

Our CONSTRUCTION CLIENTS at WORK!



California tower wins national architecture award

Jurors called the renovation of the Imperial Bank Tower in Costa Mesa, Calif., an "[e]legant, refined fusion of steel and glass" when the project was named a National Winner in the 2002 I.D.E.A. Architecture Awards, a competition sponsored by Stites & Harbison client **American Institute of Steel Construction**. AISC members Plas-Tal Mfg. Co. Inc. fabricated, detailed and erected the steel, including the glass-vaulted lobby shown here, which uses an extremely light steel-and-cable support system. Murphy/Jahn designed the renovations. Stites & Harbison's construction attorneys have helped the AISC develop design guides and the technical specifications, which have made this kind of dramatic use of steel safe and cost-effective.

ON the JOB

— continued from inside

NEW ARRIVALS!

David Mura has joined Stites & Harbison's Construction Service Group. Mura has a degree in civil engineering (Georgia Tech, '94) and a 2002 law degree, *cum laude*, from the University of Georgia. He'll be based in the firm's Atlanta office. **Matt Gillies** is slated to rejoin the group after a year-long stint with the law department of Fluor Corporation. Gillies, an EIT (civil) with a law degree from the University of Kentucky, will be based in the firm's Louisville office. He is also one of the firm's seven Registered



David Mura



Matt Gillies



Cassidy Ruschell

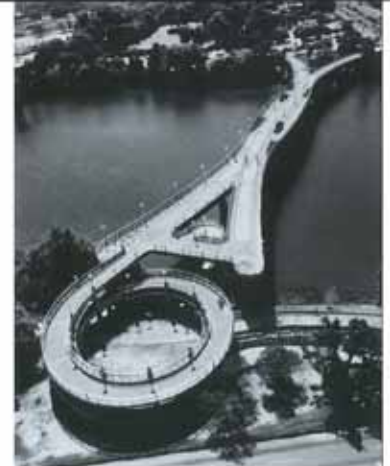
U.S. Patent Attorneys. **Cassidy Ruschell** joined the group last fall, following her 2002 graduation, *magna cum laude*, from the College of Law of the University of Kentucky. She earned her bachelor's degree in 1998 from DePauw University. Ruschell will be based in Lexington.

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Steel provides solutions for Texas bridge



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A tight budget, short construction schedule and pedestrian-friendly site led the City of Austin, Texas, to choose weathered steel plate girders for the superstructure of its new bridge at scenic Town Lake, a project recognized in the **American Institute of Steel Construction's** September 2002 issue of *Modern Steel Construction*. AISC-member Hirschfield Steel of San Angelo, Texas, fabricated the steel for the dramatic, doubled-curved alignment.

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INSIDE UPDATE

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Three Stites & Harbison attorneys OK'd for dispute resolution by national group

The CPR Institute for Dispute Resolution recently added Buck Hinkle, Greg Parsons and David Ratterman to its Panel of Neutrals for construction matters. Parsons and Ryan Quinn also received training from the New York City-based organization (<http://www.cpradr.org/>) in mediation. In addition, six more Stites & Harbison attorneys — John Hays, Morgan Varner, Bill Hopson, Anne Gosham, John Gallagher, and Dan Douglass — have been trained in ADR by the American Arbitration Association, the Atlanta Justice Center or the Mediation Center of Kentucky and regularly serve as

arbitrators and mediators in construction and commercial matters.

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BY JOE HARDESTY AND DAN DOUGLASS, STITES & HARBISON

Who should mediate construction disputes?

Hiring the right mediator is crucial because resolving a dispute often depends on the mediator's ability to get the parties pulling together. Start by checking state or local rules or regulations governing mediation. These and other selection criteria can be made part of the contract.

While each construction dispute is different, there are some common factors. Construction disputes usually involve technical issues, which can be an expensive learning curve for a mediator from outside the industry. Plus, a mediator who understands construction concepts can more easily establish credibility with the parties.

If the dispute is focused on legal issues or questions, bringing the mediator up to speed can be accomplished faster and cheaper with an attorney-mediator. Although mediators don't have to be lawyers or have any formal legal training, it may be wise to hire an attorney to mediate.

Parties to a construction dispute often want a mediator who is qualified by education and experience to offer an opinion about the merits of their respective positions. Some mediators will evaluate the merits of a dispute, and some won't. Decide from the outset if you want a mediator who will evaluate the dispute.

There are many qualified construction mediators available at reasonable rates, so fees should not be the driving factor in choosing a mediator. But, good construction mediators in areas with thriving mediation markets often have tight schedules.

Every mediator has a unique personality and style. Some are assertive and take control of the mediation process, and some are compliant, allowing the



Joe Hardesty

parties to control the mediation while serving more as a messenger. The parties should choose a mediator who best fits their

objectives and personalities.

The editors gratefully acknowledge John Hays, Esq., for his contribution, which has been adapted from an article which first appeared in The Benchmark, Spring 2001. Mr. Hays is a Certified Member of the Mediation Center of Kentucky and a Panel Member of the American Arbitration Association. He can be reached at jhays@stites.com or 859/226-2275.

Contractors beware! Liability for wrongfully filing a mechanics lien

Mechanics liens are a favorite payment tool that can backfire if you're not careful. Here are some ways to avoid getting hit with a claim for slander to title by wrongfully placing a lien on someone's property.

There are three tests for an owner who's seeking to recover alleged damages this way. They've got to show that they own the property, that the contractor maliciously published a false statement about the property, and that the false statement caused the owner damages.

Obviously, proving a lien is malicious can be tough. Courts are not likely to label it so if contractors file mechanics liens based on a good faith belief that they're



Dan Douglas

owed the amount stated in the liens.

Even if a contractor meets the maliciousness test, owners still have to prove they

were damaged. This can include a lost sale of the property due to the lien or special damages, such as attorneys fees or costs incurred in removing the lien, a drop in the fair market value of the property and impaired ability to refinance or sell the property. In some jurisdictions, contractors can also be liable to the owner for punitive damages.

So, beware of your potential liability for wrongfully placing a lien. Remember that mechanics lien statutes can vary from state to state. Know the law where the project is located and strictly comply.

And, file liens only for what you're actually due on the project and only to satisfy a legitimate debt ... not to teach somebody a lesson. Or you might be the one learning the lesson!

PLAs are up to contractors on federal projects

A federal court recently upheld the Bush Administration's Executive Order which leaves Project Labor Agreements up to the contractors on federal construction projects. (For background on PLAs, see Ivan H. Rich's article in "The Construction Trailer," *Construction Law Update*, May 2002, Vol. 6, No. 1.) *Building and Construction Trades Department v. Allbaugh*, 2002 U.S. App. Lexis 14020 (D.C. Cir., July 12, 2002).

On Feb. 17, 2001, President Bush

issued an Executive Order preventing federal agencies, which award construction contracts or provide federal assistance to construction projects, from either requiring or forbidding the use of a PLA on a project. This meant that the decision to have a PLA will be left up to contractors.

Various labor organizations filed suit to block enforcement of the Executive Order, but the Federal Court of Appeals agreed with the White House. The court found that the order was not preempted by other federal laws such as the National Labor Relations Act, adding that the government is the proprietor of its own funds and has the legal right to ensure the most effective use of those funds.

Construction Law Update is published by Stites & Harbison, PLLC, for its clients and friends. Editors Dan Douglas (ddouglas@stites.com) and Joe Hardesty (jhardesty@stites.com) invite readers to contact them with questions, comments and suggestions.

This publication is intended to provide accurate information on the subject matter addressed. It is not intended to provide legal or other professional services or render any legal opinion on any matter and should not be relied upon for such a purpose.

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BY ERICA L. HORN, STITES & HARBISON

A (little) breather from Tennessee's tax increase

Some relief is in sight for contractors and subcontractors subject to Tennessee's sales and use tax in light of the recent increase in the taxes. Effective July 15, 2002, the state's sales and use tax rate jumped from six to seven percent. Here's the scoop on the breather:

- Contractors subject to the Tennessee sales and use tax may be entitled to a refund for taxes paid to any of the contractor's vendors at a rate in excess of the state's prior six percent rate and the applicable local option sales tax in effect July 1, 2002. However, there is a catch — the refund only applies to "lump sum or unit price construction contracts" entered into prior to July 15, 2002.
- Subcontractors may also file a refund claim with the Department of Revenue provided that prior to September 1, 2002 they entered into a lump sum or unit price contract with a general or prime contractor who entered into a lump sum or unit price construction contract prior to July 15, 2002.

A claim for refund must have two things. First, a copy of the general contractor's contract that was signed prior to July 15, 2002 (and the subcontractor's contract signed prior to September 1, 2002). And, second, documentation in the form of schedules and invoices to support the payment of sales tax in excess of the six percent state rate. A separate claim form is required for each contract.

"Lump sum or unit price construction contract" is defined as a written contract for the construction of, or improvements to, real property under which the amount payable to the contractor, subcontractor, or material vendor is fixed without regard to costs incurred in the performance of the contract.

Erica L. Horn, Esq., is an attorney based in Stites & Harbison's Frankfort, Ky., office whose practice focuses on state and local tax issues. Ms. Horn may be reached at ehorn@stites.com or 502/209-1218.



Erica L. Horn

ON the JOB



David Ratterman

David B. Ratterman has been selected by the Metropolitan Transportation Authority of the State of New York for the List of Approved Potential Dispute Review Board Members for the MTA/LIRR East Side Access Project. In addition, Ratterman spoke at the 17th Annual "Contractor's" Construction Superconference, December 12-13, San Francisco, Calif.

Bradford L. Cowgill and **Joseph L. Hardesty** presented "Mechanics' Lien Law and Strategies in Kentucky," in Lexington (Dec. 11) and Louisville (Dec. 13).

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