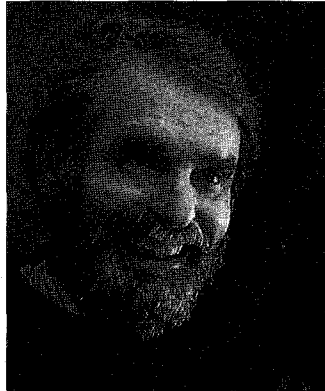


# A VIEW FROM THE TOWER

I have always treasured my informal Construction Law Network (SWEETNET). It enables me to obtain valuable information from people on the firing line. Though currently I divide my time between Berkeley and Jerusalem, the SWEETNET still functions. This column is based upon thoughts that were triggered by a recent communication on the Network.



Justin Sweet

In 1986, I was preparing the first edition of Sweet on Construction Industry Contracts (third coming out in Spring). The AIA graciously sent me drafts of the documents which were to emerge in 1987. I also had periodic conversations with AIA staff. The 1976 A 201 had contained ¶ 4.18.1, an "all or nothing" intermediate indemnity clause (the indemnitor pays the cost of defense and the entire claim even if the indemnitee was in part to blame for the loss).

An early draft of A 201 had contained a formula, deleted in subsequent drafts, for implementing "comparative" indemnification. The indemnitor pays the portion of the cost of defense (as to defense costs, I have employed the language in the *Dillard* case to which I will refer later though the language in ¶ 3.18.1 is not clear) and the portion of the loss caused by its negligence. Some statutes require comparative indemnity and there was a mood at that time for more loss sharing.

The AIA usually seeks comments and, hopefully, approval from the insurance industry for insurance-sensitive clauses such as indemnity clauses. The insurance industry was incurring underwriting losses. The industry was not, I was told by AIA staff, in "an adventurous mood." Back to "all or nothing" or so I thought.

The language that found its way into the 1987 A 201, ¶ 3.18.1 was a mixed bag. It included leftover language from earlier comparative indemnity language, "but only to the extent caused" yet it also included all or nothing language, "regardless of whether or not...caused in part by a party indemnified." This phrase was needed to validate an "intermediate" indemnity clause, one which transferred the entire loss despite some negligence by the indemnitee. This would not be as crucial if the clause were one for comparative indemnification. I concluded that "to the extent caused" made the clause one for comparative indemnity. I said so in my text, as did others.

But before I proceed further, let me report the letter response of Howard G. Goldberg, currently AIA outside counsel, to my suggestion that what came out may not have been what AIA intended. He did not serve in that capacity at

the time the 1987 A 201 was drafted. He wrote that he never understood that the drafters of the 1987 edition intended that the final version be an "all or nothing indemnity" and that the language, "confirms that fact."

Now to my SWEETNET communication. A lawyer sent me *Dillard v. Shaughnessy, Fickel and Scott, Arch., Inc.*, 884 S.W. 722 (Mo. App. 1993.) It held 3.18.1 created comparative indemnification. He wanted to let me know the court agreed with me.

I am dealing with drafting errors and how they can be corrected. Drafting errors can include using language the drafter wishes he had left out, omitting language he wishes he had included or using language which achieves an unintended outcome. Goldberg says there was no error, that the AIA achieved its intended outcome. I suggest the possibility that either § 3.18.1 produced an unintended outcome or the AIA changed its mind and decided to go for comparative indemnity.

My purpose is not to decide whether it made an error. Let us assume "without deciding" that the AIA had made a drafting error. How could it correct the error?

The most drastic step would be to issue a new A 201. (A new edition is planned for 1997.) To rush out a new edition before one is scheduled risks drafting errors, requires an unplanned outlay of space resources and can appear to be a confession of error.

Less drastic would be issuance of an A 512, amendment to its guide to Supplementary Conditions. The AIA did this in response to complaints about its handling of the discovery of hazardous materials in A 201, ¶ 10.1 issued in 1987. This takes much less resources than an emergency new edition. But is still a confession of error. Least drastic would be an announcement in the AIA Supplement Service (a service I recommend highly). Unfortunately, this would not reach many users.

First, this communication made me realize how hard it would be for the AIA to correct drafting errors. Errors cannot be corrected, as are statutes, by a revision the next legislative session. The efforts and resources to crank out a new edition can be mustered about every 10 years. This is a reason, among others, for the current AIA 10-year cycle. Precise, mistake-free drafting required talented drafters, thorough research, long lead time, input from those affected, careful review and, I would add, preview hypotheticals and solutions like law school exams to flush out errors.

Second, this communication made me reflect upon structures in a standard contract. The AIA could have given users a choice, "all or nothing" or "comparative", by including alternate clauses. The use of alternates along with more blanks in A 201 would create a framework which would allow users to customize their contracts to fit their special needs and desires. Pity it does not.

Keep the SWEETNET busy!

# If you like this issue of The Construction Lawyer

Here's an opportunity to order another subscription, or request back issues.

☐ **The Construction Lawyer Subscription** \$40.00

A widely acclaimed quarterly focusing on the latest legal developments in the construction industry.

☐ **The Construction Lawyer (Back Issues)** \$10.00 each

- ☐ Volume 11, Number 1 Jan 1991
- ☐ Volume 11, Number 2 Apr 1991
- ☐ Volume 11, Number 3 Aug 1991
- ☐ Volume 11, Number 4 Oct 1991
- ☐ Volume 12, Number 1 Jan 1991
- ☐ Volume 12, Number 2 Apr 1992
- ☐ Volume 12, Number 3 Aug 1992
- ☐ Volume 12, Number 4 Nov 1992
- ☐ Volume 13, Number 1 Jan 1993
- ☐ Volume 13, Number 2 Apr 1993
- ☐ Volume 13, Number 3 Aug 1993
- ☐ Volume 13, Number 4 Oct 1993
- ☐ Volume 14, Number 1 Jan 1994
- ☐ Volume 14, Number 2 Apr 1994
- ☐ Volume 14, Number 3 Aug 1994
- ☐ Volume 14, Number 4 Oct 1994
- ☐ Volume 15, Number 1 Jan 1995
- ☐ Volume 15, Number 2 Apr 1995
- ☐ Volume 15, Number 3 Aug 1995
- ☐ Volume 15, Number 4 Nov 1995

☐ **The Construction Lawyer Binder** \$5.00  
PC: 5570022 1988 (for first one)  
\$3.00 (ea. add'l)

Binders are ideal for storing the three-hole punch publication. Each holds 16 issues.

**YES!** Please send me the items noted.

☐ Check enclosed made payable to the  
**American Bar Association.**

☐ Charge to my ☐ Visa ☐ MC  
Account #: \_\_\_\_\_

\_\_\_\_\_  
Exp. Date

\_\_\_\_\_  
Cardholder's Signature

(NOTE: Only credit card orders may be sent via FAX.  
Prepayment is required.)

Total dollar amount: \$ \_\_\_\_\_

\*\* Postage and handling: \$ \_\_\_\_\_

\*\* \$2.00 on orders of \$ 2.00 - \$ 9.99

\$3.95 on orders of \$10.00 - \$24.99

\$4.95 on orders of \$25.00 - \$49.99

\$5.95 on orders of \$50.00 and up

\*\*\* Sales tax (if applicable): \$ \_\_\_\_\_

\*\*\* Illinois residents add 8-3/4% sales tax.

District of Columbia residents add 6% sales tax.

**GRAND TOTAL:** \$ \_\_\_\_\_

Name: \_\_\_\_\_

Firm: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_

Zip: \_\_\_\_\_

Telephone: ( ) \_\_\_\_\_

Send Order to:

American Bar Association  
ABA Service Center  
750 N. Lake Shore Drive  
Chicago, IL 60611-4497

You may FAX credit card orders to: 312/988-5568.  
To order by phone, or for more information, call 312/988-5522.

**ALLOW 2 TO 4 WEEKS FOR DELIVERY**

## PUBLICATIONS ORDER FORM

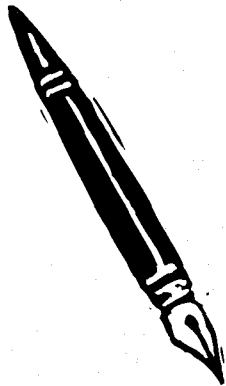
The Forum on the Construction Industry provides quality information in the area of construction industry law. To obtain publications, please check the title you wish to order, complete this form, and return it with your payment to: **Member Services, American Bar Association, 750 North Lake Shore Drive, Chicago, Illinois 60611; Fax: (312) 988-5568.**

- |   |  |
|---|--|
| <p><input type="checkbox"/> <b>10th Annual Forum on Construction:<br/>The Changing Role of Construction<br/>Counsel in the '90s</b><br/>PC: 5570041 (1994) <span style="float: right;">\$125</span></p> <p><input type="checkbox"/> <b>Environmental Construction:<br/>Market or Minefield?</b><br/>PC: 5570040 (1994) <span style="float: right;">\$100</span></p> <p><input type="checkbox"/> <b>Fundamentals of Construction Law<br/>and the Construction Industry</b><br/>PC: 5570039 (1993) <span style="float: right;">\$75</span></p> <p><input type="checkbox"/> <b>Design Issues in Construction:<br/>Who's Responsible and What's Working?</b><br/>PC: 5570038, 5570038i1 and 5570038i2 (1993) <span style="float: right;">\$50</span></p> <p><input type="checkbox"/> <b>A Guide for Sureties and Contractors<br/>to Owners' Financing of Construction Projects</b><br/>PC: 5570037 (1992) <span style="float: right;">\$45</span></p> <p><input type="checkbox"/> <b>International Construction Law:<br/>Opportunities and Risks in the '90s</b><br/>PC: 5570036 (1992) <span style="float: right;">\$50</span></p> <p><input type="checkbox"/> <b>Construction Management: Making the<br/>Right Choice</b><br/>PC: 5570035 (1992) (2-vol. set) <span style="float: right;">\$95</span></p> <p><input type="checkbox"/> <b>When the Walls Come Tumbling Down:<br/>Who Pays? Analysis and Advocacy<br/>of Post-Construction Disputes</b><br/>PC: 5570034 (1992) <span style="float: right;">\$45</span></p> <p><input type="checkbox"/> <b>Preventing and Resolving Construction<br/>Disputes on the Job Effectively</b><br/>PC: 5570032 (1991) <span style="float: right;">\$45</span></p> <p><input type="checkbox"/> <b>Ethical Considerations for Construction<br/>Lawyers in the '90s: A Minefield for Lawyers</b><br/>PC: 5570031 (1991) (2-vol. set) <span style="float: right;">\$65</span></p> <p><input type="checkbox"/> <b>Construction Defaults: Risks in the '90s</b><br/>PC: 5570030 (1991) <span style="float: right;">\$45</span></p> <p><input type="checkbox"/> <b>Design/Build: Issues for the '90s and Beyond</b><br/>PC: 5570029 (1990) <span style="float: right;">\$45</span></p> <p><input type="checkbox"/> <b>Future Shock: A Survival Guide<br/>to Jobsite Regulation</b><br/>PC: 5570027 (1990) (2-vol. set) <span style="float: right;">\$75</span></p> <p><input type="checkbox"/> <b>Allocating Risks in Today's Construction:<br/>A Search for Fairness and Solution</b><br/>PC: 5570024 (1989) <span style="float: right;">\$75</span></p> | <p><input type="checkbox"/> <b>A Decade of Experience Under the<br/>Bankruptcy Code: A View from the Trenches</b><br/>PC: 5570023 (1989) <span style="float: right;">\$50</span></p> <p><input type="checkbox"/> <b>Managing and Litigating the Complex<br/>Construction Case</b><br/>PC: 5570021 (1988) <span style="float: right;">\$75</span></p> <p><input type="checkbox"/> <b>Current Issues in the Construction Industry</b><br/>PC: 5570020 (1988) <span style="float: right;">\$50</span></p> <p><input type="checkbox"/> <b>Practical Considerations in the Selection<br/>and Use of Construction Experts</b><br/>PC: 5570019 (1988) <span style="float: right;">\$50</span></p> |
|---|--|
- YES! Please send me the publications noted.**
- ☐ Check enclosed made payable to the American Bar Association.
- ☐ Charge to my ☐ Visa ☐ MC
- Account #: \_\_\_\_\_
- Exp. Date \_\_\_\_\_ Cardholder's Signature \_\_\_\_\_
- (NOTE: Only credit card orders may be sent by FAX.)
- Total dollar amount: \$ \_\_\_\_\_
- \*\*Postage and handling: \$ \_\_\_\_\_
- \*\*\*Sales tax (if applicable): \$ \_\_\_\_\_
- \*\*\*\$2.00 on orders of \$ 2.00 - \$ 9.99  
\$3.95 on orders of \$10.00 - \$24.99  
\$4.95 on orders of \$25.00 - \$49.99  
\$5.95 on orders of \$50.00 and up
- \*\*\*Illinois residents add 8-3/4% sales tax.  
District of Columbia residents add 6% sales tax.
- GRAND TOTAL:** \$ \_\_\_\_\_
- Name: \_\_\_\_\_
- Firm: \_\_\_\_\_
- Address: \_\_\_\_\_
- City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_
- Telephone: ( ) \_\_\_\_\_

**ALLOW 2 TO 4 WEEKS FOR DELIVERY**

# MARK YOUR CALENDAR

## ABA Forum on the Construction Industry 1996 Events



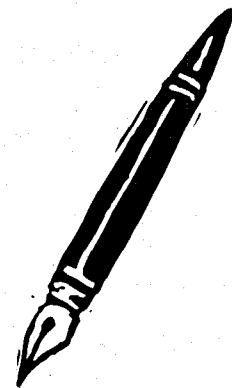
**January 25**

**"Battling For the Bucks"**

CI/TIPS Fidelity & Surety Joint Meeting

*Fairmont Hotel*

*San Francisco*



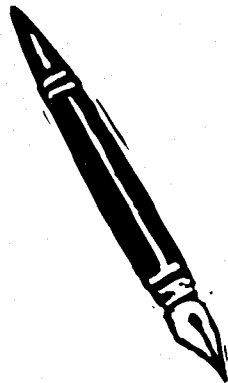
**May 1-4**

**"Construction Law Roundup"**

20th Year Anniversary

*Grand Kempinski Hotel*

*Dallas*



**October 17-18**

**"SuperDuper Conference"**

Forum/Public Contracts/TIPS

Joint Meeting

*New York Hilton & Towers Hotel*

*New York*

## Members of the 1995-96 FCI Governing Committee

### HOWARD W. ASHCRAFT, JR. (1997)

Hanson, Bridgett et al  
23rd Floor  
333 Market Street  
San Francisco, CA 94105-2173  
415/777-3200  
fax 415/541-9366

### F. MALCOLM CUNNINGHAM, JR. (1998)

Cunningham & Self  
Reflections, Suite 400  
450 Astralian Ave. South  
West Palm Beach, FL 33401  
407/833-6400  
fax 407/833-6558

### ALLEN HOLT GWYN (1998)

Patton, Boggs, LLP  
P.O. Drawer 20004  
Greensboro, NC 27420  
(Ste. 500, 101 W. Friendly Ave., 27401)  
910/273-1733  
fax 910/272-9254  
(Liaison to Division # 6 & 10)

### LARRY D. HARRIS (1997)

Piper & Marbury  
1200 Nineteenth Street NW  
Washington, DC 20036  
202/861-3900  
fax 202/223-2085  
(Liaison to Division #3)

### LESLIE KING O'NEAL (1996)

Holland & Knight  
P.O. Box 1526  
Suite 2600  
200 S. Orange Avenue  
Orlando, FL 32802  
407/425-8500  
fax 407/244-5288  
(Liaison to Division #1)

### CHARLES F. SEEMANN, JR. (1997)

Deutsch, Kerrigan & Stiles  
755 Magazine Street  
New Orleans, LA 70130-3672  
504/581-5141  
fax 504/566-1201  
(Liaison to Division #5)

### STANLEY P. SKLAR (1996)

Schain, Firsel & Burney, Ltd.  
Suite 1910  
222 N. LaSalle Street  
Chicago, IL 60601  
312/332-0200  
fax 312/332-4514  
(Liaison to Division #9)

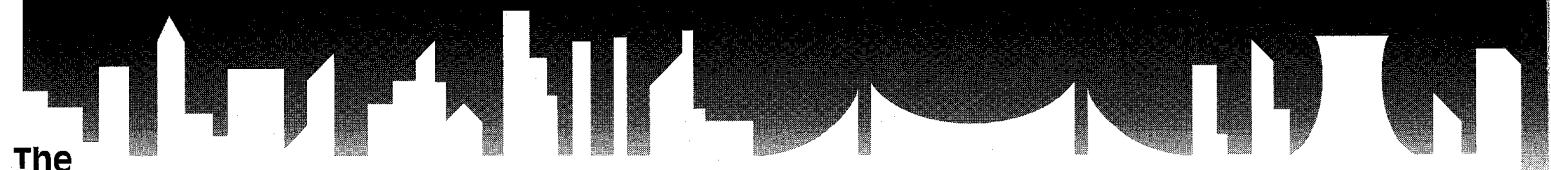


American Bar Association  
750 N. Lake Shore Drive  
Chicago, IL 60611-4497

Volume 16  
Number 1  
January 1996

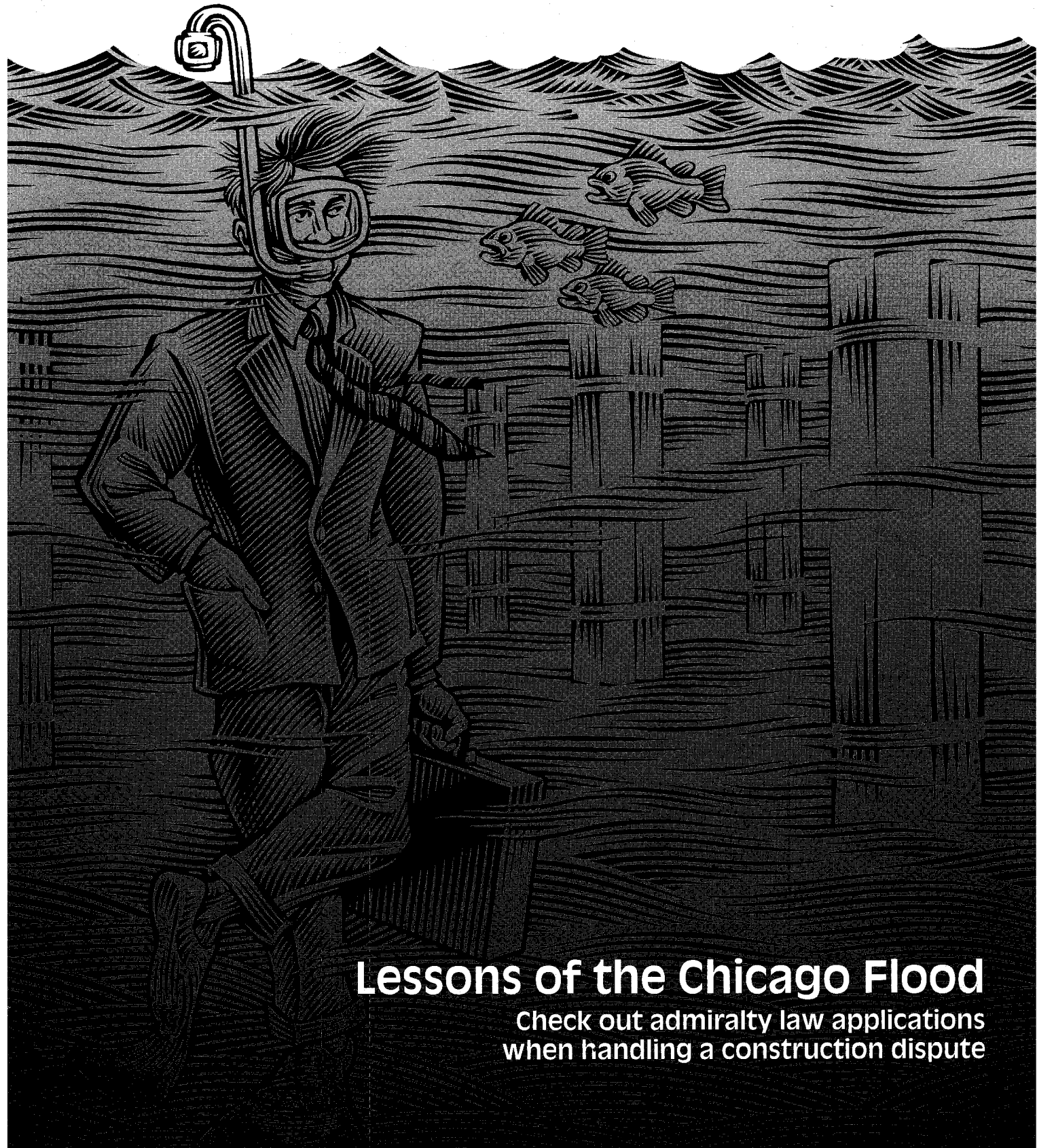
Nonprofit Organization  
U.S. Postage  
**PAID**  
American Bar Association





The  
**Construction Lawyer**

Journal of the Forum on the Construction Industry    Volume 16 Number 2    April 1996



**Lessons of the Chicago Flood**  
Check out admiralty law applications  
when handling a construction dispute