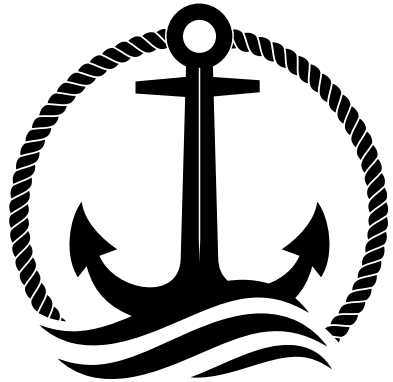




Pearlman
CONFERENCE

Privilege & Work Product

Issues for Sureties, Counsel, and Consultants

Amy Bernadas - Liberty Mutual Surety

Caroline Lee - Palomar Surety

Matthew Geary - Rouse Frets White

Rodney J. Tompkins, Jr. – RJT Construction, Inc. Consulting Services

THE CORE PRINCIPLE

Protection is not automatic.

Purpose, role, timing, and control determine the result.

PURPOSE

ROLE

TIMING

CONTROL

Three doctrines. Three different jobs.

ATTORNEY–CLIENT

Confidential communications made for legal advice.

WORK PRODUCT

Qualifying material prepared because of anticipated litigation.

COMMON INTEREST

Preserves an existing protection during aligned legal collaboration.

None is a blanket label for the claim file.

Jurisdiction comes first

- Federal claims: federal common law governs privilege.
- State-law claims: applicable state privilege law governs.
- Mixed federal and state claims: federal privilege law commonly controls.
- Work product in federal court: Rule 26(b)(3) supplies the framework.
- Inadvertent disclosure: analyze Federal Rule of Evidence 502.

START HERE

**Claims
Forum
Governing law
Waiver rules**

Privilege requires every element

- | | | |
|----|---------------|--|
| 01 | COMMUNICATION | The exchange - not the underlying facts. |
| 02 | CLIENT | A qualifying client or corporate representative. |
| 03 | CONFIDENCE | Intended to be, and actually kept, confidential. |
| 04 | LEGAL ADVICE | Counsel acting in a professional legal capacity. |

If one element fails, the privilege fails.

A CRITICAL DISTINCTION

Privilege protects the exchange.

It does not protect the underlying facts.

Counsel's presence at a site meeting does not convert discoverable facts into privileged information.

Consultants can qualify but not by title

- Necessary third party: the role must facilitate legal advice, not merely add convenience.
- Functional equivalent: integration, authority, and unique knowledge can matter.
- Original retention: a factual or operational role cannot be relabeled after the fact.
- Engagement, authority, information flow, and distribution must support the claim.

COURTS ASK

What did the consultant actually do and why?

Routine sharing can waive protection



LIMIT

Recipients to those needed for legal advice or strategy.



SEPARATE

Legal requests from routine project and business communications.



TREAT

Forwarded email, shared drives, and meeting attendance as disclosure decisions.



RESPOND

Quickly when an inadvertent disclosure occurs.

Confidentiality is a legal element - and an operating practice.

Common interest does not create privilege

- The underlying communication must first qualify as privilege or work product.
- The parties must share a legal, not merely commercial interest.
- A joint legal effort or strategy must actually exist.
- Chronology, participants, purpose, and confidentiality still matter.

ANTI-WAIVER

Common interest preserves an existing protection. It does not manufacture one.

Work product turns on purpose

THE “BECAUSE-OF” TEST

Would the material exist in substantially the same form without anticipated litigation?

- Anticipated litigation must be subjectively held and objectively reasonable.
- Fact work product may yield to substantial need and undue hardship.
- Opinion work product receives stronger protection.

Ordinary business records remain ordinary

- Claim investigation and evaluation are often routine surety functions.
- Hiring counsel does not automatically transform the file.
- A takeover can generate ordinary successor-contractor records.
- Protection strengthens when work shifts to a distinct litigation or subrogation purpose.
- Courts test each document not just the file as a whole.

THE QUESTION

Why was this specific document created in this specific form?

Dobco asks for facts, not labels

Default notices

Investigation
begins

Consultant
retained



Counsel
engaged

Bond position

Later reliance

The chronology must show when work became litigation-driven and how it differed from ordinary practice.

Consultant protection follows the facts

WEAKER SHOWING

- Ongoing construction management
- Ordinary project contact
- Broad distribution
- Conclusory labels

STRONGER SHOWING

- Discrete litigation assignment
- Limited circulation
- Analysis directed to a litigation position
- Clear separation from operations

Retention • purpose • work performed • deliverable • use

Safeco: Protection denied

- Safeco Ins. Co. of Am. v. M.E.S., Inc., 289 F.R.D. 41 (E.D.N.Y. 2011).
- Consultant prepared loss-exposure reports while also serving as a construction manager.
- Surety relied on conclusory claims of anticipated litigation without document-specific facts.
- The court held the surety failed to establish work-product protection.

WHY IT FAILED

**Operational
duties +
unsupported
litigation labels =
no protection.**

Gross: Protection upheld

- William A. Gross Constr. Ass'n v. Am. Mfrs. Mut. Ins. Co., 262 F.R.D. 354 (S.D.N.Y. 2009).
- Consultant performed a discrete, short-term assignment directed to anticipated litigation.
- Consultant had no construction-management duties or routine contractor contact.
- Analysis addressed a specific litigation position and qualified as protected work product.

WHY IT WORKED

Defined litigation role + separation from operations = protection.

Expert status changes disclosure

CONSULTING EXPERT

Generally protected absent exceptional circumstances.

TESTIFYING EXPERT

Facts, data, and assumptions considered become subject to disclosure rules.

DUAL-ROLE HAZARD

Operational work may remain discoverable after later redesignation.

State rules may provide less protection than the federal rules.

Build the record before the dispute

DEFINE

Client, counsel, role, purpose, and deliverables

CONTROL

Need-to-know recipients and appropriate channels

LOG

Specific facts - not conclusory assertions

SEPARATE

Operational claim handling from litigation analysis

DOCUMENT

Defaults, counsel, decisions, and anticipated litigation

REASSESS

When the consultant's role or litigation posture changes

THE PRACTICAL TAKEAWAY

Build the record before you need it.

Protection is strongest when purpose, role, chronology, and distribution are documented as the work unfolds.

What one practice change would most improve the defensibility of the surety file?

Beat the clock

Scheduling and Delay

During the Performance Bond Claim Process

Gustavo "Gus" Fernandez
Vertex

David Harris
Manier & Herod

Elliot Scharfenberg
Krebs Farley

Rob Smiley
Sage Associates



Beat the Clock SURETY BOND CLAIM

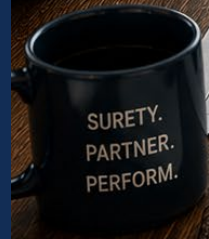
A STRATEGIC OBLIGATION. A SHARED OBJECTIVE.

SURETY

- 🔍 INVESTIGATE
- ⚖️ EVALUATE
- 🛡️ RESERVE RIGHTS
- 🤝 COLLABORATE
- 👤 ACT IN GOOD FAITH

OBLIGEE

- 🔔 NOTIFY
- 📄 PROVIDE INFORMATION
- ✂️ MITIGATE DAMAGES
- 🤝 COOPERATE
- 👤 ACT IN GOOD FAITH



SURETY OBLIGATIONS

- ☒ DILIGENT REVIEW
- ☒ FAIR EVALUATION
- ☒ TIMELY RESPONSE
- ☒ OPEN COMMUNICATION



SUCCESS THROUGH COLLABORATION

TIMELY COMMUNICATION.
TRANSPARENT PROCESS.
STRONGER OUTCOMES.

STRONGER
TOGETHER.
BUILT ON TRUST.

OBLIGEE OBLIGATIONS

- ☒ PROMPT NOTICE
- ☒ FULL DISCLOSURE
- ☒ REASONABLE MITIGATION
- ☒ ONGOING COOPERATION

COMMUNICATE.
COOPERATE.
RESOLVE.

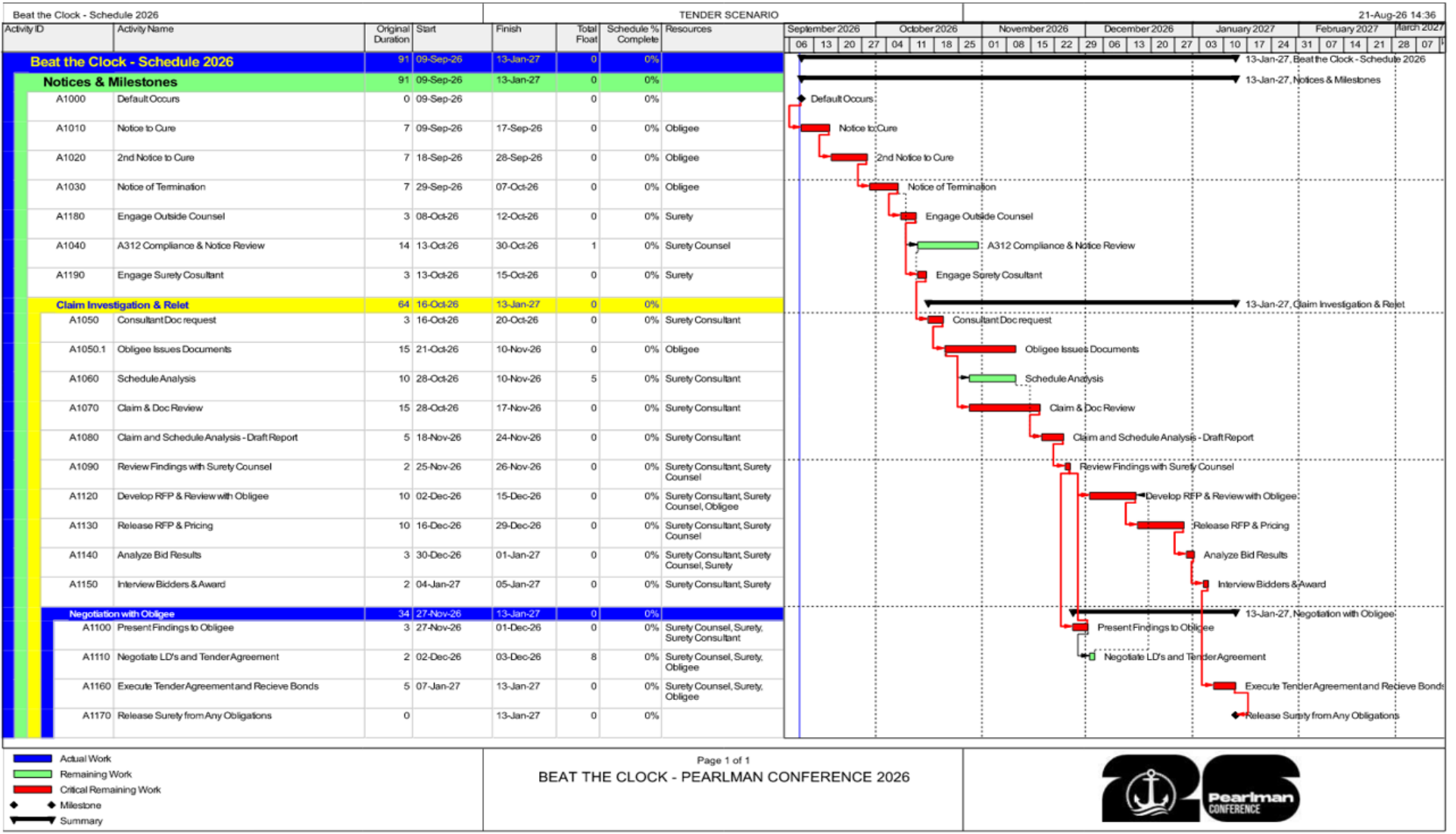


Notices & Milestones

The Obligee Starts the Clock



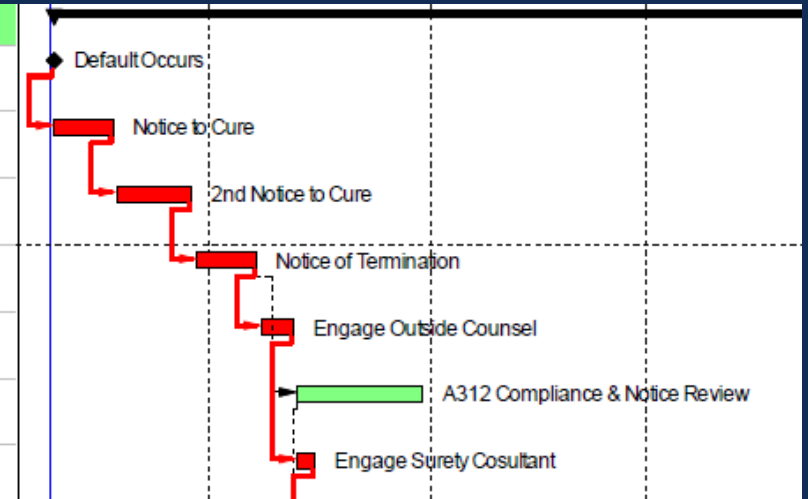
BEAT THE CLOCK



Obligee Starts the Clock



Notices & Milestones		91	09-Sep-26	13-Jan-27	0	0%	
A1000	Default Occurs	0	09-Sep-26		0	0%	
A1010	Notice to Cure	7	09-Sep-26	17-Sep-26	0	0%	Obligee
A1020	2nd Notice to Cure	7	18-Sep-26	28-Sep-26	0	0%	Obligee
A1030	Notice of Termination	7	29-Sep-26	07-Oct-26	0	0%	Obligee
A1180	Engage Outside Counsel	3	08-Oct-26	12-Oct-26	0	0%	Surety
A1040	A312 Compliance & Notice Review	14	13-Oct-26	30-Oct-26	1	0%	Surety Counsel
A1190	Engage Surety Consultant	3	13-Oct-26	15-Oct-26	0	0%	Surety



Document Request & Claim Verification

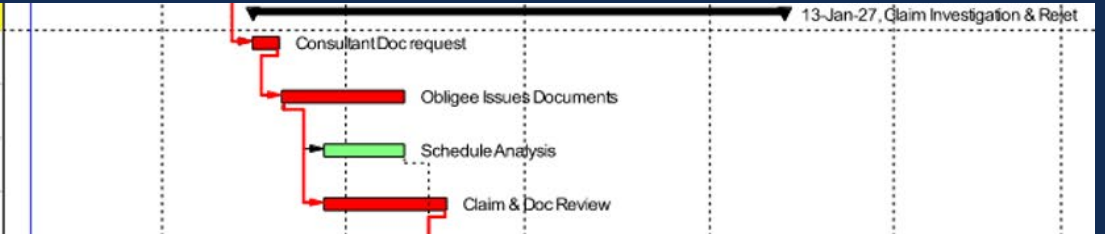
The Consultant's First Steps in a Default Analysis



Document Request



Claim Investigation & Relet		64	16-Oct-26	13-Jan-27	0	0%	
A1050	Consultant Doc request	3	16-Oct-26	20-Oct-26	0	0%	Surety Consultant
A1050.1	Obligee Issues Documents	15	21-Oct-26	10-Nov-26	0	0%	Obligee
A1060	Schedule Analysis	10	28-Oct-26	10-Nov-26	5	0%	Surety Consultant
A1070	Claim & Doc Review	15	28-Oct-26	17-Nov-26	0	0%	Surety Consultant



- Payment Applications
- Change Orders
- Contracts
- Plans & Specifications
- Project Acct. Summary
- Job Cost Reports
- AP & AR Reports
- Project Schedules
- Notices and Key Corresp.
- RFI's, CCD's, Directives

All pay apps including rejected or modified pay app, per project

Approved, Rejected and Potential Change Orders, per project

Contract documents per project

Access to plans and specifications per project

Invoices to Obligee and payment history, per project

Internal Accounting of Costs to Date, per project

Accounts Payable and Accounts Receivable, per project

Project Schedules from start to current, per project

Notices from Obligee's and related correspondence from principal (per project).

Contract stipulated documents, initiating disputed or changed scopes of work

Schedule Analysis



Claim Investigation & Relet		64	16-Oct-26	13-Jan-27	0	0%	
A1050	Consultant Doc request	3	16-Oct-26	20-Oct-26	0	0%	Surety Consultant
A1050.1	Obligee Issues Documents	15	21-Oct-26	10-Nov-26	0	0%	Obligee
A1060	Schedule Analysis	10	28-Oct-26	10-Nov-26	5	0%	Surety Consultant
A1070	Claim & Doc Review	15	28-Oct-26	17-Nov-26	0	0%	Surety Consultant



1. Obligee's master schedule analysis
2. Subcontractors near term schedules
3. Concurrent delays
4. Separate claims from obligee to project owner
5. Problem projects: schedules not updated, ghost schedules
6. Who owns the float?

Claim Analysis



Claim Investigation & Relet		64	16-Oct-26	13-Jan-27	0	0%	
A1050	Consultant Doc request	3	16-Oct-26	20-Oct-26	0	0%	Surety Consultant
A1050.1	Obligee Issues Documents	15	21-Oct-26	10-Nov-26	0	0%	Obligee
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1. Notices – Contract and Bond Terms
2. Payment History
3. Change Management
4. Disputed Scopes
5. Non-conforming Work

Stop the Clock

LDs and Delay During the Surety's Investigation



LDs and the Investigation



THE PROBLEM

The contract completion date does not move when the principal is terminated. The surety needs time to decide whether it has an obligation at all, but the obligee treats every day of that investigation as chargeable delay.

The bond gives the surety a reasonable time to act. It does not say who pays for that time.

If nothing is negotiated, the surety investigates under a running meter and the obligee later argues the delay is one more thing the principal caused.

Key tension: A312 § 5 (surety acts with "reasonable promptness") versus § 7.3 (surety liable for liquidated or actual delay damages).



THE OBLIGEE'S POSITION

- LDs run from the original completion date regardless of who is in charge of the work.
- The surety stands in the principal's shoes; the investigation is a continuation of the principal's delay, not an excuse for it.
- § 7.3 expressly makes the surety liable for liquidated damages.



THE SURETY'S POSITION

- § 7.3 reaches damages "caused by delayed performance or non-performance of the Contractor." Time the surety reasonably needs to investigate is not delay the principal caused.
- Delay driven by the obligee (late or defective § 3 notice, withheld documents, no site access, slow answers) is on the obligee's account.
- The obligee still has to mitigate.



STOP THE CLOCK: THE TOOLS

- Tolling or standstill agreement with an express LD holiday during a defined investigation window.
- Interim or takeover agreement that resets the completion date and the LD start date.
- Full reservation of rights, and a contemporaneous record of every obligee-caused delay.

Time and Cost of Delay



TIME IMPACTS

- The schedule slips day for day while the surety decides.
- Subcontractors demobilize, lose crews, and lose their slots in the sequence.
- Permits, inspections, and weather windows expire and must be re-sequenced.
- Re-starting the critical path takes longer than the pause itself.
- The obligee's downstream commitments (tenants, funding deadlines, operations) begin to drive its behavior.

COST IMPACTS

- Extended general conditions and supervision on both sides.
- Remobilization and re-procurement, including replacement subs at current pricing.
- Site protection, security, temporary works, and stored-material handling.
- Material and labor escalation between termination and restart.
- Obligees design professional and legal fees, and delay damages, all of which § 7 puts in play.

WHO BEARS IT?

- Principal-caused delay before termination: surety exposure under § 7.3, capped by the penal sum.
- The surety's reasonable investigation period: contested. Negotiate it; do not assume it.
- Obligee-caused delay (notice defects, withheld documents, no access, slow decisions): the obligee's account.
- Delay after a takeover or tender is governed by the new agreement, not the original completion date.

Practical rule: document the investigation timeline contemporaneously. Every request, every response, and every delay in the obligee's answer becomes the record on causation when the LD dispute is fought later.

Three Numbers

One Contract Balance



Three Numbers, One Balance



P

PRINCIPAL'S POSITION

What the Principal contends remains unpaid under its Contract.

O

OBLIGEE'S CALCULATION

What the Obligee contends remains available under the bonded Contract.

A

ACTUAL CONTRACT BALANCE

The amount properly remaining after reconciliation of:

- Contract Sum and approved adjustments
- Payments made – Look for withholds
- Earned but unpaid work
- Retainage
- Yet to be performed
- Backcharges and offsets
- Allowances and credits
- Review unit contract reliability

*common items on Surety loss tracking forms

Reconcile the Contract Balance



OBLIGEE

Build the accounting

- Establish original and adjusted Contract Sum
- Identify amounts paid to the Principal
- Account for retainage, allowances, and credits
- Identify asserted backcharges and withholds
- Document direct payments related to Principal's scope – canceled checks
- Identify pending or disputed Change Orders



PRINCIPAL

Test the accounting

- Identify unpaid Contract amounts
- Identify approved and pending changes
- Review disputed backcharges and withholds
- Reconcile earned work and stored materials
- Account for retainage
- Identify disputed direct payments or deductions



SURETY / CONSULTANT

Reconcile

- Independently evaluate both positions
- Determine which adjustments are supported
- Identify disputed amounts
- Establish the Actual Contract Balance
- Report findings to the Surety

Contract Balance $\neq$ Penal Sum



The penal sum caps the Surety's obligation. The contract balance funds it. The gap between cost to complete and contract balance is the exposure the Surety actually has to manage.

Performance of the Work

Who Owns the Issues



Who Owns the Defects?

Alleged non-conforming work and defects



THE ASSIGNMENT

- Investigate the Obligee's alleged defects
- Confirm, deny, or qualify each condition
- Identify causation and responsibility
- Provide Surety an independent technical opinion

NOT EVERY DEFECT IS THE PRINCIPAL'S



PRINCIPAL



DESIGN



OTHERS



UNRESOLVED

Separate defective work from design issues, incomplete work, pre-existing conditions, and the work of others.

Investigate the Claim



1

EVALUATE PERSONALLY: SITE WALK

- Observe the alleged defective conditions firsthand
- Compare installed work to the Contract Documents and approved submittals
- Evaluate applicable codes, standards, and manufacturer requirements
- Photograph and document the actual conditions
- Determine whether testing, destructive investigation, or additional expertise is needed
- Identify conditions requiring immediate protection or stabilization

OBLIGEE ALLEGATION



FIELD EVIDENCE



TECHNICAL EVALUATION

The allegation starts the inquiry. The evidence drives the opinion.

Hear Both Sides, Provide Opinion



OBLIGEE: INDEPENDENT MEETING

- What is alleged to be defective?
- What contractual requirement was violated?
- When and how was it discovered?
- What correction is being demanded?
- What supporting documentation exists?



PRINCIPAL: INDEPENDENT MEETING

- What is the Principal's position?
- What caused the condition?
- Was the work installed as designed?
- Were there directives or changed conditions?
- Can it be corrected, and what is disputed?



OPINION TO SURETY: CATEGORIZE THE CONDITION

PRINCIPAL RESPONSIBILITY

NOT PRINCIPAL RESPONSIBILITY

UNRESOLVED

Reasonable Investigation Period

Factors Affecting the Timeline



2.Mechanical, Electrical, Plumbing, Fire Alarm, Fire Sprinkler

Complexity of the Project(s)



What the surety needs to know about the project before it can say how long a reasonable investigation should take.

1

PUBLIC OR PRIVATE

- Public: statutory bond forms and notice rules, procurement limits on replacement contractors, prevailing wage and DBE obligations, and slower approvals.
- Private: lender consent, owner liquidity, and more room to negotiate, but thinner documentation.

2

NATURE OF THE PROJECT

- Horizontal vs. vertical, specialty or process-driven scopes (MEP, fire, controls), occupied or phased facilities.
- Design-build pulls design risk into the bond. Specialty scopes need specialty consultants, and that takes time to staff.

3

COMPENSATION STRUCTURE

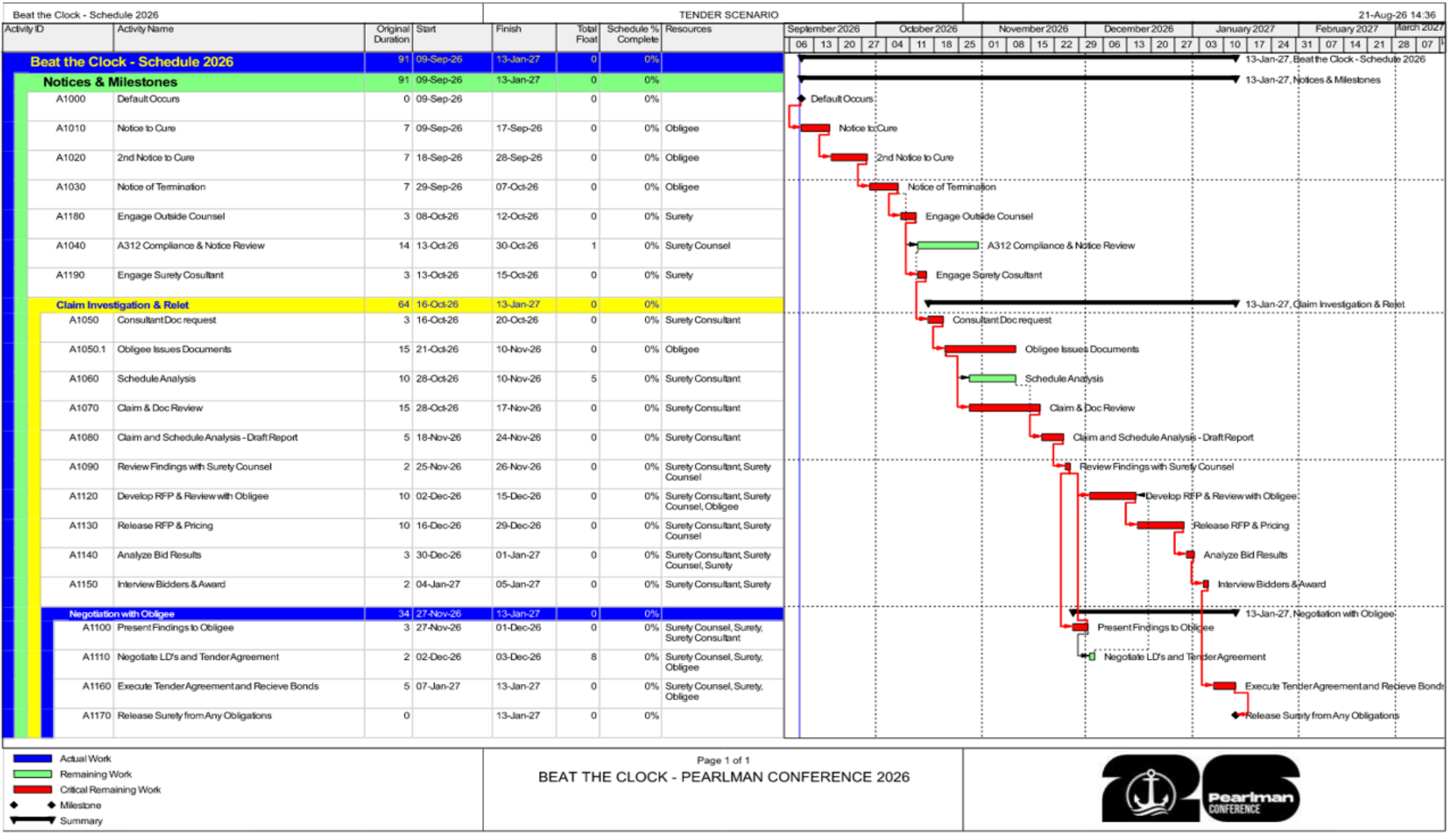
- Lump sum: the balance turns on the schedule of values and percent-complete disputes.
- Unit price: quantities are verifiable, but overruns, underruns, and unbalanced bids distort the balance.
- Cost-plus / GMP: audit rights and contingency drive the reconciliation.

4

LEVEL OF COMPLETION

- Early: replacement or takeover is practical and the contract balance is large.
- Late: punch list, defects, warranty, and sub buyout dominate; the option set narrows to tender or finance.
- Percent complete also tells you whether the LD exposure is still ahead of you or already incurred.

BEAT THE CLOCK







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PEARLMAN 2026 | MATCHDAY SESSION

ESI MANAGEMENT: FROM KICKOFF TO FINAL WHISTLE

Collections, client conversations, ESI agreements, sanctions, and spoliation

Four perspectives. One defensible game plan.

The panel follows the same sequence a well-managed ESI matter should.



Brian J. Rice

RiskScape Strategies

01 KNOW THE PITCH

ESI overview + collections



Suzanna Shaub

Travelers

02 BRIEF THE SQUAD

Client conversations + pitfalls



Caralisa Connell

Dry Law

03 WRITE THE RULES

The ESI agreement



Eric Liberman

Carney Law

04 AVOID THE CARDS

Sanctions + spoliation

Source → Client → Agreement → Sanctions



ESI is the match record, not a specialty exhibit.



DISCOVERY IS OFTEN WON OR LOST BEFORE THE FIRST REQUEST IS SERVED.

- Relevant information is spread across email, cloud platforms, chat, mobile devices, databases, and endpoints.
- Visible content may omit thread structure, versions, permissions, audit events, and other metadata.
- Reasonableness depends on a source-appropriate, proportionate, documented process, not on collecting every byte.



Soccer language legend

A completely unofficial glossary for very official obligations.

MATCHDAY / KICKOFF / OPENING WHISTLE

The matter starts, and everyone suddenly wants to know what data exists.

MATCH PLAN

The ESI roadmap, preferably written before invoices become exhibits.

KNOW THE PITCH

Map the systems before choosing tools, terms, or production formats.

BRIEF THE SQUAD / LOCKER ROOM

Get counsel, client, IT, records, and specialists telling the same story.

STOP PLAY

Pause when a client statement needs verification, not applause.

OWNS THE BALL / CAPTAIN'S ARMBAND

Assign responsibility. Vendors do not inherit counsel's armband.

KEEP IT ON THE FIELD / TOUCHLINES

Define proportionate scope so discovery stays inside the case.

TRAINING DRILL

Sample and test searches before declaring them match-ready.

MATCH BALL

Agree on production form before anyone kicks around native, PDF, and load files.

VAR / REPLAY

Review privilege calls now, and let the court test the record later.

RUN THE PLAY

Confirm the producing team can execute what the agreement actually says.

AVOID THE CARDS / YELLOW / RED

Curative measures versus severe sanctions. Same referee, different findings.

89TH MINUTE

The late preservation crisis everyone insists arrived unexpectedly.

ON-SIDE

Within scope, within the rules, and exactly where the records should stay.

MATCH RECORD / OFFICIAL REPORT

The ESI and chain-of-custody record explaining what happened.

FULL TIME / FINAL WHISTLE / STOPPAGE TIME

Close the process, document exceptions, and take questions.

Legal effect: absolutely none. Memory value: surprisingly high.

01

KNOW THE PITCH

ESI overview and types of collections

The goal is a reasoned, documented process that can be explained later.

Modern matters rarely involve a single repository.

The same event may appear in several systems, but each source preserves different context and control data.



Email + calendar

Headers, IDs, attachments, cloud links, mailbox context



Cloud documents

Versions, permissions, comments, sharing, audit history



Chat + collaboration

Threads, edits, reactions, identities, linked files



Mobile + SMS

Device ownership, attachments, backups, ephemeral content



Databases + SaaS

Schema, queries, filters, object relationships, business logic



Endpoints + media

Local files, app artifacts, deleted data, sync behavior

Map the source environment before selecting a tool, a search term, or a production format.

Choose the collection method that fits the play.

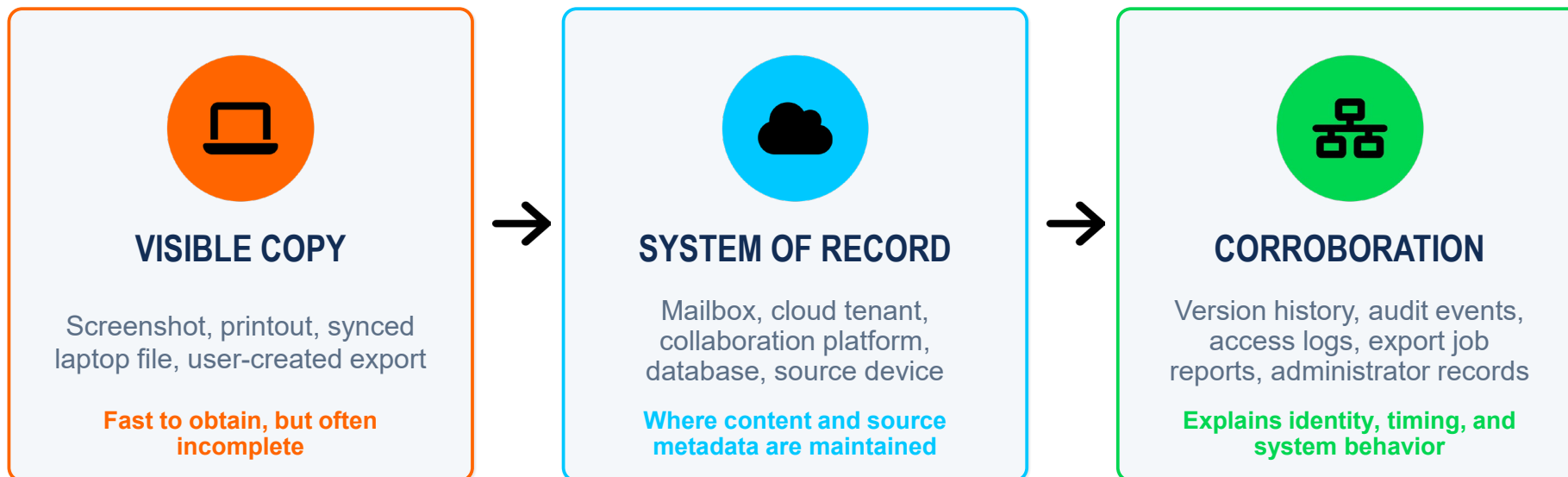
No method is automatically more defensible. The source and evidence question determine the formation.



Fit the method to the source, preserve the required attributes, and decide how the result will be validated.

Collect from the authoritative source, not the easiest copy.

A convenience copy can be useful, but it may not preserve the context needed for search, authentication, or explanation.



A Teams message may point to a living SharePoint file. Decide whether the current version, historical version, access history, or all three matter.

Five questions before anyone touches the data.

These questions connect technical defensibility with proportionality.



1

What source is most authoritative?



2

What information will this method preserve or omit?



3

How will completeness and integrity be checked?



4

What limitations must be disclosed?



5

What less burdensome alternative still meets the need?

Source and collection method reference

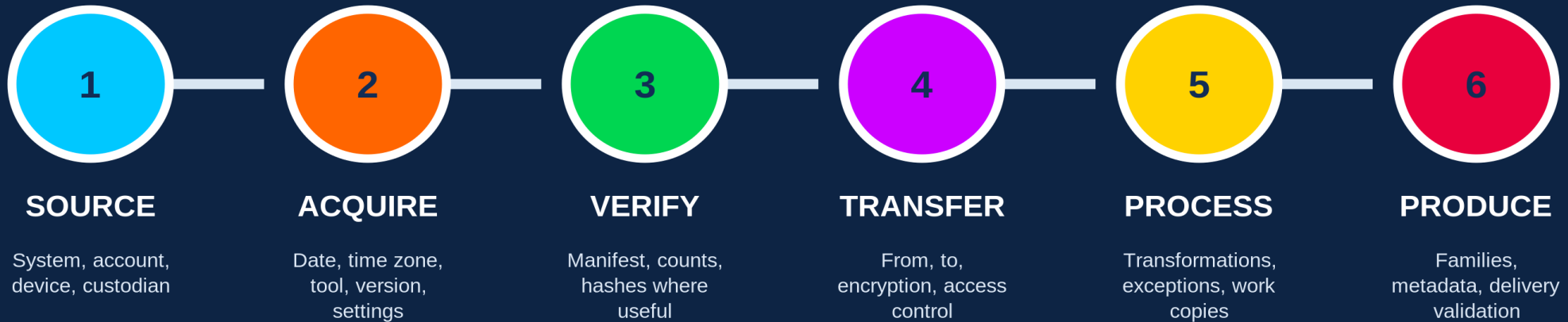
The appropriate method depends on the evidence question, source architecture, required attributes, and proportionality.

METHOD	BEST FIT	PRESERVES	COMMON LIMITATION	VALIDATION
Bit-stream image	Deleted data, unallocated space, full device state	Sector-level copy and local artifacts	High volume, privacy, encryption, time	Hashes, tool logs, device and size checks
Targeted logical	Active files and selected application data	Chosen native files and metadata	Misses deleted or unselected data	Manifests, path/date checks, sampling
Platform / API export	Cloud mail, chat, documents, audit records	Structured content, IDs, relationships, source metadata	Plan, permission, retention, API, and context limits	Job reports, counts, user mapping, attachment checks
Database query	Transactions and structured records	Fields, object relationships, query output	Schema, filters, business logic, time zones	Query preservation, row counts, source reconciliation
Third-party records	Provider-held or external data	Provider output and certifications where available	Control, scope, timing, and format limitations	Request scope, provider reports, comparison to other sources

Chain of custody is the official match report.

It records provenance, continuity, integrity, transfers, transformations, and exceptions.

CONTEMPORANEOUS RECORD OF PROVENANCE, CONTINUITY, AND INTEGRITY



A hash can show bitwise identity. It does not prove authorship, truth, intent, or historical existence.

Replay the sequence before you call the collection complete.

Validation should be designed before collection, not added after a dispute.

Manifest + item counts

Confirm expected population and volume.

Date range + time zone

Normalize display and document source zones.

Attachments + families

Verify family relationships and linked content.

Threads + identity mapping

Confirm users, channels, edits, and reactions.

Job reports + exceptions

Review failed, skipped, encrypted, or unsupported items.

Source-side reconciliation

Compare output to platform reports or source evidence.

02

BRIEF THE SQUAD

Talking to your client: issues and pitfalls

The goal is a reasoned, documented process that can be explained later.

Client and IT interview checklist

Use this as a structured issue-spotting guide, then adapt it to the matter.

- Claims, defenses, relevant events, and date range
- Key custodians, decision-makers, assistants, and administrators
- Email, cloud, chat, mobile, databases, endpoints, and third parties
- Authoritative source for each data type
- Auto-delete, retention, sync, backup, and departure workflows

- Personal devices, personal accounts, guest access, and collaboration partners
- Privacy, security, confidentiality, regulatory, and cross-border constraints
- Available export rights, tools, permissions, and platform limitations
- Known gaps, migrations, legacy formats, encrypted or inaccessible data
- Responsible person, verification step, monitoring cadence, and escalation path

Do not interview only the custodian.

One person rarely knows the content, architecture, retention rules, export limits, and preservation controls.

A black icon of a person in a suit.

Business custodian

What happened, who communicated, and which records matter?

A black icon of two server racks.

IT / system administrator

Where does the data live, how is it retained, and what can be exported?

A black icon of a shield.

Legal / records / privacy

What holds, policies, restrictions, and third-party obligations apply?

A black icon of a person with a shield.

Technical specialist

What method will preserve the required content and metadata, and how will it be validated?

Interview the people who know the facts and the people who know the systems. Then reconcile what they tell you.

Six questions before the preservation plan leaves the locker room.

Translate the claims and defenses into people, systems, time periods, transaction types, and deletion risks.

01 What happened, and what dates define the relevant period?

02 Who created, received, approved, or controlled the information?

03 Which systems are authoritative, and which are convenience copies?

04 What deletes, overwrites, expires, or changes automatically?

05 What sits on personal devices, third-party platforms, or outside company control?

06 Who can verify scope, execution, exceptions, and continuing compliance?

Client statements that should stop play.

Each statement may be true, but none is a sufficient preservation or collection plan without verification.

"Everything is in Outlook."

Cloud links, archives, chat, phones, and shared drives may sit elsewhere.

"We turned off auto-delete."

Which systems, accounts, devices, dates, and retention layers were changed?

"No one uses personal devices."

Confirm policy, actual practice, messaging apps, and backups.

"IT can just export it."

Export rights, plan level, permissions, context, and job limits matter.

"The screenshot is the record."

A convenience copy may omit metadata, thread context, versions, or attachments.

"That employee left months ago."

Departure workflows can delete mailboxes, devices, cloud accounts, or mobile data.

The cure is a follow-up question, a system check, and a written decision, not an assumption.

A preservation sequence, not a stopwatch.

Move deliberately and in parallel where appropriate. Negotiation, access, and technical validation may take the time the matter requires.



Order matters. A rigid hour-by-hour deadline does not. Document why the sequence, pace, and follow-up were reasonable.

Know who owns the ball at every step.

A defensible process assigns legal scope, technical execution, verification, monitoring, and escalation.



Counsel

Define legal scope, preservation trigger, and instructions. Supervise and test the process.



Client legal

Coordinate stakeholders, holds, privacy, records, and decision logging.



IT / admins

Map systems, retention, access, exports, deletion controls, and source-side reports.



Custodians

Identify content, devices, accounts, shorthand, and actual communication practices.



Specialist / vendor

Design and execute source-appropriate collection, validation, and documentation.

03

WRITE THE RULES

ESI agreement section

The goal is a reasoned, documented process that can be explained later.

The ESI agreement defines the rules before the match becomes the dispute.

It should be specific enough to execute, test, and enforce, while preserving a process for reasonable revision.

SCOPE

Custodians, systems, dates, noncustodial and third-party sources, inaccessible data, privacy limits

METHOD

Search terms, structured queries, sampling, TAR, AI, validation, revision

PRODUCTION

Native, image, text, load files, metadata, families, linked content, redactions

RISK

Preservation, privilege, Rule 502(d), confidentiality, cost allocation, dispute process

A good agreement does not promise perfection. It creates a transparent, proportionate, testable process.

Twelve clauses that keep discovery on the field.

The exact language should be adapted to the case, court, sources, and capabilities.

01 Cooperation + liaisons

02 Custodians + sources

03 Third-party + inaccessible

04 Preservation + deletion

05 Privacy + cross-border

06 Search / TAR / AI

07 Date + file limits

08 Production form

09 Metadata + families

10 Dedupe + threading

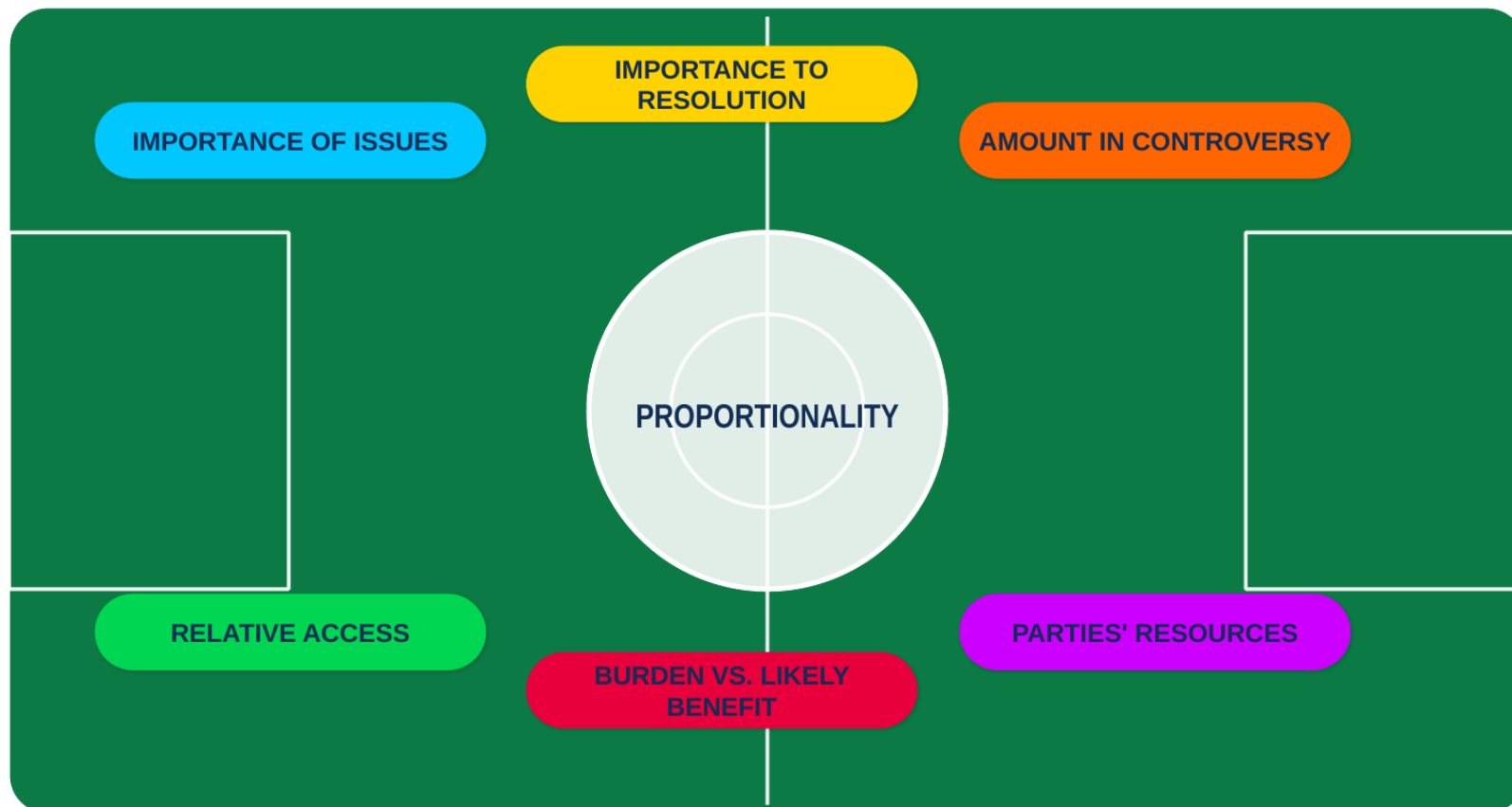
11 Privilege + 502(d)

12 Disputes + cost

The agreement should answer who, what, where, when, how, in what form, at whose cost, and what happens when assumptions change.

Draw the touchlines with evidence, not adjectives.

Rule 26(b)(1) requires a concrete discussion of scope, access, resources, burden, cost, and likely benefit.



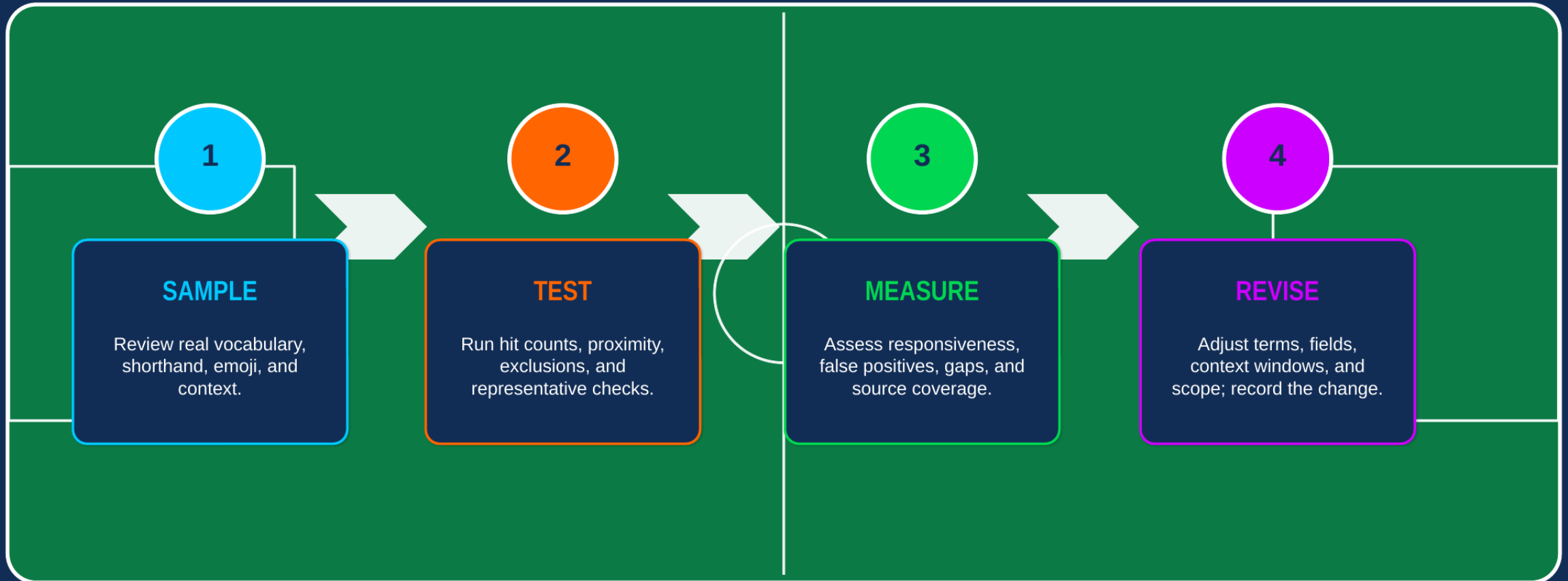
BURDEN RECORD

- Volume + custodian count
- Collection difficulty
- Processing complexity
- Review cost
- Security + privacy
- Less burdensome alternatives

FRCP 26(b)(1)

Search is a training drill, not a word list.

Sample, test, measure, revise, and document. Chat language often requires a different vocabulary and unit of context than email.



Each iteration should leave a record: what changed, why it changed, and how the result was checked.

Agree on the match ball before kickoff.

Native data, structured exports, rendered images, text, load files, and forensic images are not interchangeable products.



Native / near-native

Spreadsheets, databases, audio, video, cloud exports, formulas, hidden content



Image / PDF

Appearance, Bates numbers, redactions, color treatment, searchable text



Metadata / load files

Custodian, dates, IDs, paths, families, thread fields, processing fields



Special handling

Linked cloud files, version history, attachments, encrypted items, exceptions

The agreement should preserve the information needed for the case, identify expected requirements and results, and define how delivery will be handled.

Install VAR (video-assistant referee) before the disputed call.

A defined clawback process and a court-entered Rule 502(d) order can reduce waiver risk and privilege-review cost.

VAR REVIEW: PRIVILEGE

1. Identify and notify
2. Sequester or return
3. Resolve the claim without using the material
4. Preserve a defined challenge process



Private agreement

Binds the parties according to its terms.



Rule 502(d) order

Court order can provide broader protection against waiver.



Privilege log protocol

Define timing, categories, redaction metadata, and challenges.

Can the producing team actually run the play you negotiated?

Confirm platform rights, search syntax, export components, security controls, timing, and cost before making commitments.



Platform plan + permissions

Who has legal and technical authority to access and export?



Search syntax + limitations

Can the proposed Boolean, proximity, date, and file filters be run?



Export components + context

Will threads, edits, reactions, linked files, and metadata be included?



Storage + security controls

How will case data be transferred, encrypted, retained, and accessed?



Processing + exception handling

How will unsupported, encrypted, skipped, and failed items be handled?



Timing + cost + expansion triggers

What is the estimate, who pays, and what evidence justifies expansion?

04

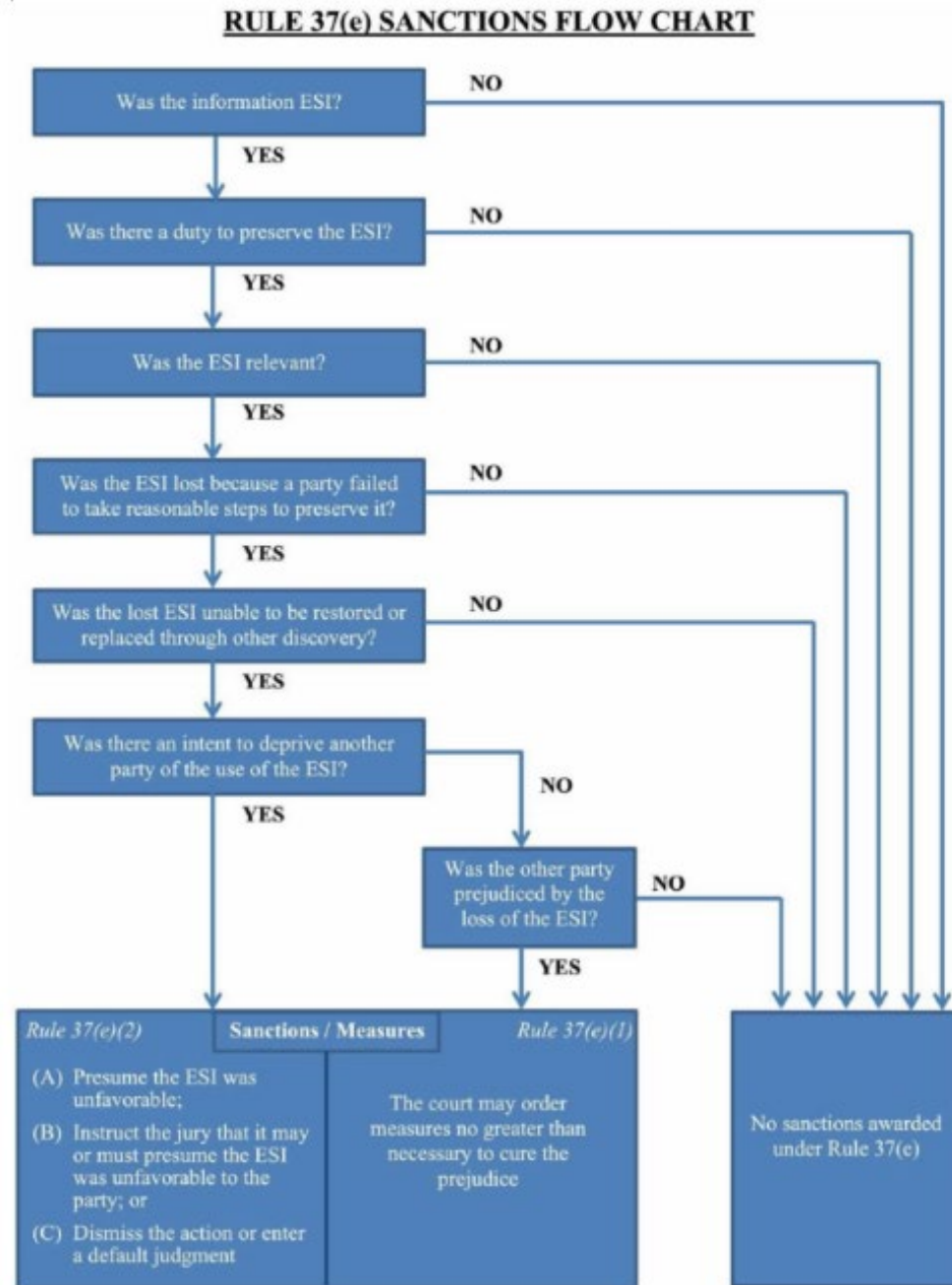
AVOID THE CARDS

Sanctions and spoliation

The goal is a reasoned, documented process that can be explained later.

Determining Available ESI sanctions.

The missing-information narrative must be tested against each element of the federal rule.



Yellow card or red card: prejudice and intent are different findings.

Rule 37(e)(1) authorizes curative measures. Rule 37(e)(2) reserves severe measures for intent to deprive.



RULE 37(e)(1)

PREJUDICE

CURATIVE MEASURES

- No greater than necessary
- Additional discovery
- Cost allocation or fees
- Evidentiary measures tied to prejudice



RULE 37(e)(2)

INTENT TO DEPRIVE

SEVERE MEASURES

- Adverse inference
- Dismissal or default
- Reserved for intent to deprive
- Prejudice need not be separately found after intent

Same referee. Different findings. Different remedies.

What will the judge ask when the replay begins?

A clear record turns methodological disputes into testable questions instead of competing rhetoric.

1 What did you know, and when did the preservation duty arise?

2 What reasonable steps did you take, and who verified them?

3 What ESI was actually lost, and from which authoritative source?

4 Can the information be restored or replaced through other discovery?

5 What evidence shows prejudice or intent to deprive?

Courts do not require perfection. They require a reasonable, proportionate process and an honest record of limitations and changes.

The 89th-minute deletion.



PANEL REVIEW

89:37

What facts prove reasonable steps, replaceability, prejudice, or intent?

What additional facts would change your view of reasonable steps, replaceability, prejudice, or intent?

Counsel cannot outsource the captain armband.

Hiring a vendor is a first step. Counsel must give a competent scope, monitor execution, and verify the result.



UNDERSTAND

Know how the client creates, stores, retains, and retrieves relevant ESI.



DIRECT

Translate legal issues into reasonable custodians, sources, dates, methods, and preservation instructions.



SUPERVISE + VERIFY

Confirm that the client and vendor followed the instructions, addressed exceptions, and documented changes.

Technological complexity does not eliminate the duty of competent inquiry and active supervision.

STOPPAGE TIME

QUESTIONS?

Bring us the hard fact pattern, the awkward platform, or the preservation call nobody wants to make.

SOURCE + COLLECTION

What is authoritative, and what method preserves the evidence you need?

CLIENT + PRESERVATION

Who knows the facts, systems, retention, and actual practice?

AGREEMENT + SANCTIONS

What should be negotiated now, and what record will matter later?

PRESERVE • COLLECT • REVIEW • PREVAIL



Andrew Barton
American Arbitration Association
VP, AI Business Development



Mike F. Pipkin
Weinstein Radcliff Pipkin LLP
Attorney, Mediator & Arbitrator



Why AI in Arbitration — Why Now



More documents.

Construction disputes are document-heavy and operationally complex.

More pressure.

Parties want faster, lower-cost resolution that better matches claim value.

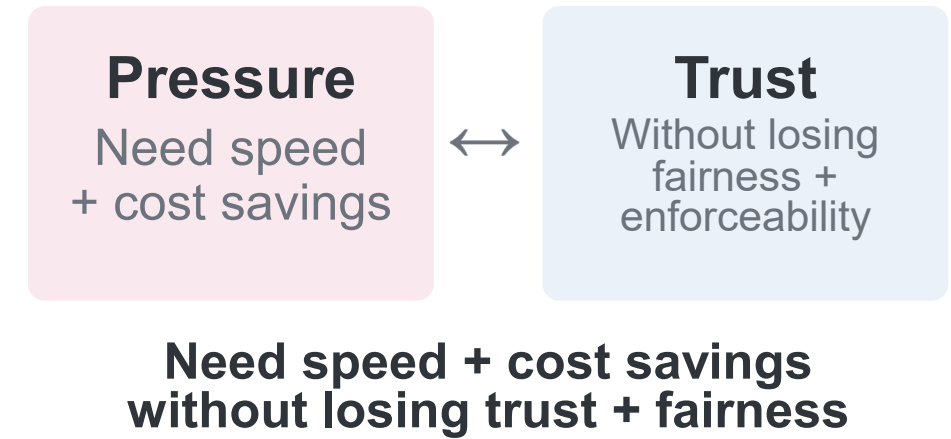
AAA's through-line.

Efficient, fair, and accessible dispute resolution remains the mission.

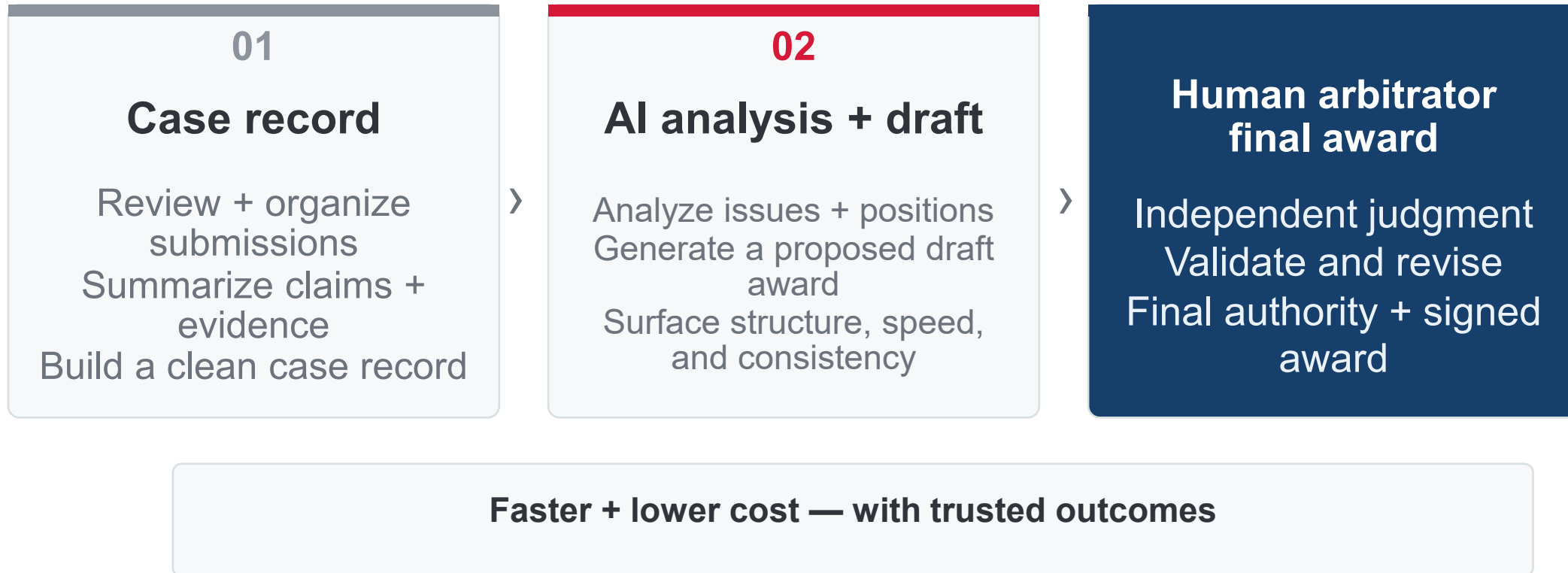
Responsible opportunity.

AI already helps with review, summarization, and drafting; ADR can apply those gains responsibly.

THE TENSION



Keep human judgment at the center. Accelerate the workflow with AI.



AI supports — arbitrator decides.

Trained on 1,400+ real AAA construction awards and case materials — not generic public web content.

Designed to emulate arbitrator reasoning within AAA rules and workflows.



Development path: MVP → simulation pilots → validation → launch

01

Curated AAA data

Real construction awards and case materials

02

Arbitrator calibration

Expert review tuned reasoning to AAA workflows

03

Pilot testing

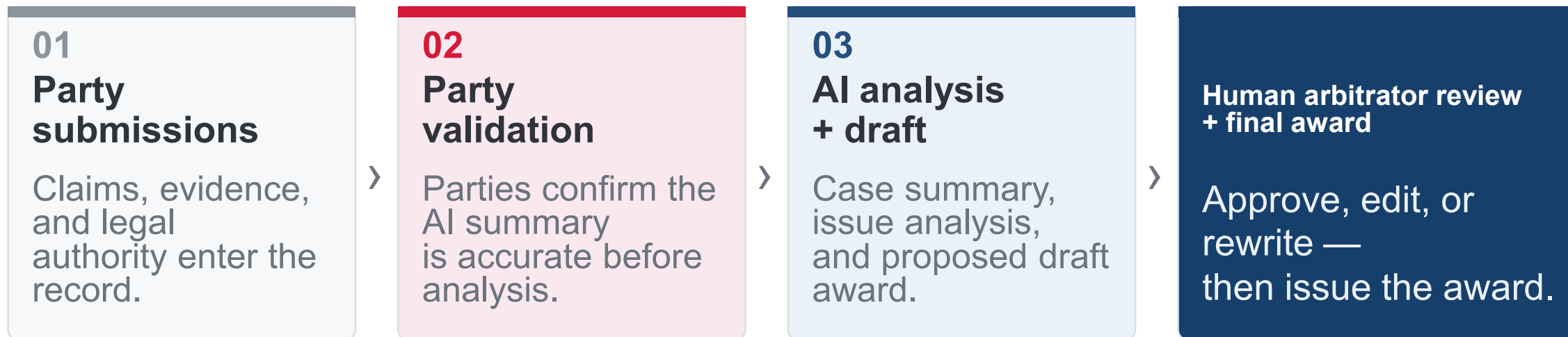
Simulation pilots and validation

04

Governed launch

Human oversight, standards, and feedback loops

Nothing is final without human arbitrator validation.



WHY IT MATTERS

Enforceability

Fairness & due process

Risk control

Efficiency from AI. Trust from human judgment.



SELECTION

Human arbitrators selected from the AAA Roster of Arbitrators.

Matched to the case, with party rights where rules permit.

STANDARDS

Impartial and independent.

Conflicts disclosed throughout the case.

Act diligently and in good faith.

ROLE

Review the record and party feedback.

Test and revise the AI's reasoning.

Finalize, sign, and issue the award.

Faster. More cost-effective. Human-validated.



20–25%

faster
resolution time

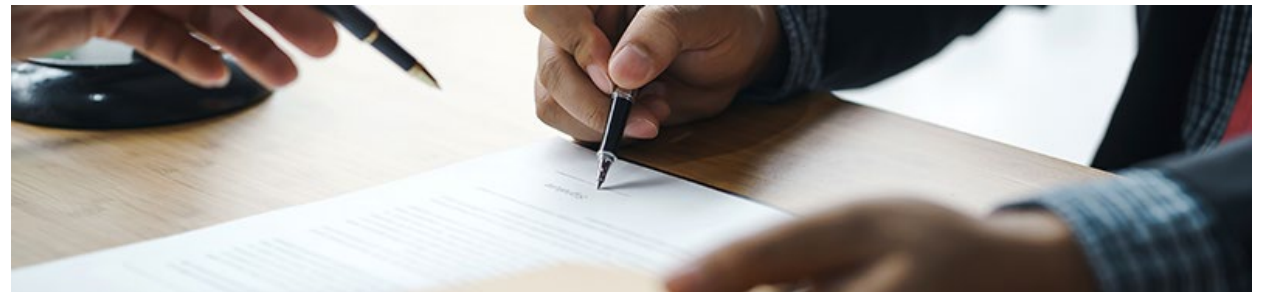
35%+

cost savings
in documents-only
construction cases

**Human-
validated**
final award
trusted outcomes

Combines the speed and structure of AI with the judgment of human arbitrators.

Creates scalable model for growing caseloads and document volume. Advances AAA's mission: efficient, fair, accessible dispute resolution.





Demo



Andrew Barton
American Arbitration Association
AI Arbitrator Lead

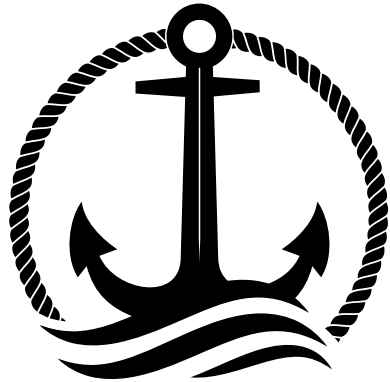
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Pearlman
CONFERENCE

Welcome Remarks



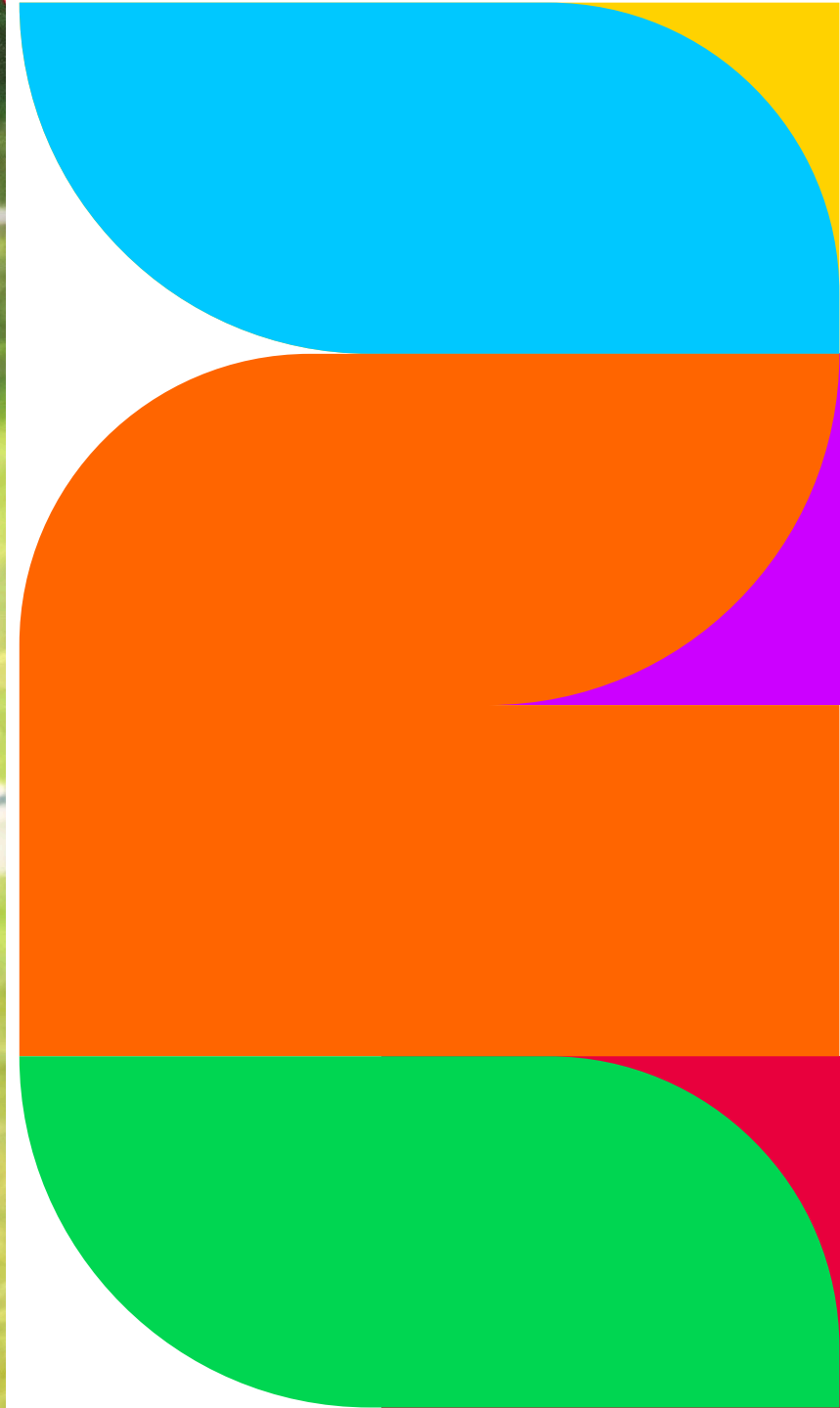
Amanda Marutzky

Watt Tieder



Bryce Holzer

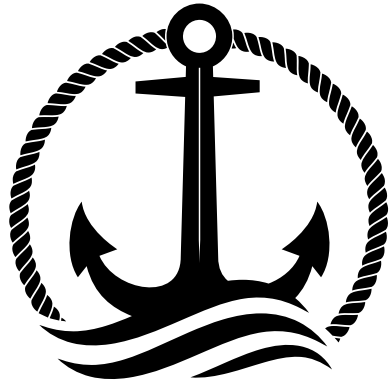
Travelers



Drew Brouwer

Nicholson Professional
Consulting





Pearlman
CONFERENCE



Pearlman
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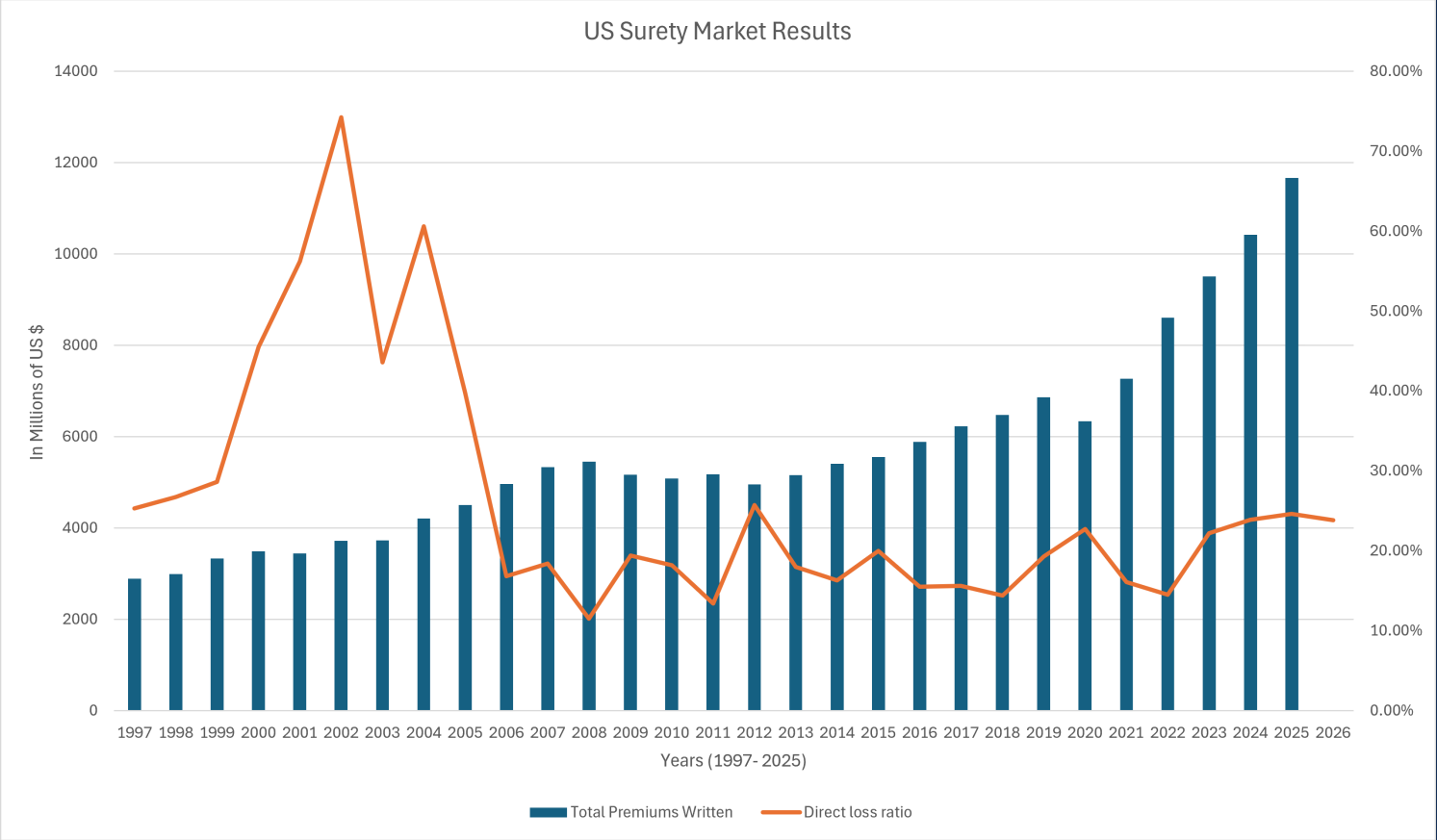
The Playbook – Marketing Trends & Insights



Topics

- Loss ratio trends
- Large Losses and Impact on underwriting
- Federal Projects
- Economic Factors
- Underwriting considerations on long-term projects
- Ownership Transition
- Utility and Impact of AI
- Broker Relationship

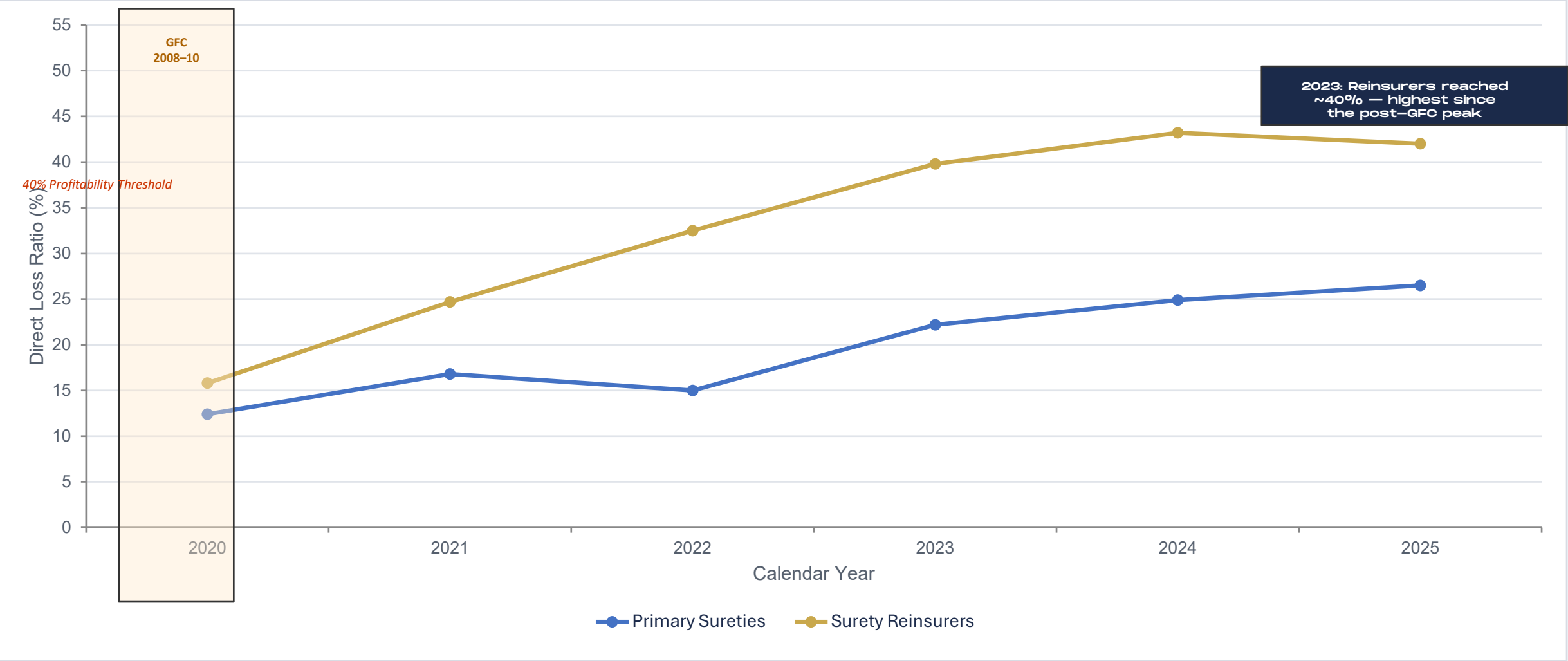
Loss Ratio Trends



Large Losses and Impact on Underwriting

U.S. Surety: Direct Loss Ratios (2020–2025)

Source: SFAA Annual Reports / Industry Publications



Notes: Direct loss ratios reflect direct premiums earned vs. direct losses incurred per SFAA statistical data and industry publications. Reinsurer figures represent a market composite and incorporate greater year-to-year volatility due to adverse development recognition. 2024–2025 data are preliminary/estimated. GFC = Global Financial Crisis.

Federal Projects And Mega Projects



- **Economic Factors**
 - **Federal Funding Impacts**
 - **Economic Impacts**
 - **Competent and experienced labor**
 - **Impact of Data Center Construction**

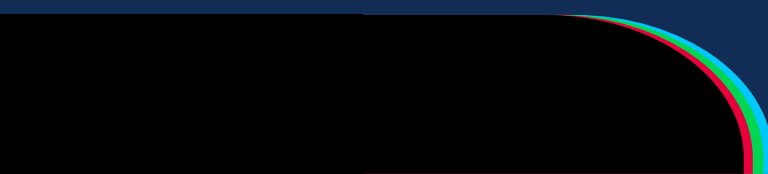


Underwriting Considerations on Long-Term Projects

Ownership Transition

- Internal Sale (Key Employee/Next Generation)
- Private Equity
- ESOPs
- General Transition

Utility and Impact of AI



Broker Relationship





PLAYING TO WIN

The Co-Surety Game Plan A Referee's Guide to Teamwork

Jennifer Fiore – Dunlap Fiore
Mark Degenaars – The Vertex Companies
Marc Domres – Zurich Group
Erin Fonacier – Dunlap Fiore



Setting up the Team

The Co-Surety Agreement

- Lead authority
- Decision thresholds
- Pre-default workouts
- Post-default claims administration
- Financing
- Collateral
- Salvage / recoveries
- Dispute resolution

Captain's Armband

The Lead's Job

Pass the Ball



COMMUNICATION

- Early circulation of claim notices
- Share investigative materials as they develop
- Regular calls + documented decisions

THE BIGGEST MISTAKE

- Too little information
- Information too late
- Different sureties receiving different information



HYDRATION BREAK

Sponsored by Sustaining Members



The World Cup Final

DEFAULT

- Multiple projects / co-surety relationships
- Different participation percentages
- Joint venture structure
- Huge potential exposure
- Obligor wants an immediate response

WHO HAS THE BALL?

YELLOW CARD • PARALLEL DECISION-MAKING

Separate investigations, consultants, obligor negotiations, or principal contacts can create mixed messages, duplicate costs, and exploitable divisions.

• PENALTY KICK → FINAL WHISTLE

THE PENALTY KICK

Lead wants to finance continuation.
One co-surety agrees.
Another refuses.
Another wants to terminate.

Who takes the shot?

BREAKING THE TIE

Majority vote • Escalation • Mediation
• Arbitration

Defined thresholds • Replacement of
lead

The agreement should prevent
disagreement from becoming delay or
stalemate.

RED CARD

Immediate fouls:

- Withholding material information
- Unilateral decisions
- Inconsistent positions to the obligee
- Refusing to participate
- Waiting for crisis to discuss authority
- Ignoring the agreement

THE REFEREE'S RULES

PLAY AS A TEAM • COMMUNICATE • KNOW WHO'S TAKING THE SHOT
• NO SURPRISE GOALS • DON'T TACKLE YOUR OWN TEAMMATE



Blowing the Whistle on the Vanishing Contract Balance

Overpayment, Material Alteration & the Surety's Defense

2026 Pearlman Association Conference • September 10–11, 2026 • Woodinville, Washington

Emory G. Allen — Clark Hill, PLC

Michael Cronin — Markel Surety

Rudy Dominguez — Liberty Mutual Surety

Mason Fleming, PMP — Nicholson Professional Consulting, Inc.

Your Role Today

Part 1 — Tell us what you think. As the overpayment issues come up, you weigh in. Expect wide variation: surety professionals hold very different views on how viable overpayment really is as a defense.

Part 2 — Work the investigation with us. We build out a fictional overpayment investigation together, and you make the call on whether there was an overpayment.

Today's 45-Minute Game Plan

Time	Segment
0:00–2:30	Opening and introductions
2:30–7:30	Two forms of material alteration
7:30–12:30	What counts as an overpayment?
12:30–17:30	Payment safeguards and construction proof
17:30–22:30	Prejudice, discharge, and the governing rulebook
22:30–24:00	Transition to the central case
24:00–36:30	The Case of the Vanishing Contract Balance
36:30–40:30	Competing arguments
40:30–43:30	Final audience verdict
43:30–45:00	Practical takeaways

Part I — Learn the Rules

POLL 1 • What Kind of Call?

Which scenario is most likely to support complete, rather than proportional, discharge of the surety?

- A. The owner prematurely reduces retainage
- B. The owner pays for unverified stored materials
- C. The owner fundamentally changes the nature or scope of the bonded work without the surety's consent
- D. The owner pays without obtaining required lien waivers
- E. All of the above

Launch Slido Poll 1. Select one answer.



Which scenario is most likely to support complete, rather than proportional, discharge of the surety?

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- E. All of the above



Material Alteration: Two Different Calls

	Red Card: Cardinal Change	Foul: Impairment of Collateral
Conduct	Fundamentally alters the amount or nature of the bonded undertaking	Material departure from payment or contract-administration requirements
Typical example	Scope transformed beyond changes contemplated by the contract	Premature payment; payment for incomplete, defective, or unverified work
Typical result	Potential complete discharge	Usually pro tanto discharge to the extent of resulting prejudice

The surety generally must establish:

- 1. A material alteration or departure from the bonded contract
- 2. Lack of the surety’s consent
- 3. Resulting harm or prejudice

A material alteration may arise from conduct in the contract’s execution or enforcement—not only from a written amendment. Governing law and bond language matter.

POLL 2 • Is the Math That Simple?

The contractor has received 80% of the adjusted contract price, but the project is reportedly 70% complete. Is the project overpaid by exactly 10%?

- A. Yes
- B. No
- C. Only if retainage was not withheld
- D. There is not enough information
- E. Ask the consultant

Launch Slido Poll 2. Select one answer.



Respond at

pe.app/**masonfleming**



Poll Everywhere

The contractor has received 80% of the adjusted contract price, but the project is reportedly 70% complete. Is the project overpaid by exactly 10%?



0



0

A. Yes

B. No

C. Only if retainage was not withheld

D. There is not enough information

E. Ask the consultant



Edit



Choices



Results



Lock



Correctness

Overpayment Is Not Just Subtraction

Before reaching a conclusion, reconcile:

- Retainage and early retainage reduction
- Approved and pending changes
- Stored materials and off-site equipment
- Mobilization and other early-value work
- Front-loaded schedule-of-values items
- Defective or incomplete work
- Unpaid subcontractors and suppliers
- Earned value versus reported physical progress
- Reasonable cost to complete

Contract Balance Meter

POLL 3 • Where Do You Look First?

Which missing payment safeguard would you investigate first?

- A. Payment certification
- B. Inspection and quality-control records
- C. Verification of stored materials
- D. Lien waivers and proof of lower-tier payments
- E. Retainage and schedule compliance
- F. The entire payment file

Launch Slido Poll 3. Select one answer.



Respond at

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Poll Everywhere

Which missing payment safeguard would you investigate first?

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0



0



Edit



Choices



Results



Lock



Correctness

Payment Safeguards: The Investigation Checklist

Safeguard	Questions to Ask
Certification	Was each payment properly submitted and certified? What did the certification actually represent?
Inspection and quality	Was billed work inspected? Were testing and quality-control requirements satisfied?
Schedule	Was the contractor complying with the project schedule when payment was made?
Stored materials	Were materials delivered or properly verified, insured, segregated, and tied to the project?
Lower tiers	Were lien waivers obtained and payment to subcontractors and suppliers confirmed?
Retainage	Was the required percentage withheld? Was any reduction authorized and justified?
Changes	Did payment applications include unapproved change-order work?
Defective work	Was defective or incomplete work treated as complete—or later concealed by additional work?

Important distinction: A red flag is not automatically a quantified overpayment or proof of prejudice.

POLL 4 • Improper Payment, but No Harm?

The owner made a premature payment but proves that the funds were used for labor and materials on the bonded project. What is the likely significance?

- A. The surety is automatically completely discharged
- B. The surety automatically receives a dollar-for-dollar discharge
- C. The payment may have been improper, but resulting prejudice remains disputed
- D. The owner necessarily defeats the defense
- E. It depends on the bond, contract, facts, and applicable law

Launch Slido Poll 4. Select one answer.



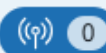
Respond at

pe.app/[masonfleming](#)



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E. It depends on the bond, contract, facts, and applicable law



Edit



Choices



Results



Lock



Correctness

Prejudice: Competing Stories

Surety's Position	Obligee's Response
The payment depleted collateral available after default	The project received the benefit of the funds
Required payment protections were relinquished	The funds paid for necessary labor and materials
The contractor may not have earned the payment	The payments avoided liens, delay, or an earlier default
Early payment reduced the contractor's incentive to complete	The surety's position was not materially worsened
The reduced balance increased completion exposure	The ultimate completion loss resulted from other causes
Defective work may have been covered by later work	Most payments were certified and supported performance

Core question: How—and by how much—did the obligee’s payment conduct materially worsen the surety’s position?

Read the Rulebook Before Making the Call

- **Common-law or statutory bond?** Statutes may constrain traditional common-law defenses.
- **Private or public project?** Public payment, inspection, and retainage duties may be statutory or regulatory.
- **Miller Act or Little Miller Act?** Determine whether governing law is incorporated into the bond.
- **What does the bonded contract require?** Examine certification, inspection, retainage, stored materials, and lower-tier payment provisions.
- **Did the surety consent?** Analyze actual consent, knowledge, waiver, and estoppel.
- **What does local law require?** The prejudice showing and measure of discharge vary by jurisdiction.
- **Does the bond alter traditional defenses?** Review waiver-of-defenses and “in lieu of” language.

AIA A312 focus: “Balance of the Contract Price” is reduced by **valid and proper payments**—not necessarily every payment the owner elected to make.

Part II — Solve the Case

The Case of the Vanishing Contract Balance

The Blackacre Barrel & Event Center

Item	Amount or Status
Original contract	\$20.0 million
Revised contract price	\$22.0 million
Amount paid	\$19.8 million
Remaining stated balance	\$2.2 million
Owner’s reported completion	78%
Preliminary cost to complete	\$5.4 million
Contractor status	Defaulted and off the project
Lower-tier claims	Substantial and increasing

The owner demands that the surety perform immediately. The owner wants an answer by Friday.

POLL 5 • What Should the Surety Do First?

- A. Deny the claim based on overpayment
- B. Accept responsibility and immediately arrange completion
- C. Reserve rights and investigate the payment history
- D. Demand that the owner replenish the contract balance
- E. Negotiate an interim or standstill arrangement
- F. Review the bond and contract before deciding

Launch Slido Poll 5. Select the best answer—even though several actions may need to occur in parallel.



Respond at

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Poll Everywhere

What Should the Surety Do First?

- A. Deny the claim based on overpayment
- B. Accept responsibility and immediately arrange completion
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- D. Demand that the owner replenish the contract balance
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- F. Review the bond and contract before deciding



0



0



Edit



Choices



Results



Lock



Correctness

Evidence Round 1 • The Payment File

- Retainage was reduced from **10% to 2% at 55% completion.**
- The contractor billed **\$1.2 million** for off-site equipment.
- Only **\$400,000** of that equipment can initially be located and verified.
- One **\$600,000 payment** lacks the required architect certification.
- Several payment applications include unapproved change-order work.
- Required lower-tier lien waivers are missing.
- A project-management report states that billing was **“ahead of the field.”**

Likely immediate path: Review the bond and contract, reserve rights, investigate the payment history, protect the project, and preserve completion options. These steps are not mutually exclusive.

Panel Challenge • Critique the Preliminary Analysis

Preliminary conclusion: “The owner overpaid the contractor by at least \$2.6 million. The surety should assert complete discharge from the performance bond.”

What is wrong—or at least premature—about that conclusion?

- The amount is not yet adequately supported.
- Reported completion is not necessarily earned value.
- Stored materials, retainage, changes, and defective work remain unresolved.
- It confuses cardinal change with impairment of collateral.
- It does not analyze lack of consent.
- It does not connect the payments to material prejudice.
- It ignores the bond form, governing law, and measure of discharge.

Evidence Round 2 • Consultant's Findings

- Significant work billed as complete remains unfinished.
- Installed work valued at approximately **\$800,000** is defective and must be removed.
- Some stored materials cannot be located or tied to the project.
- Several schedule-of-values items were materially front-loaded.
- Multiple subcontractors remain unpaid.
- The consultant's earned-value estimate is below the amount certified and paid.
- The owner contends that accelerated payments kept the contractor working for six additional months.

Construction question: Which items establish a payment irregularity, which establish an overpayment, and which establish resulting prejudice?

Quantifying the Vanishing Balance

Measure	Preliminary Range
Potential improper payments	\$2.4–\$3.2 million
Corrective work	\$700,000–\$1.0 million
Unverified materials	\$600,000–\$800,000
Remaining stated contract balance	\$2.2 million
Reasonable completion estimate	\$5.0–\$5.8 million

Do not simply add the figures. They answer different questions and may overlap:

- Payment made contrary to the contract
- Difference between paid and earned value
- Cost of correcting defective work
- Contract-balance deficiency
- Reasonable cost to complete
- Resulting prejudice to the surety

Closing Arguments • 45 Seconds Each

Perspective	Best Argument
Surety	Express payment protections were ignored; disputed payments were not valid and proper; collateral was depleted; completion exposure increased.
Obligee	Payments supported bonded work, avoided an earlier default, and did not cause the ultimate completion loss.
Construction consultant	Separate questionable payments from provable overpayments; identify assumptions, missing records, and defensible valuation ranges.
Outside counsel	Distinguish cardinal change from impairment; address consent, waiver, causation, prejudice, governing law, and the measure of discharge.
Alternative surety perspective	Identify how another surety might evaluate or resolve the claim—and the one missing fact most likely to change the decision.

POLL 6 • Final Verdict

What call should be made?

- A. **Red card:** Complete discharge based on cardinal change
- B. **Foul:** *Pro tanto* discharge to the extent the improper payments caused prejudice to the surety
- C. **Foul occurred:** A potential overpayment defense exists, but the amount of prejudice cannot yet be established
- D. **No call:** No material prejudice to the surety has been proven
- E. **Defense compromised:** Consent, waiver, or estoppel substantially limits or defeats the defense
- F. **Further review:** Additional investigation is required before determining whether a defense exists

Launch Slido Poll 6. Select one answer.



What call should be made?

A. Red card: Complete discharge based on cardinal change

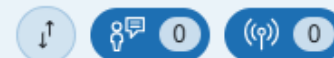
B. Foul: Pro tanto discharge to the extent the improper payments caused prejudice to the surety

C. Foul occurred: A potential overpayment defense exists, but the amount of prejudice cannot yet be established

D. No call: No material prejudice to the surety has been proven

E. Defense compromised: Consent, waiver, or estoppel substantially limits or defeats the defense

F. Further review: Additional investigation is required before determining whether a defense exists



Edit

☒ Choices

☒ Results

☐ Lock

☐ Correctness

When the Contract Balance Vanishes

1. **Read the rulebook.** Analyze the bond, bonded contract, statutes, and governing law.
2. **Identify the foul.** Distinguish cardinal change from impairment of collateral.
3. **Reconstruct the payment history.** Do not rely solely on reported percentage complete.
4. **Quantify the impairment.** Separate improper payments, earned value, corrective work, cost to complete, and prejudice.
5. **Preserve the defense.** Consider consent, waiver, estoppel, reservation of rights, and interim arrangements.

The money may be gone, but the payment history remains. The surety that knows what to look for can determine whether the obligee's conduct warrants no call, a foul, or a red card.



PEARLMAN 2026
THE BEAUTIFUL GAME OF SURETY

PLAYING THE FEDERAL PITCH

Handling the Contracting Officer, Claims, and
Surety Risk in Federal Construction Projects

Sunny Lee • Matt Drake
Patrick Weller • Guy Armfield



The Match Plan

00'



00'–15'

KEEP PLAYING

Authority, field direction, and relationship-preserving notice.



15'–30'

BUILD THE CASE

Contemporaneous record, REA/claim strategy, and decision clocks.



30'–45'

AVOID THE RED CARD

Surety communication, cure/show cause, and recovery response.

AUDIENCE = PROJECT TEAM

At each whistle:

1

Call the play

What should happen next?

2

Name the risk

What right, relationship, or bond exposure is changing?

3

Choose the communication

Who needs to hear what—and in what tone?

Use the hypothetical to surface judgment calls—not to recite doctrine.

Training Camp

What to prepare for before Game Day



Underwriting a Federal Contractor

Where will the Match be played

What are the rules of the League – Know recent changes

Relationship with the Principal

Know your "Opponents" both Owner and Subcontractor

Health of your players: Financial status – Staffing Plan – Bond capacity

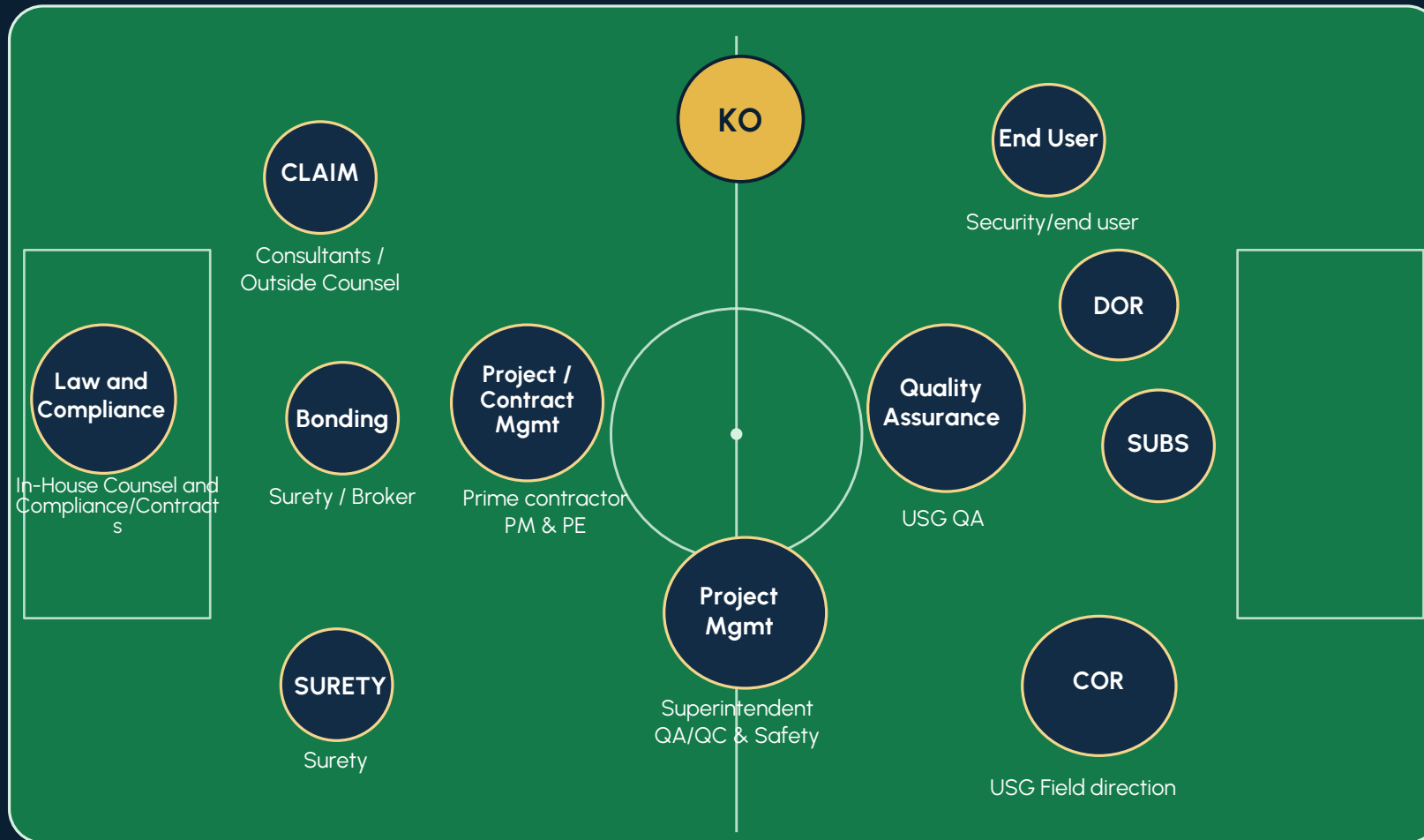
What is on the line: High Profits – Repeat Client – Niche Work

Regular Season vs. Playoffs: Project Type

Contract Structure: Firm Fixed Price – MAC – Short List – Sole Source – Design Build –

The Starting XI: One Project, Many Decision-Makers

The best result depends on role clarity and one credible project story.



THE WIN CONDITION

**Aligned roles.
Credible facts.
One message.**

- Prime manages performance and the government relationship.
- Counsel preserves rights without needless escalation.
- Consultants prove causation, time, and cost.
- Broker and surety team communicate risk before crisis.

Kickoff: A Bonded Federal Renovation Starts to Slip

An active facility, multiple government voices, and a project record still being written.

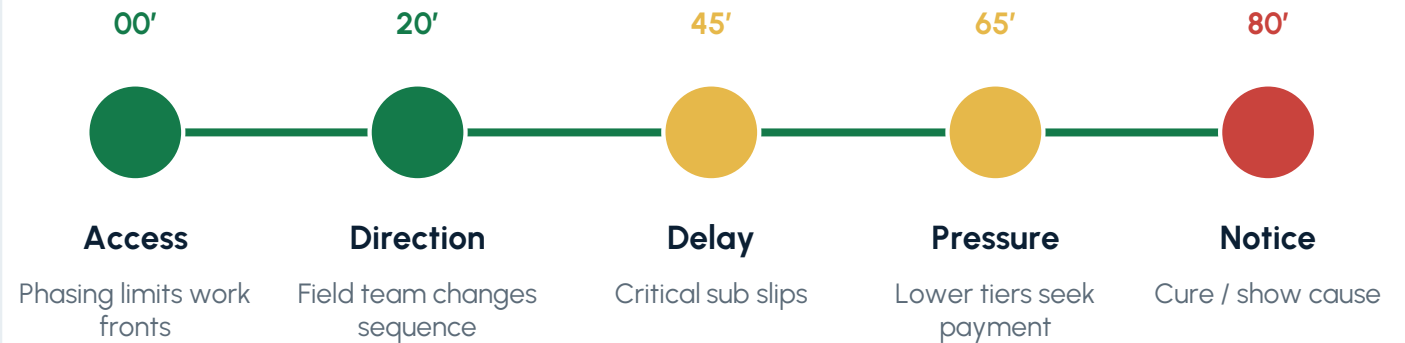


Pearlman
CONFERENCE

MATCH FACTS

- Bonded federal renovation at an active government facility
- Phased access restrictions and late field direction
- Disputed resequencing, acceleration, and changed work
- Critical-path subcontractor delay and lower-tier pressure
- Government says the contractor is not making adequate progress

THE MATCH TURNS IN STAGES



CALL THE PLAY

Which event first converts ordinary project friction into surety risk?

Access restrictions · Unpaid change work · Critical-path delay · Cure notice

Who Can Bind the Government?

Federal projects have many government voices—but only one central match official.



Two Emails. One Record.

The objective is not merely to "reserve rights." It is to give the CO a usable decision record.



RED CARD

"The government is delaying us and we reserve all rights."

- Vague event and source
- No affected work or schedule logic
- No request the CO can act on
- Tone escalates without advancing proof

PLAY ON

"The March 12 direction changes the planned access sequence for Areas B and C."

Continue with:

WHO / WHEN

Identify the source and timing of the direction.

MITIGATION

Explain how the contractor will keep moving.

WHAT CHANGED

Name the work, sequence, or schedule activities affected.

REQUEST

Ask the CO to confirm direction or issue a written modification.

TIME / COST

State the potential impact and what is being tracked.

RIGHTS

Reserve the specific time and cost consequences.

Build the Match Film During Performance



The best claim documents are usually created before anyone calls them claim documents.

DAILY

Daily reports

MIN.

Meeting minutes

RFI

RFIs & submittals

CPM

Schedules &
look-aheads

FIELD

Manpower, photos
& inspections

COST

Cost codes,
notices &
payments

FOUR EARLY MOVES

1

DIAGNOSE CAUSE

Access, changed work, specifications, subcontractor performance, procurement, weather, coordination, or concurrent causes?

2

PRESERVE DOWNSTREAM POSITIONS

Protect rights against responsible subs without undermining the prime's government claim.

3

DOCUMENT DISAGREEMENT

Silence can be misread as agreement.

4

ISOLATE THE IMPACT

Track costs and tie schedule events to the critical path.

Use the claims consultant early enough to shape the facts—not merely reconstruct them.



Contemporaneous facts Entitlement Causation Time Cost

Documentation Contract Documentation Project Documentation

Halftime Huddle: Who Owns the Next 24 Hours?

Assign the first call, the first document, and the first external communication.

21'



CONTRACTOR

- Stabilize performance
- Verify field facts
- Manage the CO relationship

COUNSEL

- Preserve notice and rights
- Protect privilege
- Align positions across forums



CLAIMS CONSULTANT

- Test causation
- Update critical-path analysis
- Identify proof and damage gaps

BROKER / SURETY TEAM

- Map cash-flow and sub pressure
- Explain remaining-work risk
- Create no-surprise communications

90-SECOND HUDDLE

Choose:

FIRST CALL

Who convenes the team?

FIRST DOCUMENT

What must be verified before anyone writes externally?

FIRST EXTERNAL MESSAGE

CO, subcontractor, broker, or surety?

Surety needs a credible picture—not a curated surprise.

REA, Claim, or Keep Playing?

Escalate deliberately—based on proof, project posture, and the path to a Contracting Officer decision.



CLARIFY

PROJECT ADMINISTRATION

Confirm direction, request a written modification, and keep the record current.

RESOLVE

REQUEST FOR EQUITABLE ADJUSTMENT

Relationship-first path: tell a clear story, show impact, mitigation, and requested adjustment.

DECIDE

CDA CLAIM

Written demand to the CO. Certification required above \$100,000. Seek a final decision.

THREE QUESTIONS BEFORE ESCALATING

- 1 Is entitlement clear enough?
- 2 Can time and cost be proved?
- 3 Is the relationship still productive?

CLAIM BASICS

Written to CO · Generally 6 years · Proceed diligently

Contracting Officer's Decision Starts the Clock



Treat the final decision as a gateway event—not another project letter.

60
DAYS

CO DECISION

Decision—or a stated date for a larger certified claim.

90
DAYS

AGENCY BOARD

Appeal after receiving the Contracting Officer's final decision.

12
MONTHS

COURT OF FEDERAL CLAIMS

File an action after the final decision.

Calendar immediately. Preserve the record. Choose the forum deliberately.

Tell the Surety Before the Scoreboard Does

Reliable information is most valuable before a bond demand, payment-claim surge, or default scenario.



WHAT THE SURETY NEEDS

SCHEDULE

Current status and critical-path exposure

CHANGES

Unpaid change work, REAs, and claims

SUBS

Subcontractor and lower-tier pressure

CASH

Project cash flow and payment needs

RECOVERY

Manpower, procurement, and remaining-work plan

GOVT.

Material government correspondence and decisions

Useful picture = project status + exposure + credible recovery plan

CONFIDENCE KILLERS

1

Surprise

2

Inconsistent narratives

3

Uncoordinated privilege-sensitive analysis

4

No practical completion and recovery story

Performing · Preserving · Mitigating · Recovering

Red Card Moment: Cure or Show Cause



The project has moved from ordinary administration to potential default.

DEFAULT RISK

CURE / SHOW CAUSE

When termination appears imminent, the CO must provide written notification to the surety.

IMMEDIATE WAR ROOM

Contractor + Counsel + Schedule Consultant + Broker/Surety Team + Key Subs

CHRONOLOGY

Verified project facts and material directions

SCHEDULE

Current analysis, causes, and critical path

RECOVERY

Mitigation, manpower, procurement, and completion plan

GOVERNMENT

Outstanding decisions, access, and pending changes

RIGHTS

Excusable causes, government contribution, and reservations

TONE

Firm, professional, and focused on control

OBJECTIVE: Show control. Show why termination is premature. Show a practical path to completion.

The 48-Hour Response Drill

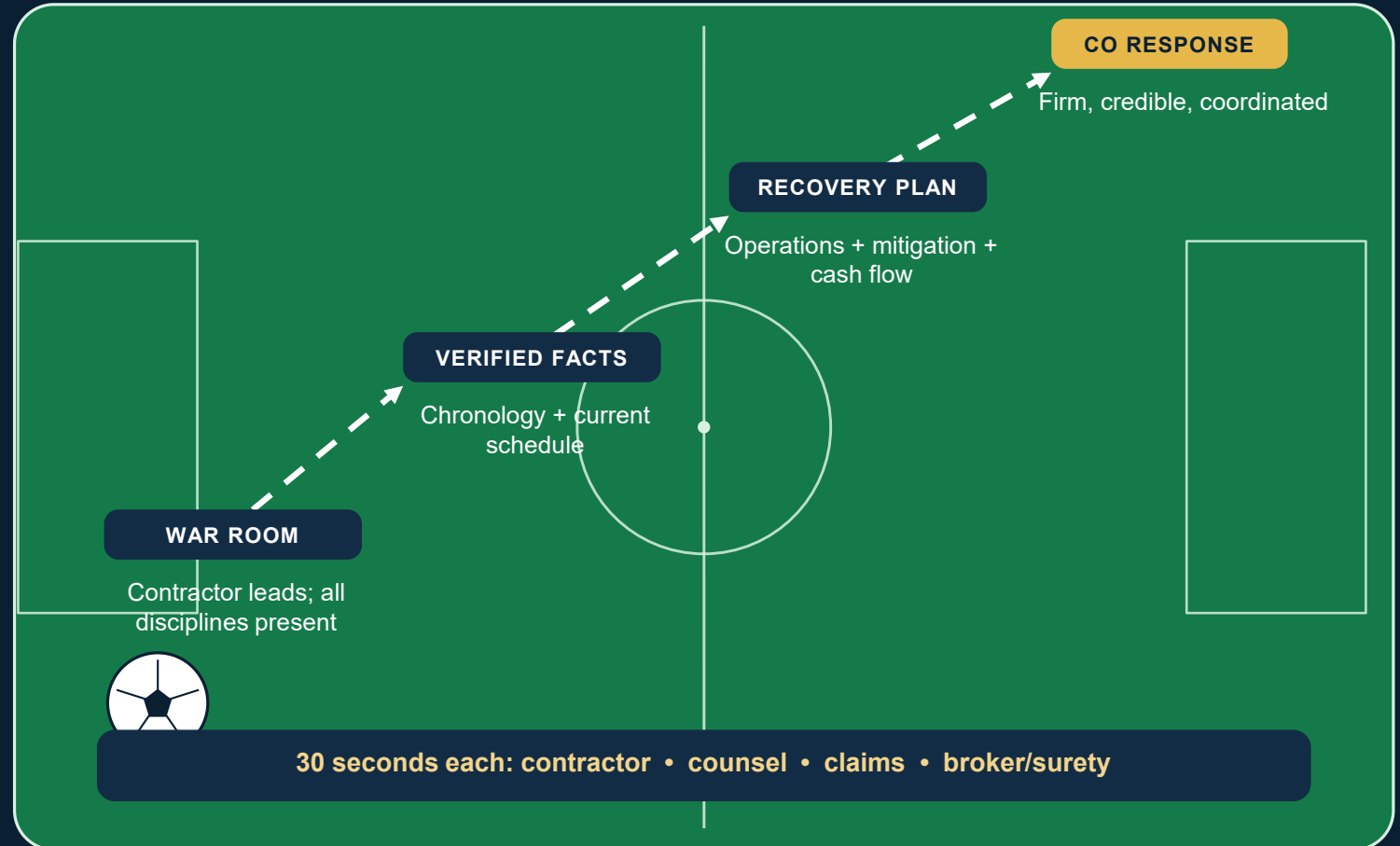
Access remains restricted. Field direction is unresolved. A critical sub is slipping. Lower tiers are pressing. A cure notice arrives.



RANK THE FIRST FOUR MOVES

- A** Convene the integrated team
- B** Verify chronology and current schedule
- C** Stabilize subs, manpower, and procurement
- D** Send a coordinated CO response and recovery plan

Some moves happen in parallel. The sequence still matters.



Win the Match Before the Red Card

Resilient surety outcomes are collaborative outcomes.



FINAL QUESTION

Where does your team usually lose possession?

AUTHORITY

DOCUMENTATION

COMMUNICATION

Clear authority +
contemporaneous record +
coordinated team

Key FAR Authorities Referenced in the Paper



Confirm the current contract clause and delegated authority before applying any rule.

AUTHORITY	PRACTICAL SUBJECT
FAR 1.602-1 / 1.602-2	CO authority and responsibilities
FAR 43.102	Only authorized COs execute contract modifications
FAR 52.243-4	Construction changes; notice; equitable adjustment
FAR 52.233-1	Claims, certification, decision, and continued performance
FAR 33.211	Final decision appeal-rights language and timing
FAR 28.102-1 / 52.228-15	Federal performance and payment bond requirements
FAR 49.402-3	Cure/show cause procedures and surety notice
FAR 52.249-10	Default—fixed-price construction; excusable delay

Cure / Show Cause Response Checklist



A one-page working list for the project war room.

- ✓ Convene contractor, counsel, schedule consultant, broker/surety team, and key subs
- ✓ Verify the factual chronology and source of material government direction
- ✓ Update the current schedule, critical path, and causes of delay
- ✓ Document mitigation already attempted and near-term recovery measures
- ✓ Prepare manpower, procurement, sequencing, and completion plans
- ✓ Identify outstanding government decisions, access issues, and pending changes
- ✓ Analyze excusable and government-caused delay; preserve downstream rights
- ✓ Coordinate the message to the CO, subcontractors, broker, consultant, and surety
- ✓ Protect privilege and avoid inconsistent factual narratives
- ✓ Submit a firm, professional response showing control and a practical path forward

GOAL: A credible record, a viable recovery plan, and no surprises.



Financials: The Underrated Key to Strategy

The Pearlman Conference 2026

Amy Pascalide · Mary Lynn Kotansky · Patricia Wager · Nick Femia · Claude

September 10, 2026



FIRST HALF

READING THE SIGNALS

HOW DISTRESS SHOWS UP BEFORE IT SHOWS UP ON A DEFAULT NOTICE



Financial Distress Is Usually a Process, Not an Event



- Contractor distress rarely begins on the day of default.
- Warning signs often emerge months earlier across multiple information sources.
- The challenge is connecting:
 - **Underwriting/Claims Signals** — what changed?
 - **Accounting Signals** — what is the financial reality?
 - **Engineering Signals** – what is the status of projects?
 - **Legal Signals** — what rights, obligations, and deadlines are impacted?
- The earlier the disciplines align, the more options the surety preserves.

The Early Warning Framework



Underwriting / Claims Team

Changes in backlog

New debt or bonding pressure

Management turnover

Increased claims activity

Capacity expansion

Assembling the Team



Engineering	Accounting / Finance	Legal
Rework/performance issues.	Cash flow deterioration.	Contract compliance.
Subcontractors are missing from jobsite.	Margin fade.	Notice requirements.
Scheduling slippage.	Accounts receivable and payable stress.	Reservation of rights.
Material/procurement distress.	WIP volatility.	Default standards.
Increasing safety or site management issues.	Liquidity constraints.	Takeover/financing options.

Early Warning Signs & Intervention Strategies



1. The Early Call for Help
2. The Value of an In-Person Meeting
3. Independent Financials and Project Review
4. Re-Engaging the Principal with a Candid Assessment
5. Testing the Contractor's Plan
6. Looking Beyond the Bonded Work

Working with the Claims Team to Identify Recovery Sources



The financial team should work closely with the claims team to identify possible sources of funds and recovery. This may include review and analysis of:

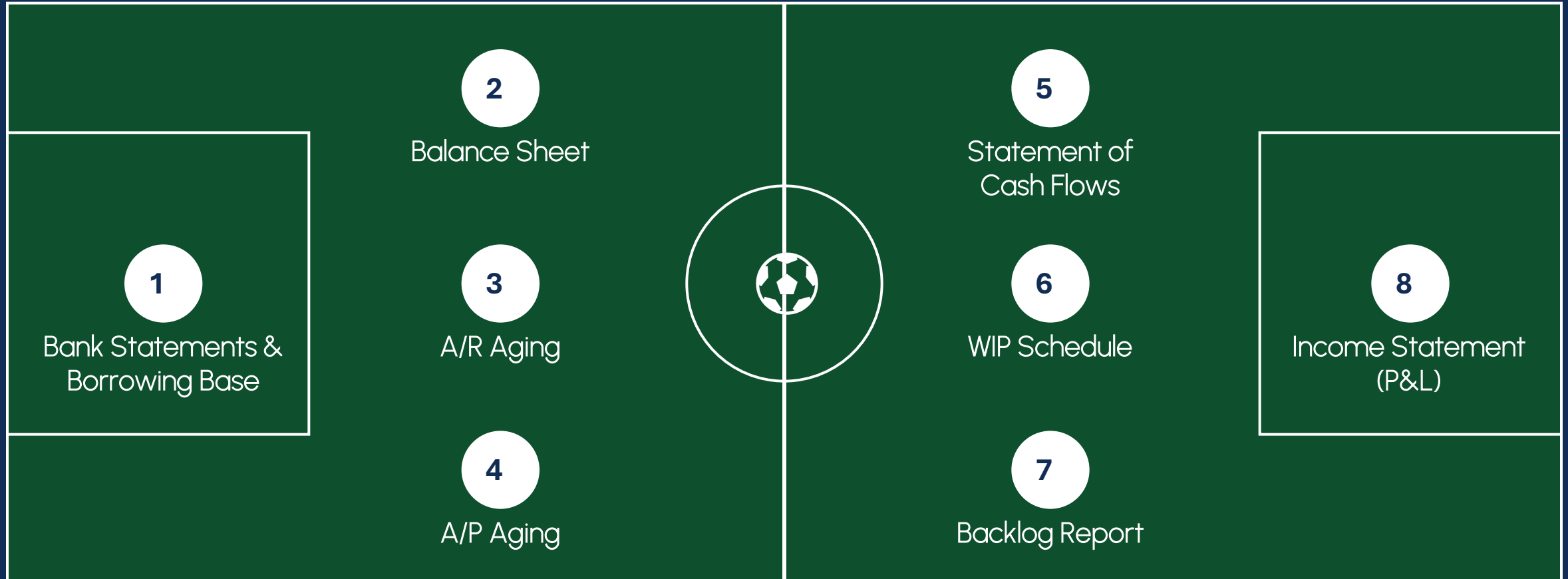
- Contract Balances
- Tax Receivables
- Corporate financial statements.
- Personal financial statements.

The goal is to identify assets that may help mitigate risk and support any indemnity settlement discussions, including the amount and timing of repayment.

The Starting Team: How the Documents Line Up



Each document answers a different question. Read them as a team, not as individuals.



Financial Yellow Cards:



1. The Cash Flow Crunch
2. Margin Fade
3. Backlog Problems
4. The “Three Signals” Test

The "Three Signals" Test



When multiple disciplines see the same deterioration, the risk profile changes.

1. Liquidity

- Can the contractor fund the next 30–90 days?

2. Performance

- Can the contractor complete its existing work at realistic costs?

3. Capacity

- Does the contractor have the management, capital, and operational capacity to stabilize?

If all three are deteriorating, the surety should move from monitoring to active intervention planning.

SECOND HALF

INTERVENTION AND TIMING

STABLIZE, DECIDE, AND ACT WHILE OPTIONS STILL EXIST



Strategic Timing: Should we stay or should we go?



Too early:

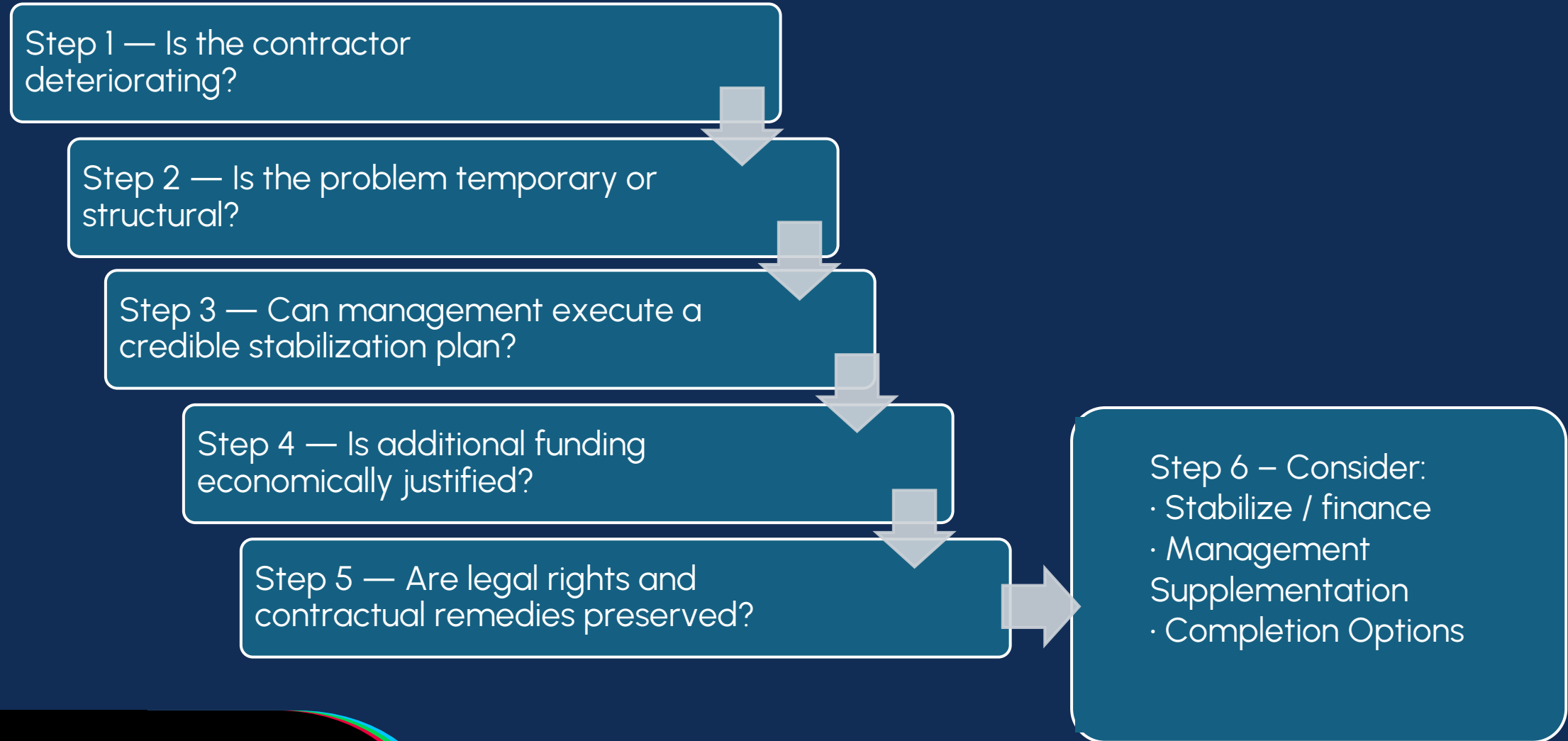
- May unnecessarily trigger disruption.
- Can damage relationships.
- May eliminate a viable rehabilitation opportunity.

Too late:

- Cash disappears.
- Key employees leave.
- Suppliers stop performing.
- Project records deteriorate.
- Replacement capacity becomes scarce.
- Completion costs increase.

Timing matters. The best intervention is often the one that preserves the greatest number of viable options.

A Practical Decision Tree



Intervention Strategy: Stabilize Before You Decide



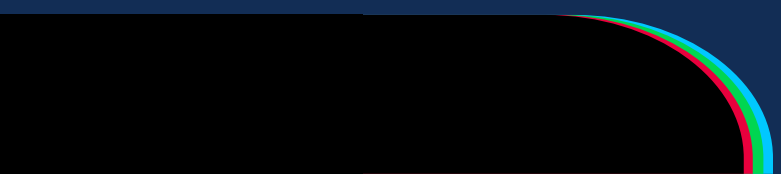
Immediate objectives:

- Preserve project continuity.
- Protect labor and critical suppliers.
- Maintain owner relationships.
- Stabilize cash flow.
- Secure reliable financial information.
- Preserve contractual and legal rights.
- Prevent further deterioration.

Potential tools:

- Enhanced reporting requirements.
- Weekly cash forecasting.
- Joint check arrangements.
- Controlled disbursement.
- Additional collateral.
- Management changes.
- Financing or working-capital support.

Key Takeaways



Thank You!



Winning the Match: Offensive Opportunities and Defensive Risks in Attorney-in-Fact Clauses

PRESENTED BY

MICHAEL PRISCO

GINA LOCKWOOD

MARC BROWN

BEN CHAMBERS



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THE PLAYERS

EVERGREEN CONSTRUCTION, INC.

- GENERAL CONTRACTOR
- \$50 MILLION
UNIVERSITY
CONSTRUCTION
PROJECT

NATIONAL SURETY COMPANY

- PERFORMANCE AND
PAYMENT SURETY
BROAD AGREEMENT OF
INDEMNITY

JOHN ELLIS

- EVERGREEN'S
PRINCIPAL
- INDIVIDUAL
INDEMNITOR
- OWNS SIGNIFICANT
REAL ESTATE

STATE UNIVERSITY

- PROJECT OWNER

APEX MECHANICAL

- MAJOR
SUBCONTRACTOR

The Attorney in Fact Provision



- The Undersigned do hereby irrevocably nominate and appoint any officer of Surety as the true and lawful attorney-in-fact of the Undersigned, with full right and authority to execute on behalf of, and sign the name of, the Undersigned to any voucher, release, satisfaction, check, bill of sale of all or any property assigned by this Agreement to Surety, or any other document necessary or desired to carry into effect the purposes of this Agreement...
- Surety may pledge, assign, mortgage, transfer, convey, sell or otherwise liquidate or dispose of any property assigned to it pursuant to this Agreement, or heretofore or hereafter provided or pledged to Surety for any purpose, or which may otherwise be in the possession of Surety, without incurring any liability of whatsoever kind. The sale may be public or private and with or without notice of the time or place thereof. Surety is hereby authorized to settle any of its claims against, or release or compromise any collateral security of any one or more of the Indemnitors severally and such settlement or release of collateral shall not affect the liability of any of the others to Surety nor shall they be discharged in whole or in part by reason of the settlement or release in whole or in part of one or more of the Indemnitors of their obligations hereunder...
- The Surety's Indemnity Agreement: Law and Practice, 234-235 (2d ed. 2016).

The Attorney in Fact Provision

- **EVERGREEN BEGINS TO EXPERIENCE FINANCIAL PROBLEMS.**
- **STATE UNIVERSITY DECLARES EVERGREEN TO BE IN DEFAULT.**
- **APEX MECHANICAL SUBMITS A \$6 MILLION PAYMENT BOND CLAIM.**
- **NATIONAL SURETY CORRECTLY IDENTIFIES THIS AS AN EVENT OF DEFAULT UNDER THE INDEMNITY AGREEMENT, WHICH TRIGGERS THE ATTORNEY-IN-FACT PROVISION.**

**Factual
Scenario**

The Surety Settles The Bond Claim

- **APEX DEMANDS \$6 MILLION.**
- **EVERGREEN INSISTS, "WE DO NOT OWE MORE THAN \$1.5 MILLION."**
- **AFTER INVESTIGATION, NATIONAL SURETY DETERMINES APEX LIKELY HAS A LEGITIMATE \$4 MILLION CLAIM.**
- **EVERGREEN SAYS, "WE DISAGREE. DO NOT SETTLE. WE WANT TO FIGHT."**
- **NATIONAL SURETY SETTLES THE BOND CLAIM.**

**Factual
Scenario**

Settling your Principal's Affirmative Claim

- **EVERGREEN ASSERTS A \$6 MILLION AFFIRMATIVE CLAIM AGAINST APEX.**
- **APEX IS WILLING TO ACCEPT \$2 MILLION IN EXCHANGE FOR A COMPLETE RELEASE OF ALL CLAIMS AND COUNTERCLAIMS (I.E., EVERGREEN'S CLAIM IS BEING VALUED AT ONLY \$2 MILLION FOR SETTLEMENT PURPOSES).**
- **EVERGREEN REFUSES TO AGREE TO THE SETTLEMENT.**

**Factual
Scenario**

The Good–Faith Question

- NATIONAL SURETY BELIEVES EVERGREEN'S \$6 MILLION CLAIM IS WORTH \$5 MILLION.
- NATIONAL SURETY ACCEPTS APEX'S \$2 MILLION OFFER BECAUSE:
 - IT WANTS TO ELIMINATE THE BOND EXPOSURE;
 - LITIGATION WILL BE EXPENSIVE AND TIME CONSUMING;
 - EVERGREEN IS INSOLVENT;
 - COLLECTING AGAINST APEX MAY BE DIFFICULT; AND
 - NATIONAL SURETY WANTS CERTAINTY.
- EVERGREEN REFUSES NATIONAL SURETY'S INDEMNITY DEMAND BECAUSE IT BELIEVES THE SETTLEMENT WAS UNREASONABLE AND NOT IN GOOD FAITH.

**Factual
Scenario**

The Settlement Creates The Collateral Problem:

Collateral Mortgages And The Recording Trap

- **NATIONAL SURETY HAS PAID \$2 MILLION ON APEX'S CLAIM IN RESOLUTION OF THE AFFIRMATIVE DISPUTE.**
- **IT HAS NOT BEEN REIMBURSED DESPITE COLLATERAL AND INDEMNITY DEMANDS AND EVERGREEN IS NOW ESSENTIALLY INSOLVENT.**
- **NATIONAL SURETY DISCOVERS THAT JOHN ELLIS OWNS A COMMERCIAL PROPERTY WORTH \$7 MILLION, FREE AND CLEAR, BUT ELLIS REFUSES TO GRANT IT A COLLATERAL MORTGAGE.**
- **NATIONAL SURETY'S LAWYER RESPONDS, "WE DO NOT NEED YOU TO SIGN. WE ARE YOUR ATTORNEY-IN-FACT."**

**Factual
Scenario**

The Recording Trap/Notarization Bomb

- **THE INDEMNITY AGREEMENT WAS ELECTRONICALLY SIGNED AND IS NOT ACKNOWLEDGED.**
- **NATIONAL SURETY EXECUTES A COLLATERAL MORTGAGE: "JOHN ELLIS, BY NATIONAL SURETY COMPANY, AS ATTORNEY-IN-FACT."**
- **NATIONAL SURETY ATTEMPTS TO RECORD THE COLLATERAL MORTGAGE – WHAT HAPPENS?**

**Factual
Scenario**

The Surety Doesn't Use The Powers Granted

- AFTER NATIONAL SURETY SECURES ITS COLLATERAL, ANOTHER SUBCONTRACTOR, BETA CORP, SUES EVERGREEN AND NATIONAL SURETY, SEEKING \$6 MILLION.
- EVERGREEN DOESN'T FILE AN ANSWER BECAUSE IT CANNOT AFFORD TO PAY FOR LEGAL SERVICES.
- EVERGREEN ASSURES NATIONAL SURETY THAT IT WON'T BE IMPACTED BY A DEFAULT BECAUSE IT ENCUMBERED ALL OF EVERGREEN'S ASSETS AND HAS A PRIORITY INTEREST.
- NATIONAL SURETY ONLY ANSWERS ON ITS OWN BEHALF AND BETA OBTAINS A DEFAULT JUDGMENT AGAINST EVERGREEN.

**Factual
Scenario**

CONCLUSION — THE FIVE RULES



1. KNOW HOW BROAD YOUR AUTHORITY IS.

DON'T ASSUME "ATTORNEY-IN-FACT" MEANS ONLY SETTLING BOND CLAIMS. IT MAY REACH:

- AFFIRMATIVE CLAIMS.
- COUNTERCLAIMS.
- DEFENSES.
- RELEASES.
- SETTLEMENTS.
- COLLATERAL.

2. BROAD DOESN'T MEAN UNLIMITED.

- ASK: "ARE WE ACTING IN GOOD FAITH?"
- AND: "WHAT DOES GOOD FAITH MEAN IN THIS JURISDICTION?"

3. AUTHORITY DOESN'T EQUAL ENFORCEABILITY.

BEFORE EXERCISING REAL-PROPERTY RIGHTS:

- CHECK THE JURISDICTION.
- RECORDING.
- REGISTRATION.
- NOTARIZATION.
- EXECUTION.
- ATTACHMENT.

4. MAKE INFORMED DECISIONS.

- WHEN THE PRINCIPAL IS SUED ASK: "DO WE HAVE THE AUTHORITY TO STEP IN?"
- AND EVALUATE WHAT HAPPENS IF YOU DON'T STEP IN.

5. DOCUMENT THE DECISION.

- THE FILE SHOULD DEMONSTRATE WHY THE DECISION WAS MADE, NOT SIMPLY THAT THE SURETY HAD CONTRACTUAL AUTHORITY TO MAKE IT.

PLAYING FOR A DRAW

How Trying to "Win" A Construction
Dispute Could Make You a Loser

Hon. Nancy Holtz (Ret.)

JAMS, Boston

Michael Carson

**Nationwide Mutual
Insurance Company,
Philadelphia**

Bryan Kelley

Balfour Beatty, Seattle

Jonathan Burwood

Watt Tieder, Boston



**"Back where I'm from, you try to
end a game in a tie; well, that might
as well be the first sign of the
apocalypse."**

- Tedd Lasso, AFC Richmond

Three Important Questions to ADReSS

**What Is The True Value
of Mediating "Before It's
Too Late?"**

**And How Do We Screw
It Up?**



**Why Isn't Construction
Arbitration Actually
Efficient?**

**And What Is Our Role In
Fixing It?**



**How Do You Define
Success?**

**More Importantly, How
Do I Define Success?**



Mediation: Not a Battle to be Won



Be Prepared To:

- ☐ Stop Battling, Start Negotiating
- ☐ Do More Than Advocate Strengths
- ☐ Recognize and Counsel Weaknesses Too
- ☐ Discuss Favorable and Unfavorable Facts & Law
- ☐ Move Beyond Your "Position"
- ☐ Maintain Focus on an Attainable Goal

Timing Matters: Do Not Miss the Moment



- ❑ Recognize When You Are Overplaying Your Hand
- ❑ Avoid Forcing Other Party Into The Wall



HITTING THE WALL



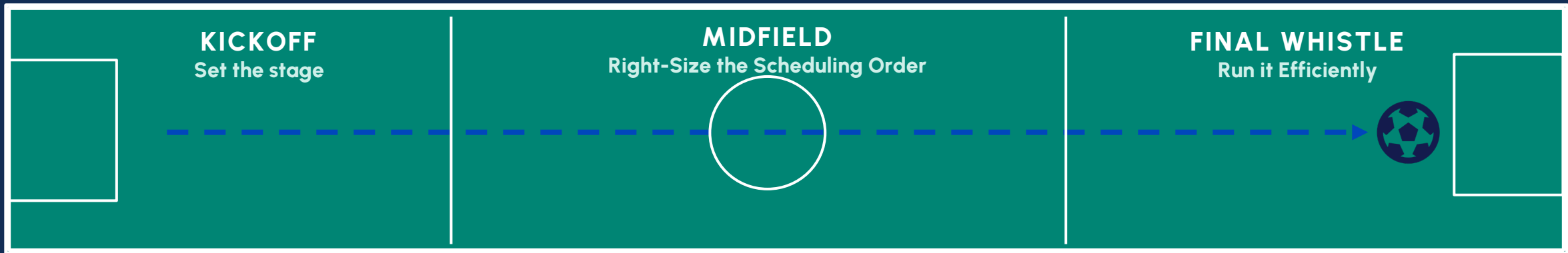
FRUSTRATED PLAYERS

Work With The Mediator



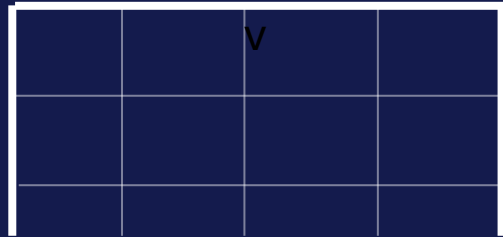
- ☐ Encourage Direct Communication Between Mediator and Client
- ☐ Engage in Candid Discussions
- ☐ Ask for Mediator's Thoughts on Moves & Messaging

Own The Pitch: Control The Arbitration From Kickoff



- ✓ Don't be a spectator, get involved with the rules
- ✓ Panel of one vs. three
- ✓ Pick the arbitrator and location
- ✓ Limit the schedule
- ✓ Control discovery
- ✓ Dispositive motions and bifurcation
- ✓ Hearing duration and consecutive days
- ✓ Decide up front on award format
- ✓ Bring in a mediator early to try to resolve in parallel

Stoppage Time: Take the Shot or Pass on Arbitration



Surety Participation?

A Deliberate Choice

Core Issues to Consider

- If sued, is the surety required to arbitrate?
- If not sued:
 - Will an award be binding on the surety?
 - Can the surety still litigate surety-specific defenses?
 - Intervention

What Is 'Success'?



Success is Multi-Dimensional

It May Mean Something Different to Each Participant

Three Stories:

- 1. As Outside Counsel*
- 2. As In-House Counsel*
- 3. As Mediator*

Do We All Need to Agree?

Understanding Dynamics



Dispute Resolution is a Goal

Litigation and ADR are Tools in a Toolkit

In-House Counsel Perspective:

- *Certainty/Finality Over Outright Victory*
- *Hitting Forecasted Targets*
- *Internal Burdens*
- *Reputational Impact*
- *Preserving Relationships*

Insurance & Surety Role



Risk Transfer Tools

Looking For:

- *The Product Working as Intended*
- *Sensitivity to Insured's "Non-Transferable" Risks*
- *Impact of Time*

General Contractors Must Sell These Products to Clients
Know the Game(s) Within the Game

QUESTIONS FOR THE PANEL?



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- This presentation does not amend, or otherwise affect, the provisions or coverages of any insurance policy. Any discussion of coverages is about those generally available in the marketplace and is not based specifically on the policies or products of any particular carrier.

"Sometimes when you win, you really lose, and sometimes when you lose, you really win, and sometimes when you win or lose, you actually tie, and sometimes when you tie, you actually win or lose. Winning or losing is all one organic mechanism, from which one extracts what one needs."

- Gloria Clemente, White Men Can't Jump