

# UNDER CONSTRUCTION

## THE NEW AIA DESIGN BUILD DOCUMENTS “Designed with the Owner in Mind”

by [Howard G. Goldberg](#)

In late 2004, the [American Institute of Architects \(“AIA”\)](#) unveiled its new family of design-build documents. These new contract forms have been in development for more than four years and are revolutionary, not evolutionary. They were developed with one principal goal - to create a family of design-build agreements which address the concerns voiced by the Owner community in response to the standard design-build forms created by all of the organizations which have published such forms over the past fifteen years.

One of the novel approaches adopted by the AIA in its new design build family, that of “bridging,” has been successfully utilized extensively for building construction projects in Europe and in large engineering projects in the United States. Bridging suggests that the Owner will retain its own design consultant to record the Owner’s requirements in the form of the project criteria, which will govern the ultimate design and construction of the project. The form and detail of the criteria are not fixed. Rather, the owner, with or without a consultant, can vary the completeness and complexity of the criteria. On the one extreme, the criteria can consist of a simple pre-design program description of the size and nature of the project, or, at the other extreme, it can consist of relatively detailed design development drawings and outline specifications, which establish many of the primary components and systems of the project. The bridging approach offers many advantages to the Owner.

First, the Owner, either individually, with the Owner’s own forces, or through a

Consultant, has direct input into the scope and required quality of the project. Depending on the detail of the criteria package, the Owner or its Consultant can make such choices such as that between cost and longevity of a particular system or component, and not leave that significant economic issue to the Design Builder. If the Owner contracts with a Consultant to perform that function (as opposed to the Design Builder), the Consultant’s only loyalty is to the Owner.

Second, the Owner does not have to use a Consultant, but has the option to do so, for

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### REPORT OF THE NOMINATING COMMITTEE

The Nominating Committee of the Forum on the Construction Industry convened at The Forum’s Mid-Year Meeting in New York City in January and selected nominees for Chair-Elect and Governing Committee Members-at-Large. The nominees are: for Chair (automatic) [Douglas S. Oles](#), Seattle, WA; for Chair-Elect: [Ty D. Laurie](#), Chicago, IL; for Governing Committee Members-at-Large: [Anne E. Gorham](#), Lexington, KY; [Carina Y. Ohara](#), San Francisco, CA; [John I. Spangler, III](#), Atlanta, GA; and [Michael S. Zetlin](#), New York, NY. In accordance with The Forum’s by-laws, the nominations will be presented to The Forum membership for a public vote on April 7, 2005, as part of The Forum’s Business Meeting which is held in conjunction with its [Annual Conference in New Orleans, LA.](#)



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MESSAGE FROM THE

**CHAIR** Doug Oles,  
Chair-Elect  
**ELECT**



## WE ARE A FORUM

In ancient Rome, a *forum* was a marketplace or public place where judicial and commercial business was transacted. Although originally a marshy area, the *forum romanum* became a central place for public meetings and law courts during the Roman Republic. Under the Roman Empire, the *forum*

evolved into a place of public ceremonies and even gladiatorial spectacles, featuring grand temples, monuments and basilicas. Because so many citizens gathered there, it was a natural location for shops and open-air markets, which developed around the edges. With this history in mind, it is appropriate that our construction industry group within the ABA is named a "forum". Through the programs, publications, and division activities of our organization, people from every corner of the construction industry have an opportunity to share ideas, debate proposals, and ultimately to improve the legal environment in which we and our clients conduct business.

During this past year, as your Chair-Elect, I have attempted to highlight the opportunities for members to participate more actively in the Forum. If your time is very limited, you can at least avail yourself of our publications and programs. And to make sure that you have our upcoming programs on your calendars, I commend the following dates:

- |                       |                                                    |
|-----------------------|----------------------------------------------------|
| April 7-9, 2005       | <a href="#">Annual Forum Meeting</a> (New Orleans) |
| September 29-30, 2005 | <a href="#">Fall Meeting</a> (Toronto)             |
| January 26, 2006      | <a href="#">Mid-Winter Meeting</a> (New York City) |
| May 18-19, 2006       | <a href="#">Annual Forum Meeting</a> (San Diego)   |

I would also, however, urge each member to volunteer at least a small amount of time to participate in one of our [divisions](#) or preparing one of our publications. To get information on publications that are currently in planning or production, you may contact the Publications Committee chair (currently [Ty Laurie](#) of Chicago, who will be succeeded this summer by [Fred Wilshusen](#) of Dallas). To get information on speaking or submitting papers to a future program, you may contact your division chair or the Governing Committee liaison for your division.

When Forum members come together, they often gain a better understanding of the perspectives held by others in the industry. This enlarged perspective helps the group to formulate and advocate improvements that will ultimately make the industry fairer and thereby stronger. In a world of global competition, this important goal can best be achieved by combining the input of many diverse voices.

Our modern forum is still a place of law and a place of business, and sometimes still a place of gladiators. I hope to see each of you there.

# THE NEW AIA DESIGN BUILD DOCUMENTS

## “Designed with the Owner in Mind”

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whatever purposes the Owner wants. The new Owner-Consultant Agreement (denoted as [AIA Document B-142](#)) contains a detailed list, (like a menu of services) from which the Owner can choose. Thus, the Owner can employ the Consultant solely to prepare a program; or to create the criteria package; or to provide a schematic design; or to serve as the Owner’s representative to review the final design created by the Design-Builder’s Architect; or to give advice to the Owner during the construction phase. The Owner has the option to select none, some or all of these available services.

Third, the Owner has an irrevocable license to use the intellectual property created by the Consultant (i.e., the design) regardless of the delivery system utilized or regardless of the identity of the particular Design Builder, who is eventually selected to complete the design and to construct the project. No longer can the design be held hostage by one Design-Builder, with the Owner being required to lose access to an acceptable design unless the Owner agrees with the Design-Builder’s proposed price, which might be considered by the Owner to be unreasonable.

Fourth, the approach facilitates alternative methods of procurement of a builder, from competitive bidding to competitive negotiation with several potential design builders. Thus, the Owner can choose the Design-Builder based on price, quality of the design build team or a myriad of other factors. The document offers a great deal of flexibility in this regard.

In addition to a new Owner - Consultant Agreement, the AIA will be publishing a new Owner/Design-Builder Agreement. Instead of the former AIA approach of utilizing a two-part agreement form (one part for preliminary design and a second for final design and construction),

only a one-part agreement will exist. That one part form is for complete design and construction will be based on the criteria package, along with the Design Builder’s qualifications or exclusions.

Depending on the level of detail of the criteria package, some Design Builders will choose to offer a fixed price or a guaranteed maximum price. Typically that price will arrive with a number of clarifications and assumptions which will further define the criteria which will govern the project. Alternatively, the parties can agree to arrive on a price at a different time, depending on the future development of design. How and when this negotiation might occur is left to the parties. Again, the key word is flexibility.

One of the reasons some Owners choose design-build as the method of project delivery is to create single point responsibility for disputed issues which may later arise between designer and builder. If errors or other problems occur, many Owners do not want a debate between their Architect and their Contractor as to which is at fault. Without a clear allocation of sole point responsibility, this same problem could occur where part of the design is reflected by the criteria package created by the Owner’s consultant. For this reason, the AIA Documents Committee has chosen to allocate responsibility among the participants in the process in the family of documents.

First, it has created strict contractual responsibility on the part of the Design-Builder to conform the final design and construction to the Owner’s criteria. The Design-Builder can not hide behind a “professional standard of care” as to the adequacy of the design or construction. While this strict liability standard was implied in prior editions, it has been more specifically reflected in the new family of documents. (Whether that strict liability standard will be

passed along by the Design-Builder to the Architect will be a matter of negotiation.)

Secondly, a choice had to be made as to which professional (the Owner’s Consultant or the Design-Builder’s Architect) would be ultimately responsible to the Owner for Code compliance, including those issues inherent in or created by the Owner’s criteria package. Since the Design-Builder’s Architect will be the person to sign and seal the ultimate design for approval by Code authorities, the AIA approach is to impose ultimate responsibility for Code compliance for the completed structure on the Design-Builder’s Architect and not on the Owner’s Consultant. Thus, the Design-Builder’s Architect may bear the ultimate financial cost for code violations created by criteria created by the Owner’s consultant. This liability arises from the act of sealing the drawings.

Of course, if code issues require changes in criteria, those changes may have an economic impact on the Design-Builder, and the Design-Builder may be entitled to additional compensation from the Owner by reason of changes in the criteria.

For those Owners who choose design build as a delivery method with the belief that they will have no involvement in the project during design and construction, the new AIA documents, like the old, may turn out to be disappointing. The Owner has certain minimum responsibilities, with options for more. At a minimum, the Owner will be required to review and approve the final design documents created by the Design Builder [Yes, but it may be misleading to say this without clarifying that the review is only for conformance with the Design-Build Documents (Project Criteria) and that the final design documents don’t take precedence over the Project Criteria.]. The Owner will have to review and approve applications for payment and issues relating to

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# THE NEW AIA DESIGN BUILD DOCUMENTS

## “Designed with the Owner in Mind”

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substantial and final completion. The Owner will have to decide on its preferred degree of involvement in the shop drawing process, the change order process, in observations or inspections of work and in other such activities.

The use of a cost plus alternative to the fixed price contract was another innovation deemed essential. In today's world, many Design Builders would only agree to provide a proposal on a cost plus a fee basis, if the project criteria is based on skimpy or incomplete design information. While such Design-Builders might be willing to provide a guaranteed maximum price to the Owner, the amount of the contingency built into the guarantee will obviously be a reflection of the degree of completion of design. Again, the new agreement form is sufficiently flexible so as to accommodate either a fixed price contract or a cost reimbursable approach (with or without a guaranteed maximum price).

The new Design-Builder/Architect Agreement is modeled after other forms promulgated by AIA. If the design concepts are well developed by the Owner's Consultant, the Design-Builder's Architect may not need to perform a complete schematic design, as many of the building systems will already have been selected. In fact, another advantage of the new AIA approach will be that the Design-Builder may wait until receipt of the Owner's criteria package before choosing the design team. For example, if the Owner wants a curtain wall building, the Design-Builder may select the Architect based on that Architect's prior experience with such systems or components. The same may be true of other Consultants, such as structural, mechanical or electrical. Thus, the Design-Builder's negotiation with the design team may be more realistic and efficient as the Design Builder will know the level of development of the project criteria actually provided by the Owner.

At the other end of design, the Design Builder may not feel the need for completed construction documents. The Design-Builder's Contractor and its Subcontractors may provide partial design of specialized elements during the submittal process. For example, the sprinkler subcontractor may design the sprinkler system. The curtain wall manufacturer may design the curtain wall and its connections. The Contractor may choose to provide construction coordination drawings in lieu of having the Architect undertake a final "coordination" of the consultants' drawings. While many Architects may question the advisability of such an approach, the fact is that such processes do exist, particularly in this method of project delivery.

Another significant issue involves the degree to which the Design Builder's Architect will be involved in providing traditional contact administration during construction. Many of the Architect's "traditional services" are rarely used in the design-build

context. Most often the Architect remains involved in shop drawing and submittal review; responding to Contractor initiated inquiries regarding the intent of or requirements of the design documents; and conducting inspections for substantial and final completion. Depending on circumstances, some or all of the other such services may be eliminated, particularly where, as often occurs, the Design-Builder will serve as its own General Contractor or where the General Contractor is affiliated with the Design-Builder.

These unique concepts and more are to be found in the new documents. You will find them available in hard copy now and in AIA Contract Documents software in late February.

*Mr. Goldberg served as outside legal counsel to the Documents Committee of the American Institute of Architects since 1987.*

## READER'S COMMENT

I am late with my reading, but nevertheless read with puzzlement the piece on arbitration consolidation in the December Newsletter.

My puzzlement stems from the absence of any mention of [Greentree Financial Corp. v. Bazzle, 123 S. Ct. 2402 \(2003\)](#). Although [Bazzle](#) dealt specifically only with whether a class arbitration is permitted when an arbitration clause is silent on the subject, the reasoning of the Supreme Court plurality appears to be equally applicable to any other joinder issue, such as consolidation. Thus, the cases discussed [in the December Newsletter] flew squarely in the face of the Court's direction that when a clause is broad ("any dispute arising out of or relating to") and subject to enforcement under the FAA (as almost any is these days) and silent on the issue of joinder, the issue of whether joinder is permissible or not is up to the arbitrator.

If that were not enough, when the clause incorporates [AAA rules](#), the arbitrator is expressly authorized to pass on jurisdiction questions, including the scope of the arbitration clause.

Regards,

James Madison, 750 Menlo Avenue, Suite 250, Menlo Park, CA 94025

# In Memorium: Overton A. Currie (1926 - 2005)

by [Patrick J. O'Connor, Jr.](#)

I did not know Overton well, but my professional life has been profoundly influenced by him. I suppose that's the sign of an important person -- someone whose life is not only meaningful to the familiar, but also the multitude. Overton Currie was such a person.

Overton is often referred to as the "father" or "dean" of construction law. The description is fitting. Overton was one of the first (if not the first) lawyers to specialize in representing clients involved in the construction business. As the founder of the construction law practice at the Atlanta firm of [Smith, Currie & Hancock, LLP](#), Overton was a tireless advocate of construction law as a separate, identifiable discipline. Trained in law (University of Mississippi and Yale) and divinity (Emory and Columbia Theological Seminary), Overton utilized tremendous personal gifts of passion and communication to enlist enumerable lawyers at the hundreds of seminars he gave throughout the country to his chosen field of construction law.

I was one of those lawyers. I first met Overton in the December 1982 at a Federal Publications seminar given in Las Vegas, Nevada. Overton was speaking on subcontractor relationships. He was spellbinding. His theological training, coupled with his thorough knowledge of construction law, was an unbeatable combination. I left a "convert" to the practice of construction law. Over the years, I would encounter Overton at various industry events. He as always gracious and warm. He genuinely liked lawyers and was interested in assisting them in their careers. Somewhere along the line, Overton handed me a copy of his book "[Dollars & Sense Construction Law](#)," and told me that he had watched with interest my development as a construction lawyer and believed that I had a secure place in this profession.



His encouragement meant a lot to me. A few years later when I began to write my own book, I often referred to Overton's works - which were a delightful mixture of parable, humor, and insight.

Upon reflection, it seems odd, but somehow strangely fitting, that my law practice in snowbound Minnesota would be so fundamentally influenced by a man born in Hattiesburg, Mississippi, seventy-eight years ago. But, the fact that I practice in a construction law group is the direct outgrowth of Overton's development of construction law as a distinct discipline. My view of what falls within the concept of construction law can be traced back to the many books and lectures Overton developed as he carved out this new practice area. He truly was the "father" of our profession. Some remembrances:

I first met Overton in the late 1960s when I was a young Army captain attending an ABA Public Contracts Section meeting. Overton introduced himself and talked with me like we were professional colleagues. The only difference is that he was the incoming chair of the section, and I was a fledgling lawyer, two years out of law

school. Simply stated, Overton was never too busy to take the time to talk with and inspire a young lawyer. For many lawyers, outside his law firm or in, he was either a mentor or the lawyer who introduced them to the practice of construction law. We will miss him and never forget him.

[Thomas E. Abernathy, IV](#)

I'd like to think Overton had heard I was a young lawyer with a real interest in construction law, and that was why he came up and introduced himself many years ago at a Forum meeting. In reality, I suspect he saw the ponytail and said to himself "that fella is certainly new here, I'll go chat with him." I saw that happen many times over the years, Overton searching the crowd for the newest faces to say hello and visit with. A conversation with Overton was easy since he had the gift of a good teacher, he was a natural listener. God bless him and his family.

[Robert J. McPherson](#)

Would you believe it, but even in Hawaii we have brushed with greatness. Overton was the first teacher that I had in Construction Law.

[Kenneth Kupchak](#)

Overton was one of the two-three attorneys . . . that I consulted before I took the big step and entered Vanderbilt law school at the age of 36. I'm glad I listened to their counsel. No matter how busy he might be, Overton always had time to advise an aspiring lawyer.

[Gerald B. Kirksey](#)

His body of work, his humor, his dedication to the practice of construction law, his leadership, as well as his spirit will all continue to be with us.

[Larry D. Harris](#)

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# PRIVILEGE PROTECTING DOCUMENTS PREPARED FOR MEDIATION HELD TO BE UNQUALIFIED BY CALIFORNIA SUPREME COURT

By [Jason R. Houghton](#)

The California Supreme Court has held that disclosure of written materials, including witness statements, reports, analyses of test data and photographs, prepared for or used in a mediation cannot be compelled in subsequent litigation and that there are no good cause exceptions to this rule. [Rojas v. Superior Court, 33 Cal.4th 407 \(2004\)](#).

The decision is important because in some contexts, such as the toxic mold claims at issue in *Rojas*, evidence prepared for and used at a mediation is otherwise unavailable to subsequent litigants. This was the case in *Rojas* because the mold had been abated as part of a prior lawsuit and the only photographic evidence of and testing results from the mold were prepared for and used in the mediation that resolved the prior lawsuit. Thus, the test results and photographs were protected from discovery by the mediation privilege.

## Facts

In 1996, the owner of a 192-unit apartment complex in Los Angeles sued the contractor and subcontractors that constructed the building. The owner alleged the building was defective because it was leaking water that caused toxic mold. The trial court entered a case management order in July 1998 providing that “[e]vidence of anything said or any admission made by attorneys, parties, principals, consultants, or others in the course of any ‘mediation proceeding’... and any document prepared for the purpose of, or in the course of, or pursuant to any mediation proceeding shall be deemed privileged pursuant to Evidence Code §1119 and shall not be admissible as evidence at trial or for any purpose prior to trial.”

Mold abatement work was performed on the building and completed in late 1998. The case then settled in mediation in April 1999. The

settlement agreement provided: “[T]hroughout this resolution of the matter, consultants provided defect reports, repair reports, and photographs for informational purpose which are protected by the Case Management Order and Evidence Code §§1119 and 1152, and it is hereby agreed that such materials and information contained therein shall not be published or disclosed in any way without the prior consent of plaintiff or by court order.”

In August 1999, several hundred tenants of the apartment complex sued the owner and other parties involved in development and construction of the complex. The tenants alleged that defective construction resulted in water leakage, which caused toxic mold to develop, resulting in numerous health problems for tenants; that the owner and other defendants conspired to conceal the defects; and that the tenants did not become aware of the defects until April 1999.

In discovery, the tenants sought photographs, test results and witness statements and other writings that had been prepared for and used in the mediation. The tenants contended that these photographs and writings were the only evidence of conditions in the building during the toxic mold infestation.

The defendants refused to produce the materials on grounds of the mediation privilege in §1119, and the tenants moved to compel. The trial court judge denied the motion to compel. He found that the photographs and writings were protected by the mediation privilege set out in §1119. It provides in part: “No writing, as defined in [Evidence Code] Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation... is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration,

administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.”

The trial judge acknowledged that it was “a very difficult decision... because it could very well be that there’s no other way for the plaintiffs to get this particular material.” But, the trial court held, “the mediation privilege is an important one, and if courts start dispensing with it... you may have people less willing to mediate.”

The tenants then sought a writ of mandate to reverse the trial court order, and the Court of Appeal issued one. It held that attorney work product doctrine principles governed the application of §1119. Thus, the “raw test data, photographs, and witness statements” were non-derivative material that was not protected by §1119. However, the Court of Appeal held, derivative material consisting of “amalgamations of factual information and attorney thoughts, impressions, and conclusions” such as charts, diagrams, reports, compilations, appraisals and opinions were qualifiedly protected and subject to discovery only upon a showing of good cause. Thus, the Court of Appeal held that §1119 does “not protect pure evidence” but protects only “the substance of mediation, *i.e.*, the negotiations, communications, admissions, and discussions designed to reach a resolution of the dispute at hand.”

The Court of Appeal cited Evidence Code §1120, which provides that “[e]vidence otherwise admissible or subject to discovery outside of a mediation... shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation...” The Court of Appeal was concerned that refusing discovery “would render

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# PRIVILEGE PROTECTING DOCUMENTS PREPARED FOR MEDIATION HELD TO BE UNQUALIFIED BY CALIFORNIA SUPREME COURT

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section 1120 surplusage” and would “permit the parties to use mediation as a shield to hide evidence.”

## The Holding

The California Supreme Court overturned the Court of Appeal decision. It first outlined the policy reasons behind the mediation privilege in §1119. It wrote that the Legislature has sought to encourage mediation by enacting several mediation confidentiality provisions because “confidentiality is essential to effective mediation” since it “promote[s] ‘a candid and informal exchange regarding events in the past.... This frank exchange is achieved only if participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.’ ”

The Supreme Court concluded that §1119’s protection of mediation writings is unqualified, and there are no good cause exceptions in §1119. Thus, the Supreme Court concluded that the Court of Appeal’s analysis conflicted with the statute.

The Supreme Court also reviewed the legislative history of §1119. It found that the Law Revision Commission had considered what to do when a photo is made for a mediation and cannot be replicated in later litigation because the building has been razed or an injury has healed. The Supreme Court found that the Law Revision Commission recommended that no exception be made in §1119 for this circumstance and that none was enacted by the Legislature. The Supreme Court concluded that the Commission “chose language expressly designed to give a mediation participant who takes a photograph for purpose of the mediation control over whether it is used in subsequent litigation, even when another photo cannot be taken.”

The Supreme Court did catalogue some of the evidence that remains discoverable and admissible despite the mediation privilege:

Writings that were prepared for reasons other than for use at mediation but that later were used at a mediation are not protected. Only writings prepared especially for a mediation are protected. Section 1119 applies only to “writings” as defined in Evidence Code §250. Physical objects such as actual physical samples collected from the apartment complex are not covered by the privilege. Rather, only recorded analyses of those samples “prepared for the purpose of, in the course of, or pursuant to, a mediation” are protected.

While witness statements prepared for mediation are protected, the facts in the witness statements are not protected. Rather, they come under the “otherwise admissible” exception in §1120. “Otherwise..., parties could use mediation ‘as a pretext to shield materials from disclosure.’ ”

Evidence Code §1122 (a) (2) allows a mediation participant to use in later litigation writings that it prepared for a mediation so long as the writings do not reveal anything said, done or admitted during the mediation.

The Supreme Court expressly did not address the tenants’ contention that many of the withheld documents in fact had not been prepared as part of a mediation.

*This article first appeared on [www.constructionweblinks.com](http://www.constructionweblinks.com) on February 14, 2005. Mr. Houghton is interested in any comments relative to this issue in jurisdictions around the country. You can email your comments to him at [jhoughton@thelenreid.com](mailto:jhoughton@thelenreid.com) or call him at 415-369-7420.*

# In Memorium: Overton A. Currie

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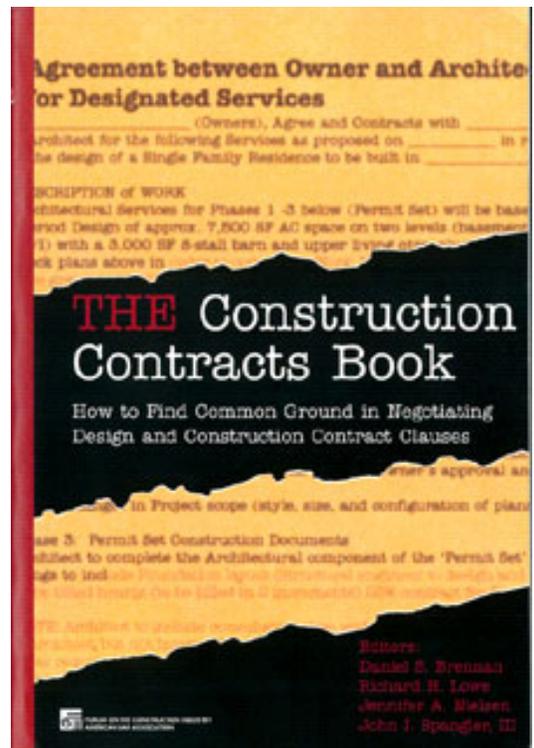
Overton was unique and unforgettable. He was a brilliant lawyer and yet was a remarkably folksy personality who had the ability to bring common sense and humanity into the most complex and adversarial situations. He was quite the philosopher as well, someone who connected with people, first and foremost on a common-sense, emotional level.

[Neal Sweeney](#)

Through his writing, teaching, and preaching of construction law, Overton Currie must be recognized as one of the giants of our profession, and on whose shoulders we stand.

[John W. Hinchey](#)

Overton, you will be missed, but never forgotten.





# Don't Miss the Next Forum Meeting!

## ANNUAL MEETING 2005

**WHEN:** April 7-9, 2005

**WHERE:** [Sheraton New Orleans](#)

**TITLE:** Construction from the Owner's Perspective: It's My Party So I'll Choose the Music

**TELL ME MORE:** The plenary sessions cover a diverse selection of subjects such as negotiating construction claims in a false-claims environment, understanding the designer's "betterment defense," the role of construction leader in the construction financing process, working with Native American communities, and managing risk in condominium development. The workshops vary as well and focus on a number of developing trends ranging from the implications of the International Building Code; Bridging and the Design/Build System; abandonment; economic loss doctrine; dealing with performance bond surety; challenges of public/private partnerships; performing construction work in Iraq to insurance in financing the repair of faulty construction.

All this and a chance to enjoy the sights and sounds of beautiful New Orleans during its French Quarter Festival.

To register for the program online or download a registration form, please visit the Forum's website at [www.abanet.org/forums/construction](http://www.abanet.org/forums/construction). If you have questions on whether or not you are registered, please contact TREX at 877-309-1565.



### UNDERCONSTRUCTION

The newsletter of the  
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March 2005

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