



*The 2009 Construction SuperConference
San Francisco, California
December 10 and 11, 2009*

Evans Barba's "Report Card"

on

**AACEI's Recommended Practice No. 29R-03
FORENSIC SCHEDULE ANALYSIS**

*Since my "Peer Review" of the RP in
December 2008, some things have changed,
others have not, and there are still miles to go.*





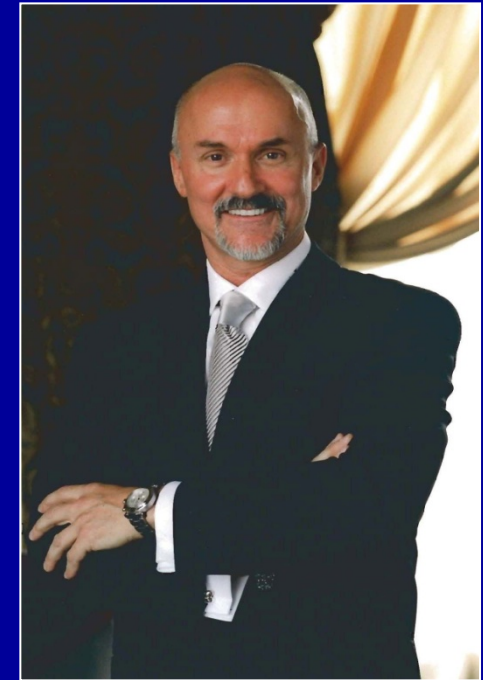
Evans Barba is the Chairman and CEO of Barba Consulting, Inc. He specializes in providing construction program management and disputes resolution services on domestic and international projects.

Mr. Barba has 36 years experience in engineering design, construction program and project management, contract administration, critical path method scheduling, and claims and disputes resolution.

He has directed hundreds of program management and disputes resolution assignments across a broad range of infrastructure, commercial, environmental, transportation, healthcare, hospitality, power, detention, and industrial projects, as well as complex development and acquisition programs.

He has authored numerous works on Program Management and Disputes Resolution topics and lectured internationally on these topics for over thirty years.

Mr. Barba is a Registered Professional Engineer, a Registered Professional Planner, a Certified Planning and Scheduling Professional, and a Certified Forensic Claims Consultant.



Evans M. Barba, PE, PSP
Chairman and CEO

Barba Consulting, Inc.
Five Greentree Centre
525 Route 73 South
Marlton, N.J. 08053
856-985-0500
ebarba@barbaconsulting.com





Outline

- ❑ Overview of AACEL's Recommended Practice No. 29R-03
- ❑ Overview of E. Barba's Dec. 2008 "Peer Review" comments
- ❑ The RP Task Force response to the Barba "Peer Review"
- ❑ Chronology of events from Dec. 2008 to Dec. 2009
- ❑ Observations and Conclusions
- ❑ Recommendations
- ❑ Is there an alternative to the RP





aace
International

AACE International Recommended Practice No. 29R-03
FORENSIC SCHEDULE ANALYSIS
TCM Framework: 6.4 – Forensic Performance Assessment

The stated purpose of the RP “...is to provide a unifying technical reference for the forensic application of critical path (CPM) scheduling.”

Acknowledgments:

Kenji P. Hoshino, PSP CFCC (Author)
Robert B. Brown, PE
John J. Ciccarelli, PE CCE PSP
Gordon R. Costa, PSP CFCC
Michael S. Dennis, CCC
Edward E. Douglas, III CCC PSP
Philip J. Farrocco, PE
Sidney J. Hymes, CFCC
John C. Livengood, PSP
Mark F. Nagata, PSP
Jeffery L. Ottesen, PE PSP CFCC

Thomas F. Peters, PE CFCC
Keith Pickavance
Dr. Anamaria I. Popescu, PE
Jose F. Ramirez, CCE
Mark C. Sanders, PE CCE PSP
Takuzo Sato
L. Lee Schumacher, PSP
Robert Seals, PSP
Ronald M. Winter, PSP
James G. Zack, Jr. CFCC

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AACE International Recommended Practices





The RP defines the word “forensic” as:

1. Relating to, used in, or appropriate for courts of law or for public discussion or argumentation;
2. Of, relating to, or used in debate or argument; rhetorical;
3. Relating to the use of science or technology in the investigation and establishment of facts or evidence in a court of law: a forensic laboratory.





Overview Of The RP

Peer Review Group Composition

Organization Type	Count	
Claim Consultants	29	21%
Construction Managers / Project Controls	49	36%
General Contractors	11	8%
EPC Contractors	3	2%
Subcontractors	2	1%
Owners	3	2%
Architects / Engineers	4	3%
Associations	2	1%
Government	1	1%
Academia	7	5%
Attorneys	3	2%
Software Developers	1	1%
Judges, Arbitrators, Mediators	1	1%
Unknown	19	14%
Total	135	100%





The Intent Of The RP

- ❑ Identify and quantify
 - ❑ Compensable delay
 - ❑ Excusable delay
 - ❑ Inexcusable delay
 - ❑ Schedule variances
 - ❑ Schedule Acceleration
 - ❑ Schedule disruption, and
 - ❑ Apportion delay between contracting parties

- ❑ On the basis of these analyses, legal conclusions concerning monetary damages flow.





Overview of the RP - Structure

- ❑ Contents
 - ❑ Organization and Scope
 - ❑ Source Validation
 - ❑ Method Implementation
 - ❑ Analysis Evaluation
 - ❑ Choosing a Method

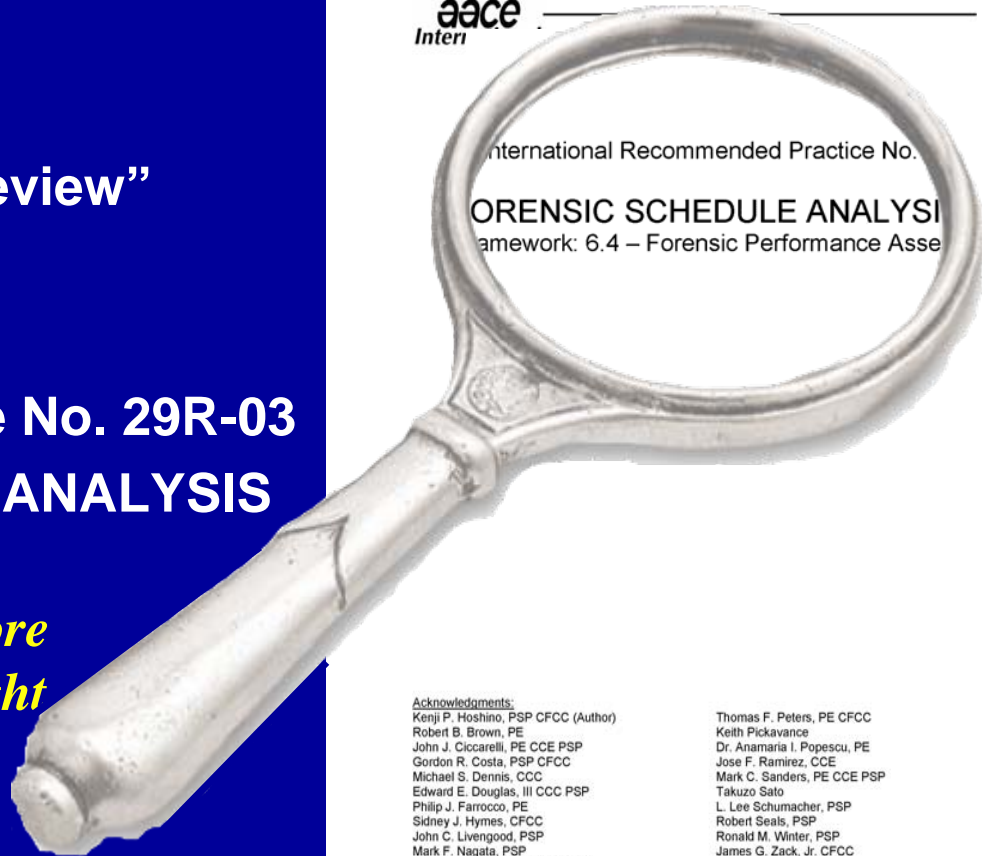




December 2008 Session E03

Evans Barba's "Peer Review" of AAACE International Recommended Practice No. 29R-03 FORENSIC SCHEDULE ANALYSIS

*I didn't get to review it before
it was published, so I thought
I'd do it now.*



aaace
Interi

International Recommended Practice No.
FORENSIC SCHEDULE ANALYSIS
Framework: 6.4 - Forensic Performance Assessment

Acknowledgments:

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Keith Prickavance
Dr. Anamaria I. Popescu, PE
Jose F. Ramirez, CCE
Mark C. Sanders, PE CCE PSP
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December 2008 Opening Remarks

- ❑ The “Forensic Schedule Analysis RP” was developed for the stated purpose of providing a “... *unifying*” *technical reference for the forensic application of critical path method (CPM) scheduling.*

- ❑ Based on my review of this purported “Recommended Practice” I have concluded that there are a number of significant issues/problems that need to be resolved prior to viewing or accepting this document as a *bona fide* Forensic Schedule Analysis “**Recommended Practice.**”

- ❑ Recognizing that ACEI has published **Practice No. 29R-03**, labeling it a “**Recommended Practice**” relative to the forensic application of CPM scheduling, I have reviewed this document with a critical eye.





*Views expressed during Barba's
2008 SuperConference Presentation*

- ❑ My 2008 presentation identified and discussed numerous flaws and problems in the RP. The noted deficiencies were both global and specific, overarching, and detailed.





December 2008
Summary Findings and Conclusions

- ❑ While Practice No. 29R-03 represents a step forward in terms of attempting to establish a unifying technical reference for the forensic application of critical path (CPM) scheduling, **it has not yet achieved that goal.**

- ❑ In its current state, the “RP” cannot and should not be viewed as a “**Recommended Practice**” or “**standard**” relative to the performance of Forensic Schedule Analyses; rather, at most, it should be viewed as a **work in progress**, whose ultimate goal is to establish a set of **guidelines** that will serve as a technical reference for the forensic application of critical path scheduling.





December 2008

Summary Findings and Conclusions (cont'd)

- As it stands, Practice No. 29R-03 **should not** be entitled a “**Recommended Practice.**” It would be more accurate to characterize and title this document:

“**Forensic Schedule Analysis Guidelines**: Definitions, principles, and a description of suggested steps involved in performing various methods of forensic schedule analysis.”





December 2008

Summary Findings and Conclusions (cont'd)

- The document should also include introductory language similar to that which ACEI uses in other “Practice” documents:

“This Document is intended to provide certain guidelines, not to establish a standard of practice. This Document provides an overview of principles and guidelines applicable to the performance of certain methods of forensic analysis, irrespective of whether said methods have been deemed “acceptable” or “unacceptable” by various Courts of Law.”





December 2008

Summary Findings and Conclusions (cont'd)

- ❑ While Practice No. 29R-03 carries the title “**Recommended Practice**,” it does not “**rank**” the methods of analysis discussed therein, nor does it provide any “**legal input**” or guidance in terms of identifying whether the methods of analysis discussed therein have been deemed “**acceptable**” or “**unacceptable**” by Courts of Law.

- ❑ Due to these factors alone, Practice No. 29R-03 **should not** be “**entitled**” or “**viewed**” as a bona fide Forensic Schedule Analysis “**Recommended Practice**” manual.





December 2008

Summary Findings and Conclusions (cont'd)

- ❑ Given ACEI's decision not to “rank” or include any “legal input” in Practice No. 29R-03 relative to whether the methods of analysis discussed therein have been deemed acceptable or unacceptable by Courts, it should be made clear that nothing in the Manual should be viewed as an endorsement or condemnation of the use of any one of the methods of analysis discussed therein over another.

- ❑ In this regard, the “Advantages and Disadvantages” sections set forth under each of the “MIP” sections should be eliminated. As it stands, the wording under the various section headings “Advantages and Disadvantages,” are extremely misleading, in some instances incorrect, and in any event are subject to being misinterpreted.





December 2008

Summary Findings and Conclusions (cont'd)

- As it stands, Practice No.29R-03 is misleading and can be used as (i) a “**weapon**” to **undermine** the credibility of methods of analysis that have historically been deemed acceptable by Courts and Boards, and (ii) a “**vehicle**” to “**resurrect**” and **give credence** to other methods of analysis that have been deemed unacceptable by Courts and Boards.

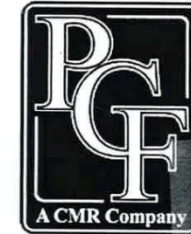




Response to the Barba “Peer Review” Presentation

- The AACEI RP Task Force Response to the Barba “Peer Review” Presentation





Attorney's Guide to AACEi's Recommended Practice for Forensic Schedule Analysis RP-29R03

Superconference 2008
San Francisco, CA





- ***Regardless of agreement or belief in the document you have to thoroughly understand it if you are a practitioner or a consumer of forensic schedule analysis services***





The Label, “Recommended Practice”

- **AACEi's pre-existing class of documents with specific built-in peer review procedures.**
- **Would changing label really stop misuse and abuse?**





Scope & Focus: What It Is NOT

- ▶ Not intended to override contract provisions regarding schedule analysis methods or other mutual agreement by the parties.
- ▶ Not intended to be a primary resource for legal theories governing claims related to scheduling.

- **Reference to specific legal rulings require frequent and regular updates.**
- **Other publications already do this.**
- **AACEi is an international organization with members in over 60 nations worldwide.**





3.6 & 3.7 I.A.P. & Fragnet Insertion

- **Valid uses include:**
 - **Non-compensable time extensions**
 - **State-of-mind evidence**
 - **Identification of out-of-sequence activities in constructive acceleration claims**

- Solution: Caveats and warnings as opposed to absolute exclusion





How Lawyers May Use the RP

- ▶ Reference Manual / Self-Study
- ▶ Screening and Interviewing an Expert
 - Familiarity with the document
 - Clear understanding of the methods & procedures described
 - Call out “One-Trick Ponies”
- ▶ ‘Pre-Flight Checklist’ for Finalizing Expert Reports

➤ **Deposing & Cross Examining Expert Witnesses**

- **‘Weaponization’ – cuts both ways**

- ▶ Preparing Project Specifications
 - Terminology



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Recommendations

- **Make sure you have the latest version**
- **Be more than familiar with; understand it thoroughly.**
- **Accept the fact that the RP will be used as a weapon.**
- **You can use it as a weapon too.**

included in the document

- ▶ Consider using more than one method
 - Don't be a one-trick pony



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Conclusions

- ▶ RP intended to help both practitioners and consumers of forensic schedule analysis
 - Reduce argument over methodology by increasing transparency
 - Establishes commonality of basic building blocks in performing and understanding forensic schedule analyses

➤ **Regardless of varying individual opinions, the RP exists and must be dealt with:**

- **It has already influenced the practice**
- **Thorough knowledge of the content is a must**





Following the 2008 SuperConference

- ❑ In the months following the SuperConference, a number of forensic schedule analysis practitioners communicated with ACEI expressing similar concerns and dissatisfaction with the RP, including calls for the elimination of the designation “Recommended Practice” and even the outright rescission of the RP.





A Chronology

□ A Chronology of events related to the Dispute concerning ACEI's RP

[The following are excerpts from letters forwarded to ACEI by the noted forensic schedule analysis practitioners, along with excerpts from ACEI email responses related to the subject letters]





A Chronology

- January 14, 2009, letter from Evans Barba, Chairman and Chief Executive Officer of Barba Consulting, Inc. to the President of AACEI regarding the RP.





While the intent of the RP is admirable, I am deeply concerned that in its current form it will create more conflict, confusion, and misunderstanding than it was trying to eliminate in the first place. Based on my review of the RP, I have concluded the following:

[the five major findings set forth in my 2008 SuperConference Presentation]

* * *

Beyond all of the above, a number of statements made during the last Session of the day on Thursday, December 12, 2008, entitled "Attorney's Guide to ACEI's Recommended Practice for Forensic Analysis, RP-29R03/" ... struck me ... including:

1. The reason the RP is titled a "Recommended Practice" is that ACEI mandated this title be placed on the RP, as it does any practice guide that goes through its preparation process.
2. The reason ACEI decided not to incorporate guidance in the RP relative to whether the methods discussed have been deemed *acceptable* or *unacceptable* by Courts, was based on two factors: (a) Because ACEI is an international organization with members in over 60 nations worldwide, the decision was made not to tailor the RP to the practice of forensic schedule analysis, or Law, in the United States alone [and] (b) Because the development of the RP was a voluntary work, it was deemed not feasible to include references to case law in the RP, which would have to be updated on a regular basis.





As it stands, the RP has not yet decided "*what it wants to be*": (1) a generic, "*60 nations*," "*how to*" guide, which discusses basic principles, guidelines and suggested steps to follow in performing certain methods of forensic schedule analysis; or, (2) a *bona fide* "Recommended Practice Manual," which ranks the methods discussed, and provides guidance with respect to whether said methods have been deemed acceptable or unacceptable in Courts of Law. Presently, the RP exists in a "*twilight zone*" between the two.

In conclusion, ACEI has produced a purported "Recommended Practice" using a "*one size fits all nations*" approach. It is not possible to do so. As a result, the RP will create more conflict, confusion, and misunderstanding than it was trying to eliminate in the first place.

I thank you in advance for your consideration and assistance in addressing the issues discussed above.





A Chronology (cont'd)

- January 14, 2009, email from the President of AACEI to Evans Barba in response to Barba's letter of January 14, 2009.





Thank you for your email highlighting your concerns with AACEI's RP 29R-03. We will look into your concerns with all seriousness and diligence, and respond back to you at the earliest possible time.





A Chronology (cont'd)

- January 19, 2009, letter from Thomas Caruso to the President of ACEI regarding the RP.





Mr. Barba recently shared his letter of January 14, 2009 with me regarding the subject AACEI Publication. I concur with Mr. Barba's concerns and want to add some recent practical experience in dealing with this document under cross examination. This AACEI Publication has been utilized by savvy construction lawyers in several recent cases which I have been involved.

* * *

The AACEI Recommended Practice Publication has quickly become a "be all easy reader" version of scheduling. This document is overloaded with sound bites which lawyers selectively feed to unsuspecting triers of fact. In a recent case, this Publication, with the power of the AACEI behind it, contributed to the misapplication of scheduling methodologies resulting in an opinion which stated "*The Contract required [], in preparing its "Time Impact Analysis" to use the "Impacted As-Planned" methodology.....*" The contract did not reference or use the words "Impacted As-Planned".

* * *

I would join with Mr. Barba in requesting that this document be recharacterized by the AACEI in a manner as he has suggested in order to hopefully prevent its abusive use in our adversarial system.





A Chronology (cont'd)

- January 22, 2009, email from the President of AACEI to Evans Barba responding to Mr. Barba's letter of January 14, 2009.





Thank you for your email below. As I noted previously, we take your comments seriously and have therefore evaluated your entire letter.

Rather than debate the points in your letter via email, some of which we agree with, some of which you and others involved with the development of the RP should consider discussing further, I would like to make a proposal to you.

Currently, there is a group of experts in the claims and disputes field initiating the development of the next revision of RP 29R-03. I propose that you contact [the author of the RP] and offer yourself as a participant in this group. By doing this, along with the other group members, you will be able to better influence the outcome of the RP.





A Chronology (cont'd)

- January 25, 2009, letter from Dr. Patricia Galloway to the President of AACEI regarding the RP.





There appears to be a continuing concern in the industry as how this Practice Manual is to be viewed. I had sent a letter to [a co-author] and [the author].

* * *

I have discussed my observations with other schedule experts in the industry and would agree with Evans Barba conclusions below which I believe have been sent to you:

[The five major findings set forth in Barba's letter to AACEI dated 1/14/09]

* * *

As it stands, I believe that the RP will have a significant adverse effect on the practice of forensic schedule analysis in the U.S. If you wish to discuss with me, I would be pleased to share my thoughts further with you.





A Chronology (cont'd)

- January 26, 2009, letter from Evans Barba to the President of AACEI.





Only those who prepared and vetted the RP can provide answers to the matters raised and concerns expressed in my January 14, 2009 letter. As it stands, industry practitioners are subject to being cross-examined and, I believe, unfairly and inaccurately "measured" by the RP in an adversarial proceeding.

With all respect, the RP is "*out there*" now; thus, waiting for answers that may not come until the next revision of the RP, if at all, is not, in my view a viable option. ACEI knows what it "thinks" regarding my questions and concerns. I need to understand that thinking just as quickly as possible.

Recognizing that time is of the essence in this regard, the courtesy of a timely response is greatly appreciated.





A Chronology (cont'd)

- January 26, 2009, email (copied to Evans Barba), from the President of AACEI to Dr. Galloway responding to Dr. Galloway's letter of January 25, 2009.





Thank you for your letter. If it is ok with you, I would like to pass it on to our Technical Board chair, [], who is ultimately responsible for the Recommended Practices that the association produces. I have to admit, I have not thoroughly read the subject RP, so I cannot comment one way or another. However, I highly respect your opinion on this matter and between you, Tom Driscoll and Evans Barba, the three people that have contacted me directly on this matter, I believe there are issues with the way it may be portrayed in the legal field.

I have traded emails with [the author of the RP] on the subject of this document being a guidance document, standards, etc. He is entirely aligned with this document not being considered a standard, but more of a guidance document.





A Chronology (cont'd)

- January 27, 2009, email from the President of AACEI to Evans Barba responding to Mr. Barba's letter of January 26, 2009.





Although you state in your letter that you don't want to debate the issues, it sure sounds like you want to debate the issues concerning your comments on As-Planned Impact delay analyses.

Therefore, I will reiterate my proposal that you become active in the ACEI Claims & Disputes Resolution committee and debate the issues there with a collection of many domestic and international claims experts.

Thanks again for your interest in RP 29R-03, and I look forward to your new thread discussion in the ACEI CD&R forum.





A Chronology (cont'd)

- January 27, 2009, AACEI email (copied to Evans Barba), from the President of AACEI to the RP Task Force Technical Director regarding the RP.





Since concerns with how the disputes industry should or does view RP 29R-03, Forensic Schedule Analysis, have been directly raised to me by three of the most highly respected disputes experts in the business over the past two weeks, I am asking that you take a closer look at **their comments**. I have already forwarded to you the letter from Mr. Evans Barba, and am now forwarding to you a letter from Dr. Pat Galloway. Additionally, I received a phone call from Mr. Tom Driscoll, a pioneer in the delay analysis area and one of my mentors in the claims business, stating a few of his concerns with the RP.

I understand that the document is undergoing a revision now, or will be soon. Will you please ensure that Mr. Barba's and Dr. Galloway's letter get placed at the top of the pile of comments.





A Chronology (cont'd)

- January 28, 2009, letter from Dr. David Halligan to the President of AACEI regarding the RP.





At the request of one my clients, a major construction litigation law firm, I carefully read the publication *AACE International Recommended Practice No. 29R-03, Forensic Schedule Analysis ("RP")*. My client made this request as a result of an arbitration hearing where the RP was entered into evidence to cross examine the forensic scheduling expert witnesses for both plaintiff *and* defendant. The arbitration panel's subsequent written decision leads me to believe that the RP did not achieve the RP's stated purpose, that is, to "minimize disagreements over technical implementation of accepted techniques." Instead, the RP added to the confusion that can attend the presentation of complex, fact-based forensic schedule analyses in a legal setting. In addition, having now completed my review of the RP, as member of AACE International it is my duty to bring to your attention the fact that the RP contains serious flaws. These flaws are so serious that in my view the only responsible course of action is for AACE International to immediately rescind *Recommended Practice No. 29R-03, Forensic Schedule Analysis*.





I am concerned that because the RP bears the title *Recommended Practice* it will be misused by the legal community for purposes not intended by the author(s) or AACE International. In addition, whereas the statements in the RP no doubt accurately reflect the *opinions* of the author(s), these *opinions* are unsupported by fact, case law, or reasoned argument. Nevertheless, because the publication bears the title *Recommended Practice*, it may erroneously be deemed by arbitrators, judges and juries to represent the established consensus of forensic schedulers.

In fact, *no* such consensus exists, as evidenced by the recent presentation by Mr. Evans Barba at the 2008 Construction SuperConference in San Francisco, California.

Subsequently, Mr. Barba shared with me his January 14, 2009 letter to you on this very; topic. I endorse Mr. Barba's recommendation that AACE International withdraw the publication as a *Recommended Practice*.





A Chronology (cont'd)

- January 29, 2009, letter from Evans Barba to the President and Board of Directors of AACEI requesting a written response to the questions raised in Barba's January 14 and January 26 letters, and calling for AACEI to withdraw the RP from Publication pending revision of the RP.





Please consider this letter a formal request to you and ACEI's Board of Directors for a written response to the serious matters and concerns set forth in my letters to ACEI of January 14, 2009 and January 26, 2009 in regard to ACEI Practice No. 29R-03, Forensic Schedule Analysis (the "RP").

In the alternative, to the extent ACEI is unwilling or unable to respond to the serious issues and concerns set forth in my January 14, 2009 and January 26, 2009 letters, consider this my request that ACEI immediately withdraw Practice No. 29R-03 from publication pending its anticipated revision.





A Chronology (cont'd)

- ❑ Via email dated February 13, 2009, the author of the RP forwarded an “Advance Copy” of a letter responding to the various letters I had forwarded to ACEI regarding the RP.





AACEI has received your letters concerning the Recommended Practice - Forensic Schedule Analysis, along with a few others recently. You've already heard AACEI's position on the matter through [AACEI's], President. At a recent teleconference of the RP task force the position [AACEI's President] expressed did not change. There was unanimous agreement that the Association should not and will not withdraw or retract this Recommended Practice. After incorporating substantial input from dozens of practitioners who participated during the initial development of this RP, it would be unprofessional for AACEI to withdraw the document. AACEI is, however, open to revisions to this RP, as with all RP's, when there is good reason to do so.





A Chronology (cont'd)

- March 6, 2009, letter from Irvin E. Richter, Chairman and Chief Executive Officer, Hill International, Inc. to the President of ACEI requesting that ACEI remove the designation Recommended Practice from Practice No. 29R-03.





I am writing to address the above referenced Recommended Practice No. 29R, Forensic Schedule Analysis (RP). As you may be aware, the publication of the RP has generated a significant amount of controversy in the scheduling and expert witness community. Notwithstanding the original intent of the RP, "to minimize disagreements over technical implementation of accepted techniques", it has only served to add further confusion and been a tool for litigators and fact finders who attempt to use the RP as a baseline of acceptable performance. As a result I must respectfully request that the AACEI remove the designation of Recommended Practice.





I do not make this request lightly. After reviewing the RP in detail, speaking with colleagues and peers, and seeing the manner in which the RP is being used, it is evident that the actual use is inconsistent with the original intent. In the engineering and construction community the term Recommended Practice denotes procedures or processes that are established by authority, custom, or general consent as a model from which a deviation could be the basis for allegations of failure to comply with the standard of care for that industry. The RP does not rise to this level as it is not supported by case law and certainly does not meet the standard of a general consent. While this may not be the intended purpose of the RP, it is indeed how it is being used by the legal community.





A Chronology (cont'd)

- June 20, 2009, letter from Mr. Thomas Driscoll to the President of AACEI regarding the RP.





The RP [] states the focus of the document [is] on the technical aspects of forensic scheduling as opposed to the legal aspects. Additionally, it states that schedules in and of themselves, do not demonstrate root causation or responsibility. Further, the RP is not intended to be a primary recourse for legal theories governing claims related to scheduling, delays and disruptions. In my view, the RP contradicts itself.

* * *

Rather than being a recommended practice and a unifying technical reference, it has created just the opposite. The Recommended Practice has come under significant scrutiny and criticism by a number of leading delay experts.





* * *

I have reviewed a number of letters by recognized experts that were sent to the ACEI offering suggestions including the following:

- Remove the designation Recommended Practices (Richter);
- Consider it as a work in process (Barba and Caruso);
- Use it to provide certain guidelines, not to establish a standard (Galloway); and
- The only responsible course of action is for ACEI to immediately rescind the RP (Halligan).

I basically concur with the comments and concerns that were offered including Dr. David Halligan's suggestion of rescinding it completely. I also believe the work to date is at best a work-in-process and until the RP reaches the level of content, quality and level of acceptance necessary, and then released as guidelines, not a recommended practice.





A Chronology (cont'd)

- ❑ In June 2009 RP 29R-03 rev. 1 was completed during the spring of 2009 and approved by the ACEI Technical Board on Friday, June 26, 2009.

- ❑ The Claims and Disputes Committee also “...concluded that a second revision, Revision 2, is necessary to address the issues raised by those who objected to Revision 0.”

- ❑ The planned timeline for completing Revision 2 projected issuing Revision 2 in June 2010.

Source: CDR Committee Meeting Minutes, ACE International Annual Meeting, Seattle, Washington USA, June 29th and 30th, 2009





A Chronology (cont'd)

- ❑ Revision 1 to the RP added a new methodology listed under section 3.9 and made other minor technical and grammatical changes.”
- ❑ Among the changes made in Revision 1, the following sentence was added to the “Introduction” Section of Practice No. 29R-03:

“The RP/FSA is not intended to establish a standard of practice.”

Source: CDR Committee Meeting Minutes, AACE International Annual Meeting, Seattle, Washington USA, June 29th and 30th, 2009





A Chronology (cont'd)

- ❑ October 2009. An article authored by Judah Lifschitz, Alexis Lockshin, and Evans Barba entitled “A Critical Review of AACEI Recommended Practice for Forensic Schedule Analysis” appeared in the publication “The Construction Lawyer.”





The Construction Lawyer
*“A Critical Review of the AACEI Recommended Practice for
Forensic Schedule Analysis”*

- The article in “The Construction Lawyer” addresses the use of CPM scheduling as a tool for discerning the proximate cause of project delays, and in particular, presents a critical review of the Recommended Practice for Forensic Schedule Analysis (RP) issued by the Association for the Advancement of Cost Engineering International (AACEI) in June 2007.^[1]





Observations & Conclusions

- Notwithstanding all of the concerns, criticisms, and calls for removal of the designation “Recommended Practice” from Practice No. 29R-03 to date (or in the alternative withdrawal from publication of this document pending revision), ACEI remains firm in its position that Practice No. 29R-03 is appropriately designated a “Recommended Practice.”





Observations & Conclusions (cont'd)

- ❑ **Question:** How can AACEI credibly continue to maintain its position that Practice No. 29R-03 is appropriately designated a “Recommended Practice” on Forensic Schedule Analysis when it currently states, among other things:

- ❑ “The RP/FSA is not intended to establish a standard of practice.” (Reference Section 1, “Introduction,” of Revision 1 of the RP)“

- ❑ “It is not the intent of the RP to exclude or endorse any method over others.”

- ❑ “The focus of the document is on the technical aspects of forensic scheduling as opposed to the legal aspects.”





Observations & Conclusions (cont'd)

- ❑ AACEI cannot establish that Practice No. 29R-03 represents or has achieved the status of representing general industry consent.

- ❑ Documents such as the **ASTM** standards, **AISC**, and **ACI**, etc. are technical documents that are recognized as standards in the industry.





Observations & Conclusions (cont'd)

What AACEI *can* establish with respect to its RP:

- ❑ The RP represents the views and opinions of the co-authors whose names appear on the cover of the document;
- ❑ The RP was peer reviewed by 135 professionals, 29 of whom are involved in the claims and disputes industry. The names of those who peer reviewed the RP are not listed as co-authors, nor are their names included as an Appendix to the RP;
- ❑ The RP has not been “Peer Reviewed” by the industry at large or achieved general industry consent.





Observations & Conclusions (cont'd)

- ❑ A number of nationally and internationally recognized forensic schedule analysis practitioners have formally expressed their concerns and criticisms regarding the RP to ACEI, and have called for ACEI to remove the designation “Recommended Practice” from Practice No. 29R- 03.

- ❑ Practice No. 29R-03 is an ongoing work in progress, with future revisions to the document anticipated to be issued in June 2010.





Recommendations

- ❑ Short of rescinding the RP, **at a minimum**, ACEI should remove the designation “Recommended Practice” from Practice No. 29R-03.
- ❑ The “Introduction” should be revised to include a “clarifying” statement (see following slide).





1.1. Introduction

The purpose of this AACE International (AACE) Practice Guide is to set forth a set of technical basic principles and guidelines relative to the forensic application of critical path method (cpm) scheduling. This Guide discusses certain methods of analysis, irrespective of whether these methods have been deemed acceptable or unacceptable by various Courts and Boards in the United States of America.

This Practice Guide is not intended to establish a standard of practice. In addition, it is not intended to be a prescriptive document to be applied without exception. AACEI recognizes that the method(s) of analysis to be utilized in a given situation and the manner in which a given method might be implemented are dependent upon the contract, facts, applicable law, availability and quality of contemporaneous project documentation, and other nuances and circumstances particular to a given situation.

As with any other advisory document, this Practice Guide should be used in conjunction with professional judgment.

This Practice Guide represents the views and opinions of the professionals whose names appear on the cover of this Guide. This Practice Guide is a work in progress with future revisions planned.





Is there an alternative to the RP

- ❑ Develop a set of Basic Principles and Guidelines
- ❑ “Players”: AACETI, PMI, “others” and the ABA
- ❑ Develop a Guide for practice in the United States
- ❑ Discuss basic definitions
- ❑ Describe methods of analysis using “recognized names”
- ❑ Include an analysis of case law
- ❑ Update the Guide annually
- ❑ Develop a “paid” update program





Closing

- ❑ What do you think?
- ❑ Should Practice No. 29R-03 be designated a “Recommended Practice” ?
- ❑ Do you believe that Practice No. 29R-03 should serve as the “yardstick” against which the analyses of forensic schedule analysis practitioners in the United States should be measured?
- ❑ As a forensic schedule analysis practitioner, I encourage you to let AACEI know what you think!





THE END

Thank you for attending this Session.

and

Have a Great Day!

