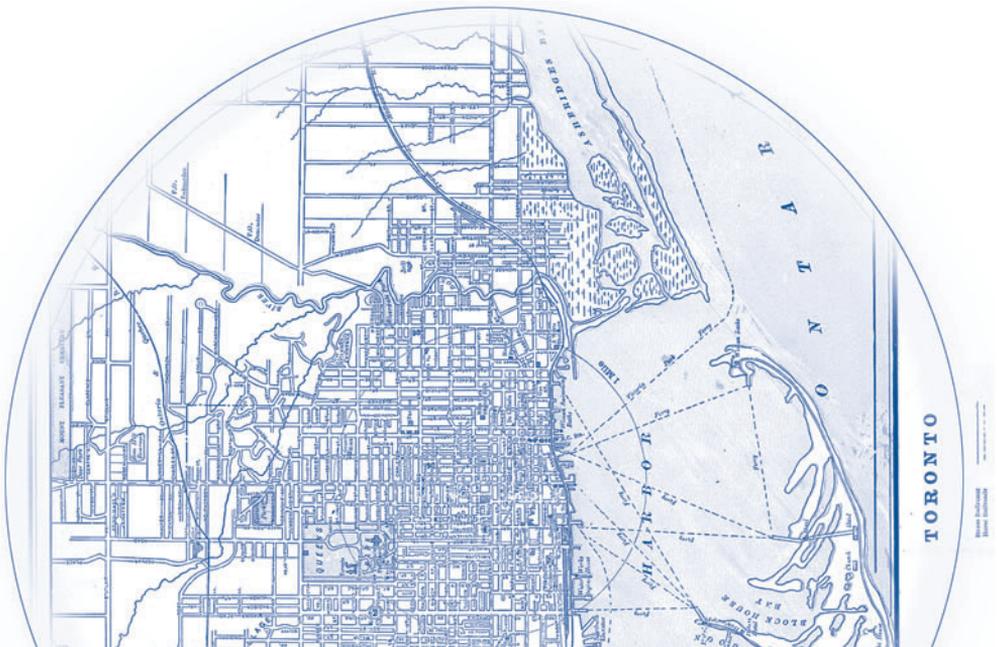




American Bar Association  
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Chicago, IL 60610

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ABA FORUM ON THE CONSTRUCTION INDUSTRY  
**2005 ANNUAL FALL MEETING**

TEN KEY DECISIONS  
TO A SUCCESSFUL  
CONSTRUCTION  
PROJECT



*September 29-30, 2005*

**Intercontinental Toronto Centre**  
Toronto, Ontario, Canada



Lawyers Serving the Construction Industry  
Through Education and Leadership



# Dear Colleagues

Have you ever been presented with a construction project in disarray, and thought—if the parties had just had a little guidance before they made some key decisions, this project could have been a success? Because we all encounter such projects, the Forum has designed a program that analyzes key project decisions and offers advice on how and when they best benefit from legal input.

But what *are* the key project decisions, and how can they be expected to vary from one type of job to another? To explore these questions, we offer a two day program that is jam-packed with practical guidance for a winning project. We have highlighted ten key decisions which, if properly made, will guide most construction projects to a successful result. Starting with the owner's creation of the program, moving to selection of a project delivery method, negotiating the contracts and proceeding step by step to a proper close-out, attendees will learn the basic ingredients of providing good counsel to clients in every segment of the industry.

The focus is not limited to a particular type of project. The goal is to identify and explore fundamental issues that must be addressed on almost every complex project. The program will be valuable to construction lawyers in a wide variety of developments from fairly small undertakings to multi-billion dollar complex development ventures. The program will approach the underlying issues in their typical sequence, offering attendees a framework for evaluating each project in which their clients become involved. We will also offer a session addressing the ethics applicable to negotiation. This session will blend the concepts developed during the course of the program, providing indispensable advice on how to avoid ethical pitfalls when negotiating to implement key project decisions.

The written materials for this program will be an essential guide for construction lawyers, as well as owners, design professionals and subcontractors. Checklists will be provided, as well as tips on factors to be considered with respect to the various types of construction projects. This program should appeal to the experienced construction practitioner because it concentrates on the tools necessary to effect success on a variety of types of projects, but it will also serve as a useful primer for younger participants in the industry, who will learn to organize their advice to clients with an understanding of the timeframes when project decisions must be made.

We are proud to present this important program at a prime venue with exciting opportunities for attendees and guests. The hotel overlooks beautiful Lake Ontario, and is a stone's throw from the CN Tower. Our Thursday evening reception is within walking distance at the elegant Hockey Hall of Fame. Other nearby attractions include the Art Gallery of Ontario, theatres, and world-class shopping. Niagara Falls is only an hour and a half away. More information is available at [www.torontotourism.com](http://www.torontotourism.com) and [www.city.toronto.on.ca/visitors.com](http://www.city.toronto.on.ca/visitors.com). Come visit our neighbors to the North and enjoy the beautiful autumn days of September. Don't forget your passport! Although a U.S. driver's license may suffice for some border crossings, your passport will ensure smoother sailing when traveling to Canada.

**Anne E. Gorham**  
**PROGRAM CO-CHAIR**

*Stites & Harbison PLLC, Lexington, KY*

**George J. Meyer**  
**GOVERNING COMMITTEE LIAISON**

*Carlton Fields PA, Tampa, FL*

**Richard J. Tyler**  
**PROGRAM CO-CHAIR**

*Jones Walker, New Orleans, LA*





# LEADERSHIP

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*Oles Morrison Rinker & Baker  
Seattle, WA*

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# Program Schedule

## WEDNESDAY

SEPTEMBER 28

3 - 6 PM

Advanced Registration/Information

## THURSDAY

SEPTEMBER 29

7:30 - 5 PM

REGISTRATION/EXHIBITION OPEN

7:30 - 8:30 AM

CONTINENTAL BREAKFAST

*(Available to Paid Registrants)*

8:30 - 8:40 AM

WELCOME FROM THE CHAIR

**Douglas S. Oles**

Oles Morrison Rinker & Baker,  
Seattle, WA

8:40 - 8:45 AM

OPENING REMARKS AND ANNOUNCEMENTS

**Anne E. Gorham**

Stites & Harbison, PLLC, Lexington, KY

**Richard J. Tyler**

Jones, Walker, Waechter, Poitevent, Carrère & Denègre,  
LLP, New Orleans, LA

8:45 - 9:45 AM

KEY DECISION 1:

CREATING THE PROJECT PROGRAM

**A. Elizabeth Patrick**

Kilpatrick, Stockton, LLP, Atlanta, GA

**Ann Rackas Pate**

Rackas Pate Law, PLLC, Washington D.C.

The foundation for a successful project is development of a solid program plan. The breadth and depth of project planning and programming vary widely. The speakers will examine and discuss what factors must be considered in program development, such as scope, project elements, budget, design, cost, financing and scheduling.

9:45 - 10:30 AM

KEY DECISION 2:

SITE SELECTION AND PERMITTING

This session will highlight significant issues facing an owner regarding site selection and permitting, such as: How is a site identified, assembled and acquired? How do you determine what permits will be necessary? Will land use regulations need to be modified? Is it better to buy or lease the project site? Should the owner ask bidders to propose a site? How should necessary easements and permits be obtained and by whom?

**C.W. Daniel Kirby**

Osler, Hoskin & Harcourt LLP, Toronto, ON, Canada

**Anne F. Harris**

Black & Veatch Energy Group, Overland Park, Kansas

10:30 - 10:45 AM

BREAK

10:45 - 12 Noon

KEY DECISION 3: SELECTING THE OPTIMAL PROJECT DELIVERY METHOD.

**Allen L. Overcash**

Woods & Aitken, LLP, Lincoln, NE

**William A. Lichtig**

McDonough Holland & Allen, PC, Sacramento, CA

**Ross J. Altman**

DLA Piper Rudnick Gray Cary, Chicago, IL

This program will focus on how to select among the myriad of available project delivery methods, identifying advantages and disadvantages of each from the standpoints of the principal participants, owners, designers and contractors.

12 Noon - 1:15 PM

LUNCHEON

1:15 - 2 PM

KEY DECISION 4: SELECTING THE MOST APPROPRIATE METHODS FOR INSURING THE PARTIES AND THE WORK

**Deborah S. Ballati**

Farella Braun & Martel, LLP, San Francisco, CA

**Mike Hastings**

Marsh National Wrap-Up, Atlanta, GA

This session will describe alternative means of covering the various parties to construction project and how to decide which coverages are best suited for the project as a whole. For example, should insurance be owner controlled or contractor controlled? When is wrap up insurance better than multi-tiered overlapping insurance? What is an appropriate insurance company rating and how do you determine appropriate insurance limits? What coverages do you need, and what language should be in your contract to obtain and properly coordinate those coverages?

2 - 2:45 PM

KEY DECISION 5: SELECTING THE BEST APPROACH TO PROJECT DESIGN.

**Becky Cotton Zahner**

HNTB Architecture, Inc., Kansas City, MO

**Kristine A. Kubes**

Meagher & Geer, PLLP, Minneapolis, MN

This segment will address the multitude of decisions that should be taken into account when approaching project design. Allocation and coordination of design work will be discussed. How should performance specifications be balanced against prescriptive specifications? What sorts of performance criteria should be provided? What are reasonable limits on the designers' liability? Who should own the design? What factors should be considered when an owner, contractor or designer selects a design professional or subconsultant? What design submissions and deliverables should be required?

**2:45 - 3:15 PM**

**KEY DECISION 6: HOW TO ADEQUATELY SECURE PERFORMANCE**

**Diane Morgenroth**

Metropolitan Transit Authority, New York, NY

**Steve Nelson**

Sure Tec Financial, Austin, TX

The speakers will address options available for securing performance of the parties to construction contracts. What is an appropriate bond rating? Under what circumstances may or should an owner replace a surety? While performance bonds are the traditional means of securing performance, are other unique and innovative means of securing performance available, and under what circumstances are they appropriate? Does project size matter? When are warranty and/or maintenance bonds appropriate or necessary?

**3:15 - 3:30 PM**

**BREAK**

**3:30 - 5 PM**

**KEY DECISION 7: SELECTING AND RETAINING CONSTRUCTION CONTRACTORS AND KEY SUPPLIERS**

**Christopher Whitney**

Little, Medeiros Kinder Bulman & Whitney, PC, Providence, RI

**Timothy R. Thornton**

Greensfelder Hemker & Gale, St. Louis, MO

**Allen Gibson**

Buist, Moore, Smythe McGee, PA, Charleston, SC

**David A. Scotti**

Duane Morris, LLP, Pittsburgh, PA

This session will briefly address evaluation of prequalification and selection criteria, balancing price vs. experience, and will be followed by a role playing negotiation that will contrast prime contractor resistance to owner requests with prime's efforts to negotiate a tough subcontract with its lower tier subcontractors and suppliers. This negotiation will highlight the relevant issues facing the parties in their attempt to establish a fixed price or GMP and reach a fair and reasonable allocation of the project's risks.

**5 - 5:30 PM**

**CONSTRUCTION QUE**

This session will address a "hot topic" in the construction industry.

**6 - 8:00 PM**

**WELCOME RECEPTION  
HOCKEY HALL OF FAME**

# FRIDAY

## SEPTEMBER 30

**7:30 - 12:00 Noon**

**REGISTRATION/EXHIBITION OPEN**

**7:30 - 8:30 AM**

**CONTINENTAL BREAKFAST**

*(Available to Paid Registrants)*

**8:15 - 8:30 AM**

**OPENING REMARKS**

**8:30 - 9:30 AM**

**KEY DECISION 8: THE ETHICAL NEGOTIATOR**

**Michael H. Rubin**

McGlinchey Stafford PLLC, Baton Rouge, LA

The art of negotiation cuts across contract formation, performance, and dispute resolution. A lawyer should represent clients zealously, but where does such representation cross the line into unethical behavior? May an attorney bluff, exaggerate, or withhold information? May an attorney misrepresent the client's real position or the facts for negotiating purposes? These and other ethical issues will be at the forefront as our speaker explores the ethics of negotiation.

**9:30 - 10:30 AM**

**KEY DECISION 9: SETTING UP PROCEDURES TO SUCCESSFULLY DEAL WITH ANTICIPATED CHANGES AND CLAIMS.**

**William E. Franczek.**

Vandeventer Black, LLP, Norfolk, VA

**Danny G. Shaw.**

Baker Donelson, New Orleans, LA

**James Nagle**

Oles Morrison Rinker & Baker, Seattle, WA

Through role playing, this program will contrast the dynamics of negotiating a contract and the successful implementation of key decisions made during that negotiation, with the procedures and negotiation of changes and claims. The issues will evaluate decisions on how to provide for adjustments in price and schedule that frequently arise. It will address changes in the broader context. Not just scope or specification changes, but also differing site conditions, design deficiencies, emergencies, latent defects by other contractors, property insurance casualty events, etc. This segment also will address the creative use of bid alternates and other innovated ways and procedures for timely addressing change situations.

**10:30 - 10:45 AM**

**BREAK**

**10:45 - 12 Noon**

**KEY DECISION 10: HOW TO SUCCESSFULLY CLOSE OUT AND TURNOVER THE PROJECT**

**Luis Prats**

Carlton Fields, Tampa, FL

**Andrew T. Englehart**

Construction Process Solutions, Ltd, Cincinnati, OH

This segment will address how to effectively and efficiently wind up an otherwise successful project and smoothly turn it over to the Owner. The discussion will include proper punchlist procedures, warranty issues, reasonable allocation of responsibilities at substantial completion, as well as other clear and fair criteria for substantial and final acceptance.

**12 Noon**

**ADJOURN**



# Conference Information

## ADVANCE REGISTRATION

Please complete and return the attached registration form with your payment by AUGUST 29, 2005. If you wish to have your name appear on the pre-registration list distributed at the program, we must receive your registration no later than this date.

Conference registrations will only be accepted when accompanied by a check, Visa, American

Express, or MasterCard information. Credit card registrations may be FAXED to our registration company, T-REX directly at (630) 262-1520. Registrations cannot be held without payment.

## ON SITE REGISTRATION

On site registration is available for those persons who missed the registration deadline. If you plan to register at the door, you must call (312) 988-5579 at least 72 hours before the conference to confirm that space is still available. Failure to call in advance may result in not being admitted to a sold out program. On site registration will only be accepted when accompanied by a check, money order, American Express, Visa or MasterCard information. Registrations will not be accepted without payment.

## REGISTRATION CONFIRMATION

If you do not receive a written confirmation by AUGUST 29, 2005, please call T-Rex directly at (630) 262-1599 to verify that your registration form and check were received. Failure to call in advance of the program may result in not being admitted.

## TUITION

Tuition includes admission to the program, coffee breaks, continental breakfasts, lunch, one ticket to Annual Reception at the Hockey Hall of Fame, and one set of program course materials. Lunch is limited to registrants, faculty and members of the press.

## CANCELLATION POLICY

No refunds will be granted for cancellations received after AUGUST 29, 2005. To receive a refund (less a \$50 administrative fee), cancellations must be made IN WRITING and RECEIVED on or before AUGUST 29, 2005. Registrants who are unable to attend may send a substitute or receive course materials in lieu of a refund. The ABA reserves the right to cancel any programs, and assumes no responsibility for personal expenses.

## HOTEL

The conference will be held at the Intercontinental Toronto Centre, 225 Front Street West, Toronto, Ontario, M5S 2X3, Canada. Reservations can be made by calling the Intercontinental at (416) 597-1400. To insure availability please make your reservation by AUGUST 29, 2005. The Hotel Reservation Office will assign rooms on a space available basis. Conference Rates: \$229 (CAD) single/double. To convert rates into US Dollars, you may visit <http://www.xe.com/ucc>.

## AIR TRANSPORTATION:

Airfare discounts to ABA meetings are available through ABA Online Travel, the ABA travel agency, Travelocity Business or directly from the airlines. To access ABA Online Travel, go to [www.abanet.org](http://www.abanet.org), "Member Tools". 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 Travelocity Business is 1-866-321-8403. If you are calling American Airlines directly at 1-800-433-1790, reference Discount Code 17715; for US Airways, call 1-877-874-7687 and mention Discount Code 65163236.

## CUSTOMS & BORDER CROSSING INFORMATION:

Citizens or permanent residents of the US require either a US Passport or birth certificate and driver's license to enter Canada and return to the U.S. All other international visitors must be in possession of a valid national passport and, in some cases, a visa (check with your local Canadian Consulate or Embassy).

## CLE CREDIT

Accreditation has been requested for the conference from every state with mandatory continuing legal education (MCLE) requirements for its lawyers. Please be aware that each state has its own rules and regulations, including its definition of "CLE". Check your state agency for confirmation of this program's approval. Attorneys seeking to obtain MCLE credit in Louisiana and Pennsylvania are required to pay state accreditation fees directly to that state. Certificates of attendance will be available at the conclusion of this conference. You may contact the ABA Service Center toll free at 1-800-285-2221 or Laura Gutt at 312-988-5666 for confirmation of the number of CLE credit hours requested by the ABA or credit approved by any particular state.

## MEMBERSHIP

As an added bonus to new members, the membership tuition rate will be available to registrants who join the Forum on or before the first day of the program. For your convenience, a Forum membership form is included in the brochure. Membership dues are not deductible as charitable contributions for federal income tax purposes. However, such dues may be deductible as a business expense.

## 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. 1.162-5) (Coughlin vs. Commissioner 203 F 2d 307).

## COURSE MATERIALS

If you are not planning to attend the program and wish to order the course materials, check the appropriate box on the registration form and send it with the appropriate fees. Allow approximately 3-4 weeks after the program for delivery.

## SERVICES FOR PERSONS WITH DISABILITIES

If special arrangements are required for an individual with a disability to attend this program, please submit your request in writing to Alanna Sullivan, Forum on the Construction Industry, American Bar Association, 321 N Clark, MS 18.2, Chicago, IL 60610, or Fax to (312) 988-5677, no later than AUGUST 29, 2005

## DRESS

In keeping with Forum tradition, attendees and guests are encouraged to wear business casual attire during the program and special events.

## FORUM ON THE CONSTRUCTION INDUSTRY WEBSITE

Website: [www.abanet.org/forums/construction/home.html](http://www.abanet.org/forums/construction/home.html)

## CELL PHONE POLICY

As a courtesy to speakers and attendees, we request that all cell phones and pagers be turned off in the meeting rooms.





# Program Registration Form

\* THIS FORM IS AVAILABLE ONLINE AT:  
[www.abanet.org/forums/construction/home.html](http://www.abanet.org/forums/construction/home.html)

**Housing Deadline: August 29, 2005**  
**Registration Deadline: August 29, 2005**

Please print or type

## 1. REGISTRANT INFORMATION

\_\_\_\_\_  
Last Name First Name M.I.

\_\_\_\_\_  
(Name as you wish it to appear on attendee list & name badge) ABA Member ID#

\_\_\_\_\_  
Firm/Company/Agency

\_\_\_\_\_  
Address

\_\_\_\_\_  
City State Zip

\_\_\_\_\_  
(Area Code) Business Phone Number (Area Code) Business Fax Number

\_\_\_\_\_  
E-mail Address

\_\_\_\_\_  
Spouse or Guest (Print as you wish names to appear on badge)

If you are an attorney licensed in the state of New York, please check here.

I am a New Member and would like a mentor to contact me

## 2. REGISTRATION FEES:

	ON OR BEFORE	AFTER
	8/29/05	8/29/05
<input type="checkbox"/> General Attendees	\$500	\$525
<input type="checkbox"/> Forum Members	\$460	\$485
<input type="checkbox"/> Government/Academic/YLD	\$395	\$420
<input type="checkbox"/> Law Students	\$325	\$350
<input type="checkbox"/> Additional Reception Tickets	\$50	\$50
	<b>Subtotal</b>	\$ _____

## 6. PAYMENT INFORMATION:

- Check (made payable to ABA)
- MasterCard
- American Express
- VISA
- Season Pass Voucher  
(please include voucher with registration)

\_\_\_\_\_  
Credit Card Number

\_\_\_\_\_  
Expiration Date

\_\_\_\_\_  
Signature

## 3. MEMBERSHIP APPLICATIONS:

- Please enroll me as a member of the **Forum on the Construction Industry**. Membership fee (\$40 Regular/\$5 Law Student). I understand I must be a member of the ABA and at least one Section. I belong to the following Section(s):

\_\_\_\_\_  
Subtotal \$ \_\_\_\_\_

## 4. MATERIALS ONLY:

- I will not be attending the seminar and wish to order program materials at \$195

Subtotal \$ \_\_\_\_\_

## 5. TOTAL PAYMENT:

Total (Add subtotals 1, 2, or 3): Subtotal \$ \_\_\_\_\_

## 7. THREE WAYS TO REGISTER:

### ONLINE:

[www.abanet.org/forums/construction/home.html](http://www.abanet.org/forums/construction/home.html)

### MAIL:

Technical Registration Experts (T-Rex)  
FORUM ON THE CONSTRUCTION INDUSTRY  
13 South 2nd Street, Suite 2, Geneva, IL 60134

### FAX:

(630) 262-1520  
T-Rex phone is (877) 309-1565 or (630) 262-1599