

# 26TH ANNUAL CONSTRUCTION LAW CONFERENCE



FEBRUARY 28 & MARCH 1, 2013  
THE WESTIN LA CANTERA RESORT  
SAN ANTONIO, TEXAS

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**The Construction Law Section  
of the State Bar of Texas**

*in cooperation with*

**The Texas Institute of  
Continuing Legal Education**

# 26TH ANNUAL CONSTRUCTION LAW CONFERENCE

February 28 & March 1, 2013 ♦ The Westin La Cantera Resort ♦ 16641 La Cantera Parkway ♦ San Antonio, Texas 78256

## WEDNESDAY, FEBRUARY 27, 2013

- 12:30 **GOLF TOURNAMENT** – Shot Gun Start  
The Resort Course on the grounds of The Westin La Cantera Resort
- 6:30 **RECEPTION** – In cooperation with the Young Lawyers Council of the Construction Law Section – Sponsored by HSSK

## THURSDAY, FEBRUARY 28, 2013

*PRESIDING OFFICER: William B. Short, Jr., Dallas*

- 8:00 **LATE REGISTRATION** – Ballroom Foyer, Westin La Cantera Resort, 16641 La Cantera Pkwy., San Antonio, TX 78256, (210) 558-6500
- 8:00 **CONTINENTAL BREAKFAST** – Sponsored by Nelson Architectural Engineers, Inc.
- 8:50 **WELCOME ON BEHALF OF THE CONSTRUCTION LAW SECTION**  
William K. Andrews, Houston
- 9:00 **CASE LAW UPDATE** – Recent case law and other developments impacting the construction industry.  
Gregory M. Cokinos, Houston
- 9:45 **“NO DAMAGES FOR DELAY” – DOES IT ACTUALLY MEAN WHAT IT SAYS?** – The recent Court of Appeals decision in the *Zachry Construction v. The Port of Houston* case calls into question the viability of the so-called common law exceptions to “no damages for delay” clauses. We will review that decision, including the issues presented in the appeal to the Texas Supreme Court, and also cover the practitioner’s options for dealing with “no damages” clauses.  
Jeffrey A. Ford, Dallas
- 10:30 **BREAK** – Sponsored by Synergen Consulting
- 11:00 **CONSTRUCTION INDUSTRY DISPUTES: “THE GOOD, THE BAD, & THE UGLY”** – The art of mediation has changed since the passage of the Texas ADR Statute in 1987. This panel of ADR professionals will address current developments and recent trends in mediation that affect litigation, arbitration and ethical considerations. Topics include: Dealing with Insurance coverage issues; Strategies for taming the multi-party beast; How to break logjams at mediation; and Do’s, Don’ts and Maybe’s at Mediation. The panel’s primary focus will be to discuss and highlight areas they see from multiple years of experience within the ADR world that will assist you in becoming a more effective and better prepared advocate for your client(s) at mediation.  
Moderator: Jerry Hoover, Houston  
Panelists: Steven D. Nelson, Austin  
Richard Paul Flake, Houston  
Stephen K. Yungblut, Arlington
- 12:00 **LUNCHEON** – *RSVP at no cost prior to 2/15. Tickets available for \$31 each after 2/15.*  
*1.00 Ethics* **Topic: THE ETHICAL CONSTRUCTION LAWYER IN TODAY’S CLIMATE** – The good old days may not have been as good as we remembered, and the future may not be as bad as we expect. How can we best balance being ethical lawyers with the need to represent the client “zealously,” especially in a difficult economy? The goal of this presentation is to take a look at these ethical issues, without ruining your lunch.  
Jeffrey R. Jury, Austin
- 1:30 **LEGISLATIVE UPDATE** – An update on the construction related bills filed (to date) in the 83rd Regular Legislative Session, as well as a discussion of the anticipated construction related issues that are likely to be addressed.  
Robert C. Bass, Jr., Austin
- 2:00 **THERE’S A WHOLE OCEAN OF LIENS UNDER OUR FEET** – An overview of the liens against mineral property provided under Chapter 56 of the Texas Property Code.  
Vijay A. D’Cruz, Houston

- 2:30 **TRICKS & TRAPS OF MULTI-FAMILY/CONDOS** – A review of contractual risk transfer strategies, construction defect avoidance and responsibility, insurance strategies, standing, causes of action and defenses applicable to new Multi-Family/Condo projects and post completion Condo Conversions from the differing perspectives of Owners, Contractors and Designers.  
Thomas W. Myers, Houston
- 3:00 **BREAK** – Sponsored by Interface Consulting International, Inc.
- 3:30 **ROBINSON, DAUBERT, AND MCGINTY V. HENNEN: UPDATE ON EXPERTS AND EVIDENCE IN CONSTRUCTION CASES** – First the courts gave us *Robinson and Daubert*. The trial judge became the gate keeper for admissibility of expert opinion. In *Havner* and *Khumo* cases, the courts tightened the requirements for admissibility of expert opinion. Now we have *McGinty v. Hennen*, a disaster for a plaintiff if ever there was one. How do you get the evidence in? How much evidence do you need? What do you need to prove?  
David D. Peden, Jr., Houston
- 4:00 **INSURANCE UPDATE** – An update on important insurance law cases that impact the construction industry.  
Lee H. Shidlofsky, Austin
- 4:30 **THE CERTIFICATE OF MERIT: FIELD OF OPPORTUNITY AND PERIL** – Join two construction litigators in a walk through the statutory requirements and case law developments related to the Certificate of Merit, and learn about the litigation strategies, tactics, and potential risks – including possible malpractice exposures – that await the uninitiated when lodging claims against and defending design professionals in Texas.  
Matthew C. Ryan, Austin  
G. Stewart Whitehead, Austin
- 5:15 **RECEPTION** – Sponsored by Rimkus Consulting Group, Inc.

## FRIDAY, MARCH 1, 2013

- 7:00 **CONTINENTAL BREAKFAST**
- 7:15 **BREAKFAST BREAKOUTS** – *Choose one of four sessions. Open to all registrants on a first-come, first-served basis until all seats are full.*
- Breakout #1* **P-3: COMING SOON TO A PROJECT NEAR YOU** – TxDot has been authorized to use Public Private Partnerships (P-3) for highway construction since 2003. In 2011 the legislature authorized other state and local governmental entities to use P-3. This hybrid delivery system is changing how cash-strapped governments develop projects – and how creative contractors and developers promote new work. We will consider lessons from the TxDOT experience, examine the process that SB 1048 requires for non-highway P-3 projects, and discuss issues that participants will face in this new hybrid form of project development.  
Curtis W. Martin, Houston
- Breakout #2* **THE NEW NORMAL IN RESIDENTIAL CONSTRUCTION** – The housing boom of the early 2000s has led to an uptick in residential construction disputes. Since that boom ended, there has been an explosion in multi-family residential construction. Add to this the 2009 expiration of the Texas Residential Construction Commission Act (“TRCCA”), the rise in importance of the Residential Construction Liability Act (“RCLA”), and recent court opinions related thereto. Construction parties must rethink how to best navigate residential disputes, and draft effective contract clauses. This presentation will cover these topics and other recent key developments in residential construction law.  
Ian P. Faria, Houston

- Breakout #3* **PRACTICAL GUIDANCE FOR WORKING WITH SURETIES ON PERFORMANCE BOND CLAIMS: HOW TO GET STARTED, WHAT TO EXPECT, WHAT TO HAVE READY, AND WHAT TO CONSIDER COMPROMISING** – Wonder how to checkout bonding company financial strength? How to trigger a claim under a performance bond? What to expect from the first meeting and how to make things more streamlined once the surety does come to see you? What might be realistic expectations of a surety in a claim situation and why? How you can best prepare to make a deal with the bonding company? In this topic we will briefly examine why a performance bond surety behaves the way it does and practical tips on how to respond. The focus of this presentation will be getting to the completed project, not the perfect lawsuit.  
Brian R. Gaudet, League City
- Breakout #4* **SOCIAL MEDIA IN YOUR PRACTICE** – Social media either has impacted or will impact your practice. Topics include: discovery strategies, ideas, and techniques utilizing social media, ethical implications of obtaining social media information, and admissibility of information obtained through social media.  
William Stewart Shurtleff, Dallas
- 8:30 **TOP 10 TOPICS IN FEDERAL CONTRACTS** – The Federal Government spends hundreds of \$billions each year on contracts but it can be a minefield which is unforgiving of missteps. This session will explore ten of the hot areas in federal contracts and especially new developments that contractors must know about.  
James F. Nagle, Seattle, WA
- 9:15 **POST-ACCIDENT INJURY INVESTIGATIONS: THE FIRST WEEK** – We will explore the goals of injury investigations (know your client’s wishes, desires and needs), the need for legal leadership of the investigating team, privilege issues, development of subsequent remedial measures. How you do it: a) What to bring; b) Arrival on site; c) Who to talk to/who assists; and d) practical discussion of conduct of investigation.  
Jeffrey A. Brannen, Dallas
- 10:00 **PERSPECTIVES ON DISPUTED WORK/TIME** – What happens when Owner directs drastic changes to the scope of the project? How does the Contractor respond when changes have the potential to put Contractor out of business? We will focus on relevant contract language, the distinction between change orders and construction change directives, and remedies available to both Owner and Contractor when disputes over changes threaten to shut down construction.  
Mitzi T. Shannon, El Paso
- 10:30 **BREAK** – Sponsored by McCullough & Associates
- 11:00 **RUNNING WITH SCISSORS – INHERENTLY DANGEROUS INSURANCE DRAFTING PRACTICES** – This session will center on the elimination of antiquated terminology, drafting of enforceable requirements, interaction with indemnity, and recommendations for obtaining “evidence” of insurance. Specific coverages to be addressed include general liability, auto, workers’ compensation, umbrella/excess liability, contractor’s professional liability and pollution liability, and builder’s risk.  
Charles E. Comiskey, Houston
- 11:45 **LUNCHEON** – *RSVP at no cost prior to 2/15. Tickets available for \$32 each after 2/15.*  
*1.00 Ethics* **Topic: TRYING THE CASE ECONOMICALLY** – Cost/Risk/Reward of small case litigation.  
David P. Benjamin, San Antonio  
David P. Boyce, Austin
- 1:15 **BLINDSIDED: STATUTES THAT CAN TRIP-UP THE UNSUSPECTING LAWYER** – In this session, seemingly benign or little-known statutes that can impact the construction law practitioner will be identified and discussed.  
Laird E. Lawrence, Dallas

# HOTEL INFORMATION

## 26th ANNUAL CONSTRUCTION LAW CONFERENCE February 28 & March 1, 2013

The Westin La Cantera Resort • 16641 La Cantera Parkway • San Antonio, TX 78256

A special block of rooms has been reserved at The Westin La Cantera Resort at the special rate of \$209 for single/double. The hotel will release all unused rooms on the **CUTOFF DATE of JANUARY 31, 2013**. When contacting the hotel you must identify yourself as a participant with this conference in order to obtain the special rate in our room block. **Please call the hotel directly at 210/558-6500 to make your reservation.** We recommend that you make your reservations immediately if you plan to attend this course.

# REGISTRATION FORM

**Mail to:** Texas Institute of Continuing Legal Education  
26th Annual Construction Law Conference  
P.O. Box 4646  
Austin, Texas 78765-4646

**Online at:** [www.clesolutions.com](http://www.clesolutions.com)

**Fax Form to:** 512/451-2911 (must be accompanied by American Express, Visa or Mastercard Information)  
**or Phone:** 512/451-6960

### Please register me for the conference as follows:

- Regular Pre-Registration Fee (due by 5 p.m. February 15).....\$500.00
- Pre-Registration for Construction Law Section Members.....\$450.00  
(due by 5 p.m. February 15)
- Registration *after 5 p.m. February 15 & before 5 p.m. February 22*.....\$+50.00
- Registration *after 5 p.m. February 22* and at the door.....\$+100.00
- Construction Law Section Dues (eligible for the member registration fee)..... \$ 30.00
- \_\_\_ Thursday Luncheon Ticket RSVP (\$31.00 each *after February 15*).....\$ \_\_\_\_\_
- \_\_\_ Friday Luncheon Ticket RSVP (\$32.00 each *after February 15*).....\$ \_\_\_\_\_

- I will play in the Golf Tournament on Wednesday, February 27, 2013**  
Green Fee (includes range balls and shared cart).....\$155.00  
My handicap is \_\_\_\_\_. **Required**

### Conference Materials: Choose ONE

Registrants have the option of choosing between electronic or printed versions of the conference materials. Please choose one option below. If you would like to receive both the USB and printed materials, an additional \$54.13 must be included with your registration.

- USB Version (includes hard copies of PowerPoint presentations for note-taking)
- Printed Version (3-Ring Binder)
- Both USB & Printed Version at \$50 + .0825 tax.....\$54.13

*I cannot attend the conference. Please forward the following:*

- Audio CDs & course materials ( USB *or*  Printed) at \$450 + .0825 tax.....\$487.13
- Course materials only ( USB *or*  Printed) at \$180 + .0825 tax.....\$194.85

**TOTAL ENCLOSED**.....\$ \_\_\_\_\_

**No refunds after 5:00 p.m. Friday, February 22, 2013. Cancellation policy on back cover. (Call for Government and Student Discount Information)**

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Billing Address (including zip): \_\_\_\_\_

Authorized Signature \_\_\_\_\_

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1:45 **THE IMPACT OF DELIVERY SYSTEMS ON LITIGATION STRATEGIES** – How various delivery systems affect procedural and substantive issues including statutes of limitation, joinder and liquidating agreements.

Allison J. Snyder, Houston

2:15 **THE CHALLENGES OF PROJECT CLOSEOUT** – How do savvy owners, lenders, contractors and subcontractors determine when and how to pay the final retainage draw according to the new lien law amendments.

Thomas J. Walthall, Jr., San Antonio

2:45 **BREAK** – Sponsored by Demand Construction Services, Inc.

3:00 **FIRST PARTY INSURANCE/CONSTRUCTION DEFECT CLAIMS** – While liability policies often receive much attention, first party coverages such as builders risk and permanent property coverages can play a key role in paying many claims for defective construction.

Patrick J. Wielinski, Irving

3:45 **THE STRATEGIC USE OF TORT CLAIMS IN CONSTRUCTION CASES** – We have all seen torts pled in construction cases to avoid priority defenses, invoke insurance coverage, establish individual liability, or prevent debt discharge in bankruptcy. However, the decision to utilize a tort theory in a construction case may have unanticipated consequences. This topic explores advantages/disadvantages and ethical issues surrounding the use of torts in construction cases.

Bret A. Sanders, Austin

4:15 **ADJOURN**

### Yes, there *is* such a thing as a free lunch!

*In continued celebration of the conference's 25th Anniversary in 2012, the 2013 luncheons are complimentary to those who indicate their RSVPs prior to February 15th. After that date, lunch tickets may be purchased at the designated price.*

## CHAIR, CONSTRUCTION LAW SECTION

William K. Andrews, Andrews Myers, P.C., Houston

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William B. Short, Jr., Coats | Rose, Dallas

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Stephen K. Yungblut, Pratt & Yungblut, P.C., Arlington

.25 Ethics



*26th Annual*  
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**San Antonio, Texas**

**Cover Art - A Tribute to Byron Fullerton** — "Autumn River" is an original by Byron Fullerton from Austin, Texas. Byron's artwork has graced the covers of our conference brochures for over 25 years. We were saddened to learn of his passing in the fall of 2011 and continue to honor his memory and artistic talent by featuring this special piece for the 26th Annual brochure.

**Special Accommodations** — If special arrangements are required for a person with a disability to attend this program, please contact us at 512/451-6960.

**Visit Our Website** — Visit the Construction Law Section's website at [www.constructionlawsection.org](http://www.constructionlawsection.org) for information on how to join the Section and access past conference papers.

**Pre-Registration** — To ensure sufficient materials are available for all attendees, pre-registration is strongly encouraged. Late registration is subject to additional fees.

**Online Registration** — Visit [www.clesolutions.com](http://www.clesolutions.com) to register online using a Visa, MasterCard or American Express.

**Registration by Telephone** — You may register by telephone by calling 512/451-6960 or by fax 512/451-2911. Faxed and phone-in registrations require a Visa, MasterCard or American Express number, expiration date and security code.

**Cancellations and Refunds** — Refunds, less a \$50.00 processing fee, will be given to registrants who cancel by 5:00 p.m. on the Friday preceding the conference. No refunds will be granted thereafter. Course materials and audio CDs will automatically be mailed to prepaid registrants who did not receive a refund and were not able to attend.

**2013 PLANNING COMMITTEE**

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Houston

Matthew C. Ryan, Section Chair-Elect  
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*This course has been approved for 14.50 hours credit (including 3.00 hours ethics) which will apply toward MCLE, the College of the State Bar of Texas and the Texas Board of Legal Specialization in the fields of Real Estate Law, Personal Injury Trial Law, Civil Appellate Law and Civil Trial Law. You must attend all sessions to receive full credit. MCLE credit is available in other states. Please let us know your needs when you register.*

*CPAs may obtain 17.40 hours of CPE credit toward licensing with the Texas State Board of Public Accountancy. Sponsor No. 6867.*

*The Texas Institute of CLE is an accredited sponsor with the Texas Department of Insurance. An application has been approved for 12.00 hours of General credit (all license types) and 2.50 hours ethics. This course is eligible for MCE credit through the Texas Real Estate Commission.*



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