



February 1, 2010  
Volume 1, Issue 1

# Construction Law Section Newsletter

## Construction Law Section Semi-Annual Mixer

Construction Law Section of the State Bar of Nevada invites you to join us for our Semi-Annual Mixer

February 25<sup>th</sup> at 5:30 pm

**Southern location:**

**Gordon Biersch Brewery**  
3987 Paradise Road  
Las Vegas, NV

**Northern location:**

**Amendment 21 Bar & Grill**  
425 S Virginia St.  
Reno, NV

*Meet, reconnect and share ideas with colleagues practicing in Construction Law*

We look forward to seeing you there!

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## Nevada Contractors Offered a Second Chance at Success

The Board’s mission to protect Nevada’s public’s health, safety, and welfare is met with a wide range of regulatory and disciplinary tools. Among these tools is the ability to place a contractor on probation for a period of time to correct issues or violations discovered during the Board’s investigation.

The Board may implement probation when the Board is able to suspend or revoke the contractor’s license or otherwise discipline a contractor but determines the issues to be correctable. The Board’s Order implementing probation typically include terms that require the contractor to appear for personal interviews with the Board, submit documents and financial records to the Board, submit all contracts to the Board, cooperate with Board investigations, as well as comply with all Nevada laws and administrative rules and the other terms of the Order that implemented probation during the entire probationary period. In exchange, the contractor is able to continue business by completing existing projects and contracting to start new work. This allows the contractor to comply with State regulations and keeps the Board timely informed of such compliance.

Oftentimes, a probationary period is offered by the Board and accepted by the contractor in lieu of license suspension or revocation. Probation is for a fixed period of time, but the Board may extend the probationary period or suspend or revoke the license if the contractor fails in its obligations under the probation order. If the contractor successfully completes the

## Message from the Editor:

Dear Members:

This is the inaugural issue of the Construction Law Section Newsletter. In it you will find articles written by our very own members. Let that example guide you in deciding to submit an article of your own or one that you have read that will benefit the other members of the Section.

Bottom line: this is your newsletter and your opportunity to contribute to the discussion of all the issues in our common area of practice. For example, we are looking for articles on (i) the issue of license bond surety litigation and (ii) subrogation as it pertains to CGL policies implicated in construction claims.

Travis Barrick, Esq.

## Certificates of Insurance: Proof of Insurance

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Contractors and their attorneys are no doubt familiar with the term “certificate of insurance.” Subcontractors routinely request their insurance broker to issue such certificates, which identify the general contractor as a certificate holder, in order to comply with their contractual promise to procure insurance adding the general contractor as an additional insured. But what is the legal effect of a certificate of insurance? Does a certificate of insurance actually function to amend the subcontractor’s insurance policy? Does the certificate function to qualify the general contractor as an additional insured under the subcontractor’s policy, even if that policy is never amended to include an additional insured endorsement?

The phrase “certificate of insurance” refers to a standard, pre-printed form that describes one or more insurance policies in effect as of the date of the certificate. Such certificates typically set forth the name of the insurance carrier; the types of insurance coverages and policies; the policyholder’s name; and the policy limits. Certificates of insurance also routinely identify the entity that issued the certificate—typically, the policyholder’s insurance broker. Certificates of insurance also identify the entity or person for whom the certificate is issued, commonly referred to as the “certificate holder.”

The certificate does not ordinarily create any contractual rights in the certificate holder under the policies set forth in the policies. Rather, it is a convenient method for proving the existence of one or more insurance

policies. For example, in order to commence work on a construction project, subcontractors usually must show that they procured insurance as required by their subcontracts with the general contractor. To satisfy this requirement, subcontractors ordinarily contact their insurance broker, who then prepares a certificate of insurance. Subcontractors use such certificates as proof of insurance.

While a certificate of insurance is a quick and easy way to demonstrate that insurance is in place, it does not change the original insurance contract. In other words, a certificate holder may not be insured under an insurance policy if that policy has not been amended to add the certificate holder as an additional insured. Thus, a certificate of insurance is merely evidence that a policy has been issued; it is not a contract between the insurer and the certificate holder. *Inland Fire and Marine Ins. Co. v. Bell* (1997) 55 Cal.App.4th 1410, 1423. Additionally, the statutes of several states (such as Alabama, California, and New York) specifically provide that a certificate of insurance is not an insurance policy and does not amend, extend, or alter coverage afforded by the original policy. See, e.g., Cal. Ins. Code sec. 384.

As noted above, the subcontractor’s insurance broker is typically the person who issues a certificate of insurance. That broker, however, often does not have a direct agency relationship with the insurance carrier or the carrier’s insurance agent.

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## Second Chance (continued from page 1)

probationary period, the Board will conduct a hearing to lift the probation. During the probation period, the Board's public records will reflect that the contractor is operating under probation as proper notice to the public. After exiting probation, the Board's public records will be updated to reflect a successful end to the probation period.

Probation is an administrative burden on the Board because it consumes substantial

resources to review, interview, and supervise the contractor. In some aspects, probation is a recognition that the contractor, although previously non-compliant with Nevada law, is worth the public's investment in supervision to rehabilitate the contractor, to correct minor issues, and to encourage better business practices.

At first blush, few contractors would welcome the Board's close supervision. However, the Board's efforts strike a

good balance between protecting the public and the contractor's business interests. The probation period gives the contractor an opportunity to redeem itself not only in the eyes of the public and the Board, but to correct its business practices and operations. This opportunity should not be wasted by the contractor; by embracing the chance to improve internal controls and operations, the contractor can not only satisfy the Board that the contractor can be a valuable licensee, it can

save the contractor's business.

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## The Ethics of Engineers and Land Surveyors as Litigation Experts

The U.S. legal system relies on an adversarial process to determine facts, and, from the facts, to dispense justice according to the law. Professionals, like engineers and land surveyors, play key roles in presenting information to fact finders, usually juries, by acting as expert witnesses.

An expert is any person that is qualified, by reason of education, training, or experience, to give guidance to a lay person. An expert does not offer a sworn "fact statement" like an eye witness; instead, experts offer "expert opinions"

that rely on "given" facts as applied to the professional's discipline. For instance, an engineer who does not witness an automobile collision can offer an expert opinion of the vehicle's speed based upon skid mark length, the pavement type, and other factors the engineer considers relevant.

Professionals who offer expert opinions are usually governed by overlapping ethical and legal duties. For instance, Nevada Administrative Code 625.510 establishes as a "fundamental principle" that engineers and land surveyors shall be

"honest and impartial." The American Council of Engineering Companies Ethics Guidelines Fundamental Canon 3 requires a consulting engineer to "issue public statements in an objective and truthful matter." Additionally, Nevada civil court rules require an expert to sign his or her report; thereby signifying its authenticity and implicitly vouching for the truthfulness of the report's statements. This duty is augmented by the attorney's duty of candor to the court that prevents

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*"Professionals who offer expert opinions are usually governed by overlapping ethical and legal duties."*

See Evidence pg. 4

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## Certificates (continued from pg. 3)

Consequently, the subcontractor's insurance broker possesses no actual authority to amend the subcontractor's policy. Rather, the subcontractor's broker must arrange for the insurance carrier or its agent to issue an additional insured endorsement in order to ensure that the certificate holder is formally added to the subcontractor's policy.

In some instances, however, the mere issuance of a certificate of insurance may function to amend the subcontractor's policy, even if the policy is not formally amended to include the certificate holder an additional insured. For example, a certificate of insurance will suffice to amend

the policy if the subcontractor's policy contains provisions stating that a certificate holder qualifies as an insured. Also, if the broker or agent has apparent authority (also known as ostensible authority) to bind the insurance carrier, a certificate of insurance may be sufficient to amend the policy. To establish apparent authority, it must be shown that the insurance carrier—not the insurance broker—intentionally or through lack of ordinary care has caused a third party to believe the broker possessed such authority. See, *National Liability & Fire Ins. Co. v. Fiore* (2006) 187 Fed. Appx. 733, 735.

About the author:

Jeffrey S. Bolender founded

Bolender & Associates in 2001. He has broad experience in complex business litigation before state, federal, and appellate courts in matters involving insurance coverage, subrogation, trademark and copyright disputes, domain-name recovery, unfair competition, wrongful death, personal injury, products liability, defamation, internal corporate disputes, and maritime law.

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## Evidence (continued from pg. 3)

an attorney from presenting evidence that is non-truthful. Finally, whenever an expert is deposed or testifies, the expert will make the statements after swearing to tell the truth under the penalties of perjury. In short, the professional's own ethical system and the legal system cooperate to assure juries that only supported expert opinions are presented.

However, the adversarial process does permit difference in opinion; two reasonable experts can, and often do, review identical information and reach differing conclusions. This does not mean that one expert is not fulfilling an ethical obligation; instead, the adversarial process, played out in the expert opinions, merely offers

differing explanations and conclusions for observed events. When "dueling experts" are presented, it is the jury's duty to evaluate their credibility and act accordingly.

Consequently, while some complain that one can find an "expert" that will "say anything if the fee is right," the overlapping ethical system and legal system cooperate to eliminate "junk science" from our courtrooms.

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### Note from the editor:

Special thanks to my paralegal Will Lehman for volunteering to assist with this newsletter.