

# NASCC: THE STEEL CONFERENCE

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• 2019 •

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## ***Your Code of Standard Practice Understanding its Legal Implications***

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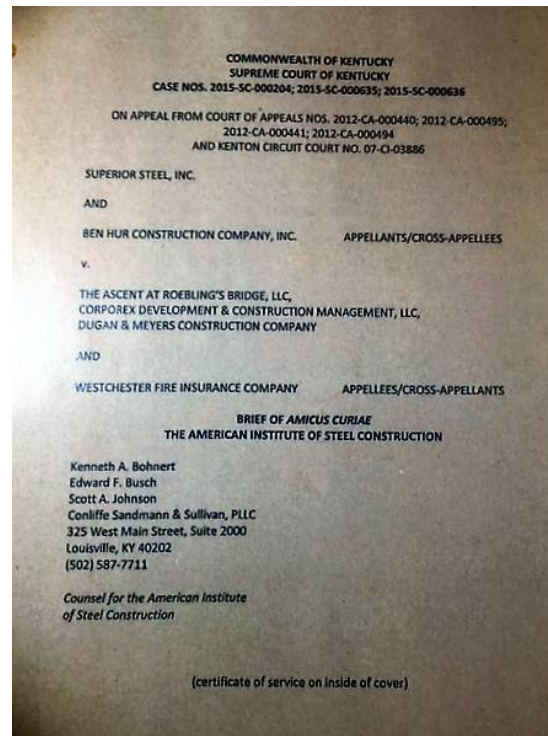
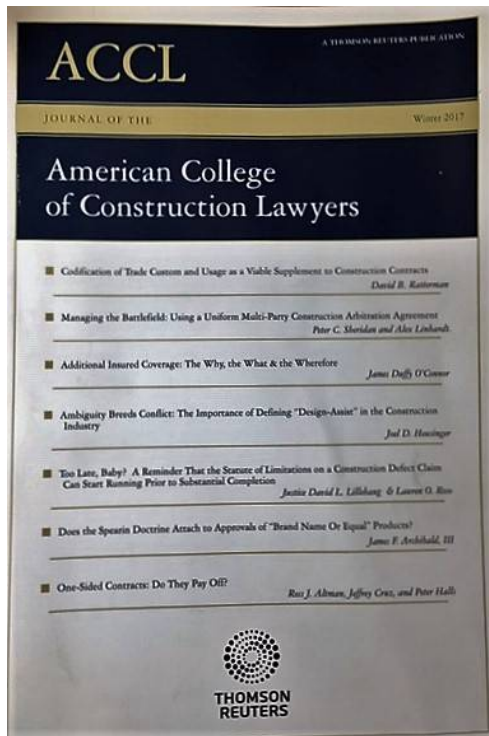
# Your Code of Standard Practice



***The Preface***  
***The Glossary***  
***Section 1***  
***Section 2***  
***Section 9***  
***Sections 3.1 & 3.6***

# Your Code of Standard Practice

## NASCC: THE STEEL CONFERENCE



# ACCL

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## American College of Construction Lawyers

- Codification of Trade Custom and Usage as a Viable Supplement to Construction Contracts  
*David B. Rattmann*
- Managing the Battlefield: Using a Uniform Multi-Party Construction Arbitration Agreement  
*Peter C. Sheridan and Alex Linhardt*
- Additional Insured Coverage: The Why, the What & the Wherefore  
*James Duffy O'Connor*
- Ambiguity Breeds Conflict: The Importance of Defining "Design-Assist" in the Construction Industry  
*Jul D. Hovinger*
- Too Late, Baby? A Reminder That the Statute of Limitations on a Construction Defect Claim Can Start Running Prior to Substantial Completion  
*Justin David L. Lillibridge & Lauren G. Rice*
- Does the Spearin Doctrine Attach to Approvals of "Brand Name Or Equal" Products?  
*James F. Archibald, III*
- One-Sided Contracts: Do They Pay Off?  
*Russ J. Altman, Jeffrey Cruz, and Peter Hall*



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COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
CASE NOS. 2015-SC-000204; 2015-SC-000635; 2015-SC-000636

ON APPEAL FROM COURT OF APPEALS NOS. 2012-CA-000440; 2012-CA-000495;  
2012-CA-000441; 2012-CA-000494  
AND KENTON CIRCUIT COURT NO. 07-CI-03886

SUPERIOR STEEL, INC.

AND

BEN HUR CONSTRUCTION COMPANY, INC. APPELLANTS/CROSS-APPELLEES

v.

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CORPOREX DEVELOPMENT & CONSTRUCTION MANAGEMENT, LLC,  
DUGAN & MEYERS CONSTRUCTION COMPANY

AND

WESTCHESTER FIRE INSURANCE COMPANY APPELLEES/CROSS-APPELLANTS

BRIEF OF AMICUS CURIAE  
THE AMERICAN INSTITUTE OF STEEL CONSTRUCTION

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# codewise SPECIFIC INSTRUCTIONS TO THE CONTRARY

BY CHARLES J. CARTER, SE, PE, PhD, DAVID B. RATTERMAN AND MICHAEL A. WEST, PE

With the *CoSP* comes great power—  
and great responsibility.

**ANSI/AISC 303-16**, the 2016 AISC *Code of Standard Practice* (*CoSP*), defines the statement of custom and usage for fabricated structural steel, and provides the usual agreement for buying and selling it. This is important to all; you don't have to reinvent the wheel every time you have a new project! Following the *CoSP* also helps make bids comparable.

At the same time, individual projects may have different or special conditions that are not adequately addressed in full or part in the usual agreement. Accordingly, the *CoSP* respects the freedom for parties involved in the design, fabrication and erection of structural steel to agree to "specific instructions to the contrary" in the contract documents.

Specific instructions to the contrary are sometimes necessary or desirable, but those instructions often are not specific in nature. Beyond a lack of specificity, there have been instances where instructions are written that violate building code provisions and/or other applicable laws, instances where attempts have been made to edit the *CoSP* as if it were a template and instances that attempt to dictate a commercial advantage to an individual project participant.

Specific instructions are easy to provide if you know how. It's similarly easy to avoid mistakes and pitfalls like the ones mentioned above. This article will help you in both cases.

## The Don't List

First, let's look at the things to avoid. That will make it a lot easier to cover the *do* list.

**Don't write instructions that violate the building code or applicable laws.**

Portions of the *CoSP* have been incorporated by reference into the *International Building Code*. The *IBC* references ANSI/AISC 360 (the *AISC Specification*) and ANSI/AISC 341 (the *AISC Seismic Provision*), and these documents both reference parts of the *CoSP*.

A complete list of those parts is provided at [www.aisc.org/303IBC](http://www.aisc.org/303IBC). That summary looks primarily at the 2015 *IBC* but also relates well to what is currently developing for the 2018 *IBC*.

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IBC Chapters 22 and 17 make reference to:	ANSI/AISC 360-10 ANSI/AISC 341-10	ANSI/AISC 360-16 ANSI/AISC 341-16
ANSI/AISC 360 and 341 make reference to:	AISC 303-10	ANSI/AISC 303-16

A similar relationship also exists in recent prior versions of the *IBC*, and it is worth noting that this relationship predates the existence of the *IBC*. For example, Section 1201.1 in the 1981 edition of the *BOCA Basic Building Code* incorporated



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# Your Code of Standard Practice



## ***Overview of the CoSP:***

- ***History***
- ***Formulation***
- ***Committee Structure***
- ***Committee Autonomy***
- ***Official Interpretations***



## Your Code of Standard Practice



### ***Legal Status of the CoSP:***

- ***Certified American National Standard (ANSI/AISC 303-16)***
- ***Judicially-Recognized Statement of Trade Custom and Usage***
- ***Portions are incorporated into the International Building Code (IBC)***



*American National Standards Institute*

# American National Standards Institute (ANSI)

- ANSI certifies the development of American National Standards by accrediting the procedures of standards developing organizations.
- Accreditation by ANSI signifies that the procedures used by the standards body . . . meet ANSI's essential requirements for openness, balance, consensus and due process.

## ANSI Essential Process Requirements:

- Consensus by a committee that is open to representatives from all interest groups and the general public
- Broad-based public review and comment process on draft standards
- Consideration of and response to comments
- Incorporation of submitted changes that meet the same consensus requirements into a draft standard
- Availability of an appeal by any participant alleging that these principles were not respected during the standards development process.

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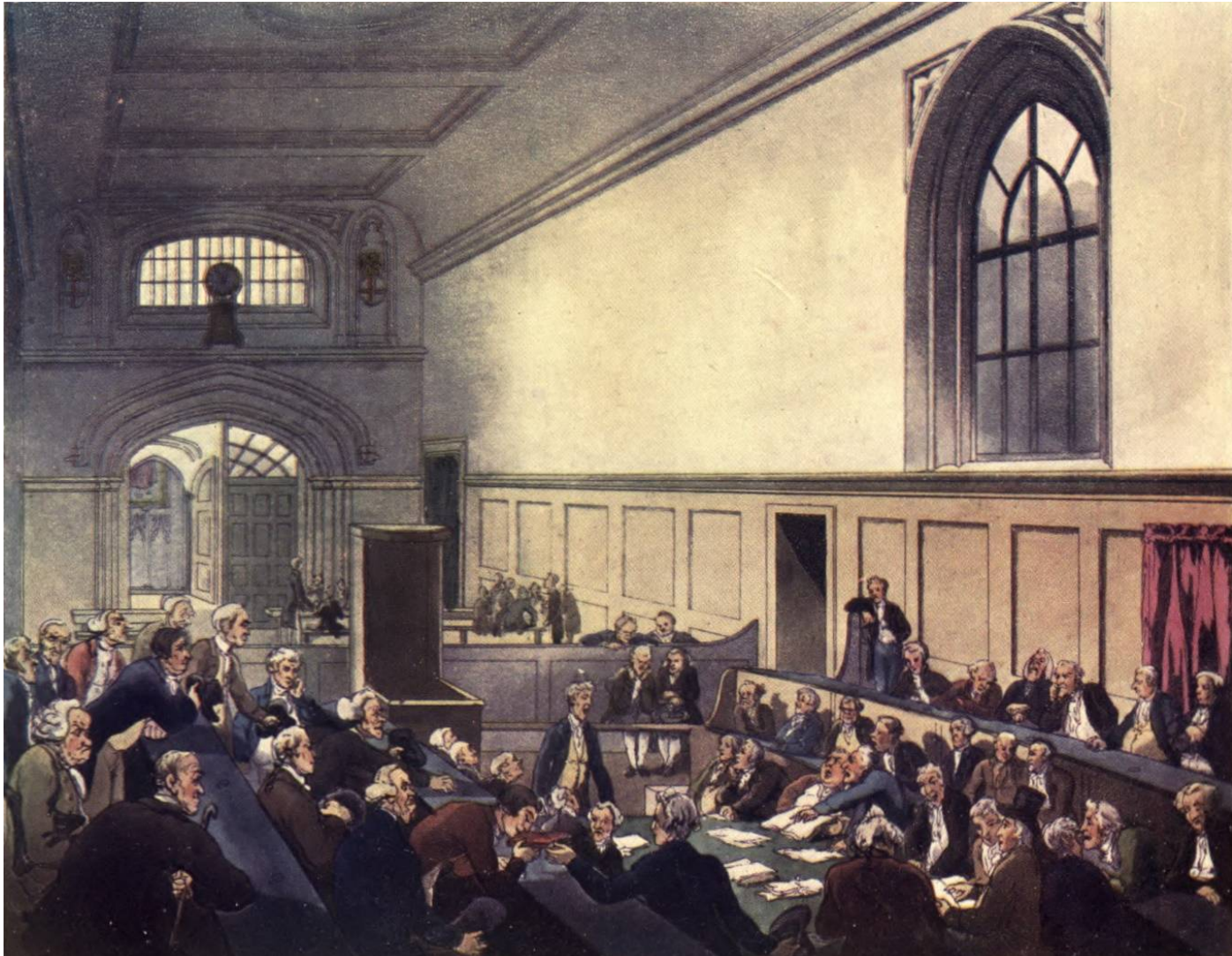


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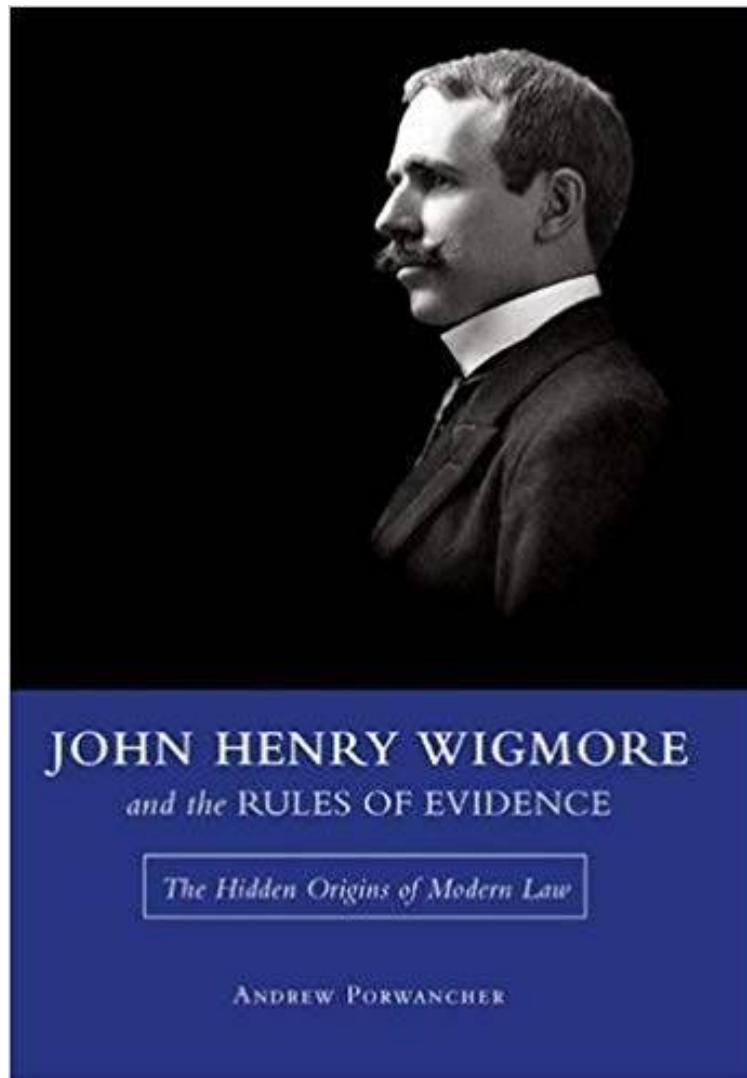






## Trade Custom & Usage

- “any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question” UCC § 1-205(3)
- “Any usage of trade . . . having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to a particular agreement.” Restatement (Second) of Contracts § 222.



## Wigmore on Trade Custom and Usage

*“[U]sage or custom of a trade . . . will equally form a part [of a written contract] . . . provided the document was not intended to cover the topic affected by the custom. . . .*

*“The liberal rule . . . is today conceded practically everywhere, to permit resort in any case to the usage of a trade. . . .”*

*“The document alone will not suffice . . . the concept of a writing as wholly and intrinsically self-determinative of the parties’ intent . . . is an impossible one.”*







## Williston's "Four Corners Rule"

*"A contract will be read as a whole and every part will be read with reference to the whole. If possible, the contract will be so interpreted as to give effect to its general purpose as revealed within its four corners or in its entirety. . . To the extent possible . . . Every word, phrase, or term of a contract must be given effect . . ."*

*"Wherever reasonable, the manifestations of the parties to . . . . a[n] agreement are interpreted as consistent with each other and with any relevant . . . usage of trade."*

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## Corbin, the UCC, and the Restatement of the Law

*Trade custom and usage can be consulted by courts to aid in interpretation of the meaning of contract terms, to add a provision not addressed by the parties, to fill a void, or to qualify the express terms of a contract.*

## Corbin on Exclusion of Trade Custom and Usage

*The parties must expressly and specifically identify those provisions of trade custom and usage to be excluded from a contract. Trade custom and usage cannot be excluded by implication.*





## Judge Posner's "Objective" Evidence Rule

*Codified trade custom and usage is among the highest category of objective evidence available to courts and juries to interpret the intentions of the parties when negotiating and performing contracts; and to determine the parties' relative rights and responsibilities.*

## Your Code of Standard Practice



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## International Building Code

- IBC Section 2205.1 incorporates AISC 360
- AISC 360 A4. STRUCTURAL DESIGN DRAWINGS AND SPECIFICATIONS incorporates AISC 303.
- AISC 303, Code of Standard Practice, Section 3.1

## International Building Code

- IBC Section 2205.1 “The design, fabrication and erection of structural steel elements in buildings, structures and portions there of shall be in accordance with AISC 360.”

## International Building Code

- AISC 360 A4. STRUCTURAL DESIGN DRAWINGS AND SPECIFICATIONS: The structural design drawings and specifications shall meet the requirements of the *Code of Standard Practice*. [AISC 303]

## International Building Code

- AISC 303, Code of Standard Practice, Section 3.1 Structural Design Documents and Specifications sets out mandatory requirements for content of structural design drawings and specifications. **As part of the IBC, this provision is not subject to an “instruction to the contrary” in the contract documents other than through application of IBC § 104.10**
- CoSP Section 3.6 deals with fast track projects where the design is not complete at the time that it is released for construction.



# Your Code of Standard Practice



***The Preface***  
***The Glossary***  
***Section 1***  
***Section 2***  
***Section 9***

## CoSP Preface

*“This preface is not part of ANSI/AISC303-16, but is included for informational purposes only.”*

Therefore the Preface itself does not establish legal rights or obligations. It does, however, provide an interesting overview of the then-current edition of the Code.

## CoSP Glossary

Terms defined in the Glossary are *italicized* in the text of the CoSP. These definitions become part of a legally binding document and have legal significance. Example:

*Released for Construction.* The term that describes the status of *contract documents* that are in such a condition that the *fabricator* and the *erector* can rely upon them for the performance of their work, including the ordering of material and the preparation of *shop* and *erection drawings* or *fabrication* and *erection models*.

## CoSP Section 1.1 Scope

*“This Code sets forth criteria for the trade practices involved in steel buildings . . . In the absence of specific instructions to the contrary in the contract documents, the trade practices that are defined in this Code shall govern the fabrication and erection of structural steel.”*

## Instructions to the Contrary

Modifications to the commercial provisions in the CoSP should be addressed in commercial contract documents and not in the project specifications or design documents.

Modifications to the CoSP addressed in specifications or design documents should be based on application of engineering judgment and limited to technical requirements and different or special conditions.



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## Commentary to CoSP Section 1.1

*This Code is not intended to define a professional standard of care for the owner's designated representative for design; change the duties and responsibilities of the owner, contractor, architect or structural engineer of record from those set forth in the contract documents; nor assign to the owner, architect or structural engineer of record any duty or authority to undertake responsibility inconsistent with the provisions of the contract documents.*

## CoSP Section 2

### Classification of Materials

- Relied upon often in administration of projects
- Rarely becomes an issue in arbitration or litigation

## CoSP Section 9, Contracts

This section of the CoSP addresses the commercial relationships in the contract chain of command from the project owner through the prime contractor, fabricator, erector, detailer, and other vendor/suppliers.

Modifications to the commercial provisions in the CoSP should be addressed in commercial contract documents and not in the project specifications or design documents.



Questions?







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