

## New Construction for a New Day

by Roger L. Price, Esq., and Mark L. Johnson, Esq., of Seyfarth Shaw

### PROJECT AND CLAIM ADMINISTRATION UNDER NEW AIA AND CONSENSUSDOCS CONSTRUCTION FORMS

Last fall, two organizations, one well known and established and one recently formed, published a series of contract forms for the construction industry. In releasing its 2007 revised edition of its popular series of project forms, including the widely utilized A201™ General Conditions of the Contract for Construction, the American Institute of Architects (AIA) expressly acknowledged considerable industry concern about terms in the A201-1997 form with respect to financial matters and dispute resolution, among other items. Consequently, it attempted to refine its product in order to “fairly balance divergent interests, and accurately reflect the modern construction industry.”

While AIA has been publishing and revising its forms every ten years for many decades, within the last few years a consortium of owner, contractor and trade groups joined together to develop and publish what they consider to be “contract documents based on best practices and proper risk allocation, for the benefit of organization members and the construction industry at large.” The end result of the effort are documents branded ConsensusDOCS™\*.

Among the endorsers of ConsensusDOCS are owner associations such as Construction Owners Association of America, Inc. (COAA), National Association of State Facilities Administrators (NASFA), and The Construction User Roundtable (CURT); contractor associations like Associated General Contractors of America (AGC), and Associated Builders and Contractors, Inc. (ABC); a dozen subcontractor associations, surety associations such as National Association of Surety Bond Producers (NASBP) and The Surety & Fidelity Association of America (SFAA), and others, e.g., Construction Industry Roundtable (CIRT) and Lean Construction Institute

(LCI). Not surprisingly, AIA has not endorsed ConsensusDOCS, nor at this time, have Engineers Joint Contract Documents Committee (EJCDC), Construction Management Association of America (CMAA), or Design-Build Institute of America (DBIA).



This article will compare certain features of the ConsensusDOCS form for a lump-sum project, namely the ConsensusDOCS 200 form, with the new AIA A201-2007, focusing on matters of project and claim administration. Needless to say, given the many changes made by AIA and the new materials offered by ConsensusDOCS, owners, contractors and others involved should consult with competent construction counsel when drafting or reviewing contractual obligations.

### PROJECT ADMINISTRATION

There are clear differences in tone and approach between the AIA and ConsensusDOCS forms. ConsensusDOCS emphasizes the importance of the Owner-Contractor relationship, literally invokes language of “harmony and cooperation,”

### Special Interest Topics

- AIA A201 vs. ConsensusDOCS 200
- Integrated Project Delivery
- How E-mails Can Be Dangerous
- Expert Profile
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stresses the desirability of direct communications and places the burden of dispute resolution on the principal parties themselves. AIA injects a third party into the administration of the project and into the dispute resolution process. Section 4.2.1, for example, provides now as it did previously that the “Architect will provide administration of the Contract . . .” But AIA also allows for someone other than the Architect, a person called the “Initial Decision Maker” (IDM) to be involved. The IDM is defined in Section 1.1.8 as “the person to render initial decisions on Claims . . . and certify termination of the Agreement . . .”

The utilization of an Initial Decision Maker was reportedly made by AIA in response to Owners’ and Contractors’ complaints that they did not always prefer to have the Architect serve in the role of the initial decision maker. In the event that the parties do not select and IDM, the default choice is for the Architect to serve as the IDM, consistent with prior practice. For the role of the IDM in alternative dispute resolution processes, see below.

### THIRD PARTY CLAIMS AND PROGRESS PAYMENTS

Both AIA (§ 9.5) and ConsensusDOCS (§ 9.3.7) allow Owner to withhold payment if a third party files a claim, such as a mechanics lien. They differ, however, in the determination of what is sufficient security to require the eventual release of those funds.

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AIA empowers Architect to withhold funds until Contractor provides “security acceptable to the Owner,” but provides no guidance as to what is sufficient security, other than leaving it up to Owner’s, or Architect’s, seemingly unilateral determination.

ConsensusDOCS, on the other hand, requires the release of funds upon the furnishing by Contractor of adequate



security that is “sufficient to discharge” such claims, which provides more guidance than AIA and, arguably, reduces the arbitrariness in the determination of what is acceptable security to Owner.

### RETAINAGE

Similarly, both AIA and ConsensusDOCS address retainage, but with different approaches. Under the AIA approach (§ 9.8.5), retainage is not to be released until the achievement of substantial completion of the entire Work of the project, and only then as to designated portions of the Work if there still remain parts that are not substantially complete. Thus, as to early finishing trades and other subcontractors, whose work has been accepted or as to which Owner has made no complaints, Owner may still withhold the applicable retainage until the end of the project, when substantial completion is achieved.

ConsensusDOCS (§ 9.2) allows Owner to release retainage applying to the work of early finishing trades and other subcontractors once their work has been accepted. Once the overall Work of the project is 50% complete, then Owner is not permitted to withhold any additional retainage. ConsensusDOCS believes that its approach allows for payment to flow in a more fair and equitable manner on the project.

### LIQUIDATED DAMAGES

AIA (§ 8.3.1) provides that the Architect, in the event Contractor is delayed in its performance, may determine that the Contract Time should be extended. AIA A201-2007 does not, however, contain a provision authorizing, or disallowing, liquidated damages for either Owner or Contractor. Section 8.3.3 makes clear that the allowance of a contract extension does not necessarily bar such damages, should the parties agree to them.

ConsensusDOCS (§ 6.5) gives the Owner and Contractor an express opportunity to provide for liquidated damages instead of other damages that may be incurred because of a delay.

And it does so both in the context of Substantial Completion as well as Final Completion. Because this provision allows for the election of liquidated damages, it must be read in connection with the waiver of consequential damages found in Paragraph 6.6. On that issue, there are some competing concerns among the ConsensusDOCS member organizations. AGC, for example, has expressed concern that having both Owner and Contractor waive consequential damages, but allowing Owner to recover liquidated damages is not an even trade-off, in that liquidated damages are typically intended to compensate Owner for its actual delay damages, such as lost revenues or income, which also are a type consequential damages. Thus, AGC reasons, allowing Owner to recover lost

revenues or income in the form of liquidated damages, but then requiring both Owner and Contractor to waive such in the form of consequential damages, may actually result in Contractor giving up more rights than Owner.

### CONSEQUENTIAL DAMAGES

In general, consequential damages are those that do not flow directly and immediately from a breach of contract (such as the direct costs of repair or for extras), but arise rather from some other consequence or result of the breach (such lost income or extended office overhead).

AIA provides for a mutual waiver of consequential damages (§ 15.1.6) because, according to it, such a waiver serves the purpose of avoiding large, complex claims that are oftentimes uninsurable. AIA reasons that if they are aware that consequential damages are unrecoverable, the parties can plan accordingly.

ConsensusDOCS provides for a limited mutual waiver of consequential damages (§ 6.6), although, again,

**“ConsensusDOCS™ (§ 6.5) gives the Owner and Contractor an express opportunity to provide for liquidated damages instead of other damages that may be incurred because of a delay.”**

there are significant competing concerns among the ConsensusDOCS member organizations. As noted above regarding liquidated damages (§ 6.5), AGC believes that a waiver of consequential damages is only truly mutual where Owner is not entitled to recover liquidated damages. Owner groups frequently complain that their losses due to consequential damages, such as for lost income, typically dwarf the amounts of Contractor’s consequential damages, such as home office overhead.

Owners reason, therefore, that a waiver of consequential damages is not truly

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## INTEGRATED PROJECT DELIVERY: EFFECT ON LIABILITY AND RISK EXPOSURE OF DESIGN AND CONSTRUCTION PROFESSIONALS

by Bruce M. Cohen, Esq., and Julia V. Lee, Esq., Cohen & Lord, a P.C.

Integrated Project Delivery (IPD) is a new paradigm that is capturing the attention of the construction industry. If adopted, it promises to radically change the way design and construction professionals do business.

IPD is a project delivery approach that integrates people, systems, business structures, and practices into a collaborative process aimed at reducing waste and optimizing efficiency in all phases of design and construction. A key element of this process is early, open, and collaborative participation by designers, constructors, and fabricators beginning when the project is first conceptualized and continuing throughout its full life cycle.

The IPD model involves two contractual agreements: an internal contract between the members of the project team, which includes architects, engineers, and other design professionals, as well as general contractors and other major project participants, assembled at the outset of the project, and an external contract between this team and the project owner.

The project team contracts with the owner as a single entity, or, alternatively, member by member. Internally, each team member signs what has been called an “alliance” agreement. Although the degree of “alliancing” varies from one project to another, generally team members agree to share risk and profit (or loss) for total project performance and to be jointly and severally responsible for all provisions of the prime contract with the owner.

Under true “alliancing” agreements, such as the one that was used in the construction of the National Museum project in Canberra, Australia<sup>1</sup>, team members assume greater risks in case of delayed completion or overrun but expect reward through performance bonuses and a share of budget savings. A striking feature of this model is that the internal agreement usually has a “no blame” clause: if one team member makes a mistake, all pay for it and members do not sue each other absent a “willful default.” Typically, “willful default” is

defined to exclude errors of judgment, mistakes, acts, or omissions, whether negligent or not, that are made in good faith by an alliance member<sup>2</sup>, which, of course, constitutes the majority of claims that project participants may have against each other.

Compared to its Australian counterpart, the American IPD model should properly be called “alliancing lite.” Under the American model of integrated project delivery, each team member is guaranteed reimbursement of its overhead and direct costs and receives (hopefully) a share of the “savings” or “profit,” which is calculated at the project level at the end of the project and divided based on a preset formula.

As an alternative to a “no blame” clause, American integrated agreements typically provide for the establishment of a multi-tiered system of risk sharing for both negligent and non-negligent design errors and omissions. The first tier is comprised of “contingency funds,” which can be shared by designers and contractors and are paid out without proof of negligence. Above the “contingency funds,” a designer or a contractor is responsible up to a pre-negotiated cap, without proof of negligence. Above these combined amounts, proof of negligence is required.

To facilitate integration into the team and the anticipated level of collaboration, the IPD model contemplates that major consultants and subcontractors will be selected during schematic design. Early participation by key participants means that important decisions—and any necessitated design changes—are made when they result in maximum financial savings. Ideally, this should dramatically reduce the need for RFIs and Change Orders because



many issues are resolved well before the beginning of the actual construction.

Early participation is largely made possible through the use of the new collaborative design technologies, such as Building Information Modeling, which replaces the traditional two-dimensional drawings with multi-dimensional virtual models. BIM allows unprecedented coordination among all stakeholders because owner, architect, engineer, contractors and subcontractors all have access to the model, at the same time if need be, which allows great efficiency and reduces the error rate at the design stage. That means that errors and omissions, whether negligent or expected, which wouldn't normally be discovered until actual construction was under way, now reveal themselves on screen in the studio beforehand. The enhanced opportunity for coordination and communication between designers and builders is by itself a great risk management tool.

By venturing into the world of collaborative process and virtual modeling, design and construction professionals are facing new kinds of risk exposure. Working collaboratively and on the Internet can expose firms to media liability and even copyright or libel claims but the problem is that, currently, there is no corresponding insurance coverage available. There are separate issues relating to security: a firm that hosts a virtual model on its server (perhaps the same one it uses for other purposes, such as personnel files or client data) and allows access for collaborative

## Expert Profile: David J. Mitchell, PE, PSP

**David Mitchell** is a Senior Claims Analyst in URS' San Francisco office. He has 30 years of experience in the engineering and construction management of a wide range of complex projects, including power generating facilities, hospitals, correctional facilities, highways, bridges, water and wastewater treatment plants and educational facilities.

Mr. Mitchell holds a business administration degree from the University of California, Berkeley along with an electronic engineering degree from the Ohio Institute of Technology. He is a licensed Professional Engineer in both California and Pennsylvania and is a certified Planning and Scheduling Professional.

His claims consulting experience includes the review and analysis of project schedules, their implementation and use as both a project controls tool and a dispute resolution mechanism as well as the assessment and quantification of labor inefficiencies and the identification of the root causes of such losses of productivity. Mr. Mitchell has provided expert testimony in these areas in court, arbitration and mediation settings.

In addition, he has provided clients with a range of services focused on the effective mitigation or resolution of contract disputes, including process evaluation and training program development and implementation.



David J. Mitchell, PE, PSP

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mutual or equitable because they are giving up more rights than Contractors. Consequently, COAA believes that allowing Owners to recover liquidated damages is a fair and balanced approach, and enables them to minimize some of the risks attendant to a waiver of consequential damages.

### TIME LIMITS ON CLAIMS

AIA has eliminated from the prior A201-1997 version language that triggered the limitation period upon one of three events: substantial completion, final completion, or to the date of warranty work corrected, which allowed for the possibility of shortening limitation periods to bring claims, such as for latent defects against Contractors, under applicable state-law by eliminating the “discovery rule” for bringing claims.

AIA now links the right of the parties to bring claims with the requirements established by governing law, so that any applicable discovery rule will still apply. And AIA (§ 13.7) imposes a statute of repose that cut-off's all claims ten (10) years from the date of substantial completion. That period may be less than allowed in some states. Failure to commence claims in accordance with this provision results in a waiver of those claims.

ConsensusDOCS does not address time limits for claims. Similar to AIA,

it links the right of parties to bring claims with the requirements established by governing law, including any applicable discovery rule. Unlike AIA, however, ConsensusDOCS does not impose any contractual statute of repose, which would serve to bar all claims as of a date certain. Only if applicable law imposed a statute of repose would such an automatic cut-off date exist.

### ALTERNATIVE DISPUTE RESOLUTION

Both AIA and ConsensusDOCS require the parties to pursue some form of alternative dispute resolution as a condition precedent to either final arbitration or litigation. The procedures articulated by each, however, demonstrate a difference in philosophy and approach.

AIA requires that an initial assessment and proposed resolution of the dispute be made by a third-party serving as the initial decision maker (IDM) – either the Architect or some third-party whom Owner and Contractor are required to designate at the time of contracting in the Owner-Contractor Agreement. (*See, e.g.*, A101-2007, § 6.1.) If they fail to do so, then Architect serves as the default IDM. The IDM's initial decision is final and binding, unless either Owner or Contractor elects to challenge it.



Note that if one of the parties is pleased with the IDM's ruling, it may force an early binding resolution by demanding the other party to immediately file for mediation, the failure of which constitutes a waiver of that right. If a challenge to the IDM's ruling is pursued, it must initially be in the form of mediation. Following mediation, the parties can pursue binding dispute resolution of the ruling through either arbitration or litigation, which they must, again, pre-select at the time of contracting in the Owner-Contractor Agreement. (*See, e.g.*, A101-2007, § 6.2.) If they fail to so designate, litigation is the default choice.

While AIA allows for the introduction of a third person in the decision making process, it provides no practical guidance for the selection or operation of such a person, leaving open many, many questions.

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For instance:

- *What, if any, qualifications should the IDM have?*
- *How, if at all, is the IDM to be compensated?*
- *What, if any, immunity will be provided to the IDM?*
- *What, if any, insurance will be required of the IDM (and can it secure any)?*

Each of these questions, in turn, raises others, rendering the entire concept somewhat problematic.

ConsensusDOCS, on the other hand, places initial responsibility for resolving a dispute in the hands of parties themselves. It requires, in the first instance, that they try to mitigate their claims by communicating directly before claims and expenses escalate. This process, called the direct-discussions procedure, may ultimately lead to senior executives of the parties meeting to endeavor to reach a resolution.

This requirement reflects ConsensusDOCS's view that the parties themselves, who will ultimately be directly impacted by the resolution, must initially try to work together to reach a resolution of the dispute, as opposed to vesting that duty to a third-party who may not be aware of the intricacies of a dispute or subject to the same business pressures as the parties themselves. If no resolution is reached, then the parties may either pursue mediation or some other mitigation procedure as a condition to final binding dispute resolution.

Notably, if some other mitigation procedure is selected, then the non-binding finding that is yielded can be introduced at a subsequent binding arbitration or litigation. Finally, similar to AIA, ConsensusDOCS affords the parties themselves the freedom to choose either arbitration or litigation as the forum in which to finally resolve the matter. ■

*\*A201 is a trademark of the American Institute of Architects. ConsensusDocs is a trademark of ConsensusDocs LLC.*

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## Integrated Project Delivery

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work should not do so without taking additional steps to protect itself against hackers and other Internet threats.

Perhaps the most perplexing unresolved questions arise out of the shift to a collaborative, "no blame" culture that the integrated project delivery signifies. Our legal system is based on the idea of definite responsibility, in which each participant knows what it is responsible for and what is the responsibility of another. When projects fail, we try to apportion responsibility and liability along those lines, and our traditional contract documents are built around the same concept of trying to define the edges of apportioned liability. Whether fully contemplated or not, edges of apportioned liability disappear on an integrated project. One of the most pressing problems—and one on which AIA is currently working—is the fact that there currently exists no generally accepted legal or contractual framework within which to encourage the full implementation of the integrated project delivery.

Unlike the traditional design-bid-build model, with integrated project delivery design professionals' exposure to liability is potentially increased because of the participation in the team. Even having a "no blame" agreement or some type of release from team partners does not entirely alleviate this concern because most claims originate with the owner.

From a risk management standpoint, design and construction professionals should have indemnity arrangements with team partners, but to the extent indemnity obligations inhibit collaboration between the parties, they should be approached with caution.

While broad indemnities (where enforceable) can be efficient risk allocation mechanisms, narrower indemnities tailored to the generation or transfer of electronic data might create tension and invite disagreement. Tailored indemnities do not provide the same efficiencies as broad indemnities because parties may argue over whether indemnification is owed and have an incentive to dispute the issue as the stakes are higher.

On the other hand, burdening one party with the responsibility to defend and indemnify all others in connection with any loss arising from the creation,

transfer, receipt or use of electronic data may be unrealistic, unless the risk is fully insurable and agreement can be reached on who bears the cost of coverage. In the end, the guiding principle when developing contractual arrangements between the parties in an IPD environment must be to develop arrangements that foster the collaborative working relationships so crucial for achieving the full benefits of Integrated Project Delivery.

Notwithstanding these unresolved questions, IPD attracts design and construction firms because of the enhanced financial incentives which are funded by the cost savings generated by the efficiencies of integration. Moreover, IPD offers firms the ability to select team partners, and, because of the joint and several responsibility and the "no blame" provisions, there is an incentive to select partners that are best for the project. Working with partners that one trusts, as opposed to the lowest bidder selected by the owner, is a great risk management tool, not to mention a sensible way of doing business.

The IPD model fosters long-term relationships and emphasizes reputation, making a firm more likely to remain committed to the team approach even if the project goes poorly. Realistically, not every firm can make this kind of commitment, just as not every project should be integrated. But, at its best, IPD offers a more efficient, cost-effective, outcome-oriented and less adversarial way of doing business, which certainly warrants excitement. Importantly, the change in the industry is being driven by top-tier design and construction firms and sophisticated owners all preparing for, if not demanding, integrated delivery on their projects. Under these circumstances, can anyone afford not to get onboard? ■

<sup>1</sup> Despite complexity and time constraints, the National Museum project was successfully completed within a fixed budget and opened on schedule on the 100th anniversary of the Australian Federation.

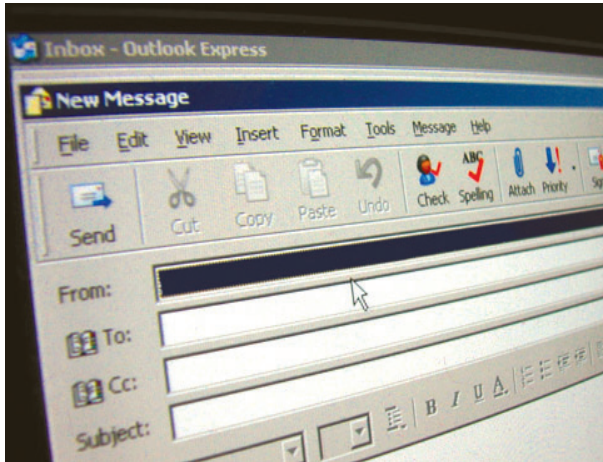
<sup>2</sup> See Chris Noble, *Can Project Alliances Change the Way We Build?*, *Architectural Record*, July 2007.

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## A Path to Disaster: How E-mails Can Be Dangerous

**Industry managers must pay close attention to the content of their e-mails and educate employees about what not to write and send**

by Robert S. Peckar, Esq. of Peckar & Abramson



As attorneys who read through thousands of e-mails in the context of pending lawsuits, we see the potentially dangerous, indiscriminate use of e-mail every day. Consider these four examples:

- “Bill, our guys are screwing up something terrible here. If we don’t get them into first gear, this project is going to be delayed several months and we’ll be at fault.” -John

“John, I know. I reported this up the line, but no one is paying attention. Everyone is busy working on marketing that big new stadium job, and I can’t get their attention. I’ll try again and let you know.” -Bill

- “Jane, these financial reporting records are wrong! Someone in the field must be putting costs into the wrong categories. Do you think the project staff is covering up something?” -Dave

“Dave, I’m afraid I have the same concerns. This project was bid pretty tight and the project super has been complaining from the get-go that he can’t make the numbers on carpentry and concrete. My guess? He’s spreading the costs around to make it look like he overcame the problem. I’ll try to dig deeper.” -Jane

- “Warren, I’ve about had it with this damned electrical sub. I can’t get him to produce, no matter what. We probably should default him right now, but I want him to put another million in work-in-place, then we can default him and not pay him any more money. That will leave us with a pot to try to get his work done (maybe even leave some for us!). If that doesn’t work, we can always look to his surety, right?” -Jay

“Jay, delete your e-mail immediately. This is not the kind of thing we should be talking about in e-mail. This could prove that we are plotting to screw this guy’s surety, and our lawyers wouldn’t be too happy with that. Get rid of this now. Talk to you later.” -Warren

- “Dwight, did you hear about Gwen? I heard she had quite a fight with Doug [her boss] this a.m. Called him an ‘a-hole’ and accused him of lying about her performance to the higher-ups. Everyone knows she’s a jerk and has the job because she’s a female—Doug told me so himself. She looks good in a hard hat, though, don’t she?” -Tony

“Tony, those jeans look pretty good too—nice sweater last week. Hope she stays on. At least she’s better looking than you!” -Dwight

These are, of course, just “teaching examples” of dangerous e-mails, but typical of what we find in the e-mail records of many companies.

The first exchange could be very damaging in a trial about the contractor’s performance. What if Bill

is wrong? What if people are listening up the line and, later, some changes correct the problem, but no one writes an e-mail confirming that? Will the jury believe the message: “No one is paying any attention up the line,” or will they believe the trial testimony of the project executive who says he really was paying attention and his subordinate was simply wrong in the e-mail?

**Remember this basic concept: There is no such thing as a confidential e-mail.**

In the second exchange, the contractor’s attempt to prove his economic damages is going to be in real jeopardy, thanks to these e-mails. The third exchange shows that at least one person knew it was not wise to express such views in an e-mail. However, his sentiment is too little too late. Deletion of the e-mail exchange will not make it go away from the computer hard-drive and back-up systems, so it will be found, and then the mere fact that it was deleted will deepen its damage.

The fourth exchange actually sets up the perfect sex discrimination case for Gwen and will probably cost the company or its insurer a ton of money. But what if this exchange is just a “testosterone duel” between two male chauvinists outside the mainstream of the company’s culture and whose expressions have created the opposite impression—at least in writing?

### Writing or Talking?

The four imaginary e-mails above raise some important questions: Is an e-mail a letter, a memo or a conversation? Do people really discern any difference between “writing” and “talking” in an e-mail? Often it is the alluring simplicity of “talking” in e-mail that catches the unwary. The careless and foolish

## A Path to Disaster: How E-mails Can Be Dangerous

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language used in e-mails suggests that the boundary between the written and spoken work is lost in the process of e-mail communication. That's why an intelligent person who would never write that letter to the electrical subcontractor in the third example above—or even file it as a memo—says, “we are plotting to screw this guy's surety...”

Yet we see examples of that kind of communication every day in e-mails and, if you will think about it, so do you. Perhaps more frightening is the lack of understanding in the business world about how easily people's e-mail-recorded thoughts, uninformed concepts and emotions can be used against them and their company.

### Confidentiality

So let's start with a basic concept: There is no such thing as a confidential e-mail. While an e-mail between a lawyer and client is probably privileged and protected from scrutiny, a prudent person must assume that all other e-mails and their attachments can be examined by anyone with a legal right to do so. That could include e-mails in an inbox or outbox, sent files, deleted

e-mails and those placed anywhere else.

E-mail options can also create problems. The indiscriminate use of “Reply to All” has resulted in plenty of embarrassing moments when someone in the trail of recipients mistakenly gets to read something about themselves, starting a chain of events that can be calamitous. However, as bad as that experiences can be, it must be understood that each e-mail recipient's inbox becomes another place where e-mails may be found, read and used against them by lawyers for a party involved in a lawsuit or even by government investigators.

### Precautions

Many companies already have in place a monitoring program that identifies staff members who violate the company's e-mail policies. Of course, such policies will cause many to recoil at the suggestion of “invading” employees' e-mail records. But, however unpleasant the concept, there is no other way to police employee adherence to these rules and no better way to assure that employees take these rules seriously.

Would the “loose-cannon” employee be more likely to avoid dangerous e-mails if he or she knew that there was someone checking company e-mail records? We think so, and most employers have the legal right to review those e-mails records without requesting permission from the employee.

Every company should have a protocol for the retention and destruction e-mail records. The courts take a dim view of companies that destroy e-mail records they ought to maintain as evidence. This can result in the company paying the costs of having experts invade the company's information technology systems to rebuild lost records. It may also result in the entry of judgment, sanctions or the awarding attorneys' fees. Numerous courts have shown a willingness to issue harsh punishment for the negligent destruction of data. ■

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## Avoiding the E-Mail Trap

**Here are some basic rules for companies to keep employees from creating a trail of inappropriate or dangerous e-mails**

- ✓ Always assume that your e-mails will be read by someone who is not looking out for your interests or the company's best interests.
- ✓ Do not say things in e-mails you know you should not say at all, much less put it in writing.
- ✓ Do not use language you should not use.
- ✓ Never assume that your e-mails are private or confidential unless you are communicating with your lawyer. In fact, assume the opposite.
- ✓ Do not “say” anything in an e-mail you would not want someone else (other than the recipient) to read.
- ✓ Remember that the company network is not your personal communications channel.
- ✓ E-mails sent through the company network belong to the company, reflect upon the company, and the company will be held accountable for what you have said and how you have said it.
- ✓ Do not use language you should not use.
- ✓ Never use e-mails to criticize or malign the company or an individual working for the company. If you have a complaint, you should use the telephone or a personal meeting and speak to your superior, or, if necessary, call the president of the company, who will speak with you.
- ✓ Do not use e-mails to “think aloud,” any more than you would in a letter or memorandum of record.
- ✓ Do not write anything in an e-mail as a “fact” if you're not sure it's a fact.
- ✓ Re-read all e-mails before you hit the “Send” button.
- ✓ Double check the recipient list before you hit “Send”.
- ✓ Do not hit the “Send” button without first counting to 10. This may sound like the old advice on how to avoid a fight, but you can use that 10 seconds to adhere to the previous two rules—re-reading your text and checking the recipients.

## Claims and Dispute Resolution Group

When you need assistance with dispute resolution, URS knows you need an in-depth, fact-based analysis that can withstand rigorous examination by other design and construction experts. That's why our dispute resolution staff has the project experience as well as the technical expertise to make authoritative statements concerning schedule, cost, design, and construction quality and technique. We have a practical knowledge of construction logistics, methods, and management for projects ranging from public buildings to massive transportation construction efforts. Our services are often used pro actively by clients to resolve difficulties on ongoing projects, thereby avoiding or mitigating claims.

Most important, URS staff can communicate its findings clearly to any audience. Whether listeners have little technical background or a sophisticated understanding of the issues, our in-house software and graphic presentations will help legal advocates argue a case persuasively to a favorable conclusion.

### Services include:

- Construction Claims Analysis
- Schedule & Cost Analysis
- Construction Defect Analysis
- Design Standard of Care/Errors & Omissions Analysis
- Expert Testimony/Litigation Support



- Claims Avoidance/Training
- Construction Risk Analysis

## Speaking and Training Engagements

URS Dispute Resolution Group will be participating in the following seminars, conferences or exhibitions.

### Don Giegerich, PE

May 9, 2008

#### “How Project Controls Impact the Bottom Line”

— AACEI Chicago Midwest Seminar  
Des Plaines, Illinois

### Tom Driscoll

June 11–12, 2008

#### “Construction Delay, Acceleration & Inefficiency Claims”

— Federal Publication Seminars  
Las Vegas, NV

July 15–17, 2008

#### The Masters Institute In Construction Contracting

— Federal Publication Seminars  
Hilton Head, SC

October 21–22, 2008

#### “Construction Delay, Acceleration & Inefficiency Claims”

— Federal Publication Seminars  
Washington, DC

### Matthew Lankenau

July 10, 2008

#### “Managing Construction Projects in California”

— Lorman Education Services  
Pasadena, CA

### Richard D. Smith, PE, CCE

June 29–July 2, 2008

#### “Single Line Critical Path Shift Analysis”

— AACE International Annual Meeting  
Toronto, Canada

### Dave Mitchell, PE; Nihan Tiryaki, PE; and Yeshim Erim, AIA

October 10, 2008

#### “Tricks, Traps & Ploys Used in Construction Scheduling”

— Lorman Education Services  
San Francisco, CA

### Jon Porterfield, PE

November 14, 2008

#### “Managing Construction Projects”

— Lorman Education Services  
Sacramento, CA

### Dispute Resolution Group Offices

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## Upcoming Conferences

April 24–25, 2008 “What do I do now? Confronting the Unexpected” —La Quinta, CA

American Bar Association, Forum on the Construction Industry 2008 Annual Meeting

For information regarding any article appearing in Claims Resource or our Dispute Resolution Services, please contact Adam Winegard at 213.996.2579 or by email at [dispute\\_resolution@urscorp.com](mailto:dispute_resolution@urscorp.com)

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