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CONSTRUCTION LITIGATION

The essential forum that will shape the future of litigation and insurance coverage strategies for the industry's leading counsel & claims and risk management professionals

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Terry Yeager
Berkeley Research Group, LLC

John H. Jordan
Helman Hurley Charvat Peacock/Architects, Inc.

Brad A. Gordon
Gilbane Building Company

“The percentage of engineering/construction companies with lawsuits of \$20 million-plus has more than doubled, from 17% in 2010 to 37% in 2011”

– Fulbright’s 8th Annual Litigation Trends Survey Report

There has never been a more important time to get the most up-to-the-minute practical information on:

- **Emerging** trends in construction litigation, contract drafting, negotiation and settlement
- **Navigating** insurance coverage disputes and new developments in surety laws
- **Maximizing** overseas construction opportunities while minimizing risk
- **Dealing** with the most troublesome insurance coverage triggers and exclusions
- **Drafting** effective indemnity clauses and overcoming state-by-state anti-indemnity statutes
- **Preventing** and **resolving** construction defect claims
- **Successful** approaches to mediation and arbitration
- **Practical** insights for resolving trouble spots related to government contracting and public/private partnerships
- **Avoiding** and resolving extra work and delay claims
- **Resolving** the special problems that arise in the representation of subcontractors and design professionals

A unique opportunity to hear how judges interpret contracts and manage complex litigation in the construction context. Hear from:



Hon. Lee Yeakel
U.S. Dist. Ct., W.D. Tex



Hon. F.A. Gossett
U.S. Dist. Ct., D. Neb.



Hon. Mildred E. Methvin
U.S. Dist. Ct., W.D. La.



Hon. Fred A. Hazouri
Florida Fourth Dist. Ct. of App.



Hon. Juan Ramirez, Jr.
Florida Third Dist. Ct. of Appeal



Hon. Richard A. Kramer
San Francisco Super. Ct.

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Led by an unparalleled faculty of in-house counsel, insurance professionals, top litigators and renowned jurists, ACI's premier **CONSTRUCTION LITIGATION** conference will shape the future of the industry for today's leading professionals.

The issues facing the construction industry have never been as complex as they are now. The economy has severely hampered new project development and the completion of existing projects, bankruptcies and collapsed companies have become obstacles to getting paid, and parent companies, insurers and sureties are being brought into claims just for their deep pockets. With every dollar essentially being worth more, construction litigation is on the rise. Industry players have never been so reliant on their attorneys to help keep their companies above water.

With a multitude of various players involved in every project, determining the cause of delays and defects can often seem impossible. Add this to the layers and layers of insurance coverage and the factors involved in litigating and resolving construction cases just become more complex.

The ability to understand and navigate these various issues are essential elements to handling construction cases. With all of these factors, counsel are fighting an uphill battle from the very start. As such, there has never been a more important time for the industry to convene and trade valuable pointers and insights on the most current strategies and techniques for defending and managing construction litigation.

In response, American Conference Institute is proud to introduce its premier installment of the essential forum that will shape the future of litigation strategies for attorneys, in-house counsel from companies working as builders, general contractors, owners, subcontractors and design professionals, claims professionals and counsel from insurance companies: *National Advanced Conference on CONSTRUCTION LITIGATION*. Renowned judges, leading outside counsel and in-house professionals will provide even the most seasoned professionals with the clarity and certainty needed to remain ahead of the curve on today's key issues needed to vigorously represent your clients.

This conference offers unique opportunities for law firm litigators to learn from some of the best in the industry and for in-house counsel and risk managers to gain expertise in evaluating litigation strategies and bring valuable tactics back to their legal departments. The event will also offer tremendous networking opportunities with senior practitioners in the field.

Be sure to add value to your attendance by registering for one of our in-depth workshop sessions:

A Overseas Construction Opportunities: Minimizing the Risks Inherent In Doing Business Overseas, Drafting Effective International Contracts and Managing Cross-Border Litigation
Wednesday, February 29 | 8:00 – 10:30 a.m.

B A Focus on Florida: A Construction Litigation Hotbed
Thursday, March 1 | 3:45 – 5:45 p.m.

ABOUT THE VENUE



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A | In-Depth Workshop

Wednesday, February 29, 2012

8:00 – 10:30 a.m. (Registration & Continental Breakfast begins at 7:30 a.m.)

Overseas Construction Opportunities: Minimizing the Risks Inherent In Doing Business Overseas, Drafting Effective International Contracts and Managing Cross-Border Litigation



George Anthony (Tony) Smith
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
(Atlanta, GA)



Scott D. Nader
Legal Counsel, AMEC (Tucker, GA)

The current financial state of the country has changed the construction industry law dramatically and changed business opportunities for both industry players and the lawyers who represent them. These domestic challenges have created a unique opportunity for builders, owners and design professionals to look overseas to continue growing their businesses...but with these new opportunities come unique challenge. Join our industry specialists at this unique session that will focus on the risks inherent in expanding into overseas projects and more importantly, the most effective strategies for mitigating those risks.

- Best practices for implementing forum and choice of law provisions in international contracts
- Understanding the Foreign Corrupt Practices Act and the political implications of doing business overseas
- International ADR procedures and the enforceability of ADR provisions around the world
- Overcoming the unique challenges in representing multi-national corporations
- Structuring projects to comply with foreign regulations and codes
- Resolving issues that arise in cross-border employment relationships

DAY ONE | Wednesday, February 29, 2012

10:30 Main Conference Registration & Coffee Served

11:00 Co-Chairs' Opening Remarks



Andrew Stephenson
Holland & Knight LLP
(Washington, D.C.)



J. Paul Allen
Assistant General Counsel
Contech Construction Products, Inc.
(West Chester, OH)

11:15 In-house Roundtable on Managing Construction Disputes, Containing Costs and Formulating Litigation Strategies



Charles F. Mitchell
John J. Kirlin, LLC
(Rockville, MD)



John H. Jordan
Senior Vice President
Helman Hurley Charvat Peacock/Architects, Inc.
(Maitland, FL)

John J. Bronga
Major Case Specialist, Construction Defect Unit
Travelers Insurance (Tampa, FL)

George S. Burkoski, Jr.
Counsel
Kiewit Corp. (Omaha, NE)



Leonard L. Burrige
General Counsel
Weis Builders, Inc. (Minneapolis, MN)



Brad A. Gordon
Senior Vice President, General Counsel and Secretary
Gilbane Building Company (Providence, RI)

Moderator:



James W. Barkley
Morin & Barkley LLP
(Charlottesville, VA)

- Legal challenges for residential builders and developers
- Effective use of experts in developing defenses
- Mitigating loss through proper insurance coverage and contractual safeguards
- Litigation over payment and performance bonds
- The pros and cons of BIM and who is using it
- In-house views on IPD
- Resolving defect claims
- Worksite injuries and other labor issues
- The emergence of green building and LEED certification
- Practical approaches to binding and non-binding ADR
- Resolving extra work and delay claims
- Managing litigation costs and eDiscovery
- Insights on selection of outside counsel

12:30 Networking Luncheon for Speakers & Attendees

1:30 A Deep Dive Into Construction Insurance & Bond Issues: Navigating the Recent Developments in Insurance Coverage and Surety Laws, Performance and Payment Bonds, Coverage Triggers and Duties to Defend, and Bad Faith Avoidance



Mike Kolloway
Corporate Vice President & Assistant General Counsel
AECOM Technology Corporation (Chicago, IL)



Ben Patrick
Watt, Tieder, Hoffar & Fitzgerald, LLP
(Miami, FL)



Mary E. Borja
Wiley Rein LLP
(Washington, D.C.)



R. Brent Cooper
Cooper & Scully, P.C.
(Dallas, TX)

Insurance Coverage

- Overcoming insurance obstacles
 - Ensuring all parties are properly insured or bonded
 - Additional Insured?
 - Primary v. supplemental
 - Waiver of subrogation
 - Limits / Aggregates
 - Deductibles / SIRs
 - The pros and cons of covering all parties under one policy
- Determining when a claim is covered by a builders risk policy v. a CGL
 - What types of losses does each policy cover?
 - Who are insureds and additional insureds on each?
- Best practices for dealing with notification and claims made policies
- A deep dive into the investigation and claims process for attorneys
- Contractual indemnification v. additional insured status
- Absolute pollution exclusions and handling environmental claims
- Coverage triggers when dealing with first and third-party insureds
- Top issues that arise in “your work,” “insured product,” “faulty workmanship” and “impaired property” exclusions
- Determining liability allocations
- Allocating insurance proceeds between multiple parties
- Factors governing an insurer’s decision whether to defend when the duty to defend is questionable
- Avoiding common mistakes when dealing with SIRs
- Pros and cons of using third party administrators

Performance & Payment Bonds

- Overcoming statutes of limitations and other common law and contractual defenses that impede the rights of the surety
- Defenses for surety and bond principals
- Performance bond issues
 - Evaluation and completion options
 - Selecting a remedy
 - Negotiating takeover agreements
 - Dealing with subcontractors
- Payment bond issues
 - Making a claim
 - An overview of the surety’s obligations to the claimant and principal

Bad Faith Litigation

- Best practices in claims investigations and crafting well thought out and properly documented claims decisions
- Strategies for achieving a favorable settlement and winning summary judgment

- Resolving bad faith claims where multiple layers of insurance are involved
- Thoroughly investigating causes of defect or injury claims to avoid bad faith allegations
- Understanding the duties of the primary carrier and the excess carrier in a bad faith claim
- The duties of insurers in the underlying case and the bad faith claim
- New concerns for insurers in punitive damage trends
- Strategies for avoiding bad faith claims when litigating questionable coverage

2:45 **Afternoon Refreshment Break**

3:00 **Negotiating & Drafting Effective Construction Contracts: Minimizing Risk, Helping to Increase Client Profitability and Reducing Litigation**



J. Paul Allen
Assistant General Counsel
Contech Construction Products, Inc.
(West Chester, OH)

Arthur M. Nalbandian
Vice President & Associate Counsel
Chubb & Son (Warren, NJ)



Anne L. Blume
Meckler Bulger Tilson Marick & Pearson LLP
(Chicago, IL)



Jonathan Bondy
Wolff & Samson PC
(West Orange, NJ)

- Drafting and negotiating indemnification clauses, liquidated and consequential damage clauses and other contentious points
 - Scope (who is covered and for what sort of actions)
 - Damages (what damages are you indemnifying for)
 - Duration (how long does it last?)
- Payment Terms
 - “Pay if paid” and “pay when paid” clauses
 - Progress payments
 - Retainage
- Understanding your client’s duty to mitigate
- Dealing with anti-indemnity statutes
- Flow down of prime contract to subcontractors
- Warranties (scope & duration)
- “Time is of the essence” provisions
- Choice of law & forum selection provisions
- Termination for convenience
- Allocating and controlling risk
 - Indemnification agreements
 - Waivers of subrogation
- The product supply chain
 - How to protect against defective products
 - Issues inherent in returning supplies
 - The interplay between contract docs and the UCC
- Hot spots in residential v. commercial projects
- The pros and cons of using ConsensusDOCS

4:20 **Preventing and Resolving Construction Defect Claims & Defining "Occurrence" in the Changing Judicial and Legislative Landscape**



Richard B. Maltby
Carnahan, Evans, Cantwell & Brown, P.C.
(Springfield, MO)



Ryan A. Hiss
Lyman & Nielsen, LLC
(Oak Brook, IL)

- Overcoming defect litigation being used to stall closings
- Breach of contract v. negligence/professional negligence claims
- Latest developments in construction defect insurance coverage law
- The evolving definition of the terms "occurrence" and the legislative responses to judicial interpretations
- Additional insured provisions and transfer of risk in defect claims
- Right to repair statutes
 - Which states are leading the way in development and use of these statutes?
 - How they are affecting resolution of defect claims?
 - Using right to cure statutes effectively
- Overcoming defect accusations used as counter-claims to non-payment

5:15 **Conference Adjourns**

DAY TWO | Thursday, March 1, 2012

7:30 **Continental Breakfast**

8:00 **Co-Chairs' Recap**

8:05 **The View From the Bench: Judicial Perspectives on Presenting Construction Cases, Managing Multi-Party Litigation, Settlement and Avoiding Common Litigation Mistakes**



Hon. Lee Yeakel
U.S. Dist. Ct., W.D. Tex.



Hon. Mildred E. Methvin
U.S. Dist. Ct., W.D. La.



Hon. F.A. Gossett
U.S. Dist. Ct., D. Neb.



Hon. Juan Ramirez, Jr.
Florida Third Dist. Ct. of Appeal



Hon. Fred A. Hazouri
Florida Fourth District Ct. of Appeal



Hon. Richard A. Kramer
San Francisco Superior Court

Moderator:



Andrew Stephenson
Holland & Knight LLP
(Washington, D.C.)

- Resolving reasonable time for payment clauses in contract disputes

- Best practices for managing multi-party litigation
- Managing e-discovery costs in multi-party litigation
- The benefits of arbitration and mediation in construction disputes
- Judicial pet peeves in construction cases

9:20 **Alternative Dispute Resolution Strategies: Practical Approaches to Mediating and Arbitrating Construction Cases**



Terry Yeager
Principal
Berkeley Research Group, LLC (Atlanta, GA)



John D. Onnembo, Jr.
JDO Solutions
(West Caldwell, NJ)



Michael Wilson
Broad and Cassel
(Orlando, FL)



Chris Ryman
Coats Rose Yale Ryman & Lee, P.C.
(Houston, TX)



Bruce D. Partington
Clark Partington Hart Larry Bond & Stackhouse
(Pensacola, FL)

- Constructing intra-project alternate dispute resolution strategies that allows work on projects to continue while issues are resolved
- Strategies that work in overcoming challenges in mediation
- Developing ADR clauses that meet client needs
- Utilizing ADR to streamline complex construction disputes
- Managing multi-party arbitrations and mediation
- Managing discovery in ADR settings
- How to resolve claims when not all parties can be brought into the arbitration/mediation

10:40 **Morning Coffee Break**

10:50 **Alleviating Special Problems that Arise in the Representation of Design Professionals & Subcontractors**



Steven G. Shapiro
LEED AP BD&C
Whiting-Turner Contracting Company (Bethesda, MA)



John P. Ehrig
Vice President
Helman Hurley Charvat Peacock/Architects, Inc.
(Maitland, FL)



C. William Daniels, Jr.
Burr & Forman LLP
(Mobile, AL)



Richard Nikonovich-Kahn
Senior Vice President and General Counsel
Heery International, Inc. (Baltimore, MD)

- Overcoming owner and GC pushes for contractual anti-indemnity clauses
- Emerging legal theories of liability against design professionals

- Understanding and contracting for risk transfers
- Helping your client understand the implications of contractual indemnification v. additional insured status
- Overview of the roles of the architect, including design and contract administration.
- Roster of engineers (mechanical, electrical, structural) and consultants (LEED, envelope) working under the architect.
- What are common mistakes that can lead to liability?
- Does the form of contract matter (design-bid-build vs. design-build)
- Liability insurance limits: balancing costs and proper coverage for design professionals

12:00 Practical Insights for Resolving Issues Related to Government Contracting & Public Private Partnerships

Caesar P. Cardozo
Deputy General Counsel
Boston Housing Authority (Boston, MA)



Y. Lisa Colon Heron
Smith, Currie & Hancock LLP
(Fort Lauderdale, FL)



Neal J. Sweeney
Kilpatrick Townsend & Stockton
(Atlanta, GA)

- Understanding the bidding process
- Dealing with Miller Act requirements
- Updates on state-by-state reforms to public construction laws
- Updates on reforms to public construction laws
- Understanding the bidding process from an awarding authority's perspective
- Meeting prequalification requirements: local hiring requirements and ordinances
- Resolving bid disputes
 - Typical grounds for bid rejection
 - Forums for bid dispute hearings
- Challenging qualifications through bid protests
- Bidder evaluation standards
- Using private financing to revitalize distressed government projects
- Avoiding GC liability for improper subcontractor certifications
- Dealing with the uptick in fraud investigations in procurement of government contracts
- Ethical and other considerations in disclosure obligations, FCPA claims, the False Claims Act and more
- Preserving profit when dealing with prevailing wages and union contracts
- Understanding the funding mechanisms involved in public-private partnerships

12:45 Networking Luncheon for Speakers & Attendees

1:45 Overcoming Obstacles to Getting Paid: Post-Judgment Collection & Garnishment Proceedings, Liens and the Impact of Bankruptcy



Shannon M. Bell
Moye White LLP
(Denver, CO)



Christopher M. Cobb
Jimerson & Cobb, P.A.
(Jacksonville, FL)

- Preventing non-payment or disgorgement over licensing issues by
 - Knowing your state licensing laws
 - Verifying subcontractors and design professionals licensing status
- Protecting and preserving lien and bond rights
- Filing and properly recording *lis pendens* and liens
- Issues with bonding liens to clear title
- Best practices for foreclosing on mechanics liens
- What property is subject to a lien? Who is entitled to recover?
- Defenses available to surety and bond principals
- What items can be covered by a bond?
- Common law bond claims
- Useful collection remedies
- Steps to ensure payment when dealing with distressed assets and recovering costs from aborted projects
- Preserving statutes of limitations pending bankruptcy
- Obtaining relief from automatic stay
- Objections to non-dischargeability
- Filing proof of claims
- What alternative claims do you have if you lose your lien/bond rights.

2:35 Avoiding and Resolving Extra Work and Delay Claims: Practical Strategies for Creating Realistic Work Schedules, Dealing with Delays and Resolving Overage Costs



Larry S. Logsdon
Wallace, Jordan, Ratliff & Brandt, L.L.C.
(Birmingham, AL)



Josh N. Bowlin
Chamberlain, Hrdlicka
(Houston, TX)



George Anthony (Tony) Smith
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
(Atlanta, GA)



Gregory S. Martin
Gregory S. Martin & Associates, (Maitland, FL)

- Dealing with late delivery
- The use of CPM scheduling: is it an effective tool for avoiding delay claims?
- Calculating disruption delay claim amounts
- Documentation and proof of delay claims
- Developing base line and as planned schedules to avoid litigation
- Typical construction contract time extension provisions
- The importance of contemporaneous documents in documenting delays

3:25 Co-Chairs' Closing Remarks

3:30 Main Conference Concludes & Registration Begins for In-Depth Workshop B

B | In-Depth Workshop

Thursday, March 1, 2012 | 3:45 pm – 5:45 p.m.

A Focus on Florida: A Construction Litigation Hotbed



Michael Wilson
Broad and Cassel
(Orlando, FL)



Christopher M. Cobb
Jimerson & Cobb, P.A.
(Jacksonville, FL)



Bruce D. Partington
Clark Partington Hart Larry Bond & Stackhouse
(Pensacola, FL)



Jared R. Henthorn
Construction Practice Group Manager
S.E.A. Construction Inc. (Tampa, FL)

In regards to construction litigation, Florida is a leader. The volume of cases in Florida courts is unprecedented, and the regulations continue to evolve and grow. As the claims continue to rise, it is imperative that companies with a Florida presence must be up-to-date on the changing regulations and trends in construction litigation. In this in-depth workshop, participants will receive comprehensive, Florida specific insights on:

- Updates on recent case law, legislation and trends in construction litigation
- Dealing with special issues that arise in condominium development, condo conversions and funding of common reserves
- Managing and defending against COA suits
- Bidding on public sector contracts
- A deep dive into the Chinese drywall litigation
- Litigating construction issues involving mass torts or natural disasters
- Applying the *Daubert* standards to experts
- Low limit insurance policies and catastrophic injuries
- Winning strategies for your summary judgment coverage motions

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Charles F. Mitchell John J. Kirlin, LLC	Arthur M. Nalbandian Chubb & Son
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