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## UNDERCONSTRUCTION

The newsletter of the ABA Forum  
on the Construction Industry

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## MESSAGE FROM THE

# CHAIR

James Duffy O'Connor,  
Chair-Elect

## ELECT



In the last century, physics drove the most dramatic advances in human experience. At the turn

of the nineteenth century, physicists were reinventing the basic tools we had used for hundreds of years to measure time, space, mass, movement and distance. Beginning near the mid-point of that century, advancements in nuclear physics were the catalyst for multi-disciplinary collaboration in science, engineering, manufacturing and later construction. In the last twenty three years, physicists and computer scientists jointly conducted semi-conductor research that resulted in design and manufacturing of electronic devices that have transformed how we communicate, document, confirm, trade, bid, build and generally live our lives.

The century we now find ourselves in will be dominated by the biological sciences, particularly the inter-disciplinary collaboration of biological sciences, computer science and nano-technology engineering. Pioneering biologists today are tracking and mapping the human genome; investigating how the human brain works; determining how cells communicate; why certain signals transported across that cell preserve, while others destroy it and surrounding cells. Biological chemists are designing synthetic molecules that can produce biological effects. Cellular

biologists are working with them to identify cellular checkpoints that protect against DNA damage. These scientists are paving the way for bio-computation, enhancement of brain behavior and astounding regenerative medicine. Today, in laboratories across the country, biologists, engineers and physicists are working together to link nano-technology with medicine. Bio-engineers are designing products that will one day soon be implanted in humans presently enduring life without sight, or the capacity for physical movement, or hindered by the physical impacts of stroke. The energy generated by these collaborations is unstoppable. Just as we experienced the transformation of the technology boom between 1980 and today, we will witness even more incomprehensible advancements over the next twenty five years. These advancements will alter how we go about our daily lives.

Opportunity offers the challenge to succeed. At a time of unprecedented advancement in these sciences, we are also witnessing an exodus of scientists. Educated in America, they are heading for other technology (and economically) friendly locations: India, Taiwan, Korea, and China. We are observing the exportation of an essential talent pool to a growing global marketplace, where the world is learning that their deliverables are electronic and that they can be instantly delivered from virtually anywhere in the world, and soon it will be anywhere. Leadership is

*(continued on page 4)*

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# Forum's Winter Program

*(continued from page 1)*

lution by lay juries. Nonetheless, as construction lawyers, we are often faced with this prospect. How does one successfully present a fact-intensive, highly technical case to a jury? How does one portray the mega-firm or surety as a sympathetic party? The first session of the Winter Program will suggest answers to these and many other questions regarding construction disputes and our jury system. This portion of the program will be anchored by [Robert B. Thum](#) of [Thelen, Reid & Priest, LLP](#) and [Robert L. Ivey](#) of [Holland & Knight, LLP](#), both of Los Angeles, CA, who have won multi-million dollar jury awards in complex construction disputes. They will be joined by [Karyn J. Taylor](#) of The Strategic Image, Torrance, CA, a jury consultant who has been similarly successful in assisting attorneys in their presentations during construction jury trials. These jury trial warriors will review the basic considerations in preparing your construction case for a jury trial. They will address the use of "story" themes, hot button issues, expert presentations, graphics, high-tech presentation tools, personalizing your client, and "teaching" your jury basic engineering. Actual trial exhibits and computer animations from the panelists' past jury trials will make this presentation dynamic and entertaining.

Of course, in today's ever changing marketplace, sureties face their own set of dilemmas. The second portion of the Winter Program will begin with [Steven D. Nelson](#) of SureTec Information Systems, Inc., Dallas, TX, exploring a segment of



the surety market's departure from "standard" performance and payment bond provisions. He will address how and why such provisions are changing, the surety industry's appetite for tougher bond forms, and the impact of such changes on small, emerging and disadvantaged contractors. In keeping with the focus of truly current trends, [Mary Jeanne Anderson](#) of [Arch Insurance Company](#), Philadelphia, PA, will focus on emerging alternatives to traditional bonds. As we know, few insurance products have enjoyed the preferred status that surety bonds have held for over a century – federal, state, and local governments require them. Now surety bonds are being challenged by alternative products – why? This session will address the performance and viability of alternative products. Not to be lost is the surety's ever-present exposure to mold claims. [Lawrence B. Moelmann](#) of [Hinshaw & Culbertson, LLP](#), Chicago, IL, will educate us on the

nature of the contractor's and its surety's exposure to mold claims and whether this exposure can be transferred to an insurance carrier.

"Ethics, I don't need no stinkin ethics." Yeah, right! We all need all of the help we can get. The third session of the Winter Program will provide an hour of ethics credit on issues facing the construction lawyer. Construction experts, [Pamela Phillips](#) of [Rogers, Joseph O'Donnell & Phillips, PC](#) and [Mark Tuft](#) of [Cooper, White & Cooper, LLP](#), both in San Francisco, CA, will look at the minefield of ethical issues facing a construction lawyer. False Claims Act liability, multi-party representation problems and other hot button issues will be explored.

The final session of the Winter Program promises to be lively. Its focus is critical to us all – "Rethinking, Reworking and Reenergizing Construction Arbitration." Who of us has not recently complained about the

*(continued on page 4)*

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# Forum's Winter Program


*(continued from page 3)*

current state of arbitration and arbitration administration? An experienced panel consisting of [Robert S. Peckar](#) of [Peckar & Abramson, PC](#), New York, NY, [Stanley P. Sklar](#) of [Bell, Boyd & Lloyd, PLLC](#), Chicago, IL, [Stuart H. Sobel](#) of [Siegfried, Rivera, Lerner, De La Torre & Sobel, PA](#), Miami, FL, and [Victor A. Bullock](#) of [Sedgwick, Detert, Moran & Arnold, LLP](#), Los Angeles, CA, will tackle the nuts and bolts of arbitration from all perspectives. Of particular interest, this panel will lead a forum on dispute resolution in the construction industry – a view from 30,000 feet. What is

right/wrong with arbitration in the construction industry today? How can we make it work better? The program attendees will be given the unique opportunity to share their questions and opinions on the state of arbitration today and how it can be improved. We may not like the answers!

The luncheon speaker for the Program will be [Allyn Eric Kilsheimer, PE](#), of [KCE Structural Engineers, PC](#), Washington, DC. After being called to both the Pentagon and the World Trade Center on 9/11, Mr. Kilsheimer chose the Pentagon. He arrived on site at 1:30 p.m. on 9/11 and was the

lead engineer for the assessment, design and reconstruction of the Pentagon. He will provide insight into each phase of this complex, public and highly emotional project.

Please join us for a full day of insight and instruction on these issues of considerable significance to construction and surety lawyers alike. We look forward to seeing you in San Francisco at the wonderful [St. Francis Hotel](#). 

*[David A. Senter](#) is a partner with [Adams Kleemeier Hagan Hannah & Fouts, PLLC](#), in Greensboro, North Carolina, and is Co-chair of the 2004 Winter Program.*

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# Message

*(continued from page 2)*


defined by the capacity to produce results before crisis compels action; opportunity being the desired mother of invention. We are faced today with the opportunity to make our environment more technology friendly, more electronically inviting, more intuitive, more interesting, more graphic, more visual, more adaptable, more changeable, more searchable, more accessible, more informative, more, more.

In the months ahead, the Forum plans to introduce more technological advancements to its membership. We plan to showcase the Forum e-Library, an electronic library that we have designed for

the construction lawyer. It continues to be a dramatic work in process, with hundreds of additional titles and new resources added regularly throughout the year. We plan to continue to distribute it to our program attendees; a value added project that just happens to contain millions of resources. Our website continues to develop and expand as our Divisions increase the scope and extent of their research activities. Our books are showcased on-line, and can be purchased from your office desktop or your traveling laptop.

Also in the months ahead, we will be introducing wireless high speed

to our programs. We plan to set up hot zones around the program site, complete with multiple laptops for the use of the program attendees. We especially invite those of you who don't typically navigate the net to allow us to show you how. We will be demonstrating the e-Library, showcasing Forum publications and programs, and generally getting the word out to all our members about our technological advances.

Can you hear me now? 

***[Jim O'Connor](#) heads the Construction Law Group of the Maslon Law Firm of Minneapolis, MN***

# NEW FROM THE ABA FORUM ON THE CONSTRUCTION INDUSTRY



## Construction Damages And Remedies

*Charles M. Sink, C. Allen Gibson, Jr., Douglas S. Oles, Allen Holt Gwyn, Leslie O'Neal-Coble*

The latest Forum book, *Construction Damages And Remedies*, should be of value to every practitioner in the construction field. It can serve as a useful reference when evaluating a claim for settlement, drafting complaints and answers, negotiating risk allocation terms in a construction or design contract, or offering quantum evidence at trial.

Five experienced and highly regarded construction lawyers from across the country have produced the best available combination of:

- The historical sources and applications of various damages theories and equitable remedies, and the elements of proof by which they can be established and defeated.
- The array of damages to which participants in the construction process – owner, designer or constructor – are exposed.
- Practical suggestions based on the authors' substantial collective experience about the best techniques for presenting damages in a dispute.

Not only will the reader find extensive citations to leading case law in *Construction Damages And Remedies*, but in a unique innovation, the authors have also included citations to the West key number system, enabling the reader conveniently to cite additional case authorities both before and after publication of the book.

*Construction Damages And Remedies* is a resource that will be indispensable to any construction industry lawyer, from the newly involved to the seasoned veteran.

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415 pages

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# Announcement Corner

## 20 YEAR MEMBERS

The Forum honors the following members who are celebrating their twentieth year with the Forum:

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Victor Angeline, Linden, NJ  
Samuel J Arena, Philadelphia, PA  
Lynn R Axelroth, Philadelphia, PA  
John Calhoun Bales, Tampa, FL  
D Stan Barnhill, Roanoke, VA  
David F Bartz, Portland, OR  
Philip C Baxa, Richmond, VA  
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Farmington Hills, MI  
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Vionette Benitez-Quinones,  
San Juan, PR  
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William J Taylor, Philadelphia, PA  
Janice E C Teramae,  
San Francisco, CA

(continued on page 7)

## Season Pass Program

Remember the Forum's Season Pass Program when budgeting for your CLE in 2004. A season pass entitles you or someone from your firm to attend all three Forum programs held in 2004 at a discount. One pass (3 programs) provides a savings of 20%, two passes (6 programs) provide a savings of 25%, and three passes (9 programs) provide a savings of 33%. The programs for the upcoming year include:

**Midwinter Program, January 29, 2004 in San Francisco, CA.**

**Annual Meeting, May 6-8, 2004 in Scottsdale, AZ.**

**Fall Meeting, October 21-22, 2004 in Tampa, FL.**

To obtain more information about these programs, visit the Forum's website at: [www.abanet.org/forums/construction/html/future\\_programs.html](http://www.abanet.org/forums/construction/html/future_programs.html).

To order season passes, send your name, firm name, address, and phone number or e-mail address, along with number of passes desired and payment (or your credit card information) by fax to 312-988-5677 or by mail to the ABA Forum on the Construction Industry, Attention: Alanna Sullivan, 750 N. Lake Shore Dr., Chicago, IL 60611.

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## Announcement Corner


*(continued from page 6)*

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### FORUM WEBSITE

Visit the Forum website at <http://www.abanet.org/forums/construction/home.html>. You will find useful information on Forum [leadership](#), its [Divisions](#), [meetings](#) and [publications](#). You will also find links helpful to construction lawyers on the Division pages.

### LEADERSHIP OPPORTUNITIES

If you are interested in being involved in Forum leadership, the Forum is accepting nominations for Chair-Elect and three Governing Committee Members-at-Large. If you have any questions, call anyone in the Forum leadership – they will be happy to answer your questions about the nominating process and what it takes to be a Forum leader. 

## The Forum on the Construction Industry

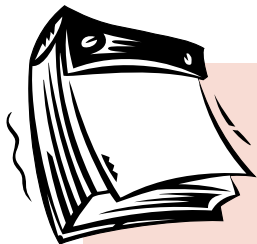
# CALENDAR OF MEETINGS

**Forum on  
Construction/TIPS  
Joint Midwinter Meeting**  
**January 29, 2004**  
Westin St. Francis Hotel  
San Francisco, CA

**Forum on Construction  
Annual Meeting**  
**May 6-8, 2004**  
Hyatt Regency Scottsdale  
Gainey Ranch  
Scottsdale, AZ

**Forum on Construction  
Fall Meeting**  
**October 21-22, 2004**  
Marriott Waterside Tampa  
Tampa, FL

*See you  
there!*



## Don't Miss the Next Forum Meeting!

### ANNUAL JOINT MEETING WITH THE FIDELITY & SURETY LAW COMMITTEE OF THE ABA TORT & INSURANCE PRACTICE SECTION

**WHEN:** January 29, 2004  
**WHERE:** [Westin St. Francis](#), San Francisco, CA  
**TITLE:** *Construction Dilemmas: Caught Between  
"The Rock" And A Hard Place*

**TELL ME  
MORE:** Sessions include:

- Practical-how to session on presenting construction claims to a jury
- New and onerous bond forms and market alternatives to traditional bond claims
- Mold and the surety
- Ethics for the construction attorney
- Rethinking, reworking and reenergizing construction arbitration

**LUNCHEON  
SPEAKER:** Allyn Eric Kilsheimer, P.E.  
*KCE Structural Engineers, PC  
Washington, DC*

*To register for the program, call the ABA at 877-309-1565.  
To request a brochure or download a registration form,  
see the Forum's website at: [www.abanet.org/forums/  
construction/home.html](http://www.abanet.org/forums/construction/home.html)*

As construction lawyers we frequently face dilemmas, but do not know where to look for answers or questions. This year's joint program by the Forum and the TIPS Fidelity & Surety Law Committee will provide you with resources to help identify, evaluate and resolve those dilemmas. One panel will dissect the practical issues confronted when selecting and presenting construction claims to juries. Experts in legal ethics will explore many hot button ethical issues. Experienced surety attorneys will tackle current surety issues such as alternatives to traditional bonds, new bond forms and mold liability risk-shifting. Another panel will revisit and consider reworking arbitration. Program attendees will be allowed to participate in a forum about what is right and what is wrong with arbitration today. Please join us for a lively day of insight and learning on these issues of considerable significance to construction and surety lawyers alike. We look forward to seeing you in San Francisco at the wonderful St. Francis Hotel!



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### UNDERCONSTRUCTION

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