ProNet Practice Notes

Counting Coup in Ancient Ways and Courtroom Days

The Indian peoples of the American great plains counted coup. The rest of us do, too, but the Indian story first.

In Older Ways

Coup was counted to establish position in the tribal honor system. Status mattered, and competition to count the greatest coup was intense. Personal exploits of exceptional bravery and daring counted most. Killing an enemy at long range counted no coup; winning by overwhelming numbers counted no coup. But the solitary warrior in a headlong battle charge climaxed by harmlessly touching an enemy scored a coup; honors were given for the daring required of close contact. Indians fashioned wooden sticks for just that purpose. The surprise nudge from a coup stick would sting in one person's memory and sing in another's for a long time. Dishonor followed a coup counted on oneself.

The Sioux people counted coup in colorful feather and paint display. An eagle feather as worn vertically in the headband of the first to touch an enemy; the second through fourth coups earned *count* feathers: The second worn tilted to the left, the third horizontal, and the fourth a buzzard's feather hung downward. If wounded in a coup, the feather was dyed with red paint. The victor in hand-to-hand combat could paint a red hand on his clothing or on his horse.

Painted white crosses recalled rescues; two crosses recorded a rescue on horseback. Indian ponies were painted with a hoof print to show coup by capture of another's mount.

In ancient ways, fear and doubt were laid aside by more than meeting the hazards of life. Self-esteem was built by courting danger and counting coup. The risk was deliberately chosen, and there was much honor involved.

Coup Counted Today

The white-shifted, darkly-suited tribe of the Americas counts coup today. But don't look for bravery or daring—we are the fainthearted counters of pen and paper coup.

The coup recalled here touches you with stinging words fashioned into contracts of indemnity. By them, one party holds to fortifications and counts coup, while the other meets and answers the dangers outside for both. The darkly-suited tribe counts coup when it has saddled another with peril. Risks squarely met in ancient ways are nowadays foisted on others with premeditation.

How were ancient rules reversed? What council decided? It sounds mendacious, but, look, it is down on paper. Whether coup is counted on you will be unrecognized without training. That is our business here.

It is the business of moving responsibility from the backs of some onto the backs of others. It is the business of hoarding precious justice for oneself. We are joined in trial systems where self-esteem is basely made on the courage of others, and little honor is involved.

Council fires die; all light dissolves to the pale grey shades favored by the darkly-suited. They see best here, and you need insights to unlock their clauses, repel their coup. Align with the older rhythms: You will hear the beat of ponies, and you will catch the flash of the coup stick. The Mont Blanc's stain on a paper landscape marks coup in our time.

Answering in Law for Harms

A Territory Where No Coup is Counted

The law has for a very long time told architects and engineers what they shall answer for. They answer for the harm caused when they fail to do what men and women standing as architects and engineers ought to do. The law can name their failure when it happens: It is called *negligence.* It means someone fell short of the *standard of care* for professional services. Readers needing more instruction in that should return to 'An Architect Looks at the Standard of Care, " James R. Franklin, FAIA, ***a/e ProNet*** *Practice Notes*, Vol. 2, No. 2, April 1989.

Every person, regardless of profession or position, stands in a territory. Portions of it are well explored, and conduct there is sanctioned: One does there which one ought to do. Other portions are unexplored. They might be safely explored, but one could fail: What ought to be done might be left undone; what was done should not have been done. Conduct will not be sanctioned, and the law calls for an answer.

Redistribution of Justice

It is simple and just that every person should answer for what he does in his territory. When an answer for the harm done is demanded, no coup is counted. It is simple, and it is just. More than a few in our time are discontent with the simple and the just. They would have someone else answer for the wrong they do in their territory. Redistribution of justice is demanded. When the law gives it, they count coup on the rest of us.

You question the inequality in that: How anyone could be elevated above the simple and the just to demand a redistribution of justice in his favor? A very good question, and you are correct for asking it early.

We respect equality of justice in America. That is a right burning at the core of our tribe, and without it we would be some other, callous tribe altogether. But the law also respects private contracts, and, within limits, a kind of private law is enforceable in our courts, even if justice is made unequal. In most states, parties can make law between them in contracts to redistribute justice; one party is made to answer for the harms caused by the other.

Those agreements are called by names: *Indemnity and hold harmless.* But don't start using terms too quickly. Calling a thing a name has a way of hiding the manipulations behind it. *Redistribution of justice is* a way of saying what indemnity can do in the same way that *counting the limbs and dividing by four* says what a body count does.

While you are asking such good questions, ask why anyone would agree to a redistribution of justice against him. Why would one answer for the harms caused by another? Be specific: Ask why you would

agree to answer for the harms caused by your client. Is it because they pay you a great deal of money to lift a burden from them? Probably not. Is it because you are better able to pay for the harms they cause than are they? Doubtful. Is it the social function of design professionals to reap and digest the errors of their clients? Get serious; we do that for our children.

I know the only reason, and you know it too: If design professionals agree to answer for the harm done by their clients, it is because clients compel a redistribution of justice as a condition of doing business. Otherwise, justice is not redistributed by anyone freely negotiating a contract. Freedom of contract is illusory when an unalterable condition is forfeiture of a fundamental blessing of justice.

Know this: When justice is redistributed, powerful parties have pounded on weaker parties who either accept a blow from the coup stick, or they abandon the territory. What faint quality of freedom this is.

Reading the Landscape for the Coup in it

When Indemnity Counts No Coup

Indemnity need not redistribute justice. It can be what is simple and what is just. When it is, what is indemnified is all the law calls each citizen to answer for—the harm caused by him. There is no coup in this:

The Architect/Engineer shall indemnify and hold Client harmless from and against demands, damages, and expenses caused by the negligent acts, errors, or omissions of the Architect/Engineer or those for whom Architect/Engineer is legally responsible.

Beginning with this simple contract that counts no coup, the skills of an army of the darkly-suited and the weight from large chunks of economic and political advantage are thrown against every party who stands a half head shorter. Surely it is thus: Any person a half head taller would return mendacious coup sticks in small pieces to the darkly-suited.

Indemnity That Counts Coup

The variations that redistribute justice are limitless, but they set similar traps. Once you learn to count coup in the paper landscapes of contracts, the stain it makes will be unmistakable. You will track expertly.

1. Answer Without Fault: Count One Feather

Design professionals shall answer in law for harms caused by their negligence. All fifty states say this is true. Exceptions are unknown, unless the design professional contracts for one. Then, coup is counted on you.

Indemnity agreements compelling you to answer for all claims, demands, damages and expenses:

in any way caused by the Architect/ Engineer's services, this contract, or the performance of this project. . .

invite you to repeal the law of negligence in our case. Do not misjudge the power in your own hand: You can forfeit blessings.

If you do, you will be responsible whenever the acts you did or did not do can be connected with the harm. The quality of your act would not matter. That everything you did was reasonable, that everything you did was more than reasonable, would not matter. You will answer for harms without blame, without fault, without negligence.

Something very valuable just left your camp: The standard of care. Negotiations to retrieve it will go badly. The coup counted on you can be fatal.

2. Answer for Any Consequence: Count a Second Feather

Keepers of the law's wisdom established that no person in ordinary circumstances, even w hen negligent, should be made to answer for harm unless his conduct was a material element and substantial factor in bringing it about. They call the limit on responsibility for remote consequences *proximate cause,* but scant showing of it is required when you promise to answer for harms that are:

related in any way..., OR... arise in any way...,OR... are connected in any way to the service performed under this Agreement.

Consequences fitting that promise reach harms beyond the vision of any person to see. No pony is tall enough, and no eagle flies so high.

Professor Peck instructs on proximate cause by the story of a punctual man who drove through a particular intersection punctually every day at exactly the same time. He was late only one, unfortunate day. On that day, he had been cut shaving with a defective razor. The defect cost him five, vital minutes. The otherwise punctual man passed through that particular intersection five minutes later than he otherwise passed every other day. There, he injured a crossing pedestrian who would not have been there five minutes earlier. In the suit against the razor manufacturer, it was alleged that the accident *related to,* arose *in any way* out of, and was *connected in any way* with the defective razor.

Everything necessary for the manufacturer to answer for the harm is alleged except proximate cause. The law would not charge the manufacturer with a harm so remote from the defective razor. But had the agreements you are asked to sign been in effect, the coup could have been fatal.

3. Answer for Another's Harms: Count a Red Painted Hand

Construction is complex, and that makes for complex litigation. Many parties may have contributed to a harm done, and all could be called to answer. Some would simplify their defense by redistributing justice to their side. When they are successful, your side receives the call to answer for all harms:

. . .caused in whole or in part by the Architect/Engineer.

OR. . . caused in whole or in part by the Architect/Engineer, whether the Client is negligent or otherwise.

OR. . . caused in whole or in part by Architect/Engineer, unless arising out of the sole negligence of Client.

All variations ask your answer for harm caused by someone else. The arithmetic is bleak. Should your conduct cause even one percent of the harm, you will answer for the whole. You pay both the one and the ninety-nine parts. The perpetrator of the ninety-nine parts paints a red hand. Check the laws in advance. Most states award the red hand, and the coup counted on you is fatal.

Battle Lines

When confronted with demands for indemnification, you should draw a forward battle line and hold to it whenever possible. On the forward line, you stand on the law to do justice equally, and you give no indemnity. When the forward line cannot be held, you can retreat to a secondary line where you give exactly that indemnification you can cover with available professional liability insurance.

Either line can hold against evenly-matched forces, but at the pinnacle of our tribal power structure dwell the chiefs who council only if you are first bent under the coup stick. No battle line is effective against them. No lasting peace is made with them except by Pericles' example: Democracy alone can correct the tilt to privilege here.

We Do Not Indemnify: It's Our Policy

You will be vulnerable to countless coup if you never establish your forward line. The client demands an indemnity clause, and the coup stick is headed your way! What do you have? Quickly: Do you expect equal justice under law? Why not?

Three things can happen if you hold to your forward line, and only one of them is bad. First, the demand for indemnity could be dropped. Some coup is feigned. Second, a negotiation might commence, and the indemnity confined to the simple and the just. The only bad result is the one you could not have changed, because the chiefs there always count coup. It's their policy.

We Indemnify What We Can Insure

Practical notions recognize that you cannot negotiate a person out of his house; force him, yes, you can do that, but not negotiate. Insurance may make negotiation possible.

The three, principal factors that defeat insurability are the same demands that redistribute justice: A demand that you answer without fault, answer for remote events, and answer for another's harms. Reasonable people know they are redistributing the justice that is our common resource when they make those demands. Unreasonable people know it, too, but they feel entitled to more justice than others.

What can be insured must be determined between you, your attorney, and your insurance advisor. Generally, a clause that counts no coup is insurable. Do not go unguided here.

Is Insurability Sufficient Reason to Indemnify?

Indemnification is generally forever. Not so insurance. An indemnity may be covered by the policy carried today, but protection might be required years later. The policy effective then must protect, if any can. Many years from the day one indemnifies, a judge may hand over a very ugly, fat legal file (or judgment) and announce, "This is yours! "

Indemnify, if you must, because you benefit from it today. Indemnify, if at all, because you will continuously carry professional liability insurance all the years you have assets. Your indemnity obligations survive your contracts, and they survive your retirement.

Unequal Justice Served by Phantom Hands

The Dilemma of Unequal Portions

We have said that equal justice heats the core of our tribe, and it does; the courts enforce that. But some important few are able by their power and position to appropriate justice to themselves, and they leave others deficient in it. One can be made to answer for the harms indisputably, incontestably caused by another; the courts enforce that, too.

Can the law mean equal justice for all and at the same time enforce a deficiency in it against some? Can the law be for one but not against the other?

Invisible Secrets to Conceal

When principles collide, the law frequently slips out of the wreckage with a fiction, and so it is with the reallocation of justice by indemnity. No fiction is quite as favored as an economic fiction. Replete with invisible hands, economics is the ideal servant for washing hands of nagging inequality.

Bargaining is the fiction given to enforce indemnity agreements for one party to answer in court for the one hundred or the ninety-nine harmful parts caused by another. The fiction indulges a belief in a range of possible reallocations. It imagines that the parties circled in commercial maneuvers: They sized up the soundness of hoof and the depth of wind; a price was thrice spoken; they clasped hands; and the kit passed along with the pony's reins contained justice equally or unequally in the proportion accorded by the bargaining.

You doubt story books, and you never saw it happen that way. Your Uncle Louie never saw it happen that way either, and it never has. In fact, fees and indemnity are not balanced by bargaining, and responsibility is not allocated by indemnity according to the risk or circumstances. There is no range of actual allocations. No indemnity agreements appear in the stream of commerce for an 80/20 split of justice, nor 75/25, and not 50/50, either.

Those whose economic power is not the invisible kind do not bargain their indemnity with you. They do not have to: Their deal was struck at the statehouse in council with the darkly-suited. Your bargaining was done for you then. Were you not told this before?

The corporate giants, public utilities, and governments of the land who demand that others answer for the harms indisputably, incontestably caused by them do so because the outside edge of the law will allow commercial traffic in the reallocation of precious justice.

The economic hands are invisible, because they are not there. The bargaining is a fiction, because it does not exist. There is no sincere comfort there for courts seeking justification to heap the wrongs of one on the shoulders of another.

Caesar Delivers the Arms and Shields

What is Graven in Contract is Graven First in Law

Some state legislatures were made skeptical of the invisible hands of economic bargaining, and they enacted laws to limit the fiction—to still the coup. Hold your cheers: The ancient honor in coup is not restored.

A few states expressly legislated that agreements to indemnify another against that other's own negligence are void. Coup is not permitted there—responsibility and justice triumph. But their number is small. Other states prohibit coup only where the harm is caused solely by the party indemnified. Ninety-nine parts pure coup is allowed there. Some states are silent. We walk a patchwork of laws in our broad territory under a hail of coup sticks blocked by a few good shields but otherwise only by the transparent fiction of bargaining.

Judges need not believe the fiction, and sometimes they do not. They may conclude that an indemnification clause is confusing, too ambiguous, buried too deeply in a fat contract, printed in faint type, or they may give another reason that puts a gloss on the original fiction. It is a long and painful wait to hear what a judge's discretion and conscience will allow or what will stand on appeal.

Laws that sanction coup give the powerful the first swing at the weaker of us, and the swings they take are both wide and frequent. Ironically, it is those already the most protected who hold the largest sticks: Governments, public utilities, and corporate giants. Empires have taken this for their preamble:

To the greatest extent permitted by law, the Architect/Engineer shall indemnify ME.

Caesar has given you the reason: What is graven in the law is graven next in contract.

Where There is Coup, and Where Not

You should check your state's laws. Perhaps the simple and just prevails in your state, but security for you might not. The law of the location of the project or the client may apply, and coup could be allowed there. The contract may choose a particular state law, and that state may sanction coup.

Your legal advisor is the best guidance here. Your own education could be continued with materials at hand. Consult "Anti-Indemnification Statutes, " Guidelines for Improving Practice, Volume XIX, Number 8, 1989, published by Victor O. Schinnerer & Company, Inc., Chevy Chase, Maryland.

The Empire Strikes Back

Those positioned to take advantage of the law's sanction for others to pay the price of their negligence have a case to make. They contend the law is, in fact, unfair to the Empire, and they need coup by indemnification to even the score. It is quite a story.

Joint Tortfeasors: The Mingling of Liability

The common law provides that a person would be liable for the consequences proximately caused by his negligence. If there were never more than two people involved, if only one person's cow crossed the fence to trample the plaintiff's corn, then life at law would be simplified. But reality is not simple. Frequently, many people are involved, and cows from two or more farms will tread on plaintiff's corn.

Holding to its line of authority, the common law further provides that a person is liable for the consequences proximately caused even if his negligence was concurrent with the negligence of another. Where negligence of two people combines to cause an injury, both are responsible for the whole injury. They are *joint tortfeasors,* and their liability is joint and several.

Common law is rich in variation and nuance, but the heart of it is this: All persons whose negligence combine to cause a harm are jointly and separately responsible for the whole harm. Mathematically inclined readers have figured by now that a joint tortfeasor causing one-hundredth part of the harm can be responsible for the whole harm; a joint tortfeasor causing ninety-nine parts can be responsible for the whole harm.

Plainly, this is not common law for the benefit of tortfeasors. It is law for the benefit of the injured. By it, the injured do not have to prove who caused each part of the harm, and they do not have to chase each separately to collect judgments. Sorting out what exact proportion of the harm was caused by each joint tortfeasor is left to the tortfeasors themselves. They cross-claim against one another for *contribution.* A defendant can then argue that he had but one loose cow, while another had five in plaintiff's field. Accounts are settled.

The Burden of Empire

Empires just plain don't like joint and several liability. People, they contend, are out to get them. They fear cases where they have caused one part of the harm, but are required to pay for one hundred parts of the judgment. It is a burden of Empire.

To avoid their burden, Empires generally require that the people they contract with must either be Empires themselves or must buy insurance policies to protect against liability. An Empire is smart to do that, for insurance creates a treasury able to pay if the Empire wins its case for contribution.

Pause here, and work out the arithmetic. When everyone is an Empire or has adequate insurance to pay for the part of the harm caused individually, contribution has the just result of making everyone pay his individual share. The result is simple, and it is just.

Empires are burdened only when other people are poor, and there is a remedy for that. Empires are also troubled by their exposure to the courts when they contract with others. Empires believe themselves magnets for lawsuits, and construction enhances the potential for them. Even if all of that were true, coup by indemnity would still not be the remedy. It is no more a remedy that the Architect/Engineer should be made poorer by paying for the harm done by the Empire than the Empire should itself become poor the better to avoid attracting lawsuits. Whose wrongs are put at issue here? When coup is counted by indemnification, it is plain that the Empire reloads and shoots the Architect/Engineer with the Empire's own negligence.

Doubtful Rx for Joint Liability: Count the First Coup

But the Empire's story does not end there. More than the simple and the just can be gotten from the law, and that is quite an ending to the tale.

Indemnification that counts the first coup can pay off better than contribution. Empires can make a profit from it, and most state laws support that.

Quick review: Under common law, rich, joint tortfeasors tend to pay first and most, but by contribution they can get back from the other joint tortfeasors the part of the judgment caused by them—provided they are Empires themselves or have insurance. Finally, the Empire pays only for the part of the harm it caused.

Next case: Suppose the Empire has an indemnification that counts coup on other defendants. Again, the plaintiff collects the whole judgment from the richest—the Empire. But that is not the end of the story. The Empire's right to count coup by indemnification includes the fighting chance to get back BOTH what it paid on the other defendants' account (same recovery as contribution) AND a bonus—the part of the judgment that the *Empire directly caused and is able to pay.*

If coup by indemnification is the remedy for the joint and several liability of joint tortfeasors, then it more than cures the disease of too little money by giving us the worse disease of deliberate reward for wrongdoing.

Empire has its privileges, and laws are written to enforce them.

I Shot the Sheriff but Not the Deputy

Can lawmakers stand for equality, responsibility, and at the same time pass laws inviting compensation for wrongdoing? When principles collide, do they codify coup with a clear conscience?

How do legislators resolve their paradox? Some may still believe invisible hands wash them clean; others may be working for the Empire; but most try to please both the Empire and the rest of us, and many think

they do. They acknowledge that some of us are made, by the laws they pass, to pay for the harm caused by the Empire. But they believe they left us a sanctuary—and themselves with a clear conscience.

Insurance Gives Sanctuary to Some

You have to appreciate the legislators' problem. On the one hand, relatively few but very powerful Empires ask for the right to count coup by indemnity on a very large population of smaller businesses. If the legislators put a bullet in equal justice, they have to explain why the damage is not fatal. And that is what they do. Many states have chosen to shoot the sheriff on the theory that the deputy can carry on. The deputy, they believe, is insured.

When construction contractors went *en mass* to state legislatures in the 1970's to get relief from indemnifications that would have them pay for the harm caused by the project owner and others, the solution wasn't (except for a minority of states) to return the law to the simple and just. No, the remedy was to make unenforceable only those indemnifications that would have one party pay for harm caused solely by another.

No need to search for invisible hands in this legislation. The movement toward equal justice was stalled at exactly the point at which contractors were still able to purchase insurance (which contractors could buy for the whole damage if caused in the least degree by them). A price could be put on that. The contractors could buy the insurance, and the cost could be passed through to the owner.

Equality walks with a crutch in the field called just by the darkly-suited. The gait is neither elegant, nor confident. If what is right is just, can what is insurable be just enough?

Your Sheriff is Dead; Your Deputy, Too

The result is not just enough for you. Insurance to pay for the owner's harm when caused even in the least degree by architects and engineers cannot be had. A price cannot be put on that. Design professionals cannot buy the insurance. The coup counted on you is complete.

You, Don Quixote, and Pericles

The sheriff is dead, your deputy, too, strangled by invisible hands washing everyone in sight but you, and the law supports that. The Empire delivers ultimatums—sign or be banished—the choices are yours. Do you surrender? Do you fight? In what capacity, and where?

You must fight close to home. You are not Don Quixote. When the branch office of the corporate giant says its home office lawyers will not permit a change in the indemnity language, it will be a rare day on your home field that a change is made. The coup is counted from a very great distance, and that is by design. You carry no currency there.

Pericles loosed Democracy on Athens, and the world saw it prosper and rise to triumph. Democracy is close to home. You can he Pericles in your place, and you will be in good and decent company.

Your local governments, the public utilities, and the water, sewer, and flood control districts who seek to count coup on you by stinging words of indemnification are just Pericles' creatures—all are creations of the people's will. You have currency in these halls. When institutions of great power count coup on the citizens who created them, they need reminding that the burdens indisputably, incontestably belonging to them should not be put on others.

It's Our Policy: But Who Rules?

Your reception at government and agency staff levels rarely yields a policy change. Conversation with their lawyers may be unavailing. Those servants of the darkly-suited tribes are paid to make graven in contract what is graven in law. They are not fed for their reasoned discourse.

Staff sends you to the lawyer for a more definitive "No dice! " It is here you are told, "Insurable or not, our indemnity clause is non-negotiable. " If the architect or engineer must risk personal assets to pay for the harm caused indisputably, incontestably by the agency, then the agency and the lawyer can live with that.

When rebuffed, you and your fellows in the design professions need to work the political halls. The people who vote appropriations, confirm appointments, and renew charters need to have forced on them responsibility for the coup counted on ordinary citizens. They will need instruction on coup in our time, on the myth of invisible hands, on how the sheriff of equality is slain, and on how the dead deputy cannot deliver on the crutch of insurance.

You can do battle close to home. Your case is for equality. It is against tribute as a condition of work. You mourn the dead sheriff and his deputy, and your case is simple and just. But your case will be unheard if you do not make it.

The Unfinished Business of Equal Justice

When elements of Empire are determined to exact bald tribute in the wrongs done by them, they are following the sad example of the law incompletely reformed. Their contracts are graven in stone because the law is stalled in reform. The sanction others have to count coup needs revisiting in the legislature, where reform is incomplete.

Reform asks a question fundamental in a nation of laws: How much restraint, conformity, and liberty are conducive to making the institutions of society flourish? That a small, powerful group is able to demand that others answer in law for the harms done by them alone is a liberty that nourishes them alone. The conformity they demand from the rest of us yields no benefit whatever to our people and their institutions.

A handful of states have restrained the liberty of the few to count coup. More have moved toward the light, but they have been content with exactly the restraint that still permits insurance to pay the price of conformity. In fact, insurance is not the true price of conformity at all. It is available to some but not to others. The real price is paid by ordinary businesses in their answer at law for the harm caused by someone else.

The philosophy of *insurable coup is* unworthy of us, and we do not flourish by it. Instead, we play a shell game with responsibility and equal justice. If one person can insure an indemnification to pay for the harms caused by another, it must be true that the harms could have been insured by the wrongdoer in the first place. This middle step in counting coup contorts simple logic and shames fairness. Judges need not indulge their paradox with invisible hands, and legislators need not excuse a bullet in equal justice by promoting an insurance-toting deputy.

If you want to know what is just, must you ask an insurance company? No. Better answers lie in the spirit of equality handed down to us.

Last Words

We have behaved badly and lost the honor and spirit of counting ancient coup. In our loss, we trample hard won, precious principles just to decide by counting the first coup whose insurance policy will pay. Our institutions are poorer for it.

Priceless principles will remain underfoot so long as equality is stalled in the law. Yet what the law gives, it could as easily give to all by laying coup in our time elegantly to rest:

Indemnification in agreements for design and construction to indemnify a person for that person's negligence is void.

George J. Vogler writes from Oklahoma City, Oklahoma, where he is president of Reserved Resource Insurance Agency. He has specialized since the early 1970's in professional liability insurance and loss prevention services for architects and engineers. Mr. Vogler is a graduate of the University of Kansas and received his law degree from the University of Washington. He is a member of the Bar in the State of Missouri.