC/MA 50th Anniversary Celebration

Wednesday, June 2, 2010

Westin Waltham, 5:30–9:00 PM

### 18th Annual TECET Golf Tournament

Monday, June 21, 2010

Charter Oaks Country Club, Hudson

[Click Here for More Information](#)

### ACEC/MA Committee/Forum Meetings

Check the web calendar at [www.acecma.org](http://www.acecma.org) for updates

## ACEC/MA 2009–10 Board of Directors

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David F. Young, PE, Vice President  
CDM  
T/F: 617/452-6544, E: [youngdf@cdm.com](mailto:youngdf@cdm.com)

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Nitsch Engineering  
T: 617/338-0063, x220, E: [lbrothers@nitscheng.com](mailto:lbrothers@nitscheng.com)

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Mary B. Hall, PE, Principal  
GZA GeoEnvironmental, Inc.  
T: 617/963-1001, E: [mhall@gza.com](mailto:mhall@gza.com)

### VICE PRESIDENT

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Senior Vice President  
Meridian Associates Inc.  
T: 978/299-0447, x202, E: [soneill@meridianassoc.com](mailto:soneill@meridianassoc.com)

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James A. Pappas, PE, Senior Principal  
Stantec Consulting Services Inc.  
T: 617/226-9227, E: [jim.pappas@stantec.com](mailto:jim.pappas@stantec.com)

### TREASURER

Judy S. Eburn, Vice President/Controller  
GEI Consultants, Inc.  
T: 781/721-4062, E: [jeburn@geiconsultants.com](mailto:jeburn@geiconsultants.com)

### SECRETARY

David A. Bohn, PE, Principal  
VHB/Vanasse Hangen Brustlin, Inc.  
T: 617/924-1770, x2907, E: [dbohn@vhb.com](mailto:dbohn@vhb.com)

### DIRECTORS

Ko Ishikura, PE  
President & Principal  
Green International Affiliates, Inc.  
T: 978/923-0400, E: [ko@greenintl.com](mailto:ko@greenintl.com)

Brian W. Lawlor, PE, LEED AP

Senior Vice President  
Symmes Maini & McKee Associates  
T: 617/520-9224, E: [blawlor@smma.com](mailto:blawlor@smma.com)

Joel S. Mooney, PE, LSP

Senior Vice President  
Haley & Aldrich, Inc.  
T: 617/886-7435, E: [jmooney@haleyaldrich.com](mailto:jmooney@haleyaldrich.com)

Richard F. O'Brien, PE, Vice President

Parsons Brinckerhoff  
T: 617/960-4919, E: [obrien@pbworld.com](mailto:obrien@pbworld.com)

Suzanne L. Pisano, PE  
Senior Associate/Compliance Specialist  
GeoInsight, Inc.

T: 978/692-1114, E: [slpisano@geoinc.com](mailto:slpisano@geoinc.com)

William J. Reed, PE, Sr. Vice President, Principal

Fay, Spofford & Thorndike  
T: 781/221-1118, E: [wreed@fstinc.com](mailto:wreed@fstinc.com)

Michael J. Scipione, PE, President & CEO  
Weston & Sampson Engineers, Inc.  
T: 978/532-1900, E: [scipionm@wseinc.com](mailto:scipionm@wseinc.com)

### NATIONAL DIRECTOR

William M. Kelleher, CFO/Principal  
S E A Consultants Inc.  
T: 617/498-4610, E: [william.kelleher@seacon.com](mailto:william.kelleher@seacon.com)

### LEGAL COUNSEL

David J. Hatem, PC  
Donovan Hatem LLP  
T: 617/406-4800, E: [dhatem@donovanhatem.com](mailto:dhatem@donovanhatem.com)

### ACEC NATIONAL EXCOMM CONTACT

Robin S. Greenleaf, PE, LEED AP, President  
Architectural Engineers, Inc.  
T: 617/542-0810, x102, E: [rgreenleaf@arcengrs.com](mailto:rgreenleaf@arcengrs.com)

### TEC STAFF CONTACTS

Abbie R. Goodman, IOM, ACEC/MA Executive  
Director

The Engineering Center  
T: 617/305-4112, E: [agoodman@engineers.org](mailto:agoodman@engineers.org)

Elizabeth Tyminski, COO  
The Engineering Center  
T: 617/305-4127, E: [etyminski@engineers.org](mailto:etyminski@engineers.org)

Susan H. D'Olimpio, IOM, Association Manager  
The Engineering Center

T: 617/305-4111, E: [sdolimpio@engineers.org](mailto:sdolimpio@engineers.org)