



# Arbitrator Subpoenas: Are They Worth the Paper They're Printed On?

March 23, 2016 – 1:00 p.m. – 2:15 p.m. ET

## PROGRAM SUMMARY

**Speakers:** William K. Andrews and Don Gregory

Attendees will gain a working knowledge of the current trends, successful approaches and strategies that parties and arbitrators have employed, as well as the roadblocks that commonly frustrate efforts to secure non-party discovery and hearing attendance.

## AGENDA

<b>1:00 p.m.</b>	<b>Welcome and Introduction of Speakers</b>	(5 minutes)
<b>1:05 p.m.</b>	<b>Issuing Subpoenas in Arbitration</b> Review of Circuit Courts of Appeals Holdings/Splits State Court Case Review Discussion of "Real World" Examples Best Practices	(60 minutes)
<b>2:05 p.m.</b>	<b>Conclusion and Questions</b>	(10 minutes)
<b>2:15 p.m.</b>	<b>Evaluation</b>	(5 minutes)
<b>2:20 p.m.</b>	<b>Adjourn</b>	

## ATTORNEYS

### William K. Andrews

#### Shareholder

#### PRACTICE EMPHASIS:

Complex construction and engineering claims; litigation; arbitration and mediation

#### EDUCATION:

J.D., *cum laude*, University of Houston Law Center, 1978  
Order of the Barons  
B.A., University of Texas at Austin, 1974

#### ADMITTED:

State Bar of Texas

#### COURT ADMISSIONS:

U.S. District Court, Southern, Eastern and  
Western Districts of Texas  
U.S. Court of Appeals, Fifth Circuit



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#### Profile:

For over 30 years, Bill Andrews has practiced construction law, focusing on construction-related claims, lawsuits, mediations and arbitrations. He has represented owners, contractors, subcontractors, vendors, suppliers and engineering firms on a wide variety of construction-related projects. His experience in claims, trials, arbitrations and mediations includes projects such as highways and bridges, public works projects, commercial and retail construction, industrial and warehouse facilities, hospitals and health care facilities, power plants (including simple cycle and cogeneration plants), pipelines, petrochemical plants, refineries, chemical plants, gas processing plants, cryogenic plants, schools, multi-family housing and environmental remediation projects. He has represented several EPC firms in disputes and claims involving large plants. He also has significant experience representing owners, contractors and engineering firms in claims and disputes involving upstream, midstream and downstream facilities.

Bill has tried to verdict and arbitrated to award more than 50 construction cases. Since 1988, he has been a member of the American Arbitration Association's National Panel of Construction Arbitrators and has served as a construction mediator since 1998. He is a member of the American Arbitration Association's Large Complex Construction Case Panel of Arbitrators and was recently approved by the AAA's National Construction Dispute Resolution Committee as a member of its Construction Arbitration Master Panel.

For the eleventh consecutive year, Bill received a top ranking among construction lawyers in the state by the prestigious legal directory, *Chambers USA, America's Leading Lawyers for Business*.

#### Professional Recognition:

Fellow, American College of Construction Lawyers  
Fellow, Texas Bar Foundation  
Fellow, American Bar Foundation  
Fellow, Litigation Counsel of America  
"America's Top 30 Construction Lawyers," The Best of the Best, USA 2012  
The Best Lawyers in America, 2012 Litigation-Construction Lawyer of the Year for Houston  
The Best Lawyers in America, Since 2006

William K. Andrews

Professional Recognition (Con't)

*Chambers USA, America's Leading Lawyers for Business*, Since 2004  
The International Who's Who of Business Lawyers (Construction), Since 2005  
"Texas Super Lawyers," *Texas Monthly* (Construction Litigation and Alternative Dispute Resolution), Since 2004  
AV© Preeminent™ Peer Review Rating (5.0 out of 5), Martindale-Hubbell  
Top 100 Houston Area Super Lawyers, Since 2007  
Top 100 Texas Super Lawyers, 2008, 2014

**Teaching Experience:**

Adjunct Professor of Law, University of Houston College of Law, Basic Construction Law, Spring 2011

**Affiliations:**

American Arbitration Association, Arbitrator  
State Bar of Texas, Construction Law Section Member (Federal Judiciary Appointments Committee, 1984-1986; Governing Council, 1990-1992; Treasurer, 2009-2010; Secretary, 2010-2011; Vice-Chair, 2011-2012 and Chair, 2012-2013  
Houston Bar Association, Construction Law and Alternative Dispute Resolution Member (Member, Governing Council, Construction Law Section, 1989-1990)  
American Bar Association, Forum on the Construction Industry  
Associated Builders and Contractors  
The Associated General Contractors of America

**Representative Experience:**

Bill has tried to verdict and arbitrated to award more than 50 construction cases. The following are representative cases:

- Represented owner in arbitration arising out of construction of multi-hundred million dollar industrial gas facility, involving claims of cost overruns, delay, disruption, acceleration, loss of efficiency and loss of productivity. Final evidentiary hearing spanned 19 days, conducted before panel of 3 AAA complex construction case arbitrators and was tried to award.
- Represented religious institution in lawsuit against contractor related to repairs to campuses damaged by Hurricane Ike.
- Led prosecution of EPC subcontractor delay and breach of warranty claims in arbitration against construction contractor arising out of gas processing project and defense against contractor counterclaims of loss of efficiency/productivity and disruption.
- Represented developer and owner of wind power generation project regarding equipment supply, operation and maintenance issues.
- Led defense of building contractor-project manager against governmental owner asserting breach of contract and negligence claims in multi-party, complex litigation arising out of convention center project.
- Led prosecution of loss of efficiency/productivity and disruption and delay claims of EPC contractor in arbitration against refinery owner, settling case favorably to contractor-client shortly after formal commencement of proceedings.
- Defended and obtained settlement for general contractor in litigation against owner, its lending consortium and builders risk carrier involving the alleged differential settlement of 31-story beach condominium and lost investment claim of \$125 million.
- Represented EPC Contractor in 5-week arbitration of disputes arising out of the design and construction of a degassing plant.
- Represented pipeline owner in the arbitration of claims arising out of the construction of a gas pipeline.
- Represented EPC contractor in the trial of claims and counterclaims pertaining to the design and construction of a cryogenic plant and fractionation plant.
- Represented contractor in arbitration of payment and delay claims related to a commercial building project.

William K. Andrews

Representative Experience (Con't)

- Represented fabricator in the arbitration of disputes arising out of the fabrication of multiple modules for a floating production storage offloading vessel.
- Represented contractor in the arbitration of disputes arising out of the construction of modules for an offshore oil and gas platform.
- Represented contractor in the arbitration of payment, delay and workmanship claims arising out of a commercial building project.
- Represented contractor in the arbitration of termination costs arising out of a Strategic Petroleum Reserve project.
- Represented owner in the trial of contract claims arising out of a major public works contract.
- Represented contractor in the trial of contract and tort claims (including defense of counterclaim) against the owner of a refinery.
- Represented subcontractor in the trial of wrongful termination claims against a general contractor for the construction of a laboratory building.
- Represented contractor in the trial of claims against an engineer arising out of a petrochemical plant project.
- Represented contractor in the arbitration of contract claims against the owner of a petrochemical plant.
- Represented subcontractor in the arbitration of disruption claims against an EPC contractor of an HDPE plant.
- Represented contractor in the arbitration of delay, disruption and extra work claims against the EPC contractor of a power plant (cogeneration plant).
- Represented contractor in the arbitration of lost profit claims against an EPC contractor of a power plant (cogeneration plant).

**Recent Publications**

"The Miracle of Modern Technology: Digitally Transporting the Long-Distance Witness to the Hearing Room," Building Resolutions, American Arbitration Association Construction Division News, Issue No. 2, June, 2010  
"Taming the Jury Charge Beast in the Trial of Complex Construction Case," Construction Law Journal, (Co-Author), Summer 2008

**Recent Presentations/Seminars:**

"Overview of the Construction Industry and Glossary of Construction Terms," The Basic Course in Texas Construction Law, State Bar of Texas, Construction Law Section, November 2013, November 2014  
"Advanced Mediation Training," Houston Bar Association, Arbitration Section Seminar at University of Houston Law Center, (Panelist), April 2012  
"Strategic Growth of a Construction law Practice," State Bar of Texas Construction Law Conference, San Antonio, TX, (Panelist), March 2012  
"Creative Use of FRCP 30(b)(6) in Construction Litigation," American Bar Association, Forum on the Construction Industry, Midwinter Meeting, (Panelist), February 2012  
"Breaking Logjams in Mediations," Houston Bar Association Construction Law Section, (Panelist), January 2012  
"Texas Anti-Indemnity Bill (HB 2093)," Client Education Series, (Co-Presenter), January 2012  
"Texas Anti-Indemnity Bill (HB 2093)," Client Education Series, (Co-Presenter with Lee Shidlofsky), October 2011  
"Advanced Mediation Training: Mediating Construction Disputes," A.A. White Dispute Resolution Center, University of Houston Law Center, (Panelist) April 2011  
"The Ethics Behind 'Better, Faster, Cheaper' in ADR," American Arbitration Association, March 2011  
"Anatomy of a Complex Construction Arbitration," Construction Law Section of the State Bar of Texas, 24<sup>th</sup> Annual Construction Law Conference, (Panelist) March 2011  
"Legal and Practical Considerations for Arbitration Participants," Construction Law Section, Houston Bar Association, January 2011  
"Chairing an Arbitration Panel," American Arbitration Association, December 2010



# Don Gregory

Director



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Gregory is well known for his experienced and pragmatic advice and is highly rated as one of Ohio's very best construction lawyers. He maintains a Band 1 ranking by Chambers USA, the highest ranking possible for his practice. Don stays abreast of cutting-edge developments in the industry by serving many of the leading national construction trade associations as their general counsel.

## Construction Advice to Minimize Risk

Don enjoys providing practical preventative advice on all aspects of a project, from bid to punch list, including: bidding (responsibility, responsiveness, mistaken bids and conditional bids); construction contracts (review and revision of AIA, AGC, ConsensusDOCS and other trade association forms, design-build, construction manager, architect, contractor and subcontractor agreements, purchase orders, and special clauses, such as No Damage for Delay and Contingent Payment); and risk management (insurance and indemnity).

## Construction Litigation

Don has been involved in many of the most sizeable and important cases impacting the construction industry over the last 30 years, including disputes concerning: bid challenges, claims (differing site conditions, defects, defaults and performance bond claims, change order disputes, equitable adjustments, and liquidated damages); mechanic's liens (notices of furnishing, notices of commencement, lien waivers, lien filings and foreclosures); and prompt payment (collections, payment bond claims, and recovery of interest and attorney's fees under federal and state prompt payment acts).

## Alternative Dispute Resolution

Don is active both as an advocate in the ADR process, and regularly serving as a mediator and arbitrator solving complex construction disputes. He has experience utilizing arbitration, mediation, dispute review boards, partnering and summary jury trials.

## Recent Work Highlights

- + Won Landmark Competitive Bidding Cases
- + Drafted ConsensusDOCS + Green Building Addendum
- + Established law on Fairness in Construction Act
- + Established the Spearin Doctrine in Ohio
- + Won First Prompt Payment Case Jury Verdict

## Professional Affiliations

- + American Arbitration Association, National "Blue Ribbon" Panel of Arbitrators, member
- + American Bar Association, Construction Forum, member
- + American Subcontractors Association, general counsel
- + Association of the Wall & Ceiling Industry, general counsel
- + Litigation Counsel of America, fellow
- + National Ground Water Association, general counsel
- + Steel Framing Industry Association, general counsel

## Special Honors

- + Selected as the 2015 "Lawyer of the Year" in Columbus in the area of Construction Law by *The Best Lawyers in America*<sup>®</sup>
- + Rated Band 1 by *Chambers USA* for Construction
- + Martindale-Hubbell Rating of AV
- + Recognized in *The International Who's Who of Business Lawyers* for expertise in construction law
- + Recognized as an Ohio Super Lawyer<sup>®</sup> by *Law & Politics* magazine
- + Recognized as a "Top 50 attorney" in Columbus by *Law & Politics* magazine

## Recent Publications + Presentations

- + "Private Work: How to Secure a Fair Contract + Get Paid," Kegler Brown seminar, presented May 1, 2014
- + "Bond Claims: How to Make Them and How to Avoid Them," Kegler Brown seminar, presented February 26, 2014
- + "Construction Lawyer: Problem or Problem Solver? The Need for Cost-Effective Dispute Resolution in the Construction Industry," *The Construction Lawyer*, Fall 2013
- + "Ethical Challenges of Bid Shopping," *The Construction Lawyer*, Summer 2010

## Bar Admissions

- + Ohio
- + Wyoming

## Education

- + The Ohio State University Moritz College of Law (J.D., 1982)
- + Miami University (B.A., 1979)

KEGLER  
BROWN  
HILL +  
RITTER



American Arbitration Association

*Dispute Resolution Services Worldwide*

## **Subpoenas Process FAQ**

The purpose of this Q & A is to provide a brief explanation regarding the subpoena process in arbitration. Please make sure to review any applicable arbitration statutes and rules pertaining to your specific case for additional information.

### **Q. How do I subpoena someone?**

A. Anyone authorized by law to issue subpoenas may do so in arbitration. In addition, under many arbitration statutes, the arbitrator can issue subpoenas either at the request of a party or independently. In either instance, the parties are responsible for preparation of the subpoena service and enforcement.

### **Q. Is the arbitrator the only one who can sign a subpoena?**

A. An arbitrator or other person who is authorized by law to subpoena witnesses or documents may sign a subpoena in an arbitration.

### **Q. In a panel of three arbitrators, can only one arbitrator issue the subpoena?**

A. Unless the law or the applicable rules provide to the contrary, or the parties otherwise agree, decisions on subpoena issuance should be made by a majority of the panel.

### **Q. What does the subpoena process involve?**

A. In general, the following steps take place when subpoenas are sought by a party:

1. Party/attorney informs the AAA case manager of its wish to request subpoena(s).
2. The AAA case manager sends subpoena form(s) to the party/attorney for completion or directs the party/attorney to the AAA web site to obtain the form for completion.
3. Party/attorney completes subpoena form(s) and returns same to the case manager, with a copy to all parties.
4. The case manager sends completed subpoena form(s) to the arbitrator for review and signature, if determined by the arbitrator to be appropriate (if there are three arbitrators serving, at least a majority will generally sign the subpoenas, unless the parties have agreed otherwise).
5. If acceptable, arbitrator signs subpoena(s) and returns same to the case manager. If time is of the essence, the arbitrator, with the approval of the case manager, may forward signed subpoena(s) directly to the requesting party/attorney, with a copy to all parties.

6. The case manager receives subpoenas(s) and returns same to requesting party/attorney, with a copy to all parties.

7. Requesting party/attorney serves subpoena(s) on witness or custodian of documents.

**Q: What if I do not want to copy the other parties on my subpoena request?**

A: If you want or need the arbitrator to sign the subpoena and do not want the subpoena request shared with the other side, you should put your request in writing to your case manager and your case manager will forward your request to the arbitrator for a determination. The arbitrator will decide whether or not you need to share the subpoena request with the other parties. The AAA's actions will then be guided by the arbitrator's determination.

**Q. Can I subpoena someone from another state?**

A. This requires review of the applicable law. Ultimately, enforcement of the subpoena lies with the court, not the AAA.

**Q. May an arbitrator refuse to sign a subpoena requested by a party?**

A. In some instances, an arbitrator may question the need for the subpoena requested and ask the case manager to obtain detailed information from the requesting party to aid the arbitrator in deciding whether or not to sign the subpoena.

**Q. How are subpoenas enforced?**

A. Enforcement of subpoenas is sought through a court of proper jurisdiction.

**Q. What if someone I subpoena does not appear for the hearing?**

A. If a subpoena is ignored, it is up to the requesting party to have that subpoena enforced through a court of proper jurisdiction. In addition, arbitrators may draw "negative inferences" about a party's failure to abide by a subpoena.

**Q. Can a party request an arbitrator to quash a subpoena?**

A. A party to the arbitration, who is served with a subpoena and questions the authority of the arbitrator, may raise the issue to the arbitrator at the hearing. The arbitrator may then rule as to whether the subpoena should be quashed.

**Q. Who should I contact if I have questions regarding subpoenas or any other general questions about the process?**

A. Contact the case manager assigned to your case. The case manager has the most knowledge about every aspect of your case and is there to assist you throughout the process.



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