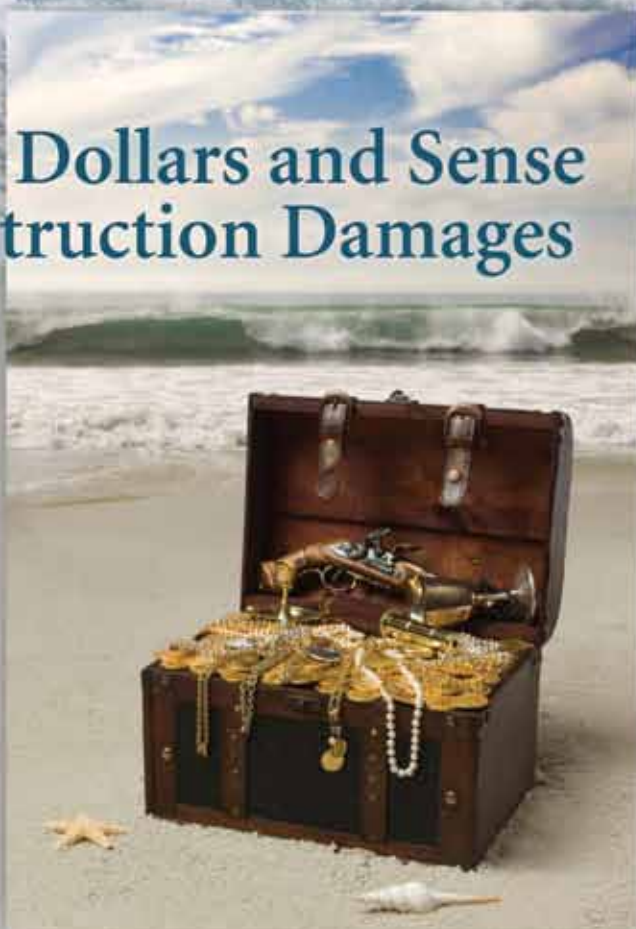




American Bar Association  
Forum on the Construction Industry

## 2013 Midwinter Meeting

### Making Dollars and Sense of Construction Damages



**January 31-February 1, 2013**  
Waldorf Astoria Naples, Naples, FL

Serving the Construction Industry Through Education,  
Leadership, and Fellowship of Construction Lawyers





# DEAR COLLEAGUES:

Got a great case? Ready to prove that the contract has been breached or a tort committed? Ready to defend that claim? In a construction case, establishing that your client has been wronged means little unless the wrong is compensated through an award of damages. A construction project gone bad can mean financial disaster to one or more of the parties. It is essential to a construction lawyer's practice to know the ways to maximize a damages award as well as to defend damages claims.

The Forum's 2013 Midwinter Meeting is designed to guide you through the world of construction damages. You will learn the latest legal strategies, the best ways to present your claim through the use of experts, and, perhaps most importantly, the mistakes to avoid. On Thursday, we will take on the cutting edge issues involving delay damages, the ways to draft contracts to control or eliminate damages, how to work with damage consultants for the best results, and the latest and greatest approaches to creating graphics to illustrate your damages claim. The day culminates in a mock trial that puts the damages expert through his paces. You, our audience, will judge which techniques are most successful.

Lunch meetings Thursday will be hosted by the Forum's Divisions, with each lunch focusing on a different subject within construction law. You will have the chance to choose your topic and to network in a smaller setting with those similarly interested in that topic.

Friday morning, the program offers two sets of concurrent workshop sessions, featuring in-depth coverage of particular damages issues. In one, the curtain is pulled back to reveal what is behind industry studies that attempt to measure lost labor productivity. Another explores the costs recoverable when a contract is terminated for convenience. Damages that can be claimed on "green" (sustainable) projects and alternative remedies when money damages are inadequate are the subjects of the last two workshops sessions. The program concludes with the ethics issues raised when one goes too far in presenting a damages claim.

Following the program, the beauty of Naples calls us to outdoor events. Join us on the hotel's white sand beach where a sand castle competition will test your building skills. A golf tournament on a championship course and a boating outing by mangrove islands also beckon. The hotel also offers a beautiful pool area, a secluded beach on the Gulf, and a spa for pampering of body and soul. Fine restaurants, upscale shopping, a charming old town district and a variety of cultural attractions are minutes away.

So come to Naples this winter for a sun break. Enjoy the sparkling Gulf of Mexico at a first class resort while attending a great education program!

## PROGRAM CO-CHAIRS

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# PROGRAM SCHEDULE

**Wednesday,  
January 30, 2013**

**10:00 AM – 5:00 PM**

**Advance Registration Open**

**3:00 PM – 5:00 PM**

**On-site Registration Available**

**Thursday,  
January 31, 2013**

**7:30 AM – 5:00 PM**

**Registration/Exhibition Open**

**7:30 AM – 8:30 AM**

**First Time Attendee & New  
Member Breakfast**

**Continental Breakfast**

**8:30 AM – 8:45 AM**

**Welcome from the Forum Chair**

**Opening Remarks and Announcements**

**8:45 AM – 9:45 AM**

**PLENARY 1**

**DELAY DAMAGES –**

**What's Hot, What's Not**

A review of the latest legal developments involving delay damages. Hear the latest on total cost claims, cumulative impact claims, the use of Eichleay and other formulas for extended home office overload, as well as liquidated vs. actual owner damages.

**Dennis A. Estis**

Greenbaum, Rowe, Woodbridge, NJ

**Mary Beth Hagan**

Hagan & Farrar, PLLC, Murfreesboro, TN

**Dorothy E. Terrell**

Smith Pachter McWhorter, PLC, Vienna, VA

9:45 AM – 10:45 AM

## **PLENARY 2**

### **CONTRACT DRAFTING TO REDUCE OR ELIMINATE DAMAGES – What are the Limits?**

Contract provisions that set, reduce or eliminate damages for breaches of contract have never been more popular. This session covers “No Damages for Delay” clauses, Consequential Damages waivers, liquidated damages clauses, reverse liquidated damages clauses, and other clauses limiting claims or particular liabilities. How are these clauses interpreted and when will they be enforced?

**Linda Dickhaus Agnant**

Casey Ciklin Lubitz Martens & O’Connell,  
West Palm Beach, FL

**Buck S. Beltzer**

Holland & Hart, Denver, CO

**Jaimee L. Nardiello**

Zetlin & DeChiara, New York, NY

**Joseph D. West**

Gibson Dunn, Washington, DC

10:45 AM – 11:00 AM

## **Break**

11:00 AM – 12 NOON

## **PLENARY 3**

### **WORKING WITH DAMAGES CONSULTANTS: Ten Steps to Success**

What are the best practices in working with experts and how should you deal with your opponent’s experts? Learn the 10 steps to success from retaining the expert, discovery issues, preparing expert reports, Daubert Challenges – fighting junk science, through trial.

**William E. Franczek**

Vandeventer Black, Norfolk, VA

**Kenneth P. Metcalfe**

Kenrich Group, Washington, DC

**Peter J. Torcicollo**

Gibbons P.C., Newark, NJ

12:15 PM – 1:30 PM

## **Division Program Lunches**

1:30 PM – 1:45 PM

## **Break**

1:45 PM – 2:30 PM

## **PLENARY 4**

### **PREPARING THE DAMAGES EXPERT FOR TRIAL**

Watch a top damages expert work with the attorney on how his testimony will be presented. Learn dos and don’ts from the pros.

**Roy Bash**

Polsinelli Shughart, Kansas City, MO

**Patrick A. McGeehin**

FTI Consulting, West Palm Beach, FL

2:30 PM – 3:30 PM

## **PLENARY 5**

### **GRAPHICS FOR DAMAGES PRESENTATIONS – Putting the Pow into Ow**

See the cutting edge techniques that can be used in to present damages through exhibits and technology. Be ready with “Plan B” if the judge excludes the exhibit or the technology doesn’t work. Finally, hear a discussion of just what is demonstrative evidence. Is it “evidence” at all?

**Brian W. Bennett**

Page, Eichenblatt, Bernbaum & Bennett,  
Orlando, FL

**Michael Boucher**

Trial Consulting Services, LLC, Tampa, FL

3:30 PM – 3:45 PM

## **Break**

3:45 PM – 5:00 PM

## **PLENARY 6**

### **MOCK TRIAL – Direct and Cross Examination of the Damages Expert**

Watch a live reenactment of a damages expert testifying at trial. The audience will be asked to register approval/disapproval at key points. Real time results will be discussed and practice pointers will be offered by a jury consultant.

**James Adrian**

Adrian International, Peoria, IL

**Ann Greeley**

DecisionQuest, State College, PA

**Daniel D. McMillan**

Jones Day, Los Angeles, CA

**Paul Sandars**

Lum, Drasco & Positan, Roseland, NJ

5:00 PM

## **Opening Day Concluding Announcements**

6:00 PM – 8:00 PM

## **Welcome Reception**

**Poolside, Waldorf Astoria Naples**

Co-Sponsor: Florida Bar RPPTL, CLC

## Friday, February 1, 2013

7:30 AM – 8:45 AM

**Continental Breakfast**

**Diversity Breakfast**

7:30 AM – 12:30 PM

**Registration/Exhibition Open**

8:50 AM – 9:00 AM

**Opening Remarks & Announcements**

9:00 AM – 10:00 AM

### **WORKSHOP A THE REALITY BEHIND THE THEORY OF LOST LABOR PRODUCTIVITY CLAIMS**

What is the value of industry studies that attempt to measure loss of labor productivity from various causes. Do such industry studies provide a sufficient basis for an expert opinion on lost productivity? How should these studies be used in court or arbitration?

**W. Alexander Moseley**  
Hand Arendall LLC, Mobile, AL

**William Ibbs**  
University of California, Berkeley, CA  
The Ibbs Consulting Group

**Lee Schumacher**  
ARCADIS U.S., Inc., Middletown, CT

**Paul Stynchcomb**  
FTI Consulting, Rockville, MD

9:00 AM – 10:00 AM

### **WORKSHOP B TERMINATIONS FOR CONVENIENCE: You Want Me to Pay You What?**

Learn what different costs can be recoverable under common variations of termination for convenience clauses. This workshop also tackles the thorny issue of whether the owner should pay the contractor a profit for not building the project. Can the clause be modified to provide a middle ground? And what happens when there is a wrongful termination for convenience?.

**Ben Patrick**  
Watt Tieder Hoffar & Fitzgerald, Miami, FL

**Stephen M. Seeger**  
Seeger, PC, Washington, DC

10:00 AM – 10:15 AM

**Break**

10:15 AM – 11:15 AM

### **WORKSHOP C PROJECT NOT GREEN ENOUGH? What Types of Green \$\$\$ Can An Owner Recover?**

We know, we know -- you are tired of hearing about green building lawsuits. But this program starts with explaining why there have been so few cases in this field to date. Next it turns to upcoming developments in the green building industry that will make lawsuits more likely. Finally, it explores what future damage claims will look like when a project is not green enough, as well as ways to reduce the risk of such damages.

**Christopher W. Cheatham**  
Cheatham Consulting, LLC,  
Shawnee Mission, KS

**Angela R. Stephens**  
Stites & Harbison, PLLC, Louisville, KY

10:15 AM – 11:15 AM

### **WORKSHOP D WHEN DAMAGES AREN'T ENOUGH**

Sometimes a monetary damages award won't make things right. What alternative and unusual remedies may be available besides money? Included in the discussion are remedies involving equitable relief, specific performance, injunctions and accountings.

**William G. Geisen**  
Graydon Head & Ritchey, LLP, Ft. Mitchell, KY

**Denise Morris Hammond**  
Wright, Fulford, Orlando, FL

**Michael S. McNamara**  
Pillsbury Winthrop Shaw Pittman, LLP,  
Washington, DC

11:15 AM – 11:30 AM

**Break**

11:30 AM – 12:30 PM

### **PLENARY 7 ETHICS: THROWING IN THE KITCHEN SINK – How Far Can You Go in Presenting Damages in Litigation and Mediation?**

This workshop takes on the ethical concerns involved in prosecuting or defending damages claims. Does it matter whether the forum is court, arbitration or mediation? When might a damages claim lack a good faith basis such that the claim or lien ends up voided? When might the client or attorney be liable for damages or sanctions? What practical steps should the attorney take to protect both her client and herself?

**Kirsten K. Davis**  
Stetson University College of Law, Gulfport, FL

**Patrick J. Poff**  
Trenam Kemker, Tampa, FL

12:30 PM

**Program Closing Remarks**



# EVENT HIGHLIGHTS

## SPONSORS and EXHIBITS

Visit Forum Sponsors in the Exhibits Area! The Forum Exhibits Area brings a variety of companies together in one place with capabilities fitting the unique needs of construction lawyers. The Exhibits Area will be open Thursday, January 31, 7:30 AM – 5:00 PM and Friday, February 1, 7:30 AM – 12:30 PM. Thanks to all of the Forum Sponsors for their continued support of the Forum!

## DIVERSITY BREAKFAST

Join us Friday morning at the Diversity Breakfast Program, sponsored by the Forum Diversity Committee.

## WELCOME RECEPTION

Start your Thursday evening at the Midwinter Meeting Welcome Reception, by the pool at the Waldorf Astoria Naples. Enjoy great food, drinks and music at the social highlight of the program! All registered attendees are invited to the Welcome Reception, included in your registration fee. Guest passes are available for an additional fee, paid during your registration process. **Special thanks to the Construction Law Committee of the Florida Bar's Real Property Probate & Trust Law for co-sponsorship.**

## CASTLES IN THE SAND

Hear Ye, Hear Ye, Come One, Come All! On Friday, February 1st (between 1 and 5 PM), castles will be rising out of the sand, designed and built by our colleagues and friends. We invite you to join a Division Team, Young Lawyers or band together to compete to build the best sandcastle (or feel free to simply stroll along and cheer on the teams). The teams stretched along the beachfront will meticulously sculpt their piles of sand, enjoying four hours of camaraderie and magically transforming sand into imaginative castles. The designs are environmentally friendly, too – no dyes or glues. Only basic tools, buckets and sand toys allowed. Teams are encouraged to use shells, stones, seaweed and other embellishments found on the beach for ornamentation. Celebrity judges will rate castles on originality of concept, artistic execution of the concept, technical difficulty, carving technique, and utilization of the site, along with best team spirit, best team signage and public favorite. Trophies will be awarded for Best Overall Sandcastle, Best All American Castle, Best Traditional Castle, Most Fanciful Castle, Most Architectural Castle, Most Comical Castle, Most Complex Castle and Most Realistic Castle.

**Registration Fee - \$10/adult and \$5/child**

## NAPLES AREA ATTRACTIONS

### Beaches

The Paradise Coast is famous for its sugar-white sand beaches that stretch from Barefoot Beach Preserve at the northern tip of Collier County, through the city of Naples, along the four miles of Marco Island's crescent shoreline and into the deserted Ten Thousand Islands region of the Everglades.

### Fifth Avenue South - Main Street

Explore the many unique boutiques, gift stores, art galleries, restaurants, bars and pubs along Fifth Avenue South, Naples' historic Main Street. Enjoy street musicians and entertainment, as well as many other special events.

### Third Street South and the Avenues Shopping District

Shop, dine and stroll Third Street South and the Avenues Shopping District, Naples' most romantic and chic shopping area. Historic buildings and exquisite architecture house shops and restaurants offering the essential Naples experience. The district is two blocks from Naples beach and the nightly sunsets.

### Naples Botanical Garden

Always in bloom, the garden's tropical location gives guests a year-round choice of themed landscapes from around the world, offering diverse flora from locations such as Brazil, Asia, the Caribbean, and Florida.

### Everglades National Park

Everglades National Park is the only subtropical wilderness in the U.S. It contains temperate and tropical plant communities, as well as marine and estuarine environments. Take a boat trip from the Gulf Coast Visitor Center to see dolphins, birds and other wildlife.

### Big Cypress National Preserve

A 729,000-acre unit of the National Park Service in south Florida, it is part of the Everglades ecosystem and a critical watershed for the Ten Thousand Islands area to the southwest. A diverse wild area of cypress swamps, prairies, pinelands, hardwood hammocks and mangrove estuary, the preserve is also home to a variety of wildlife.

### Naples Museum of Art

Located in the Philharmonic Center for the Arts Complex, the Naples Museum of Art is Southwest Florida's only full-scale art museum. Fifteen galleries showcase permanent collections and traveling exhibits.

For more information on area attractions, visit [www.paradisecoast.com](http://www.paradisecoast.com).

# CONFERENCE INFORMATION

**1. HOTEL INFORMATION:** The conference will be held at Waldorf Astoria Naples; Phone: 888-722-1267. Visit the hotel's website at <http://waldorfastorianaples.com/> for further information.

**2. HOTEL RESERVATIONS:** The Forum has negotiated a special room rate of \$256 (including resort fee) plus 10% tax per night for a single/double room. You may call the hotel directly at 888-722-1267 or 239-594-6321 and mention the ABA Forum on the Construction Industry 2013 Midwinter Meeting. We have reserved a limited block of rooms through January 8, 2013. You must register for the conference prior to making your hotel reservation. After this date, and if we are sold out of our block, rooms will be assigned on a space available basis at a rate the hotel chooses. All changes and cancellations to guaranteed hotel reservations must be made with the hotel at least 72 hours before the scheduled day of arrival to avoid a one night's cancellation charge.

**3. AIR TRAVEL:** Airfare discounts to ABA meetings are available through ABA Orbitz for Business. To book online, go to [www.americanbar.org/travel](http://www.americanbar.org/travel) > click on the Orbitz for Business logo at the top of the page > read the instructions under the "Travel Paid by Self" box. For assistance with online or offline reservations using the ABA Orbitz for Business website, call toll free 877-222-4185.

**GROUND TRAVEL:** The Waldorf Astoria Naples is approximately 30 miles or a 40-minute drive from Southwest Florida International Airport (RSW) Airport in Fort Myers. Approximate taxi fare is \$65 each way. For other travel options, please visit [www.americanbar.org/groups/construction\\_industry](http://www.americanbar.org/groups/construction_industry).

**4. PROGRAM REGISTRATION:** Online registration (and a printable form) will be available November 1, 2012 at [www.americanbar.org/groups/construction\\_industry](http://www.americanbar.org/groups/construction_industry). In order to be included in the list of program attendees, you must register by January 4, 2013. Guest tickets for special events are available for an additional fee and may be purchased at the time of registration.

**5. ONSITE REGISTRATION** is available for those persons who missed the registration deadline. If you plan to register at the door, please call the Forum at 312-988-5579 on or before Friday, January 25, 2013, to confirm that space is still available. Failure to call in advance may preclude admission to a sold out conference. Onsite registrants must pay the registration fees by check, money order, Visa, MasterCard, or American Express. NO registrations will be accepted without payment.

**6. TUITION AND SCHOLARSHIP INFORMATION:** Tuition includes admission to the program, welcome reception, continental breakfasts, beverage breaks, luncheon, and course materials. The Forum will be providing program materials on CD-ROM only in effort to help green the environment. Please contact Bridget Miller at [Bridget.Miller@americanbar.org](mailto:Bridget.Miller@americanbar.org) for scholarship information.

**7. CANCELLATION POLICY:** Registrants who are unable to attend the conference will receive a refund less a \$50 administrative fee if written cancellation is received by January 18, 2013. Cancellations may be faxed to 312-988-5677. No refunds will be granted after January 18, 2013. Substitutions are acceptable, or conference materials will be sent in lieu of a refund after the program. The ABA reserves the right to cancel any programs and assumes no responsibility for personal expenses.

**8. CLE CREDIT:** ABA programs ordinarily receive CLE credit in AK, AL, AR, AZ, CA, CO, DE, FL, GA, GU, HI, IA, ID, IL, IN, KS, KY, LA, ME, MN, MS, MO, MT, NH, NM, NV, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, VI, WA, WI, WV, and WY. These states sometimes do not approve a program for credit before the program occurs. This transitional program is approved for both newly admitted and experienced attorneys in NY. For more information about CLE accreditation in your state, visit [www.americanbar.org/groups/construction\\_industry](http://www.americanbar.org/groups/construction_industry) or contact Bridget Miller at [Bridget.Miller@americanbar.org](mailto:Bridget.Miller@americanbar.org).

**9. MEMBERSHIP:** To encourage registrants to join the ABA Forum on the Construction Industry, the reduced member's tuition rate will be extended to registrants who join the Forum when they register for the conference. Forum membership dues are \$50 for attorneys/associates and \$5 for law students. Membership in the ABA and one Section is a prerequisite to Forum membership. Please include a separate check (payable to the American Bar Association) for membership dues.

**10. RPPTL, CLC MEMBERS:** Members of the Florida Bar, RPPTL, Construction Law Committee, are invited to attend at the same rate as offered to members of the Forum.

**11. 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. Sec. 1.162-2) *Coughlin v. Commissioner*, 203 F.2d 307 (2nd Cir. 1953.)

**12. AMERICANS WITH DISABILITIES ACT:** If special arrangements are required for disabled individuals to attend this program, please contact the Forum in writing by December 28, 2012 at the American Bar Association, 321 N. Clark Street, Chicago, Illinois, 60654. Email: [Bridget.Miller@americanbar.org](mailto:Bridget.Miller@americanbar.org).

**13. DRESS:** In keeping with Forum tradition, participants are encouraged to wear business casual attire during the programs and to the special events.

**14. FOR THE LATEST PROGRAM INFORMATION:** Please visit the ABA Forum on the Construction Industry's website: [www.americanbar.org/groups/construction\\_industry](http://www.americanbar.org/groups/construction_industry). For further information on the city, travel, activities and entertainment options, visit [www.paradisecoast.com](http://www.paradisecoast.com). Contact [Bridget.Miller@americanbar.org](mailto:Bridget.Miller@americanbar.org) with questions.



American Bar Association  
321 North Clark Street MS 18.2  
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# SAVE THE DATE

## Annual Meeting 2013

APRIL 25-27, 2013  
St. Regis Monarch Beach, Dana Point, CA

## Fall Meeting 2013

SEPTEMBER 26-27, 2013  
Omni Shoreham, Washington, DC

Online  
Registration  
Available  
November 1

at [www.americanbar.org/groups/construction\\_industry](http://www.americanbar.org/groups/construction_industry)

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