What Doesn’t Bankrupt You Makes You Stronger

Is the judge going to enforce the no-damages-for-delay clause?
What about the GMP? How am I going to beat the spoliation claim?
Am I going to get sued for malpractice? What could I have done different??
I can’t wait for Scottsdale!

JANUARY 29-30, 2015      WESTIN KIERLAND RESORT & SPA       SCOTTSDALE, AZ

Building the Best Construction Lawyers
Chris jolted awake, his heart racing. It only took a split second for him to realize he was safe and sound in his own bed. A glance left; his wife, Mary, was still sleeping soundly. To his right, the dim numerals of the alarm clock indicated it was 3 A.M. But he was firmly awake now. As he lay there staring into the darkness of his room, Chris thought back to the day he had just had. He played out the day’s events over in his mind. “That easily was one of the worst days in court,” he thought to himself, “I wish I’d never taken this case.”

Chris had been a construction lawyer for many years. Nothing about this case suggested early on that it would become the nightmare it currently was. It seemed straightforward when he agreed to take it: a breach of contract dispute between his condominium developer client, on the one hand, and the contractor and its surety, on the other. But it hadn’t taken too long for Chris to realize the headache the case ultimately would become.

For starters, the contract, a heavily modified standard industry construction contract, was poorly revised. He was confident the no-damages-for-delay clause was not enforceable, a conclusion his developer client just didn’t seem to understand. There were problems with the Guaranteed Maximum Price (GMP) provisions, too. So much so, in fact, that he had serious doubts the GMP would provide any meaningful measure of protection to his client. And it didn’t help that his client agreed in the contract to litigate disputes in the contractor’s home state, which was halfway across the country from where the project was located. There was no doubt in Chris’ mind that the outcome of today’s hearing, which focused on the contractor’s assertions that Chris’ client failed to preserve evidence and withheld electronic discovery, if it didn’t go Chris’ way, would be the result of a little “home cookin’.” “The judge just doesn’t understand ESI,” Chris lamented to himself.

“We need a vacation,” Chris muttered quietly aloud, and his mind wandered to a trip he and Mary were planning in late January to Scottsdale, Arizona. It was going to be a great trip. Chris had registered for the ABA’s Forum on Construction Law’s 2015 Midwinter Meeting. The focus of the meeting was to learn from some of the best construction lawyers in the country how to avoid making and how to manage mistakes that bankrupt clients or result in malpractice claims against construction attorneys. It seemed tailor-made for Chris’ current case.

The meeting was going to be held at the Westin Kierland Resort & Spa, which offered plenty of amenities for Chris and Mary to take advantage of when Chris wasn’t attending sessions. It was also Super Bowl week, with the Big Game being played the following Sunday in nearby Glendale. The men’s PGA tour was going to be in town, too, for the Waste Management Phoenix Open, the largest golf tournament on the PGA Tour. There was going to be no shortage of activities to take part in, that was for sure.

*****If this 3 A.M. story speaks to you, or if you are looking for a great winter getaway to sunny Arizona in order to obtain some CLE credits, this is the meeting for you. We hope you will join us as we look at a series of mistakes made by attorneys so that we can all avoid them in our future practice.

DEAR COLLEAGUES AND FRIENDS:

Chris

GOVERNING COMMITTEE LIAISON
Joseph C. Kovars
Ober Kaler | Baltimore, MD

PROGRAM CO-CHAIRS
J. Andrew Howard Esq.
Alston & Bird, LLP | Los Angeles, CA

Angela R. Stephens Esq.
Stites & Harbison, PLLC | Louisville, KY
MEETING SCHEDULE

WEDNESDAY, January 28, 2015
12:00 P.M. – 6:00 P.M.
ADVANCE REGISTRATION OPEN

3:00 P.M. – 6:00 P.M.
ON-SITE REGISTRATION OPEN

THURSDAY, January 29, 2015
7:30 A.M. – 8:30 A.M.
FIRST TIME ATTENDEE & NEW MEMBER BREAKFAST,
CONTINENTAL BREAKFAST

7:30 A.M. – 5:00 P.M.
REGISTRATION/EXHIBITS OPEN

8:45 A.M. – 9:00 A.M.
OPENING REMARKS

9:00 A.M. – 10:15 A.M.
PLENARY I:
3 A.M. NIGHTMARES – MISTAKES ATTORNEYS MAKE IN COMPLEX LITIGATION AND HOW TO AVOID THEM (ETHICS)

Most attorneys who have been practicing any length of time have awoken at 3 A.M. with a sinking feeling that they forgot something or regretted taking some action. This program will cover mistakes attorneys make in taking a case, staffing the case, managing your staff, and how to ultimately handle those mistakes which turn into potential malpractice claims.

Danielle J. Cole
Peckar & Abramson PC | Atlanta, GA
L. Tyrone Holt
The Holt Group LLC | Denver, CO
Timothy R. Thornton
Greensfelder Hemker & Gale PC | St. Louis, MO

10:15 A.M. – 10:30 A.M.
NETWORKING BREAK

10:30 A.M. – 11:30 A.M.
PLENARY II:
DRAFTING DISASTERS – WHY YOU NEED TO SHARPEN YOUR CLAUSE

No attorney wants to see a drawn out court battle over the interpretation of a
contract that they drafted. This program will cover some exceptional drafting mistakes that have led to disasters, and how to avoid those drafting mistakes in the future. Topics that will be covered include a review of costly mistakes made in drafting alternative dispute resolution clauses, failing to properly revise and advise on one-sided contracts from hell, no damages for delay clauses that don’t work, dangers in drafting GMP contracts and owner-architect agreements, and mistakes made in drafting guarantees.

Asha Echeverria
Bernstein Shur Sawyer & Nelson PA
Portland, ME
Douglas S. Oles
Oles Morrison Rinker & Baker LLP
Seattle, WA
Patricia H. Thompson
Carlton Fields Jorden Burt PA | Miami, FL

11:30 A.M. – 1:00 P.M.
DIVISION LUNCHES

1:00 P.M. – 1:30 P.M.
NETWORKING BREAK

1:30 P.M. – 2:30 P.M.
WORKSHOPS

A: Spoliation Tsunamis
You have just opened the mail and have received a motion to dismiss your client’s claims or, alternatively, to exclude your expert’s testimony because of the failure to preserve and spoliation of evidence or the failure to give notice of repair and allow the other party to observe your client’s remediation activities. You advised the client on what to do prior to and during the remediation. What now? How do you respond to those allegations and what should you do in the future to prevent allegations like these?

Karen A. Denys
Drinker Biddle & Reath LLP
Princeton, NJ
Michael Hornreich
Weinberg Wheeler Hudgins Gunn & Dial LLC | Orlando, FL

B: Litigating the $200,000 case
How do you litigate a $200,000 case (1) without it costing more than the value of the case, and (2) without committing malpractice? What risks do you recommend to the client to minimize costs that also maximize the likelihood of success on the merits? Is skimping on proof an ethical violation?

L. Franklin Elmore
Elmore Goldsmith PA | Greenville, SC
Erik P. Raines
Hill Ward Henderson | Tampa, FL

2:30 P.M. – 2:45 P.M.
NETWORKING BREAK

2:45 P.M. – 4:00 P.M.
PLENARY III

Journey to E-Discovery World: The 6 Rings of Hell
In this day and age, all clients deal with electronic documents and data. Collecting those documents usually is a nightmare and can be very expensive. This program will discuss common e-discovery mistakes and problems that can arise from things like allowing your client to handle e-discovery, waiving the attorney-client privilege, missing the hot document. This program will also provide an overview of the different types of e-discovery tools available to help minimize mistakes attorneys can make when dealing with e-discovery, including predictive coding, the latest trend in machine-based relevancy review that can drastically reduce the amount of time and the cost needed to identify potentially relevant documents within hundreds, thousands or, more usually, millions of electronic records. The panel also will provide tips for devising a document management protocol to maximize efficiency and minimize wasteful spending when resolving disputes in a modern construction case.

Jessica A. Hill
Stites & Harbison PLLC | Covington, KY
Laura Kibbe
Morgan Lewis | New York, NY
Richard J. Tyler
Jones Walker | New Orleans, LA

4:00 P.M. – 4:15 P.M.
NETWORKING BREAK

4:15 P.M. – 5:30 P.M.
PLENARY IV

Work Hard, Play Smart, or Pay For It Later
This session will cover common malpractice and disciplinary traps for lawyers when dealing with substance abuse, how lawyers react to those mistakes (including working with
professional liability insurance), ethical issues that are raised by such mistakes, and how to develop a balanced approach to make healthy decisions in a lawyer’s work-life balance.

Briggs F. Cheney
Sheehan & Sheehan PA | Albuquerque, NM
Michele Rusinko
Certified Health Coach | Scottsdale, AZ

6:30 P.M. – 8:00 P.M.
WELCOME RECEPTION

FRIDAY, January 30, 2015
7:30 A.M. – 12:30 P.M.
REGISTRATION/EXHIBITS OPEN

7:30 A.M. – 8:30 A.M.
Diversity Breakfast
Keynote Speaker:
Judge Bernice B. Donald, Memphis, TN
Continental Breakfast

8:30 A.M. – 8:45 A.M.
WELCOME FROM THE FORUM CHAIR,
OPENING REMARKS, AND
ANNOUNCEMENTS

8:45 A.M. – 9:45 A.M.
PLENARY V
Home-cooked!: Things Not to
Do When Practicing in a Foreign
Jurisdiction or Acting as Local
Counsel (Ethics)
More and more of our clients are
conducting work across state lines. Clients
would like to be able to seek advice from
their in-house counsel or their go-to firm.
However, when can an attorney provide
advice on a project across state lines? Can
you mediate or arbitrate a case in a state
where you are not licensed to practice?
When do you need to call in local counsel,
and what are the responsibilities that local
counsel must assume when agreeing to be
local counsel? What due diligence should
you do on the local culture and how do
you deal with it?

James F. Butler, III
Smith Currie & Hancock LLP | Atlanta, GA
Melinda S. Gentile
Peckar & Abramson PC | Miami, FL

9:45 A.M. – 10:00 A.M.
NETWORKING BREAK

10:00 A.M. – 11:00 A.M.
WORKSHOPS
C: Uncle Sam Wants You!
How to Handle Government
Raids, Investigations, and
Government Contract Crises
Unfortunately, many of our construction
clients are the subjects or targets
of criminal investigations, anti-trust
investigations, and similar federal
investigations or audits that can subject
them to criminal penalties. This session
will provide an overview for construction
lawyers on how to handle investigations
that may lead to criminal penalties,
when to call in a white collar criminal
lawyer, how to respond to grand jury
subpoenas and government raids, and
how to handle government audits.

Jacqueline M. Arango
Akerman LLP | Miami, FL
Adria L. Perez
Kilpatrick Townsend & Stockton LLP
Atlanta, GA

D: How to Get Your Cake and Eat It
Too – The Top Ten Mistakes to Avoid
When Asserting a Bond Claim: Tips
from the Insiders
Whether you represent the owner,
contractor, subcontractor, or surety,
almost every construction lawyer will
deal with a payment or performance
bond claim at some point in time.
Attorneys can often make mistakes
that lead sureties to deny bond claims.
Come learn about the top ten mistakes
to avoid when asserting a bond claim,
and what you can do to avoid receiving
the denial letter.

Jonathan C. Burwood
Hinshaw & Culbertson LLP
Boston, MA
Bradford R. Carver
Hinshaw & Culbertson LLP
Boston, MA
Daniel J. Goldberg
Ruberto, Israel & Weiner PC
Boston, MA

11:00 A.M. – 11:15 A.M.
NETWORKING BREAK

11:15 A.M. – 12:30 P.M.
PLENARY VI
Careful What You Ask For:
How to Avoid Fraud Claims
and Other Penalties When
Seeking Additional Compensation
from the Federal Government
In Daewoo Eng. & Constr. Co. v. United States, the Federal Circuit upheld a $50.6 million award against a contractor who submitted a false claim of $64 million. Daewoo fundamentally altered the way we think about fraud and claims for payment. Similarly, in Morse Diesel Int’l v. United States a contractor that sued for less than $500,000 because of a dispute over the appropriate credit to be given the government for deleted work was hit with a counterclaim of almost $7.3 million as a result of violations of the Anti-Kickback Act and False Claims Act for reimbursement of payment bond premiums on four, unrelated projects. This session will provide an overview of the major mistakes that cost these contractors millions of dollars and how to advise our clients and develop the right litigation strategies to avoid claims like those encountered in Daewoo and Morse Diesel.

Philip L. Bruner  
JAMS ADR | Minneapolis, MN  
Donald E. Kinner  
U.S. Dept. of Justice | Washington, D.C.  
James F. Nagle  
Oles Morrison Rinker & Baker LLP | Seattle, WA

12:30 P.M.  
CLOSING COMMENTS & ADJOURNMENT

**PROGRAM HIGHLIGHTS**

**Tuesday, January 27, 2015**

1:00 P.M. – 5:00 P.M.  
**FORUM GOLF SCRAMBLE**

3:00 P.M. – 4:00 P.M.  
**FLOW RIDER EVENT**  
If you ever wanted to learn to surf, now is your chance. For details visit: http://kierlandresort.com/fun-things-to-do-in-scottsdale/flowrider/. Open to registered attendees and their guests. RSVP for this event when you register.

7:00 P.M.  
**Young Lawyer Division Dinner**

**Wednesday, January 28, 2015**

12:00 P.M. – 6:00 P.M.  
**REGISTRATION**

2:00 P.M. – 4:30 P.M.  
**90 MINUTE TOUR OF FRANK LLOYD WRIGHT’S TALIESIN WEST**  
Visit Frank Lloyd Wright’s personal winter home, studio, and architectural campus. For more information visit: http://www.franklloydwright.org/about/TaliesinWestTours.html. The cost of this tour is $26 per person and payable by check by 1/14/15. Please make checks payable to Stites & Harbison, PLLC. Mail checks to Stites & Harbison, Attn: Angela Stephens 400 West Market Street, Suite 1800, Louisville, Kentucky 40202. Price does not include transportation or food.

2:00 P.M. – 5:00 P.M.  
**HIKE UP CAMELBACK MOUNTAIN**  
Hike up the beautiful Camelback Mountain. Although considered a moderately difficult hike, the views from the top will be well worth it. Be sure to bring your camera! No fee.

**Thursday, January 29, 2015**

7:30 A.M. – 8:30 A.M.  
**FIRST TIME ATTENDEE AND NEW MEMBER BREAKFAST & CONTINENTAL BREAKFAST**

8:45 A.M. – 11:30 A.M.  
**PROGRAM BEGINS**

11:30 A.M. – 1:00 P.M.  
**DIVISION LUNCHES**

1:30 P.M. – 2:30 P.M.  
**PROGRAM CONTINUES**

5:30 P.M. – 6:30 P.M.  
**WOMEN’S NETWORKING EVENT**

6:30 P.M. – 8:00 P.M.  
**WELCOME RECEPTION**  
Start your Thursday evening at the Midwinter Meeting Welcome Reception, on the Terrace at the Resort. Enjoy great food, drinks and music for the social highlight of the program! All registered attendees are invited to the Welcome Reception, included in your registration fee. Guest passes are available for an additional fee, paid during your registration process.

**Friday, January 30, 2015**

7:15 A.M. – 8:15 A.M.  
**DIVERSITY BREAKFAST**  
Join us Friday morning at the Diversity Breakfast Program, sponsored by the Forum Diversity Committee.
Scottsdale Area Attractions

SUPER BOWL XLIX
Enjoy the start of the Super Bowl festivities in Old Town Scottsdale!

FINE DINING AND SHOPPING
Fine restaurants and upscale shopping are located within walking distance of the resort.

Sponsors and Exhibits
Visit Forum Sponsors in the Exhibits Area! The Forum Exhibits Area brings a variety of companies together in one place with capabilities fitting the unique needs of construction lawyers. The Exhibits Area will be open Thursday, January 29, 7:30 AM – 5:00 PM and Friday, January 30, 7:30 AM – 12:30 PM. Thank you to all of the Forum Sponsors for their continued support of the Forum!

At the Resort

AGAVE, THE ARIZONA SPA
Offering relaxing spa treatments, yoga, boot camps, etc... For details visit: http://kierlandresort.com/agave-scottsdale-spa/

FLOW RIDER
If you ever wanted to learn to surf, now is your chance. For details visit: http://kierlandresort.com/fun-things-to-do-in-scottsdale/flowrider/

POOLS, LAZY RIVER, AND CABANAS

The Forum would like to thank all of the meeting sponsors featured on the “ABA CI FORUM” App.
1. **Housing:** The conference will be held at Westin Kierland Resort & Spa - 6902 E. Greenway Parkway, Scottsdale, AZ 85254. To reserve a hotel room visit: [http://bit.ly/midwinterhotel14](http://bit.ly/midwinterhotel14) The deadline for reservations is January 5, 2015 (5 PM CST) or until the block is exhausted. Room rates are: $289 (single/double)/night (plus tax). Please reference the ABA Forum on Construction Law 2015 Midwinter Meeting.

Rooms are available through the above date or until the room block is exhausted, whichever is earlier. After the above cutoff, the hotel will assign rooms on a space-available basis. Due to high demand and anticipated strong meeting turnout for Super Bowl week, we strongly encourage you to make your reservations as early as possible. Individuals with guaranteed reservations must cancel their reservation 72 hours prior to the scheduled day of arrival to avoid a one night cancellation charge. A limited number of overflow rooms are available. Contact tamara.harrington@americanbar.org for details. You must register for the conference prior to making your hotel reservation.

2. **Air Travel:** Airfare and car rental discounts for ABA meetings are available through ABA Orbitz for Business. To book online, go to [www.americanbar.org/travel](http://www.americanbar.org/travel) > click on the Orbitz for Business logo at the top of the page > read the instructions under the “Travel Paid by Self” box. For assistance with online or offline reservations using the ABA Orbitz for Business website, call toll free 877-222-4185. Additional airline discounts may be available. Visit [http://www.americanbar.org/membership/travel_services/air_travel_discounts.html](http://www.americanbar.org/membership/travel_services/air_travel_discounts.html) for more information.

3. **Ground Transportation:** The Westin Kierland Resort is approximately 20 miles or a 30-minute drive from Phoenix Sky Harbor International Airport (PHX) in Phoenix, Arizona. Approximate taxi fare is estimated $50 - $65 each way. For other travel options, please visit ambar.org/constructionlaw.

4. **Program Registration:** To register for all programs and events described in this brochure, we encourage you to register online at ambar.org/constructionlaw. Confirmations will be emailed or faxed to you within 72 hours of registration receipt. In order to be included in the list of program attendees, you must register by January 5, 2015. Guest tickets for special events are available for an additional fee. Please see the registration form for price details.

5. **Onsite Check In:** Beginning Wednesday, January 29, 2015 from 12:00 P.M. to 6:00 P.M., attendees may check in at the ABA registration desk to pick up name badges and course materials.

6. **Onsite Registration** is available for those persons who missed the registration deadline. If you plan to register at the door, please call the Forum at 312-988-6319 on or before Friday, January 23, 2015, to confirm that space is still available. Failure to call in advance may preclude admission to a sold out conference. Onsite registrants must pay the registration fees by check, money order, Visa, MasterCard, or American Express. NO registrations will be accepted without payment.

7. **Tuition and scholarship information:** Tuition includes admission to the program, welcome reception, continental breakfasts, beverage breaks, luncheon, and course materials. The Forum provides program materials only on a flash drive to help the environment. Please contact Tamara Harrington by email at tamara.harrington@americanbar.org or by phone at 312-988-5674 for more scholarship information.
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 14, 2015. Cancellations may be emailed to tamara.harrington@americanbar.org or faxed to 312-988-5677. No refunds will be granted after January 15, 2015. 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:** The ABA directly applies for and ordinarily receives CLE credit for ABA programs in AK, AL, AR, AZ, CA, CO, DE, GA, GU, HI, IA, IL, IN, KS, KY, LA, MN, MS, MO, MT, NM, NV, NY, NC, ND, OH, OK, OR, PA, SC, TN, TX, UT, VT, VA, VI, WA, WI, and WV. These states sometimes do not approve a program for credit before the program occurs. This course is expected to qualify for 16.5 CLE credit hours (including 1.25 ethics hours) in 60-minute states, and 19.8 credit hours (including 1.5 ethics hours) in 50-minute states. This transitional program is approved for both newly admitted and experienced attorneys in NY. Attorneys may be eligible to receive CLE credit through reciprocity or attorney self-submission in other states. For more information about CLE accreditation in your state, please contact Kathryn.Henning@americanbar.org.

10. **Membership:** To encourage registrants to join the ABA Forum on Construction Law, 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 $60 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. **Arizona Bar Members:** Members of the Arizona Bar are invited to attend at the same rate as offered to members of the Forum.

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 January 15, 2015 at the American Bar Association, 321 N. Clark Street, Chicago, Illinois, 60654. Fax: 312-988 5677. Email: tamara.harrington@americanbar.org.

14. **Dress:** Attire for Forum events varies by the day. Attire for events during the day on Tuesday and Wednesday will be resort casual. Attire for Thursday typically consists of members wearing coats and slacks (although coats are not required), and the attire for Friday is business casual.

15. **For the latest program information:** Please visit the ABA Forum on Construction Law’s website: ambar.org/constructionlaw.

16. **Questions:** If you have questions or require additional conference information, please call 312-988 5674 or email: tamara.harrington@americanbar.org.
TUESDAY – Events are Starting on Tuesday!

1:00 P.M. – 5:00 P.M. - Forum Golf Scramble

3:00 P.M. – 4:00 P.M.
Flow Rider Event – If you ever wanted to learn to surf, now is your chance. For details visit: http://kierlandresort.com/fun-things-to-do-in-scottsdale/flowrider/. Open to registered attendees and their guests. Rsvp for this event when you register.

7:00 P.M. – YLD Dinner

AT THE RESORT:
Agave, The Arizona Spa – Offering relaxing spa treatments, yoga, boot camps, etc.. For details visit: http://kierlandresort.com/agave-scottsdale-spa/


Fine Dining and Shopping – Fine restaurants and upscale shopping are located within walking distance of the resort.

WEDNESDAY

Forum Committee Meetings (various times throughout the day)

12:00 P.M. – 7:00 P.M. Registration

2:00 P.M. – 4:30 P.M.
90 minute tour of Frank Lloyd Wright’s Taliesen West – Visit Frank Lloyd Wright’s personal winter home, studio, and architectural campus. For more information visit: http://www.franklloydwright.org/about/TaliesinWestTours.html The cost of this tour is $26 per person and payable by check by 1/14/15. Please make checks payable to Stites & Harbison, PLLC. Mail checks to Angela Stephens, 400 West Market Street, Suite 1800, Louisville, KY 40202. Price does not include transportation or food.

2:00 P.M.- 5:00 P.M.
Hike up Camelback Mountain (Level: moderate)

THURSDAY

7:30 A.M. – 8:30 A.M.
First Time Attendee and New Member Breakfast & Continental Breakfast

8:45 A.M. – 11:30 A.M. - Program Begins

11:30 A.M. – 1:00 P.M. – Division Lunches

1:30 P.M. – 2:30 P.M. – Program Continues

5:30 P.M. – 6:30 P.M. – Women’s Networking Event

6:30 P.M. – 8:00 P.M. – Welcome Reception

Late Night – Enjoy the start of the Super Bowl festivities in Old Town Scottsdale! (on your own)

FRIDAY

7:15 A.M. – 8:15 A.M. – Diversity Breakfast

8:30 A.M. – 12:30 P.M. – Program Resumes and Concludes at 12:30 P.M.