



# CORPORATE PROFILE: LEADERS IN CONSTRUCTION LAW

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# It's a New World in 2021 – The Ongoing Rebalancing of Efficiencies, Risk Management and Dispute Resolution

A new season is dawning in construction. After navigating the immediate demands of the COVID-19 pandemic—job shutdowns of “non-essential” work, slowdowns of “essential” work, and delays—the industry is experiencing a rebalancing of efficiencies, risk management and dispute resolution. Some are attributable to factors triggered by the pandemic, while others were underway beforehand, such as evolving project delivery methods.

A key question industry participants are asking: “What worked and what didn’t?”

Where will the industry continue to employ practices from the past 16 months that led to new efficiencies, and shed others where the “law of unintended consequences” revealed more downside than benefit? How has the trajectory of advances underway before the pandemic been altered?

**Efficiencies.** When the pandemic struck, contractors almost immediately developed ways to address the wave of regulatory guidance and government mandates while keeping their jobs safely moving forward. Some methods led to new efficiencies. One example is how contractors instituted staggered start times and lunch breaks to achieve social distancing. Contractors have reported resulting efficiency gains.

As many office and management functions—from operations, to legal and more—swiftly transitioned to a more virtual environment, there was a notable divergence of efficiencies. Negotiations or meetings moved to Zoom, Teams and other virtual environments. The transition resulted in savings of time and money, by obviating the need for plane tickets, hotel stays and unproductive travel. The downside, of course, is the reduced effectiveness of virtual engagement, the loss of human interaction and the challenges in maintaining culture and cohesiveness.

**Risk Tolerance.** Prior to the pandemic, the industry was experiencing shifts in risk allocation, most notably in the growing popularity of alternative delivery methods, i.e., delegated design, design assist, IPD, PPP and design-build. Certain efficiencies that are gained when designers and contractors work collaboratively to achieve a desired result are not seen with the more traditional delivery method of design bid build. To what extent will lessons learned during the pandemic—including virtual engagement—advance means of collaboration, and might those advance or otherwise impact risk allocation and delivery methods?

Before and during the ongoing pandemic, we’ve seen changes in risk tolerance and added focus on particular concerns, such as pandemics, the supply chain and price escalation. Some parties may be more willing to accept or dismiss increased risk, others are less inclined. Others still sought to find ways to manage these risks, for example through contract terms and shifting to subcontractors or insurers. The role of insurance in mitigating these risks was and continues to be an unclear playing field, as the insurance markets are conducting a similar rebalancing.



**Dispute Resolution.** The pandemic was a catalyst for a stunning change to our court and dispute resolution system. There were rapid changes as the ability to physically appear in courthouses and mediation rooms was whisked away as we moved to a more virtual world. Many expected an eventual shift to an increased use of technology in courts and other dispute resolution venues, a transition that may have taken years, but it occurred in a matter of months so as to give society access to the judicial system.

Prior to the pandemic, court hearings and conferences typically took half a day or more, necessitated by travel and wait times amongst slews of attorneys as the day's docket was slowly called. Now, hearings and conferences happen much quicker, often taking less than an hour, as matters are scheduled for virtual hearings or meetings at specific times. And they often take place on time! The need for travel and wait times is obviated, leading to new efficiencies.

While it is clear that parts of our new and more virtual world are here to stay, there may be downsides to balance. Do judges, attorneys and mediators have more or less control in a virtual environment? Without parties and witnesses in the same room, to what extent are the dynamics of a proceeding or ability to assess the credibility of a witness diminished? Do parties have the same ability to read and absorb nonverbal cues and body language and subtleties as with in-person litigation?

For practicing litigators, when not in the same room as the judge when arguing a motion, or by not being across the table from a witness, how much is lost? Does virtual mediation work the same way as an in-person mediation? For example, how much is lost when the mediator has no ability to meet with or bring parties physically together in one room?

As courts and meeting rooms across the county start to reopen, we expect to see a rebalancing as the industry works to continue to draw the benefits of a virtual environment, but return to an in-person environment for those certain appearances and meetings that are not best suited for the virtual world.

This rebalancing of efficiencies, risk tolerance and dispute resolution will unquestionably lead to a changed industry once the pandemic is behind us.

*Written by Melissa Salsano and Steven M. Charney*

**“** 2020 Chambers USA market commentary refers to Peckar & Abramson as ‘the go-to firm for contractors.’ **”**

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