



Means and Methods: Sword or Shield?

Brooklyn Law School/Geraldo Rivera Room@ 205 State Street, Brooklyn

June 15, 2016 (8:30 a.m. to 11:00 a.m.)

8:30-8:45—INTRODUCTION Terri Matthews, Director, Town+Gown

8:45-10:45—PANEL DISCUSSION

- Lawrence Chiarelli, Professor, Department of Civil and Urban Engineering NYU Tandon School of Engineering New York University
- Frank X. DarConte AIA, Vice President - Planning and Development, The DeMatteis Organizations
- F. H. (Bud) Griffis, PE, PhD, Professor of Civil Engineering (Construction) Tandon School of Engineering New York University
- Michael Plottel, AIA, LEED AP, Columbia University, Director, Capital Project Management
- Howard Rowland, President, E.W. Howell Company
- David Varoli, General Counsel, New York City Department of Design and Construction

Moderator: James Savalli, Associate Attorney, Shumaker, Loop & Kendrick, LLP and Brooklyn Law School, Class of 2015

10:45-11:00—CLOSING REMARKS Joseph Hogan, CDT, Vice President-Building Services, AGC NYS, LLC

BROOKLYN LAW SCHOOL, GERALDO RIVERA ROOM, 205 STATE STREET, BROOKLYN, NY

NYC DDC TOWN+GOWN SYMPOSIUM EVENT:

MEANS AND METHODS: SWORD OR SHIELD?

JUNE 15, 2016: 8:30AM-11:00AM

MEANS AND METHODS: SWORD OR SHIELD – TIMED AGENDA

(CLE credit available only to New York City employees)

8:30-8:45am: Opening Remarks

Terri Matthews, Esq., Director, Town+Gown

8:45-10:45am: Panel Discussions

Panelists:

Lawrence Chiarelli, Esq., PE, F.ASCE, Professor, Dept. of Civil and Urban Engineering, NYU Tandon School of Engineering; Brooklyn Law School Class of 1993

Frank X. DarConte, AIA, Vice President – Planning and Development, The DeMatteis Organizations

F.H. (Bud) Griffis, PE, PhD, NAC, Professor, Dept. of Civil and Urban Engineering, NYU Tandon School of Engineering

Michael Plottel, AIA, LEED AP, Director, Capital Project Management, Columbia University

Howard Rowland, President, E.W. Howell Company

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Moderator:

James S. Savalli, Esq., Associate Attorney, Shumaker, Loop & Kendrick, LLP; Brooklyn Law School Class of 2015

8:45-9:40am: Form Construction Contracts and Case Law

Overview of Research and Parties to Construction Project..... 5 minutes

Liability Shifting Provisions in Form Construction Contracts..... 5 minutes

Contractual Obligations of Parties to Construction Contract 15 minutes

Bright Line Demarcations in Contractual Obligations..... 15 minutes

Overlaps in Performance of Contract and Resulting Liabilities 15 minutes

9:40-10:45am: Construction Industry Trends and Contract Implications

CH2M Hill, Inc. v. Herman – “Substantial Supervision Test” 15 minutes

Design Delegation – Express and Implied 15 minutes

Contract Implications – Innovations in Design 20 minutes

“Bulletproof” Contracts vs. Good Faith and Fair Dealing 15 minutes

10:45-11:00am: Closing Remarks

Joe Hogan, CDT, Vice President – Building Services, AGC NYS, LLC

– CLASS OVER –

In the construction contract between owner and contractor, with the architect sometimes having a role, the term “means and methods”, a term of art, most often not defined in the contract, is used in practice by parties to advance and protect their respective interests. Researchers and practitioners have noted the adversarial nature of participants “on the ground”, which is the result of risk shifting contract provisions and regulations and case law interpretations over the years. The historical movement away from the “master builder” into the modern specialized world of participants, many of whom have been professionalized and regulated, may also explain some of the bases for litigation and the adversarial nature of the industry. Savalli undertook to unpack and analyze the various relationships on construction projects by subjecting “means and methods” contractual provisions to legal analysis, in the context of historical practice, risk shift conventions and regulation, in order to provide a foundation for future research projects related to risk analysis and management.

Savalli conducted an historical legal analysis into the term “means and methods” beginning with the origin of the term from the days of the “master builder”, which found expression in the law of agency focusing on the nature of “independent contractor”. Savalli traced the early cases in tort as they evolved into contract law, with the professionalization of the architect and the promulgation of the early standard contracts by the American Institute of Architects. Savalli also assessed the impact of the regulation of construction participants and state and workplace safety at both state and federal levels, which added another level of complexity. Savalli also conducted interviews with construction industry professionals.

While the sophistication of contracting has intentionally evolved, shaped by rational actors in the industry and the courts, Savalli concluded that the continued use of the undefined term “means and methods” functions as a risk shifting device from which the owner appears to benefit the most. He concluded that whether “means and methods” works as a shield or a sword appears to depend on the facts of the particular harm that resulted so that analysis of case law revealed little conceptual structure to the term. The increasing sophistication of contract forms and provisions, linked with insurance products, in an environment of evolving advances in building technology and project service delivery methods, amid variance in state laws governing construction, further hindered the ability to pin down the definition of the term.

In view of the continued use of the undefined term and interview results that suggested that there is a need to define the term in light of dramatic inconsistencies of understanding of the term, Savalli prepared a survey instrument for distribution across the industry to identify issues for deeper understanding. Savalli also suggested that future analysis focus on how emerging building technologies, including building information modeling, the growth of modern service delivery methodologies and the introduction of environmentally sustainability designs and materials impact the use of this term as a risk shifting device.