Winning Advocacy: From Contracts through Trial, **Sophisticated Strategies for the Construction Lawyer**

> May 6-8, 2004 Scottsdale, Arizona **Hyatt Regency Gainey Ranch**

ANNUAL MEETING 2004



The ABA Forum on the Construction Industry 2004 Annual Meeting Lawyers Serving the Construction Industry Through Education and Leadership

In cooperation with the Construction Litigation Committee of the ABA Section of Litigation

Winning Advocacy: From Contracts through Trial, **Sophisticated Strategies for the Construction Lawyer**

Dear Colleagues

We are counselors and advocates to the construction industry and those who design, build, and procure construction services. From the inception of a project to the final resolution of any disputes we must provide these services in a zealous and effective manner, without losing sight of the practical realities of business. This three day program will provide practical insight and sophisticated strategies to enhance the quality of services we provide to our clients, and to help us help our clients achieve success.

The program provides a balanced mix of practice pointers for both transactional and litigation construction lawyers. Starting with suggestions on effective modification of standard contract terms, through a trial demonstration with local jurors, and concluding with an entertaining and informative ethics presentation on challenges to marketing of legal services, this program will afford you the opportunity to refine your skills and build upon the experiences of your colleagues.

The presentations are intended to address very practical problems faced by all construction lawyers whether seasoned by years of experience or just embarking on their careers. We will examine how to satisfy the expectation of in-house counsel, how to help our clients manage the risks in the construction process, and how to effectively manage the complex construction case. Further, the program will include an insightful primer on the business practices of construction entities. We will also examine strategies for challenging experts, innovations in the computation of impact damages, and the mistakes commonly made in the use of technology in the courtroom.

One half day will be devoted to trial advocacy – two leading practioners will first share their theories on how to effectively argue to a judge or jury, followed by mock arguments to both a distinguished jurist and a locally selected jury panel. Critical evidentiary issues, an exploration into both the world of damages from every perspective, and standard of care issues impacting designers and contractors in a world where clients' needs change at an ever-increasing pace, are the subject of other presentations.

The program is scheduled with two half day sessions (Day 2 and 3) to allow participants and their families to take advantage of the stunning vistas of Arizona and magnificent grounds of the Hyatt Gainey Ranch Resort. Please join us May 6 - 8 at this oasis in the desert of Arizona, the Hyatt Gainey Ranch Resort.

A. Elizabeth Patrick Program Co-Chair Kilpatrick & Stockton LLP Atlanta, GA

Michael S. Zetlin Program Co-Chair Zetlin & De Chiara, LLP New York, NY

Michael D. Tarullo Governing Committee Liaison Schottenstein, Zox & Dunn Columbus, OH

Forum on the **Construction Industry** Leadership

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Fred D. Wilshusen Thomas, Feldman & Wilshusen, L.L.P.

Dallas, TX Manager

Alanna Sullivan American Bar Association Chicago, IL

Desert Botanical & Heard Museum Tour

A cultural tour dedicated to celebrating the natural beauty and heritage of Arizona — along with the history

Your afternoon begins at the Desert Botanical Gardens, where thousands of native plants and cacti flourish in their natural desert setting. The serenity and splendor of the Gardens offer a glimpse into what the desert may have been like before settlers came.

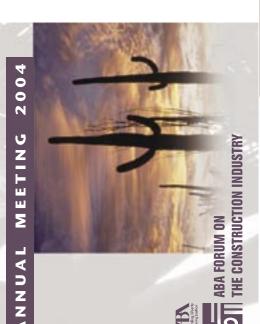
The journey into Arizona's past continues at the Heard Museum of Anthropology and Primitive Art, where hundreds of years of Southwestern history is showcased in its collections of Native American artifacts. Of special interest is the Kachina Doll Gallery, with a rare assortment of Hopi Kachina dolls, including those from the renowned collection of the late Senator Barry Goldwater.

Buses will leave the hotel at 1:00 PM and return at 5:30 PM. The \$60 per person includes transportation, lunch, guide service, souvenir booklet, admissions, taxes and gratuities.



On Friday afternoon the Forum will conduct a golf tournament at the golf course adjoining the hotel. With a 1:30 PM shotgun start, the tournament will be formatted to give all participants a chance to win team and individual prizes. For \$125, each golfer will play 18 holes with a cart, have lunch, and have free beverages on the course. Although \$125 covers only a portion of the greens fees, cart and lunch, the remaining cost for this event is being underwritten by various competition sponsors. We will pair foursomes into sponsored teams. Prizes will be awarded for individual and team competition. Players of all levels are welcome

for an afternoon of fun and sun. We picked this type of golf format to accommodate players of all levels. Please check below so that proper pre-planning can be successful.



Program Schedule

Wednesday — May 5, 2004

3:00-7:00 PM

Registration/Information

6:00-7:00 PM

Young Lawyers Reception

Thursday — May 6, 2004

7:15 AM-5:00 PM

Registration / Exhibition Open

7:30 AM-8:30 AM

Continental Breakfast (available to paid registrants)

Breakfast Meetings

- Division 11 Corporate Counsel
- Construction Litigation Committee
- First Timers/New Member Breakfast

8:15-8:30 AM

Welcome from the Chair and Opening Remarks

8·30-9·45 AM

Plenary I Concepts, Practices and Considerations for Modifying **Standard Construction Contracts**

As construction attorneys, we have all reviewed and modified the standard forms of construction contracts to protect the interests of our clients. In this program, the speakers will provide insight into the perspectives of the non-lawyer business representatives that often drive the negotiation process owner, contractor, design professional and subcontractor. These speakers will suggest changes to standard forms that address each party's key business and

Iennifer Nielsen Bedrava Lyman Oak Brook, IL

John Kofron Fennemore Craig Phoenix, AZ

Ava Abramowitz Waterford, VA

9:45-10:00 AM

10:00-11:00 AM Plenary II

Expectations of In-House Counsel When Hiring and Working with Construction Lawyers

The key to our success as construction lawyers often hinges on our ability to effectively communicate and deal with our clients on a business level, as well as possessing the requisite legal knowledge and experience. During this program, we will hear first-hand from in-house counsel how they select outside counsel, and their expectations of the outside lawyers who handle their matters, including the importance of understanding the client's business, and preparing and revising case evaluations, budgets and bills.

Jack O'Neill The Western Group St. Louis, MO

Michelle Leetham **Bechtel Corporation** San Francisco, CA

11:00 AM-12:00 NOON Plenary III

Managing The Complex Construction

Litigation of disputes involving construction projects often involves multiple parties, large-scale discovery efforts, and are timeand cost intensive. In this session, two experienced and successful construction litigators will share their roadmaps for successfully managing a complex construction case from the initial client meeting to the steps of the courthouse

Jennifer Fletcher Griffin Cochrane & Marshall Atlanta, GA

Joseph Getz Less, Getz & Lipman Memphis, TN

12:15-1:30 PM

Lunch/Forum Business Meeting/ Election of Officers/Presentation of

1:45-2:45 PM Workshop A Checks, Check-Ups, Check-Outs: What Attorneys Need to Know About the Business Practices of **Construction Entities**

Picking up where the Forum's "Sticks & Bricks" programs and publications left off, this session will provide the practicing attorney with some practical insights into the business functions performed by a few of the organizational "players" in the construction industry. The speakers' segments will focus on these players' cash flow and cost documentation ("Checks"); provide tips on midproject audits ("Check-Ups"); and analyze the closeout of a project and punch-list issues ("Check-Outs").

Julie Taylor Noble & Wickersham, LLP Cambridge, MA

Paul Hoffman Hoffman, LLC Appleton, WI

Workshop B Technology in the Courtroom: Mistakes Made with Digital Presentations and Demonstrative Evidence

All trial attorneys know that digital presentations are a pervasive force in the world today. Compelling graphics and carefully placed visual strategies are an essential tool for winning arguments. The speakers will explain how to avoid the mistakes routinely made using demonstrative evidence and techniques for successfully introducing and objecting to electronic and demonstrative evidence at trial.

Ed Iosiah GREYHAWK

Woodburv, NY John P. Gilligan Schottenstein, Zox & Dunn Columbus, OH

2:45-3:00 PM

3:00-4:00 PM Workshop C

Selecting, Attacking and Defending **Expert Witnesses**

Given the complexity of constructionrelated arbitrations and litigations. an integral aspect of success in these processes is often an attorney's ability to secure and take advantage of the abilities of one or more experts who can provide valuable insight, knowledge and guidance in many areas including pricing, scheduling, sequencing and technical aspects of design and construction. This session will offer advice on the selection of the right experts, and discuss strategies for effectively and efficiently using these experts during the dispute resolution process, including preparing the expert for trial and preparing to effectively attack the credibility of the opposing experts and

Roy S. Mitchell Hill International, Inc. Washington, DC

their theories

William Hill Mintz Levin et al Boston, MA

Workshop D Using Dynamic Simulation Modeling to Assess Impact Claims

Sophisticated mathematical simulation of the actual work processes found on a construction project is an emerging option for demonstrating the net impact of many complex and intertwined factors on labor efficiency. Dynamic Simulation Modeling can account for the effect of design changes and interruptions,

late receipt of information, and acceleration, as well as specific project conditions such as extended overtime,

work force turnover, and labor market constraints. The speakers will provide an overview of the technique, explain how it has been applied to over 100 large projects, and discuss whether simulation modeling can be successfully applied in construction litigation settings to either prove or disprove cumulative impact

Ken Cooper PA Consulting Group Cambridge, MA

and disruption claims.

Lewis Baker Watt, Tieder, Hoffar & Fitzgerald LLP McLean, VA

4:05-5:05 PM

Workshop E Time is Money: Delay Damages Dissected

Delays on a construction project impact every participant. In this program, the speakers will look at the delay damage prism from every angle, including contractor, subcontractor, owner, and surety. The speakers will explore types of construction-related delaydamages. methods of proving damages, and a critical review of the damage provision: of industry form agreements (such as AIA, AGC and DBIA).

R. Harner Heckman Nexsen Pruet et al Greensboro, NC

Deborah Butera Shapiro Fussell et al Atlanta, GA

Workshop F Hitting A Moving Target: How Innovation and Modern Day Fears Impact the Standard of Care for Design Professionals and Contractors

In recent years, security concerns, sensitivity to environmental factors such as mold growth, the evolution of new building materials and the use of innovative project delivery methods have all led to the perception that the standard of care for the design and construction industry is changing. With this evolution, how is a violation of the standard of care proven, when the "target" is always moving?

Michael Hanahan Schiff Hardin, LLP Chicago, IL

David Perry CNA Global Specialty Lines Chevy Chase, MD

6:00-8:00 PM **Annual Reception**

Friday — May 7, 2004

8:30-8:45 AM Opening Remarks and Announcements

Evidence in the 21st Century: a

Construction litigations pose unique

for winning evidentiary battles in the

Time, Payment and Communication

Mistakes, delays and disruptions can

sound the death knell for a construction

project. Through anecdotal analysis, this

program will offer insightful problem-

Hancock Rothert & Runshoft LLP

Lawyers' Marketing: Ethical Traps for the

So you think you can publicize the

expertise in drafting complex project

program an ethics maven may shock

you with his revelations of what lawyers

may not do in marketing their services.

recent case you won? Tout your

documents? Think again. In this

solving techniques for tackling the risks

Risks: Managing the Dangers

inherent in the industry

Robert Hendrickson

San Francisco, CA

11:00 AM-12:00 NOON

Thomas E. Spahn

McLean, VA

12:00 NOON

Adiourn

McGuire Woods LLP

Brian Stayton

Carlton Fields

Tampa, FL

Plenary VII

Unwarv

John Clappison

Clark Hill PLC

Detroit, MI

William F. Doris

Atlanta, GA

Ted Levin

9:45-10:00 AM

10:00-11:00 AM

Plenary VI

Kilpatrick Stockton

Morris Polich et al

Los Angeles, CA

Construction Lawyers' Guide:

8:45-9:45 AM

Plenary V

7:15 AM-12:30 PM Registration / Exhibition Open

7:30-9:00 AM Breakfast/ **Business Meetings** Divisions 1-10- & 12

challenges for the trial attorney. The (please specify interest on registration speakers will target a number of specific evidentiary issues, from contractual ambiguities to hearsay objections and 9:15-9:20 AM exceptions, and discuss techniques

9:20 AM-12:20 PM

form)

Plenary IV Trying the Complex Construction Case: Closing Arguments that Win at Trial

Opening Remarks and Announcements

You'll feel the heat in this session, not from the Arizona sun, but the drama of trial. This program will address closing argument from the very different perspectives of the three groups most intimately involved in the process: the attorneys, the judge, and the jury. Two seasoned trial lawyers will describe their tactics and strategies for making closing arguments in complex construction cases, and then present their arguments to a jury of local citizens. While the jury deliberates, an experienced judge will offer a judicial perspective on closing argument in general, and those just given, in particular. Finally, the jury's verdict and the reasoning behind it will be presented. After hearing the three sides, decide for yourself what worked (or didn't) and why.

Justice Maurice Portley Phoenix, AZ

Andrew Ness Thelen Reid & Priest LLP Washington, DC

Lou Bagwell Baker Botts LLP Houston, TX

6:30-8:00 PM Reception Honoring Women in Construction

Saturday — May 8, 2004

7:00 AM-12:30 PM Registration / Exhibition Open

7:00-8:30 AM Continental Breakfast (available to paid registrants)

7:00-8:30 AM Special Session — An Introduction to

the Forum Have you ever wondered how to get more involved in Forum activities? How programming decisions are made? How speakers are selected? How to get published in the Construction Lawyer? All of these questions and more will be answered in a special Saturday morning session.

ADVANCE REGISTRATION

Please complete and return the attached registration form with your payment by APRIL 14, 2004. 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

Conference Information

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 APRIL 14, **2004**, 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 breakfast, lunch, one ticket to Annual Reception at the Hyatt Regency, and one set of program course materials Lunch is limited to registrants, faculty and members of the

CANCELLATION POLICY

No refunds will be granted for cancellations received after APRIL 14, 2004. To receive a refund (less a \$50 administrative fee), cancellations must be made IN WRITING and RECEIVED on or before APRIL 14, 2004. 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.

The conference will be held at The Hyatt Regency Scottsdale-Gainey Ranch, 7500 East Doubletree Ranch Road, Scottsdale, AZ 85258. Reservations can be made by calling the Hyatt Regency at (480) 991-3388. To insure availability please make your reservation by **April 19, 2004.** The Hotel Reservation Office will assign rooms on a space available basis. Hotel check-in time is 4:00 PM and the check-out time is 12:00 PM Conference Rates: \$210 single/double.

AIR TRANSPORTATION

You can fly to ABA meetings with unbegtable girfgres on the following carriers by purchasing your ticket under the **ABA** Discount Code and using one of two options: Percentage **Discounts** or **Zone Fares.** Once your airfare has been determined, the percentage discount can then be applied to produce additional savings to you. By asking the agent to compare the percentage-discounted fare with the carrier's **Zone Fares**, even greater savings may be achieved. **Zone** Fares are more flexible and user-friendly than non-refundable restricted airfares. While **Zone Fare** rules and restrictions vary with each airline, most only require a 7-day advance purchase; do not require a Saturday night stay; are changeable and refundable and require only a 2-day minimum stay.

The ABA Discounted Meeting Airfares are available on the airlines or from the ABA travel agency, Tower Travel at (800)

American Airlines Discount Code #15794 (800) 433-1790 Delta Air Lines Discount Code #189408 A (800) 241-6760 US Airways Discount Code # 36632473 (877) 874-7687

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. For questions pertaining to the number of credit hours granted by each state, call (312) 988-6217 two or three weeks after the conference.

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.

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, 750 N. Lake Shore Drive, MS 11.2, Chicago, IL 60611, or Fax to (312) 988-5677, no later than APRIL 14, 2004.

FORUM ON THE CONSTRUCTION INDUSTRY INTERNET

Website: 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.

following airlines through your travel agent, directly from the

SERVICES FOR PERSONS WITH DISABILITIES

Program Registration Form

☐ Past Governing Committee Member

3. SOCIAL EVENT TICKETS

Event

Spouse/Adult

(under 12)

Friday's Tour

*Golf Tournament

Reception Honoring

Women in Construction

5. MATERIALS ONLY

6.TOTAL PAYMENT

program materials at \$150

Total (Add subtotals 2,3,4 or 5): \$__

Reception for Young Lawyers N/A

4. MEMBERSHIP APPLICATIONS

Annual Reception

Child Annual Reception

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

\$50

\$30

\$60

\$125

N/A

on Construction Industry. Membership fee (\$40 Regular/\$5

Law Student). I understand I must be a member of the ABA

☐ I will not be attending the seminar and wish to order

and at least one Section. I belong to the following Section(s):

Please enroll me as a member of the Forum

Fee Quantity Total

Subtotal: \$

* THIS FORM IS AVAILABLE ONLINE AT: www.abanet.org/forums/construction/home.html

Housing Deadline: Apri	il 19,	2004	Reg	gistration Deadline: April 14, 2004
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) Busines	s Fax Numbe	r
E-mail Address				
Spouse or Guest (Print as you wish names to	appear	on badge)		
If you are an attorney licensed in the st	ate of N	New York, please	check here.	<u> </u>
2. REGISTRATION FEES			7. PAYMENT INFORMATION	
☐ Forum Members: \$5 ☐ Construction Litigation Members: \$5 ☐ Government/Academic/YLD: \$4		After April 14, 2004 \$675 \$700 \$595 \$620 \$595 \$620 \$425 \$450 \$345 \$345	Master	(made payable to ABA) Card □ American Express Pason Pass Voucher (please include voucher with registration)
			Credit Card	Number Expiration Date
☐ New Member, First Time Attendees:☐ Forum 20-Year Member:	\$295	\$320	Signature	
	\$445 \$470		8. THREE WAYS TO REGISTER	
	Subtotal: \$		ONLINE: MAIL:	www.abanet.org/forums/construction/home.html Technical Registration Experts (T-Rex) FORUM ON THE CONSTRUCTION INDUSTRY
Please check one if you are: Member of BOTH Forum and Construction Litigation Committee			ΓΛ V.	13 South 2nd Street, Suite 2 Geneva, IL 60134
□ Past Forum Chair			FAX:	Fax: (630) 262-1520 T-Rex phone is (877) 309-1565 or (630) 262-1599

Educational Registration Thursday, May 6, 2004 7:30 AM-8:30 AM Breakfast

☐ Div. 11 – Corporate Counsel (Division Members Only) ☐ Construction Litigation Committee ☐ First timers /New Member

1:45–2:45 PM (Make one choice) ☐ Workshop A

3:00 PM-4:00 PM (Make one choice)

☐ Workshop D ☐ Workshop C or 4:05–5:05 PM (make one choice)

Workshop F

☐ Workshop E or

Friday, May 7, 2004 7:30 AM-9:00 AM - Division Breakfast Meetings

(Make one choice) ☐ Div. 1 Dispute Avoidance & Resolution

☐ Div. 2 Contract Design

☐ Div. 3 Design ☐ Div. 4 Project Delivery Systems

☐ Div. 5 Contract Negotiations, Performance & Administration

☐ Div. 6 Employment Law & Labor Relations

☐ Div. 7 Bonds, Liens & Insurance

☐ Div. 8 International Contracting

☐ Div. 9 Specialty Trade Contractors and Suppliers ☐ Div. 10 Legislation & Environment

☐ Div. 12 Owners and Lenders

*Golf pairings can be prearranged by contacting Ty Laurie, tlaurie@schiffhardin.com