



American Bar Association  
Forum on the Construction Industry

## 2012 MIDWINTER MEETING

# Innovative Legal Strategies Developed from Challenging Projects



**FEBRUARY 2-3, 2012**

**Intercontinental Hotel – Galleria  
Houston, TX**

SERVING THE CONSTRUCTION INDUSTRY THROUGH EDUCATION,  
LEADERSHIP, AND FELLOWSHIP OF CONSTRUCTION LAWYERS

**ABA**  
AMERICAN BAR ASSOCIATION  
Defending Liberty  
Pursuing Justice

# Dear Colleagues:

You know what they say: Everything is bigger in Texas! At a day and a half, the Forum's Midwinter Seminar is bigger. Our venue, Houston, is one of the largest cities in the country. The program will explore innovative and advanced legal strategies developed from large, challenging projects that are essential to any construction attorney's practice. The Forum's Divisions have a bigger role, presenting all 6 of the workshops. Finally, you will have bigger opportunities to network at the Exhibitors and Welcome Receptions, during the Diversity Committee Meeting and at the traditional and Women in Construction lunches.

Our program has been organized so that all plenary sessions are on Thursday and all workshops are on Friday in order to minimize shuffling people from one room to another and maximize the learning experience. We start with a presentation addressing one of the biggest, longest-running debates in the industry, design control and delegation, and explore whether the advent of new technology has altered, or will alter, the debate. Next, we consider the future sources of funding for significant construction projects as the country emerges from a slack economy to enormous infrastructure needs. We finish the morning by discussing every contractor's biggest issue, money, particularly how to keep track of it with open book accounting.

Thursday afternoon begins by addressing another big issue faced by every project: time. This plenary session will consider the complexities of schedules and describe the best ways to analyze them. Our next presentation focuses on quality control and assurance through the prism of the precise requirements of construction for Houston's own energy and petrochemical industries. Our final program of the day reviews ethical issues every lawyer faces with the creation, maintenance and operation of joint ventures.

Friday opens with the varied offerings at Division Breakfasts. Our first workshops provide a choice between labor and international issues. In one workshop the Workforce Management and Human Resources Division will address practical aspects of the use of project labor agreements, while in the other the International Contracting Division will consider the unique aspects of dispute resolution overseas. Next, we pair a workshop by the Specialty Trade Contractors and Suppliers Division about third-party liability issues encountered as a result of the I-35 bridge collapse with another by the Owners & Lenders Division addressing the negotiations between owners and design professionals about the hiring of geotechnical consultants. The last set of workshops will offer lessons from the Insurance, Surety & Liens Division about the use of various insurance products to manage project risks or from the Young Lawyers Division about actions that lawyers and their clients should take to protect against litigation before it occurs.

After the program is over attractions abound. In your free time, you can take a tour of the Johnson Space Center, the nerve center of America's Space Program. If earth-bound exploration is more your style, Houston offers a myriad of points of interest and the Gulf of Mexico is just to the southeast. Only minutes away from the Intercontinental Hotel, you can enjoy upscale shopping at the 300-store Galleria or the wander through the shops and restaurants of Uptown Park. Houston's Museum District contains 18 museums from the Byzantine Fresco Chapel to the Center for Contemporary Crafts. Several historic structures can be visited in Sam Houston Park, while the Orange Show Monument is a whimsical, unique experience.

Come to south Texas this winter. Learn some big lessons and see some even bigger sights. Please join us for a varied and advanced program that promises to be different from any you have attended before.

## PROGRAM CO-CHAIRS

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AECOM, Phoenix, AZ

**Stanley J. Dobrowski**

Calfee, Halter & Griswold LLP, Columbus, OH

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**Arthur D. Brannan**

DLA Piper LLP, Atlanta, GA

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Tampa, FL

# Program Schedule

## Wednesday, February 1, 2012

**10:00 AM – 5:00 PM**

Advanced Registration Opens

**3:00 PM – 5:00 PM**

Onsite Registration Opens

**5:30 PM – 6:30 PM**

Exhibitor Appreciation Reception  
Co-Sponsored by the Houston Bar Association  
Construction Law Section

## Thursday, February 2, 2012

**7:30 AM – 5:00 PM**

Registration/Exhibition Open

**7:30 AM – 8:30 AM**

First Time Attendees & New Member Breakfast

Diversity Breakfast Program  
**Immigration Compliance in  
the Construction Industry**  
**Jacob M. Monty, Monty & Ramirez, LLP**  
Co-sponsored by the  
Hispanic Bar Association of Houston

**Continental Breakfast**  
(available to paid registrants)

**8:30 AM – 8:45 AM**

Welcome From the Forum Chair  
Opening Remarks and Announcements

**8:45 AM – 9:45 AM**

### Plenary 1

**WHOSE IDEA WAS THIS?**

**Design Control and Delegation –  
The Road to a Project Utopia**

The construction industry has long grappled with the problems of design control and delegation, including whether anyone has ultimate central control of and responsibility for a project's design. Does new technology finally deliver answers to the questions of who controls the design and who is responsible for design errors? This session will explore the puzzle and the reasons various members of the industry may hesitate to adopt BIM technology to solve it.

**Carl L. Popovsky**  
Stein Ray, LLP  
Chicago, IL

**Carl G. Roberts**  
Ballard Spahr LLP, Philadelphia,  
PA

**9:45 AM – 10:00 AM**

Break



**10:00 AM - 11:00 AM**

## **Plenary 2**

### **WHO'S GOING TO PAY FOR THIS MESS?**

#### **Current Issues Facing Complex Project Funding.**

The American Society of Engineers assigned the nation's infrastructure a grade of "D" in 2009 blaming decades of underfunding and inattention. The continued constraints of an anemic economy and the lack of any semblance of conventional government funding for large, complex construction projects have necessitated the development of innovative funding sources. In turn, privatizing public improvement projects and the use of concessionaires have created a new set of issues within the construction industry. The purposes of this plenary is to provide an outlook on future funding for complex projects and to highlight the types of issues innovative funding sources have created and will create for the various project stakeholders.

**Lauren P. McLaughlin**

BrigliaMcLaughlin PLLC, Vienna, VA

**Michael G. Murphy**

Greenberg Traurig LLP, Orlando, FL

**11:00 AM - 11:15 AM**

#### **Break**

**11:15 AM - 12:15 PM**

## **Plenary 3**

### **WHAT'S THIS CHARGE FOR? The Use of Open Book Accounting in Cost Reimbursable Contracts**

This plenary will explore the use of open-book accounting in managing a complex project with multiple stakeholders such as concessionaires, bond holders, owners, etc. Open-book accounting can be both a blessing and a curse. The various nuances that arise in controlling costs through open-book accounting will be discussed including examples of open-book accounting provisions, the applicability of such provisions during the project, and how open-book accounting can be used to set a GMP, improve payment applications, and negotiate subcontracts, licenses, warranties, etc. Finally, the Plenary will address how open-book accounting increases risks to the relevant parties.

**Bob Meynardie**

Meynardie & Nanney, PLLC, Raleigh, NC

**Al Nagorzanski**

Veritas Advisory Group, Dallas, TX

**12:15 PM - 1:30 PM**

#### **Lunch**

**Michael Lutomski**

Risk Manager, International Space Station Program  
NASA - Johnson Space Center

### **Lessons from Building and Sustaining a Large International Space Project**

Called one of the largest and most complex construction projects since the pyramids, the International Space Station spans the size of a football field in length and width. Five space agencies, and 15 countries around the globe are involved in designing, building, sustaining, and utilizing this laboratory in earth orbit every day. What are some of the lessons learned from this engineering and foreign policy endeavor? How did it come together technically and politically? How is risk managed on this space station? How is it maintained for over 13 years now? And most importantly, what does the future hold for NASA and other countries as far as exploration of the Moon and Mars? Join Mr. Michael Lutomski for a journey into the past, present, and future of Human Spaceflight and exploration!

**1:30 PM - 2:30 PM**

## **Plenary 4**

### **WHAT IS A SCHEDULE GOOD FOR?**

#### **A Study of Issues Posed by Schedules for Complex Projects.**

Complex projects mean more complex schedules, and more complex schedules are causing experts to challenge some long-held assumptions about how to make and use schedules, both for project management and proof of claims. The scheduling community debates whether best practices exist, while the legal community questions the reliability and admissibility of many of those practices. Our speakers will discuss reliability of methods of schedule analysis and some of the issues posed by schedules for complex projects. They will discuss contractual requirements for schedules, and whether contracts should require certain scheduling practices. They will also discuss the implications for evidence and testimony in the face of disagreement in the scheduling community over the best practices despite update recommended practices.

**Robert M. D'Onofrio**

URS Corporation, New York, NY

**Anthony L. Meagher**

DLA Piper LLP (US), Baltimore, MD

**2:30PM - 2:45 PM**

#### **Break**

**2:45 PM - 3:45 PM**

## **Plenary 5**

### **WHY DIDN'T YOU TELL SOMEONE? A Review of Good and Bad Quality Assurance/Quality Control Case Studies.**

This session will explore techniques for providing quality control and assurance during the construction of a project, particularly when operations must continue during construction. Should contractors be required to engage dedicated QC personnel? What role should designers play? Does the use of third party inspectors by the owner absolve contractors from responsibility? What are the effects of government mandated limitations on contractor liability?

**Scott A. Greer**

King & Spalding, Houston, TX

**E. Lee Haag**

Fulbright & Jaworski LLP, Houston, TX

**3:45 - 4:00 PM**

#### **Break**

**4:00 PM - 5:00 PM**

## **Plenary 6**

### **YOU TOLD OUR JV PARTNER WHAT!?!?!?**

#### **Ethical Issues in Creating, Maintaining and Operating Joint Ventures**

Joint Ventures are very common on large or complex projects. The creation of project specific entities create a number of ethical issues for attorneys representing the various partners and the entity itself. The session will discuss and address issues such as: How do you maintain privilege among the partners? What are the ethical responsibilities in meetings, negotiations of agreements on behalf of the Joint Venture, and in creating the Joint Venture?

**Bennett J. Lee**

Watt Tieder Hoffar & Fitzgerald, LLP, San Francisco, CA

**Trey Moyer**

KBR Inc., Birmingham, AL

**Danielle J. Cole**

Burr & Forman, LLP, Atlanta, GA

**5:00 PM**

#### **Announcements**

**6:00 PM - 8:00 PM**

#### **Welcome Reception at**

**The Tasting Room, Uptown Park**

# Friday, February 3, 2012

**7:30 AM – 8:45 AM**

**Division Breakfasts**

(see information at registration)

**Continental Breakfast**

(available to paid registrants)

**7:30 AM – 12:30 PM**

**Registration/Exhibition Open**

**8:50AM – 9:00 AM**

**Opening Remarks & Announcements**

**9:00 AM – 10:00 AM**

## **Workshop A**

**IS THAT AN OFFER YOU CAN'T REFUSE?**

**Practical Tips in Navigating Project Labor Agreements**

The workshop will focus on tips to allow construction attorneys to understand the risks associated with entering a PLA for both the contractor and the owner. The discussion will include significant PLA clauses and their effects on the parties.

**Robert J. Orelup**

Drewry Simmons Vornehm, LLP, Carmel, IN

**Matthew J. DeVries**

Stites & Harbison, Nashville, TN

**9:00 AM – 10:00 AM**

## **Workshop B**

**DID I REALLY AGREE TO THAT? A Cautionary Tale for Resolving Disputes in the Middle East**

The globalization of the economy has provided construction companies with unique opportunities abroad. But be aware of the dispute resolution process. This Workshop will provide a case-study of a project gone bad in the Middle East and the lessons learned from the subsequent dispute resolution process.

**Michael Black QC**

XXIV Barristers' Chambers, London, England & Geneva, Switzerland

**Timothy W. Triplett**

General Counsel, Black & Veatch, Overland Park, KS

**Raid Abu-Manneh**

Mayer Brown International LLP, London, England

**10:00-10:15 AM**

**Break**

**10:15 AM – 11:15 AM**

## **Workshop C**

**WHAT HAVE WE LEARNED FROM THE I-35W TRAGEDY?**

I-35W has demonstrated that a large complex project can have liabilities well beyond the completion of the Project, even beyond otherwise expired statutory repose periods. I-35W has also demonstrated that such liabilities cannot always be adequately limited through the use of a contract, minimized through contribution or indemnity claims, or avoided by reliance on the repose statutes. This workshop will provide an overview of the lawsuits associated with the I-35W bridge collapse, an analysis of two noteworthy appellate court decisions that address the interplay between contribution, indemnity and repose, as well as special statutory catastrophe victim compensation schemes. The workshop also discuss what lessons can be learned by parties involved in the design, construction and maintenance of high profile projects as they grapple with the issue of risk allocation related to future catastrophic failures.

**Mark R. Becker**

Fabyanske, Westra, Hart & Thomson, P.A., Minneapolis, MN

**Robert J. Huber**

Leonard Street and Deinard, Minneapolis, MN

**10:15 AM – 11:15 AM**

## **Workshop D**

**WHY WOULD I DO THAT? A Review of Factors to Consider When Determining Who Should Engage the Geotechnical Consultant**

Architects often believe that the role of the Geotechnical Consultant is different from consultants traditionally engaged by the Architect. Owners often desire a single point of responsibility for all "design" elements and believe that the Architect is better able to select and manage the services of the Geotechnical Consultant. This workshop discuss how contract provisions and arrangements intend to allocate the risks and examples of how risks have actually been assessed.

**Christopher S. Dunn**

Waller, Lansden, Dortch & Davis LLP, Nashville, TN

**R. Craig Williams AIA**

HKS Architects, Inc., Dallas, TX

**11:15AM – 11:30 AM**

**Break**

**11:30 AM – 12:30 PM**

## **Workshop E**

**CAN ONE SIZE REALLY FIT ALL? Understanding and Using Proper Insurance Products to Manage a Complex Project's Risks.**

Controlled Insurance Programs appear to be ideal insurance vehicles for large complex projects. Whether owner controlled (OCIP), Contractor Controlled (CCIP), or project specific (PSP), these insurance programs provide a number of advantages and disadvantages to the stakeholders. Do these insurance products provide efficient loss resolution? Do these products adequately cover the liabilities incurred by the project? This workshop will provide a discussion about the benefits and advantages of using project insurance products.

**Brett Lamb**

Gardere Wynne Sewell LLP, Dallas, TX

**David J. Hatem**

Donovan Hatem LLP, Boston, MA

**11:30 AM – 12:30 PM**

## **Workshop F**

**YOU'RE KIDDING ME, RIGHT? What You Need to Teach the Client Before Litigation Occurs**

This workshop will discuss the best practices for document and testimony management before and after a Litigation Hold including keeping track of potential witnesses and documents, preserving testimony and the use of third-party vendors. The workshop will also consider what "in anticipation of litigation" means and update significant changes in the law related to electronic discovery.

**Carla T. Dillon**

Jones Walker, Baton Rouge, LA

**Curtis W. Martin**

Ford Nassen & Baldwin P.C., Houston, TX

**12:30 PM**

**Announcements and Closing Remarks**

**12:45 PM – 1:45 PM**

**Women's Social Luncheon**

# Event Highlights

## EXHIBIT HALL

Visit the Exhibits! The Forum Exhibit Hall brings companies together in one place to fit the unique needs of construction lawyers. The Exhibit Hall will be open Thursday, February 2, 7:30 AM – 5:00 PM and Friday, February 3, 7:30 AM – 12:30 PM. Thanks to all of the exhibitors for their continued support of the Forum!

## DIVERSITY BREAKFAST

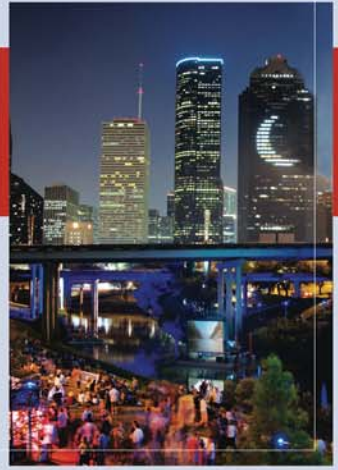
Thursday morning join the Diversity Committee at the Diversity Breakfast Program *Immigration Compliance in the Construction Industry* with speaker Jacob M. Monty, Monty & Ramirez, LLP. This program is Co-sponsored by the Hispanic Bar Association of Houston.

## WELCOME RECEPTION

Come and join us Thursday evening for the Midwinter Meeting Welcome Reception at The Tasting Room, Uptown Park. All registered attendees receive a free ticket to the Welcome Reception. Guest Tickets are an additional fee and must be paid for during your registration process.

## WOMEN'S LUNCHEON

Network, eat and socialize with other Women in the Construction Law Industry on Friday, February 3, at 12:45 pm.



## HOUSTON AREA ATTRACTIONS

### HOUSTON MUSEUM DISTRICT

The Houston Museum District is not just a collection of 18 museums, it's a destination where Houston families and out of town visitors can discover and enriching, cultural experience. The museums are all conveniently located within a 1.5 mile radius of the Mecom Fountain and provide a range of exiting exhibits, collections, workshops, and live performances.

### GALLERIA

Shopping, Shopping, Shopping. Set beneath spectacular glass atriums, The Galleria features more than 375 fine stores and restaurants. The Galleria is the fourth largest mall in the nation. Walking distance from the Intercontinental Hotel.

### SPACE CENTER HOUSTON

Space Center Houston, the Official Visitors Center of NASA's Johnson Space Center, offers a full day of interactive group fun for all ages. With six different major section as well as a variety of ever changing exhibits, Space Center Houston is a must do destination.

### UPTOWN PARK

Uptown Park has over 50 fabulous places to shop, dine, dance, rejuvenate, sip, crave and enjoy where European elegance meets Texas style. Short distance from the Intercontinental Hotel.



# Conference Information

**1. HOTEL INFORMATION:** The conference will be held at InterContinental Houston; Phone 800-316-8645. Visit the hotel's website at [www.ichouston.com](http://www.ichouston.com) for further information.

**2. HOTEL RESERVATIONS:** The Forum on the Construction Industry has negotiated a special room rate of \$165 per single/ double room. A 17% sales tax will also apply per night. You may call the hotel directly at 800-316-8645 or 713-627-7600 and mention the ABA Forum on the Construction Industry 2012 Midwinter Meeting. We have reserved a limited block of rooms through January 17, 2012. You must register for the conference prior to making your hotel reservation. After this date, and if we are sold out of our block, the Hotel Reservation Office will assign rooms on a space available basis at a rate they choose. All changes and cancellations to guaranteed hotel reservations must be made with the Hotel within 24 hours of the scheduled day of arrival to avoid a one night's cancellation charge.

**3. AIR TRAVEL:** Houston is serviced by two airports; the George Bush Intercontinental Airport and the Hobby Airport. The George Bush Intercontinental Airport is approximately 35 minutes away from the program hotel and the Hobby Airport is approximately 25 minutes away from the program hotel. Airfare discounts to ABA meetings are available through ABA Online Travel. To access ABA Online Travel, go to [www.abanet.org](http://www.abanet.org), and click on the link at the bottom of the ABA Calendar Box. At ABA Online Travel you will have automatic access to meeting airfare discounts, web fares and web book only airlines. The ABA's toll-free number for Orbitz for Business (OFB) is 877-222-4185.

**4. PROGRAM REGISTRATION:** To register for all programs and events described in this brochure, we encourage you to register online at [www.americanbar.org/groups/construction\\_industry](http://www.americanbar.org/groups/construction_industry). Confirmations will be emailed to you within 72 hours of registration receipt. Confirmation will be sent only if an email is provided on the registration. In order to be included in the list of program attendees, you must register by January 5, 2012. Guest tickets for special events are available for an additional fee. Please see the registration form for price details.

**5. ON-SITE CHECK-IN:** Beginning Wednesday, February 1, 2012 at 3:00 p.m. – 6:00 p.m., attendees may check-in at the ABA registration desk to pick up name badges and course materials.

**6. ON-SITE REGISTRATION** is available for those persons who missed the registration deadline. If you plan to register at the door, please call the Forum at 312/988-5678 on or before Friday, January 25, 2012, to confirm that space is still available. Failure to call in advance may preclude admission to a sold out conference. On-site registrants must pay the registration fees by check, money order, Visa, MasterCard, or American Express. NO registrations will be accepted without payment.

**7. TUITION INFORMATION:** Tuition includes admission to the program, welcome reception, continental breakfasts, beverage breaks, luncheon, and course materials. The Forum will be providing this year's program materials on CD-Rom only in effort to help "green" the environment.

**8. CANCELLATION POLICY:** Registrants who are unable to attend the conference will receive a refund less a \$50 administrative fee if written cancellation is received by January 13, 2012. Cancellations may be faxed to 312/988-5677. No refunds will be granted after January 13, 2012. Substitutions are acceptable, or conference materials will be sent in lieu of a refund after the program. The ABA reserves the right to cancel any programs and assumes no responsibility for personal expenses.

**9. CLE CREDIT:** ABA programs ordinarily receive CLE credit in AK, AL, AR, AZ, CA, CO, DE, FL, GA, GU, HI, IA, ID, IL, IN, KS, KY, LA, ME, MN, MS, MO, MT, NH, NM, NV, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, VI, WA, WI, WV, and WY. These states sometimes do not approve a program for credit before the program occurs. This transitional program is approved for both newly admitted and experienced attorneys in NY. For more information about CLE accreditation in your state, visit [www.americanbar.org/groups/construction\\_industry](http://www.americanbar.org/groups/construction_industry); or contact Melissa Reesh at [Melissa.Reesh@americanbar.org](mailto:Melissa.Reesh@americanbar.org)

**10. MEMBERSHIP:** To encourage registrants to join the ABA Forum on the Construction Industry, the reduced member's tuition rate will be extended to registrants who join the Forum when they register for the conference. Forum membership dues are \$50 for attorneys/associates and \$5 for law students. Membership in the ABA and one Section is a prerequisite to Forum membership. Please include a separate check (payable to the American Bar Association) for membership dues.

**11. ADDITIONAL COURSE MATERIALS:** Materials for all programs may be available for purchase after the conference by calling the ABA Service Center at 1-800-285-2221.

**12. TAX DEDUCTION FOR EDUCATIONAL EXPENSES:** In the United States an income tax deduction may be allowed for educational expenses undertaken to maintain or improve professional skills. This includes registration fees, travel, meals and lodging expenses (see Treas. Reg. Sec. 1.162-2) *Coughlin v. Commissioner*, 203 F.2d 307 (2nd Cir. 1953.)

**13. AMERICANS WITH DISABILITIES ACT:** If special arrangements are required for disabled individuals to attend this program, please contact the Forum in writing by September 16, 2011 at the American Bar Association, 321 N. Clark Street, Chicago, Illinois, 60654. Fax: 312/988-5677.

**14. DRESS:** In keeping with Forum tradition, participants are encouraged to wear business casual attire during the programs and to the special events.

**15. FOR THE LATEST PROGRAM INFORMATION:** Please visit the ABA Forum on the Construction Industry's website: [www.americanbar.org/groups/construction\\_industry](http://www.americanbar.org/groups/construction_industry). For further information on the city, travel, activities and entertainment options, visit [www.visithouston.com](http://www.visithouston.com).

**16. QUESTIONS:** If you have questions or require additional conference information, please call 312/988-5678. Fax: 312/988-5677; e-mail: [melissa.reesh@americanbar.org](mailto:melissa.reesh@americanbar.org)



American Bar Association  
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**Save the Date**

## Annual Meeting 2012

**APRIL 26-28, 2012**

The Bellagio Hotel, Las Vegas, NV

## Fall Meeting 2012

**OCTOBER 18-19, 2012**

The Sheraton Boston Hotel, Boston, MA

## Midwinter Meeting 2013

**JANUARY 31- FEBRUARY 1, 2013**

Naples Grande Beach Resort, Naples, FL

