VOLUME 6 ISSUE NO. 4 — JULY/AUGUST 2020

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DISPUTE RESOLUTION
MEDIATION AND ARBTRATION IN TODAY'S CONSTRUCTION WORLD

ELECTION RULES
STAYING UP TO DATE WITH THE NLRB

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Merit Shop Contractor Wisconsin is published six times annually by Associated Builders and Contractors of Wisconsin, Inc. (ISSN# 10642978)
5330 Wall St., Madison, WI 53718. Periodicals Postage Paid, Madison, WI and other additional mailing offices. (UPS 340-650). Subscription price is $50 per year.

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FROM OUR PRESIDENT

A legal education service built on merit

IT TURNS OUT THAT SOMEONE WAS NOT PLAYING A JOKE ON ME WHEN I RECEIVED AN AARP MEMBERSHIP APPLICATION IN THE MAIL. My wife reminded me that I have been getting them for some time. While some will say AARP has a smart business model, I like to think there is a big difference between organizations like AARP and ABC of Wisconsin; and not just politically.

ABC members are committed to Merit. I make a point of instilling on chapter staff that "merit" is not a buzzword like "holistic approach" or "customer journey." Merit is the successful result of free enterprise and open competition. We know you work hard to literally build Wisconsin, which is why we want to be the best trade association value for your dollar.

The reason ABC of Wisconsin is the largest, and in many measures, the best ABC chapter, is because we try to work hard delivering value as you do for your customers. Merit is part of everything we do here at ABC.

So, instead of simply offering 5% discounts on everything from hotel stays to restaurants like AARP does, ABC offers real member value, including world-class safety consulting, an expanding apprenticeship program, aggressive government affairs services, meaningful insurance programs, and legal education.

After rebranding and re-establishing the ABC member legal education service last year, we committed to re-evaluating the legal education program on an annual basis to make sure ABC members are getting excellent value. That is why for every familiar face on the list, you will see new faces as well.

Like so much of what we do and stand for, this program will continue to operate on merit. So, while I cannot guarantee who will be participating after each annual evaluation, I promise we will continue to make sure that this member benefit brings value to you, just as your work does to your clients.

— John Mielke

> "I MAKE A POINT OF INSTILLING ON CHAPTER STAFF THAT 'MERIT' IS NOT A BUZZWORD LIKE 'HOLISTIC APPROACH' OR 'CUSTOMER JOURNEY.'

ABC Wisconsin
Associated Builders and Contractors

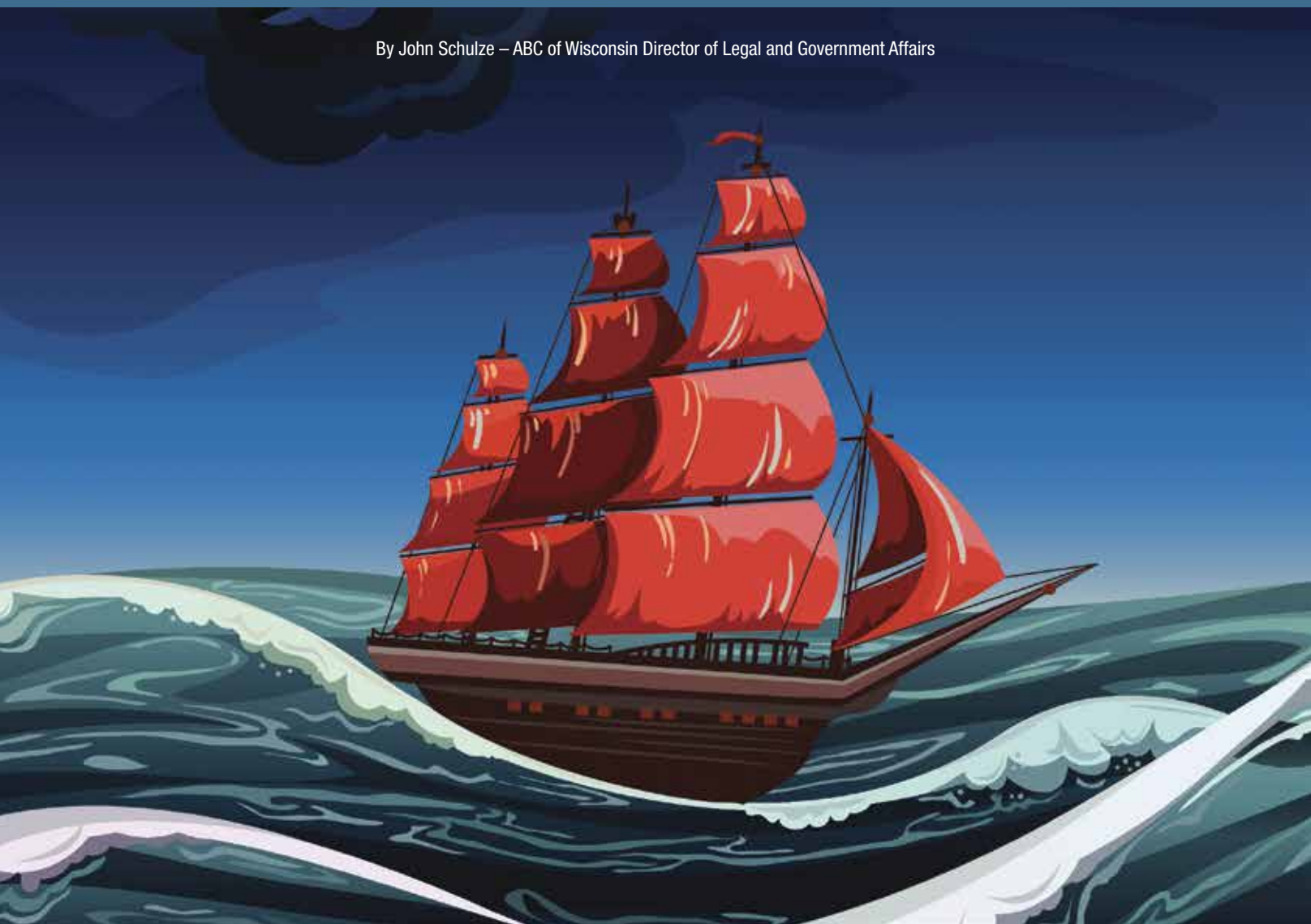
EVENT REMINDERS

- **THE CONSTRUCTION FOREMAN (SIX-PART SERIES BEGINS)**
  Online, July 21
- **HR MEMBER PARTICIPATION FORUM: FIRING WITHOUT FEAR (FOR ALL MEMBERS)**
  Online, July 22
- **OSHA 10-HOUR CONSTRUCTION SAFETY & HEALTH**
  Eau Claire, July 23
- **GOLF OUTING (SOLD OUT)**
  Cottage Grove, July 29
- **CONFINED SPACE AWARENESS**
  Madison, July 31
- **NETWORKING SOCIAL (HELD OUTSIDE)**
  Beloit, Aug. 5
- **CONFINED SPACE AWARENESS**
  Pewaukee, Aug. 6
- **OSHA 10-HOUR CONSTRUCTION SAFETY & HEALTH**
  Appleton, Aug. 13
- **NETWORKING SOCIAL (HELD OUTSIDE)**
  Wausau, Aug. 19
- **QUALIFIED RIGGER & CRANE SIGNAL PERSON TRAINING**
  Madison, Aug. 21
- **OSHA 10-HOUR CONSTRUCTION SAFETY & HEALTH**
  Green Bay, Aug. 27
- **SPORTING CLAY SHOOT**
  Johnson Creek, Sept. 2
- **NETWORKING SOCIAL (HELD OUTSIDE)**
  Sturtevant, Sept. 17
- **NETWORKING SOCIAL (HELD OUTSIDE)**
  Menomonie, Sept. 24

SAFE HARBOR

DURING THE STORM OF A LIFETIME

By John Schulze – ABC of Wisconsin Director of Legal and Government Affairs



You are probably as tired reading about COVID-19 as you are having to live in a world where we need to think about it every day. The pandemic has caused thousands of infections and the statewide shutdown order has cost hundreds of thousands of jobs in Wisconsin.

It was only due to hard work lobbying by ABC's government affairs staff and members backed by contractors' decades of sound safety practices that prevented construction from being deemed as unessential as dentists, restaurants and hair salons.

Even though the construction industry in Wisconsin was deemed essential, it was not unaffected; everything from having to take a morning temperature to eliminating group lunch was added to the ever present – but bigger worry – about how the shutdown will affect the next job.

Finally, big and small businesses in other parts of Wisconsin's economy are reopening, but the road to recovery is uncertain. As we plan for the needed steps to restart Wisconsin's economy, it is vitally important that employers are able to focus on providing for their customers and making payroll; not worrying about lawsuits. You may have already seen the TV and internet ads trying to recruit plaintiffs related to COVID-19. In a flashback of the McDonald's hot coffee case, at least one lawsuit has already been filed against the manufacturer of Purell hand sanitizer alleging that their claim that the sanitizer kills 99.9 percent of germs is misleading.

Your ABC of Wisconsin chapter government relations efforts have shifted from keeping construction deemed essential to fighting to protect members from lawsuit abuse at both the state and federal level. Proposed solutions include:

- **Premises Liability Safe Harbor:** Protections for all property owners/occupants who are good actors against frivolous lawsuits alleging a plaintiff was infected with COVID-19 at a specific premise. It is not business community specific and would protect homeowners, government entities – including schools and universities – and any other premises including outdoor events and festivals. The safe harbor would not protect bad actors. An entity should lose the liability exemption if they knowingly violated a public health order or spread COVID-19 by acting in a reckless, wanton or intentional manner.

- **Limitation on Recovery from No-Injury Lawsuits:** First, plaintiffs cannot recover if they have not been diagnosed as having COVID-19. Second, even if a plaintiff was diagnosed, they cannot recover damages if they were asymptomatic or had mild symptoms. Again, these protections should not protect bad actors. The limitation should not apply to cases where another's act or omission that caused the exposure involved reckless, wanton or intentional misconduct.

- **Employee Testing: Employers should be allowed to test prospective or current employees for COVID-19 without legal liability**. Further, employers should be allowed to refuse to hire a prospective employee who tests positive for COVID-19 or refuses to submit a test. Finally, employers should be allowed to require an employee to take leave until they submit to a COVID-19 test, show the negative results of

a test, or until they no longer test positive for COVID-19.

This is not about defending employers who recklessly or intentionally caused harm. This is about employers already struggling to stay in business, facing the very real threat of frivolous lawsuits that will push their employees out of their jobs and seriously undermine efforts to restart and rebuild the economy. The goal is to provide safe harbor for businesses who are doing their level best to keep their employees and the public safe from being sued by someone who allegedly contracted COVID-19 at their place of business even if they never got sick. Following federal, state or local public health orders and recommendations can still leave businesses vulnerable to lawsuits alleging a businessowner exposed a person to COVID-19.

The government has provided safe harbor in extraordinary times before. As the nation prepared for Y2K, Congress passed a three-year ban on lawsuits over economic losses from related glitches. After the 9/11 attacks, the $38 billion victim compensation fund also eliminated punitive damages and protected airlines against liability for exceeding their insurance coverage for related claims. Already this year, Wisconsin Democrats and Republicans came together to help prevent lawsuits against companies that donate PPE equipment to health care workers fighting COVID-19 on the front lines. These were important first steps, but all Wisconsin employers need reasonable safe harbor protection from liability to serve the public to meet payroll while taking commonsense measures to protect employees and the public.

Either the state or federal government should act quickly and pass these temporary, targeted measures intended to protect businesses that are doing the right thing and will help stabilize the economy so the recovery can continue. We don't want an "Open for Business" sign to mean "open season" on employers who are trying to do the right thing by restarting and rebuilding the state's economy. Employers have enough to worry about.

If you would like more information or to participate, please contact John Schulze at 608-244-5883 or jschulze@abcwi.org.

"EITHER THE STATE OR FEDERAL GOVERNMENT SHOULD ACT QUICKLY AND PASS THESE TEMPORARY, TARGETED MEASURES INTENDED TO PROTECT BUSINESSES.

Q&A

ABC Interview with **Congressman Tom Tiffany,** after 100 days in office

Q: Thanks for taking the time, not only to call into the ABC of Wisconsin Board of Directors meeting the week after you were sworn in, but for taking the time to participate in this interview.

A: Thank you. I am always happy to make time with the Associated Builders and Contractors. It's been an honor to work together on shared goals during my time in the legislature, and I'm looking forward to continuing that record of cooperation in the nation's capital.

Q: Well, we miss you being in the Wisconsin Legislature, but are glad were elected to Congress. By the time this interview is published, you will have been in office for a little over 100 days. What's it been like so far?

A: Unfortunately, Speaker Pelosi has kept the House in recess for much of the time since I was sworn in, and that has really limited our ability to get things done. When we have convened for short periods, fewer members have been present as a result of a new "proxy voting" rule put in place by the Democrats. This allows individual lawmakers to "loan" their vote to another member to cast on their behalf. Under this new rule, one single "designated proxy" member can vote on behalf of as many as 10 other representatives – which means just 22 members of the 435-member House of Representatives can wield control of a majority of the chamber's votes through proxy. I'm against the rule because I believe I was elected to represent folks in my district – not to outsource their voice to someone from another district or state. So I've been showing up personally to carry out my duties, and I will continue to do so.

Q: How do you think your job has changed in a post COVID-19 world?

A: On a basic level, much more communication is happening over the phone or through videoconferencing rather than the kind of personal interaction we are all used to. And I already mentioned the proxy voting change in the House, which I think has unfortunately limited the ability of lawmakers to talk face-to-face, build relationships and work together. But I think we are seeing some encouraging signs as the economy begins to reopen, and I'm hopeful that the House leadership will follow suit so that Congress can get back to normal operation.

Q: We often hear about the bad things about being in Congress – the constant travel and being away from home. Are there any pleasant surprises?

A: Ask me in a couple months.

Q: What are your priorities to get accomplished in your first term? Specifically, what do you want to get done for Northern Wisconsin?

A: First and foremost, I'm focused on getting the economy back on track. I think many of the one-size-fits all, state-mandated closures went too far and inflicted a lot of pain, and I've been pretty vocal about that even going back to my time in the Legislature. The good news is that we've seen how resilient this economy is thanks to the landmark tax and regulatory reforms put in place by President Trump. As states have reopened – like Wisconsin did after our state Supreme Court overturned Gov. Evers' wide-ranging business shutdown order – we've seen record job creation, a steady decline in new unemployment claims, and a historic increase in retail sales. That's all good news – but there's a lot more to do. Businesses need common-sense liability protections and we've got to get our schools reopened so our kids don't fall even further behind in their studies. We've also got a lot of work to do on nuts and bolts issues like securing our border, expanding patient choice in health care, addressing the security and economic challenges we face from China, putting our state back in the driver's seat on conservation by removing the wolf from the federal endangered species list, and removing the many government obstacles that prevent folks like your members from creating opportunity and prosperity in our communities.

Q: What was your first vote and so far what do you think was your most important vote?

A: I've only cast a few non-procedural votes so far – two of them were very important. One was a vote to give Paycheck Protection Program recipients more flexibility in how to spend funds and keep their businesses afloat during this difficult time, and the other authorized sanctions against Communist Chinese officials responsible for operating forced labor camps and committing wide-scale human rights abuses.

Q: In a repeat of the movie Groundhog Day, there is talk again about a significant federal infrastructure investment to spur the economy. What are the chances of such a significant investment taking place, and what do you think should be part of it?

A: I think there is broad agreement on both sides of the political aisle that government has a role to play when it comes to maintaining an adequate transportation system. But I think there is a lot of disagreement about what such a package ought to look like.

Q + A Tom Tiffany *Continued on page 15*

ELECTION RULES

Staying Up to Date with the NLRB

By Dan Barker – Attorney at Law, Jackson Lewis, P.C.

In 2015, the National Labor Relations Board ("NLRB") enacted rules that shortened the amount of time that an employer has to campaign after a union files an election petition with the NLRB. Some of those rules have recently been dialed back.

Before 2015, employers had about 42 days after a petition was filed to campaign before the vote. The 2015 rules shortened this period to about 21 days. When the time frame between petition and election is shortened, an employer has less time to develop its campaign message and educate employees about what choosing union representation really means and what is on the line.

The 2015 "quickie election" rules also required employers to jump through a number of procedural hoops in the first few days after an election petition was filed. For example, they required the employer to post a Notice of Petition within two business days after receiving the petition and often required the employer to email the notice to all potential unit employees. The rules also required the employer to appear at a hearing eight days after the petition was filed and to file a detailed position statement the day before the hearing. If an issue or argument was left out of this required statement, that argument would be waived forever. Some unions would even serve onerous pre-hearing subpoenas as a way to further burden the target company and to distract it from hearing preparation. And then, as soon as an election was directed, the employer had only two business days to provide the union with a comprehensive listing of all unit employees, their home addresses, email address, cell phone numbers, and work shifts.

> **"WHEN THE TIME FRAME BETWEEN PETITION AND ELECTION IS SHORTENED, AN EMPLOYER HAS LESS TIME TO DEVELOP ITS CAMPAIGN MESSAGE AND EDUCATE EMPLOYEES.**

From a practical perspective, all these procedural requirements meant that the first 10 days after an election petition usually involved focusing on the NLRB's process rather than on the employer's campaign message. Many companies can't even get a conference call together on five days' notice, much less plan a comprehensive legal strategy. Thus, the mad scramble of the first 10 days meant that the company usually ended up with less than two weeks to actually campaign; not much time to get the message out at all.

In late 2019, the Republican-dominated NLRB published new rules that substantially eased the burden on employers. The rules removed the requirement that elections be held as soon as practicable after a petition, pushed back the hearing to 14 days, and gave the employer more time to file its statement of position. They also gave the employer more time to prepare the voter list.

These important reforms were scheduled to go into effect on May 31, 2020, but the AFL-CIO filed a legal challenge to the rules in a last-ditch effort to maintain the advantage that the Obama NLRB had given them. At the 11th hour, before the rules went into effect, a U.S. District Court issued a decision that upheld some of the reforms and struck down others. The court said that the NLRB could validly enact changes to its procedural rules but said that some of the changes it had announced were substantive and therefore, could not be changed through the legal process that the NLRB used when it enacted the new rules. The NLRB plans to appeal the ruling. In the meantime, however, the NLRB issued a memorandum explaining which changes would survive and which changes would not be enacted.

Many of the changes that survived the court challenge provide employers with precious additional time to consider its legal position and strategy at the outset of a campaign. Specifically, the NLRB explained that hearings would not be scheduled until fourteen business days after the petition and that employ-

ers do not need to file their position statements until the eighth business day after service of the hearing notice. The NLRB also made it clear that briefs would be allowed after the hearing. These changes take some of the immediate pressure off of employers and gives them some valuable time to consider the issues raised by the petition as well as to plan campaign strategy at the same time.

The NLRB also explained, though, that elections would still need to be scheduled as soon as practicable after a petition and that voter eligibility lists are still required to be sent to the union within two business days after an election is directed. Thus, elections will still be pushed through on an expedited basis. In other words, the pressure is still on and employers have limited time to campaign.

While the new rules provide employers with more space and time to operate in after a petition is filed, the days after a petition is filed are still extremely stressful and demanding. Thankfully, however, there are steps that employers can take to reduce the pressure a bit. Like any emergency action plan, avoiding the emergency in the first place is the best approach, but a little contingency planning can pay huge dividends when the pressure mounts.

First, employers should make themselves "hard targets" for organizing in the first place. While paying market-competitive wages and providing great benefits is a good start, it falls far short of the mark. When employees are valued and listened to, they are less likely to seek outside representation. The second step is to ensure that supervisors know how to talk about unions and are not too scared to communicate and answer employee questions. The third step is to create an action plan for what to do if organizing occurs or if a petition is filed. This plan can include implementing a rapid-action team prepared in advance with clear understandings about what managers will play what roles. Part of this action plan includes ensuring that the company is ready to answer common information requests from the NLRB and is ready to prepare a voter eligibility list in a limited amount of time.

In the construction industry, being ready to prepare this voter eligibility list is important because the list of eligible employees does not just include those employees who are currently working. Instead, NLRB's eligibility formula looks back for up to two years and includes employees who worked 30 days in the past year, or 45 days in the past two years. It excludes employees who quit or who were discharged for cause. Putting this list together within two days after the NLRB directs an election makes for a stressful time and some late nights. Employers can reduce the stress by maintaining contact information in a single system and coming up with a plan for how the company can quickly identify employees who meet the eligibility criteria and those who do not.

In summary, the new NLRB election rules provide employers with additional time to plan. For the foreseeable future, though, elections will continue to occur within a short time window, and we will not be going back to the days where employers had six luxurious weeks to campaign.

Daniel D. Barker is a Principal in the Madison office of Jackson Lewis P.C. He can be reached at daniel.barker@jacksonlewis.com or 608-729-5598

DISPUTE RESOLUTI

MEDIATION AND ARBITRATION IN TODAY

By Steven J. Slawinski – Attorney at Law

With the ongoing economic impact of the COVID-19 pandemic, disputes are more likely to arise on construction projects. Contractors and owners may find themselves facing formal dispute resolution proceedings, which may include mediation and arbitration. For some, it may be their first time. In the author's experience, while most contractors have heard of both mediation and arbitration, many do not have a clear understanding of either one. Fewer still know enough about arbitration to make an informed decision either to accept or to reject an arbitration clause in a contract they are being asked to sign. This article will provide a basic practical understanding of mediation and arbitration within the context of construction disputes.

The Dispute Resolution Clause — Pick Your Poison

Most construction contract documents include dispute resolution provisions intended to chart the parties' course in the event of a dispute. The dispute resolution provisions typically require the parties to make a choice up front at the time of contract formation between arbitration and litigation as the method of binding dispute resolution that will be used. Mediation, a non-binding method, is also frequently mandated. The standard contract documents promulgated by the American Institute of Architects (AIA) call for the parties to expressly select between arbitration and litigation as the method of binding dispute resolution, but where the parties fail to make a selection, litigation is the default method. The dispute resolution provisions of the ConsensusDocs standard documents are similar. Both the AIA and ConsensusDocs contract forms require mediation as a precondition to proceeding with binding dispute resolution.

Binding arbitration can only be used if both parties have expressly agreed or consented to it. Agreements to arbitrate are heavily favored in the law, because arbitration helps to reduce the workload of the courts. The law deems agreements to arbitrate to be "valid, irrevocable and enforceable." Wis. Stat. §788.01. A party refusing to honor its agreement to arbitrate will be ordered to do so by a court. Wis. Stat. §788.03. The decision of whether to agree to arbitration is an important one with significant consequences and should therefore not be taken lightly.

Mediation — Let's Make a Deal

Mediation is a non-binding form of dispute resolution intended to help bring about a settlement of a dispute by the mutual agreement of the parties. The parties begin by selecting and engaging a neutral third party to act as the mediator. Attorneys or retired judges are often chosen as mediators. The mediator's fees are usually split equally between the participating parties.

Typically, each party's attorney submits an informal written statement of the party's position to the mediator in advance

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Y'S CONSTRUCTION WORLD

> **AGREEMENTS TO ARBITRATE ARE HEAVILY FAVORED IN THE LAW, BECAUSE ARBITRATION HELPS TO REDUCE THE WORKLOAD OF THE COURTS.**

of the mediation. The mediation takes place at the office either of the mediator or of one of the party's attorneys and usually takes no more than a day. At the mediation, the parties are placed in separate rooms, and the mediator engages in shuttle diplomacy going back and forth between them. The mediator acts as a deal broker, who tries to persuade the parties to compromise and to reach a resolution that both parties can live with. The key issues of the dispute are discussed and debated, through the mediator. The mediator tries to get each party to view the strength of its respective position more objectively, often focusing on the weaknesses of the party's position. To facilitate successful mediation, the law generally treats all discussions and settlement offers in connection with the mediation as inadmissible in evidence, in case the mediation fails. Wis. Stat. §904.085.

Mediation is informal. It does not involve the presentation of any evidence or testimony, and the mediator does not make any decision or ruling. The mediator has no power to force a party to make or to accept any settlement offer. All he or she can do is facilitate settlement discussions and negotiations between the parties, and try to persuade the parties to reach common ground.

Since the 1990s, Wisconsin Courts have had the power to order litigants to mediate their cases. See, Wis. Stat. §802.12(1)(e). Mediation has proven to be highly successful in resolving a high percentage of civil cases to the point where actual trials in civil cases have become relatively rare. Because mediation helps to lighten judges' case loads, most judges routinely order parties to mediate prior to trial in civil cases. Furthermore, as noted above, many construction contracts require the parties to mediate as a prerequisite to proceeding with binding dispute resolution. Therefore, regardless of whether the parties have opted for arbitration or litigation, they are likely to mediate the dispute before the case is decided.

But while courts can order parties to mediate, they cannot force parties to settle. Likewise, while the contract may require mediation, it will not require that the parties reach a resolution. Mediation will only succeed if both parties are willing and motivated to compromise their respective positions and to make a deal.

Both the AIA and ConsensusDocs standard contract documents call for early mediation as a precondition to binding dispute resolution (arbitration or litigation). While early mediation may look good on paper, it does not always work, particularly with larger and more complex cases. For mediation to succeed, the parties must first have reached the point where they are ready to mediate. When mediation occurs too early, often the relevant facts have not yet been adequately developed to allow for an accurate or objective assessment of the case. In addition, the parties may not yet be emotionally and psychologically prepared to compromise.

Mediation can be a quick and inexpensive means of resolving a construction dispute. It can be a particularly efficient way to resolve a dispute involving multiple parties. However, because mediation necessarily involves compromise, the ultimate result achieved (the settlement) may often appear disappointing to each of the parties. Nevertheless, mediation has a proven track record as an effective

means of resolving disputes, and it will remain a prominent feature on the legal landscape for the foreseeable future.

Arbitration – It's Decision Time

In the construction industry, arbitration has been a popular means of dispute resolution for many decades. During the contracting process, contractors often choose between arbitration and litigation as the method of binding dispute resolution without fully understanding the differences and the ramifications of those differences.

Arbitration is a dispute resolution process in which a neutral third person or panel of neutrals selected by the parties presides over a formal hearing as evidence and testimony is presented, culminating in a decision on the merits by the arbitrator or panel of arbitrators. Arbitration comes in two flavors: binding and non-binding. In the context of construction disputes, arbitration is typically always binding, and therefore, the focus of this article will be on binding arbitration.

Wisconsin courts lack the power to order any party to engage in binding arbitration in the absence of an agreement to do so. Wis. Stat. §802.12(2)(b). But courts will enforce a valid agreement to arbitrate. Wis. Stat. §788.03. If there is an agreement to arbitrate, it is usually found in the dispute resolution provisions of the contract documents.

> **"THE MEDIATOR HAS NO POWER TO FORCE A PARTY TO MAKE OR TO ACCEPT ANY SETTLEMENT OFFER.**

Arbitration is generally a more streamlined process than litigation in court, however this is less true the larger and more complex the case becomes. In litigation, the parties typically investigate and develop their cases through the formal pre-trial discovery process. The parties may obtain documents from one another and from third parties and they may interrogate witnesses in sworn depositions. In litigation, the discovery process is where much of the heavy lifting is done and where much of the expense is incurred. Generally, in arbitration, the discovery process is more limited and often no discovery is allowed in smaller and simpler cases. The limitations on discovery are intended to streamline the proceedings to save time and money. However, if proving your case depends upon obtaining evidence from the opposing party or from third parties, the limitations on discovery can be a serious handicap.

The arbitration hearing is conducted much like a bench trial in court. Witnesses testify, being examined and cross examined by the parties' attorneys, and evidence is presented. The rules of evidence tend to be more relaxed than in court, and in some cases witness affidavits are allowed in lieu of live testimony. The arbitrator presides over the hearing, much like a judge does at trial in court, and he or she is the sole decision maker being both judge and jury. The arbitrator's decision (award) typically only gives the bottom line (who won and how much they won), often with little or no explanation of how the arbitrator arrived at his or her decision. The arbitrator's award is legally enforceable. A court will confirm (rubber stamp) the arbitrator's award and enter a judgment consistent with it. Wis. Stat. §788.12. The judgment may then be enforced just like a judgment arising from a civil lawsuit in court.

One advantage of arbitration is that the parties may select an arbitrator that understands and is familiar with construction disputes. Many judges lack these qualifications. It is also relatively easy to bring the arbitrators to the construction site to see it for themselves, but this is rarely done with a judge and jury.

In litigation, the loser at trial always has the right to appeal the decision to a higher court. Consequently, the trial is not necessarily the end of the dispute. In arbitration, generally there are no appeals allowed. The arbitrator's award is final and is enforceable. A court will only upset an arbitrator's award on grounds of fraud, misconduct, or corruption, not merely because it may have been wrongly decided. Wis. Stat. §788.10. The lack of appeals in arbitration is good for winners and bad for losers, but brings a swifter conclusion to the dispute.

One important disadvantage of arbitration is that it can be difficult or even impossible to require third parties to join in the proceedings. For example, in a dispute between an owner and a general contractor alleging defective work, the G.C. may wish to require the subcontractors that performed the work in question to participate in, and be bound by, the arbitration proceedings, but the G.C. would be unable to compel them to do so in the absence of their agreement or consent. In litigation, parties can be joined without their consent.

Whereas court proceedings are public in nature, arbitration proceedings are generally considered private. At the request of a party, arbitrators often issue gag orders enforcing the privacy of the proceedings. This can be an advantage or a disadvantage, depending upon the party's circumstances. It can be an invaluable advantage to a party seeking to avoid any bad publicity that may arise from the dispute or from the proceedings. It can be a disadvantage to the opposite party counting on the leverage from such potential bad press.

While the streamlined nature of arbitration may result in lower attorneys' fees, the arbitrator or panel of arbitrators do not come cheap. The arbitrator or the panel will charge by the hour for their time spent on the case and, in addition, there may be substantial administrative fees. These fees and expenses are typically split equally between the parties to the dispute. In large and complex cases, particularly where a panel of arbitrators is used, the arbitrator's fees and expenses can become quite substantial; sometimes making arbitration more expensive than litigation.

As between arbitration and litigation in court, arbitration is not always the better option. Which option is best depends upon the facts and circumstances of each case.

Conclusion

Because it is non-binding, being required to mediate rarely has disastrous consequences. But the significant differences between binding arbitration and litigation can have an impact on the outcome of the dispute. When entering a contract, a contractor should consult legal counsel to assist in making the important decision on whether to opt for arbitration or litigation as the designated means of binding dispute resolution.

Steven Slawinski is an attorney and shareholder with the Milwaukee law firm of O'Neil, Cannon, Hollman, DeJong & Laing S.C. He currently serves on the ABC of Wisconsin Board of Directors. He can be reached at steve.slawinski@wilaw.com or 414-276-5000.

Tom Tiffany, *Continued from page 9*

I believe we have to start by spending the gas tax dollars people are already forking over a lot more responsibly. We hear a lot about how the federal gas tax is a "user fee," but in reality, somewhere between 25 and 50 cents of every gas tax dollar that the federal government collects is being frittered away on projects that have nothing to do with roads, and that percentage is rising with each passing year. While people sit in traffic, their gas tax dollars are being wasted on boondoggle passenger-rail projects, bike paths, landscape beautification and even museums. Even worse, highway planners seem to be spending more time and complying with red tape than they do putting down concrete and asphalt. Major federal highway projects now take between nine and 19 years to complete thanks to bureaucratic permitting and analysis requirements. Other government restrictions like prevailing wage mandates and project labor agreements can artificially boost project costs and short-change taxpayers. I think there is definitely a need to look at infrastructure, but it can't be a situation where we simply hammer motorists with new taxes at the pump while avoiding long overdue spending-side reforms.

Q: What's next on tap for the federal Government's response to COVID-19?

A: I think we need to look at ways to make targeted, temporary relief programs like the PPP more flexible and useful to recipients, we need to explore tax changes that make it easier for employers to hire and retain workers, and we need to review and modernize regulatory policies and laws like the National Environmental Policy Act and Endangered Species Act that often do more to harm the economy than they do to protect public safety or the environment. We also need to enact common-sense liability protections for employers so that businesses can reopen their doors without the constant fear of being bankrupted by job-killing lawsuits. And most of all we need to resist the urge that we've seen in recent months to turn relief packages into gravy-trains loaded up with funding for unrelated pet-projects and programs.

Q: The issue ABC members are talking about most is COVID-19-related lawsuits.

A: I've talked a little bit about that already and I think it is immensely important. We are already seeing instances where trial lawyers have attempted to take advantage of the current crisis to pursue junk lawsuits, and that threat is something that a lot of small businesses are being forced to consider as they grapple with decisions about whether to reopen or not. Some states have taken steps on this, but we need to do something at the federal level to provide certainty for businesses. Sen. McConnell and Rep. McCarthy are committed to finding a solution, but so far Democrats continue to balk. I'm hopeful that we can build a bipartisan consensus to address this as leadership in both houses continue to negotiate on what a future relief package might look like.

Q: Anything we missed?

A: I hope to see you all out in Washington when Congress gets back to work.

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MADISON

Democrat vows to invest in infrastructure

By State Democratic Leader Janet Bewley, 25th Senate District

From ironworkers in Milwaukee to machinists in La Crosse to carpenters in Superior and electricians in Janesville, the building and construction trades are literally building our state from the ground up. I am proud of the effort of my Democratic colleagues in the Senate to enhance the working conditions for those in the trades and for all hardworking Wisconsinites.

As one of the few Democrats in the Legislature from north of Route 8, I have done my best to work with my Republican colleagues whenever possible to influence legislation that effects the building and construction trades. While I am not always on the same page as the majority party, I believe it is imperative that we find agreement when and where we can.

Going into next legislative session, Democrats will pursue our vision of how to promote a fair economy that expands opportunities for families and strengthens communities. It is hard to predict just what the long-term effects that COVID-19 will be on our state and much of our work next session will be impacted by those effects. One thing I do hope to see is a way to build on the increased willingness of industry and state agencies to work together during the COVID-19 crisis.

Democrats will continue to focus on issues that working people face every single day. It is more important than ever to reduce the burden of increasing health care costs on workers and employers. We need to find a way to give our public schools and technical colleges the resources they need to ensure young people are prepared for whatever path they choose in life. And we will continue to pursue policies that expand economic security for working families and seniors. As a former Community Relations Officer for WHEDA, I hope to be able to find additional opportunities to make bipartisan progress on solutions to our current workforce housing shortage.

We look forward to working with Gov. Tony Evers to grow Wisconsin's economy and make sure people across the state have

Janet Bewley, *Continued on page 19*

Reforming Commercial Plan Review

By State Rep. Jesse Rodriguez

In Wisconsin, most commercial building and plumbing plans are reviewed by the Department of Safety and Professional Services (DSPS) before projects can begin. This review process is meant to serve as a necessary check to ensure construction projects, are compliant with state safety codes.

Unfortunately, DSPS has been unable to finish their commercial reviews within the four-week goal set previously by agency secretaries. Their inability to meet this goal creates delays on building projects often at the most optimal time for builders to break ground.

Recent feedback on the DSPS permitting process indicates that a review of a plumbing plan takes about six months and the wait on a sprinkler review is roughly 13 weeks. This permit process is inefficient, so we recommend that it be streamlined so builders don't lose opportunities to start their projects.

For this reason, my colleague, Sen. Roger Roth, and I have introduced Assembly Bill 962 (AB 962) to start this conversation. Our proposed legislation aims to ensure a fair and efficient review by:

- Requiring that the fees be submitted prior to the scheduled day of the review and that 50% of the fee be non-refundable to ensure builders are invested and ready for the examiner the day of the scheduled review.
- Exempting single story commercial buildings (under 200,000 cubic feet) that are not

> **"THIS PERMIT PROCESS IS INEFFICIENT, SO WE RECOMMEND THAT IT BE STREAMLINED SO BUILDERS DON'T LOSE OPPORTUNITIES TO START THEIR PROJECTS.**

Jesse Rodriguez, *Continued on page 19*

Continued, State Rep. Jesse Rodriguez

deemed to be healthcare facilities, schools, factories, or places of assembly providing they are examined by a licensed engineer, architect or designer.

• Changing the plumbing plan review requirements to require that only projects with 26 or more planned plumbing fixtures need to be reviewed by DSPS (an increase from 16 or more fixtures). As a point of reference, most new homes with a master and main bath have 24 plumbing fixtures, and they are not subject to review because they are not commercial buildings.

When we had the hearing, the department shared its goal of expediting their review process. I hope that we can work together in the coming months to improve the plan review turn-around process.

Regrettably, recent events concerning the coronavirus pandemic has prevented this bill from getting the attention it deserves. However, I am committed to continuing to work on this issue throughout the rest of 2020 and as we prepare for the next session.

As I continue to work with ABC to find solutions to this problem, I encourage ABC members to reach out to my office and share their ideas on how we can reform the permitting process going forward. I can be reached by email at Rep.Rodriguez@legis.wi.gov.

Continued, State Senator Janet Bewley

stable jobs and family-supporting wages. It's not enough to invest in Southeast Wisconsin and in Dane County. We need talent development and retention in all 72 counties. In order to push forward this priority, we want to improve skills training, lower tuition costs, and help address the burden of student loan debt in Wisconsin. That starts with passing legislation like Senate Bill 840 (SB 840) that would allow students to repay their student loans through the EdVest college savings plan without state tax penalties. By making it easier to save for training programs and apprenticeships and pay off debt, we can give greater financial flexibility and opportunities to become a skilled worker.

As some of you know, SB 840 was introduced by Sen. Jon Erpenbach and Rep. Diane Hesselbein and was incorporated in an amendment to Assembly Bill 754 that passed the Joint Finance Committee 14-0. It looked as if it was on track to pass the Assembly and Senate. Unfortunately, it failed to become law due to the legislative session being cut short this spring.

Given the bipartisan support for SB 840, I am hopeful that we can renew our push for this legislation next session and send it to the Governor's desk to be signed into law. Some other proposals that ABC of Wisconsin supported that we would like to see revived next session include:

• Assembly Bill 45 / Senate Bill 45 would have created an income and franchise tax deduction for tuition expenses paid by an individual, including a sole proprietor, or corporation for an individual to participate in an apprenticeship program that is approved by the Department of Workforce Development.

• Assembly Bill 606 / Senate Bill 529 would have required the Department of Workforce Development to prepare a packet of information describing the employment and training opportunities that are available to former students of the universities and two-year college campuses within the University of Wisconsin System who have not graduated from a university or college campus within the UW System.

• Assembly Bill 797 / Senate Bill 716 would have prohibited the sale of coal tar-based sealant products and high PAH sealant products and imposed a cut-off date to prohibit the use of such products.

Although these proposals will have to make their way through the legislative process again next session, I also want to note the success of Assembly Bill 532 / Senate Bill 440. This bill enhances the Wisconsin tax benefits under the federal Opportunity Zones program to drive long-term investments in and boost economic opportunities for communities. This is a critical step to motivate Wisconsin investors to keep their investment dollars right here in Wisconsin and boost economic growth and job creation. As a co-sponsor of this bill, I was pleased that it passed the Senate and Assembly and was signed into law as 2019 Wisconsin Act 36.

Moving forward, we need to work collaboratively and engage our private and public sector partners to solve the challenges facing our hard-working Wisconsin families and focus on strengthening the middle class. A strong economy with job and wage growth is good for everyone in our state.

> **"I HAVE DONE MY BEST TO WORK WITH MY REPUBLICAN COLLEAGUES WHENEVER POSSIBLE TO INFLUENCE LEGISLATION THAT EFFECTS THE BUILDING AND CONSTRUCTION TRADES.**

I want to close by pointing out that Democrats want to invest in all aspects of the 21st century infrastructure. We absolutely must fix crumbling roads and bridges. A safe and reliable transportation network is critical for boosting economic development, but it is only part of the equation. More access to broadband is critical to the northern part of the state. Democrats will be fighting to provide more incentives for providers to make those investments.

From the shores of Lake Michigan to the banks of the Mississippi River and from the Rock River to the Chequamegon Bay, Wisconsin Democrats want to tackle the tough issues, strengthen communities, and ensure Wisconsin is a place where the next generation wants to live, work and raise a family.

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MAY 2020

• Battaglia Industries, Inc.
Keith Battaglia
406 W. Campus Drive
Arlington Heights, IL 60004
Phone: (847) 483-0300
Description: Electrical Contractor
Sponsor: Gene Jacobson, PDC – Electrical Contractors
Beam Club Members-to-date: 18.5

• Oak Ridge Electric, LLC
Kelsey Neubauer
N2178 County Rd OA
La Crosse, WI 54601
Phone: (608) 780-0440
Description: Electrical Contractor
Sponsor: Brian Wieser, Wieser Brothers General Contractor, Inc.
Beam Club Members-to-date: 48.5

• Pelikan Plumbing
Michael Pelikan
P.O. Box 484
Sullivan, WI 53178
Phone: (262) 593-2290
Description: Plumbing Contractor
Sponsor: Jay Zahn, R&R Insurance Services
Beam Club Members-to-date: 47

• Repka Electric, LLC
John Repka
4016 South 104th Street
Greenfield, WI 53228
Phone: (414) 305-7634
Description: Electrical Contractor
Sponsor: John Jrolf, Giraffe Electric II, Inc.
Beam Club Members-to-date: 32.5

JUNE 2020

• Area Mechanical, Inc.
Chris Hughes
W4060 Aspen Court
Fond du Lac, WI 54937
Phone: (920) 375-0282
Description: Mechanical Contractor
Sponsor: Jeremiah Mand, Mand Plumbing LLC
Beam Club Members-to-date: 1

• Conklin Electric, LLC
Chris Conklin
2011 Pleasant Drive
Kronenwetter, WI 54455
Phone: (715) 574-9735
Description: Electrical Contractor
Sponsor: Tom Altmann, Altmann Construction Co., Inc.
Beam Club Members-to-date: 39

• Home and Business Electric, LLC
Amanda Cole
P.O. Box 1486
Waukesha, WI 53187
Phone: (262) 278-0330
Description: Electrical Contractor
Sponsor: Cheryl Sment, Interstate Sealant & Concrete
Beam Club Members-to-date: 20

• JW Commerical Painting
Wyatt Haas
316 Eau Claire St.
Eau Claire, WI 54701
Phone: (715) 307-8454
Description: Painting Contractor
Sponsor: Jim Bunkelman, Royal Construction, Inc.
Beam Club Members-to-date: 4

• Northland Plumbing and Heating, LLC
Carl Thompson
N9019 State Road 49
Iola, WI 54945
Phone: (715) 445-3156
Description: Mechanical Contractor
Sponsor: Jeff Disher, Disher Electric Inc.
Beam Club Members-to-date: 1

• Power Solutions, LLC
Aaron Pollnow
3011A S. 7th St.
Milwaukee, WI 53215
Phone: (414) 243-2116
Description: Electrical Contractor
Sponsor: David Murphy, PDC – Electrical Contractors
Beam Club Members-to-date: 13

• Rock Valley HVAC, Inc.
Carla Schoville
928 Todd Drive, Suite 2
Janesville, WI 53546
Phone: (608) 247-4949
Description: Mechanical Contractor
Sponsor: Kevin Day, Corporate Contractors Inc. (CCI)
Beam Club Members-to-date: 11

• Tom Miller Electric, LLC
Tom and Traci Miller
1355 Boettcher Road
Park Falls, WI 54552
Phone: (715) 762-3250
Description: Electrical Contractor
Sponsor: Jim Bunkelman, Royal Construction, Inc.
Beam Club Members-to-date: 5

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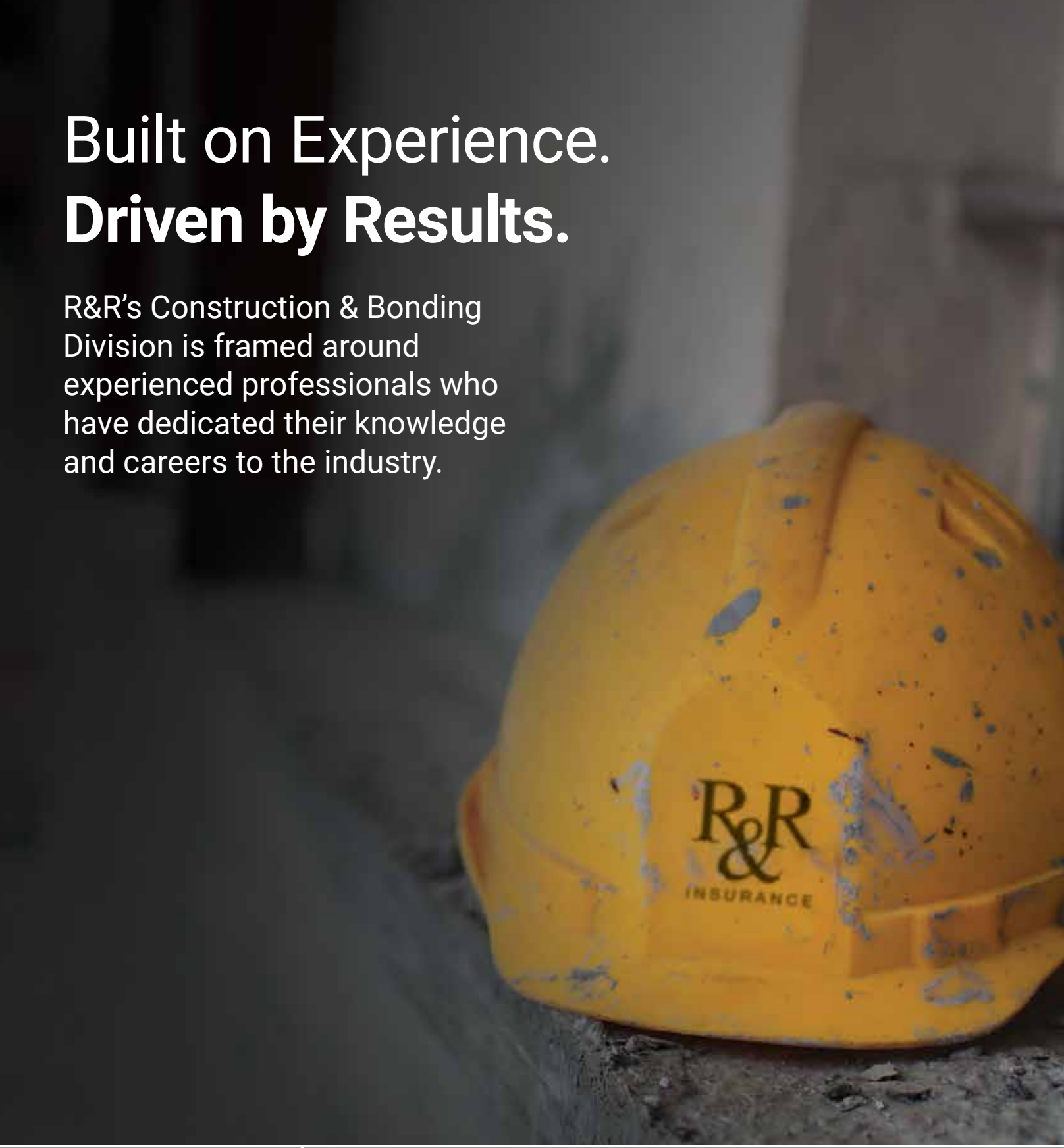

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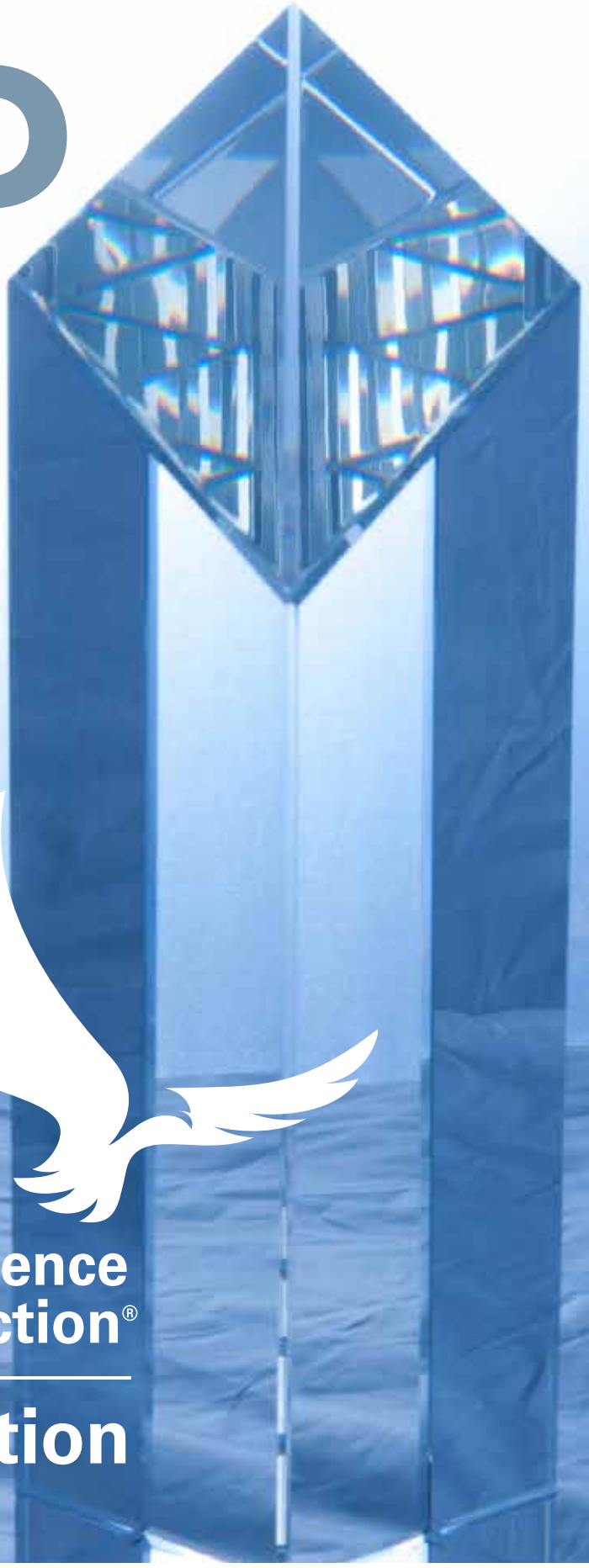

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