

# 34TH ANNUAL CONSTRUCTION LAW CONFERENCE



**MARCH 4 & 5, 2021  
VIRTUAL CONFERENCE**

***Earn up to 14.00 Hours MCLE Credit, including 2.75 Hours Ethics!***

*Applicable toward MCLE, the College of the State Bar of Texas and the Texas Board of Legal Specialization in the fields of Construction Law, Real Estate Law, Personal Injury Trial Law, Civil Appellate Law and Civil Trial Law. Submitted for Texas Department of Insurance credit and MCE credit through the Texas Real Estate Commission.*

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**&**

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

*in cooperation with*

**The Texas Institute of Continuing Legal Education**

# 34TH ANNUAL CONSTRUCTION LAW CONFERENCE

March 4 & 5, 2021 ♦ Virtual Conference

## THURSDAY, MARCH 4, 2021

*PRESIDING OFFICER: Fred D. Wilshusen, Dallas*

### 8:40 WELCOME ON BEHALF OF THE CONSTRUCTION LAW FOUNDATION

Laird E. Lawrence, Dallas

### 8:50 CASE LAW UPDATE – Recent case law and other developments impacting the construction industry.

Gregory M. Cokinos, Houston

### 9:50 COME ON IN, THE WATER'S FINE: VOUCHING IN TO CONSTRUCTION DISPUTES – An overview of this consequential but often overlooked doctrine of common law indemnity in the construction context, from each perspective. We'll examine what a hopeful indemnitee needs to show in order to bind a non-party to the results of its dispute, as well as factors a potential indemnitor should consider when deciding whether to dip its toe in the water, or rsvp "with regrets."

William B. Westcott, Houston

### 10:20 PIONEER AWARD PRESENTED TO DONALD O. PRATT

Paul H. Sanderford, Temple

### 10:30 BREAK

### 10:45 NO PARTNERSHIP BY AMBUSH – AN OVERVIEW OF TRANSACTIONAL ENTITIES IN CONSTRUCTION AND COMMERCIAL AGREEMENTS – A primer on the various transactional entities available for use in commercial and construction agreements such as teaming, joint ventures, single asset entities and the like. Additionally, a detailed look at the 2020 Texas Supreme Court decision in *Energy Transfer Partners, L.P. and Energy Transfer Fuel, L.P. v. Enterprise Products Partners, L.P. and Enterprise Products Operating, LLC* and its implications for the future.

Tracy Russell Galimore, Houston

### 11:25 IF YOU BUILD ON IT, YOU BUY IT – Exploring existing site conditions, predecessor work issues, related requirements to “kick the tires,” and contractual representations of satisfactory inspections. Does what your mom told you “*You Touch It - You Buy It*” ring true on the job site? Can you contractually agree the predecessor work is satisfactory when it does not yet exist? Is the next subcontractor the *Guarantor DeLuxe* of all underlying, prerequisite work?

Thomas J. Walthall, Jr., San Antonio

### 12:00 BREAK

### 12:15 LUNCH SESSION

**ETHICS – HOW I BECAME AN FBI INFORMANT** – Ashley Yablon, the then General Counsel for the US entity of ZTE China (the third largest telecom company in the world) found himself caught in an international scandal when he discovered his multi-billion dollar company was selling billions of dollars of spying technology to the embargoed countries including Iran. Left with an ethical dilemma, Ashley made the difficult decision and turned into a whistleblower working with the FBI, Department of Commerce and Justice Department. But when his cover got leaked, the drama and life-threatening nature of this John Grisham real life story really began.

Ashley Kyle Yablon, Dallas

### 1:15 BREAK

*PRESIDING OFFICER: Kelly A. Carr, Carrollton*

### 1:30 INSURANCE UPDATE – Insurance in the world of construction litigation. An update on what's new and what's around the bend.

Douglas P. Skelley, Austin

### 2:00 ETHICS – BUILDING DIVERSITY & DEMOLISHING IMPLICIT BIAS IN THE CONSTRUCTION INDUSTRY – This panel presentation will candidly discuss inclusion, diversity, and implicit bias in the legal and construction industries and will offer perspectives and strategies for consciously identifying recurring problems and crafting meaningful solutions to effect positive change on diversity and inclusion efforts in our industry.

1.00 Ethics

*Moderator:* Kristen L. Sherwin, Dallas  
Earnest DeLoach, Jr., Orlando, FL  
John W. Slates, Dallas  
Amy M. Stewart, Dallas

### 3:00 BREAK

## CONCURRENT SESSIONS - Select a session from A or B

### Sessions A

3:15 **GOVERNMENTAL IMMUNITY: A CONTRACTOR, AN ENGINEER, AND A CITY WALK INTO A CONSTRUCTION CONTRACT** – Basic review of construction contract terms as they relate to governmental immunity and a review of *Graham v. Corpus Christi*, an appellate court case between a contractor, an engineer, and a city. Discussion will include “owner-caused delay”, attorneys fees, and notice.  
J. Paulo Flores, Dallas  
Laura Mueller, Dripping Springs

3:50 **DO YOU SEE WHAT I SEE? THE TEXAS PUBLIC INFORMATION ACT FOR CONSTRUCTION LAWYERS** – An overview of the PIA, including a discussion on relevant entities, information that can be disclosed, the ability to challenge disclosure, and common exceptions to the PIA.  
Matthew W. Sherwood, Amarillo

### Sessions B

3:15 **COVID-19 FAQ: Coronavirus-related laws, regulations, and guidelines are changing by the day. Find out the answers to employers' most frequently asked questions about COVID-19 legal requirements.**  
Autum Flores, Amarillo

3:50 **WHAT YOU NEVER WANT TO NEED – BANKRUPTCY BASICS FOR CONSTRUCTION LAWYERS** – Discussion of how to attempt to get paid on partially completed project, the impact of the automatic stay, perfection of liens and issues with lien avoidance, and descriptions of bankruptcy proceedings and what may be done in them and to your client (Chapter 7, Chapter 11 [new subchapter 5] and Chapter 13.  
Eric J. Taube, Austin  
Patrick H. Autry, San Antonio

### 4:30 ADJOURN THURSDAY SESSIONS

## FRIDAY, MARCH 5, 2021

*PRESIDING OFFICER: Matthew S.C. Moore, Houston*

8:00 **LEGISLATIVE UPDATE** – Learn what to expect from the upcoming 87th Texas Legislative Session and how it may impact the construction industry.  
Sean M. McChristian, Houston

8:30 **LEGAL ISSUES IN ARBITRATION** – As the catchy title implies, this presentation will provide an update on key legal issues in arbitration, such as statute of limitations, waiver, binding non-signatories, filing lien and bond claims, appeal of an arbitrator's decision, and more.  
Mason P. Hester, Houston

9:10 **THE LAND AFTER TIME** – Despite the advent of technologies designed to better plan trade sequencing and man-loading requirements for projects, baseline and regularly updated project schedules have been going the way of the dinosaur. While time remains of the essence in construction, the industry has gotten too busy and fast-paced to meaningfully plan its work. The absence of a complete baseline schedule at the time of contracting often sets off a chain-reaction of ‘missed’ milestones, trade stacking, resequencing, and a cacophony of notice and response letters that further distract from progressing the work (and ultimately in some cases, trigger liquidated damages). This presentation will discuss when time should be of the essence and when it shouldn't, contract provisions to beware of, and practical tips on how to foster collaborative construction planning to ensure the work is performed in the most efficient and cost effective manner.  
Matthew S.C. Moore, Houston

9:40 **AN ANTIDOTE FOR CONSTRUCTION DEFECTS? THE RIGHT TO CURE IN PUBLIC WORKS AND BUILDINGS** – H.B. 1999 sought to cure vague construction defect claims brought by governmental entities. Has the statute delivered its intended effect? Learn about the origins and application of the statute, as well as other rights, when pursuing or defending claims from governmental entities.  
Stephanie Hayes Cook, Austin

### 10:10 BREAK

10:40 **HI, LAWYERS, IT'S TECHNOLOGY. WE NEED TO TALK** – They said there wouldn't be math, and now lawyers are required to deal with all these confusing 1s and 0s. New (ish) ethical rules about technological “competence” now apply to attorneys in Texas, so what's a construction lawyer to do? The pandemic has proven we can all learn new technology quickly, and we'll talk about ways to maintain that momentum to ensure we're all providing competent, efficient and technologically-advanced legal services to our clients.  
Tyler T. O'Halloran, Austin

.75 Ethics

11:25 **FACING THE CONSEQUENTIALS: HOW TO RECOVER, NEGOTIATE, AND WAIVE CONSEQUENTIAL DAMAGES** – Texas law has never clearly defined the distinction between direct and consequential damages, including in the construction context. Yet consequential damages waivers are ubiquitous in construction contracts. This presentation will address the distinction between the two types of damages, the requirements for recovering consequential damages (if unwaived), and how to negotiate and draft consequential damages waivers so that the parties are not inadvertently waiving more damages than intended. Finally, the presentation will address developing exceptions to enforceability of consequential damages waivers, including willful misconduct, gross negligence, and active interference.

William W. Allensworth, Austin

11:55 **BREAK**

12:15 **LUNCH SESSION BREAKOUTS** – Choose one of three sessions. Open to all registrants.

**Option #1** **A (NOT SO) PROMPT PAYMENT: ASSERTING AND DEFENDING AGAINST PROMPT PAYMENT CLAIMS** – This presentation examines how to assert and defend against prompt payment claims, under both federal and state law, and the intersection between the prompt payment statutes, pay-if-paid provisions, and the right to stop work. We'll also discuss how prompt payment claims may be used as a vehicle for the recovery of attorney's fees and analyze the potential risks of relying on the "good faith" withholding exception.

Misty Hubbard Gutierrez, Dallas

**Option #2** **TURNING YOUR JUDGMENT INTO MONEY** – This presentation will take you through the various ways to collect on a judgment in Texas.

Kathleen A. Hurren, San Antonio

**Option #3** **THE 411 ON THE RCLA** – This presentation will discuss the underlying purpose of the RCLA, when it applies, the pre-suit requirements and best practices, the RCLA offer and potential damage caps, the RCLA's interplay with the DTPA, and key RCLA provisions, such as contract requirements, mediation provision, and conditional sale to builder provision.

Kimberly G. Altsuler, Houston

1:15 **BREAK**

**PRESIDING OFFICER: Amy M. Emerson, Austin**

1:30 **NTFAQS: MECHANICS LIENS: MORE ODD QUESTIONS, ANSWERS, AND IMPONDERABLES** – Most of you have a good grasp of the basics of getting a Texas Mechanics Lien properly noticed and filed under the Texas Property Code Chapter 53. But at nearly 20,000 words in the statute, what traps are in store for the unsuspecting? The presentation will continue our discussion of Mechanic's Liens "Off the Beaten Path" from 2019 and dive into some additional vagaries and pitfalls of the Texas Property Code.

Steven E. Kennedy, Dallas

2:10 **THE INS AND OUTS OF WAIVER OF SUBROGATION** – Should your contract include a waiver of subrogation? This presentation will explain the purpose and benefits of subrogation and discuss whether waiving subrogation benefits or harms your client. An examination of typical waivers found in contracts, builder's risk policies, and the AIA forms will prepare you for the next time you find yourself facing this question.

Lawrence T. Bowman, Dallas

2:50 **BREAK**

3:05 **YOU WANT ME TO DO WHAT? THE DUTY TO DEFEND BEYOND THE AI** – A discussion of the duty to defend, as contained within the Indemnity provision of the construction contract. Is this just an insurance issue? What if my insurance company denies the AI claim, do I still owe a duty to defend? How do I enforce the duty to defend my client? What are the damages?

John Emory Pipkin, Houston

3:45 **STUCK IN THE MIDDLE WITH YOU** – Owners, general contractors, and subcontractors face unique legal and practical issues in dealing with pass-through claims. This presentation will address competing and complementary venues, liquidating agreements, "diligent pursuit" obligations, false claim perils, liability limits, standing arguments, and other issues that invariably loom large in the pursuit and defense of many pass-through claims.

Gregory Alan Harwell, Dallas

4:30 **ADJOURN CONFERENCE**

## PRESIDENT, THE CONSTRUCTION LAW FOUNDATION OF TEXAS

Laird E. Lawrence, Lawrence Arbitration, Dallas

### PRESIDING OFFICERS

Kelly A. Carr, The Brandt Companies, LLC, Carrollton

Amy M. Emerson, Allensworth & Porter, LLP, Austin

Matthew S.C. Moore, Peckar & Abramson, P.C., Houston

Fred D. Wilshusen, Thomas, Feldman & Wilshusen, L.L.P., Dallas

### CONFERENCE FACULTY

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Allensworth & Porter, LLP, Austin

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Peckar & Abramson, P.C., Houston

Kimberly G. Altsuler  
Peckar & Abramson, P.C., Houston

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City of Dripping Springs, Dripping Springs

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Cokinos | Young, Houston

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Munsch Hardt Kopf & Harr, P.C., Houston

Ashley Kyle Yablon  
Axiom, Dallas

Kathleen A. Hurren  
Law Office of Kathleen A. Hurren, San Antonio

**PIONEER AWARD PRESENTATION**

Steven E. Kennedy  
McGuire, Craddock & Strother, P.C., Dallas

Presenter: Paul H. Sanderford  
Sanderford & Carroll P.C., Temple

Sean M. McChristian  
Porter Hedges LLP, Houston

Recipient: Donald O. Pratt  
Pratt & Yungblut, P.C., Arlington

## 2021 PLANNING COMMITTEE The Construction Law Foundation of Texas Board

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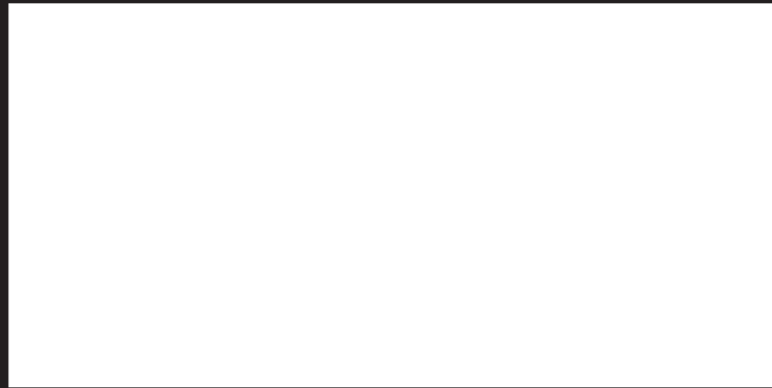
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March 4 & 5, 2021

Virtual Conference

### MCLE / CONTINUING EDUCATION CREDIT

This course has been approved for 14.00 hours credit (including 2.75 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 Construction Law, 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 approximately 16.80 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 submitted for 11.50 hours of General credit (all license types) and 2.5 hours ethics. This course is eligible for MCE credit through the Texas Real Estate Commission.

**24 Hot Topic Sessions, 30 Experienced Presenters, 14 Hours MCLE Credit!**

Register online at: [WWW.CONSTRUCTIONLAWFOUNDATION.ORG](http://WWW.CONSTRUCTIONLAWFOUNDATION.ORG)

**Cover Art** – "Road to Golden Sunset" is a photo taken in the Hill Country by Payman Karimi from Houston. As an enthusiast photographer, he captures nature's beauty & harmony in his work. You can reach Payman by emailing him at [pkarimi68@gmail.com](mailto:pkarimi68@gmail.com).

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

**Section 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 access and preparation time are available for all attendees, pre-registration is strongly encouraged. Late registration is subject to additional fees.

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

**Registration by Telephone** — You may register by phone at (512) 451-6960 or by fax to (512) 451-2911. Faxed and phone-in registrations require a Visa, MasterCard or American Express number, expiration date, security code and billing address.

**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. Access to the recorded sessions and course materials will automatically be sent to prepaid registrants who did not receive a refund and were not able to attend.

FOR MORE INFORMATION ABOUT OTHER PROGRAMS OFFERED BY THE TEXAS INSTITUTE OF CLE, PLEASE VISIT [WWW.CLESOLUTIONS.COM](http://WWW.CLESOLUTIONS.COM).

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## GENERAL INFORMATION

### 34th ANNUAL CONSTRUCTION LAW CONFERENCE

March 4 & 5, 2021 ♦ Virtual Conference

This year's conference will be offered online-only via Zoom or similar platform with an interactive format. Access to the conference materials in a digital format will be provided as will opportunities for questions and comments with the session presenters. We recommend that you register immediately if you plan to attend this conference. **Materials will only be provided in digital format for this event.** Attendees may download and/or print the materials on-demand once the conference begins.

## REGISTRATION FORM

**Mail to:** The Construction Law Foundation of Texas  
34th Annual Construction Law Conference  
P.O. Box 4646  
Austin, TX 78765-4646

**Online at:** [www.constructionlawfoundation.org](http://www.constructionlawfoundation.org)

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

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

- Regular Pre-Registration Fee.....\$500.00  
(due by 5 p.m. February 12)
- Pre-Registration for Construction Law Section Members....\$450.00  
(due by 5 p.m. February 12)
- Registration after 5 p.m. Feb. 12 & before 5 p.m. Feb. 26.....+50.00
- Late Registration after 5 p.m. Feb. 26 (week of event).....+\$100.00
- Add Construction Law Section Dues..... \$ 30.00  
(immediately eligible for the member registration rate)

I cannot attend the conference. Please forward the following:

- Access to Recorded Version & Course Materials (\$450+tax).....\$487.13
- Course Materials Only (\$180 + .0825 tax).....\$194.85

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

No refunds after 5:00 p.m. Friday, February 26, 2021. Cancellation policy on back cover. (Call for Government and Student Discount Information.)

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