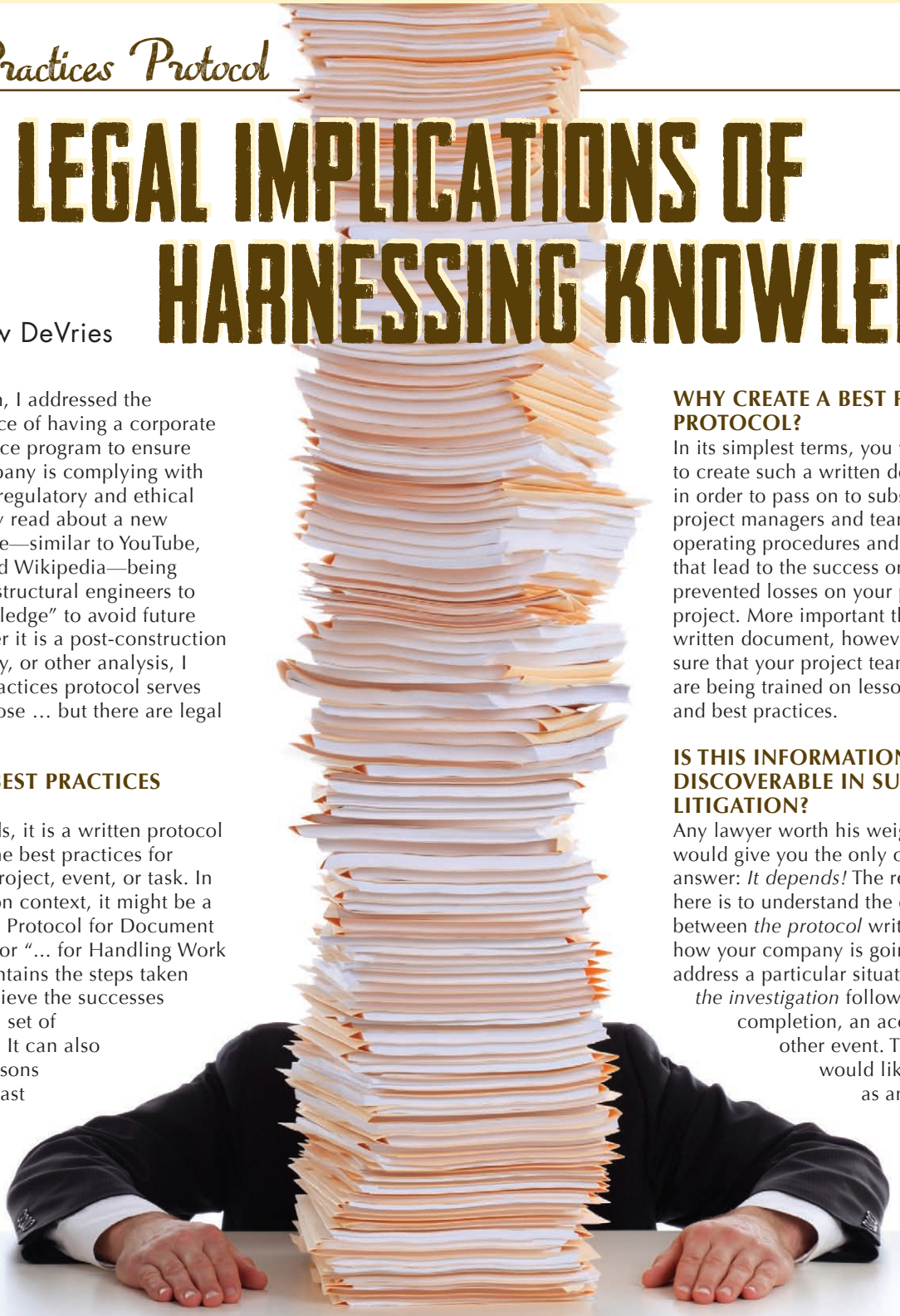
Best Practices Protocol

THE LEGAL IMPLICATIONS OF HARNESSING KNOWLEDGE

By Matthew DeVries



Last month, I addressed the importance of having a corporate compliance program to ensure that your company is complying with all applicable regulatory and ethical laws. I recently read about a new digital database—similar to YouTube, SharePoint, and Wikipedia—being developed by structural engineers to "harness knowledge" to avoid future losses. Whether it is a post-construction meeting, survey, or other analysis, I think a best practices protocol serves the same purpose … but there are legal risks.

WHAT IS A BEST PRACTICES PROTOCOL?

Just as it sounds, it is a written protocol that outlines the best practices for success on a project, event, or task. In the construction context, it might be a "Best Practices Protocol for Document Management" or "… for Handling Work Injuries." It contains the steps taken in order to achieve the successes from any given set of circumstances. It can also contain the lessons learned from past failures or losses.

WHY CREATE A BEST PRACTICES PROTOCOL?

In its simplest terms, you would want to create such a written document in order to pass on to subsequent project managers and team leaders the operating procedures and protocols that lead to the success or that prevented losses on your particular project. More important than the written document, however, is to make sure that your project team members are being trained on lessons learned and best practices.

IS THIS INFORMATION DISCOVERABLE IN SUBSEQUENT LITIGATION?

Any lawyer worth his weight in gold would give you the only correct answer: *It depends!* The real issue here is to understand the difference between *the protocol* written for how your company is going to address a particular situation and *the investigation* following project completion, an accident, or other event. The "protocol" would likely be treated as any other company

ABOUT THE AUTHOR

Matthew DeVries, construction attorney and LEED AP, is a member of the Construction Service Group of Stites & Harbison, PLLC, as well as the founder of www.bestpracticesconstructionlaw.com. He can be reached at matthew.devries@stites.com.

document, such as an Employee Handbook, that sets out the company's policies, which would likely be discoverable. On the other hand, any documents related to a "self-critical examination" may be subject to a privilege, which depends on your state's laws.

The key question becomes whether a "self-critical analysis" can be used by the opposing party as evidence of liability, breach of contract, or violation of some standard of care. The courts have treated the issue differently—a few of which hold that these type of documents are "privileged" and are not discoverable. In short, the basic requirements for the privilege are: (1) the information must result from a critical self-analysis undertaken by the party seeking protection; (2) the public must have a strong interest in preserving the free flow of the type of information sought; and (3) the information must be of the type whose flow would be curtailed if discovery were allowed. In addition, some courts require that the documents be prepared with the expectation that they will, and in fact do, remain confidential. This privilege should not be confused with attorney-client communications, which as a general rule are privileged and not discoverable.

Most courts have rejected the self-critical analysis privilege entirely or defined it very narrowly. Examples of project documents where courts have rejected application of the self-critical analysis privilege include:

- Safety review and meeting notes
- Quality control documents
- Audit documents and other information
- Environmental assessments and analysis
- Internal communications and corporate reviews

Ultimately, you need to be concerned that any document containing your company's self-critical analysis is generally not privileged and, therefore, will be subject to discovery in the event of litigation. However, this should not dissuade you from using "lessons learned" or "best practices" to ensure future successes and to avoid future losses. ■

ROMIX