

## JIM NOWACKI

### Construction Counsel From Here to Dubai

by Amanda Robert

James N. Nowacki once spent two weeks in Riyadh, Saudi Arabia, negotiating a building design contract. He sat across the table from princes and picked up on their culture of bargaining. He traveled to the Middle Eastern country during Ramadan and grew accustomed to working at night and sleeping during the day.

He squeezed in a trip to a 600-year-old abandoned fortress town that had been made from a mud-based material. He studied the architecture of the ancient structures and admired their ability to weather the test of time.

Nowacki, 63, a partner at **Kirkland & Ellis LLP**, has traveled to many unusual spots and spaces during his 37 years of practice in construction law. He worked on litigation that took him inside a pre-radioactive nuclear reactor at a power plant in Moscow, Ohio; on the roof of the Hubert H. Humphrey Metrodome in Minneapolis; and out on a scaffold 40 stories above South Wacker Drive in Chicago.

one of the firm's first lawyers to focus on the broad spectrum of construction law. As a senior trial partner, he represents architects, engineers, contractors, and developers in construction litigation and professional liability litigation. He also assists these parties with the transactional side of construction by drafting their design contracts and solving their project problems.

When considering what he's enjoyed most about his experience in construction law, Nowacki points to three things:

"I have really had a lot of fun, and I wouldn't change my practice or what I've done. Another part is the challenge—the complexity and the intellectual competitiveness is remarkable. The third is Kirkland. It's the most remarkable place to do this."

#### Building Bridges

Nowacki grew up in Bexley, a suburb of Columbus, Ohio, with his parents, and younger

may have been his family's move across the street from Cathy, the woman who later became his wife. The pair, who dated all through high school and college, got married in 1970 while he was in law school.

Nowacki attended Princeton University and studied economics in the Woodrow Wilson School of Public and International Affairs. He discovered an interest in law after taking several classes in governmental regulation, business, and constitutional history. After playing high school football and college lightweight varsity football, he desired to further develop his drive to win.

"The law seemed like a great opportunity to combine those two things—thinking processes and a competitive nature," Nowacki says. "It made litigation particularly attractive."

He graduated from Yale Law School in the same class as Bill and Hillary Clinton in 1973 and joined Isham, Lincoln & Beale in Chicago. He began practicing litigation with an emphasis on construction law after firm partner Philip Purcell invited him to participate in a conference call with a client in Hong Kong.

The conversation with Skidmore, Owings & Merrill LLP, an international architecture, engineering, and planning firm, hooked him. When Purcell and the firm moved to Kirkland five years later, he moved with them.

"The opportunity of moving to Kirkland was probably the most significant in my career," Nowacki says. "Part of the Kirkland tradition is to take on complicated, high-technology litigation. Being part of that and having the opportunity to work with people who do that has been wonderful."

Richard Viktora, the chief legal officer of Skidmore, Owings & Merrill, called on Nowacki over the years to counsel his firm in various business matters, to work on large project contracts, and to defend against claims in litigation.

Nowacki gained the respect of the firm through his counseling with intelligence and ability.

"He's the kind of person who gives sage advice," Viktora says. "When you're talking to him, you understand that he has a great depth of experience, and when he's suggesting that something would be appropriate, it generally is. The firm has looked to him quite a bit in that



He negotiated design contracts for the Burj Khalifa, the world's tallest building, in Dubai, and the Freedom Tower, the replacement for the World Trade Center, in New York City.

When he joined Kirkland in 1979, he became

brother and sister. His mother raised the three children while his father worked as a research chemical engineer and exposed him to science and engineering at an early age.

The most important moment of his childhood

area and has never been disappointed.”

Nowacki has become effective at negotiating contracts for the firm because he understands the needs of all of the participants and moves them to common ground, Viktora says. He works to ensure that all agreements are fair—not just for his client, but for everyone.

He also invests his knowledge and background in the firm’s litigation, which includes cases involving the Arlington Park Racetrack in Arlington Heights and the Infinity Tower in Dubai. He successfully reaches the heart of disputes because he knows the field and its players, Viktora says.

“Most lawyers are real estate or contract lawyers, but they don’t really understand the construction process,” he says. “He understands the construction process, and that’s very useful. If you don’t understand how the business operates, you don’t understand the opinions of the people on the other side.”

## Most Valuable Players

Nowacki became fascinated with construction law as he learned more about its participants and the roles they played in their projects.

Architects combine art and business as they create something tangible that others can see and feel, Nowacki says. Engineers sit at the forefront of science and technology and bring that knowledge to the built environment. Contractors organize a construction site in the same way that commanders organize a battlefield. Last, but not least, he says, the owners and developers employ the economic engine that drives this creativity and delivers a successful construction project.

“Very special people put together our environment, and they have an intellectual capacity mixed with a keen business sense and the drive,” Nowacki says. “Making this all come together is not easy, and it gets more difficult all the time as the buildings get taller and the environments get more challenging.”

Construction law weaves through all of these components and involves more parties, witnesses, complex legal issues, documents, and damages than any other area of the law, Nowacki says.

His work on a construction project begins when owners or developers seek his assistance in putting out a request for proposal or when architects or engineers seek his assistance in responding to a request for proposal. He creates the language that governs their business relationship; these words become critically important, as they define the parties’ understanding of what they are building, how they plan to build it, and how much they

expect it to cost.

Learning the importance of these words also helps in drafting contracts in anticipation of litigation, Nowacki says. For example, his involvement in arbitrations has provided a greater appreciation for the specific language in contracts related to arbitration clauses—like the details regarding the number of arbitrators and their backgrounds, the arbitration schedule, the arbitration location, and the discovery limits.

“All of those things are very important to the litigator, but to someone who only does contracts, they might not appreciate the significance,” Nowacki says.

Nowacki considers it a special opportunity to try construction law cases to a jury. Jury members often appreciate buildings, but they don’t always understand the process involved in constructing them. They face cases that include issues such as complex scheduling systems, damage calculations, and engineering features that allegedly caused problems. They must understand the science and technology behind these issues and make a decision in the dispute between participants in the construction project.

“That is a very significant undertaking,” Nowacki says. “Lawyers have the responsibility to teach them by simplifying the issues so they can understand and make a fair judgment about who should prevail. That challenge for a lawyer, especially in front of a jury, is truly invigorating.”

Nowacki also enjoys the stage in between creating the contracts and solving the disputes for his clients. In this project-troubleshooting stage, he helps clients resolve legal issues as they arise on their construction sites. He examines these issues—a collapsed structure, a worksite injury, overrun costs, or schedule delays—and calls into play the language in the contracts to avoid litigation or to prepare for future litigation.

In addition to his practice in construction law, Nowacki handles professional liability defense for law firms and their lawyers. He has also worked on commercial litigation and insurance coverage issues.

“Once in a while, doing something out of your area keeps you sharp,” he says. “If you do one thing all the time, you have the tendency not to see innovative ideas going on in other areas of the law.”

## Testing the Limits

In 2004, Nowacki represented MWH Global Inc., a global engineering and construction firm, in litigation that became one of the most memorable of his career.

MWH Global designed a fuse plug that was supposed to regulate the water levels in Silver

Lake, a reservoir in Michigan’s Upper Peninsula. But after a severe rainstorm struck the area, and the lake washed down the river, more than 30 plaintiffs filed 12 lawsuits alleging that the firm designed a faulty fuse plug that did not dissolve properly. These plaintiffs sought more than \$100 million in damages.

Nowacki reached an initial strategic settlement with one party and then won the motion for judgment as a matter of law to dismiss 10 other cases. He used an innovative, investigative experiment to resolve the final suit with the reservoir owner.

He examined the fuse plug, which was designed to allow extra water to wash out the downstream spillway. Its design called for both sand and grass to comprise the spillway, but he discovered that the grass had never been grown.

“Our position was that grass, particular grass that was called Michigan roadside blend, had long-root structures that would have held that sand-like spillway for the fuse plug in place if everyone had done the job that our client had specified,” Nowacki says.

Nowacki contacted the hydrology laboratory at the University of Iowa and asked for help in replicating the fuse plug spillway. They trucked in sand from the same area in the Upper Peninsula and arranged it in a flume, which is a device that runs high-speed water over a test surface. They planted the Michigan grass in the sand and allowed it to grow for the next year.

They used video and audio to document the effect of water rushing over the replicated sand-and-grass spillway.

“We showed that if you had grown that grass on the sand, under the speeds of the water that were experienced from the date of the flood, Silver Lake would have completely withstood the forces of the water,” Nowacki says. “It would not have eroded.”

They also filmed water rushing over pallets of pure sand. Within minutes, the sand eroded away, except where a few weeds had grown.

“They were still holding the sand there, demonstrating the remarkable holding power of grass,” Nowacki says. “I think it had a very dramatic impact on everyone.”

Nowacki relied on the dramatic results of the experiment to help deter any appeals in the dismissed cases and to move for summary judgment in the case of the reservoir owner. He obtained a settlement on favorable terms for his client on the eve of the court hearing his motion.

Don Ungemah, who served as senior vice president and general counsel of MWH Global, says he found a “diamond” when he found Nowacki. He brought him on to the Michigan case after firing his previous outside counsel, who never realized that the missing grass was

the issue.

When Nowacki simplified the facts and identified the solution, it was like “a light bulb went on in the room,” Ungemah recalls.

“This had been staring everyone in the face for a year and a half, but this guy comes in and immediately sees it.”

Nowacki exhibited many vital qualities, such as his ability to see the big picture, grasp technical matters, and take risks, during his representation of MWH Global, Ungemah says. But, his “zeal for strategy” really set him apart from any other lawyer who worked for the firm.

“I couldn’t wait to get to work to get him on the phone to talk about the next development in the case—you’ve got to believe me in this,” Ungemah says. “I’ve never worked with anyone that I just loved working on a matter with like him.”

MWH Global valued Nowacki’s role in the success of the Michigan case, not just because he helped save the firm money, but also because he helped save its reputation, Ungemah says.

“We’re a leader in the business,” he says. “That’s a very important thing for us, to be able to determine that we didn’t have any liability. We were really right, and we were really professional about the way we did it. Jim helped us do that.”

## **Family Matters**

When Nowacki isn’t drafting a design contract for an innovative skyscraper in a country across the world or creating a well-timed lab experiment to secure a victory for his client, he’s taking long bicycle rides with his wife, Cathy, in Michigan, or reading Civil War accounts or other biographies. While he mostly reads nonfiction, he recently started *The Death of the Adversary*, by Hans Kielson.

This year, he and Cathy celebrated 40 years of marriage. Two of their three daughters are lawyers. Emma and Anastasia practice as Cook County assistant state’s attorneys, while their older sister, Carrie, works as an investment banker.

“My wife has gone through the bar exam three times—as a coach,” Nowacki says.

Emma and Anastasia live in Chicago. Anastasia has one daughter, Garnet, who is 18 months old. Carrie has two children, Holden, who is 3 years old, and Ruby, who is nearly 7 months old, and they live in Winnetka.

Anastasia’s husband, Baird, is a writer, and Carrie’s husband, Adam, is in the creative side of advertising, which Nowacki says he sees as a wonderful consistency with the family interest in reading and the arts.

Nowacki and his wife also live in Winnetka. ■