



ABA FORUM ON THE CONSTRUCTION INDUSTRY

FALL MEETING

ADVANCED ANALYSIS OF CONTRACT
RISK-SHIFTING PROVISIONS:
SHARPEN YOUR CLAUSES!

Hyatt Regency Gainey Ranch
SCOTTSDALE, AZ



October 12-13, 2006



LAWYERS SERVING THE CONSTRUCTION INDUSTRY THROUGH EDUCATION AND LEADERSHIP



DEAR COLLEAGUES:

The Forum's Fall 2006 Meeting returns to the desert at the Hyatt Regency Gainey Ranch in Scottsdale, Arizona, for an advanced and thorough analysis of those risk-shifting provisions routinely included in contracts drafted by, or issued to, our clients. Whether you represent providers or procurers of construction services, this Program will provide you with unique perspectives and insight into the various ways these provisions may be interpreted.

The first day of this one and a half day Program opens with a lively panel discussion by industry experts spotlighting the diverse philosophical approaches to contractual risk allocation embodied within the various standard industry documents published by the AIA, AGC, and EJCDC. The remainder of the day is spent in Plenary Sessions and Workshops with nationally-recognized counsel and industry experts who will explain the actual impact of these clauses on owners, contractors, and designers "in the field," and to demonstrate how these provisions may be modified to achieve intended—or avoid unintended—results. Topics will include: liability for shop drawing approval, design versus performance specifications, interplay between the right to payment and the duty to perform, continuing contractual obligations post-completion, expansion versus constriction of indemnity and insurance clauses, liability for project budgets and estimates, interim remedies and enforcement of international dispute resolution provisions, termination, and scope of work and changes clauses.

The second day of the Program begins with a review and critique of the AIA's new Design-Build documents from both the owners' and designers' perspectives. Next, you will be enthralled by experienced trial practitioners who will argue a "live" Motion for Summary Judgment before a seasoned judge. When confronted with a challenging fact pattern, the judge will be asked to decide whether a contractual notice provision is enforceable, and if so, whether compliance was proper and timely, or waived. Finally, the Program concludes with an entertaining ethics session on firm administration, including our obligations when hiring new attorneys or temporary lawyers, the responsibility of lawyer supervisors, and multi-firm partnerships.

As if the cast of preeminent speakers and accompanying materials alone weren't worth the price of admission, the venue in beautiful Scottsdale is an added value. The Program's schedule allows attendees and their families to take advantage of the stunning vistas of Arizona and the magnificent grounds of the Hyatt Regency Gainey Ranch Resort. Please join us October 12 - 13, at this oasis in the desert of Arizona, the Hyatt Regency Gainey Ranch Resort.

See you in the desert!

John T. Clappison
The Colasanti Companies
Macomb Twp, MI
Program Co-Chair

L. Franklin Elmore
Elmore & Wall, PA
Greenville, SC
Program Co-Chair

Michael S. Zetlin
Zetlin & De Chiara LLP
New York, NY
Governing Committee Liaison

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Zetlin & De Chiara, LLP
New York, NY

PROGRAM SCHEDULE

Wednesday, October 11

3:00 – 5:00 PM

ADVANCED REGISTRATION/INFORMATION

Thursday, October 12

7:30 AM – 5:00 PM

REGISTRATION/EXHIBITION OPENS

7:30 – 8:30 AM

CONTINENTAL BREAKFAST
(Available to Paid Registrants)

8:30 – 8:40 AM

WELCOME FROM THE CHAIR

Ty D. Laurie
DLA Piper Rudnick Gray Cary US LLP

8:40 – 8:45 AM

OPENING REMARKS AND ANNOUNCEMENTS

L. Franklin Elmore
Elmore & Wall, PA, Greenville, NC

John T. Clappison
The Colasanti Companies, Macomb Twp, MI

8:45 – 10:15 AM

PLENARY 1:

RISK ALLOCATION IN STANDARD FORM
AGREEMENTS: WHO'S THE FAIREST OF THEM ALL?

Moderator:

John R. Heisse II
Thelen Reid & Priest LLP, San Francisco, CA

Speakers:

J. William Ernstrom
Alberici Group, Inc., St. Louis, MO

Robert J. Smith
Wickwire Gavin, Madison, WI

Suzanne H. Harness
The American Institute of Architects, Washington, DC
Industry experts from the AIA, AGC, and EJCDC debate their philosophical approaches to risk allocation in their respective owner/contractor and owner/designer documents for design-bid-build delivery systems.

PROGRAM SCHEDULE (continued)

Thursday, October 12 (continued)

10:15 – 11:00 AM

WORKSHOP A:

LINES IN THE SAND: WHERE DOES DESIGN STOP AND CONSTRUCTION START?

William J. Tinsley

Sills Cummis Epstein & Gross PC, Newark, NJ

Laura A. Hauser

Thompson Hine LLP, Cleveland, OH

This Workshop will address the interplay/crossover of the roles and responsibilities of contractors and design professionals, including:

- liability for shop drawing review/approval;
- circumstances requiring contractors to carry design professional insurance; and
- drawing the line between design specifications and performance specifications.

10:15 – 11:00 AM

WORKSHOP B:

TO PAY OR NOT TO PAY; TO STAY OR NOT TO STAY

William D. Lyman

Lyman & Nielsen, Oak Brook, IL

Patricia H. Thompson

Carlton Fields, Miami, FL

The panelists will discuss what constitutes a trigger for the owner to withhold payment, and a contractor's remedies for non-payment, including:

- a contractor's right to cease performance;
- rights to withhold payment and/or offset against amounts otherwise due; and
- requests for and providing evidence of adequate financial assurance.

11:00 – 11:15 AM

BREAK

11:15 AM – 12:15 PM

PLENARY 2:

ARE WE DONE YET?

Penny P. Cobey

Brown, Winfield & Canzoneri, Inc., Los Angeles, CA

R. Harper Heckman

Nexsen Pruet Adams & Kleemeier, Greensboro, NC

This Plenary will guide contract drafters on defining continuing obligations, including drafting:

- continuing insurance obligations;
- warranties as sole/exclusive remedies; and
- express warranties for owner-specified equipment/materials, which account for Spearin implied warranties.

12:15 – 1:30 PM

LUNCHEON: PRESENTATION ON THE CONSTRUCTION OF THE NEW ARIZONA CARDINALS FOOTBALL STADIUM

Jose Pienknagura

VP, Risk Manager & General Counsel, Hunt Construction Group, Inc., Scottsdale, AZ

Robert Aylesworth, Jr.

Executive VP, Hunt Construction Group, Inc., Scottsdale, AZ

1:45 – 2:45 PM

WORKSHOP C:

WHY SHOULD I PAY FOR YOUR MISTAKES?

Kent Holland

Wickwire Gavin, PC, Vienna, VA

Steven GM Stein

Stein, Ray & Harris, Chicago, IL

This Workshop will address key components of construction indemnity provisions, including:

- duty to indemnify vs. duty to defend;
- indemnity for property damage and bodily injury vs. any contract breach;
- indemnity against personal injury/property damage claims vs. "economic" injury;
- indemnity on a comparative-fault basis vs. inclusion of indemnitee's negligence;
- anti-indemnity statutes/sole negligence of indemnitee; and
- non-negligence of indemnitor.

1:45 – 2:45 PM

WORKSHOP D:

YES, WE CAN BUILD IT FOR THAT

Bradford L. Bright

Veritas Consulting Group, Inc., Dallas, TX

Douglas C. Green

Marsh USA, Inc., Minneapolis, MN

This Workshop will address contractual allocation of responsibilities of construction managers and design professionals in:

- establishment of project budgets and cost estimates, including agreements to design and/or build to budget; and
- responsibility of design professionals for budget accuracy and cost overruns arising from design omissions (the "betterment" argument).

2:45 – 3:45 PM

WORKSHOP E:

THE RULES OF ENGAGEMENT BEYOND THE BORDER: WHY SHOULD WE PLAY BY YOUR RULES?

David Buoncristiani

Thelen Reid & Priest LLP, San Francisco, CA

Karen R. Smith

Trenam, Kemker, Scharf, Barkin, Frye,

O'Neill & Mullis, P.A., Tampa, FL

This Workshop will focus on drafting contractual dispute resolution procedures and alternative dispute resolution clauses for international projects, including:

- forum selection clauses;
- choice-of-law provisions;
- step negotiations;
- mandatory mediation;
- unilateral arbitration; and
- provisions regarding collection and enforcement of interim remedies and judgments.

PROGRAM SCHEDULE (continued)

Thursday, October 12 (continued)

2:45 – 3:45 PM

WORKSHOP F: YOU'RE FIRED!

Allison J. Snyder

Porter & Hedges LLP, Houston, TX

Mike F. Menicucci

Calvert Menicucci PC, Albuquerque, NM

This Workshop will address the drafting of termination clauses, both for cause and for convenience, including:

- grounds for termination (as defined vs. as a matter of law);
- coordinating notice and opportunity to cure provisions between contract and bond; and
- enforceable termination for convenience provisions (including discussion on minimal consideration required and impact of "bad faith" termination).

3:45 – 4:00 PM

BREAK

4:00 – 5:00 PM

PLENARY 3: DOWN THE SLIPPERY SCOPE: THAT'S NOT WHAT WE AGREED TO!

Stephen Hess

Sparks Willson Borges Brandt & Johnson, PC,
Colorado Springs, CO

Gary Berman

Greyhawk North America, Woodbury, NY

This Plenary deals with five key assumptions and qualifications in drafting "scope of work" and "changes" clauses to protect the contractor's bottom line, including:

- defining, limiting, and expanding the scope of work;
- owner disclaimers vs. duty to investigate;
- defining first class, highest quality, best efforts;
- identifying and quantifying changed or extra work; and
- CCD's vs. field orders.

6:00 – 8:00 PM

WELCOME RECEPTION

Hyatt Regency Gainey Ranch, Palm Grove

Friday, October 13

7:30 AM – 12:00 Noon

REGISTRATION/EXHIBITION OPENS

7:30 – 8:30 AM

CONTINENTAL BREAKFAST (Available to Paid Registrants)

8:10 – 8:15 AM

OPENING REMARKS AND ANNOUNCEMENTS

8:15 – 9:15 AM

PLENARY 4:

YOU AIN'T SEEN NOTHIN' YET! THE AIA DESIGN BUILD DOCUMENTS, 2004 EDITION

Matthew A. Gillies

Stites & Harbison, PLLC, Louisville, KY

John E. Kofron

Fennemore Craig, Tucson, AZ

Review of key changes in the new AIA Design/Build documents with suggested changes from the Owner's, Contractor's, and Design Professional's perspective.

9:15 – 10:30 AM

PLENARY 5:

MOTION FOR SUMMARY JUDGMENT: ENFORCEABILITY, SUFFICIENCY, TIMELINESS, AND WAIVER OF CONTRACTUAL NOTICE PROVISIONS

William J. Postner

Schiff Hardin LLP, New York, NY

Charlotte Wiessner

Sherman & Howard LLC, Denver, CO

Honorable Pendleton Gaines

Arizona Superior Court, Presiding, Scottsdale, AZ

A local Superior Court Judge will hear arguments by attorneys for a contractor and an owner regarding:

- enforceability of owner's notice provision as drafted;
- timeliness of contractor's notice;
- sufficiency of contractor's notice; and
- whether the owner waived the notice requirement.

10:30 – 10:45 AM

BREAK

10:45 – 11:45 AM

PLENARY 6:

CONSTRUCTION LAW FIRM HIRING OF LAWYERS AND NON-LAWYERS: RISKS AND REWARDS

Thomas Spahn

McGuireWoods LLP, McLean, VA

Using hypotheticals, this Program will focus on the hiring of lawyers and non-lawyers by construction law firms. The topics to be covered in connection with hiring lawyers include: the imputation of disqualification to other firm lawyers; the different standards for hiring private sector and government lawyers; and the rules governing the hiring and billing of contract and "temp" lawyers. Topics to be covered in connection with hiring non-lawyers include: the states' varying rules covering imputed disqualification; the fee-sharing ramifications of rewarding non-lawyer "rainmakers;" and law firms' responsibility to avoid assisting the unauthorized practice of law.

12:00 NOON

ADJOURN

CONFERENCE INFORMATION

ADVANCE REGISTRATION

Please complete and return the attached registration form with your payment by **SEPTEMBER 27, 2006**. 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.

You are encouraged to register online at www.abanet.org/forums/construction. Conference registrations will only be accepted when accompanied by a check, money order, Visa, American Express, or MasterCard. Credit card registrations may be FAXED to the ABA Forum on the Construction Industry at (312) 988-5677. *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. *Registrations will not be accepted without payment.*

REGISTRATION CONFIRMATION

If you do not receive a written confirmation by **SEPTEMBER 27, 2006**, please call Lynn Parker at (312) 988-5678 to verify that your registration form and payment 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 the Annual Reception at Hyatt Regency Gainey Ranch, 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 **SEPTEMBER 27, 2006**. To receive a refund (less a \$50 administrative fee), cancellations must be made IN WRITING and RECEIVED on or before **SEPTEMBER 27, 2006**. 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 Program and assumes no responsibility for personal expenses.

HOTEL

The conference will be held at Hyatt Regency Gainey Ranch, 7500 East Doubletree Ranch Road, Scottsdale, AZ 85258. Reservations can be made by calling the hotel directly at (480) 991-3388. To insure availability please make your reservation by **SEPTEMBER 5, 2006**. The Hotel Reservation Office will assign rooms on a space available basis. Conference Rate: \$239

AIR TRANSPORTATION

Discounted airfares are available for travel to ABA Master Calendar meetings. ABA and Travelocity negotiated airfare discounts and web-only fares are available to members at ABA Online Travel. Visit www.abanet.org; go to Member Tools and select ABA Online Travel from the drop down menu. Airfare discounts are available to all meeting attendees by calling the ABA's travel agency, Travelocity Business, toll-free at (866) 321-8403.

CLE CREDIT

Accreditation has been requested for the conference from every state with mandatory continuing legal education requirements (MCLE) 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 those states. 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) 988-5678 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 three to four 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 **SEPTEMBER 27, 2006**.

FORUM ON THE CONSTRUCTION

INDUSTRY 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.

PROGRAM REGISTRATION FORM

Housing Deadline: September 5, 2006
Registration Deadline: September 27, 2006

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 name to appear on badge)

I would like a mentor to contact me I am a new member

2. REGISTRATION FEES:

	ON OR BEFORE	AFTER
	9/27/06	9/27/06
<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 Ticket	\$50	\$50
Subtotal:	\$_____	\$_____

6. TOTAL PAYMENT:

Total (Add subtotals 2, 3, 4, and 5): \$_____

7. PAYMENT INFORMATION:

Check (made payable to ABA)
 MasterCard American Express VISA
 Season Pass Voucher Money Order

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):

5. MATERIALS ONLY:

I will not be attending the seminars and wish to order Program materials for \$150

8. THREE WAYS TO REGISTER:

ONLINE:

www.abanet.org/forums/construction/home.html

MAIL:

ABA Forum on the Construction Industry
321 N Clark Street, Chicago, IL 60610

FAX:

(312) 988-5677

American Bar Association
321 North Clark Street MS 18.2
Chicago, IL 60610



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