Green Opportunity Knocks!

The Institute for Sustainable Infrastructure (ISI; ASFE is a charter member) has announced a new training course to prepare individuals to become Verifiers in the Envision™ Rating System Program. Verifiers’ employers (like your firm) – not the Verifiers themselves – will contract with ISI to review and validate the sustainability goals inherent in infrastructure projects submitted by developers and owners for ISI third-party review. The result of this review will be the achievement of a sustainability designation indicating the project fulfills the requirements of the Envision™ Rating System. Interested? If so, you will want to have qualified staff attend the first or subsequent training sessions.

While we expect a relatively modest project volume at first, realize that the U.S. Green Building Council processes an average of three projects a day…and that’s just for buildings. The total civil infrastructure community represents a far greater business opportunity. Get the details at www.sustainableinfrastructure.org.

continued on page 16

Are You Taking Advantage of ASFE’s Writing Webinars? Your Peers Are!

ASFE has conducted six writing-improvement webinars to date, covering taboo words, e-mail, the passive-voice (“scientific style”), list construction, and personal pronouns (dangerous!). While no one can please all the people all the time, the overall ratings have continued on page 3
Tired of throwing your money into the liability-insurance industry’s black hole of premiums and profits? Want some transparency for a change?

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Terra treats its insureds like they own the company. Because they do.
The report in question – “The State of the Practice in Foundation Engineering on Expansive and Collapsible Soils” – was written by William N. Houston, Ph.D., P.E. and John D. Nelson, Ph.D., P.E. and delivered live as a keynote lecture at GeoCongress 2012, then published in the proceedings. The paper's publication is the most concerning issue, because it could be characterized (accurately) at trial as a “peer-reviewed paper published by the American Society of Civil Engineers” and then cited in an effort to convince a trier of fact – a judge or jury – that what is so is not so, and vice versa, thus to knowingly put a 100% nonnegligent geoprofessional at an extreme disadvantage.

The paper begins with the two authors defining the terms “state of the practice,” “state of the art,” and “standard of care.” They attempt to establish that “state of the practice” and “standard of care” do not mean the same thing, whereas a review by members of ASFE’s Legal Affairs Committee – composed solely of attorneys – indicated that is not the case, that the two terms are interchangeable. Worse, the two engineers came up with a definition of “standard of care” that is inaccurate when applied to professionals, a seemingly odd oversight given that both are experienced experts. (In fact, Dr. Nelson is CEO of Engineering Analytics, Inc., a company which claims to have provided expert services for more than 200 projects over the last 10 years; i.e., more than one a month for the last decade.) Because expert witnesses testify about the applicable professional standard of care (failing to meet it and causing damage as a result comprises negligence), it’s unfortunate they evidently were not more familiar with its meaning and application. Drs. Houston and Nelson chose as their source an on-line legal dictionary which made no distinction between the standard of care applicable to Joe Sixpack vs. that applicable to Joe Sixpack, Ph.D., P.E. (as well as Pat Sixpack, P.G. and Chris Sixpack, CPA, et al.). They then went on to augment their definition by quoting several well-known geoprofessionals, like Fu Hua Chen and Ralph Peck, even though neither was an attorney (let alone a legal scholar) and even though the professional standard of care applies to far more than engineers alone.

The two authors then move on to talk about the findings of their research into foundation-engineering practice, even though they are uncertain about how many reports actually were reviewed and, apparently, with the outlook that what was happening more than three decades ago identifies what is happening now, with the caveat that “now” apparently means six or seven years ago, given that 2005 was the date of the most recent report.

The only effective way to attempt to mitigate the damage that feasibly could be done by the paper’s publication would be to have ASCE publish an opposing point of view. Toward that end, ASFE called on its Legal Affairs and Geotechnical Committees. Although many members of each provided input, their chairs found volunteers ready and willing to do the heavy lifting.

Key developers of the legal review were Ji H. Shin, Esq., general counsel to the Earth Systems, Inc. group of engineering companies, and ASFE Consultant Member Michael J. Byrne, Esq., a partner of the law firm Gogick, Byrne & O’Neill, LLP. What they wrote speaks for itself; in part:

The professional standard of care is a concept that American society has enacted into law in order to judge the performance of professionals, including, but not limited to, engineers. By definition, professional standard of care is a legal concept – not an engineering or accounting or medical concept.... As such, it is inappropriate for the Authors to cite engineers’ opinions as authority for the legal meaning of “professional standard of care.”

Establishing the professional standard of care in any given case is a process that almost always requires testimony by expert witnesses. They serve to explain professional and technical issues to the trier of fact. This process is intentionally flexible, so courts have the discretion they require to consider the unique circumstances of a particular case, including factors such as similarity, locality, and the time when the work was completed....

The Discussers [Shin and Byrne] spoke with attorneys from throughout the United States about the Authors’ belief that “state of the practice” is different from “standard of care.” The attorneys, all members of the Legal Affairs Committee of ASFE/The Geoprofessional Business Association, confirmed that no difference exists in the law of their respective jurisdictions, and that “state of the practice” means exactly what “professional standard of care” means when applied to design professionals.....

continued on page 4
It is particularly important to note that design professionals are never required to be aware of, let alone apply, the state of the art. The state of the art can be described colloquially as “the bleeding edge”; i.e., practices whose efficacy has not been established and whose application may be unwise and actually lead to allegations of negligent performance should they be inapplicable to the project at issue. Furthermore, were professionals required to apply state-of-the-art practices, they would perforce be required to practice in an environment where anything less than perfection would be actionable, meaning they would become insurers for their clients and the public in general. Needless to say, this would wreak havoc on the engineering profession and the public it serves, which depends so heavily on engineers to analyze, create, enhance, and maintain the nation’s infrastructure.

Following their discussion of definitions, the Authors summarize what they purport to be the professional standard of care for various engineering tasks. In fact, however, the professional standard of care applicable to any given engineering task is determined by the trier of fact – a judge or jury – that considers the relevant evidence in conjunction with expert testimony and then applies judgment. Absent that venue, one could establish what was ordinarily done at a given time – the focus of the professional standard of care – only by accumulating for each task empirical knowledge about the performance of all other like professionals in a given area (as likely to be defined by a trier of fact) at a given time. To avoid bias in forming their conclusions about the professional standard of care applicable to a given area at a given time, the researchers would need to review hundreds if not thousands of reports and/or conduct just as many peer reviews, and/or poll most practitioners about their practices. 

Ji and Mike concluded by summarizing: The Authors attempt to validate their own definitions and theories about the professional standard of care and related issues. These definitions and theories conflict with law, however, and so should not be promoted or accepted as methods for elevating geoprofessional practice. In particular, were the professional standard of care to become what the Authors believe it should be, all professions – not just engineering – would experience devastating consequences, because professionals would be forced to practice in a corrosive legal atmosphere where they would be subject to a lawsuit for failing to meet standards far in excess of what they currently contend with.

The technical review was initiated by Alan F. Claybourn, P.E. (Kumar and Associates, Inc.) and Earth Systems Pacific’s Rob Down, P.E., Judd King, G.E., Fred Potthast, G.E., and Dennis

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**UPCOMING MEETINGS**

- **October 25-27, 2012**  
  ASFE Fall Meeting  
  Sheraton Denver  
  Downtown Hotel  
  Denver, Colorado

- **April 25-27, 2013**  
  ASFE Spring (Annual) Meeting  
  Wild Dunes Resort  
  Isle of Palms, South Carolina

- **October 10-12, 2013**  
  ASFE Fall Meeting  
  Boston Marriott Copley Place  
  Boston, MA
Shallenberger, G.E., with Dennis completing the work and submitting the rebuttal discussion under his own name. Here are a few highlights:

The Authors use the following paragraph to conclude their introduction:

“In this paper the Authors present what we consider should be the state of practice for field investigation techniques, laboratory testing, and foundation design on expansive and collapsible soils. We then discuss the state of practice that is being followed and present recommendations for change.”

While the Authors are at liberty to develop their own aspirational model for the standard of care, they cannot possibly know “the state of practice that is being followed” unless they identify what practitioners are doing now, in 2012. The Authors, by their own admission, relied on a review of reports that were as much as 35 years old. The most recent was dated 2005.

The Authors state, “Over 300 geotechnical reports prepared for the Front Range area of Colorado have been reviewed and compiled into a database. These reports were prepared by a wide range of different geotechnical engineers during the period from 1978 to 2005.” The Authors evidently assumed that the standard of care in 1978 was the same as that which existed in 2005, and that the latter is the same as that which exists in 2012. Not mentioned: When were the reviews performed? By whom? Using what standard protocols? How many “different geotechnical engineers” were included? What does the phrase “wide range” mean? And why don’t the Authors know how many reports were reviewed? Also, given that the Authors and their colleagues reviewed “perhaps as many as 600 to 700” reports, and given that more than 300 reports related to the Front Range of Colorado, it appears the Authors’ analysis of all other areas was based on perhaps 275 or fewer reports, most of which do not relate to moisture-sensitive sites.…

[Section 3.0 Laboratory Testing] comprises a discussion of test and design methods. While the Authors favor certain methods over others, they fail to consider relative costs and, thus, the methods’ practicality and how much better or worse the results have been or would be compared to alternatives, including the judgment of an engineer who is experienced with the soil deposit at hand.…

In concluding their paper, the Authors state that “for every billion dollars wasted due to underdesign there are probably 5 billion dollars, or even more, wasted in overdesign.” While dramatic, this statement appears to be utter speculation; the Authors cite no research to support their contention.

In discussing site characterization, the Authors present the following:

“In addition to advancing the hole to sufficient depth and testing samples at those depths is the need for careful logging of the soil profile. Author Nelson asserts that an important element of careful logging is inspection of continuous core when practical. Granted that taking core during sampling increases the cost of investigation, that cost is minimal when compared to potential cost of damages. It is the responsibility of the engineer to educate the client as to the need to undertake that cost. Author Houston asserts that continuous coring is not practical in a great many cases.”

If the two Authors disagree strongly about the value of continuous-core inspection, how could they agree to state, “It is the responsibility of the engineer to educate the client as to the need to undertake that cost”? Such statements are dangerous, because an attorney could use them to allege defendant engineers were negligent for failing to fulfill their professional “responsibility…to educate the client as to the need to undertake that cost.”

Dennis’ conclusions are worth reporting in full:

ASCE’s publication and maintenance of this paper give it credibility it does not merit. The Authors describe their research in vague, poorly supported terms and offer as facts statements that are highly speculative. Although the Authors lament the standard of care “today,” none of their research – by their own admission – considers what is being done today. The Discusser urges ASCE to expunge the paper from the institution’s annals and evaluate the peer-review process that enabled its publication.

So, do we do a couple of fist bumps and declare victory? We’d better not. First, ASCE reviewers must decide whether or not to publish either discussion, let alone both. And if they do publish, it would be up to defense counsel to somehow be aware of the discussions should they be cited by an expert willing to misapply the paper to assassinate a peer’s reputation for the right price. This is knowledge you likely would have to impart.

While we are confident that the two authors sought to achieve exactly what they proclaimed as their purpose – “to help bring about at least some modest upgrade relative to certain aspects of the state of the practice” – the three “discussers” believe that Drs. Houston and Nelson do not know what “state of the practice” actually is, either as a legal concept or by virtue of their own and others’ research. That alleged deficit has resulted in the publication of a paper that, used by an experienced, ruthless hired gun, could be just as destructive as one intended to be so.

To obtain a copy of what ASFE’s representatives submitted – bear in mind, we’ve assigned the copyright to ASCE – send your request to info@asfe.org or call 301/565-2733. To obtain a copy of the Houston/Nelson paper, click here.
Jack Zenger and Joseph Folkman write for the Harvard Business Review’s HBR Blog Network. Jack is the CEO and Joseph the president of Zenger/Folkman, a leadership development consultancy. They are co-authors of the book How To Be Exceptional: Drive Leadership Success by Magnifying Your Strengths. They recently discussed traits of a bad boss, noting, “Our research suggests that the offensive actions so often associated with being a bad boss make up less than 20% of the behavior that actually defines the worst bosses. When we analyzed the behavior of 30,000 managers, as seen through the eyes of some 300,000 of their peers, direct reports, and bosses on 360-degree evaluations, we found that the sins of the bad boss are far more often those of omission, not commission.”

Here are the traits, listed in descending order of damnation:

- **Failure to inspire because of low energy and enthusiasm** was the most notable of all poor leaders’ failings, colleagues said.
- **Acceptance of mediocre performance** occurs because the poorest leaders fail to set stretch goals, thereby encouraging people to do less work, less well than those working for better managers.
- **Lack of vision** and, thus, inability to know what direction to take and an unwillingness to talk about the future, leaving subordinates without a clear path forward.
- **Failure to collaborate** that manifests itself as independent action, avoidance of peers, and lack of positive relationships with colleagues. (“The worst of them view work as a competition and their colleagues as opponents.”)
- **Hypocrisy**, demonstrated as saying one thing but doing another, a behavior that can lose the trust of colleagues.
- **Failure to learn from mistakes**, causing poor leaders to believe their development is complete, even though they continue to do the same things wrong time and time again. The trait could be regarded as arrogance and/or complacency.
- **Resistance to new ideas**, creating an inability to lead change or innovate and a failure to take suggestions from others.
- **Self-focus**, leaving them unconcerned about the development of their direct reports and, as a result, the longer-term success of their department.
- **Poor interpersonal skills** that lead to rudeness, yelling, and belittling others out of malice or “boorish insensitivity.” It also leads to their failure to listen, ask good questions, reach out to others, and give praise or otherwise reinforce good behavior.
- **Bad judgment** that leads to poor decisions, thus leading the troops over a cliff.

While any one of these flaws could be fatal insofar as leadership is concerned, most traits show up in clusters of three or four, and almost all involve a failure to do what’s right as opposed to doing what’s wrong. How do you regard yourself? Answer that in terms not only of what you do, but also in terms of what you don’t do… but should.

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**BUSINESS 101**

**So how’s business?** ASFE’s Business Practices Committee responds to that question each year by conducting its annual Financial Performance Survey. The most recent survey is complete and its findings are conveyed in ASFE Practice Alert No. 54: Fiscal Year 2011-12 Financial Performance Survey Report. Topics covered include predistribution profit, discretionary profit distribution, net multiplier, utilization rate, predistribution overhead, marketing costs, group insurance, collections, fee backlog, and more.

Download your copy of ASFE Practice Alert 54 now at www.asfe.org. If you cannot download it for any reason, contact ASFE staff for assistance: telephone 301/565-2733 or e-mail info@asfe.org.

**Best Civil Engineering Firms To Work For**

Who are the best civil-engineering firms to work for? That’s what CE News sets out to learn each year and the results for 2012 are in. Listed in the top 20 are three ASFE-Member Firms:

- **Schnabel Engineering, Inc.** (Glen Allen, VA),
- **GeoConcepts Engineering, Inc.** (Ashburn, VA), and
- **R&M Consultants, Inc.** (Anchorage, AK).

Congratulations, one and all: Happy employees make clients happy!
Absolute Software is a Vancouver-based firm that provides theft-recovery services for businesses and consumers. It recently issued a report of findings based on its analysis of 13,818 theft investigations it conducted in 2011, mostly (80%) for corporate clients. Road warriors should know that Atlanta’s Hartsfield-Jackson International Airport is the most dangerous airport of all: it’s responsible for 18% of the thefts in the top-13 most theft-prone airports. Miami International Airport was in second place (12%), followed by three which tied for third (7% each): Chicago’s O’Hare, Orlando, and San Francisco.

An airport’s luggage or storage area is where most (29%) airport laptop thefts occurred. Another 22% percent took place in the terminal or boarding area, while 18% were stolen on the plane itself. According to the report, “Airport theft can be the result of carelessness on the part of the device owner, where they leave their computer unattended, providing the perfect crime of opportunity. We’ve also seen extremely well-organized rings where multiple criminals work together to distract the device owner and ultimately steal their computer from under their nose.”

As for the cities where most laptop thefts occur, Chicago was the winner (12.5%), followed by Houston (11.9%), and Detroit (11.3%).

The peak time for corporate-owned laptop theft is June and July, probably because that’s when employees are more mobile and more likely to leave their machines unsecured.

The most common location for laptop theft? Schools, because students, being less experienced, tend to leave their property vulnerable. (If you allow your child to borrow your laptop, be sure to back up your data and keep it separate from the laptop.)

The second-most common spot? Residential property, followed by number three: owners’ parked cars.

It Makes This Pinging Noise

“Y’got a problem here, Mr. Jones. This car’s a wreck.”

“But it seemed to be running so well.”

“When was the last time you had it inspected and tuned?”

“Inspected? Tuned?”

“Well, that explains it. If’n you don’t have your car looked at and tuned up once in a while, eventually it’s just gonna fall apart and cost a fortune to repair. It’s called preventive maintenance.”

“My, that is an interesting concept. But to heck with it. Get it going again and I’ll just take my chances.”

Pretty dumb, huh? Imagine: No preventive maintenance. And can you believe it, some people actually do that with their geoprofessional firms. No five-year review. No five-year tune-up. I guess they figure they’ll just continue forever, no matter what problems may be hidden inside, lurking in the shadows.

There are exceptions, of course; like those who get their firms Peer Reviewed every five years or so. And this issue’s list of exceptional people and firms includes:

- **James M. “Jim” Baker, P.E.**
  Foundation Design, P.C. (Rochester, NY)

- **Chris C. Beck, P.E.**
  ALLWEST Testing & Engineering, LLC ( Hayden, ID)

- **Paul B. Bopp, Ph.D., P.E., G.E., C.E.G.**
  Terraken Geotechnical Consultants (Newport Beach, CA)

- **David C. DiGioia, P.E.**
  DiGioia, Gray & Associates, LLC (Monroeville, PA)

- **Kevin B. Hoppe., P.E.**
  NTH Consultants, Ltd. (Detroit, MI)

Give any one of them a call. Ask what they got from their Peer Review. Was it worthwhile? What did they learn? Have they been able to fix what was found to be wrong and do more of what was found to be right? “Were’t you afraid that they might learn something embarrassing?” you might ask, perhaps echoing a fear of your own. And the answer to that would be, “Of course I was. And every time it’s happened, I’ve been thankful.”
Communication skills. Project management. Contracts. PLI. Accounting. Risk management. HR. IT. Legal. Professionalism. Meeting management. Forecasting. Scenario planning. And so much more geoprofessionals need to know to run their businesses well, achieve profitability, and manage risk. That's what ASFE is all about. Hundreds of DVDs, CDs, videos, audio-education programs, books, manuals, guides, monographs, model documents, case histories, and more, all free to all members of all ASFE members’ staffs. Join an organization that walks the talk.

When you belong to ASFE, ASFE belongs to you.
Good times just have to be around the corner and, when they hit, your number-one need is going to be employees whom you can trust to get the job done well. But why settle for good when you can have extraordinary? The problem is finding them, of course. As it so happens, you can make that problem far less severe by taking some of the advice offered at a recent leadership conference summarized by Geoffrey James in Inc. Online.

**Define “Extraordinary”**
Among your own employees and others’ you know, who’s extraordinary? And more to the point, why? What are they able to do that makes them so special? Which of their attributes make them that way? Are they perfectionists? Are they focused on pleasing others, including client representatives and coworkers? Are they good “schmoozers”? Is it all of the above and then some? Figure it out! Write it down. And then identify observational methods that help you spot the traits you’re looking for. And be sure to also develop interview questions that may reveal what you need to know about a candidate’s attributes that might comprise or at least lead to the creation of “extraordinary.”

**Develop a Candidate Pool**
Mr. or Ms. Right is not likely to walk in the front door ten minutes after you tack a “position available” sign to it. That’s why you should make it clear that your firm is always on the look-out for top talent. Use your website, social media, newsletter, blog, and person-to-person contact to encourage people to learn more about your company and possibly come in for an “informational interview” at any time, whether or not you have a position open. If the interview makes you believe that “this is a person I want on our team as soon as we have a position open,” then you can bet the individual is extraordinary. Use the same types of tools – social media, et al. – to stay in touch with the person. Then, when the time is right….

**Hire for Attitude**
Experience can be overrated, especially because it may have involved methods you’re not too keen on. Besides, experience may not be all that valuable when your work environment is subject to change or when the next few years may bring an individual opportunities that will require development of new skills. Developing new attitudes is far more difficult, of course, and it’s attitude that truly makes people extraordinary. What is a person’s attitude? Does the individual possess the traits you’ve already identified as extraordinary?

**Ask Extraordinary Questions**
You’re not likely to learn a whole heckuva lot about a person’s traits or find extraordinary candidates by asking ordinary questions during an interview. You need to ask questions that folks cannot easily prepare for and that reveal character. Here’s an approach we really like: Rather than asking people about their greatest achievements, ask them to write down their two greatest achievements from grade school, two from high school, two from college, and two post-college, with at least one related to business. Then ask the candidate to identify the one that is the source of greatest satisfaction. This should give you a glimpse into what makes a prospective hire tick.

**Look for Resiliency**
No matter what the job, it will entail frustrations and disappointments. Extraordinary workers typically are able to learn from these and move forward. The not-so-extraordinary decide to move on. “What are some of the biggest disappointments you’ve ever experienced?” may be a good question, with follow-ups designed to indicate to what extent candidates were able to dust themselves off and move forward. “How’d you overcome that? How long did it take?”

**Look for Self-Motivation**
Extraordinary employees don’t need constant motivation the way some top performers do. While, certainly, that doesn’t mean you should withhold frequent “atta-boys,” it does mean that you shouldn’t have to constantly oversee a person, hold the person’s hand, and so on.

**Speak with Real References**
Plenty of people are likable and that trait can encourage others to give them a good reference. “She’s just a heckuva great gal” is encouraging, of course, but how likely is it that a candidate would identify references who may say negative things? Don’t limit your references to those identified on a candidate’s resume. Dig about a bit. For example, if a person worked on a certain project whose design team included a person or two you know, call them and ask about interactions they had with the candidate. When you hear “Great. I wish I had an opening for him,” then you know you have a winner, even if you don’t happen to have a spot just now.
Aware that its clients were concerned about some of the place names of their forebears’ local origins, the genealogy site Findmypast.com polled respondents in the U.S., U.K., Ireland, Canada, Australia, New Zealand, Canada, and South Africa to identify the worst names of all. Coming in at number one – a fanfare, please! – was Toad Suck, Arkansas, an unincorporated Perry County community, that just edged Climax, Georgia (home to the annual “Swine Time” festival), and Boring, Oregon.

According to the ever-popular toadsuck.org website, Toad Suck used to be an unnamed, but popular drinking location for Arkansas River boaters: “While they waited, they refreshed themselves at the local tavern there, to the dismay of the folks living nearby, who said: ‘They suck on the bottle ‘til they swell up like toads.’ Hence, the name Toad Suck.”

The overall Top-10 list comprised:
1. Toad Suck, AR
2. Climax, GA
3. Boring, OR
4. Hooker, OK
5. Assawoman, MD
6. Belchertown, MA
7. Roachtown, IL
8. Loveladies, NJ
9. Squableton, CA
10. Monkey’s Eyebrow, KY

While surprised that Monkey’s Eyebrow did not fare better, your editor was utterly dismayed about the omission of an important Massachusetts town: Marblehead.

CoMET Committee Article Explains Why High-Quality CoMET Services Are Essential To Achieving LEED Objectives; Underscores Geoprofessional Value Proposition

It doesn’t apply just to LEED and sustainable design, but the dictum that “cheap geoprofessional services are expensive” is particularly apropos in that arena, given that realizing the objective of sustainable design is not everything: It’s the only thing. And how does an owner achieve the objective of sustainable design? By having a quality-focused construction materials engineering and testing (CoMET) consultancy on the project team, from project initiation through project conclusion. Now, thanks to the diligent efforts of ASFE’s CoMET Committee, exactly this thought is conveyed by an outstanding article in EDC / The Official Magazine for the LEED Professional. Titled “Achieving the Designed Quality,” the article points out the value of high-quality CoMET services and provides guidance on how to select and deploy a firm wisely, amplifying the guidance given in ASFE’s Geoprofessionals’ Value Proposition. This is exactly the kind of article you can use in presentations, or forward as suggested reading to client representatives and prospective-client representatives. It can also serve as valuable instruction for members of your staff, to help them understand what makes your firm special. And remember, too, that the CoMET Committee has also developed two “message” flyers to also serve that purpose: Project Quality Assurance: A Message to Owners and Project Quality Assurance: A Message to Architects, Civil Engineers, and Structural Engineers.

Some of the introductory copy of the EDC article is particularly to-the-point, you may agree:

It’s a beautiful day. You’re standing outside the new LEED Platinum office building that’s been your responsibility for the past three years. You hear a voice behind you say, “Congratulations. It’s not every day that a project this size comes in on time and on budget. And that usage data; wow! The building’s being used more than we expected and it’s actually consuming less energy than we hoped for. And all the occupants love it.” You turn to see whose voice it is, but no one’s there.

Then you wake up.

The fact of the matter is that buildings — especially somewhat substantial ones, LEED-compliant or otherwise — seldom come in on time or on budget.... Of course, if you have a solid set of plans and specifications, integrated through BIM and even peer reviewed, what could possibly go wrong? As you probably know well, everything ... so it seems. One of the culprits is the construction process itself.... Face it, through honest error or otherwise, some things just don’t get built the way they’re supposed to.... Wise building owners have for many years obtained quality-assurance (QA) services to help realize their buildings’ design. Construction-materials engineering and testing (CoMET) consultants provide QA to assess constructors’ attainment of the specifications they are contractually obligated to meet.

Read it all. It could be another valuable arrow for your quiver.
A client for life can easily be worth $5 to $25 million or more over a 40-year professional career. Every client-for-life relationship begins with the first project together. What do you do to enhance that experience? Do you perform well, by delivering on time and on budget...which is exactly what client representatives expect and more or less what all your competitors do or try to do? Or do you give client representatives something that truly goes beyond the ordinary; that truly exceeds their expectations? If you do go above and beyond, if you have already developed a highly effective new-client onboarding procedure, you know the value it can provide. If you haven’t, now is the time to make a change, given that 80% of your firm’s business probably comes from 20% of its clients, and it’s far easier and far less costly to keep existing clients happy than it is to bring in new ones.

What could you do to be different from your competitors in a positive way? How about hosting a new-client orientation meeting, near the end of a day, where one or more representatives of the same new client would gather at your office and be introduced to everyone who will have a role to play on their upcoming project. Assuming all your representatives/attendees would have spent some time becoming familiar with the client’s organization, experience, and such, they would be in a position to ask intelligent questions that demonstrate they have done their homework and genuinely want to delight the client. What are some good questions? Chances are the folks who will represent your firm could get together to discuss just that issue, possibly with the assistance of an “old hand,” assuming the individual would otherwise not be involved.

You should be able to use that meeting not just to exchange pleasantry and business cards, but also to learn important information; e.g., your firm and the client will discuss a variety of issues during the course of the project. How should that communication occur? By telephone (with an e-mail memorialization follow-up)? In person? By text? And if the client has a need to communicate with your firm’s representatives, to whom about what?

Are the client representatives familiar with all the various methods you use to communicate? Have they used Skype video chats or Google+Hangout technology to provide personal interaction via computer? Are they familiar with such tools? If not, could you show them what’s involved and offer to give them training, ongoing guidance, and trouble-shooting support?

Will you have at the orientation a principal of the firm not otherwise involved in the project? You should. And perhaps that individual should make it known to the client representatives that “My job is to make sure we delight you. Would it be all right for me to call you from time to time to learn how we’re doing?”

As has been said for the last half-century, “First impressions are lasting. You have only one chance to make them.” Do it right. Stand out from the crowd.

The American Tort Reform Association (of which ASFE is a founding member) and the grassroots Sick of Lawsuits campaign have released a survey report indicating that strong majorities of voters – Democrats, Republicans, and independents – believe lawsuit abuse hurts economic growth, job creation, and U.S. competitiveness.

“Lawsuit reform isn’t a partisan issue, it’s an economic issue,” said ATRA President Tiger Joyce. “When 89% of Americans say lawsuit abuse is a problem, candidates and elected officials should pay attention.”

“America’s primary focus should be on creating jobs, not lawsuits,” added Tom Scott, a California-based representative for Sick of Lawsuits. “We hear from small-business owners every day about their fear of costly lawsuits and the negative impact that expanding liability has on their bottom line and capacity to hire additional employees. People understand that, and they want their elected officials to do something about it.”

The national telephone survey conducted in mid-July also found that:

• 78% of registered voters say the “nation suffers from too many lawsuits”;
• 73% say they are more likely to support a candidate who advocates lawsuit-reducing liability reforms; and
• 75% believe that “pain and suffering” awards should be limited, and that personal-injury-lawyer advertising encourages those who haven’t been injured to file lawsuits anyway.
The Mentee Tapes

Mr. K: Who’s callin’?

Dr. E: Hello? Is this Mr. Killer?

Mr. K: Yeah. What’s it to you?

Dr. E: My name is Dr. English and I was told that you’re the man to speak with if I, uh, want to have something done away with.

Mr. K: Done away wit’? Didn’t nobody never tell you you don’t end sentences wit’ a preposition?

Dr. E: Well, Churchill kind of skewered that rule when he called it “nonsense up with which I will not put.”

Mr. K: Churchill? That’s a cigar.

Dr. E: No. Winston.

Mr. K: That’s a cigarette. What are you, some sort of tobacco-lobby wise guy?

Dr. E: No. Not at all. I legitimately have something that, uh, away with which I want done.

Mr. K: Better. And what might that be?

Dr. E: It’s a word.

Mr. K: A woid?

Dr. E: Yes. A word. Mentee.

Mr. K: You mean them walrus-like things in Florida? They’re endangered, for cryin’ out loud.

Dr. E: I don’t think that crying out loud could be cause for extinction.

Mr. K: You are a wise guy. Keep it up and I’ll make you cry out loud and for you it will be a cause for extinction. So what’s wrong with mentee? What does it even mean? It’s a candy isn’t it?

Dr. E: No. Those are Mentos. Mentee is kind of a new word, except it’s not a real word at all. It’s supposed to mean protégée.

Mr. K: Oh, like someone who gets guidance from a mentor.

Dr. E: Right.

Mr. K: I had a mentor once. He ended his sentence wit’ a lethal injection. So why don’t people just say protégée? Somethin’ wrong wit’ it?

Dr. E: People don’t use protégée because they don’t know the word exists or, if they do, they don’t know what it means. So they made up the word mentee. Y’know, mentor-mentee.

Mr. K: Instead of mentor-protégée? Wow. That’s like callin’ a baseball a batee.

Dr. E: Correct. The problem is that “mentee” presupposes the existence of the verb “to ment,” so there’d a mentor and a mentee. But the verb is “to mentor.” So if people wanted to use that “er” and “ee” stuff, they’d have to say “mentorer” and “mentoree.”

Mr. K: So people who use the word mentee are just making themselves look foolish. I mean, they don’t even know their own language. And it’s not that tough, y’know? Even the kids speak it.

Dr. E: That’s true. And that’s why I want you to, uh, do away with the word. Eliminate it, if you know what I mean.

Mr. K: Yeah. I know whatchya mean: Killie. But how am I supposed to do it?

Dr. E: I don’t know.

Mr. K: Well, I got a better idea. Anyone I catch usin’ the woid, I’m gonna look ‘im in the eye, see, and I’m gonna say, “If I catch you usin’ that woid mentee one more time, I’m gonna make you wish you was back in thoid grade.”

Dr. E: Wow. You’re tough.

Mr. K: Well, that’s my style. I’m a mentorer.

Billions and Billions and Billions: Will You Get Your Share?

Hundreds of billions of dollars’ worth of U.S. infrastructure and other projects are in their planning stages right now. Will you get your share? Not if you don’t know what they are and where they are, and the extent to which their progress could benefit from your firm’s expertise and experience. What are they? Where are they? Now you can know, thanks to CG/LA Infrastructure Inc., sponsor of the Infrastructure Leadership Forum, and a provider of strategic-consulting, project-development, and macroeconomic-analysis services. For a description of the top-100 projects, just click here.
A long-time friend of geoprofessionals and the entire design-professional community – Jean Weil, Esq. of Weil & Drage, APC – has written to us to advise about an extremely important legal victory. It significantly limits a firm’s liability to a client for the firm’s alleged failure to meet requirements of a federal law designed to apply to the client and other organizations like it. We’ll let Jean speak for herself.

I am pleased to apprise you of a favorable decision just handed down by the Nevada Supreme Court that may have far-reaching implications for the design-professional community.

By way of background, the Department of Justice (“DOJ”) in 2005/2006 investigated Mandalay Corporation and its related entities (collectively “Mandalay”) for alleged violations of the Americans with Disabilities Act (“ADA”). The investigation focused on certain properties, including the Mandalay Bay Hotel and Casino (“original project”) and THEhotel ("expansion project"), both located in Las Vegas, Nevada. In this same timeframe, MGM Mirage (“MGM”) acquired Mandalay’s assets and liabilities.

In 2007, MGM, on behalf of its newly acquired subsidiary, entered into a settlement agreement with the DOJ that involved paying a modest fine and agreeing to retrofit certain noncompliant areas involved owner-driven changes or were otherwise outside of RJA’s scope of retention. Accordingly, the primary focus of Mandalay’s lawsuit against RJA involved the toilet-room door issue from the original project and selected retrofits from the expansion project.

In 2009, we filed a motion for partial summary judgment, seeking to dismiss all tort claims as being barred under the economic-loss doctrine pursuant to the Nevada Supreme Court’s then-recent decision Terracron v. Mandalay, 206 P.3d 81 (Nev. 2009). The court granted that motion, leaving intact only Mandalay’s contract claims. Mandalay then amended its complaint to add a new tort claim – negligent misrepresentation – as an arguable exception to Nevada’s economic-loss doctrine. In doing so, Mandalay simply relabeled its previously dismissed negligence claim to circumvent RJA’s summary judgment.

In 2010, the 4th Circuit Federal Court in Maryland published the seminal decision Equal Rights Center v. Niles Bolton Associates, 602 F.3d 597 (4th Cir. 2010) (“Niles Bolton”). In that decision, the federal appellate court held that, under the “doctrine of obstacle preemption,” federal law preempts – and thus bars – all state-law claims seeking indemnity for ADA and FHA violations.

In other words, the federal court found that permitting a party to seek indemnity for its own ADA and FHA violations would serve as an obstacle to Congress’ intent and purpose in enacting those statutes. Although the Niles Bolton decision is not binding on a Nevada state court, it may be cited as persuasive authority, particularly because the federal court went to great lengths to explain its analysis of the ADA and its reasoning behind its ruling.

In light of Niles Bolton, we filed a second motion for summary judgment seeking dismissal of all of Mandalay’s remaining state-based claims (express indemnity, breach of contract, breach of warranty, negligent misrepresentation) as being barred under the doctrine of obstacle preemption. We also argued that the economic-loss doctrine barred the claim for negligent misrepresentation, because, under these facts, it was merely a recycled tort claim that had already been dismissed.

Somewhat surprisingly, the trial court denied RJA’s motion for summary judgment on both
grounds. The trial judge said she disagreed with the federal court’s reasoning in *Niles Bolton*. She also found that the Nevada Supreme Court’s decision in *Terracon* left open the door as to whether negligent misrepresentation was an intended exception to the economic-loss doctrine.

Shortly thereafter, we filed to the Nevada Supreme Court a petition for writ of mandamus (“Petition”) seeking review of the trial court’s denial of RJA’s motion for summary judgment. We sought review of both issues: 1) whether Mandalay’s remaining state-based claims were barred under the federal doctrine of obstacle preemption, and 2) whether the Supreme Court intended to create a negligent-misrepresentation exception to the economic-loss doctrine (given our view that such an exception would swallow the rule). The Supreme Court granted review on both issues and, after extensive briefing on November 1, 2011, it heard oral argument.

On August 9, 2012, the Nevada Supreme Court issued its opinion [request a copy at info@asfe.org]. In a 17-page decision with no dissent, the court granted RJA’s Petition ordering the District Court to reverse its denial of RJA’s motion for summary judgment. The Court based its ruling on its conclusion that all of Mandalay’s state-based claims were obstacles to the objectives of the ADA and therefore preempted by federal law.

In its decision, the Court held that ADA was enacted to remedy discrimination against disabled individuals and to prevent discrimination. As such, an owner that constructs a facility of public accommodation not readily accessible to individuals with disabilities would be liable for unlawful discrimination. The Court further held that, except for landlord-tenant relationships, the ADA contained no provisions permitting indemnity or allocation of liability between the various entities subject to the ADA.

In applying the law to the facts, the court found that allowing Mandalay to maintain its indemnity claim against RJA for ADA violations weakened owners’ incentives to prevent violations and conflicted with the ADA’s purpose and intentions, in that owners could contractually maneuver themselves to ignore their nondelegable ADA responsibilities. Allowing that maneuvering would frustrate Congress’ goal of preventing discrimination and intrude on the remedial scheme set forth in the ADA, which does not expressly (or impliedly) permit rights of indemnity. Accordingly, relying heavily on *Niles Bolton*, the Court found that the ADA preempts indemnity claims brought by owners for their own violations.

The Court also held that Mandalay’s breach-of-contract, breach-of-express-warranty, and negligent-misrepresentation claims were preempted by the ADA, “because, in substance, these claims are merely a reiteration of Mandalay’s claim for indemnification.” Relying again on *Niles Bolton*, if an owner seeks recovery for its ADA-violations losses via breach-of-contract and negligence theories, the owner’s claims would be *de facto* indemnity claims and, thus, preempted.

While the Nevada Supreme Court did not address the negligent-misrepresentation question left open by *Terracon*, we recently learned that the Court accepted review of this question in another case which has been set for oral argument before the full Court. We are hopeful that the Court will close this loophole left open by its otherwise sound decision.

As to the Court’s rulings about the ADA, we view this case as having far-reaching implications. Owners and developers across the nation routinely sue design professionals during or after settlements with the DOJ and/or other groups representing the disabled. Nonetheless, owners and developers uniformly have decision-making authority on ADA-compliance issues and may exert pressure on all members of the design team to minimize the scope and cost of compliance or, worse, override their recommendations. This conduct is particularly concerning where owners and developers can contractually insulate themselves from the consequences of their decisions. Even if the design team has strong defenses, designers have historically been dragged into these costly and protracted cases.

This decision will likely be cited in multiple jurisdictions across the country and may provide a measure of relief to design professionals whose services touch upon ADA compliance.

This decision will likely be cited in multiple jurisdictions across the country and may provide a measure of relief to design professionals whose services touch upon ADA compliance.

Contact Jean Weil for more information.
Sea-Level Rise Accelerating in U.S. Atlantic Coast “Hotspot”

A new U.S. Geological Survey (USGS) report – Hotspot of Accelerated Sea-Level Rise on the Atlantic Coast of North America – states that sea levels along portions of the U.S. Atlantic coast are rising at rates three to four times faster than global rates. Since 1990, sea-level rise in the 600-mile “hotspot” stretching from Cape Hatteras, NC to north of Boston, MA has increased 2.0-3.7 millimeters per year; the global increase over the same period was 0.6-1.0 millimeter per year. Based on data and analyses included in the report, continued global-temperature increases will cause increasing rates of sea-level rise. The report also shows that the sea-level rise hotspot is consistent with the slowing of Atlantic Ocean circulation, a phenomenon that may be linked to changes in water temperature, salinity, and density in the subpolar North Atlantic. According to USGS Director Marcia McNutt, “Many people mistakenly think that the rate of sea-level rise is the same everywhere as glaciers and ice caps melt, increasing the volume of ocean water, but other effects can be as large or larger than the so-called ‘eustatic’ rise. As demonstrated in this study, regional oceanographic contributions must be taken into account in planning for what happens to coastal property.”

Although the global sea level has been projected to increase about two to three feet by 2100, it will not climb at the same rate at every location. Differences in land movements, strength of ocean currents, water temperatures, and salinity can cause regional and local highs and lows. Dr. Asbury Sallenger, USGS oceanographer and project lead, said, “Cities in the hotspot, like Norfolk, New York, and Boston, already experience damaging floods during relatively low-intensity storms. Ongoing accelerated sea-level rise in the hotspot will make coastal cities and surrounding areas increasingly vulnerable to flooding by adding to the height that storm surge and breaking waves reach on the coast.”
ASFE NewsLog has conveyed some great, simple meeting-management techniques over the years. Three of our favorites (in brief):

• Play somewhat loud music during breaks, but cut it off five minutes before a break is over. The silence will communicate forcefully.

• Provide too few chairs; leave space for more only in the front of the room. That way, you force those who arrive late to get their own chairs and sit up front, where they cannot hide (a learning experience!). And everyone will think, “Wow. This person’s meetings are really popular. They ran out of chairs!”

• Have a walk-and-talk meeting, as when you have to get to the airport. “I need to speak with you, Jack.” “I’m on my way to the airport, Jill. Walk with me to the lobby.”

And now – drumroll – number four:

• You have a meeting that you want to keep brief; no more than 20 minutes, say. You’ve done all your homework, distributed agendas, and so on. People arrive at the meeting room and – guess what! – no chairs. That’s right: Conduct the meeting standing up! You can bet everyone else will want to get out on time, too, and that long-winded, gas-bag digressions and self-congratulatory war stories will not be tolerated.

ASFE Releases 2012 Spring Meeting Videos

How would you like to see all the programs presented at ASFE’s 2012 Spring (Annual) Meeting last April, in Orlando, for just a fraction of the price (time, travel, registration, and accommodations) attendees paid? Now you can, because – for the first time – we had all meeting programs video-taped and edited under the aegis of ASFE’s Education Committee (with the heavy lifting done by Committee Chair Kimberly Finke “Kim” Morrison, P.E., R.G. (Morrison Geotechnical Solutions, Inc.). Contents of the two-disc set include:

Disc 1: Videos 1-4
• Employee Engagement (Bob Kelleher)
• Social Media (New Leader’s Committee)
• Mayor 2 Mayor (Mayor Buddy Dyer of Orlando, FL & Jim Suttle, P.E. of Omaha, NE)
• Successful Ownership Transition (Colvin Matheson, CFA)

Disc 2: Videos 5-9
• Developing Future Leaders (Panel comprising Lee R. James, CPA, CMC, CBI (moderator); David A. “Dave” Mollish; Charles A. “Chuck” Brewer, P.G.; Tadeusz W. “Ted” Lewis, P.E.; and Matthew “Matt” Moler, P.E.)
• Benefits of Developing a Creative/Innovative Culture in Your Firm (Stuart G. Walesh, P.E.)
• Engineers Without Borders (Daniel L. Harpstead, P.E.)
• Alliance Update: ADSC: The International Association of Foundation Drilling
• The Construction of Mickey’s Hat (Jeffry Cannon)

Order yours on-line at www.asfe.org (you need to sign in first) for just $250. And while you’re at it, don’t forget to look at the hundreds of additional practice-management materials (books, manuals, guides, video programs, audio-education programing, computer games, monographs, and more) listed and described in ASFE’s practice-management resources catalog. ASFE members get almost all of them free of charge.

Are You Taking Advantage of ASFE’s Writing Webinars? Your Peers Are! ...

25 Words You Need To Know How To Spell: Overall Rating: 3.9 of 5.0 “Thanks! I needed that!”

Dirty Words: Overall Rating: 4.2 of 5.0 “The contents and delivery were excellent.”

Doing e-Mail Right: Overall Rating: 3.9 of 5.0 “Very insightful. Learned quite a few good things.”

Scientific Style: Overall Rating: 4.3 of 5.0 “Mr. Bachner does a good job keeping the participants engaged and interested - very difficult in a webinar setting!”

Personal Pronouns: Overall Rating: 4.4 of 5.0 “No improvement suggested. I thought the handouts and quizzes were to the point and did a great job reinforcing the message.”