

BUILDING RELATIONSHIPS | KEEPING THEM STRONG

Pearlman Conference 2026

Pearlman 2026

Building Relationships & Keeping Them Strong

THE BEAUTIFUL GAME OF SURETY: HOW COLLABORATION ACROSS ROLES AND BETWEEN COMPANIES BUILDS RESILIENT OUTCOMES

Table of Contents

SPECIAL RECOGNITION

SCHEDULE OF EVENTS

PROGRAM CO-CHAIRS

PRESENTERS/BIOGRAPHIES

SUSTAINING MEMBERS

OFFICERS

PEARLMAN 2026 ATTENDEES

PAPERS

Pearlman 2026

On behalf of the Pearlman Association and its incredible Sustaining Members, I want to thank you for joining us for this year's 2026 Pearlman Conference. Once again, the Pacific Northwest is poised to provide us with fantastic weather during our time together. Many of you travel long distances to attend. We've worked hard to put together a tremendous educational program again this year, and we continue to offer our standard extra-curricular activities to help everybody thoroughly enjoy themselves!

Pearlman is an organization designed, built, and managed exclusively by company-side surety professionals. Its close, continuous access to the collective heartbeat of a large number of surety companies makes for a unique, targeted perspective on the needs, goals, and challenges facing the industry. Our annual events draw from this special vantage point as we design our curriculum, training, and recreational events.

As you take part in our events this year, please keep in mind that Pearlman has but one mission; to strengthen and enhance the talent, professionalism, and career prospects of the surety professional. We will accomplish this mission through our scholarship distribution, our educational programs, and our commitment to building industry relationships and keeping them strong.

Thank you, again, for joining us this year.

Luis Aragon
Chairman/Director, The Pearlman Association

Special Recognition

The Pearlman thanks the following for their extraordinary contributions:

The Most Special of Thank Yous to **Lih Hudson**, who once again put together this tremendous conference. Every year, for more than 10 years now, Lih puts in countless hours to organize, plan for, and put on The Pearlman. Her dedication to maintaining such a high standard is what makes the Pearlman what it is – the industry's premier event. **Thank you Lih!**

A big thanks to **David Stryjewski** for graciously volunteering his time to do the books and keeping the Pearlman finances in order.

Pearlman appreciates the efforts of **Perrin Conferences** (**Lynnsey Perrin** and **Bethany Corio**) in obtaining CE and CLE credits, helping us all satisfy our continuing education requirements.

We want to thank **Fortify Advisory** (**Lisa Dehner** and **Kyle Matthew Garcia**) for their efforts in marketing and graphic design for the conference. **Fortify** designed and developed Digital Invitations, PowerPoint Templates, and the printed materials including the Pearlman Packet.

Special thanks also to **Brian Rice** of **RiskScape Strategies, LLC** for continuing to assist in the website maintenance and digital registration processes. **Brian** also provides in-conference IT support, making sure all presentations run smoothly. Thank you, **Brian**!

Schedule of Events

WEDNESDAY SEPTEMBER 9, 2026

4:30–7:30 **Hospitality Reception – The Willows Lodge, Woodinville**

Hosted by: Sage Associates, Inc., The Hustead Law Firm, The Vertex Companies and Langley LLP

Hospitality Reception Entertainment

Hosted by: Faux Law Group and Friedrich & Dishaw

THURSDAY SEPTEMBER 10, 2026

7:00 – 8:00AM **Registration and Breakfast – Sparkman Cellars Winery, Woodinville**

Hosted by: Chiesa Shahinian & Giantomasi P.C., Forcon International Corporation, RiskScape Strategies, LLC, and SMTD Law LLP

All Day Coffee/Beverage Service

Hosted by: Sokol Larkin Wagner Storti LLC

Espresso Bar

Hosted by: MPCS - Maximum Property Construction Services

Audio/Video Services for The Pearlman

Hosted by: Fox Rothschild LLP

8:10 – 8:25 **Opening Remarks**

Luis Aragon | Liberty Mutual Insurance Company

8:25 – 8:30 **Program Intro**

Co-Chairs: Amanda L. Marutzky | Watt, Tieder, Hoffar & Fitzgerald, LLP
Bryce Holzer | Travelers
Andrew 'Drew' Brouwer | Nicholson Professional Consulting, Inc

THE WORLD CUP BLUEPRINT

8:30 – 9:15 **PANEL 1: The Playbook: Market Strategies and Trends**

Meredith Dishaw | Friedrich & Dishaw
Bill Healy | Travelers
Whit Campbell | The Hartford
Alyssa Hecht | Merchants

9:15 – 10:00 **PANEL 2: The Passing Game: Shared Surety, Co-Surety and Reinsurance**

Alana Porrazzo | Jennings Haug Keleher McLeod Waterfall, LLP
Mark Degenaars | The Vertex Companies
Marc Domres | Zurich Group
Ryan Slepesky | Trisura
Erin Fonacier | Dunlap Fiore

10:00 – 10:15 **MORNING BREAK**

10:15 – 11:00 **PANEL 3: Blowing the Whistle: The Surety's Defense of Overpayment & Material Alteration**

Emory Allen | Clark Hill PLC

	Mason Fleming | Nicholson Professional Consulting, Inc Rudy Dominguez | Liberty Mutual Insurance Company Michael Cronin | Markel Surety
11:00 – 11:45	**PANEL 4: Playing the Federal Pitch: Handling the Contracting Officer, Claims, and Surety Risk in Federal Construction Projects** ***Jason Fair | Robins Kaplan LLP*** Matt Drake | Bristol Bay Construction Holdings, LLC Patrick Weller | JS Held Guy Armfield | Agent, Vice President Surety, IMA Financial Group
11:45 – 1:15	**LUNCH BREAK** Hosted by: Stuart-Lippman and Associates, Inc., Law Offices of James D. Curran, and Weinstein Radcliff Pipkin, LLP
1:15 – 2:00	**PANEL 5: The Impact of a Principal's Financials on a Surety's Claims Resolutions Strategies** ***Patricia Wager | Torre, Lentz, Gamell, Gary & Rittmaster, LLP*** Nick Femia | Cashin Spinelli & Ferretti, LLC Mary Lynn Kotansky | Liberty Mutual Insurance Company Amy Pascalide | Markel Surety
2:00 – 2:45	**PANEL 6: Winning the Match: Offensive Opportunities and Defensive Risks in Attorney-in-Fact Clauses** ***Mike Prisco | Rivkin Radler*** Ben Chambers | The Hartford Marc Brown | Travelers Gina Lockwood | Merchants Bonding
2:45 – 3:00	**AFTERNOON BREAK** Snacks provided by RJT Construction, Inc.
3:00 – 3:10	**Scholarship Presentation** Mary Lynn Kotansky | Liberty Mutual Insurance Company
3:10 – 4:00	**PANEL 7: Playing for a Draw: How Trying to "Win" A Construction Dispute Could Make You a Loser** ***Jonathan Burwood, Esq. | Watt, Tieder, Hoffar & Fitzgerald, LLP*** Judge Nancy Holtz | JAMS Bryan Kelley | Balfour Beatty Michael Carson | Nationwide
4:00 – 4:10	**Announcements and Adjournment for the Day**
5:00	**Welcome Reception – Sparkman Cellars Winery** Cocktails and Hors d'oeuvres Hosted by: Jennings Haug Keleher McLeod Waterfall, LLP, Nicholson Professional Consulting Inc, and Sokol Larkin Wagner Storti LLC
6:00	**Dinner – Sparkman Cellars Winery** Hosted by: J.S. Held, LLC; RJT Construction, Inc.; and Watt, Tieder, Hoffar & Fitzgerald, LLP
7:00	**Hold 'Em Tournament – Sparkman Cellars Winery**

Dealers Sponsored by J.S. Held and Weinstein Radcliff Pipkin, LLP
Cocktails Hosted by: Krebs Farley, PLLC

FRIDAY SEPTEMBER 11, 2026

7:30 – 8:10 **Registration and Breakfast – Sparkman Cellars Winery**

Hosted by: Carney Badley Spellman P.S., Cashin Spinelli Ferretti, LLC, and Spencer Fane

All Day Coffee/Beverage Service

Hosted by: YA Group

Bloody Mary Bar

Hosted by: Dry Law, PLLC

Espresso Bar

Hosted by: MPCS - Maximum Property Construction Services

8:10 – 8:20 **Opening Remarks and Program Introduction**

Luis Aragon | Liberty Mutual Insurance Company
Amanda Marutzky | Watt, Tieder, Hoffar, & Fitzgerald, LLP

THE WORLD CUP FINALS

8:20 – 9:15 **PANEL 8: Privilege and Work Product Issues with Sureties and their Consultants**

Rodney J. Tompkins, Jr. | RJT Construction, Inc.
Amy Bernadas | Liberty Mutual Insurance Company
Matt Geary | Rouse Frets White, P.C.
Caroline Lee | Palomar

9:15 – 9:45 **PANEL 9: Who Owns the Clock? Scheduling and Delay During the Performance Bond Claim Process**

Elliot Scharfenberg | Krebs Farley, PLLC
Gus Fernandez | The Vertex Companies
David Harris | Manier & Herod
Rob Smiley | Sage Associates, Inc.

9:45 – 10:00 **MORNING BREAK**

10:00 – 10:45 **PANEL 10: ESI Management: From Kickoff to Final Whistle**

Caralisa Connell | Dry Law, PLLC
Eric Liberman | Carney Badley Spellman P.S.
Brian Rice | RiskScape Strategies, LLC
Suzanna Shaub | Travelers

10:45 – 11:30 **PANEL 11: Technology Assisted Review: AAA's AI Arbitrator**

Mike Pipkin | Weinstein Radcliff Pipkin, LLP
Andrew Barton | American Arbitration Association

11:30 **Closing Announcements and Adjournment**

Luis Aragon | Liberty Mutual Insurance Company

FRIDAY AFTERNOON, SEPTEMBER 11TH – GOLF TOURNAMENT

The Golf Club at Redmond Ridge

11825 Trilogy Parkway NE, Redmond, WA 98053

12:00 pm	**Bus Service to/from The Golf Club at Redmond Ridge and Rainbow Run (Sip 'n Putt)** Hosted by: Law Offices of Larry A. Rothstein Bus leaves Willows Lodge at 12:00pm Box Lunches to be provided at Redmond Ridge
1:00	**Sign in/Warm Up – The Golf Club at Redmond Ridge**
1:30	**Scramble Tournament – Shotgun Start** Beverage Cart Hosted by: Manier & Herod, Ernstrom & Dreste, LLP and Watt, Tieder, Hoffar & Fitzgerald, LLP
6:30	**Dinner – The Golf Club at Redmond Ridge** Hosted by: Ward Hocker & Thornton, PLLC
7:00	**Awards**
7:30	**Bus returns to Sparkman Cellars Winery and Willows Lodge**

FRIDAY AFTERNOON, SEPTEMBER 11TH – SIP 'N PUTT

Rainbow Run Mini-Golf at Willows Run

10402 Willows Road, Redmond, WA 98052

12:00 pm	**Bus Service to/from The Golf Club at Redmond Ridge and Rainbow Run (Sip 'n Putt)** Hosted by: Law Offices of Larry A. Rothstein Bus leaves Willows Lodge at 12:00pm (The bus will return to Rainbow Run to pick up anyone who wishes to attend the awards dinner at Redmond Ridge.)
12:00 – 5:30	**Sip 'n Putt** Hosted by: Booth Mitchel & Strange LLP, Lewis Brisbois Bisgaard & Smith LLP, Liberty Mutual Insurance Company, and YA Group Box Lunches to be Provided at Rainbow Run Beverages to be provided

SATURDAY SEPTEMBER 12, 2026

We would like to extend our sincerest appreciation to our Sustaining Members and friends of The Pearlman who graciously volunteered their time to coordinate and chaperone Saturday's event.

Woodinville Wine Tour

Hosted by: SMTD Law LLP, The Law Offices of T. Scott Leo and Torre, Lentz, Gamell, Gary & Rittmaster, LLP

Program Co-Chairs



Amanda L. Marutzky, Esq.
Partner, Watt, Tieder, Hoffar & Fitzgerald, LLP

Amanda Marutzky is a partner in Watt, Tieder's Irvine office focusing her practice in the areas of surety and lending, construction and general commercial litigation. Amanda advises clients on contract administration and disputes related to public and private construction projects in various state, federal and alternative dispute resolution fields. Amanda also manages all phases of litigation and resolution in connection with claims for and against surety clients, including: performance bond claims; project takeover and completion efforts; indemnity disputes; asset investigation and liquidation; bankruptcy and insolvency matters; and payment bond claims. Ms. Marutzky is also rated AV-Preeminent, the highest level ranking for professional excellence, by Martindale Hubbell. She also has experience in the area of insurance defense litigation, having handled a variety of matters, including breach of contract, and tort liability.



Bryce Holzer, Esq.
Managing Director & Counsel, Travelers

Bryce Holzer brings over a decade of legal expertise to his role as Managing Director & Counsel in contract surety for Travelers. He began his career with Travelers in August 2012 in the Federal Way, Washington Construction Services Claim office, after working in private practice. Bryce holds a Bachelor of Arts in Economics from Washington State University, where he graduated summa cum laude in May 2007. He then earned his Juris Doctor from the University of Washington School of Law in March 2011.



Andrew 'Drew' Brouwer, CCCA, PMP
Director - Nicholson Professional Consulting, Inc.

Drew Brouwer specializes in serving sureties on matters large and small throughout the western states. For the first decade of his career, he developed expertise in surety consulting, international contracting, and schedule analysis with The Vertex Companies, LLC. Now Director of Surety Consulting at Nicholson Professional Consulting, Inc., Drew is expanding into expert services developing reports on delays, cost, and industry standards. Drew holds a B.S. in Physics from UC Santa Barbara, and an M.S. in Mechanical Engineering from UC Irvine. Drew is an avid golfer, enthusiastic youth sports coach, and a recent (temporary) transplant to Yale's campus in New Haven, CT.

Presenters/Biographies

PANEL 1 BIOS

Whit Campbell – The Hartford

Whit Campbell was born and raised in Honolulu. He moved to the mainland to attend college at the University of Puget Sound and graduated with a BA in Finance and Economics.

Whit started his surety career at Reliance Insurance Company in 1985. He also worked at Safeco and Travelers in the Pacific Northwest until being hired to be the Manager of the Seattle Branch of The Hartford in 2003. Whit is currently the Pacific Northwest Regional Assistant Manager. His territory covers 4 Western States; a key one is Hawaii.

Whit and his wife Malia live in Kirkland, Washington and have three adult children. Whit is a true history junkie and is the Surety Association of Washington's historian. Another interest is forestry. He owns a 40-acre forest and is Hartford's Timber Bond expert. He also enjoys gardening and tending to 2 hives of bees.

Bill Healy – Regional Underwriting Officer, Travelers Bond & Specialty Insurance

Bill Healy is a Regional Underwriting Officer at Travelers providing underwriting support to branch offices in California and the Southwest. He handles general contractors, heavy civil contractors and larger trade contractors. He also underwrites Project Loss Insurance, a liability coverage brought to market by Travelers in 2020 which is designed to protect a contractor's balance sheet in the event of a major financial loss on a construction project or a series of projects. Bill also works on internal teams within Travelers to support initiatives on underwriting best practices, data analytics, underwriter training and development, and value tools for contractors. He has made presentations to groups of contractors and to individual firms on topics such as peer group financial performance, risk management, and how to prepare for an economic downturn. He graduated in 1992 from U.C. Davis.

Meredith E. Dishaw – Partner, Friedrich & Dishaw, PLLC

Meredith E. Dishaw is a Partner at Friedrich & Dishaw, PLLC, and is licensed to practice in Washington and Oregon State, as well as various federal courts. Ms. Dishaw's practice is focused on representing sureties in all aspects of contract and commercial claims, with a particular emphasis on construction law. Ms. Dishaw also represents design professionals both in contract negotiations as well as in arbitration and litigation. Ms. Dishaw also has extensive experience in defending against surety-related bad faith claims and representation of sureties in bankruptcy-related issues. Ms. Dishaw is a frequent speaker and author on surety, design professional, and construction-related issues.

Alyssa Hecht – Contract Surety Underwriter, Merchants Bonding Company

Alyssa Hecht is a Contract Surety Underwriter with Merchants Bonding Company and has worked in the surety industry for five years. Holding both the AFSB and CPCU designations, she underwrites and manages contract surety relationships with agents and contractors throughout Alaska,

Washington, Oregon, Idaho, and Montana. She is actively involved in numerous construction and surety industry associations and is passionate about mentoring the next generation of surety professionals.

PANEL 2 BIOS

Alana L. Porrazzo – Partner, Jennings Haug Keleher McLeod Waterfall, LLP

Alana L. Porrazzo is a partner in the Phoenix, Arizona office of Jennings Haug Keleher McLeod Waterfall, LLP and licensed to practice in the state and federal courts of Arizona, New Mexico, and Louisiana. She is a co-chair of the FSLC Law Division Bankruptcy Subcommittee and a member of the Arizona State Bar Association Construction Section Executive counsel. Ms. Porrazzo studied at Yale University (B.A., 2009) and Tulane University School of Law (J.D., cum laude, 2016).

Mark Degenaars – Disputes Division Leader, The Vertex Companies

Mark Degenaars is the global Disputes Division Leader for The Vertex Companies, based out of Irvine, California. He has been with Vertex for over 15 years with a primary focus as a consultant to the surety claims industry and private public developers. Mr. Degenaars brings over 25 years of project management, facility management, private/public development and construction experience to each assignment. Mr. Degenaars has successfully managed a large variety of projects ranging from various types of vertical construction to have highway/civil design projects. Mr. Degenaars has served as an expert and fact witness for a variety of projects. Prior to joining Vertex, Mr. Degenaars owned and managed his own consulting firm for nearly a decade.

Marc Domres – Claims Counsel, Zurich American Insurance Company

Marc Domres is claims counsel for Zurich American Insurance Company based in San Diego, California. Before joining Zurich, Marc practiced law at Krebs, Farley, & Palleteri, PLLC for over 10 years specializing in torts, arbitration, trial practice, construction law, and legal writing. Mark received his bachelor's degree from Claremont McKenna College (B.A., 1990) and his JD from Tulane University (J.D., 2005).

Ryan Slepesky – Vice President, Surety Claims, Trisura

Ryan Slepesky is vice president of surety claims for Trisura based in Catonsville, Maryland. Ryan oversees all contract and commercial surety claims and surety related legal matters for Trisura. Ryan began his career as an attorney in the Law Offices of Peter G Angelos specializing in personal injury, products liability, toxic torts, and healthcare, before joining Travelers as claim counsel. Ryan received his undergraduate degree from James Madison University (B.A., 2010) and his JD from University of Baltimore School of Law (J.D., 2016).

Erin Fonacier – Partner, Dunlap Fiore, LLC

Erin Fonacier is partner at Dunlap Fiore, LLC. Erin is licensed to practice law in Louisiana, including the US District Courts Eastern, Middle, and Western Districts of Louisiana. She is a member of the Louisiana and Baton Rouge State Bar Associations. Her practice areas include commercial,

construction, and surety litigation. She has represented commercial businesses, surety and fidelity companies, insurance companies, and individuals in construction law matters. Erin received her undergraduate degree with honors from Loyola University New Orleans (B.A., 2006) and her doctorate from Louisiana State University (J.D. 2011).

PANEL 3 BIOS

Mason Fleming – Director, Nicholson Professional Consulting, Inc.

Mason Fleming is a Director with Nicholson Professional Consulting, Inc. He began his construction career as a laborer with a small-market general contractor working on federal and healthcare facilities. Over time, he advanced through progressively responsible roles, ultimately serving as Division Manager for the firm's Design-Build projects. Mr. Fleming joined Nicholson following the contractor's default on more than 30 active projects, bringing valuable firsthand experience managing complex project challenges. He is a certified Project Management Professional (PMP) and has worked on a wide range of assignments involving project investigations, claims analysis, contractor defaults, terminations, project completion, and program loss evaluations.

Rudy Dominguez – Senior Surety Counsel, Liberty Mutual Surety

Rudy Dominguez serves as Senior Surety Counsel at Liberty Mutual Surety. Within this capacity, his responsibilities center on the strategic management of surety claims while actively incorporating AI to drive operational efficiency.

Emory G. Allen – Member, Clark Hill, PLC

Emory G. Allen is a Member with Clark Hill, PLC. Emory assists clients in litigation of commercial lawsuits and contract matters with an emphasis on surety, construction and contract claims. He works with surety companies to resolve complex issues related to construction contracts and bonds from the initial investigation of claims up to and through the negotiation of surety agreements including takeover, tender, and financing agreements.

Michael Cronin – Claims Attorney, Markel

Michael Cronin has practiced law for eighteen years as a Claims Attorney with Markel Surety, where he is now Director responsible for the avoidance, handling, and resolution of construction-related disputes, as well as providing extensive underwriting and contract support. He also serves as a mediator for primarily construction and insurance disputes, including complex, multi-party disputes.

Michael is a graduate of the University of Texas and the University of Tulsa College of Law, where he served as Managing Editor of the Tulsa Law Review. He is a member of the State Bar of Texas Construction Law Section and serves as Vice-Chair for the Fidelity & Surety Law Committee of the Tort and Insurance Practice Section of the American Bar Association. He is Board Certified by the Texas Board of Legal Specialization in Construction Law (inaugural class), and he obtained his formal training in mediation at the University of Texas Center for Public Policy Dispute Resolution. Michael is a member of the Association of Attorney-Mediators and teaches a course at the

University of Texas in the Construction Engineering Project Management Program called Advanced Legal Concepts.

PANEL 4 BIOS

Jason Fair – Managing Partner, Robins Kaplan LLP

Jason Fair is the managing partner of Robins Kaplan LLP's Los Angeles and Silicon Valley offices. Jason handles high-value and industry-critical matters in the construction, fidelity, and surety fields. He guides and counsels general contractors, subcontractors, owner/developers, and sureties through complex default scenarios and he applies pragmatic and cost-effective strategies to mitigate losses and complete troubled projects. He is experienced in handling Federal, State, and private construction projects, including issues ranging from bidding processes and protests to general delay, productivity, and efficiency claims, as well as termination, takeover, and completion agreements and surety financing agreements. He is also admitted to the Federal Court of Claims to counsel clients through payment disputes with the Federal Government.

Matt Drake – Chief Legal Officer, Bristol Bay Construction Holdings, LLC

Matt is the Chief Legal Officer (CLO) for Bristol Bay Construction Holdings, LLC, an Alaska Native Regional Corporation holding company that owns a controlling interest in 35 subsidiaries, most of which operate in the federal contracting space. As CLO, Matt manages the company's legal, risk, contracts, and compliance departments. Matt is an experienced legal advisor to federal contractors and construction companies with over a decade of litigation and advisory experience in state and federal courts with multiple jury trial victories. He has advised clients on matters involving commercial transactions, contracts, cyber/data security, and construction disputes. In addition, Matt currently serves as a Judge Advocate General (JAG) in the U.S. Army National Guard. He has nearly 20 years of active and reserve component military service with prior overseas deployments supporting U.S. and NATO missions, including OIF 3 (Iraq) and the NATO Enhanced Forward Presence (eFP) mission (Poland). As a legal advisor in the Army, Matt has served in a number of roles advising commanders in areas ranging from contract and fiscal law to international and humanitarian law.

Guy Armfield – Agent, Vice President Surety, IMA Financial Group

Guy specializes in surety bonds for Alaska Native Corporations as well as general and specialty contractors. His clients are active throughout the United States, and several maintain surety programs in the billions. In addition to maximizing his clients' available bond credit, Guy's tenure in the construction industry makes him a valuable resource for a range of business issues that his clients face, including market and project risk analysis and mitigation, contract negotiation, and internal business issues like perpetuation, estimating, and cost account systems. His prior experience as a bond manager at a leading surety company makes Guy a strong, adept client advocate in negotiations with underwriters.

Guy began his surety career with Safeco in 2001 as a contract surety underwriter. He held several positions of increasing responsibility, culminating as bond manager. In that position, he managed

contractors with nationwide operations headquartered in Alaska, Washington, and Hawaii. Guy received his B.A. from the University of Washington's Michael G. Foster School of Business.

Guy is an active member of the National Association of Surety Bond Producers (NASBP), having served on the board of directors for six years. He is an instructor within IMA's University Series, and is a frequent guest speaker at events within the construction and surety industries.

Patrick Weller – CCM, CCPIA, LEED AP – Assistant Vice President, JS Held

Patrick Weller is a construction consulting expert specializing in the areas of surety, construction project management and claims analysis. Patrick has been involved in managing projects, performance bond claim investigations, payment bond claim reviews, loss analysis and cost to complete estimating, takeover and completion contract negotiations, onsite and remote project management, construction project oversight, scheduling, delay analysis, claim preparation and defense, and formal claim mediations.

PANEL 5 BIOS

Amy Pascalide – Senior Claims Counsel, Markel Surety / SureTec Insurance Company

Amy Pascalide is Senior Claims Counsel at Markel Surety / SureTec Insurance Company. Amy has practiced as surety claims counsel for 11 years and has experience in both contract and commercial claims. She currently handles court claims with an emphasis on bonds required by statute to be filed with the court or recorded with the county such as release of lien bonds, probate bonds, appeal and supersedeas bonds, injunction bonds, lost note bonds, custody bonds, and the like. She also provides underwriting support, handles loss recovery, performs exoneration reviews, and directs the use and release of collateral.

Mary Lynn Kotansky – Assistant Vice President, Claims Financial Services, Liberty Mutual

Mary Lynn Kotansky is an Assistant Vice President in the Claims Financial Services department for Liberty Mutual in Seattle. Mary Lynn joined Liberty in 2014 where she focuses on forensic investigations of large surety claims. Her prior surety experience includes 10 years at Reliance Surety Company as Surety Accounting Manager and then as Principal at Quantum Financial Consulting, LLC which she founded in 2005. She has 30 years of experience as a CPA within the surety industry. Mary Lynn is a licensed CPA in Washington State and is a member of the Washington State Society of CPAs. She earned her accounting degree at the University of Washington and her MBA in Finance from Seattle University.

Nick Femia, CPA – Principal, Cashin Spinelli & Ferretti, LLC

Nick Femia, CPA is a Principal of Cashin Spinelli & Ferretti, LLC with over 12 years of surety consulting experience. He is a Certified Public Accountant licensed in New York State and earned both a Bachelor of Business Administration in Accounting and a Master of Science in Taxation from Hofstra University.

Nick's practice is concentrated in construction accounting, forensic analysis, and surety consulting. He provides financial and project management consulting services throughout the lifecycle of construction projects, assisting clients with evaluating contractor performance, assessing surety exposure, and develop strategies to mitigate potential losses on construction projects.

Patricia Wager – Partner, Torre, Lentz, Gamell, Gary & Rittmaster, LLP

Patricia Wager is a partner at Torre, Lentz, Gamell, Gary & Rittmaster, LLP in New York. Tricia focuses her practice on advising sureties and construction industry participants on construction claims situations, performance bond defaults, payment bond claims, and bankruptcy issues, as well as complex indemnity and collection matters, pursued through litigation. She regularly handles claims on executors and administrator bonds, court fiduciary bonds, and guardianship matters, and provides broad-ranging counsel on fidelity bond claims and conflicts. She is a frequent advisor on creditor's rights in bankruptcy.

Tricia is actively involved in industry organizations including the ABA TIPS Fidelity and Surety Law Committee, the Pearlman Association and the Surety Claims Institute. Tricia is an FSLC Vice-Chair, a Mid-Winter Surety Program Chair in 2012, a co-editor of The Surety and Bankruptcy, 1st Edition in 2010, and a contributing author to, among other publications, The Law of Performance Bonds, 3d Edition, "Chapter 5, The Surety's Rights of Recovery Against Principal and Indemnitors under the Common Law and Indemnity Agreement", The Bond Default Manual 4th Edition, "Chapter 5 – Takeover", and Financial Institution Bonds, 4th Edition, "Chapter 11 – The Principal Exclusions".

PANEL 6 BIOS

Marc Brown – Assistant Vice President and Counsel, Travelers Bond & Specialty Insurance

Marc Brown is the Assistant Vice President and Counsel for the Western Region of Travelers Bond & Specialty Insurance Claim, where he leads a team of attorneys and claim representatives responsible for handling contract surety claims in the Western Region as well as providing business support to the Western Region underwriting team. Marc began his Surety Claims career in 1993 with Reliance Surety. Prior to embarking on his Surety career, he was in private practice in the Seattle area, representing general contractors, subcontractors, and owners in construction disputes. While in law school he interned with the Washington State Attorney General's Office—Department of Transportation. He is a graduate of the Seattle University School of Law and Brigham Young University and is admitted to practice in the State of Washington.

Gina Lockwood – Assistant Vice President, Claims, Merchants Bonding Company

Gina Lockwood is the Assistant Vice President - Claims at Merchants Bonding Company. She lives in Chicago where she manages Merchants' claims department and handles complex contract bond claims across the United States. Prior to joining Merchants in 2019, she spent nearly a decade in private practice handling surety, construction and bankruptcy matters. In 2022, she co-founded Surety School, a program whose mission is to develop new professionals in the surety industry through education, mentorship, collaboration, and the creation of opportunities. Gina is also a

founder and co-anchor of Surety News. She is a graduate of the University of Texas at Dallas and earned her Juris Doctorate from Southern Methodist University in Dallas, Texas.

Benjamin Chambers – Director, Bond Claims and Credit and Political Risk Insurance, The Hartford

Ben graduated from Western Washington University with a B.A. in Philosophy and received a J.D. from Seattle University School of Law. He is admitted to practice law in Washington State and is a licensed claims adjuster in a number of jurisdictions.

Michael A. Prisco – Partner, Rivkin Radler LLP

Michael A. Prisco is a partner in Rivkin Radler LLP's Surety Practice Group. He co-founded the Surety Practice Group in 2025, which has offices in New York, Florida, and New Jersey. He has over 15 years of experience in all aspects of surety and construction. Michael has successfully litigated some of the largest surety and construction disputes in the country, including large affirmative recoveries for his surety client. In addition to litigation, Michael has successfully managed program-wide defaults across the country, including: Florida, Ohio, Texas, Washington, D.C., and Virginia. He is a graduate of the University of Buffalo and Touro Law Center, where he graduated first in his class and was valedictorian. He is admitted to practice in New York State but has practiced throughout the country with pro hac vice admission.

PANEL 7 BIOS

Jonathan Burwood – Senior Partner, Watt, Tieder, Hoffar & Fitzgerald, L.L.P., Boston, Massachusetts

Jonathan Burwood is a senior partner with Watt, Tieder, Hoffar & Fitzgerald, LLP. He is a founding member and managing attorney of the firm's Boston office. Since 1999, Jonathan has served the interests of owners, contractors, and sureties through the full range of the construction lifecycle, including contract drafting and negotiation, claim management, dispute resolution, and pursuing client interests through high-stakes litigation, arbitration, and appeals. Jonathan has a national construction and surety practice that emphasizes quality, efficiency, and communication in the management of complex disputes, with a focus on balancing high expectations, competing objectives, and the practical risks of complicated litigation. Jonathan is a Vice Chair and active member of the American Bar Association Fidelity and Surety Law Committee, and is annually recognized by Chambers, Best Lawyers, and Super Lawyers for Construction Litigation.

Michael Carson – Director, Surety Claims, Nationwide Mutual Insurance Company, Philadelphia, Pennsylvania

Michael Carson oversees the majority of the payment and performance bond claims within the Surety Claims department. He is responsible for managing litigation and indemnity matters, ensuring efficient resolution and strategic oversight of both routine and complex contractual disputes. A practicing attorney licensed in Pennsylvania, New Jersey, and multiple federal and bankruptcy courts, Michael brings over 20 years of surety-specific claims experience to his role. He has played a key role in helping countless stakeholders achieve contractual close-out without

default, termination, or extended litigation. His expertise also includes advising underwriters on risk assessment related to construction contracts, bond forms, and indemnity agreements. Prior to joining Nationwide, Michael held claims leadership roles at two other sureties, served as general counsel for a construction firm, and litigated matters while in private practice. Michael earned his B.B.A. from Emory University and his J.D. from Dickinson School of Law. He resides in the suburbs of Philadelphia and is a passionate sports fan — Go Birds!

Hon. Nancy Holtz (Ret.) – Mediator & Arbitrator, JAMS, Boston, Massachusetts

Judge Holtz brings over 30 years of distinguished experience as a judge, attorney, and ADR practitioner to her role at JAMS. Her 15 years on the Massachusetts Superior Court presided over a wide range of complex cases, including business and commercial disputes, construction litigation, professional liability matters, employment claims, and significant personal injury and wrongful death actions. During her tenure at JAMS, Judge Holtz has mediated and arbitrated a diverse array of disputes, including high-stakes business conflicts, complex, multi-party construction matters, insurance coverage issues, and cases in the rapidly evolving solar energy sector. Judge Holtz is regarded as a skilled neutral with strong communication and interpersonal skills coupled with an ability to fully absorb the parties' factual and legal positions. Judge Holtz has become a "go to" mediator because of her ability to quickly establish a rapport with the participants in a dispute and help get the parties to a successful resolution.

Bryan Kelley – Senior Vice President, Balfour Beatty Construction, Seattle, Washington

Bryan Kelley is a Senior Vice President with Balfour Beatty Construction and serves as Chief Legal Officer for its Northwest Division. He is a graduate of Vanderbilt University and earned his law degree from Pepperdine University. Before joining Balfour Beatty, Bryan was a Partner at the construction law firm Oles Morrison, now Smith Currie Oles, LLP. Bryan is the 2026 Chair of AGC of America's Building Division and previously served as the 2025 President of AGC of Washington. His AGC of America leadership roles include service on the CLC Steering Committee and chairing the Contract Documents Forum. Within AGC of Washington, he has chaired both the CLC and Local Government Affairs committees. Bryan is a past recipient of AGC of Washington's Associate of the Year Award, the BCA Bar Association Writing Award, and has been repeatedly recognized by Washington Law & Politics magazine as a "Rising Star." He currently serves as President of the Board of Trustees for Seattle Children's Theatre and on The Evergreen School Board of Trustees, and frequently guest lectures at University of Washington on construction law and operations issues. Bryan lives in Seattle with his wife—an architect—and their two children.

PANEL 8 BIOS

Matthew W. Geary – Attorney, Rouse Frets White, P.C.

Matthew W. Geary is an attorney with Rouse Frets White, P.C. in Kansas City, where his focus is on fidelity and surety litigation, commercial litigation, and insurance coverage. Prior to entering private practice, Matt was a law clerk for the Honorable Patricia Breckenridge of the Missouri Court of Appeals. He is admitted to practice in the state and federal courts of Missouri and Kansas. Matt received a B.A. from William Jewell College, in Liberty, Missouri, and his J.D. from the University of Kansas School of Law, where he was an editor of the Kansas Law Review.

Rodney J. Tompkins, Jr. – Vice President/Managing Partner, RJT Construction, Inc., Consulting Services

Rodney J. Tompkins, Jr. is Vice President and managing partner of RJT Construction, Inc., Consulting Services. Mr. Tompkins is based in Irvine, California and has successfully managed surety claims, completion, and litigation matters in numerous regions for over 20 years. Mr. Tompkins obtained his bachelor's degree at University of San Diego, postgraduate in Construction Management at U.C. Berkley School of Engineering. Mr. Tompkins also earned his Juris Doctorate at Lincoln Law School of Sacramento where he was Editor-In-Chief of the "Voir Dire" and recipient of multiple awards in Moot Court and ADR. He was also chosen to represent the law school at the annual state-wide Negotiations Competition. Mr. Tompkins remains active in industry leadership including the ABA, FSLC, and other professional organizations. He is a frequent presenter and speaker on topics of surety, construction, project management, claims, damages, and others. He also dedicates his time to his family and youth sports, Boy Scouts of America, and serves on the board of local non-profit youth organizations in Southern California.

Amy Bernadas – Senior Surety Claims Counsel, Liberty Mutual Insurance Company

Amy Bernadas is a Senior Surety Claims Counsel with Liberty Mutual Insurance Company and has over 18 years of experience handling contract surety claims as both outside and inside counsel. Prior to joining Liberty Mutual, she practiced for ten years with Krebs, Farley, PLLC in New Orleans, LA, focusing on construction litigation and surety law. Amy obtained her JD from Tulane University School of Law and a BA in History from Baylor University.

Caroline Lee – Executive Surety Claims Attorney, Palomar Surety

Caroline Lee is an Executive Surety Claims Attorney at Palomar Surety. Based in New Orleans, Louisiana, Caroline manages payment and performance bond matters nationwide. Before entering the surety industry, she practiced as a litigator, concentrating on complex bankruptcy and restructuring cases. In that role, she represented creditors, debtors, and official committees in various bankruptcy courts, drawing on her strong knowledge of bankruptcy law. A Louisiana native, Caroline earned both her undergraduate and law degrees from Louisiana State University.

PANEL 9 BIOS

Elliot Scharfenberg – Partner, Krebs Farley

Elliot Scharfenberg is a partner in Krebs Farley's New Orleans office. Elliot loves being a lawyer and especially enjoys working closely with clients to solve complex problems. The majority of his practice consists of representing sureties through all manner of disputes, both on the transactional and litigation side. He has litigated surety cases in eleven different states.

Gus Fernandez – Managing Consultant, The Vertex Companies, LLC

Gus Fernandez is a licensed general contractor and Managing Consultant at The Vertex Companies, LLC. With over 30 years of experience in all facets of construction, Gus is an agile construction management consultant, working on projects throughout North and south American in both Spanish and English. Prior to joining Vertex, Gus was Director of Operations for Munilla Construction Management and Vice President of China Construction America. Gus received his undergraduate degree from University of Phoenix (B.S., 2008).

David A. Harris – Shareholder, Manier & Herod, P.C.

David A. Harris is a shareholder at Manier & Herod, P.C. in Atlanta, GA. With a practice focused on representing sureties in Georgia, North Carolina, and South Carolina, David has experience in providing full-service surety representation, including claim investigations, indemnity and subrogation rights, payment and performance bond disputes, commercial and miscellaneous bonds, fidelity bonds, and fraudulent transfer claims. David is a Vice-Chair of the ABA Fidelity & Surety Law Committee, serving as co-chair of the 2026 ABA FSLC Fidelity & Surety Law Committee's Spring Meeting, and as the co-chair of the Underwriting and Risk Management Subcommittee. David is also on the Board of Directors of the Surety Claims Institute and the Attorney Advisory Council for NASBP. In 2007 he graduated with honors in from Emory University School of Law in Atlanta, Georgia.

Rob Smiley – Construction Consultant, Sage Associates

Rob Smiley is a construction consultant with Sage Associates, based out of Eagle, Idaho. Rob specializes in project planning and quality assurance. Before joining Sage, Rob spent over 20 years managing projects in the western United States, most recently as vice president of Steed Construction, Inc. Rob received his undergraduate degree from California State University, Chico (B.S., 2004).

PANEL 10 BIOS

J. Caralisa Connell – Partner, Dry Law, PLLC

J. Caralisa Connell is a partner in the Denver office of Dry Law, PLLC. Caralisa's practice focuses on financial institution bonds, commercial crime policies, cyber insurance, and surety. Caralisa earned her B.S. in Physics from the University of Louisville and her J.D. magna cum laude from Belmont University College of Law. Caralisa is an active participant in the ABA Fidelity & Surety Law Committee and acts as co-chair of both the Technology and Social Media Subcommittee and the Young Professionals Subcommittee. Caralisa also acts as the co-chair of the Fidelity Law Association's Website and Technology Subcommittee and an Associate Editor of the Fidelity Law Journal.

Suzanna Shaub – Claim Counsel, Travelers Bond & Specialty Insurance

Suzanna Shaub serves as Claim Counsel at Travelers Bond & Specialty Insurance, primarily handling contract surety claims. Prior to joining Travelers, she practiced law in Seattle for 15 years,

most recently as a Shareholder and Vice President at a civil litigation defense firm. Her practice focused on representing corporate, insurer, and individual clients in construction, complex commercial litigation, contract disputes, employment, and professional liability matters. Suzanna holds a B.A. in Business Law from Washington State University and a J.D. from the University of Washington School of Law. She is admitted to practice law in the State of Washington.

Eric Liberman – Counsel, Carney Badley Spellman

Eric Liberman is counsel with Carney Badley Spellman. He represents and advises clients in disputes related to commercial and residential construction, surety defense, government contracts and all matters of civil litigation. Eric has represented large general contractors and sureties, as well as developers, subcontractors, property managers and insurance companies on public and private projects. With a background in accounting and tax consulting, Eric is well situated to help clients prepare and analyze claims involving breach of contract, payment disputes, delay and disruption, and labor productivity. Eric's clients often find his compassionate demeanor and quantitative analysis to be instrumental in helping parties move past misunderstandings and toward successful resolutions.

Brian Rice – Founder & CEO, RiskScape Strategies, LLC

Brian Rice is the Founder & CEO of RiskScape Strategies, LLC, with over two decades of experience in enterprise IT for an international client base. He also serves as the CTO at Element Standard, a trademarked and unique litigation case management system, and is the founder and president of RHISE Claims Management, a surety claims management SaaS application aiming to standardize the global surety claims management process. RiskScape Strategies specializes in working with law firms, insurance companies, sureties, and professional services firms. Their services include Claims Investigations (Cyber, Fidelity, Surety), Litigation Support, Strategic Risk Management Consulting, Cyber Defense, Security Breach Analysis, ESI (Electronically Stored Information) collections, and Data Governance and Compliance, Discovery Support, and Expert Witness services.

Brian actively participates in industry discussions, frequently appearing as a podcast guest, and is deeply involved with the American Bar Association. Since 2019, he has been the Technology Co-Chair for the Fidelity and Surety Law Committee (FSLC) and serves as the Technology Vice-Chair for the FSLC for the 2025-2026 term.

PANEL 11 BIOS

Andrew Barton – Vice President, AI Business Development, American Arbitration Association

Andrew Barton is the Vice President of AI Business Development for the American Arbitration Association (AAA), where he has served for over 30 years. He works with law firms, corporate counsel, and business leaders to advance the strategic use of arbitration and alternative dispute resolution, with a focus on innovation in AI-led dispute resolution. Andrew is currently leading business development efforts around the AAA's AI Arbitrator and upcoming Resolution Simulator. His work emphasizes the thoughtful integration of technology into arbitration, supported by practical guardrails and human arbitrator oversight to promote fairness, trust, and efficiency.

Mike Pipkin – Attorney, Arbitrator and Mediator, Weinstein Radcliff Pipkin

Mike Pipkin is an attorney, arbitrator and mediator with over 35 years of experience representing clients in complex construction, business, and insurance litigation and trials. Mike served on the Council for the American Bar Association's Tort Trial and Insurance Practice Section for four years (2018-2022). Mike's election to Council reflected on his years of leadership within TIPS, including as Chair of the ABA/TIPS Fidelity and Surety Law Committee in 2014-2015, his service as Co-Chair of the ABA/TIPS Book Publishing Editorial Board, Co-Chair of the TIPS Section Conference Task Force in 2019-2021, and his contributions to the ABA/TIPS Content Management Standing Committee and CLE Board. Mike also served as an original member of the National Association of Surety Bond Producers (NASBP) Attorney Advisory Council. Mike is also a member of the Federation of Defense & Corporate Counsel (FDCC), an organization comprised of leaders in the insurance and corporate defense bar. FDCC membership is selective and by invitation to those who have been judged by their peers to have achieved professional distinction.

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Sustaining Member Biographies

Aperture is a national firm comprised of premier forensic and consulting experts. We deliver objective, accurate analysis across incidents, operations, and business challenges.

Our multidisciplinary teams uncover what happened, why it happened, and what it means by using proven methodologies, advanced technology, and uncompromised integrity.

Please visit our website at https://aperturellc.com/

Bains Law is a boutique business litigation and construction/surety firm, serving clients in Texas, Florida, Arkansas, and bankruptcy courts throughout the nation. Bains Law prides itself on focusing on the client and its goals, which may range from an early, cost-effective settlement to "all hands on deck" litigation through trial and appeal. As a small firm, Brandon is intimately involved in all facets of each case. This oversight ensures that the case is progressing in accordance with client's desires, costs are monitored and budgets kept, and clients remain continually informed and updated.

Originally born in DeSoto, Texas, Brandon has spent most of his life in Texas, with the exception of a stretch in Miami as part of opening a law office for his prior firm. Brandon misses Cuban coffee more than can be expressed in words. Luckily, Bains Law is active in Florida, which provides a good excuse to return from time to time to enjoy a cortadito. Brandon has been married to Allison since 2008 and they have three beautiful (and sometimes crazy) children: Sailor, Saxon, and Cannon. At any given time, there are also dogs, cats, rabbits, and lizards running around. Brandon is thankful that his HOA does not allow chickens, donkeys, and the like, or he would come home one day to find Allison running a small farm. Finally, all rumors are true – Brandon is superb at karaoke.

Please visit our website at https://bainslaw.com/

BEACON
CONSULTING GROUP, INC.

Beacon Consulting Group is a leading construction consulting and management services company. Our clients appreciate our track record of success and trust Beacon's team to take on the largest and most challenging assignments. For more than 23 years, our team has provided professional services related to the analysis, planning, management, monitoring and turn-around of construction projects of all kinds across North America.

Beacon's team brings a unique combination of technical competence, hands-on construction site experience, and unparalleled expertise related to the analysis of ongoing and troubled projects. While Beacon specializes in serving the Surety and Insurance industries, we also provide a full range of construction consulting and project management services to owners, banks, AEs, government agencies, law firms and other construction project stakeholders.

Please visit our website at https://www.beacon.ws/

Booth, Mitchel & Strange LLP

Since 1955, Booth, Mitchel & Strange LLP has provided exemplary legal service to businesses and individuals throughout California. With offices in Los Angeles, Orange County and San Diego, we are positioned to efficiently handle litigation and transactions throughout Southern California. In addition, over half of the firm's practicing lawyers are partners who have a personal stake in the quality of our work, the satisfaction of our clients in the results obtained and in the professionalism with which we represent them. Rated AV by Martindale-Hubbell, Booth, Mitchel & Strange LLP handles private and commercial lawsuits and arbitrations involving tort, contract, environmental, construction, surety, commercial, employment, professional liability, landlord-tenant and real estate disputes. We represent both plaintiffs and defendants and have thereby developed a breath of insight that facilitates prompt and accurate analysis of our client's problem and an ability to obtain the most favorable resolution in the most efficient and cost effective way. We are also available to consult in the areas of commercial and construction contracting, real estate transactions, leasing, surety and employment.

Please visit our website at www.boothmitchel.com.

Bronster Fujichaku Robbins
ATTORNEYS AT LAW

Bronster Fujichaku Robbins is recognized as one of the premier trial law firms in Hawaii, handling cases on all of the islands. We are an experienced litigation firm with an established track record of successful settlements, work outs, and trial verdicts in a wide variety of complex litigation, arbitrations and mediations. Our firm is strongly committed to serving the community through significant public and private pro bono work.

Our philosophy is to obtain the best results possible for our clients through aggressive advocacy and efficient management practices.

Our areas of practice include commercial, business, surety and real property litigation; consumer protection law involving financial fraud, unfair or deceptive business practices; antitrust and competition law; litigation and advice to trustees and trust beneficiaries, including claims of breach of fiduciary duties; regulatory and administrative law before state and county agencies; environmental litigation; civil rights employment cases including discrimination, harassment, and wrongful discharge; and arbitration, mediation and other dispute resolution services.

Please visit our website at www.bfrhawaii.com.

CARNEY BADLEY SPELLMAN

Carney Badley Spellman works with a wide range of clients including, individuals, professionals, entrepreneurs, educators, closely-held or family businesses, franchises, as well as insurance companies, Fortune 500 companies and global industry leaders. They are in the private sector, public sector and governments. Our clients are forward thinkers, creative, collaborative and deliver high-quality products and business services to their markets. Our clients markets extend into almost every industry including, food and beverage, retail, professional services, arts, health care, education, manufacturing, technology, construction, surety, real estate and more. We partner with them so they can drive their journeys.

Please visit our website at www.carneylaw.com.

CSF
CASHIN SPINELLI FERRETTI

Cashin Spinelli & Ferretti, LLC is a multi-disciplinary firm providing consulting and construction management services to the Surety and construction industries. Since 2000, Cashin Spinelli & Ferretti has been providing expert advice and analysis to the nation's leading Surety companies. Drawing on the expertise of its staff of Professional Engineers, Architects, Attorneys, Certified Public Accounts, Field Inspectors and Claims experts, Cashin Spinelli & Ferretti is well poised to offer Surety consulting and litigation support services to the industry. Cashin Spinelli & Ferretti's workforce is large enough to handle any surety matter, but still maintain the client contact that is so important in our industry.

Operating from offices in: Hauppauge, New York (Long Island); Southampton, Pennsylvania (Philadelphia area); Avon, Connecticut (Hartford area); Crystal Lake, Illinois (Chicago area); Bend, Oregon; and Miami, Florida; Cashin Spinelli & Ferretti provides its services to all areas of the United States, and the Caribbean.

Please visit our website at www.csfllc.com.



Chiesa Shahinian & Giantomasi PC, (CSG) with offices in New York, NY, West Orange, NJ and Trenton, NJ, is committed to teaming with our clients to achieve their objectives in an increasingly complex business environment. This goal is as important to us today as it was when our firm was founded in 1972.

Over the past four decades, CSG has expanded from eight to more than 130 members and associates, all of whom are dedicated to the legal profession and to the clients they serve. As our firm has grown, we have steadfastly maintained our commitment to excellence, offering businesses and individuals comprehensive legal representation in a cost-effective, efficient manner.

Our firm provides the high level of service found in the largest firms while fostering the type of personal relationships with the firm's clients often characteristic of small firms. We take pride in our reputation for excellence in all our areas of practice, including banking, bankruptcy and creditors' rights, construction, corporate and securities, employment, environmental law, ERISA and employee benefits, fidelity and surety, government and regulatory affairs, health law, intellectual property, internal investigations and monitoring, litigation, media and technology, private equity, product liability and toxic tort, public finance, real estate, renewable energy & sustainability, tax, trusts & estates, and white collar criminal investigations.

Please visit our website at www.csglaw.com.



Clark Hill has been at the forefront of the fidelity and surety industry for over fifty years. From the quiet days of the 1960's to the mercurial 1980's dealing with the banking and real estate crisis throughout the country, to the advent of electronic banking and mega-construction projects of the 1990's and 2000's, the lawyers in Clark Hill's Fidelity & Surety group have worked in partnership with our clients in every aspect of the industry.

Clark Hill's surety lawyers provide experienced representation in all facets of the surety industry. The group's lawyers have significant experience representing sureties in connection with all types of bonds, including performance, payment, probate, public officials, subdivision, and various other miscellaneous commercial surety bonds. Our lawyers have successfully handled countless complex contract surety claims, expertly guiding sureties through pre-default investigations and negotiations and completion of construction projects after default, including drafting and negotiating completion contracts, takeover agreements, ratification agreements, financing agreements, and other pertinent surety agreements. Our lawyers likewise have extensive experience handling complicated and varied commercial surety bond claims, from the initial investigation and analysis to conclusion. Our expertise and experience extends to protecting the surety's interests in bankruptcy proceedings, including pre-bankruptcy and post-filing negotiations of reorganization plans, conflicts regarding unpaid proceeds of bonded contracts, negotiations regarding assumption of bonded obligations, and other issues affecting the surety in bankruptcy.

Please visit our website at www.clarkhill.com.

D'Arcy | Vicknair LLC is a law firm that primarily focuses on Construction Law and Surety Law. The firm is a group of attorneys with records of successful litigation outcomes. Many of our attorneys are named in Super Lawyers, Best Lawyers, and many of the firm's attorneys also participate in bar associations and other professional organizations, frequently serving in leadership roles. Our attorneys also have degrees in other areas related to the practices of the firm, such as Electrical Engineering, Economics and Civil Engineering. In addition, two of our attorneys (including Mr. D'Arcy) teach at Loyola Law School New Orleans as adjunct law professors. As regards surety work, all aspects of construction performance and construction claims are handled by D'Arcy Vicknair. The firm tackles each phase of bond work from assessing claims through working out settlements, and, when appropriate and necessary, through detailed discovery, trial of the claim and handling any appeals, and associated indemnity actions. The firm provides a full range of surety-related legal services including, but not limited to: defaults, claim analysis, management and coordination, project takeovers, indemnity issues, subrogation issues, workouts, mediation, arbitration, and litigation. Headquartered in New Orleans, Louisiana, the firm has attorneys licensed to practice in Louisiana, Texas, Mississippi, and New York.

Please visit our website at www.darcyvicknair.com.

At Dry Law, with a team of attorneys licensed in Texas, Oklahoma, Arkansas, and New Mexico, our services extend across the country, catering to clients from all corners of the nation. We pride ourselves on understanding how each client defines a successful resolution of their dispute, and work with them to achieve those results whether that occurs before, during, or at the conclusion of trial. Our goal is to provide our clients with efficient and cost-effective solutions that protect their interests. We realize that "legal victories" and "business victories" are not always synonymous and we are committed to achieving the best possible outcome for our clients, whether it is through creative and efficient pre-litigation solutions or, if necessary, tenacious advocacy in the courtroom. we understand that trust is essential in our field, and we work hard to earn our clients' trust and respect. Our clients trust us to handle their complex disputes, and we take that trust seriously. We are committed to finding the best solutions for our clients and providing them with the high-quality representation they deserve.

Over the years, the firm's attorneys have successfully obtained over $60 million in collateral orders through injunctions filed all over the South, including Texas, Oklahoma, Arkansas, Alabama, and Georgia.

Finally, our practice impacts lives not only in Texas, but across the United States and around the globe. That impact is not lost on our team and we are proud to be a part of this greater community.

Please visit our website at: https://drylaw.com/.



The attorneys at Dunlap Fiore, LLC, represent surety clients throughout the United States and have extensive experience in all aspects of the construction industry including: default, project completion, disputes involving payment, defective work, defective design, delay claims, and claims for additional work. Our attorneys are actively involved in negotiations with project owners, creditors and financially troubled contractors during all stages of the construction process.

Our firm has a particular focus in federal contracting and issues involving the Federal Acquisition Regulation. Representing sureties for government contractors, we draw on decades of experience in resolving government contract controversies. Our approach to legal representation involves fully understanding the needs of our clients, followed by personalizing our representation to obtain quick, positive results.

Please visit our website at: www.dunlapfiore.com.



Elizer Law Group is an Illinois law firm with more than thirty years' experience in commercial debt collection, judgment enforcement, asset and liability investigations and surety law. From our managing partner to our support staff, we are committed to providing the highest quality legal representation and collection services to our clients.

Please visit our website at: www.elizerlaw.com.



The Ernstrom & Dreste, LLP law firm is proud to focus its practice on the surety and construction industries. Our experience and in-depth knowledge of surety and construction law is recognized locally, across New York State and even nationally. We serve clients across the country and around the globe. We are more than just a law firm; our industry knowledge helps us understand what is important to our clients. As leaders in surety and construction law, we are a team of accomplished professionals who understand the nature of both industries and the forces which shape those industries. Because the industries we serve are intertwined, our understanding of the surety industry means we can better serve our construction clients, and our knowledge of the construction industry means we can better serve our surety clients. We go the extra mile to make sure our clients are satisfied with the legal services we provide.

Please visit our website at www.ed-llp.com.

Fasano Acchione & Associates provides consulting services for a variety of clients in the construction and surety industries. The individuals at Fasano Acchione & Associates are accomplished professionals with expertise in surety, construction, engineering, project management, and dispute resolution including litigation support.

FA&A maintains offices in New York, NY, Philadelphia, PA, Mount Laurel, NJ, Seattle, WA, and Baltimore, MD. If you would like more information, please contact Vince Fasano at (856) 273-0777 or Tom Acchione at (212) 244-9588.

Please visit our website at www.fasanoacchione.com.

The Wild-Wild West is the home of Faux Law Group. Faux Law Group represents sureties in Nevada, Idaho and Utah regarding claims on public and private payment and performance bonds, subdivision bonds, commercial bonds, license bonds, DMV bonds, and miscellaneous bonds. Faux Law Group represents sureties in the recovery of losses through indemnity and subrogation actions. Our attorneys are actively involved in the local communities in order to better represent the interests of our surety clients.

Please visit our website at www.fauxlaw.com.

Forcon International is a multi-dimensional consulting and outsourcing firm that has provided services to the surety, fidelity, insurance and construction services industry for more than twenty-nine years. Our surety and construction services include books and records review, claim analysis, third party claims administration for sureties, bid procurement, estimating, project administration, scheduling and funds control. We are able to offer these broad ranges of services because FORCON is composed of senior claim management professionals, accountants, professional engineers and construction management executives. Forcon has acted as third party administrator dealing with bond claims and runoff services since its inception. The firm operates from six (6) offices located throughout the United States [FL, GA, MI, MD, PA, VA].

Please visit our website at www.forcon.com

Fox Rothschild is a national law firm with 1,000 attorneys coast to coast. You will receive the topnotch client service you would expect from a boutique combined with the robust resources of an Am Law 100 firm. Our 70+ practice groups possess deep industry knowledge. We deliver a full range of legal services to individuals and businesses — public, private, nonprofit, startup, family-run, and multinational.

Ranked among the leading firms in the U.S. for construction law by Chambers & Partners and the top 15 by Construction Executive magazine, Fox Rothschild has one of the nation's deepest construction practices. We help clients mitigate risk and overcome challenges, guiding them through difficult circumstances by harnessing the combined strength of an experienced group of attorneys serving all segments of the construction industry.

With more than 400 litigators, we have the bench strength and flexibility to quickly mount an agile and aggressive response whenever a problem arises. Our depth enables us to handle intensive Multi-District Litigation matters and class actions, as well as the full range of complex commercial cases. We are known as enterprising, forward-thinking, and results-driven lawyers who anticipate challenges and provide customized solutions with a personal touch. At Fox, solving your problem is our top priority.

Please visit our website at https://www.foxrothschild.com/

Located in Seattle, Washington, Friedrich & Dishaw is a boutique Pacific Northwest law firm specializing in representing sureties, design professionals, and contractors in both Washington and Oregon.

Our practice primarily involves litigation and we represent our clients in federal and state courts and arbitration. However, we also offer pre-litigation assistance to all clients to help them navigate legal issues before they escalate. We are committed to serving our clients' unique interests and achieving favorable outcomes at all stages no matter the size or nature of the dispute.

Please visit our website at https://fdlawpllc.com/

HumphreyBerger and Associates Attorneys At Law
California Lawyers

Ken Humphrey, Neil Berger, and Clark Cameron are the principal attorneys of Humphrey, Berger & Associates, LLP ("HBA") and have decades of surety and construction litigation experience. HBA represents surety and insurance companies handling contract and commercial litigation matters throughout California. HBA also represents third party claims administrators and takes an active role in subrogation recoveries on behalf of our surety clients.

The attorneys at HBA have handled numerous jury trials, bench trials, arbitrations and appeals in both California and federal courts and administrative hearings before various California and federal agencies. At HBA, we are relentless in our pursuit of the most efficient and cost-effective methods to serve our clients. We pride ourselves in knowing and meeting our clients' needs and expectations by delivering timely status reports which eliminate surprises, and providing the best results to our clients, at very competitive billing rates.

Humphrey, Berger & Associates also provides third party administrator services at very competitive rates and alternate fee arrangements. We have administered both large and small claims handling programs on behalf of sureties and insurers, handling commercial and contract surety bond claims and liability insurance claims.

HBA wants to be your California legal counsel and would welcome an opportunity to discuss what our firm can do to assist your California legal needs.

Please visit our website at https://www.hbalaw.com/

Founded in 1979, JAMS is the largest private provider of mediation and arbitration services worldwide. With Resolution Centers nationwide and abroad, JAMS and its nearly 300 exclusive neutrals are responsible for resolving thousands of the world's important cases. JAMS may be reached at 800-352-5267.

JAMS neutrals are responsible for resolving a wide array of disputes in the construction industry, including matters involving breach of contract, defect, cost overrun, delay, disruption, acceleration, insurance coverage, surety, and engineering and design issues. The JAMS Global Engineering and Construction Group consists of neutrals who serve the industry through traditional ADR options such as mediation and arbitration, and through several innovative approaches to ADR such as Rapid Resolution, Initial Decision Maker, and Project Neutral functions. Further, JAMS neutrals understand the complexity of project financing and the demands of large infrastructure and other mega-projects and are uniquely qualified to serve on Dispute Review Boards and other institutional approaches to conflict resolution.

Please visit our website at www.jamsadr.com.

J.S. Held is a leading consulting firm specializing in construction consulting, property damage assessment, surety services, project and program management, and environmental, health & safety services. Our organization is built upon three fundamental pillars: to provide high quality technical expertise; to deliver an unparalleled client experience; and to be a catalyst for change in our industry. Our commitment to these pillars positions us as a leading global consulting firm, respected for our exceptional success addressing complex construction and environmental matters in the world. Our team is a group of multi-talented professionals, bringing together years of technical field experience among all facets of projects including

commercial, industrial, high rise, special structures, governmental, residential, and infrastructure. Our uncompromising commitment to our clients ensures our position as one of the most prominent consulting firms in our industry.

Please visit our website at www.jsheld.com.

JKW | JENNINGS HAUG KELEHER MCLEOD WATERFALL LLP

The surety, construction, and litigation firm of Jennings Haug Keleher McLeod Waterfall LLP delivers effective courtroom representation, capable legal advice, and superior personal service to our clients in the construction and surety industries. Our experienced lawyers provide representation in a broad array of practice areas including construction law, surety/fidelity law, bankruptcy, Indian law, business law, and insurance defense. What distinguishes our Firm is the quality of service and the consistent follow-through clients can expect from our attorneys and staff. We pride ourselves in providing timely, effective, and efficient legal services to our surety and contractor clients.

The firm serves businesses and individual clients throughout the state of Arizona, and we can accept cases in the southwest United States, California, New Mexico, Nevada and in select bankruptcy actions nationwide.

Please visit our website at www.jkwlawyers.com.

KR KERR RUSSELL
Attorneys and Counselors

Established in 1874, Kerr, Russell and Weber, PLC has evolved from a small practice in Detroit into a firm of committed, resourceful and respected lawyers with many talents and specialties. Our areas of practice include fidelity and surety.

Kerr Russell represents sureties in a wide range of matters, including the handling of defaults; claims against performance bonds, payment bonds, probate bonds and other commercial bond forms; performance takeovers, tenders and subcontract ratifications; pursuit of indemnification; and all aspects of litigation.

Our attorneys also include those whose specialties afford our surety practice access to a wide array of disciplines which are often beneficial to our services for surety clients, including corporate, tax, real estate, bankruptcy, and employment practices.

Please visit our website at www.kerr-russell.com.

KNCH
KOELLER ■ NEBEKER
CARLSON ■ HALUCK LLP

Koeller, Nebeker, Carlson, Haluck, LLP (KNCH) prides itself in its handling of complex litigation matters. Our broad spectrum of practice areas includes litigation defense, business law, employment law, insurance coverage and bad faith, environmental law, and most types of general practice areas. Our clients range from small business owners and their insurance companies; to mid-sized commercial contractors, landlords and tenants; to large nationwide homebuilders and commercial builders.

Over the 30 years of our existence, we have also become a recognized authority in all areas of construction litigation and transactions, with a particular specialty in representing builders, developers and general contractors. From real estate acquisition, development and financing, to construction and business litigation for both residential and commercial projects, our breadth of experience and geographical coverage ensures that our clients' personal business and financial concerns are being represented every step of the way.

As a direct result of the faithful support of our clients and the dedicated service of our attorneys and staff, the firm has grown to over 80 attorneys, 200 employees, with offices in Irvine, San Diego, Sacramento, Las Vegas, Phoenix, Orlando and Austin. Indeed, since its inception in 1986, KNCH has formed a dynamic presence throughout the states of California, Arizona, Nevada and Florida and has recently extended its reach into Texas. We look forward to developing new client relationships while continuing to excel at serving the needs of existing clients by achieving the highest level of excellence.

Dedicated to service, and driving ahead with integrity and courage, we are the law firm you want on your side.

Please visit our website at www.knchlaw.com.

KREBS FARLEY

The nationally recognized attorneys of Krebs Farley have litigated cases all over the United States. Our attorneys' skills show not only in the courtroom, but also in negotiation. The personal commitment and dedicated effort that our attorneys put forth make a difference in every case we handle. We are smart, pragmatic, and diligent. And we are dedicated to creatively pursuing the best solutions for our clients.

We understand the importance of prompt, correct, and concise responses; foreseeing and accounting for future contingencies in contract drafting; resolving disputes that can be amicably resolved; and positioning those matters that cannot be settled for a successful outcome in litigation. We do this while remaining cognizant that litigation often impacts business considerations beyond the case at hand. We also work closely with our clients in developing and operating within a litigation budget. Whether it be in negotiation, in mediation, in arbitration, in trial or on appeal, the attorneys at Krebs Farley seek pragmatic solutions for our clients.

Please visit our website at https://krebsfarley.com.

CurranLawyers.com

The Law Offices of James D. Curran

James D. Curran is an experienced litigator well known for his success in handling surety and construction-related matters. Mr. Curran's practice is primarily devoted to complex commercial litigation and includes representing contract and commercial sureties, contractors, subcontractors, and other businesses in a wide variety of surety, construction, and business disputes.

Mr. Curran's surety and construction litigation experience involves both contract and commercial claims. Mr. Curran assists clients in resolving contract issues, completing projects, resolving payment claims, pursuing

indemnity and collateral, recovering assets, and working through bankruptcy issues. The types of projects in which Mr. Curran regularly is involved include public and private works, schools, libraries, subdivisions, roadwork, freeways, dams, office buildings, commercial spaces, laboratories, and apartment and condominium complexes. The types of issues in which Mr. Curran is regularly involved include interpretation and enforcement of contracts, delays, disruptions, impacts, acceleration, allegations of bad faith and unfair claims practices, labor claims, class-action disputes, and prevailing wage violations.

Whether the matter is worth tens of millions or tens of thousands, Mr. Curran's focus is always on obtaining the best result for the client. Mr. Curran works with the client to position the issue for a negotiated resolution, usually by working with the other parties involved, or through mediation or other form of alternative dispute resolution. If litigation is necessary, Mr. Curran is very experienced with winning cases in both trial and appellate courts.

Mr. Curran received his Bachelor of Arts from Santa Clara University in 1980, and his Juris Doctor from Santa Clara University School of Law in 1986. Mr. Curran is a member of local, state and national bar associations, including the State Bar of California, American Bar Association, Torts and Insurance Practice Section, the Fidelity & Surety Law Committee, the Forum on Construction Industry, and the Associated General Contractors. Mr. Curran has been named as being one of "Northern California's Super Lawyers" for numerous years.

Mr. Curran is active in several civic, charitable, and social organizations in San Francisco.

Please visit our website at https://www.curranlawyers.com/

LANGLEY LLP
ATTORNEYS & COUNSELORS
Working Smarter.

Langley LLP is a Texas civil trial, commercial bankruptcy, and appellate firm that represents Fortune 500 and middle- market industry leaders in disputes throughout the United States. Our firm is made up of ambitious and smart lawyers who demonstrate passion and zeal in representation of the firm's clients. We help our clients solve their legal challenges through aggressive negotiation or litigation. Our areas of specialty include surety and construction, property insurance claims, commercial litigation, and commercial bankruptcy.

Our attorneys try cases, handle arbitrations, litigate, negotiate, analyze, and communicate. At the heart of the matter, for us it is all about understanding our clients' business and keeping our clients informed. We are strong believers in creating a plan for each matter designed to arrive at an efficient and effective resolution. Most cases in the United States settle, as do most of ours. When a case must be tried, our trial lawyers relish the opportunity – whether it is a two day trial to the bench or a sixteen week jury trial. Whether the amount in controversy is hundreds of millions of dollars or a small sum, our experience, communication skills, and use of cutting edge technology position us to achieve the winning result.

Please visit our website at www.l-llp.com.

Law Office of Mark A. Vaughn

Our firm has been representing fidelity and surety companies for over 20 years. We focus on problem solving, always attempting to resolve conflicts efficiently in a good-faith effort to avoid expensive,

protracted litigation. However, we are certainly prepared to defend claims through the entire judicial process, including appeals. The size of our firm enables us to give personal attention to our clients' needs.

Please visit our website at www.mavlawoffice.com.

Lewis Brisbois offers its clients counsel experienced in handling all facets of surety practice from its offices throughout the United States. Our attorneys have successfully represented clients in resolving contract and commercial surety, and issues ranging from simple license bonds to complex multi-state contract surety defaults. Our attorneys have extensive experience handling surety matters in mediation, arbitration, state, and federal courts, as well as appellate courts, including United States Circuit Courts.

Please visit our website at www.lewisbrisbois.com.

The Loewke Brill Consulting Group was formed in 1992 by Peter J. Brill. Peter had a wealth of construction and claim knowledge from his 40+ years of service to the industry. In 1998 Mike Loewke and Peter joined forces. The company expanded its capability in 2003 when Jim Loewke joined the team. Peter Brill passed away in the summer of 2003. Today, partners Mike and Jim Loewke continue to provide quality service as "The Best Defense in the Construction Industry."

They are supported by a staff of talented, highly trained professionals that attend to each project with attention to detail. We service all levels of surety and construction including litigation support projects.

The Loewke Brill Consulting Group professionals are Construction Specialists with three generations of experience and service in the industry. Our company's commitment to its core values of integrity, trust, and reliability has resulted in exceptional client satisfaction for many years.

The Loewke Brill Consulting Group has offices located in Rochester, NY, Hudson Valley, NY, Jensen Beach, FL, Charlotte, NC and our newest location in Ontario, Canada.

Please visit our website at www.loewkebrill.com.

Manier & Herod, P.C. is located in Nashville, Tennessee and provides representation, counsel, and advocacy on behalf of sureties and fidelity insurers throughout the United States. Manier & Herod's attorneys are actively involved in the Fidelity and Surety Committee of the American Bar Association (ABA) and frequently address the ABA and other professional organizations on topics relevant to the fidelity and surety industries. Manier & Herod represents fidelity insurers and sureties in underwriting, pre-claim workouts, coverage analysis and litigation, contractor defaults including performance bond and payment bond claims, contractor bankruptcies, surety litigation, indemnity actions, and other matters and forums.

Please visit our website at www.manierherod.com.

MARKEL

Markel Surety is proud to be a Sustaining Member of Pearlman, one of the finest networking and continuing surety claims education organizations for our industry. Markel Surety builds long-term, mutually beneficial relationships to help our partners grow their business through all market cycles. We are a Fortune 500 Company with superior capitalization. We pride ourselves on being responsive, consistent in our approach to surety credit, and committed to our clients for the long term. Our claims team strives to be responsive, creative in our approach to dispute resolution and avoidance, and a resource to our underwriters, producing partners, and accounts.

Please visit our website at www.markel.com.

MDD

Matson, Driscoll & Damico LLP is a world-class forensic accounting firm that specializes in economic damage quantification assessments. We have deep rooted and comprehensive expertise in matters related to the surety and construction industry.

Our experts speak over 30 languages and we have 42 offices on 4 continents. Our work spans more than 130 countries and 800 industries, and we frequently work with law firms, government entities, multi-national corporations, small businesses, insurance companies and independent adjustment firms.

For more information please contact David Stryjewski or Peter Fascia at 215.238.1919 or visit us at www.mdd.com.

maximum MPC property construction

Maximum Property Construction's mission is to provide expertise in the unique practices of Construction Defect Evaluations, Expert Witness Services, Owner's Representative Services, and Surety Claims Investigations. We apply core values of rapid response to all inquiries, personal integrity in our business relationships, impeccable customer service, and excellence of our work product at all times. Our services include:

- Expert Witness services in the fields of mechanical-HVAC, plumbing, and general construction
- Construction Defect Evaluation, Analysis, and Litigation Support
- Construction Surety Claims Investigations
- Owner's Representative
- Commercial Construction License

Please visit our website at www.mpcs-llc.com.

Nicholson Professional Consulting, Inc. is a time-tested accounting and construction consultancy based in Atlanta, Georgia, with various other office locations throughout the United States. NPCI provides Accounting, Engineering, Construction Management and litigation support expertise, primarily to the surety/fidelity industry, as well as, construction clients and owners. In response to our client's needs, NPCI has also developed a project completion unit, known as Nicholson Management, and has continued to expand its own expert testimony and reporting in the areas of litigation support. NPCI is vertically integrated, providing clients with a range of services that span from early-phase performance review to full-scale Surety intervention, from prime takeover and project completion to litigation support in the resolution of construction claims. NPCI leverages its experience at all phases of contract administration to provide greater peace of mind and confidence to its various clients.

Please visit our website at npcius.com.

Companies with business interests across the South turn to Phelps Dunbar for counsel on their legal needs. With 13 office locations in the U.S. and in London, we serve clients in the region's major commercial centers. Our 350-plus lawyers serve clients in several core practice areas, including labor and employment, litigation, business, admiralty, insurance coverage, and healthcare, and have a substantial construction and surety law focus in our Louisiana, Florida, Texas, Alabama, and Mississippi offices. But it's more than our casework that sets our firm apart.

We spend time with you off the clock, so we can learn everything from your strategic goals to challenging operational issues. We are known for asking questions, not just about what is, but about what should be. And we make sure that you access our experience seamlessly, with every lawyer in every office available to be part of your team. We do this because anything can make the difference in a business-critical deal or lawsuit.

We embrace the future, not just of your industry but of our own. We are constantly looking for how to improve services and outcomes through technology. Through our Phelps Analytics Lab, we partner with Tulane University to pilot programs that use AI to identify business trends, develop litigation strategies and improve efficiency.

We are proud to offer national talent with local pricing to companies working throughout the Gulf South. We welcome the chance to work with you.

Please visit our website at https://www.phelps.com/.

RiskScape Strategies, LLC is a boutique consulting firm specializing in litigation support, surety, cyber, commercial crime, and fidelity claims.

We provide insurers, law firms, and corporate clients with forensic review, policy analysis, litigation support, and claims strategy to bring clarity to complex matters.

With deep expertise in fraud, cyber incidents, and financial crime, RiskScape Strategies delivers independent insights and practical solutions that support confident decisions and stronger outcomes.

Please visit our website at www.riskscapellc.com.

RIVKIN RADLER LLP | DRIVEN TO DELIVER®
ATTORNEYS AT LAW

Through six offices and 250 lawyers, Rivkin Radler consistently delivers focused and effective legal services. We're committed to our best practices, which go beyond professional and ethical standards. Our work product is clear and delivered on time. As a result, our clients proceed with confidence.

We provide strong representation and build even stronger client relationships. Many clients have been placing their trust in us for more than 30 years. Our unwavering commitment to total client satisfaction is the driving force behind our firm.

We are the advisor-of-choice to successful individuals, middle-market companies and large corporations. And for clients who prefer to speak their native language, we can communicate in Albanian, French, French and Haitian Creole, Greek, Hebrew, Hindi, Italian, Korean, Polish, Portuguese, Punjabi, Spanish, Tagalog, and Urdu.

Rivkin Radler's attorneys are leaders in legal, business and political arenas. Many of our attorneys have received Martindale Hubbell's AV Preeminent® ranking, signifying that "a lawyer's peers rank him or her at the highest level of professional excellence." Time and again, our attorneys are recognized as leaders by peer review programs, including Best Lawyers and Super Lawyers.

Our attorneys and professional staff occupy leadership roles in many organizations. We have been named among the Top 100 Private Companies on Long Island by Newsday and are consistently ranked in the top 50 in the New York Law Journal's 100 Largest Law Firms in New York.

Please visit our website at https://www.rivkinradler.com/

RJT CONSTRUCTION, INC.
CONSULTING SERVICES

For over 30 years, RJT Construction, Inc. has been dedicated to providing exceptional quality, experience, and professional services to the construction, surety, and legal industries. RJT operates as a full service consulting firm specializing in construction, surety, and related claims and litigation. RJT's typical services include: surety claims investigation and default analysis, completion obligations and oversight on behalf of surety, reporting, monitoring, payment bond analysis, claims preparation, claims analysis including support

and defense, construction defect claims and litigation support, forensic investigation, scheduling analysis, and expert designation and testimony.

Please visit our website at www.rjtconstruction.com.

ROBINS KAPLAN LLP

Robins Kaplan LLP is among the nation's premier trial law firms, with more than 250 attorneys in eight major cities. Our attorneys litigate, mediate, and arbitrate client disputes, always at-the-ready for an ultimate courtroom battle. When huge forces are at play, major money is at stake, or rights are being trampled, we help clients cut through complexity, get to the heart of the problem, and win what matters most.

Our surety attorneys have combined over 100 years of experience in the evaluation, resolution and litigation of bond claims. This includes the handling of multi-project defaults to achieve a timely completion of open projects while mitigating losses and maximizing recovery efforts. Our surety attorneys also counsel clients on matters arising out of fiduciary bonds, litigation bonds, license and permit bonds, and other miscellaneous bond matters, as well as provide necessary training and counsel on state regulations and Department of Insurance requirements.

Please visit our website at www.robinskaplan.com.

Robinson+Cole

Robinson+Cole is an Am Law 200 firm serving regional, national, and international clients from nine offices throughout the Northeast, Florida, and California. Our 200-plus lawyers and other professionals provide legal solutions to businesses, from start-ups to Fortune 100 companies and from nonprofits and educational institutions to municipalities and state government.

Through an understanding of our clients' industry the nature and structure of their business, their level of risk tolerance, and their budget considerations, we tailor our legal strategy to align with their overall business needs. Where appropriate, alternative billing arrangements are made to provide clients with a greater degree of certainty about their legal costs. Robinson+Cole's varied practice areas include construction and surety; insurance and business litigation; land use, environmental and real estate; labor, employment and benefits; tax; and intellectual property and technology.

Please visit our website at www.rc.com.

Sage Associates, Inc.

Sage Associates is very pleased to be among the sponsoring firms of Pearlman. We have provided high quality, high value consulting services in the surety industry, as well as construction, banking, and insurance industries, for more than 30 years and our contacts within the construction community and with attorneys and mediators within the construction field is unmatched in the western United States.

The firm's employees and associates offer a broad mix of expertise and skills. Surety claims work is facilitated by knowledge, patience, focus, and relationships. We focus on our client's business and objectives, working hard to assist sureties "deliver on the promise" and resolve claims. Cost to benefit is always a paramount consideration at Sage Associates as is a long term focus both in the assignment and with our relationship with our clients.

Please visit our website at www.sage-associates.com.

SALAMIRAD, MORROW, TIMPANE & DUNN LLP
ATTORNEYS AT LAW

SMTD Law LLP is a boutique law firm specializing in construction, surety and business litigation. The Firm's attorneys are highly experienced in handling disputes unique to the construction and surety industries and they understand the rigors and challenges of litigation. The Firm handles matters for many of the world's leading sureties in all types of commercial and contract surety matters. Our attorneys frequently assist our surety clients with: defense of contract and commercial bond claims; analysis and prosecution of affirmative claims; preparation of transactional documents, including loan and financing agreements; subdivision workouts with lenders and local entities; and handling complex indemnity and other salvage actions.

Please visit our website at www.smtdlaw.com.

Simon Peragine Smith & Redfearn LLP

Simon, Peragine, Smith & Redfearn, LLP has extensive experience in handling fidelity and surety related matters and litigation. Over the years, the firm's attorneys have handled numerous fidelity, contract surety, financial guarantee and miscellaneous bond and commercial surety matters. The firm's attorneys who practice in the surety law field have been active participants in many professional associations, such as the Fidelity & Surety Committee of the Tort Trial Insurance Practice Section of the American Bar Association; the DRI Surety Committee; National Bond Claims Institute; Surety Claims Institute; and Louisiana Surety Association.

H. Bruce Shreves is the former Chair of the American Bar Association Fidelity & Surety Committee and the DRI Surety Committee; Jay Kern has served as a Vice-Chair of the American Bar Association Fidelity and Surety Committee; Mr. Shreves, Mr. Kern and Denise Puente have delivered numerous papers and lectures before various ABA Committees, as well as DRI, National Bond Claims and Surety Claims Institute.

Mr. Shreves is currently the Chair of the Louisiana Fidelity, Surety & Construction Law Section of the Louisiana Bar Association. Mr. Shreves, Mr. Kern and Ms. Puente have been named by New Orleans Magazine as Best Lawyers in New Orleans in the area of construction/surety, and have been named as Louisiana Super Lawyers in the areas of construction and surety. They are contributing authors or editors to various ABA publications, including the Law of Payment Bonds; the Law of Performance Bond; and the Law of Suretyship.

Please visit our website at www.spsr-law.com.

Sokol Larkin, a boutique law firm located in Portland, Oregon, has earned its reputation as one of the Pacific Northwest's premier firms in the areas of construction and design law, surety and fidelity law, and business, commercial and real estate matters. The firm's clients range from individuals and small businesses to large multi-national companies.

Jan Sokol and Tom Larkin established the firm to create a team of excellent attorneys. With principle, passion and purpose, our mission is to provide the highest level of legal service in an aggressive, though pragmatic and cost-effective, manner to help clients achieve the best possible results. The firm's success has helped the firm develop long-standing trust and relationships with its clients. At Sokol Larkin our attorneys and support staff each contribute their individual expertise to provide our clients with exceptional service and personal attention in all matters. The firm has attorneys admitted to practice in Oregon, Washington, Idaho, Alaska, California, the District of Columbia and other jurisdictions.

Please visit our website at www.sokol-larkin.com.

With a combination effective on March 1, 2024, Spencer Fane, LLP, steps into the shoes of Snow Christensen & Martineau as a sustaining member of The Pearlman Association and now counts Snow Christensen's Salt Lake City and St. George offices among the twenty-six Spencer Fane offices located across the United States. That combination preserves Snow Christensen's legacy of litigation expertise and related legal services to clients in Utah and throughout the Intermountain West since 1886. Spencer Fane adds to its full-service scope of business law a continuing commitment of dedicated professionals serving the surety industry, instilling confidence and certainty that the clients' interests are the firm's priority.

Please visit our website at www.spencerfane.com.

Stuart-Lippman and Associates is a nationally recognized agency providing collection, subrogation, arbitration and accounts receivable management solutions to insurance providers, financial and commercial clients. We are committed to our clients' complete satisfaction as we help them profitably manage their accounts receivable. Our reputation in the marketplace is defined by our service, integrity and results. Stuart-Lippman and Associates is committed to setting the standard by which all recovery services are measured. We offer a dynamic alternative, grounded on knowledge, that sets us apart.

You can turn accounts to us with confidence. Having a thorough understanding of your loss, while maintaining a rigorous code of ethics, ensures professional handling of accounts, responsive service, and a much higher rate of return.

Please visit our website at www.stuartlippman.com

The Horowitz Law Firm
A Professional Corporation

Our principal lawyer, Jeffrey D. Horowitz, who has more than 30 years of surety law experience, spent 10 years as in-house counsel for a national surety bond company, has since been in private practice for more than 20 years, and currently represents sureties with their bond claims and litigation needs all over California.

We have experience handling many types of surety bonds, including Performance Bonds, Payment Bonds, Subdivision Bonds, License and Permit Bonds including Contractor's License Bonds, Mechanics Lien and Stop Payment Notice Release Bonds, Bid Bonds, Motor Vehicle Dealer Bonds, Notary Bonds, and Insurance Broker Bonds.

With more than three decades of experience working specifically on issues related to surety bonds, and handling a wide range of surety bond litigation, including trials, appeals, mediations and negotiation, our office has built a reputation of successful and effective representation. For strong representation on issues related to surety bonds, including surety defense, indemnity and subrogation, we are ready to represent your interests. Mr. Horowitz also practices construction and real estate law.

The Horowitz Law Firm, APC is based in Sherman Oaks, a suburb in the City of Los Angeles, California.

Please visit our website at www.jdhorowitzlaw.com.

HLF

THE HUSTEAD LAW FIRM
DENVER, COLORADO

The Hustead Law Firm, A Professional Corporation, launched in 1996 when Patrick Q. Hustead left the partnership of one of Denver's largest law firms to create a dedicated litigation practice focused on the surety and insurance industry. Since that time, the Firm has grown into a dynamic mix of attorneys and technology that produces the results its clients deserve and expect. From complex surety matters to nuanced bad faith claims, the Firm delivers the firepower of a large firm with the personal attention of a small one.

Please visit our website at www.thlf.com.

vertex.

The Vertex Companies, (Vertex) is an international technical services firm that operates with urgency and produces exceptional value for our clients. Vertex provides construction, environmental, energy, air quality, and engineering solutions. With over 20 domestic and international offices, along with unique teaming arrangements worldwide, we have the reach and relevant expertise to approach projects with remarkable efficiency gained through local knowledge. Our reputation for excellence, both in terms of timely results and quality service, spans the globe. It has earned us the trust of a prestigious client base that includes Fortune 100 companies and esteemed boutique firms in virtually every line of business.

Please visit our website at www.vertexeng.com.

TLGGR

TORRE, LENTZ, GAMELL, GARY & RITTMASTER, LLP

Torre, Lentz, Gamell, Gary & Rittmaster, LLP is a boutique New York based law firm specializing in surety, fidelity and construction law and providing clients with the best features of small and large firms. TLGGR is able to provide this service by combining the seasoned legal talent and modern technology of a large firm with the personal attention, expertise and congeniality of a small firm. Our office is located in Jericho, Long Island, New York, which is within 30 minutes of Manhattan. While the firm's practice is located primarily in New York and New Jersey, TLGGR also has recently handled substantial matters in Connecticut, Pennsylvania, Delaware and Washington, D.C.

TLGGR handles all manner of commercial and business problems but in large measure specializes in counseling and litigation relating to (1) construction bonds, commercial surety bonds and other forms of suretyship, (2) construction contract and engineering disputes, (3) claims against project owners for wrongful termination and additional compensation, (4) financial institution bonds and other forms of fidelity or crime insurance, and (5) creditors' rights in bankruptcy. These matters involve us in a broad range of commercial problems, including workouts, bankruptcy proceedings, and insurance coverage analysis and litigation.

Please visit our website at www.tlggr.com.

WHT PLLC

WARD, HOCKER & THORNTON

For over a quarter of a century, the attorneys at Ward, Hocker & Thornton, PLLC (WHT) have diligently and competently served their clients and have provided them with the highest quality legal representation. With offices in Lexington and Louisville, WHT serves the entire state of Kentucky and has litigated cases in nearly all of its 120 counties.

Additionally, WHT often handles cases in the adjoining states of Indiana, Ohio, Tennessee and West Virginia.

WHT is a firm which generally represents the insurance industry and its insureds, the surety and fidelity industry, and the trucking industry. We also directly represent self-insured corporations (many of which are Fortune 500 companies) and various hospitals, health care providers and financial institutions. The net result is that our team of 30 lawyers has tremendous negotiation and litigation experience, having collectively handled thousands of cases encompassing several different areas of law, including: appellate practice, automobile/motor vehicle litigation, construction law, commercial and business litigation, extra-contractual/coverage issues, financial institution law, fire & casualty, governmental liability, healthcare professional liability, insurance defense, large loss subrogation, products liability defense, premises liability, surety & fidelity law, trucking & transportation litigation, and workers' compensation defense.

Our attorneys are licensed to practice in all courts in Kentucky, and in addition have attorneys licensed to practice in the states of Indiana, Ohio and Tennessee. WHT has been awarded the prestigious AV rating

offered by LEXISNEXIS Martindale-Hubbell, and we are listed in the Best Directory of Recommended Insurance Attorneys and Adjustors.

Our goal is to provide you and your business with result-oriented legal services in an effective, cost efficient manner. We at WHT welcome the opportunity to be of service to you and will aggressively work to achieve a successful outcome.

Please visit our website at www.whtlaw.com.



Watt, Tieder has one of the largest construction and surety law firms in the world, with practices that encompass all aspects of construction contracting and public procurement. Our practice groups include: domestic construction law, government contracts, international construction law and surety law. Watt, Tieder's work characteristically relates to major development and construction projects involving highways, airports and seaports, rail and subway systems, military bases, industrial plants, petrochemical facilities, electric generating plants, communication systems, and commercial and public facilities of all types in the United States and globally.

Watt, Tieder is one of the premier surety law firms in the country. We represent more than a dozen sureties in North America, acting as national, regional or public contract counsel for them. Our surety clients include industry leaders like Arch Insurance Company, Cincinnati Insurance Company, Hartford Fire Insurance Company, Liberty Mutual Surety Insurance Company, RLI Corp., SureTec Insurance Company, Travelers Casualty and Surety Company and Zurich North America. In our thirty years of practicing surety law, Watt, Tieder has gained particular expertise in default terminations, affirmative construction claims, surety "abuse of discretion" cases, government contract disputes, surety bad faith claims and all forms of contract bond defaults.

With offices in Washington DC Metro; Irvine, California; Las Vegas, Nevada; Seattle, Washington; Chicago, Illinois; and Miami, Florida, we have a staff of over 50 legal professionals working throughout the United States, Canada, Europe, the Middle East, Asia, South America, Australia and Africa.

Watt, Tieder and its attorneys are annually recognized for accomplishments in construction and surety law, including top tier rankings in Chambers USA, the Legal 500 and US News-Best Lawyers.

Please visit our website at www.WattTieder.com.

WEINSTEIN RADCLIFF PIPKIN
ATTORNEYS AT LAW LLP

Weinstein Radcliff Pipkin, LLP is a Dallas, Texas–based commercial litigation law firm with extensive experience in commercial construction, surety, fidelity and professional liability coverage and defense, and labor and employment. As advocates, clients nationwide look to us as their go–to firm for litigation in Texas, Oklahoma, Arkansas, and elsewhere. As advisers, we provide an early, honest case assessment, offering creative solutions and establishing reasoned expectations that save time, money, and headaches. Our attorneys have extensive experience handling construction and surety cases involving contractor defaults, construction and design defects, impact and delay claims, and catastrophic loss. We also have considerable

trial and litigation experience for fidelity and professional liability insurers, as well handling labor and employment cases involving corporate management, employee benefits, and non-compete agreements.

Please visit our website at www.weinrad.com.

With more than 25 years of experience, YA's experts specialize in the planning and forensic assessment of the built environment, forensic accounting, government grant consulting, and accident reconstruction & biomechanics.

We deliver unquestionable solutions to often unfathomable challenges. When you need certainty, decisive action, and a path forward, you turn to YA. No matter scale or complexity, our specialists provide indisputable clarity when it's needed most. Whatever your next step is, there's no doubt you'll be on solid footing. Our multidisciplinary team supports clients in the insurance, government, legal, and corporate sectors. We provide trusted guidance for both local and global projects through investigation, analysis, visualization, and recommendations.

YA Group combines global geographic coverage and a broad base of expertise with local presence and knowledge to give each of our clients the service and clarity they require. With strategic locations in Nashville, Los Angeles, Dallas, Houston, Seattle, and Buffalo, we can easily reach every corner of the U.S. and beyond.

Please visit our website at https://www.yagroup.com/

Officers

President	**Luis Aragon, Liberty Mutual Surety**
Treasurer, Scholarship Endowment	**Mary Lynn Kotansky, Liberty Mutual Surety**
Legal	**Eric Liberman, Carney Badley Spellman, P.S.**

Pearlman 2026 Attendees

Calvin Agus
CNA Surety
601 Union St, Ste 1601
Seattle, WA 98101-2301
(206) 587-7459
calvin.agus@cnasurety.com

Jose Tomas Alvarez
Liberty Mutual
1001 4th Ave, Safeco Plaza
Seattle, WA 98154
+56 9 9419 6786
josetomas.alvarez@libertymutual.com

Luis Aragon
Liberty Mutual
1001 Fourth Avenue, Suite 3800
Seattle, WA 98154
(206) 473-6812
luis.aragon@libertymutual.com

Guy Armfield
IMA
15404 3rd Dr SE
Mill Creek, WA 98012
(425) 505-3222
guy.armfield@imacorp.com

Laura Ashley
Krebs Farley, PLLC
400 Poydras Street, Ste. 2500
New Orleans, LA 70130
(504) 299-3577
Lashley@krebsfarley.com

Christine Bartholdt
Liberty Mutual Surety
1001 4th Avenue
Seattle, WA 98154
(206) 473-3353
christine.bartholdt@libertymutual.com

Andrew Barton
American Arbitration Assoc
18756 Stone Oak Parkway, Suite 200
San Antonio, TX 78258
(210) 998-5750
bartona@adr.org

Nick Belanger
The Hartford
One Hartford Plaza Mail Drop T-14
Hartford, CT 06155
(253) 853-2212
nick.belanger@thehartford.com

Travis Belling
Travelers
33650 6th Ave S., Suite 200
Federal Way, WA 98003
(206) 326-4284
Tbelling@travelers.com

Robert Berens
SMTD Law LLP
1220 E. Osborn Road
Phoenix, AZ 85014
(480) 628-8007
rberens@smtdlaw.com

Amy Bernadas
Liberty Mutual Insurance Company
P.O. Box 34526
Seattle, WA 98124
(601) 503-1176
amy.bernadas@libertymutual.com

Kelsey Bilodeau
Gottesman, Wolgel, Flynn & Weinberg, P.C.
11 Hanover Sq., FL 4
New York, NY 10005
(212) 495-0100
kbilodeau@gottesmanlaw.com

Jonathan Bondy
CSG Law
105 Eisenhower Parkway
Roseland, NJ 07068
(973) 530-2052
jbondy@csglaw.com

Connie Boudreau
Liberty Mutual
1001 4th Ave., Suit 3800
Seattle, WA 98154
(206) 473-3395
connie.boudreau@libertymutual.com

Ron Boyle
Boyle Consulting Inc
318 N Gateway Ct
Wichita, KS 67230
(316) 648-2560
ronboyle@rebcpa.com

Brian Bragg
The Hartford
67 Park Place East
Morristown, NJ 07960
(973) 607-5241/ (973) 738-3214
brian.bragg@thehartford.com

Stacie Brandt
Booth, Mitchel and Strange LLP
701 South Parker Street, Suite 6500
Orange, CA 92868
(714) 480-8500
slbrandt@boothmitchel.com

David Bresel
Markel Surety
9500 Arboretum Blvd
Austin, TX 78759
(480) 282-6808 / (402) 677-0100
david.bresel@markel.com

Andrew Brouwer
Nicholson Professional Consulting, Inc.
386 Prospect St, Apt E1
New Haven, CT 06511
(949) 383-8421
andrew.brouwer@npcius.com

Marc Brown
Travelers
33650 6th Ave S, Suite 200
Federal Way, WA 98003
(253) 943-5805
mbrown6@travelers.com

Jonathan Burwood
Watt, Tieder, Hoffar & Fitzgerald, LLP
175 Federal Street, Suite 1225
Boston, MA 02110
(617) 283-2983
jburwood@watttieder.com

Brian Calloway
Landmark Corporation
5634 Clinton Highway
Knoxville, TN 37912
(865) 388-7160
brian@landmarkcorp.com

Whit Campbell
The Hartford
601 Union Street
Seattle, WA 98033
(206) 419-3304
jamesw.campbell@thehartford.com

Michael Carson
Nationwide Mutual Insurance Company
c/o Nationwide Surety Claims, PO Box 182068
Columbus, OH 43218-2068
(484) 832-7521
michael.carson@nationwide.com

Benjamin Chambers
The Hartford
601 Union St., Suite 920
Seattle, WA 98101
(253) 853-2215
benjamin.chambers@thehartford.com

Edward Claxton
Travelers
14063 102nd ct NE
Kirkland, WA 98034
(425) 287-8286
eclaxton@travelers.com

Curtis Cline
Markel Surety
9500 Arboretum Blvd, Suite 400
Austin, TX 78759-6320
(512) 748-0905
ccline8@yahoo.com

J Caralisa Connell
Dry Law PLLC
909 18th St
Plano, TX 75074
(972) 797-9517
cconnell@drylaw.com

Michael Cronin
Markel Surety
9500 Arboretum Blvd, Ste. 400
Austin, TX 78759
(512) 684-3449
michael.cronin@markel.com

James D. Curran
Law Offices of James D. Curran
111 Maiden Lane, 6th Floor
San Francisco, CA 94108
(415) 816-4845
jcurran@curranlawyers.com

Myat Cyn
Beacon Consulting Group
18 West 33rd Street, Floor 6
New York, NY 10001
(212) 695-3333
mcyn@beaco.ws

Adrian D'Arcy
D'Arcy Vicknair, LLC
650 Poydras Street, Suite 2705
New Orleans, LA 70130
(504) 701-8466
aad@darcyvicknair.com

Douglas Dearie
Liberty Mutual
15604 Manion Way NE
Duvall, WA 98019
(425) 949-2787
douglasdearie1331@gmail.com

Ryan DeLaune
Clark Hill PLC
901 Main Street, Suite 6000
Dallas, TX 75202
(214) 683-9219
rdelaune@clarkhill.com

Meredith Dishaw
Friedrich & Dishaw PLLC
92 Lenora Street #119
Seattle, WA 98121
(206) 360-7655
meredithd@fdlawpllc.com

Rudy Dominguez
Liberty Mutual Surety
7900 Windrose Ave
Plano, TX 75026
(469) 242-7176
rudy.dominguez@libertymutual.com

Marc Domres
Zurich
P.O. Box 968036
Schaumburg, IL 60196
(760) 310-5456
marc.domres@zurichna.com

Matt Drake
Bristol Bay Construction Holdings
10101 Global Way
Knoxville, TN 37932
(865) 314-3477
mdrake@bbch-llc.com

Ryan Dry
Dry Law PLLC
909 18th St
Plano, TX 75074
(972) 797-9511
rdry@drylaw.com

Thomas Duke
Dry Law, PLLC
909 18th St.
Plano, TX 75074
(972) 797-9519
tduke@drylaw.com

Nina Durante
Liberty Mutual Insurance Company
PO Box 34526
Seattle, WA 98124
(206) 473-5237
nina.durante@libertymutual.com

Paul Eaves
Markel Insurance Company
9500 Arboretum Blvd, Suite 400
Austin, TX 78759
(832) 898-1240
paul.eaves@markel.com

Bruce Echigoshima
Liberty Mutual - RETIRED
23281 NE 17th Street
Sammamish, WA 98074
(425) 897-0777
bruech2022@outlook.com

Steven Elizer
Elizer Law Group, LLC
7366 N. Lincoln Ave., Suite 305
Lincolnwood, IL 60712
(847) 983-4343
selizer@elizerlaw.com

Robert Estephan
Loewke Brill Consulting Group
491 Elmgrove Rd, Suite 2
Rochester, NY 14606-3482
(585) 647-9350
bob@loewkebrill.com

Kurt Faux
Faux Law Group
2625 N Green Valley Pkwy, Suite 100
Henderson, NV 89014
(702) 460-3290
kfaux@fauxlaw.com

Trey Felty
Berkley Surety
412 Mt. Kemble Ave., Suite 310N
Morristown, NJ 07960
(312) 560-4492
jfelty@berkleysurety.com

Nicolas Femia
Cashin Spinelli & Ferretti LLC
801 Motor Parkway, Suite 103
Hauppauge, NY 11788
(631) 737-9170
nfemia@csfllc.com

Gustavo Fernandez
The VERTEX Companies LLC
44 Cook St., Suite 300
Denver, CO 80206
(727) 240-6077
gfernandez@vertexeng.com

Jennifer Fiore
Dunlap Fiore, LLC
6700 Jefferson Highway, Building 2
Baton Rouge, LA 70806
(225) 235-6453
jfiore@dunlapfiore.com

Stephen Fisher
CNA Surety
601 Union St, Suite #1601
Seattle, WA 98155
(206) 661-1018
stephen.fisher@cnasurety.com

Mason Fleming
Nicholson Professional Consulting
901 S Mopac Expressway, Building 1, Ste 300
Austin, TX 78746
(785) 418-7509
mason.fleming@npcius.com

Erin Fonacier
Dunlap Fiore LLC
6700 Jefferson Highway, Building 2
Baton Rouge, LA 70806
(225) 218-4106
efonacier@dunlapfiore.com

John Fouhy
Travelers
33650 6th Ave S, Suite 200
Federal Way, WA 98003
(253) 943-5806
jfouhy@travelers.com

Anna Frederick
EMC
717 Mulberry St.
Des Moines, IA 50309
(515) 345-2841
anna.c.frederick@emcins.com

Paul Friedrich
Friedrich & Dishaw PLLC
92 Lenora Street #119
Seattle, WA 98121
(206) 360-7655
paulf@fdlawpllc.com

Regina Gaebel
Allianz Trade Surety
662 S Edgwood Ave
Elmhurst, IL 60126
(630) 728-7342
regina.gaebel@allianz-trade.com

Mark Gamell
Torre Lentz Gamell Gary and Rittmaster
100 Jericho Quadrangle, Suite 309
Jericho, NY 11753
(516) 697-3733
mgamell@tlggr.com

Matthew Geary
Rouse Frets White, P.C.
801 W. 47th St., Ste. 500
Kansas City, MO 64112
(816) 502-4733
mgeary@rousepc.com

Kaylyn Gomez
Philadelphia Insurance Companies
9380 Station St., Suite 200
Lone Tree, CO 80124
(720) 829-8237
kaylyn.gomez@phly.com

Paul Grego
Sompo
12890 Lebanon Road
Mt. Juliet, TN 37122
(415) 961-9293
pgrego@sompo-intl.com

Craig Guenther
Booth, Mitchel and Strange LLP
701 South Parker Street, Suite 6500
Orange, CA 92868
(714) 480-8500
ggjimenez@boothmitchel.com

David Guild II
Sokol Larkin
4380 S. Macadam Ave., Ste. 530
Portland, OR 97239
(503) 221-0699
dguild@sokol-larkin.com

Paul Harmon
Applied Underwriters
10805 Old Mill Rd.
Omaha, NE 68154
(206) 619-9992
pcharmon@auw.com

Danielle Harris
Markel Surety
5555 Garden Grove Blvd., Suite 275
Westminster, CA 92683
(714) 657-1007
danielle.harris@markel.com

David Harris
Manier & Herod
7000 Central Parkway, Suite 1100
Atlanta, GA 30328
(615) 742-9311
dharris@manierherod.com

Bill Healy
Travelers Insurance
530 Broadway East, Unit 410
Seattle, WA 98102
(415) 987-5448
whealy@travelers.com

Justin Heath
Nicholson Professional Consulting, Inc.
310 Cleveland St
Rapid City, SD 57701
(770) 313-0260
justin.heath@npcius.com

Alyssa Hecht
Merchants Bonding
6700 Westown Parkway
West Des Moines, IA 50266
(425) 530-8832
ahecht@merchantsbonding.com

Landen Hecht
Travelers
33650 6th Ave, Suite 200
Federal Way, WA 98003
(253) 943-5777
lhecht@travelers.com

Elizabeth G. Henderson
The Hartford
One Hartford Plaza
Hartford, CT 06155
(206) 450-6551
elizabeth.henderson@thehartford.com

Cassie Hewlings
Liberty Mutual
1001 4th Avenue, Floor 38
Seattle, WA 98154
(206) 674-3673
cassandra.hewlings@libertymutual.com

Chris Hillman
Liberty Mutual Surety
450 Plymouth Road, Suite 450
Plymouth Meeting, PA 19426
(610) 256-3168
chris.hillman@libertymutual.com

Nancy Holtz
JAMS
One Boston Place
Boston, MA 02108
(781) 724-3594
nholtz@jamsadr.com

Bryce Holzer
Travelers
33650 6th Ave. S., Suite 200
Federal Way, WA 98003
(253) 943-5818
bholzer@travelers.com

Marci Houston
Travelers Bond & Specialty Insurance
One Tower Square
Hartford, CT 06189
(860) 805-4770
mhouston@travelers.com

Elmira Howard
Howard Genzon LLP
3200 Park Center Drive, 14th Floor
Costa Mesa, CA 92626
(949) 697-0536
Erh@howardgenzonlaw.com

Lih Hudson
Liberty Mutual
P O Box 34526
Seattle, WA 98124
(206) 473-3577
lih.hudson@libertymutual.com

Ken Humphrey
Humphrey, Berger & Associates, LLP
21300 Victory Blvd., Suite 520
Woodland Hills, CA 91367
(818) 871-0111
kenh@hbalaw.com

Patrick Hustead
The Hustead Law Firm
4643 S Ulster Street, Suite 1250
Denver, CO 80237
(303) 721-5000
pqh@thlf.com

Shiwanni Johnson
Sokol Larkin Wagner & Storti
4380 S Macadam Ave, Suite 530
Portland, OR 97239
(971) 420-9401
sjohnson@sokol-larkin.com

Matt Joy
J.S. Held
3101 N. Central Ave., Suite 670
Phoenix, AZ 85012
(602) 525-9852
mjoy@jsheld.com

Brian Kantar
Chiesa Shahinian & Giantomasi PC
105 Eisenhower Parkway
Roseland, NJ 07068
(973) 530-2112
bkantar@csglaw.com

Garen Kasparian
Merchants Bonding Company
6700 Westown Parkway
West Des Moines, IA 50266
(747) 292-1276
gkasparian@merchantsbonding.com

Steven Katz
Liberty Mutual Insurance Company
P.O. Box 34526
Seattle, WA 98124
(908) 770-3769
steven.katz@libertymutual.com

Bryan Kelley
Balfour Beatty Construction (Howard S. Wright)
415 1st Ave N, Ste 400
Seattle, WA 98109
(206) 447-7654
kelleyb@hswc.com

Robert (Rob) Kelley
Nicholson Professional Consulting
4556 S Morgantown Rd
Greenwood, IN 46143
(404) 678-6724
rob.kelley@npcius.com

Mary Lynn Kotansky
Liberty Mutual Surety
11010 54th Street Ct NW
Gig Harbor, WA 98335
(206) 643-0181
marylynn.kotansky@libertymutual.com

Hannah Lafrance
Palomar Casualty and Surety Company
1625 West Causeway Approach
Mandeville, LA 70471
(504) 258-5983
hlafrance@plmr.com

Frank Lanak
Tokio Marine HCC - Surety Group
801 S Figueroa Street, Suite 700
Los Angeles, CA 90017
(310) 242-4403
flanak@tmhcc.com

Charles Langfitt
Travelers-RETIRED
Des Moines, WA 98198
(253) 495-4443
Langfittcw@gmail.com

Thomas Larkin
Sokol Larkin
4380 S. Macadam Ave., Ste. 530
Portland, OR 97239
(503) 221-0699
tlarkin@sokol-larkin.com

Caroline Lee
Palomar Casualty & Surety Company
1625 West Causeway Approach
Mandeville, LA 70471
(504) 457-3890
clee@plmr.com

Sunny Lee
Bronster Fujichaku Robbins
1003 Bishop Street, Suite 2300
Honolulu, HI 96813
(808) 524-5644
slee@bfrhawaii.com

Eric Liberman
Carney Badley Spellman
701 Fifth Ave., Suite 3600
Seattle, WA 98104
(206) 607-4190
liberman@carneylaw.com

Hyung Lim
Liberty Mutual
1001 4th Ave
Seattle, WA 98055
(425) 615-0469
hyung.lim@libertymutual.com

Sonia Linnaus
Liberty Mutual Surety
790 The City Drive S, Suite 200
Orange, CA 92868
(949) 316-1833
sonia.linnaus@libertymutual.com

Gina Lockwood
Merchants Bonding Company
6700 Westown Parkway
West Des Moines, IA 50266
(214) 717-1074
glockwood@merchantsbonding.com

James MacLellan
Borden Ladner Gervais LLP
22 Adelaide Street West, Suite 3400
Toronto, ON M5H4E3
(416) 806-9810
jmaclellan@blg.com

Mark Manchester
Applied Underwriters
10805 Old Mill Rd
Omaha, TX 68154
(877) 234-4420
memanchester@auw.com

Grant Margeson
Sokol Larkin
4380 S. Macadam Ave., Ste. 530
Portland, OR 97239
(503) 221-0699
gmargeson@sokol-larkin.com

Chris Marron
Loewke Brill Consulting Group
491 Elmgrove Rd, Suite 2
Rochester, NY 14606
(585) 944-2505
chris@loewkebrill.com

Damitta Martin
West Bend Insurance Company
1900 South 18th Avenue
West Bend, WI 53095
(214) 683-3917
damartin@wbmi.com

Rosa Martinez-Genzon
Howard Genzon LLP
3200 Park Center Dr, 14th Fl
Costa Mesa, CA 92626
(310) 384-7121
rmg@howardgenzonlaw.com

Amanda Marutzky
Watt Tieder Hoffar & Fitzgerald, LLP
4 Park Plaza, Suite 1000
Irvine, CA 92614
(949) 852-6760
amarutzky@watttieder.com

John McDevitt
Liberty Mutual Insurance Company
157 Berkeley Street
Boston, MA 02116
(617) 981-0559
John.Mcdevitt@LibertyMutual.com

Jason McGee
Markel Surety
PO Box 5008
Woodland Hills, CA 91365
(818) 618-3082
jason.mcgee@markel.com

Taylor McMahon
JDO Law
111 W. 16th Avenue, Suite 203
Anchorage, AK 99501
(907) 261-6610
tmcmahon@jdolaw.com

Jeremy Medeiros
Liberty Mutual Surety
2342 Arezzo Lane
Allen, TX 75013
(214) 793-2625
jeremy.medeiros@libertymutual.com

Stephani Miller
Liberty Mutual
P.O. Box 3456
Seattle, WA 98154
(206) 473-3576
Stephani.Miller@LibertyMutual.com

Steve Nelson
Markel Surety
5601 Granite Parkway, Suite 600
Plano, TX 75024
(512) 330-1850
Steve.Nelson@Markel.com

Jack Nicholson
Nicholson Consulting
PO Box 705
Bremen, GA 30110
(770) 331-0282
jack@npcius.com

Vernon Nielsen
Sage Associates, Inc
2151 Michelson Drive, Suite 240
Irvine, CA 92612
(564) 444-0230
vnielsen@sage-associates.com

Mark Oertel
Lewis Brisbois
633 W 5th St, Suite 4000
Los Angeles, CA 90071
(213) 580-7952
mark.oertel@lewisbrisbois.com

Jeff Olson
Liberty Mutual
1001 4th Ave, Suite 3800
Seattle, WA 98154
(206) 473-5929
jeff.olson@libertymutual.com

Scott Olson
Nicholson
901 S. Mopac Expressway, Building 1, Suite 300
Austin, TX 78746
(512) 913-9903
scott.olson@npcius.com

Amy Pascalide
Markel Surety / SureTec Insurance Company
5555 Garden Grove Blvd *275
Westminster, CA 92683
(818) 227-8174
amy.pascalide@markel.com

Alan Pavlic
YA Group
20475 Brook Park Dr
Brookfield, WI 53045
(262) 525-1128
alan.pavlic@yagroup.com

Greg Perez
JS Held
1375 Dove Street 2nd Floor, Suite 250
Newport Beach, CA 92660
(949) 512-5599
greg.perez@jsheld.com

Jaime Perkins
Merchants Bonding Company
PO Box 14498
Des Moines, IA 50306
(346) 802-9811
jperkins@merchantsbonding.com

Mike Pipkin
Weinstein Radcliff Pipkin LLP
8350 North Central Expressway, Suite 1550
Dallas, TX 75206
(214) 865-7012
mpipkin@weinrad.com

Michael Prisco
Rivkin Radler LLP
477 Madison Avenue, Suite 410
New York, NY 10022
(516) 987-8533
prisco077@gmail.com

Brian Rice
RiskScape Strategies, LLC
5415 N Sheridan Rd #5403
Chicago, IL 60640
(917) 561-0171
brice@riskscapellc.com

Teresa Rickert
Old Republic Surety Company
18500 W. Corporate Dr. #170
Brookfield, WI 53045
(262) 797-2646
trickert@orsurety.com

Ken Rockenbach
Liberty Mutual
P.O. Box 34526
Seattle, WA 98124
(972) 689-7467
kenneth.rockenbach@libertymutual.com

Brittany Rose
Travelers
33650 6th Ave S, Suite 200
Federal Way, WA 98003
(253) 943-5802
barose@travelers.com

Larry Rothstein
LARLAW, A Professional Law Corporation
2625 Townsgate Road, Suite 330
Westlake Village, CA 91361-5749
(818) 317-1662
lar@larlaw.net

Edward Rubacha
Jennings Haug Keleher McLeod Waterfall
2800 N. Central Ave., Suite 1800
Phoenix, AZ 85004
(480) 205-1600
er@jkwlawyers.com

Michael Saba
YA Group
1601 Baldwin Mill Road
Jarrettsville, MD 21084
(443) 617-0814
michael.saba@yagroup.com

Ali Salamirad
SMTD Law LLP
17901 Von Karman Avenue, Suite 500
Irvine, CA 92614
(949) 202-7772
as@smtdlaw.com

Sarai Salgado
Travelers
33650 6th Ave S, Suite 200
Federal Way, WA 98003
(253) 943-5813
ssalgado@travelers.com

Ashley Saltzgaber
Liberty Mutual
P.O. Box 34526
Seattle, WA 98105
(206) 688-0430
Ashley.Saltzgaber@LibertyMutual.com

Katia Sarfati
Humphrey, Berger and Associates
21300 Victory Blvd-Suite 520
Woodland Hills, CA 91367
(424) 375-1576
katias@hbalaw.com

James Savio
The Hartford
601 Union St, Suite 920
Seattle, WA 98101
(206) 334-0473
james.savio@thehartford.com

Alexander Savojni
Friedrich & Dishaw PLLC
92 Lenora Street #119
Seattle, WA 98121
(206) 360-7655
alexs@fdlawpllc.com

Eugene Sawyer
Liberty Mutual
7900 Windrose Ave
Plano, TX 75024
(469) 278-2230
Gene.Sawyer@LibertyMutual.Com

Tiffany Schaak
Liberty Mutual
1001 4th Ave, Suite 3800
Poulsbo, WA 98154
(206) 473-6428
Tiffany.Schaak@LibertyMutual.com

Elliot Scharfenberg
Krebs Farley, PLLC
400 Poydras Street, Suite 2500
New Orleans, LA 70130
(504) 299-3570
escharfenberg@krebsfarley.com

Rob Senecal II
YA Group
781 Cadence View Way
Henderson, NV 89011
(860) 209-0886
Rsenecal@YAgroup.com

Suzanna Shaub
Travelers
33650 6th Ave. S., Suite 200
Federal Way, WA 98003
(253) 943-5770
sshaub@travelers.com

Rob Smiley
Sage Associates
2151 Michelson Drive, Suite 240
Irvine, CA 92612
(208) 579-0220
rsmiley@sage-associates.com

Steve Sokol
YA Group
2350 W 205th St
Torrance, CA 90501
(310) 755-8500
steve.sokol@yagroup.com

Trevor Soper
The Vertex Companies, LLC
Innovation Office Park, 220 Progress, Ste 200
Irvine, CA 92618
(657) 767-0850
tsoper@vertexeng.com

Stuart Spivack
Stuart Lippman and Associates, Inc.
5447 E. Fifth St, Suite 110
Tucson, AZ 85711-2345
(520) 881-5900
stuart.spivack@stuartlippman.com

Corey Stewart
The Hartford
One Hartford Plaza T-14
Hartford, CT 06155
(832) 416-0727
corey.stewart@thehartford.com

Jason Stonefeld
Liberty Mutual Surety Claims
6824 19th St. W, Ste. A-322
University Place, WA 98466
(469) 995-9268
jason.stonefeld@libertymutual.com

Brian Streicher
Ernstrom & Dreste LLP
525 Clinton Square
Rochester, NY 14604
(585) 734-8943
bstreicher@ed-llp.com

Michael Sugar III
Forcon International
1413 Tech Blvd, Ste 212
Tampa, FL 33619
(813) 684-7686
michael.sugar@forcon.com

Laurie Svitenko
Liberty Mutual Surety
6106 Triple Crown Dr
Reno, NV 89511
(949) 316-1850
laurie.svitenko@libertymutual.com

Katrina Swallow
Liberty Mutual Surety
7900 Windrose Ave
Plano, TX 75024
(469) 997-6784
Katrina.Swallow@LibertyMutual.com

Rick Tasker
Sage Associates, Inc.
2151 Michelson, Ste 240
Irvine, CA 92612
(949) 724-9600
rtasker@sage-associates.com

Frances Thompson
The Hartford
601 Union Square 9th Floor
Seattle, WA 98101
(206) 292-7873
frances.thompson@thehartford.com

Mike Timpane
JAMS
Two Embarcadero Center, Suite 1500
San Francisco, CA 94111
(415) 378-7984
mtimpane@jamsadr.com

Rodney Tompkins
RJT Construction, Inc. Consulting Services
1 Park Plaza, Suite 600
Irvine, CA 92614
(949) 419-3840
rodneyjr@rjtconstruction.com

Patrick Toulouse
Travelers
33650 - 6th Avenue South, Suite 200
Federal Way, WA 98003
(253) 943-5826
ptoulous@travelers.com

Mark Vaughn
Law Office of Mark A. Vaughn
68 Mitchell Blvd, Suite 135
San Rafael, CA 94903
(415) 457-3773 x224
mark@mavlawoffice.com

Paul Versage
Sage Associates
6423 East Rockaway Hills Drive
Cave Creek, AZ 85331
(602) 904-0040
pversage@sage-associates.com

Michael Vieregg
Insurors Indemnity
823 Washington Ave., Ste. 200
Waco, TX 76701
(254) 715-3541
mvieregg@insurorsindemnity.com

Josh Villarreal
Clark Hill
2600 Dallas Parkway, Suite 600
Frisco, TX 75034
(210) 857-0604
jvillarreal@clarkhill.com

Collin Vincent
Travelers
33650 6th Ave S, Ste 200
Federal Way, WA 98003-6754
(253) 943-5778
ccvincen@travelers.com

Patricia Wager
Torre, Lentz, Gamell, Gary & Rittmaster, LLP
100 Jericho Quadrangle
Jericho, NY 11753
(516) 361-3385
pwager@tlggr.com

Shannon Walls
Liberty Mutual
974 South Penn Dr
West Chester, PA 19380
(484) 459-1901
shannon.walls@libertymutual.com

Christopher Ward
Clark Hill
2600 Dallas Parkway, Suite 600
Frisco, TX 75034
(469) 371-6245
cward@clarkhill.com

Michelle Wargo
Liberty Mutual Insurance Company
2815 Forbs Ave, Ste 107
Hoffman Estates, IL 60192
(224) 234-3573
michelle.wargo@libertymutual.com

Greg Weinstein
Weinstein Radliff Pipkin LLP
8350 North Central Expressway, Suite 1550
Dallas, TX 75206
(214) 405-7472
gweinstein@weinrad.com

Kathleen Weldon
Markel/SureTec Insurance Company
P.O. Box 5008
Woodland Hills, CA 91365
(818) 648-5930
kathleen.weldon@markel.com

Patrick Weller
JS Held
1375 Dove Street, Suite 250
Newport Beach, CA 92660
(760) 802-4436
pweller@jsheld.com

Blake Wilcox
Liberty Mutual
1001 4th Avenue, Suite 3800
Seattle, WA 98154
(425) 922-6268
Blake.Wilcox@LibertyMutual.com

Amber Williams
Palomar Casualty and Surety
1625 West Causeway Approach
Mandeville, LA 70471
(504) 754-6670
awilliams@plmr.com

Scott Williams
Manier & Herod
1201 Demonbreun Street, Suite 900
Nashville, TN 37203
(615) 742-9370
swilliams@manierherod.com

Monica Xiao
Beacon Consulting Group
407R Mystic Ave., Suite 32C
Medford, MA 02141
(929) 444-1943
mxiao@beacon.ws

John Yeung
Beacon Consulting Group, Inc
18 West 33rd street, Floor 6
New York, NY 10001
(917) 620-9686
jyeung@beacon.ws

Angela Zanin
Lewis Brisbois, LLP
633 W. 5th Street, Suite 4000
Los Angeles, CA 90071
(213) 358-6164
angela.zanin@lewisbrisbois.com

Kimberly Zanotta
Travelers Bond & Specialty Insurance
10 North Park Drive, Suite 300
Cockeysville, MD 21030
(443) 353-2121
kzanotta@travelers.com

Gene Zipperle
Ward Hocker Thornton Brown PLLC
9300 Shelbyville Road, Suite 700
Louisville, KY 40243
(502) 753-3778
gzipperle@whtblaw.com

Pearlman 2026 Papers

BLOWING THE WHISTLE:

THE SURETY'S DEFENSE OF OVERPAYMENT & MATERIAL ALTERATION

Emory G. Allen
Clark Hill, PLC
2600 N Dallas Pkwy, Suite 600
Frisco, Texas 75034
(469) 287-3902

Michael Cronin
Markel Surety
9500 Arboretum Bld., Suite 400
Austin, Texas 78759
(512) 684-3449

Rudy Dominguez
Liberty Mutual Surety
7900 Windrose Ave.
Plano, Texas 75024
(469) 242-7176

Mason Fleming, PMP
Nicholson Professional Consulting, Inc.
901 S Mopac Expwy, Bldg 1, Ste 300
Austin, Texas 78746
(785) 418-7509

2026 Pearlman Association Conference
September 10-11, 2026

Sparkman Cellars Winery
Woodinville, WA

I. Introduction

A surety faced with a performance bond claim may have multiple defenses to consider, both its principal's defenses and its own standalone, surety-specific defenses. One of the surety's most powerful, yet often misunderstood, defenses is the defense of overpayment, a form of material alteration. It is often misunderstood because there are essentially two types of "material alteration," each with a different consequence. The first type, and the one most attorneys think of, is the material alteration of a bonded contract term or provision, also referred to as a cardinal change; it entitles the surety to a complete discharge of its obligations. The second, more nuanced type is the obligee's failure to comply with and enforce its own bonded contract with the principal, which materially alters the surety's bonded risk and impairs the surety's collateral. The most common form of this second type of "material alteration" is the "overpayment," and it typically discharges the surety only *pro tanto*, to the extent of the resulting prejudice. This paper seeks to provide the reader with a better understanding of the latter type of "material alteration": the impairment of the surety's rights, or prejudice to the surety, caused by the obligee's failure to comply with and enforce its own bonded contract. When a surety sees this type of history on a project connected to a bond claim it is investigating, it needs to "blow the whistle," because this impairment is a penalty from which the obligee often cannot recover.

II. Material Alteration

The defense of material alteration is generally a discharge of the surety's liability where the obligee materially alters the bonded contract or the surety's bonded risk thereunder without the surety's consent, to the surety's prejudice.[1] The obligee's compliance with provisions as to payment and other obligations under the bonded contract and project documents are conditions precedent to the surety's obligations, and courts have long held that an obligee's failure to comply with and enforce the terms of its own bonded contract discharges the surety because it materially alters the surety's bonded risk.[2] A surety is bound by the precise terms of the contract whose performance has been bonded: "[a] contract of suretyship will be strictly construed so as to impose on the surety only such

[1] 72 C.J.S. *Principal and Surety* § 33 (2023); *Old Colony Ins. v. City of Quitman*, 352 S.W.2d 452 (Tex. 1961); *United States Fid. & Guar. Co. v. Borden Metal Prods. Co.*, 539 S.W.2d 170, 174 (Tex. Civ. App. – Beaumont 1976, writ ref'd n.r.e); *see also Futerfas Family Partners v. Griffin*, 374 S.W.3d 473, 478 (Tex. App.—Dallas 2012, no pet.) ("A guarantor is discharged by a material alteration of the underlying contract that lacks the consent of the guarantor and harms the guarantor."); *Gulf Liquids New River Project, LLC v. Gulsby Eng'g, Inc*., 356 S.W.3d 54, 80 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (noting "that if there is an alteration of a bonded contract that imposes materially different risks, the surety may be entitled to a discharge of its obligations under the bonds"); *Sheet Metal Workers' Loc. Union No. 100 Wash. D.C. Area Pension Fund v. W. Sur. Co.,* 187 F.Supp.3d 569, 582 (D. Md. 2016); *U.S. Fid. and Gaur. Co. v. Braspetro Oil Servs. Co.,* 369 F3d 34, 61 (2nd Cir. 2004).

[2] *Id.*

burdens or obligations as clearly come within the terms of the contract . . . ."[3] A material alteration to the amount or nature of the bonded contract, a cardinal change, will completely discharge the surety from its bonded obligations. Where, by contrast, the alteration takes the form of the obligee's impairment of the surety's collateral, such as an overpayment, the surety is typically discharged only *pro tanto*, to the extent of the resulting prejudice.[4]

A surety is entitled to judgment on a defense of material alteration if it demonstrates: (1) the existence of a material alteration to the underlying contract; (2) lack of consent to the alteration; and (3) harm resulting from the alteration.[5] A material alteration is one that either injures the surety or guarantor or increases the risk of injury to the surety or guarantor.[6] However, a material alteration "need not be accomplished by changes in the language of the instrument but may be by material departures from its terms in its execution and enforcement."[7] A surety seeking a discharge of its obligations as a result of material alteration bears the burden of demonstrating that the material alteration was made without its consent and, as a result, it was prejudiced.[8] Moreover, whether an alteration is material is a question of law.[9]

III. Overpayment

One of the most common forms of material alteration a performance bond surety may encounter is overpayment. This, ultimately, is an impairment of collateral. Generally, the contract balance of a bonded project functions as collateral security for the benefit of both the obligee and the surety. The principal is typically entitled to receive payment from that balance only to the extent it properly performs the work and delivers it free of defects. If the obligee makes premature payments to the principal for work that is either unperformed or defective, the surety may be entitled to a *pro tanto* discharge to the extent of those improper payments. That is typically a partial discharge, measured by the amount improperly paid, rather than the complete discharge that follows a cardinal change.

Many bonded contracts, particularly AIA form contracts, have a multitude of express requirements prior to payment to a principal. It is common for an obligee to ignore

[3] *Bill Curphy Co. v. Elliott*, 207 F.2d 103, 108 (5th Cir. 1953) (quoting *Standard Accident Ins. v. Knox*, 184 S.W.2d 612, 615 (Tex. 1944)); *see also Old Colony* 352 S.W.2d at 455; *City of Shreveport v. U.S. Fid. & Guar. Co.,* 60 So. 621, 622 (La. 1913); *PC Riverview, LLC v. Xiao-Yan Cao,* 424 P.3d 162, 168 (Utah 2017).
[4] *E.g., Borden Metal Prods. Co.,* 539 S.W.2d at 174; *Futerfas Family Partners v. Griffin*, 374 S.W.3d 473, 478 (Tex. App.—Dallas 2012, no pet.); *Allied Materials & Equip. Co., Inc. v. United States,* 469 F.2d 562, 564 (Ct. Cl. 1978).
[5] *Futerfas Family Partners*, 374 S.W.3d at 478; *see also Old Colony* 352 S.W.2d at 455; *Austin Hardwoods, Inc. v. Vanden Berghe*, 917 S.W.2d 320, 325 (Tex. App.—El Paso 1995, writ denied).
[6] *FDIC v. Attayi*, 745 S.W.2d 939, 944 (Tex. App.—Houston [1st Dist.] 1988, no writ).
[7] *St. Petersburg Bank & Tr. Co. v. Boutin*, 445 F.2d 1028, 1031 (5th Cir. 1971).
[8] *Frost Nat'l Bank v. Burge*, 29 S.W.3d 50, 588 (Tex. App.—Houston [14th Dist.] 2000, no pet.).
[9] *Id.*

these requirements. *If* proper inspections of work were being performed and materials were confirmed onsite prior to payment, the risk of a reduced contract balance or incorporated defects and deficiencies in a project would be greatly reduced. The performance bond surety would have been entitled to those funds to complete the bonded project or perform the work *had* the obligee properly complied with and enforced its bonded contract. Further, perhaps, had the obligee been complying with and enforcing its bonded contract, defective work would not be covered by more defective work. In short, you cannot put the toothpaste back into the tube.

To analyze this further, contracts often require that progress payments are to be made upon certification from the contractor or architect that the contractor has satisfactorily performed the work. They also often require that 10% retainage be withheld until the project is completed. Overpayment often results from the obligee's failure to follow the payment procedures outlined in the bonded contract. For example:

1) Did the obligee require proof of payment to lower-tier subcontractors prior to payment?

2) Did the obligee require payment certification be submitted/obtained from the architect prior to issuing payment?

3) Did the obligee ensure the schedule was being complied with prior to issuing payment?

4) Did the obligee ensure all inspections were cleared of work in place prior to issuing payment?

5) Did the obligee require all quality-control requirements be complied with prior to issuing payment?

6) Did the obligee require all materials be delivered to the project site prior to issuing payment?

7) Did the obligee ensure all lien-releases from lower-tier subcontractors and suppliers were submitted prior to issuing payment?

Consistent with other "material alteration" defenses, an overpayment defense is generally required to be "material." Minor payment discrepancies are unlikely to afford the surety a viable defense. In addition, the surety must typically demonstrate actual prejudice, loss, or injury resulting from the overpayment, though such prejudice is often presumed where the overpayment contravenes the express terms of the contract. However, if the obligee can demonstrate that the prematurely released funds were (a) used to procure labor and materials necessary to complete the project, (b) applied to ensure the project remained free of mechanics' liens, or (c) paid to the principal to maintain its continued performance

on the project, a court may conclude that the surety suffered no resulting prejudice from the overpayment.[10] Even so, the surety may contend, for instance, that despite the funds being used toward contract performance, the overpayments nonetheless reduced the principal's financial incentive to complete the work, thereby causing prejudice to the surety.

IV. The Bond Form and Project Context Matter

The strength, and even the availability, of the overpayment and material-alteration defenses can turn on the form of the bond and the nature of the project. Common-law bonds, not required by statute, are governed by their own terms and the incorporated construction contract, and the surety's traditional defenses apply with full force; statutory bonds, such as those furnished under the federal Miller Act or a state "Little Miller Act," are generally read to incorporate the governing statute, so that where the bond affords less protection than the statute requires, the statute controls and the surety's common-law defenses may be correspondingly constrained. The public or private character of the obligee matters as well, because payment, inspection, and retainage obligations on public work are often dictated by statute or regulation, and a public owner's departure from those mandated procedures can supply the same impairment-of-collateral defense available on private work. The specific bond form is equally important: on private projects, the ubiquitous AIA Document A312 Performance Bond reinforces the overpayment defense by defining the "Balance of the Contract Price" the owner must tender to the surety as the amount payable to the contractor "reduced by all valid and proper payments." Premature payments, or payments for unperformed or defective work, therefore arguably do not reduce the balance owed to the surety, thereby embedding the very principle of the overpayment defense within the four corners of the bond. Counsel should nonetheless read each bond carefully for waiver-of-defenses or "in lieu of" language, as obligees will often highlight these provisions when arguing against these defenses.

V. Conclusion

The overpayment defense is among the most valuable tools available to a performance bond surety. Though only one form of material alteration, it is among the most common and most consequential: where a true cardinal change discharges the surety entirely, an obligee's improper payments discharge it *pro tanto* (at a minimum), to the extent the surety's collateral has been impaired. Either way, the obligee's own failure to

[10] *Fireman's Fund Ins. Co. v. United States*, 15 Cl. Ct. 225, 231 (1988), *rev'd on other grounds*, 909 F.2d 495 (Fed. Cir. 1990); *Transamerica Ins. Co. v. City of Kennewick*, 785 F2d 660, 661-62 (9th Cir. 1986); *United Bonding Ins. Co. v. W. S. Newell, Inc.*, 232 So. 2d 616, 625 (Ala. 1969); *Gibbs v. Hartford Acc. & Indem. Co.*, 62 So. 2d 599, 602 (Fla. 1952); *Manhattan Co. v. U.S. Fid. & Guar. Co.*, 137 P. 1003, 1005-06 (Wash. 1914); *Ramada Dev. Co. v. U.S. Fid. & Guar. Co.*, 626 F.2d 517 (6th Cir. 1980).

honor the payment safeguards it bargained for can relieve the surety of a liability it never agreed to assume.

The practical lesson is straightforward. When investigating a performance bond claim, the surety should scrutinize the obligee's payment conduct as closely as the principal's performance; the answers to a handful of questions about certifications, inspections, retainage, and lien waivers will often reveal a defense hiding in plain sight. These mostly remain common-law defenses, however, and their contours, particularly the required showing of prejudice and the measure of discharge, vary meaningfully from one jurisdiction to the next. The surety that masters both the doctrine and the governing local law will recognize a defective payment history when it sees one, and when it blows the whistle, it will know whether the obligee's conduct draws a red card, discharging the surety entirely, or merely a foul, discharging it *pro tanto*.

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

Pearlman Conference Panel
The Beautiful Game of Surety: How Collaboration Across Roles and Between Companies Builds Resilient Outcomes

Panelists:
Jason R. Fair, Robins Kaplan LLP
Matt Drake, Chief Legal Officer, Bristol Bay Construction Holdings LLC
Patrick Weller, J.S. Held
Guy Armfield, IMA Group

I. Overview

Federal construction projects are often won or lost not simply on the quality of the work, but on the quality of the team's communication, documentation, and decision-making. That is especially true when a bonded federal project begins to experience delay, disputed changes, subcontractor pressure, cash-flow stress, or performance concerns. In those circumstances, the contractor, outside counsel, claims consultant, broker, surety consultant, and surety all need to understand their respective roles and the role of the most important government-side participant: the Contracting Officer.

This paper supports a discussion-style panel using a running federal construction hypothetical. The format follows the same practical structure used in the attached prior presentation outline: begin with a project problem, evaluate early actions, introduce a "twist," transition toward formal dispute risk, and close with open questions about risk allocation and project-positioning.

The hypothetical is a bonded federal renovation project at an active government facility. The contractor faces phased access restrictions, late direction from government representatives, disputed changes, a critical-path subcontractor delay, lower-tier payment pressure, and eventually a cure or show cause notice. The contractor believes the government caused or contributed to the delay. The government contends the contractor has failed to make adequate progress. The surety wants to know whether this is ordinary project friction, a developing claim, or a potential default.

The theme of the presentation is that resilient surety outcomes are collaborative outcomes. The prime contractor must manage the project and the government relationship. Outside counsel must preserve rights without escalating unnecessarily. The claims consultant must help prove entitlement, causation, schedule impact, and damages. The broker and surety consultant must help the project team communicate risk accurately before it becomes a bond crisis. The surety needs timely, credible information. And throughout the project, the Contracting Officer must be handled as both a relationship and a decision-maker.

II. The Contracting Officer as the Central Match Official

In federal contracting, not every government representative has authority to change the contract, bind the government, or decide claims. The Contracting Officer is the central official. FAR 1.602-1 provides that Contracting Officers have authority to enter into, administer, or terminate contracts and make related determinations and findings, but they may bind the government only within the limits of their delegated authority.[1] FAR 1.602-2 also identifies important responsibilities of the Contracting Officer, including ensuring effective contracting, safeguarding the interests of the United States, and ensuring that contractors receive impartial, fair, and equitable treatment.[2]

That authority structure matters because federal projects often involve multiple government voices: the Contracting Officer, Contracting Officer's Representative, project manager, inspector, end user, security personnel, designer, and facilities staff. The daily direction may come from someone other than the Contracting Officer, but the contract is not modified simply because someone in the field wants the work performed differently. FAR 43.102 provides that only Contracting Officers acting within the scope of their authority may execute contract modifications on behalf of the government, and it cautions that other government personnel should not act in a way that causes the contractor to believe they can bind the government or direct work that should be the subject of a contract modification. [3]

The practical rule is simple: respect the field team, but confirm authority. If a COR or project representative directs resequencing, weekend work, acceleration, changed access, or additional work, the contractor should promptly confirm the direction in writing to the Contracting Officer. The communication should identify who gave the direction, when it was given, what work is affected, why the contractor believes cost or time may be impacted, and whether the contractor regards the direction as a change. The tone should remain professional and solution-oriented. The goal is not to antagonize the Contracting Officer; the goal is to make the record clear while keeping the project moving.

III. Preserving Change and Delay Rights Without Losing the Relationship

Federal construction disputes often begin informally. A government representative tells the contractor to "keep moving," "work around it," "add manpower," or "we will sort it out later." Those statements may be commercially understandable, but they are dangerous if the contractor performs changed work without notice, cost tracking, or schedule analysis.

For construction contracts using FAR 52.243-4, the Changes clause addresses changes in drawings, designs, specifications, method or manner of performance, government-furnished property or services, and directed acceleration.[4] The clause also addresses

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[1] FAR 1.602-1(a) (2026).
[2] FAR 1.602-2 (2026).
[3] FAR 43.102(a)(1)-(3) (2026).
[4] FAR 52.243-4(a)(1)-(4) (2026).

written or oral direction from the Contracting Officer that causes a change, provided the contractor gives written notice identifying the date, circumstances, and source of the order and states that the contractor regards the order as a change. [5]If a covered change increases or decreases cost or time, the Contracting Officer is to make an equitable adjustment and modify the contract in writing. [6]

The contractor's project team should therefore treat change management as a legal, factual, and business function. The business team must know what happened. The claims consultant must know whether the event affected the critical path, productivity, sequencing, or cost. Counsel must know whether notice has been given and whether rights have been preserved. The broker and surety consultant must know whether the event is likely to create payment stress, subcontractor claims, or potential performance risk.

Good Contracting Officer communications should be factual, contemporaneous, and useful. A poor communication says: "The government is delaying us and we reserve all rights." A better communication says: "The direction issued during the March 12 coordination meeting changes the planned access sequence for Areas B and C. Based on the current schedule update, the affected work includes activities 3200, 3210, and 3400. We will continue to mitigate impacts, but we request written confirmation of the direction and reserve our right to seek additional time and costs resulting from this change." The second version gives the Contracting Officer a record to evaluate and gives the contractor a better platform for an REA or claim.

IV. Building the Record: The Best Defense Is Created During Performance

The most important claim documents are usually created before anyone calls them claim documents. Daily reports, meeting minutes, RFIs, submittals, correspondence, schedule updates, manpower records, photographs, inspection reports, cost codes, subcontractor notices, payment records, and look-ahead schedules all become part of the record.

The panel should emphasize four early actions. First, evaluate the allegation early. Is the problem caused by government access restrictions, changed work, defective or ambiguous specifications, subcontractor underperformance, procurement delays, weather, coordination issues, or concurrent causes? Second, identify downstream risk. If a subcontractor may be responsible, the prime must preserve rights while avoiding positions that undermine the prime's claim against the government. Third, document disagreement. Silence can be misread as agreement. Fourth, build the record affirmatively by tracking costs, isolating impacts, and tying schedule events to the critical path.

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[5] FAR 52.243-4(b)(1)-(2) (2026).
[6] FAR 52.243-4(d) (2026).

The claims consultant's role is critical. A contractor may know it was delayed, but the claim must show how the event affected the planned sequence, why the impacted work mattered, what mitigation was attempted, and what time or cost was actually caused by the event. The surety-side participants also need this information. The surety does not need surprise; it needs a credible picture of project status, remaining work, subcontractor pressure, cash flow, claim value, and management's recovery plan.

V. REAs, Certified Claims, and Contracting Officer Decisions

A request for equitable adjustment is often the preferred first step when the contractor wants to preserve a business relationship and give the Contracting Officer a path to resolution. A strong REA should tell a clear story: what happened, why it was outside the contractor's existing obligation, how it affected time or cost, what the contractor did to mitigate, and what adjustment is requested. It should be supported by schedules, cost records, contract language, correspondence, and witness-level project facts.

If the matter cannot be resolved through project administration or an REA, the contractor may need to submit a claim under the Disputes clause and the Contract Disputes Act framework. FAR 52.233-1 provides that a contractor claim must be in writing and generally submitted to the Contracting Officer within six years after accrual. Claims exceeding $100,000 require certification.[7] The Contracting Officer must issue a decision in 60 days or, for larger certified claims, provide a date by which the decision will be issued. [8]The clause also provides that the contractor must proceed diligently with performance pending final resolution of the dispute.[9]

The Contracting Officer's decision is a gateway event. If the contractor disagrees with the decision, it may appeal to an agency board within 90 days of receiving the decision or bring an action in the United States Court of Federal Claims within 12 months.[10] FAR 33.211 describes the appeal-rights language included in Contracting Officer final decisions, including the 90-day board appeal period and the 12-month Court of Federal Claims period. [11]

VI. Payment Pressure, Bonds, and Surety Communication

Federal construction projects bring surety issues to the front of the risk analysis. For construction contracts exceeding $150,000, FAR 28.102-1 identifies the requirement for performance and payment bonds, subject to limited exceptions.[12] FAR 52.228-15 generally requires performance and payment bonds in the amount of 100 percent of the

[7] FAR 52.233-1(c)-(d)(1) (2026).
[8] FAR 52.233-1(e) (2026).
[9] FAR 52.233-1(i) (2026).
[10] FAR 33.211(a)(4)(V) (2026).
[11] *Id*.
[12] FAR 28.102-1(a)(1)-(2) (2026).

original contract price and allows the government to require additional bond protection if the contract price increases. [13]

When a federal project encounters payment pressure, the contractor should not treat the surety as an outsider. The surety needs reliable information before the situation turns into a performance bond demand, payment bond claim surge, or default scenario. Useful information includes current schedule status, unpaid change work, pending REAs or claims, subcontractor exposure, lower-tier notices, project cash flow, manpower plans, recovery schedules, government correspondence, and the contractor's strategy for resolution.

At the same time, communications with the surety should be coordinated. Counsel should help protect privileged analyses and avoid inconsistent narratives. The message to the Contracting Officer, subcontractors, broker, surety, and consultants should be aligned: the contractor is performing, preserving rights, mitigating impacts, evaluating responsibility, and pursuing a documented path to completion and recovery.

VII. Cure Notices, Show Cause Notices, and Default Risk

The most serious point in the hypothetical occurs when the Contracting Officer issues a cure notice or show cause notice. At that moment, the project has moved from ordinary administration to default risk. FAR 49.402-3 addresses default procedures, including cure and show cause notices, and provides that when termination for default appears imminent, the Contracting Officer shall provide written notification to the surety. [14]

For fixed-price construction, FAR 52.249-10 permits the government, by written notice, to terminate the contractor's right to proceed if the contractor fails to prosecute the work with the diligence necessary to complete on time or fails to complete within the required time.[15] The clause also addresses surety liability and recognizes that the contractor's right to proceed should not be terminated, and damages should not be charged, when the delay arises from specified unforeseeable causes beyond the contractor's control and without its fault or negligence, including certain acts of the government. [16]

The response to a cure or show cause notice should be immediate, organized, and multidisciplinary. The contractor should gather the project team, outside counsel, schedule consultant, broker/surety consultant, and key subcontractors. The response should include a factual chronology, current schedule analysis, causes of delay, mitigation steps, manpower and procurement plan, recovery schedule, outstanding government decisions, pending changes, and reservation of rights. The tone should be firm but professional. The objective is to show the Contracting Officer that the

[13] FAR 52.228-15(b)(1)-(3) (2026).
[14] FAR 49.402-3(e)(2) (2026).
[15] FAR 52.249-10(a) (2026).
[16] FAR 52.249-10(b)(1) (2026).

contractor is in control, that termination would be premature or improper, and that there is a practical path to completion.

VIII. Conclusion: Winning the Match Before the Red Card

The "beautiful game" of surety is not won by one player. Federal construction risk is managed through coordinated action among the contractor, Contracting Officer, counsel, consultants, broker, surety consultant, subcontractors, and surety. The best outcomes usually occur before the red card moment—before default termination, before a bond claim crisis, and before the project record becomes fixed against the contractor.

The practical lessons are straightforward. Know who has authority. Confirm field direction with the Contracting Officer. Preserve rights without destroying relationships. Build the record during performance. Use consultants early enough to shape the facts, not merely reconstruct them. Communicate with the surety before panic sets in. And when a dispute becomes unavoidable, make the Contracting Officer's job easier by presenting a clear, credible, well-supported record.

In federal contracting, handling the Contracting Officer is not a side issue. It is central to claim preservation, project recovery, surety confidence, and resilient outcomes.

THE IMPACT OF A PRINCIPAL'S FINANCIALS ON A SURETY'S CLAIMS RESOLUTION STRATEGIES

Pearlman Conference - 2026

CATHERINE BREIDENBACH & PATRICIA WAGER - TLGGR Jericho, New York

THE IMPACT OF A PRINCIPAL'S FINANCIALS ON A SURETY'S CLAIMS RESOLUTION STRATEGIES.

Suretyship is, at its essence, a credit relationship. A surety bond is executed by a surety in the expectation that any loss the surety suffers as a result of issuing bonds on the principal's behalf will ultimately be reimbursed by the principal or its indemnitors. It is the surety's role to respond as a secondary obligor to a particular set of potential liabilities of the principal as outlined in the bond – liability that the principal may have but be unable or unwilling to satisfy – and then to recover that loss from the principal, if incurred. It is not, however, the surety's expectation that it will ultimately suffer a financial loss, nor the intention of the relationship that the surety should ultimately be financially exposed. Examination of and familiarity with the principal's financial profiles permits the surety to assess its risk, evaluate the merits of a dispute or claim, and make effective business decisions throughout the suretyship relationship, with the ultimate goal of minimizing or eliminating loss.

The surety's ability to (i) determine whether to issue a bond, (ii) effectively and efficiently assess and resolve any claims on the bond, and then (iii) recover any loss sustained as a result of issuing bonds, relies heavily on data and information provided by the surety's principal, and is frequently dependent upon, or at minimum enriched by, timely, accurate, and complete access to the principal's financial records at various points in a surety relationship. Indeed, from underwriting through the claims process and any potential demand for indemnity, the principal's financials are strategically valuable and necessary to the surety, informing and influencing how it may choose to proceed at various assessment and decision points.

When a Surety's principal goes into claim, whether the claim is made on a performance bond, a payment bond, a benefits bond, or other bond instrument, a part of the Surety's evaluation of the principal and the claim includes an assessment of what we have traditionally called the principal's "Three C's" – Cash, Character and Capacity. Cash: Can the principal afford to proceed? Character: Does he possess the character to be the surety's business partner in performing? Capacity: Does a principal have the technical, financial, equipment and staffing necessary to give them the ability to proceed? In evaluating each of these "C" elements, reaching the best result in response to a claim can be influenced and impacted by what is found in the principal's financial reports, statements, and audits, along with project financial data that the surety may obtain from others. The surety's ability to access and utilize a principal's financial information is, therefore, critical to

the success of the relationship as designed and a critical element in the surety's ability to secure itself against loss.

Every aspect of the process of obtaining, reviewing and vetting a principal's financials informs a claims team's decisions. Is it easy to obtain requested information, or does it entail a fight? Is the information complete or edited? Is it current and reliable? Are project funds properly applied? Are wages and benefits current? Has money left to the detriment of the company's financial stability? Does this principal understand its own financials? Do they know why they might currently be cash poor, including how they lost or moved dollars, or has it spun out of control? Do they know the scope of the problem, and are they truthful about it? Is the current crisis a short term problem, or a permanent loss? Did a principal's project management talent or financial management talent leave the company or die or become incapacitated, such that the principal's capacity is diminished? In other words, the surety's best strategy for resolving virtually all claims issues as effectively and efficiently as possible is identified and executed when the surety claims handler and her outside claims professionals have complete and candid access to a broad range of the principal's financial records.

This paper will first address the General Agreement of Indemnity as the source of the surety's rights to the financial and other business information of its principal. It will then discuss different ways the surety's access to its principals current and accurate financial information assists the surety in making wise and efficient business decisions in resolving claims.

THE SURETY'S RIGHT TO FINANCIAL INFORMATION

At the underwriting stage, obtaining a principal's financial records is relatively uncontroversial – the potential bond principal is seeking a business partner in its would-be surety, and aware that the process of obtaining bonds is an assessment of whether a principal should be extended bond credit. The surety and its potential principal are cooperatively exchanging information on how the credit relationship might work, the grounds for establishing credit worthiness, and the terms on which a bonding line might be extended.

However, should there be bond claims later on, there is frequently less willingness to share data, often in an effort to protect or veil a potential financial weakness, or in the belief that financial stress can be righted before a reveal is necessary or discovered, thus preserving bonding capacity and avoiding surety oversight. A principal might find itself in financial stress because of a difficult project or owner, a financial claim or payment dispute, a cash crunch or cash flow issue, or a margin fade or backlog issues. As the problem persists, red flags may begin to alert a surety to

potential financial strain – payment disputes become more frequent, claims on bonds remain unresolved a little longer, or a union reaches out for information. Perhaps a payment bond lawsuit is filed to which a principal lacks meaningful defenses, but it is not financially able to make a payment to resolve it. Or maybe a union walks off a job on a Friday afternoon announcing their intention not to return on Monday. It is also possible that the principal may be terminated from a project because of alleged poor progress or lack of manpower. When these types of events occur, the surety, seeking knowledge and clarity on the status and causes of a crisis, might request that its principal provide certain updated financial records and schedules. However, a principal in this situation may be reluctant to provide what is being requested.

In such circumstances, and in many others, where a negotiated compliance cannot be achieved, the surety may need to compel a principal to share its financial information to more accurately assess the surety's evolving risk. The surety's rights to access the principal's financial data arise from its contractual rights in the General Agreement of Indemnity ("GIA") executed before the bond is issued, frequently coupled with the right to specific performance.

- **Surety's Contractual Right to Access Financial Books and Records**

The surety's primary tool for obtaining a reluctant principal's financial information is the GIA which commonly includes a clause granting surety access to financial records upon demand and to examine and copy the principal's books, records, accounts, contracts, and financial statements. Often titled the "Books and Records" provision in the GIA, it is an indispensable tool for the surety. Rather than being a passive guarantor, the surety is an informed participant with the means to independently evaluate its exposure. Because the right is contractual, the surety does not have to await formal discovery, or satisfy rules of civil procedure, or defend a principal's assertion of confidentiality. The parties have contracted for the surety to have the right to access. Additionally, the clause often extends to the records of affiliated entities and individual indemnitors and can even authorize the surety to obtain information directly from the principal's bank, bonding agent, accountant, and obligees. As such, the GIA's books and records provision is strategically important to the surety.

Furthermore, the Books and Records provision is routinely enforced by the courts.[1]

[1] *See*, *e.g.*, *Int'l Fid. Ins. Co. v. Kerri A. Noyes Constr.*, 2018 U.S. Dist. LEXIS 65432, *51-52 (U.S.D.C, S.D. Fla. 2018) (entering summary judgment for surety on its claim for specific performance for access to indemnitors' books and records); *RLI Ins. Co. v. Nexus Servs. Inc.*, 2018 U.S. Dist. LEXIS 110609, 2018 WL 3244413, at *9 (W.D. Va. 2018) (granting surety's request for a preliminary injunction and enjoining indemnitor from restricting surety's access to its books and records); *Fed Ins. Co. v. Project Control Sys., Inc.*, No. 5:06-CV-11328, 2006 U.S. Dist. LEXIS 16463 (E.D. Mich. April 5, 2006) (enforcing books and records clause with injunctive relief).

For example, in *Zurich Am. Ins. Co. v. L.P.C.&D., Inc.*[2], the U.S.D.C., District of Puerto Rico, ruled in favor of the surety, noting that the surety's right to access books and records was "enshrined in the indemnity agreement."[3] There, indemnitors failed to grant reasonable access to their financials so surety brought suit to, in relevant part, enforce the books and records provision of the indemnity agreement. The Magistrate Judge in the matter presided over an evidentiary hearing and held that surety *would not* suffer irreparable harm if denied access because, *inter alia*, its loss was merely monetary, and surety could gain access through discovery. The District Judge, however, disagreed and, relying on decisions issued nation-wide, grante the surety its contractual access, reasoning that "the protections proffered by immediate access to books and records cannot be replaced by money damages in the future."[4]

WHAT FINANCIAL INFORMATION SHOULD A SURETY ASK FOR AND WHEN?

The principal's books and records can provide tremendous insight to the surety at a variety of places in the suretyship relationship. A principal's financial statements, WIP schedules, and cash flow projections provide larger corporate health and management pictures, while requisitions, change orders, evolving schedules and accounts payable and receivables, provide project specific insights and issues. Project records might further be used to support or challenge a termination or to make a claim for money or time, or it may demonstrate the impact of other subcontractors or trades on work progress. And the financial records relating to a specific claim for payment may be utilized to assess, pay or defend a claim for labor or materials, or to clarify a dispute over value, or to identify a bad actor.

Furthermore, financial records may, through tracing, help find missing project funds that have been diverted either to another project or outside the company, or they may aid in locating materials that have been diverted from or to a project or paid for using project funds. They may also be used to identify overbilling for labor or materials, or to identify costs not attributable to or appropriate for the listed contract work.

For those reasons, the documents that the surety may well pursue are inextricably dictated by how the bond claim or financial issue arose, and the angles and parties from which a surety faces potential loss.

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[2] *Zurich Am. Ins. Co. v. L.P.C.&D., Inc.*, 2026 U.S. Dist. LEXIS 22604, *21-23 (U.S.D.C. D.P.R., Feb. 2, 2026).
[3] *Id.* at *21.
[4] *Id.* at *21-22.

THE INFLUENCE OF FINANCIALS ON STRATEGY DECISIONS

- **Using Financial Information to Evaluate and Settle Claims**

When a claim is asserted against a bond, the surety must first determine whether, and to what extent, it is liable. The principal's financial records are a critical source of information with which a surety can make that determination.

Upon receipt of a payment bond claim, the surety must determine whether the claimant provided labor or materials to a project, and whether the principal has paid what is owed to its subcontractors, laborers, and suppliers. The principal's accounts-payable ledgers, canceled checks, lien waivers, joint-check records, and supplier statements allow the surety to confirm which claims are due, which have already been satisfied, and which, if any, may be inflated or duplicative. A claimant's allegations can be confirmed or challenged by reviewing the principal's books and records, thereby reducing the risk of overpayment and providing the factual basis for a potential payment. Financial information may also be used to negotiate a resolution where disputes remain, or to deny invalid claims entirely.

Upon receipt of a performance bond claim, the surety for a defaulted principal must respond according to the bond terms, frequently by electing one of listed options which, depending on the bond form, may include financing the principal to completion, tendering a replacement contractor, taking over and completing the work itself, negotiating a buyout with the obligee, or denying the claim. Each option carries a different cost and risk, and the option that a surety elects is frequently informed and influenced by the principal's financial condition, specifically the information found in its financial records: Work-in-progress schedules, job-cost reports, the schedule of contract balances, and cash-flow projections reveal the financial condition of the principal, permitting a surety to elect the option that minimizes its ultimate loss and, consequently, the amount for which it will later seek indemnity.

Additionally, most GIAs contain a "settlement" or "sole discretion" clause authorizing the surety to settle claims based upon its assessment and/or a business decision, in its discretion. Financial records are profoundly instructive in assessing the availability of a surety's cost-effective, business-driven resolution of a claim.

- **Using Financial Information to Determine the Amount of a Collateral Demand**

The equitable remedy of exoneration allows the surety to compel the principal to satisfy the obligation before the surety is required to pay, while *quia timet* ("because he fears") permits the surety to demand that the principal post collateral to secure the surety's anticipated exposure. These rights to security against potential loss also exist in most GIAs in the form of a collateralization provision, which permits a surety to demand that the principal place it in funds, or collateralize it, against well-defined risks. Depending on the form of the GIA, the amount of a collateral demand may be a set sum, such as the amount of total paid loss or the amount of the reserve set by the surety. The collateral provision may also permit the surety broader discretion to demand collateral in whatever amount that it may perceive itself to be "at risk of loss."

The principal's financials can assist the surety in assessing risk and provide a basis for reaching a collateral demand value or to quantify potential exposure, where the GIA provides for the surety's discretion in determining the amount of a collateral demand.

In addition to traditional factors such as existing claims from third parties as against the bond, a 2025 New York court held that a general deterioration in the principal's financial condition or evidence that such deterioration may be taking place, is a sufficient trigger to demand collateral from a financially stressed principal, in the surety's discretion.[5] For the foregoing reasons, and as explained in more detail below, a thorough understanding of a principal's fiscal condition is essential to minimizing's a surety's loss.

- **Using Financial Information to Identify and Quantify Contract Balances to Control Loss**

Once a surety performs its bond obligations, the surety is subrogated to the rights of the obligee, the paid claimants, and the principal. Among the most valuable of these subrogation rights is the surety's claim to unpaid contract balances and retainage, to be used for completion of the work. In *Pearlman v. Reliance Insurance Co.*, the Supreme Court confirmed that a surety who completes a defaulted contract or pays its bond obligations acquires an equitable right to the retained contract funds superior to the claims of the principal's other creditors and its bankruptcy

[5] *Guar. Co. of N. Am. USA v. Xin Dev. Grp. Int'l, Inc.*, 2025 N.Y. Misc. LEXIS 9183 (Sup. Ct. N.Y. Cnty, Nov. 18, 2025).

trustee,[6] a principle rooted in the earlier decisions in *Prairie State Bank* and *Henningsen*.[7] To recover these funds, the surety must first identify and locate the as yet uncollected contract balances on open projects, and determine if any is owed to downstream subcontractors or suppliers. The principal's accountings records may assist in identifying the outstanding contract balances, the amount and holder of retainage, and the flow of contract proceeds. Where a statutory or common law trust fund doctrine applies, those same records may permit the surety to trace proceeds held in trust for the benefit of laborers and suppliers and/or to pursue those who diverted them.

- **Using Financial Information to Lower Out of Pocket Costs and To Maximize Indemnity**

A close review of the principal's financials may occasionally reveal transfers of assets to insiders, related entities, or family members made as the principal's condition deteriorated. Such transfers may be voidable under the Uniform Voidable Transactions Act ("UVTA") (or its predecessor, the Uniform Fraudulent Transfer Act), restoring assets to the pool available to satisfy the surety's indemnity claim.[8] Without access to the underlying financial records, these transfers may go undetected.

CONCLUSION

From underwriting to recovery, the principal's financial information is a critical tool in the evaluation of claims. It is also valuable in assessing a principal's overall financial condition, and to identify both the scope of any financial crisis, and to isolate contract balances available to the surety in order to diminish the surety's loss. A surety that effectively obtains and analyzes its principal's financials, early, thoroughly, and within the bounds of its agreement and applicable law, substantially improves its position at every stage of the bonded relationship.

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[6] *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 141 (1962).
[7] *Prairie State Bank v. United States*, 164 U.S. 227 (1896); *Henningsen v. U.S. Fid. & Guar. Co.*, 208 U.S. 404 (1908).
[8] Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act), as adopted in each relevant jurisdiction. *See also*, *Endurance Am. Ins. Co. v. Bain Berkley, Inc.*, 2024 U.S. Dist. LEXIS 246251 (U.S.D.C. N.D. Ga., Mar. 21, 2024) (recognizing applicability of Georgia's UVTA in indemnity action but holding that facts were not sufficiently pled).

For the Panel Entitled: **Winning the Match: Offensive Opportunities and Defensive Risks in Attorney-in-Fact Clauses**

The Utility and Pitfalls of the Attorney-in-Fact Provision

By
Michael Prisco
Partner, Rivkin Radler, LLP

Presented to
The Pearlman Association
Annual Conference
September 10-11, 2026
Woodinville, Washington

The Utility and Pitfalls of the Attorney-in-Fact Provision

Michael A. Prisco, Rivkin Radler, LLP

I. Introduction:

Attorney-in-fact clauses in indemnity agreements are powerful tools – and potential traps. This paper examines the breadth of authority these provisions confer on sureties after a principal's default, including the ability to settle and compromise not only claims asserted against the bond but also the principal's affirmative claims and defenses, and the good-faith limits that constrain that authority. It also addresses how attorney-in-fact language can enable a surety to secure and realize on collateral by executing mortgages and liens against an indemnitors' property, and the jurisdiction-specific recording and notarization rules that can render those efforts ineffective if overlooked. Finally, the paper highlights the litigation consequences that can flow from inaction, including the preclusive effect a default judgment against an indemnitor may have on the surety's subsequent claims and defenses, and offers practical steps for exercising attorney-in-fact powers strategically while minimizing risk.

II. Utility of the Attorney in Fact Provision:

A. The Right to Settle and Compromise Claims

In many indemnity agreements, there is an attorney-in-fact provision authorizing the surety to exercise certain rights of the indemnitors upon default. One such right is to settle or compromise claims on behalf of its principal. Below is an example of a typical attorney-in-fact provision that includes the power to settle claims:

> 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. The Undersigned hereby ratify and confirm all that such attorney-in-fact or Surety may do for the purposes set forth in this Agreement. The Undersigned specifically agree to protect, indemnify and save and hold harmless Surety and such attorney-in-fact against any and all claims, damages, costs and expenses that may in any way arise due to the exercise of the assignments contained in this Agreement and the powers herein granted, specifically waiving any claim which the Undersigned have or might hereafter have against Surety or such attorney-in-fact on account of anything done in enforcing the terms of this Agreement.". Fidelity and Surety Law Committee, American Bar Association, The Surety's Indemnity Agreement: Law and Practice, 234-235 (2d ed. 2016).

Frequently, a surety will use these broad powers to resolve both (1) claims asserted against the bond or the principal and (2) the principal's affirmative claims and defenses. See Bell BCI Co. v. Old Dominion Demolition Corp., 294 F. Supp. 2d 807, 812 (E.D. Va. 2003); Hutton Construction Co. v. County of Rockland, 52 F.3d 1191 (2d Cir.1995); Fucich Contracting, Inc. v. Shread-Kuyrkendall & Assocs., Inc., No. CV 18-2885, 2022 WL 16552815, at *29–30 (E.D. La. Oct. 31, 2022).

In Bell, the court explained that, upon default under the indemnity agreement, "the assignment and attorney-in-fact provisions were triggered, conferring on the Surety the authority to settle and resolve not just [the principal's] claims against [the claimant], but also [the claimant's] counterclaim against [the principal]." 294 F. Supp. 2d at 812. Relying on Second Circuit precedent, the court rejected the indemnitors' contention that the surety lacked authority to resolve the principal's affirmative claims. The court further explained that the attorney-in-fact clause "unambiguously . . . gave the surety the authority to settle all claims on behalf of the principal, including not only claims against the Sureties 'upon the bonds,' but also [the subcontractor's] affirmative claims growing out of its insured contracts." Id. (internal citations and quotations omitted).

The court further noted that this "is a commercially sensible result" because without "such authority, a surety's right to settle would often be ineffective because a prime contractor would likely be unwilling to settle its claims against the surety without also settling any counterclaim the subcontractor has against the prime." Id.

The primary limitation on the right to settle a principal's claims is that the surety must act in good faith when exercising its rights under the attorney-in-fact provision. Most jurisdictions construe this good-faith requirement to mean that the surety must be "honest in fact, free of improper motive or willful ignorance of the facts at hand." Associated Indem. Corp. v. CAT Contracting, Inc., 964 S.W.2d 276, 285 (Tex. 1998); see Travelers Cas. & Sur. Co. of Am. v. Flawless Walls LLC, No. 2:22-CV-0178-TOR, 2024 WL 4453278, at *3 (E.D. Wash. Oct. 9, 2024) (holding that the surety did not breach the duty of good faith and fair dealing where it settled a legitimate claim, concluding that settlement was "necessary and expedient" to avoid increased attorney fees and costs, and noting that even the principal had offered to settle the claim itself).

Stated inversely, violating the duty of good faith requires "the conscious doing of a wrong because of dishonest purpose or moral obliquity . . . it contemplates a state of mind affirmatively operating with furtive design or ill will. PSE Consulting, Inc. v. Frank Mercede & Sons, Inc., 267 Conn. 279, 305, 838 A.2d 135, 153 (2004).

Some jurisdictions, such as Rhode Island, go further and require indemnitors "to allege and prove fraud or collusion" to challenge a surety's settlement of claims. Fireman's Ins. Co. of Newark, N.J. v. Todesca Equip. Co., 310 F.3d 32, 37 (1st Cir. 2002). However, other jurisdictions, such as California and Illinois, take a narrower approach. In those states, indemnitors may establish a breach of the duty of good faith and fair dealing by merely demonstrating "objectively unreasonable conduct, regardless of the actor's motive." Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co., 47 Cal. App. 4th 464, 483, 54 Cal. Rptr. 2d

888, 899 (1996); Rush Presbyterian St. Luke's Med. Ctr. v. Safeco Ins. Co. of Am., 712 F. Supp. 1344, 1346 (N.D. Ill. 1989) (explaining that Illinois only requires "a showing of negligence in actions alleging the breach of a surety's duty of good faith toward its insured, where the insured is obligated to indemnify the surety").

Accordingly, although attorney-in-fact provisions broadly authorize a surety to settle both claims against the bond or principal and the principal's affirmative claims upon default, the enforceability of such settlements turns on the governing jurisdiction's good-faith standard, which ranges from honesty-in-fact requirements to fraud-or-collusion showings in some states, while others permit liability for objectively unreasonable conduct regardless of motive.

B. The Right to Encumber an Indemnitor's Property

In addition to authorizing the resolution of claims, an attorney-in-fact provision may grant a surety the right to execute mortgages and liens against the indemnitors' assets. For example, such a provision may read as follows:

> 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 When all liability of Surety under the Bond(s) or other instrument(s) issued by Surety is terminated, any balance remaining in the possession of Surety after Surety has paid or reimbursed itself for all indebtedness of any Indemnitor under this Agreement or otherwise shall be returned to the Indemnitors. Fidelity and Surety Law Committee, American Bar Association, The Surety's Indemnity Agreement: Law and Practice, 235-236 (2d ed. 2016).

A surety's ability to encumber an indemnitor's property is a powerful tool to mitigate and recoup losses. However, certain issues should be addressed before unilaterally filing an instrument such as a collateral mortgage.

For example, a Michigan court held that a lien against an indemnitor's property was unenforceable because it did not attach the indemnity agreement to the filing. See In re Wade, 392 B.R. 302, 304 (E.D. Mich. 2008). In Wade, the indemnity agreement provided that "if recorded, [the agreement will] constitute a consensual lien upon any and all real estate owned by the [indemnitors] at the time of such recording." Id. In light of this language, the court held that the claim of interest on the property, though referencing all relevant facts and parties, was insufficient to create an interest in the property without the indemnity agreement attached.

In addition, in Capitol Indem. Corp. v. W. Fargo Plumbing & Heating, Inc., 145 F.3d 998, 999 (8th Cir. 1998), the Eighth Circuit held that a surety's lien against real property was ineffective because it violated Minn. Stat. Ann. § 508.25(6). Given the recording requirements of the statute, the court explained that the lien rights granted in the indemnity agreement did not become effective, even as between the parties to the agreement, until the indemnity agreement was registered with the state.

Practitioners must also be wary of state-specific notarization rules that could undermine a surety's right to encumber real property. In particular, some states require the parties' signatures to be notarized as a precondition to enforcement of the indemnity agreement's attorney-in-fact provision.[1] The issue has arisen from legislation enacted to ease the elder-planning process.[2] But a power of attorney granted in a creditor relationship, such as under an indemnity agreement, is different. It is not intended to provide relief to elderly principals by permitting them to delegate personal decision-making; rather, it is intended to provide a creditor with the means to enforce contractual rights. Most states recognize this distinction and exclude powers of attorney "coupled with an interest,"[3] as in creditor transactions, from statutory limitations on powers of attorney.

Given these issues, practitioners should verify the applicable state requirements in the jurisdiction where the real property is located before executing the indemnity agreement and before seeking to create an interest in real property pursuant to the attorney-in-fact provision.

III. Pitfalls of the Attorney in Fact Provision:

The attorney-in-fact provision is not an inexhaustible source of benefits for a surety. It may impose duties that, if not properly performed, can limit a surety's defenses. The leading example is the potential preclusive effect of a default judgment entered against the principal on the surety's subsequent claims and defenses.

Although the rule is not uniform, the prevailing view "that has emerged is that a surety is bound by any judgment against its principal, default or otherwise, when the surety had full knowledge of the action against the principal and an opportunity to defend." Drill S., Inc. v. Int'l Fid. Ins. Co., 234 F.3d 1232, 1235 (11th Cir. 2000).

In Drill, the Eleventh Circuit held that the default judgment against the principal had preclusive effect on the surety because the surety had notice of the action and, under the attorney-in-fact provision, the authority and opportunity to defend. The court explained:

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[1] Eight states (Alaska; Illinois; Kansas; Mississippi; New Jersey; Ohio; Oklahoma; Vermont) explicitly require notarization to enforce the POA. A few others (Louisiana; Minnesota; Missouri; New York; Rhode Island) are "unclear" as to whether notarization (or a wet signature in the case of New York) is required. Best practice in all of these states would be to require notarization.

[2] *See* UNIFORM POWER OF ATTORNEY ACT (2006) General Comment.

[3] The POA in the indemnity agreement is "coupled with an interest." *Petrossi Bros. Contracting Corp. v. Greece* (1941, Sup) 29 NYS2d 305.

> [the surety] had the legal right to step in and defend Enviro–Group against the default judgment at every stage of the proceedings pursuant to its Agreement of Indemnity with Enviro–Group. Under the terms of the Agreement, [the surety] was designated Enviro–Group's "attorney-in-fact", giving [the surety] the "right to adjust, settle, or compromise any claim, demand, suit or judgment upon the [payment bond]." Id. at 1236.

The rule in Drill has been adopted in a variety of jurisdictions, including Virginia (Am. Safety Cas. Ins. Co. v. C.G. Mitchell Constr., 268 Va. 340, 351 (2004)); New Mexico (McAlpine v. Zangara Dodge, Inc., 144 N.M. 90, 96 (2009)); Massachusetts (United States ex rel. N&T Mech. Contractors, Inc. v. Veterans Constr. LLC, No. 10-11120-WGY, 2011 U.S. Dist. LEXIS 56318, at *3 (D. Mass. May 25, 2011)); and Florida (Volvo Fin. Servs. v. Int'l Underground Corp., No. 3:10-cv-00598-J-32JBT, 2011 U.S. Dist. LEXIS 171009, at *10-11 (M.D. Fla. May 9, 2011)).

Given Drill's broad adoption, sureties should be vigilant in exercising their rights under the attorney-in-fact provision, because failure to act on the principal's behalf may prejudice their claims and defenses.

IV. Conclusion:

Attorney-in-fact provisions offer sureties a potent combination of settlement authority and collateral remedies, but with that power comes responsibility and risk. Practitioners should verify and comply with the governing state's recording and notarization requirements before encumbering real property; proactively monitor and, where appropriate, step in to defend actions against the principal to avoid preclusion issues; and document a good-faith, fact-driven basis whenever exercising settlement authority. Approached this way, the attorney-in-fact clause functions as intended – providing efficient, commercially sensible tools to resolve claims and protect the surety – while avoiding the pitfalls that can erode defenses and undermine recoveries.

THE PEARLMAN ASSOCIATION
ANNUAL CONFERENCE
September 10-11, 2026
Woodinville, Washington

PLAYING FOR A DRAW: HOW TRYING TO "WIN" A CONSTRUCTION DISPUTE COULD MAKE YOU A LOSER

Jonathan Burwood – Watt, Tieder, Hoffar & Fitzgerald, L.L.P.
Michael Carson – Nationwide Mutual Insurance Company
Hon. Nancy Holtz (Ret.) – JAMS
Bryan Kelley – Balfour Beatty Construction

I. Introduction

"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

Construction disputes are uniquely capable of turning rational business executives into long-term investors in uncertainty. The project may be complete, the owner may be in possession of the work, the contractor may have demobilized, and the surety may be otherwise on its way clear of bonded exposure. Yet the dispute persists, voraciously consuming capital, executive attention, the efforts of project personnel, attorney and expert fees, reserves, bonding capacity, and commercial goodwill. The litigation becomes a shadow project with its own budget, schedule, management team, and risk profile.

As detailed here, in the majority of contested construction and surety disputes, the optimal business objective is not to "win" in the traditional sense. A more efficient result involves securing a prompt and commercially intelligent tie: a negotiated resolution that preserves enterprise value, reduces volatility, releases stranded cash, limits collateral damage, and allows parties to focus on current and future work rather than the archaeology of a troubled project.

Fundamentally, a dollar recovered years from now is worth less than a dollar recovered today, particularly after expense, inflation, potential credit stress, and executive distraction are considered. But beyond that simple cost-benefit mindset, efficient claim resolution is ultimately healthy for the entire project ecosystem. Most disputes result in collateral damage to downstream non-combatants. Economically fragile subcontractors and suppliers may go unpaid despite having met their obligations, sureties may face risk and expense beyond payment and performance obligations in the normal course, mechanics liens may complicate financing and title, public agency certifications may be jeopardized, reserves impact financial statements, and the prospect of future work can ultimately become clouded. Critical industry relationships become strained and may never recover.

The modern ADR toolkit has evolved accordingly. Construction contracts increasingly prescribe progressive dispute resolution, including executive escalation, standing project neutrals, dispute review boards, mandatory mediation, and expedited arbitration. These mechanisms are not merely tools of *dispute resolution*. Used correctly and consistently, they become resources for *dispute avoidance*. The objective is to move the parties away from position-taking to risk avoidance while there is still time to efficiently preserve business value.

Of course, some disputes ultimately need to be resolved through a trial. All disputes are different, and require unique solutions. This paper is not intended to be reductive or dismissive about litigation, and to be sure that tried and true method of dispute resolution will robustly outlast us all. Rather, the focus here is on the relative costs and benefits of effectively employing progressive ADR techniques to increasingly complicated and expensive construction disputes, with a focus on preserving opportunities for business decisions. On balance, experience demonstrates time and again that sophisticated construction and surety professionals should constantly strive to evaluate disputes as business assets and liabilities, rather than moral contests.

II. Negotiated Resolutions Optimize Financial Outcomes

"We lost because we didn't win."
-Christiano Ronaldo, Portugal

The strongest case for prompt negotiated resolutions begins with a simple, but not commonly enough acknowledged, premise: litigation is a negative-yield investment unless the expected recovery, after risk and cost, exceeds the value of a prompt settlement. A common fallacy afflicts construction litigants, causing them to evaluate disputes by comparing the *claim amount* to the *settlement offer*. This is self-defeating. The more rational assessment is between the *expected net value of litigation* and the *expected net value of a resolution*. The litigation side of the ledger must include attorneys' fees, experts' fees, extensive discovery costs, internal personnel time, exposure to accruing prejudgment interest, the prospect of appeal, the risk of adversary insolvency, and the ultimate likelihood and further transactional costs of actually collecting the spoils of victory. All the while, running a cashflow intensive business in the prolonged absence of all that working capital.

Construction cases tend to be particularly expensive and prolonged because they are factually complicated, document intensive, expert driven, and involve considerable amounts in controversy. A litigated dispute involving claims of delay, lost productivity, defective work, wrongful termination, or payment disputes will require heavy doses of schedule analysis, forensic accounting, estimating, engineering, project management expertise, and extensive fact development across multiple parties with diverse interests. That cost curve steepens as the case approaches depositions, dispositive motions, expert reports, pretrial preparation, and ultimately a long trial. Attorney and expert witness preparation efforts and the associated expense understandably balloon in the home stretch through trial. This is particularly true for jury trials.

Time Compounds Financial Risk

Time also compounds the financial burden. A multiyear path to trial, potentially followed by post-trial motions and an appeal, is not unusual in complex construction litigation. That often tortured timeline has its own unique financial impact, even for the prevailing party (to the extent the prevailing party can even be identified in the end). For plaintiffs, a prolonged recovery effort may impair cash flow and access to capital, and strain ancillary commercial relationships. For defendants, unresolved exposure that drags out may impact balance sheets, necessitate posting collateral, affect surety underwriting, impair bonding capacity, and complicate lender arrangements. For sureties, bond claims that necessitate a resolution of the principal's underlying dispute may tie up reserves, occupy claim personnel, create prolonged legal expense, and ultimately create unliquidated risk for years.

The time value of money is paramount. Inflation, cost of capital, professional fees, and operational distraction all reduce the true financial value of a delayed outcome. Courts notoriously avoid long construction trials and cases can be stranded on dockets. For those reasons, a thoughtful "discount" today may leave the business in the same or better economic position than a larger nominal trial recovery years later. The hidden costs of victory can be significant and difficult to quantify.

Personnel Investment

The direct cost is only the most visible part of the financial iceberg. Litigation disproportionately consumes the time of the employees whose time is most valuable. Executives, project managers, estimators, schedulers, accounting personnel, claims professionals, and in house attorneys are pulled into document and ESI collection, interviews, deposition preparation, deposition testimony, mediation preparation, and trial efforts. The pace of those activities can be maddeningly inconsistent, with months of familiarity decay punctuated by urgent and all-consuming legal support work. Each hour spent reconstructing a past dispute, on a past project, is an hour not spent competing for, winning, planning, and delivering the next project. This is not a simply a soft cost. It is a real and often undervalued opportunity cost that affects backlog, client service, employee focus, and business development.

Discovery

Discovery deserves special scrutiny. Discovery in construction disputes often has marginal return after the core records are collected and analyzed. Parties may spend heavily to obtain documents that confirm what project participants already know: the project was late, the parties disagree about responsibility, documentation is imperfect, and each side wrote contemporaneous letters preserving its position – or neither side did. Discovery is an integral and necessary component of the litigation process, but it can also be a black hole that swallows time, money, and morale. Completing a full cycle of complicated and expensive written discovery, document and ESI production, and depositions can quickly consume resources far disproportionate to its incremental evidentiary value. And there is always the risk that your emails and witness testimony are "worse" than your adversary's in the end.

Fee Shifting and Interest

The prospect of fee shifting and the of collecting prejudgment interest in the end often feeds a party's view of the of the risk/reward fallacy. A litigant overconfident that it will recover its legal expense from its adversary and "made whole" – either directly or through prejudgment interest as a proxy for expense – is impaired from properly assessing the respective net values of a negotiated resolution and an ultimate trial verdict. That approach can be dangerous for both parties as it could easily result in an asymmetrical estimate of risk. Fee shifting may be discretionary, capped, contractually limited, dependent on a "reasonableness" test that can be truly subjective, or ultimately unrecoverable if the opponent lacks sufficient assets. Similarly, prejudgment interest may be difficult to calculate, tolled, offset, reduced, or dependent on contested statutory or contractual predicates. And even when recoverable, attorneys' fees and prejudgment interest do not directly mitigate the sunk cost of the time invested by personnel and executives and the associated opportunity cost.

Winning Requires Getting Paid

The construction dispute road is paved with bankruptcies. A contractor may obtain an award against a single-purpose project entity with limited assets. An owner may prevail against a distressed contractor that cannot satisfy the judgment. A surety may successfully litigate claims against indemnitors whose collectability is suspect and further pursuit will require additional litigation. A subcontractor may win a lawsuit against a contractor only to be faced with insolvency and bankruptcy complications, requiring further legal expense. In each scenario, a direct connection between prevailing and a positive financial outcome is far from guaranteed. "Winning" often becomes impossible to recognize.

Negotiated resolutions, while also not free, involve more finite and immediate assessments. What have I spent to date? What will I spend ultimately? What could I reasonably hope to recover? Will my opponent be financially capable to satisfy that obligation? What will going the distance require of my personnel and executive team? What will happen to my company if there is a truly adverse result? What relationships will be injured by a prolonged legal dispute? What relationships might improve from a prompt resolution? What is the business cost of proving the point? Prioritizing these questions early, assigning a cost to each, putting a premium on speed and certainty, and focusing on the net result is the key. That calculus may instantly reveal that an early "discount" to a claim's face value for settlement purposes is economically superior, eliminates downside risk, restores personnel to their day jobs, frees up reserves and stranded cash, and ends the compounding cost of professional fees over time.

III. The Ripple Effect of Deferred Resolutions

"My parents have been there for me, ever since I was about seven."
-David Beckham, England

Litigated construction disputes rarely remain confined to the parties in the caption. A deferred resolution can trigger a chain reaction across the entire project structure. Retainage becomes stranded. Unimplicated subcontractors and suppliers remain unpaid. Payment and performance bond claims are asserted, investigated, and appropriately denied subject to resolution

of the underlying contested yet good faith dispute. Unforgiving timelines for the perfection of mechanics liens quickly result in the impairment of title, lender complications, the necessity for new surety bonds, and ancillary litigation. Owner-contractor disputes yield contractor-subcontractor disputes. Design claims and insurance disputes may follow. What began as a routine change order request ultimately blossoms into a portfolio of disputes, litigants, and cascading expense.

Escalating and extended disputes can also impact the behavior of the parties. Notice, claim, and reservation of rights letter warfare ensues. Project personnel become invested in defending earlier decisions. Outside counsel becomes the primary channel of communication. Parties begin to litigate about the process of litigating: preservation, privilege logs, work product, deposition topics and scheduling, expert access, lien discharge responsibility, bond claim substantiation, scheduling orders, deadline management, and trial readiness. The dispute develops institutional momentum and its own financial gravity. The longer it lasts, the harder it becomes for any participant to even recommend a path to compromise without appearing to sacrifice resolve or yield momentum.

This behavior is commonly described as escalation of commitment. In construction litigation, it derives from parties simply continuing to fund the dispute because they have funded it thus far, because there "is not turning back," because a loss would be embarrassing, or because decision makers have personally associated themselves (or been involuntarily associated) with the claim narrative and outcome. The inevitable result is distorted risk assessment and a continued march into further risk and expense. A settlement that would have reasonably looked attractive eighteen months earlier becomes unacceptable simply because the parties have already spent too much proving why they should not settle.

Sureties are particularly at risk. Subcontractors and suppliers may not be implicated in the underlying dispute between owner and contractor, yet payment delays force them into bond claims and lawsuits. Contract disputes resulting in performance bond claims may leave principals, obligees, sureties, and indemnitors in a prolonged state of uncertainty. The longer the underlying dispute persists, the more likely it is that peripheral claims become separate and costly disputes in their own right.

Prolonged disputes can wreak havoc on financial forecasting and the availability of essential credit. Unresolved claims may affect contingent liability disclosures, reserve decisions, and bonding capacity. A contractor that carries unresolved claims as expected recoveries may overstate future liquidity. Unresolved exposure inevitably yields tough questions from lenders, sureties, insurers, auditors, and public authorities. That uncertainty affects bids, prequalification, and the appetite for risk of critical financial partners.

The extended passage of time also erodes the availability and quality of evidence available to ultimately prevail in the dispute. Personnel change jobs, retire, or otherwise become unavailable in the normal course. Key subcontractors move on and are ultimately unable to provide critical claim support by the time trial is reached. Fundamentally, memories simply fade, especially with respect to projects with hundreds of RFIs, submittals, meeting minutes, change directives, daily reports, and schedule updates. Project documents may remain, but construction disputes are rarely

decided on documents alone. Credibility and context matter, and those burdens must be met through personal knowledge. A prompt negotiated resolution, pursued while personal knowledge, engagement, and motivations are still fresh, will inevitably yield more powerful claim support than trial testimony sought years later.

Beyond the evident firsthand risk and expense, the derivative hazards associated with prolonged claim litigation are significant and must be accounted for in the overall cost/benefit analysis. Actively seeking early resolution of claims through ADR presents opportunities for construction professionals to protect important commercial relationships, mitigate the risk of secondary litigation, and ensure that disputes are resolved using facts that are fresh and readily available.

IV. Beyond Financial Benefits

"I can see the carrot at the end of the tunnel."
-Stuart Pearce, England

Not every cost appears on a balance sheet. Construction is a relationship industry. Owners need reliable contractors. Contractors need qualified subcontractors and suppliers. Sureties need viable principals. A supporting cast of insurers, underwriters, and brokers is always busy behind the scenes. That entire construction ecosystem is inevitably impacted by disputes that require prolonged litigation. And though difficult to quantify, damaging or destroying those critical relationships can assess a far greater cost to the bottom line.

Focus on Project Delivery

When significant disputes arise during the course of a project, pursuing a prompt negotiated resolution increases the likelihood that the parties will be in a position to continue collaborating and deliver the project safely, timely, and within mutually acceptable cost parameters. A tense and prolonged lawsuit definitively makes the successful completion of the project – a shared objective among all parties – more difficult. Litigation is likely to discourage candid communication, influence otherwise routine decisions, and cause hesitancy that threatens delays. Early dispute avoidance or resolution creates a structured process for parties to continue prioritizing business decisions in balance with their legal positions.

Protection of Reputation

Reputation is another important consideration. Litigation in a public forum is likely to publicize competing allegations of defective work, potential safety implications, nonpayment, default and termination, and even extracontractual claims. To make matters worse, the litigation model can encourage parties to lean into the "kitchen sink" mentality of claims to create leverage, resulting in a record that can be more overblown than the actual circumstances warrant. In the end, unsubstantiated allegations that do not ultimately bring liability can have reputational consequences. Clients, commercial colleagues, competitors, lenders, and sureties may learn of unflattering allegations at the outset and diffusing first-impressions is challenging. Dispute avoidance and resolution processes are largely confidential and, although they cannot completely

eliminate reputational risk, they mitigate unnecessary public amplification and enhance confidentiality.

Solution Control

Dispute avoidance and resolution also boosts party control. Judges, juries, and appellate courts decide disputes through legal frameworks that are often misaligned with business priorities. Litigation remedies are often binary: liability or no liability, damages or no damages, win or loss. Negotiated resolutions, on the other hand, allow for commercial solutions that are generally not available to adjudicators. These include structured payment arrangements, warranty extensions, release of retainage, shared risk arrangements, future work opportunities, scope reallocations, schedule adjustments, joint communications to upstream stakeholders, and creative solutions for completing the work and securing payment. The solutions available through ADR are vastly more diverse and flexible than simply pursuing a litigated judgment, and are oriented towards producing outcomes functionally superior to litigation because they can be based on practicalities rather than merely assigning historical blame.

Reframing of Dispute and Solutions

Negotiated resolutions also create opportunities for face-saving paths to compromise. Project personnel may understandably resist settlement because they view it as an admission that their initial actions were somehow improper. However, senior executives engaged in ADR have the opportunity to reframe decisions – in concert with the other party – with the benefit of both hindsight and a focus on compromise. Within that framework, a settlement is not a concession, it becomes enterprise risk management. A mediator, project neutral, or early evaluator can also assist in reframing how a dispute is viewed by giving each side a credible external basis for recalibrating expectations. That independent assessment can reduce the internal political cost of compromise and free parties to reconsider positions that were previously hardened. Litigation, by contrast, is geared towards inexorably hardening positions.

V. Progressive ADR Tools Driving Efficient Construction Resolutions

"It was like the ref had a brand new yellow card and wanted to see if it worked."
- Richard Rufus,

The more complex and expensive construction projects – and disputes – become, the more critical it is for avoidance and resolution tools to adapt in terms of efficiency. Classically, a dispute arises, is unable to be resolved at the project level, and the parties reserve rights. The project is completed, a complaint is filed, positions are staked out, experts are retained, documents are produced, and depositions are scheduled. Often, it is not until that point that the parties consider mediation. But by that point, the parties may have spent enough money and drawn enough lines in the sand to become economically and psychologically committed to the fight. Modern construction ADR has adapted, though adoption of some of the more progressive dispute avoidance tools is not sufficiently widespread.

Executive Escalation

Executive escalation as a dispute resolution mechanism is fairly common in today's construction contracts, though in practice may be underutilized. While project personnel are busy performing the work, maintaining the schedule and managing the budget, all pursuant to the contract documents, they cannot always be focused on the big picture. Every day and dollar count. Senior executives, on the other hand, are better positioned to evaluate disputes with a view towards the business at large. They may consider total project profitability, critical relationships, future opportunities, reputational risk, bonding and lending partners, cash flow, and overall enterprise exposure. They are also less likely to gamble valuable company resources on a less than certain claim. For those reasons, requiring executives to evaluate and meet to discuss claim avoidance or resolution is both practical and efficient.

To be effective, executive escalation clauses require specificity. They should identify the specific levels of executive involvement, precise timeframes, information to be mutually exchanged, and make clear if good faith participation in the process is a condition precedent to subsequent arbitration or litigation. Executive escalation clauses should also require direct participation by those with actual settlement discretion and authority, not merely by representatives authorized to repeat project level positions.

Mandatory Mediation

Mandatory mediation remains a valuable and common dispute resolution option, but timing and design matter more than ever. The common complaint surrounding mandatory mediation is that it occurs "too early" in the process to be effective. That ignores the prospect of a thoughtful and mutual approach by the parties – with the assistance from a mediator – of identifying the specific challenges posed by rushing to mediation, the information that is most critical for development and exchange prior to mediation, and the prospect that mediation does not need to be "over" simply because the parties cannot reach a solution in one day. A well-designed mediation occurs after enough information has been exchanged to permit informed evaluations, but before the parties have spent the majority of their litigation budget and backed each other into corners. Parties should consider phased submissions, joint sessions for technical issues, confidential mediator calls with executives, and focused expert presentations where the dispute turns on schedule, productivity, estimating, engineering, or accounting issues. In practice, and even if not initially successful, requiring parties to develop, digest, and present their claim positions – to each other and to the mediator – has the benefit of forcing parties to understand strengths and weaknesses, quality and quantity of evidence, and both sides of the story - perhaps for the first time. It is far better to gain that insight through an "early" mediation than during third week of trial.

Early Neutral Evaluation

Early neutral evaluation can be particularly effective in construction matters because disputes often involve technical components that benefit from specialized review. An experienced construction neutral can assess the likely range of outcomes, identify proof problems, test damages

models, and highlight dispositive legal or contractual issues. The process is nonbinding, but it can reset unrealistic expectations.

Dispute Review Boards

Dispute Review Boards ("DRBs") and Dispute Avoidance/Resolution Boards ("DARBs") offer real-time access to neutrals who learn the project as it unfolds. The core advantage is familiarity. A standing board that receives periodic and substantive project information is not forced to reconstruct a years' long project years later, from documents cherry picked by advocates after the fact. A standing board can assist in identifying, avoiding, and resolving disputes while corrective action is still practical and cost-effective, justifying the associated expense.

Standing Neutrals

Standing mediators, project neutrals, independent schedulers, independent technical experts, and claims review panels serve similar functions. Their value is greatest in projects with high technical complexity, aggressive schedules, multiple stakeholders, or significant public or lender oversight. A neutral assessment during the project can reduce unrealistic expectations, provide credibility to asserted positions, and create face-saving paths to compromise.

Tailored Arbitration

Expedited arbitration and fixed-time/fixed-cost procedures may be appropriate where a binding decision is needed but conventional litigation would be disproportionately slow and expensive. Achieving actual speed and efficiency in arbitration requires considerable discipline and a willingness to recognize that arbitration is not simply trial-lite. The parties and arbitrators must work to considerably limit discovery, live testimony, expert opinion evidence, hearing days, and post-hearing submissions. The form of award should also be a focus of efficiency. A reasoned award may be worth the additional time and expense in some cases; in others, a standard award may be a more suitable option. Baseball arbitration and high-low arbitration can also be employed to shrink valuation gaps. Baseball arbitration requires each side to submit a final number, with the arbitrator selecting one or the other. The risk of taking an extreme position encourages moderation. High-low structures cap downside and upside while allowing a substantive adjudication to proceed. These specialized ADR tools are not appropriate for every dispute, but underscore the need for parties to think creatively and be disciplined about dispute resolution procedures that optimize efficiency and avoid unnecessary risk and expense.

Modern construction ADR is proactive, thoughtful, and ultimately efficient. The classic approach of staking out positions, reserving rights, and simply "saving it for the claim" can often turn out to be a value-destroying strategy. It permits contemporaneous problems to mature into formal disputes, which develop into contested litigation, and that litigation consumes time and money that can be truly damaging, regardless of the outcome. Employing progressive ADR techniques presents opportunities to interrupt that cycle. It forces information exchange, senior attention, neutral reality-testing, and decision-making while business-focused solutions are still available and capital can be employed with the most value.

VI. Conclusion

"If you are first, you are first. If you are second, you are nothing."
- Pele, Brazil

"Playing for a draw" does not suggest that meritless claims should be compromised, that all disputes can be resolved through negotiation, or that litigation does not serve a critical role in the overall framework of dispute resolution. The answer will not always be settlement. Some disputes require a decisive legal ruling. Some claims are strategic, precedential, meritless, personal, political, or commercially intolerable. At the same time, there is value to the industry in continuing to shift the singular focus away from "winning" a dispute, working early and hard to truly understand conflicting positions, to effectively price potential solutions, to accurately forecast the economic and enterprise costs of long term litigation, and to consciously devote at least as much attention and resources to exploring a negotiated resolution as securing a judgment. In most complex and high-stakes construction disputes, a trial should represent a necessary alternative when a compromise simply cannot be reached.

Prioritizing dispute avoidance and resolution, and effectively utilizing the full range of ADR options available today, requires sophistication and discipline – from both sides. Understanding the complicated relationship between legal merit and business value is critical. Time, money, relationships, and reputations are always in play and at risk. The line between winning and losing can be razor thin, impossible to define in real time, and must be navigated with great care. Earnestly pursuing dispute avoidance and resolution as an alternative to litigation is good business. It goes well beyond merely "settling" a claim – taking less for the sake of expediency. Instead, it represents a thoughtful focus on ultimate results, net gain or loss, and certainty. Sometimes "shooting for mediocrity" is the goal.

PRIVILEGE AND WORK PRODUCT
ISSUES WITH SURETIES AND THEIR CONSULTANTS

Matthew W. Geary, Rouse Frets White, P.C.

Presented as part of:
The Beautiful Game of Surety: How Collaboration
Across Roles and Between Companies Builds Resilient Outcomes
The Pearlman Conference
September 9-11, 2026

I. Introduction.[1]

Identifying and preserving privileged communications is an important part of every attorney's practice, and in the surety context protecting privileged communications can be met with a number of pitfalls. As part of standard business operations sureties routinely investigate defaults, evaluate completion costs, and assess claims. Sureties also routinely prepare for potential litigation involving bond claims from obligees, payment bond claimants, and to seek indemnification. Because a surety takes a different role when engaging in standard business operations as opposed to preparing for litigation, the analysis of whether a surety's communications with its in-house or outside counsel, consultants, and retained or non-retained experts are protected by the attorney-client privilege, the work product doctrine, and the common interest doctrine can be complicated. This paper addresses the legal issues sureties may face when determining whether communications and documents are protected.

II. Confidentiality.

For communications to be protected from disclosure under the attorney-client privilege or work product doctrine, the communications must be confidential. If the communications are not made in confidence, there will likely not be any protection. Moreover, along with being a component of the attorney-client privilege and work product doctrine, attorneys have an ethical obligation to keep client communications confidential. Each state has its own ethical rules many of which are based upon the ABA Model Rules. ABA Model Rule 1.6, provides:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> * * *
>
> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

[1] For additional analysis and discussion of the privilege and confidentiality issues discussed herein, *see* Andrew Carter & Carol Smith, *The Parameters of Privilege: Protecting Communications and Other Documents*, in MANAGING AND LITIGATING THE COMPLEX SURETY CASE 939 (Tracey L. Haley, Christopher R. Ward, eds. Am. Bar. Ass'n 3d ed. 2018); *see also see also* Jessica Derenbecker et al., *Exploring Privilege Issues from the Surety's Perspective*, for the 2024 TIPS FSLC Spring Surety Conference, May 2024; and Christopher R. Ward, et al, *Privilege Considerations for Sureties During the Investigation of Bond Claims and Preparation for Litigation* for the Surety Claims Institute June 2025 Conference.

When communications are not kept confidential, there can be a waiver of privilege or protection under the work product doctrine. Attorneys, sureties, and consultants should all work to maintain the confidentiality of communications for which they intend to keep confidential and to protect from discovery.

III. Jurisdictional Issues

As with all legal issues, the particular jurisdiction will govern the applicability of the attorney-client privilege. The attorney-client privilege is a substantive privilege. Therefore, the jurisdiction whose law applies to substantive matters in the case will govern the application of the attorney-client privilege. *U.S. v. Bauer*, 132 F.3d 504, 509, fn.4 (9th Cir. 1997) ("issues concerning application of the attorney-client privilege in the adjudication of federal law are governed by federal common law."). Thus, in Miller Act bond claims, under which Federal Courts have exclusive jurisdiction, federal law will govern the privilege. On the other hand, in cases where the claim on the bond is governed by state law, state law will govern the privilege. Consequently, in diversity cases pending in Federal Court, where the underlying claim is governed by state law, the state privilege law will apply.

In diversity cases, although state law may apply to govern the applicability of the privilege, the Federal Rules of Evidence may apply when considering whether inadvertent disclosures waives the privilege. Federal Rule of Evidence Rule 502(b) provides that "[w]hen made in a federal proceeding …, the disclosure does not operate as a waiver in a federal or state proceeding if: (1) the disclosure was inadvertent; (2) holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable following Federal Rule of Civil Procedure 16(b)(5)(B)."

The matter can be further complicated when there are federal claims, such as Miller Act claims, and pendant state law claims. Courts have recognized that it would be "meaningless to hold [a] communication privileged for one set of claims and not for the other." *In re Sealed Case*, 381 F.3d 1205, 1213-14 (D.C. Cir. 2004); *see also Agster v. Maricopa County*, 422 F.3d 836, 839 (9th Cir. 2005) ("Where there are federal question claims and pendent state law claims present, the federal law of privilege applies."). "This principal is codified in Federal Rule of Evidence 501, which provides that 'the common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege.'" *Est. of Rupard v. Cty. of San Diego*, No. 23CV1357-CAB (BLM), 2026 U.S. Dist. LEXIS 75707, at *16 (S.D. Cal. Apr. 7, 2026) (citing Fed. R. Evid. 501). For example, in *United States v. Ruehle*, 583 F.3d 600, 608 (9th Cir. 2009), the court vacated a privilege ruling because the district court "erred by relying on California law to define the attorney-client privilege," and reaffirmed that federal common law governs privilege disputes arising under federal law.

Protection based upon the work product doctrine is not a substantive privilege. Instead, it is a matter of procedural law, and thus in federal court, it is governed by federal law. *Pepsico v. Baird, Kurtz & Dodson, L.L.P.*, 305 F.3d 813, 817 (8th Cir. 2002). The work product doctrine is set forth in Fed. R. Civ. P. 26(b)(3)(A). It protects "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer or agent)…." However, such materials may still be discoverable if the party seeking the documents "show that is has a substantial need for the materials to prepare its case and cannot, without due hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. Rule 26(b)(3(A)(ii). "In summary, the work product doctrine affords protection for materials prepared in anticipation of litigation but allows discovery of same if the party seeking discovery can show substantial need and undue hardship in obtaining the materials elsewhere. *Pepsico*, 305 F.3d at 817. Furthermore, Rule 26 cautions that a court (if ordering disclosure of such materials) "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." *Scottrade, Inc. v. St. Paul Mercury Ins. Co.*, No. 4:09CV1855SNLJ, 2011 U.S. Dist. LEXIS 14833, at *6 (E.D. Mo. Feb. 15, 2011) (quoting Rule 26(b)(3)(B)).

IV. The Attorney Client Privilege

The United States Supreme Court has explained the policy behind the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). "The relationship between and attorney and his/her client is sacrosanct," *Scottrade*, 2011 U.S. Dist. LEXIS 14833, at *6, and the attorney-client privilege recognizes that "sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn*, 449 U.S. at 389. However, each element of the attorney-client privilege must be met for the attorney-client privilege to apply. There may be minor variations across jurisdictions for the elements of the attorney-client privilege, the key elements are:

(1) A communication;
(2) With a client;
(3) In Confidence;
(4) For the purpose of seeking legal advice.

A. Communications.

The attorney-client privilege "only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *FTC v. Boehringer Ingelheim Pharms., Inc.*, 436 U.S. App. D.C. 266, 892 F.3d 1264 (2018) (citing *Upjohn*, 449 U.S. at 395. In *Hickman v. Taylor*, 329 U.S. 495, 508 (1947), the Supreme Court held

that "protections afforded by the attorney-client privilege "do[] not extend to information which an attorney secures from a [third party] witness while acting for this client in anticipation of litigation." The Court also explained that the privilege does not apply to "memoranda, briefs, communications, and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories." *Id.* However, such documents may be protected by the work-product doctrine.

Because the privilege only applies to communications, an attorney who conducts an investigation and obtains facts during that investigation could be required to disclose those facts. For example, if a surety's attorney is the only surety representative at a meeting or site inspection, the facts learned by that attorney could be subject to disclosure. *See* Perez v. Alegria, No. 15-mc-401-SAC, 2015 U.S. Dist. LEXIS 108425, at *12 (D. Kan. June 24, 2015) (concluding that attorneys who possess discoverable facts "are not exempt from being a source for discovery by virtue of their license to practice law or their employment by a party to represent the party in litigation.").

B. With a Client.

The communication must be between an attorney and the attorney's client. The "classic test" for the attorney-client privilege is: "(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer…" *Hawkins v. Stables*, 148 F.3d 379, 383 (4th Cir. 1998) (quoting *United States. v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982)). Regarding corporations, "[t]he attorney-client privilege applies to corporations and 'covers counsel's communications with both top management and lower level employees.'" *Jacobson Warehouse Co. v. Schnuck Mkts., Inc.*, 13 F.4th 659, 676 (8th Cir. 2021) (citations omitted).

When it comes to corporations, some courts have taken a narrow approach to the attorney-client privilege using the "control group" test. Under the "control group" test, "the employee [must] be in a position to control or take substantial part in a decision about any action to be taken upon the advice of the attorney or that the employee be a member of a group having such authority." *Leer v. Chicago, Milwaukee, St. Paul & Pac. Ry. Co.,* 308 N.W.2d 305, 308 (Minn. 1981). The United States Supreme Court has recognized that the "control group" test "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy." *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981). The Court, however, specifically

declined to "draft a set of rules to govern challenges to investigatory subpoenas," and held that the analysis should be performed on a case-by-case basis. *Id.* at 396-97.

In deciding whether the privilege applied under Missouri law, the Eighth Circuit identified the following criteria:

> (1) the communication was made for the purpose of securing legal advice;
> (2) the employee making the communication did so at the direction of his corporate superior;
> (3) the superior made the request so that the corporation could secure legal advice;
> (4) the subject matter of the communication is within the scope of the employee's corporate duties; and
> (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. *Jacobson Warehouse Co. v. Schnuck Mkts., Inc.*, 13 F.4th 659, 676 (8th Cir. 2021) (quoting *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977)).

The Florida Supreme Court has adopted a similar version of the test set forth in *Jacobson*. *See Southern Bell Telephone & Telegraph Co. v. Deason*, 632 So. 2d 1377, 1383 (Fla. 1994).

Communications with contractors or consultants may also be protected, if they are considered the functional equivalent of employees. In *In re Bieter Company*, 16 F.3d 929 (8th Cir. 1994), the Eighth Circuit decided an issue left open by *Upjohn*, in holding that the attorney-client privilege can be applied to communications between a corporation's attorney and independent contractors or consultants who are the "functional equivalent" of corporate employees. In *Bieter*, the court recognized that "too narrow a definition of 'representative of the client' will lead to attorneys not being able to confer confidentially with nonemployees who, due to their relationship to the client, possess the very sort of information that the privilege envisions flowing most freely." *Id.*, at 937-38. In that case, the court found the independent contractor-consultant in that case was the functional equivalent of an employee. The court stated:

> [The contractor] has been involved on a daily basis with the principals of [corporation] and on [corporation's] behalf in the unsuccessful development that serves as the basis for this litigation. Corporation was formed with a single objective and [contractor] has been intimately involved in the attempt to achieve that objective. As [corporation's] sole representative at meetings with potential tenants and with local officials, he likely possesses the information that is possessed by no other. As the initial retainer agreement he entered into with [corporation] indicates, it retained him "to provide advice and guidance regarding commercial and retail development based upon [his] knowledge of commercial and retail

> business in the State of Minnesota," just as one would retain an outside accountant for her knowledge of, say, the proper accounting practices and taxation concerns of partnerships. There is no principled basis to distinguish [contractor's] role from that of an employee, and his involvement in the subject of the litigation makes him precisely the sort of person with whom a lawyer would wish to confer confidentially in order to understand [corporation's] reasons for seeking representation. As we understand the record, he was in all relevant respects the functional equivalent of an employee. *Bieter*, 16 F.3d at 938.

The Ninth Circuit adopted the functional equivalent doctrine set forth in *Bieter* in *United States v. Graf*, 610 F.3d at 1158-59 (9th Cir. 2010). In that case, the contractor served as a "consultant" to a health insurance company. He regularly communicated with insurance brokers and others on behalf of the company, marketed its insurance plans, managed its employees, and was the company's voice in its communications with counsel. *Id.* at 1157. In that case, the court held that the consultant was the functional equivalent of an employee.

C. In Confidence.

When asserting the attorney-client privilege it is imperative that the communications that are sought to be protected are confidential. That is, they were intended to be confidential at the time they were made, *and* the communication has remained confidential. As the authors of *The Parameters of Privilege: Protecting Communications and Other Documents*, in MANAGING AND LITIGATING THE COMPLEX SURETY CASE 939, 970 (Tracey L. Haley, Christopher R. Ward, eds. Am. Bar. Ass'n 3d ed. 2018) (Andrew Carter & Carol Smith authors), have noted, for a communication to be confidential if must "not intended to be disclosed to third parties other than parties reasonably necessary for the transmission of the message or those to whom disclosure furthers the rendition of legal services." When a party voluntarily discloses privileged communications, the waiver generally extends to "any information directly related to that which was actually disclosed" *United States v. Workman*, 138 F.3d 1261 (8th Cir. 1998), *Benson v. City of Lincoln*, 343 F.R.D. 595 (D. Neb. 2023); *United State v. Richey*, 632 F.3d 559, 566 (9th Cir 2011).

An issue that arises in the surety context is whether a surety waives the privilege by asserting claims or defenses that place the attorney's advice at issue in the litigation. *See e.g. Greater N.Y. Mut. Ins. Co. v. Phila. Indem. Ins. Co.*, No. 1:11-CV-00451, 2014 U.S. Dist. LEXIS 31285, at *23 (M.D. Pa. Mar. 11, 2014).

Two exceptions to the waiver rule that are important in the surety context are: (1) disclosure to necessary third parties; and (2) disclosure to principals in collaborating to develop a strategy for aligned interests. Disclosure to necessary third parties

1. Disclosure to Necessary Third Parties.

When sureties investigate claims, engage in litigation, or attempt to save troubled construction projects, they engage in a continuous exchange of information with outside counsel, surety consultants, engineers, other experts, principals (and their counsel). Although disclosure of privileged communications generally destroys the privilege, there is an exception if the disclosure is made to a third party who is necessary for the client to obtain legal advice. *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1424 (3d Cir. 1991). Thus, the privilege still applies to communications between an attorney and agent even if the client is not a direct participant in those communications. *Beachfront North Condominium Ass'n v. Lexington Ins. Co.*, No. 14-6706, 2015 U.S. Dist. LEXIS 102917, at *5 (D.N.J. Aug. 5, 2015). For the privilege to apply, it must be demonstrated that the disclosure to the third party was "necessary to promote the lawyer's effectiveness." *In re N.Y. Renu with Moistureloc Prod. Liab. Litig.*, No. 2:06-MN-77777-DCN, 2008 U.S. Dist. LEXIS 88515, at *19 (D.S.C. May 8, 2008). Case law indicates that the "necessity" element means more than merely useful and convenient. "The involvement of the third party must be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications." *Cavallaro v. United States*, 284 F.3d 236, 249 (1st Cir. 2002) (internal citation and quotation omitted).

Communications with consultants may fall into this category when it is demonstrated that the consultant was retained to assist the surety's counsel (either in-house or outside counsel) in providing legal advice or the purpose of the communication was to render legal advice. Courts will often look at the primary motivation of the communication and will often look at the nature of the original retention of the consultant. If the consultant was originally retained to serve a factual role, courts are reluctant to extend the privilege to materials prepared by the consultant. When, however, the consultant is acting as an agent of the client and possesses information needed by the attorney to provide legal advice, the privilege can be applied to protect communications between the consultant and the surety's counsel. In *American Manufacturers Mutual Insurance Co. v. Payton Lane Nursing Home, Inc.*, No. CV-05-5155, 2008 U.S. Dist. LEXIS 100080, at *11-12 (E.D.N.Y. Dec. 11, 2008), the court applied these principals. In that case, the court determined that communications between the surety's counsel and a construction consultant retained to manage completion of a construction fell within the scope of the attorney-client privilege. *Id.* In that case, the court determined that the consultant, whom the surety alleged was its "eyes and ears" on the construction project, was the "functional equivalent of an employee." In making its determination the court considered the following factors:

> (1) [Sureties] did not have resources to oversee the day-to-day operations of the construction project as they had no on-site representatives and no in-house construction experience.
>
> (2) [Sureties] have also demonstrated that [the consultant] had the authority to make decisions related to the construction project on [Sureties'] behalf. [The consultant's] involvement (on [Sureties'] behalf) in the negotiation of the various contracts with contractors and subcontractors had clear legal ramifications for [Sureties].

(3) Moreover, [the consultant's] services in connection with pursuing payment from [Obligee], including articulating positions on behalf of [Sureties], required consultation with and the receipt of legal advice from [Sureties'] counsel. Finally, because [the consultant] served as [Sureties'] "eyes and ears" in connection with the day-to-day supervision of the construction project, [the consultant's] representatives likely possessed information which was not possessed by anyone else employed by [Sureties]. *Id.*

The court, however, required the plaintiffs to produce a revised privilege log that "for each document for which the attorney-client privilege is claimed, the privilege log must 'identify each document with as much specificity as is needed to demonstrate that the communication was made for the purpose of obtaining or providing legal services and that the communication was intended to be and was kept confidential.'" *Id.* at *14.

2. Common Interest Doctrine.

Another exception to the waiver rule is the "common interest doctrine" or "joint defense privilege" It has been held, "[t]he common interest doctrine is 'an extension of the attorney-client privilege,'" *United States v. Dobco Inc.*, No. 22-cv-9599 (CS) (VR), 2023 U.S. Dist. LEXIS 145926, at *3 (S.D.N.Y. Aug. 17, 2023) (quoting *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989), and the work-product doctrine, *Smith v. Pergola 36 LLC*, No. 22-cv-4052, 2022 U.S. Dist. LEXIS 229914, 2022 WL 17832506, at *7 (S.D.N.Y. Dec. 21, 2022).

Thus, any document or communication potentially protected by the common interest doctrine must first satisfy the elements of the attorney-client privilege or work-product doctrine." *Id.* (citing *Smith*, 2022 U.S. Dist. LEXIS 229914, 2022 WL 17832506, at *7). "[T]he attorney-client privilege protects communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice." *United States v. Krug*, 868 F.3d 82, 86 (2d Cir. 2017). The work-product doctrine protects materials prepared in anticipation of litigation or for trial by or for another party or its representative." Fed. R. Civ. P. 26(b)(3)(A). Under the common interest doctrine, those communications voluntarily made among different parties and their attorneys (which would ordinarily waive the privilege) are not waived "where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel in the course of an ongoing common enterprise and multiple clients share a common interest about a legal matter." *Schaeffler v. United States*, 806 F.3d 34, 40 (2d Cir. 2015). *Id.*

In *Dobco*, the principal and surety sought to all communications under the "common interest" doctrine. The Court rejected a blanket application of the "common interest" doctrine. The Court noted:

> Although a common interest privilege may apply to *some* of the communications between [principal] and [surety] by virtue of their surety relationship, it does not automatically apply to every communication exchanged between them at every point in time and for all purposes. Indeed, the common interest privilege does not transform an otherwise non-privileged communication, or a document prepared in the ordinary course of business, into a protected one simply because it was exchanged between a principal and its surety. *See, e.g., United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998) (noting that work product protection will be withheld from "documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation"); *accord In re Grand Jury Subpoena Dated Oct. 22, 2021*, 282 F.3d 156, 161 (2d Cir. 2002) ("Broad categorical statements about the scope of the work product privilege are risky, as individual applications are highly fact specific."). *Id.* at *4.

In *Dobco*, to determine the application of the "common interest" doctrine, the Court stated that it needed clarity on the following information:

> (1) the chronology of when and to whom [obligee] sent its notice(s) of default, and the nature of those notices;
>
> (2) whether and when [principal] and/or [surety] retained outside counsel in response to such notices of default;
>
> (3) the date [surety] denied performance on the bond or otherwise agreed to stand behind its principal [] and deny [obliges] claim;
>
> (4) the nature of, the parties to, and the dates of, the communications and documents [principal] and [surety] seek to shield under the common interest doctrine via the attorney-client privilege, including whether the communications and documents were confidentially made between an attorney and a client for the purpose of obtaining legal advice; and
>
> (5) the nature of, the parties to, and the dates of, the communications and documents [principal] and [surety] seek to shield under the common interest doctrine via the work-product doctrine, including whether the work product was made in the ordinary course of business or in anticipation of litigation. *Id.* at *5-6

The factors identified by the Court in *Dobco* provide guidance as to when the "common interest" doctrine may apply.

D. For the Purpose of Seeking Legal Advice.

Simply because a person with the title "attorney" is a party to the communication does not automatically mean the communication is protected. *U.S. Fid. & Guar. Co. V. Barron Indus., Inc.*, 809 F.2 Supp. 355, 364 (M.D. Pa. 1992); *see also Diversified Indus., Inc. v, Meredith,* 572 F.2d 596, 602 (8th Cir 1977) ("[a] communication is not privileged simply because it is made by or to a person who happens to be a lawyer."). The attorney must have been acting in a professional legal capacity. *Vignelli v. United States*, 992 F.2d 449, 454 (2d Cir. 1993); *Carefirst of Md., Inc. v. Johnson & Johnson*, No. 2:23cv629, 2025 LX 543215, at *6 (E.D. Va. Apr. 14, 2025). "[W]here the attorney acts merely as a . . . scrivener for the client, or as a business adviser, the privilege is inapplicable." *United States v. Horvath*, 731 F.2d 557, 561 (8th Cir. 1984); *see also United States v. Spencer*, 700 F.3d 317, 320 (8th Cir. 2012) (citation omitted) ("[W]hen an attorney acts in other capacities, such as a conduit for a client's funds, as a scrivener, or as a business advisor, the privilege does not apply."). "And communications are not protected by the privilege if they are made by or to an in-house lawyer related to business matters or management decisions." *Kloss v. Argent Tr. Co.*, No. 23-cv-301 (DWF/SGE), 2025 LX 646279, at *7 (D. Minn. Apr. 1, 2025) (citing *Boca Investerings P'Ship v. United States*, 31 F. Supp. 2d 9, 11 (D.D.C. 1998)).

To determine whether an attorney is acting in a legal capacity, courts look to whether the "primary purpose" of the communication is to "solicit[] legal, rather than business, advice." *N. C. Elec. Membership Corp.*, 110 F.R.D. at 514 (citing cases); *Henson v. Wyeth Labs., Inc.*, 118 F.R.D. 584, 587 (W.D. Va. 1987) (declining to apply the privilege where the documents were prepared "primarily in a business capacity and not primarily in a legal capacity" because "business advice is not privileged."). Courts have recognized that dual-purpose communications that intertwin legal and business advice are "often too difficult, impractical and unrealistic to compartmentalize whether certain advice given to a client is legal in nature or business in nature." *La. Mun. Police Emps. Ret. Sys. V. Sealed Air Corp.*, 253 F.R.D. 300, 306 (D.N.J. 2008) (citations omitted).

Although many courts have determined that the "primary purpose" of the communication must be to obtain legal advice, other courts have adopted a broader "significant purpose test." Under the "significant purpose test," "The proponent must, that is, show that a "significant" purpose of every individual "communication" for which it asserts privilege is to secure or provide 'legal advice.'" *FTC v. Boehringer Ingelheim Pharm., Inc.*, 436 U.S. App. D.C. 266, 271, 892 F.3d 1264, 1269 (2018); *see also In re Kellogg Brown & Root*, 756 F.3d 754, 759-60, 410 U.S. App. D.C. 382 (D.C. Cir. 2014).

The Supreme Court heard oral arguments in *In re Grand Jury*, 13 F.4th 710 (9th Cir. 2021), which concerned whether to apply the "primary purpose test" rather than the broader "significant

purpose test." However, the Supreme Court dismissed the case "improvidently granted." Therefore, there remains uncertainty regarding the "primary purpose test" or the "significant purpose test" in Federal Court.

V. Work Product Doctrine

The work product doctrine, codified in Federal Rule of Civil Procedure 26(b)(3), protects documents and tangible things prepared in anticipation of litigation or for trial by or for a party or its representative, including the party's attorney, consultant, surety, indemnitor, insurer, or agent.

The work product doctrine is broader in scope than the attorney-client privilege, safeguarding the attorney's mental processes and preparing the case without undue administrative intrusion . *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 666 (2003). It encompasses any document prepared in anticipation of litigation by or for the attorney or designated representatives, including consultants. *Id.* at 662. The doctrine protects materials prepared in anticipation of litigation or for trial, but not documents prepared in the ordinary course of business, pursuant to regulatory requirements unrelated to litigation, or for other nonlitigation purposes. *United States v. Roxworthy*, 457 F.3d 590, 594 (6th Cir. 2006). A document will not be protected if it would have been prepared in substantially the same manner irrespective of the anticipated litigation. *Id.* at 594-95.

The Supreme Court articulated the essential nature of the doctrine in *Hickman v. Taylor*, 329 U.S. 495, 510-11, 91 L. Ed. 451, 67 S. Ct. 385 (1947):

> In performing his various duties, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondences, briefs, mental impressions, personal belief, and countless other tangible and intangible ways--aptly though roughly termed . . . as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial.

Now, Fed. R. Civ. P. 26(b)(3)(A) explicitly includes materials prepared by a party's "consultant, surety, indemnitor, insurer, or agent" within the scope of potential work product protection. This language confirms that consultants and sureties fall within the category of "representatives" whose litigation preparation materials may be protected. Work product protection covers documents and the compilation of materials prepared by agents of the attorney in preparation for litigation. *United States v. Richey*, 632 F.3d 559, 567 (9th Cir. 2011). The doctrine protects an attorney's trial preparation materials to preserve the integrity of the adversarial process.

In re Professionals Direct Ins. Co., 578 F.3d 432, 438 (6th Cir. 2009). The rule distinguishes between ordinary fact work product and opinion work product containing mental impressions, conclusions, opinions, or legal theories of a party's attorney or representative. If the court orders discovery of fact work product upon a showing of substantial need and undue hardship, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories concerning the litigation.

A. Anticipation of Litigation – The Motivational Factor.

Courts often apply the "because of" test to determine whether materials were prepared in anticipation of litigation. *Roxworthy*, 457 F.3d at 598-90 (6th Cir. 2006); *Richey*, 632 F.3d at 568, *Professionals Direct*, 578 F.3d at 439. The "because of" test for use under the work product doctrine, can be distinguished from the "primary purpose" test, discussed above, which depending upon the jurisdiction may be applicable to the attorney client privilege. *See In re Grand Jury*, 23 F.4th 1088, 1091-92 (9th Cir. 2022) (discussing the distinction between the "because of" and "primary purpose" tests).

Under the "because of" standard, a document qualifies for protection if it was "prepared or obtained because of the prospect of litigation." *Roxworthy*, 457 F.3d at 598-90. The test asks whether, "in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation." *Id.* The "because of" formulation considers the totality of circumstances and affords protection when it can fairly be said that the document was created because of anticipated litigation and would not have been created in substantially similar form but for the prospect of that litigation. *Richey*, 632 F.3d at 568. The test does not require litigation to be the primary or sole purpose, but asks whether litigation was a motivating factor such that the document would not have been created in essentially similar form irrespective of litigation. *In re Grand Jury*, 23 F.4th at 1091-92. The party claiming protection must establish both a subjective belief that litigation was a real possibility and that this belief was objectively reasonable. *Roxworthy*, 457 F.3d at 598-90. Courts require the party to show that anticipated litigation was the "driving force behind the preparation of each requested document." *Professionals Direct*, 578 F.3d at 439. However, even if litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of the litigation. *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998).

1. **No Protection for Documents Created in the Ordinary Course of Business.**

Generally, documents prepared in a surety's ordinary course of business are not protected under the work product doctrine because such documents would have been created whether there was a prospect of litigation or not. *See John Doe Co. v. United States*, 79 F. App'x 476, 477-78 (2d Cir. 2003); *Head v. DistTech, LLC*, No. C16-1727, 2017 U.S. Dist. LEXIS 145072, at *12 (W.D. Wash. Sept. 7, 2017); *Lynk Labs, Inc. v. Juno Lighting LLC*, No. 15 C 4833, 2016 U.S. Dist. LEXIS 145853, at *6-8 (N.D. Ill. Oct. 21, 2016). Because insurance companies handle claims in their regular course of business, some courts have adopted a rebuttable presumption that work product does not protect an investigatory file before a final decision is made. *See Milinazzo v. State Farm Ins. Co.*, 247 F.R.D. 691, 700-01 (S.D. Fla. 2007); *U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*,

247 F.R.D. 656, 659 (D. Kan. 2007); *S.D. Warren Co. v. E. Elec. Corp.*, 201 F.R.D. 280, 285 (D. Me. 2001). For example, the court in *Harper v. Auto-Owners Insurance Co.*, determined:

> [Rule] 26(b)(3) requires that a document or thing produced or used by an insurer to evaluate an insured's claim in order to arrive at a claims decision in the ordinary and regular course of business is not work product regardless of the fact that it was produced after litigation was reasonably anticipated. It is presumed that a document or thing prepared before a final decision was reached on an insured's claim, and which constitutes part of the factual inquiry into or evaluation of that claim, was prepared in the ordinary and routine course of the insurer's business of claim determination and is not work product. 138 F.R.D. 655, 663-64 (S.D. Ind. 1991).

It is also reasonable to assume that documents prepared after the denial of a claim have been prepared in anticipation of litigation and are protected from disclosure under the work product doctrine. *See Schwarz & Schwarz of Va., L.L.C. v. Certain Underwriters at Lloyd's London Who Subscribed to Policy No. NC959*, No. 6:07cv00042, 2009 U.S. Dist. LEXIS 33019, at *11 (W.D. Va. Apr. 17, 2009).

B. Application of the Work Product Doctrine to the Surety and its Consultants.

In *United States v. Dobco Inc.*, No. 22-cv-9599 (CS) (VR), 2023 U.S. Dist. LEXIS 145926, at *6 (S.D.N.Y. Aug. 17, 2023), the Court addressed whether documents created during a surety's investigation of a performance bond claim were protected by the work-product doctrine. The Court began its analysis by recognizing that "there may be distinctions between an insurer and a surety for purposes of analyzing whether [Surety's] investigation is privileged." *Id.* (citing, *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 140 n.19, 83 S. Ct. 232, 9 L. Ed. 2d 190 (1962) ("[S]uretyship is not insurance.")). The Court then analogized a surety's investigation to an insurer's claim investigation and applied the same general legal principles.

> In both the insurer and surety contexts, "it is often difficult to determine when work product protection might apply." *99 Wall Dev. Inc. v. Allied World Specialty Ins. Co.*, No. 18-cv-126, 2020 U.S. Dist. LEXIS 91888, 2020 WL 2730944, at *7 (S.D.N.Y. May 26, 2020). "This is because it is routine for insurance companies to investigate claims while at the same time the potential for litigation is ever present." *Id.* Similarly, a surety has a duty to investigate claims, *see U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, 369 F.3d 34, 80 (2d Cir. 2004),**1** and, at the same time, the potential [*7] for litigation exists. *See United States v. Seaboard Sur. Co.*, 817 F.2d 956, 959 (2d Cir. 1987) ("[A] surety has the option, when its principal is default-terminated, of either coming in and completing the project or paying the government its damages, essentially the cost of completion. A surety may, of course, also challenge the propriety of the default termination, thereby, in effect, denying liability on the bond.") (citation omitted). *Id.*

The Court recognized that some courts have held that once a claim is denied there is a presumption of litigation, while other courts have employed a more case-by-case analysis. The

Dobco Court sought to undertake a case-by-case analysis but did not have sufficient information at the time. The Cour then identified the following factors to consider:

> (1) whether [surety] has a statutory duty to investigate [obligee's] claim under the performance bond;
>
> (2) when [surety] learned of the notice(s) of default;
>
> (3) when [surety] conducted its investigation and for what purpose;
>
> (4) if and when [surety] hired outside counsel in connection with the investigation;
>
> (5) when [surety] denied performance on the bond or otherwise agreed to stand behind its principal [principal] and deny [obligee's] claim;
>
> (6) whether, and to what extent, [surety's] investigation differed from those it performed in the ordinary course of its business; and
>
> (7) whether [surety] believes any meaningful distinctions exist between an insurer and a surety as to the application of the work-product doctrine to investigation-related materials. *Dobco*, 2023 U.S. Dist. LEXIS 145926, at *8 (S.D.N.Y. Aug. 17, 2023).

In *Dobco*, the surety also sought protection of its consultant's documents pursuant to what it called the consulting expert privilege. The Court first rejected the surety's contention that all communications between it and its consultants were protected. The Court held, Although the consulting expert privilege may be applicable to some or all of these experts, the Court agrees with [obligee] that [principal] and [surety] cannot conceal prior communications with professionals engaged in the ordinary course of business by transforming them into non-testifying experts. Instead, the Court must examine the particular facts to determine whether the experts were retained or specially employed in anticipation of litigation." *Dobco*, 2023 U.S. Dist. LEXIS 145926, at *9-10). The court then identified the following factors it was going to consider:

> (1) when and by whom each of the experts (i.e., [listing consultants] were retained and for what purpose;
>
> (2) whether any reports from the foregoing experts were provided to [oblige], and if so, which reports were provided and when; and
>
> (3) whether and to what extent any of the experts' reports became discoverable based on [principal's] specific reliance upon those reports in the Complaint.

In the takeover context, the court in *Hartford Fire Insurance Co. v. Harris Co. of Fort Smith*, No. 2:14-CV-02096, 2015 U.S. Dist. LEXIS 92607 (W.D. Ark. July 16, 2015), the court analyzed whether the work product doctrine applied to certain documents in a surety's

investigative files. In that case, the court distinguished documents that were created "in anticipated of subrogation litigation, versus documents that it generated in the normal course of its role as successor general contractor." The court held that the documents created in the surety's role as successor general contractor "are not necessarily privileged, as they were not necessarily generated 'because of the prospect of litigation,' but instead during the ordinary course of business. However, when [surety] stepped out of its role as general contractor and turned its attention to the pursuit of subrogation remedies to recover monies spent in performance of the bond, the documents generated from that point onward were likely created in anticipation of trial and thus protected by the work product privilege." *Id.* at *4-5.

The issue of whether the work product doctrine protected a surety consultants' documents also arose in *United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, 2000 U.S. Dist. LEXIS 7939, at *36 (S.D.N.Y. June 7, 2000). In that case, after the principal was declared in default, the sureties undertook an investigation with the assistance of an engineering consultant. After investigation, the sureties determined that the default was improper and declined to make payment under the performance bonds. *Id.* at *29-30. In the subsequent litigation, the sureties objected to a request for materials prepared by the sureties' counsel and consultant during the investigation. The sureties contended that counsel and the consultant were retained in anticipation of litigation. *Id.* The court rejected that argument and noted, "[t]he retention of an attorney is one indicia of the anticipation of litigation. Nevertheless, it is not dispositive. While the retention of counsel is a factor to consider, . . . an insurance company may not insulate itself from discovery by hiring an attorney to conduct ordinary claims investigation." *Id.* * 36 (internal citation omitted). The court also noted, "[s]imply because an attorney participated in and supervised this process does not transform investigative documents into work product. By all accounts, there were complex issues to be addressed, regardless of litigation, for which an attorney knowledgeable in suretyship issues…" *Id.* at *44. The court determined that until the decision to deny the claim was made, the sureties' investigation was performed to make a business decision as to which option under the bond should be taken. *Id.* at *36. Therefore, the documents prepared during the investigation were made in the ordinary course of business and not protected by the work product doctrine. *Id.*

In *Safeco Ins. Co. of Am. V. M.E.S., Inc.*, 289 F.R.D. 41 (E.D.N.Y. 2011), the court analyzed whether loss exposure reports prepared by a consultant were protected by the work product doctrine. The court held that the "pertinent question remains to be whether, under the specific facts of the case, the claims analysis would have been created because of anticipated litigation or whether it would have been created in the ordinary course of business." *Id.* at 50. The court held that the surety failed to carry its burden to demonstrate that the documents were protected by the work product doctrine. The count noted that the surety raised the work product doctrine in a conclusory fashion and did not offer specific facts to demonstrate the doctrine's applicability. The court also noted that the consultant was also hired in a capacity as a construction manager.

A case where the court did find that a consultant's documents were protected by the work product doctrine is *William A. Gross Constr. Ass'n v. Am. Mfrs. Mut. Ins. Co*., 262 F.R.D. 354 (S.D.N.Y. 2009). There the court determined that documents created by a consultant was prepared in anticipation of litigation and was entitled to work product protection. In that case, the consultant was not involved with construction management work and did not have contact with

contractors. Moreover, the court noted that unlike the continuous involvement of the construction management group, the claims consultant was "involved [in] a short-term assignment that was scheduled to end . . . about three weeks before [the] litigation commenced." *Id.* at 362-63. Additionally, the consultant's analysis included "a particular possible litigation position" and "performed a litigation analysis" of certain documents. *Id*. at 364.

VI. Privilege Logs.

In order to preserve protection under the attorney-client privilege or work product doctrine, a party must prepare a privilege log in accordance with Fed. R. Civ. P. 26(B)(5)(A), in federal court or the state law equivalent in state court. Fed. R. Civ. P. 26(B)(5)(A) provides:

> (5) *Claiming Privilege or Protecting Trial-Preparation Materials.*
>
> (A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:
> (i) expressly make the claim; and
> (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

As the Court in *Safeco* recognized:

> "As the Second Circuit has repeatedly noted, 'the burden is on a party claiming the protection of a privilege to establish those facts that are the essential elements of the privileged relationship." *Bowne*, 150 F.R.D. at 470 (quoting *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d. Cir.), *cert. denied*, 481 U.S. 1015, 107 S. Ct. 1891, 95 L. Ed. 2d 498 (1987)). "[T]he party asserting either the attorney-client privilege or attorney work product protection has the 'heavy burden' of proving that privilege or protection applies to the documents or communications at issue." *Abu Dhabi*, 2011 U.S. Dist. LEXIS 116850, 2011 WL 4716334, at *1 (citations omitted). "This burden can be met only by an evidentiary showing based on competent evidence . . . and cannot be 'discharged by mere conclusory or ipse dixit assertions.'" *Bowne*, 150 F.R.D. at 470 (quoting *von Bulow*, 811 F.2d at 144 & 146) (internal citations omitted).
>
> Courts thus require a party to prove the factual basis for the claim of privilege or work-product protection. *See Bowne*, 150 F.R.D. at 473. This showing could be based on affidavits or, when a large number of documents are at issue, identified in a privilege log. *See id*. at 473-74. If this showing is made through a privilege log, then it must be "adequately detailed" and used "in conjunction with evidentiary submissions to fill in any factual gaps." *Id*. at 474. A privilege log is "adequately detailed" if, "as to each document, it sets forth specific facts that, if credited, would suffice to establish each element of the privilege or immunity." *Golden Trade S.r.L.*

v. Lee Apparel Co. 92 CV 1667 (JMC), 1992 U.S. Dist. LEXIS 17739, 1992 WL 367070, at *5 (S.D.N.Y. Nov. 20, 1992) (quoting *von Bulow*, 811 F.2d at 146). "[C]onclusory invocation[s] of the privilege or work-product rule" will not suffice; rather, "[t]he focus in on the specific descriptive portion of the log." *Golden Trade*, 1992 U.S. Dist. LEXIS 17739, 1992 WL 367070, at *5. *Safeco*, 289 F.R.D. at, 46-47, 46-47 (E.D.N.Y. 2011).

Many courts have local rules addressing privilege logs and privilege log requirements are also often set forth in case management orders or divisional standing orders. A typical standing order may require:

a. The name and job title or capacity of the provider of the information or author of the document;
b. The name and job title or capacity of each recipient of the information or document;
c. The date the information was learned or the document was prepared and, if different, the date(s) on which it was sent to or shared with persons other than its provider(s) or author(s);
d. The title and/or description of the information or document;
e. The subject matter addressed in the information or document;
f. The purpose(s) for which it was prepared or communicated; and
g. The specific basis for the claim that it is privileged or protected.

Standing orders and local rules may also provide specific procedures for challenging documents for which a privilege is claimed. Therefore, it is imperative that counsel be familiar with local rules and standing orders to ensure protection of the attorney-client privilege or work product doctrine.

VII. Experts in Litigation.

Once litigation ensues, a surety will often retain testifying experts and non-testifying experts or consultants. Whether such experts' or consultants' files will be subject to production depends upon whether they have been identified as testifying or consulting experts.

A. Consulting Experts.

Under Federal Rule of Civil Procedure 26(b)(4)(D), "[o]rdinarily, a party may not . . . discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial." "The rule is intended to allow litigants to consult experts in order to evaluate a claim without fear that every consultation with an expert may yield grist for the adversary's mill." *Agron v. Trs. of Columbia Univ.*, 176 F.R.D. 445, 449 (S.D.N.Y. 1997).

To be considered a consulting-only expert, a consultant must have been "retained or specially employed . . . in anticipation of litigation." *Emerson Elec. Co. v. Suzhou Cleva Elec. Appliance Co*., No. 4:13-CV-01043-SPM, 2014 U.S. Dist. LEXIS 155404, at *7 (E.D. Mo. Nov.

3, 2014) (requiring the party seeking a protective order under Rule 26(b)(4)(D) to show that the alleged consulting-only expert was retained in anticipation of litigation). The protection under Fed. R. Civ. P. 26(b)(4) generally includes documents reviewed by the consultant, the notes taken by the consultant, and the opinions and conclusions reached by the consultant. There are, however, exceptions to this protection, including a showing of exceptional circumstances. Additionally, the particular state's rules may provide for lesser protection.

B. Testifying Experts.

Unlike consulting experts, testifying experts must disclose facts, documents, data, and treatises relied in forming their opinions. Fed. R. Civ. P. 26(a)(2)(B). Under the Federal Rules a testifying expert must also prepare a written report. However, some states, such as Missouri, do not require testifying experts to prepare reports, and an expert's opinions are discovered through depositions. Draft reports are protected from disclosure under the Federal Rules. However, some states may not protect draft reports.

Again, the particular jurisdiction may provide for lesser protection than the Federal Rules related to communications with testifying experts. Fed. R. Civ. P. 26(a)(2)(C) explicitly protects communications with testifying experts, regardless of the form, unless the communications:

> (i) relate to compensation for the expert's study or testimony;
> (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
> (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

Missouri, for example, does not shield communications with experts from disclosure, so it is important to consider the laws of the particular jurisdiction where litigation may occur.

VIII. Conclusion.

A surety's ability to protect information pursuant to the attorney-client privilege, the work product doctrine and common interest doctrine will vary based upon the jurisdiction, the nature of the particular controversy, and the way information is shared with third parties. Sureties, their counsel, and consultants should consider in advance how their actions at various stages of a claim will impact their ability to assert these protections whenever litigation commences.

Who Owns the Clock?
Scheduling and Delay During the Performance Bond Claim Process

A contractor default creates two timelines. The first timeline relates to the construction schedule: the network of activities, milestones, and completion dates that governed the project before the default. The second is the claim-resolution timeline: the sequence of notices, investigation, remedy selection, completion planning, and mobilization that begins when the obligee invokes the performance bond. The two timelines proceed simultaneously, and they should be analyzed together. Only then can one determine who bears responsibility for the additional delay that accumulates while the surety claim is being presented, investigated, and resolved.

The answer cannot always be determined merely by counting the days between the contractor's termination and the commencement of replacement work. Some of those days may reflect delay that the principal had already caused and could not have avoided. Others may result from the obligee's failure to provide timely notice, incomplete claim information, owner-caused disruption, or unilateral completion efforts that interfere with the surety's contractual options. Still others may be attributable to a reasonable investigation or to the unavoidable time required for a completion contractor to understand, price, bond, and mobilize unfinished work. In some cases, however, the surety's indecision or failure to act may itself extend the project's critical path.

A more useful analysis divides the post-default period into discrete windows and assigns responsibility according to contractual obligation, control, and critical-path causation. Under that approach, the surety does not automatically inherit every day of delay caused by its principal, but neither is the period devoted to investigating and responding to the claim categorically immune from scrutiny. The obligee must preserve the surety's performance options and provide the information needed for a timely decision. The surety, in turn, should treat the claim as a schedule-recovery problem rather than merely a coverage investigation. Ultimately, compensable delay should be measured by the incremental effect of each party's conduct on the project's actual path to completion.

I. The Performance Bond Defines the Claim Timeline

Except in the case of a true indemnity bond, a performance bond is not simply an agreement to reimburse the obligee after the project is finished. Depending on its language, the bond may give the surety the right to participate actively in responding to the principal's default. In a standard AIA A312-2010 performance bond, for

example, the surety may arrange for the principal to continue, enter into a takeover agreement with the obligee and complete through a completion contractor, tender a replacement contractor, or decline operational involvement and determine what amount, if any, it owes. Each option has different implications for cost, control, and time.

The AIA A312–2010 performance bond, for example, illustrates the relationship between the obligee's procedural duties and the surety's performance options. In general terms, the obligee must not itself be in default, must notify the principal and surety when it is considering a contractor default, must declare the principal in default and terminate the bonded contract, and must agree to commit the remaining contract balance as required by the bond. Once those conditions are satisfied, the form directs the surety to proceed promptly by selecting one of several performance or payment options. If the surety does not proceed with reasonable promptness, the obligee may give an additional written demand that starts a seven-day period before the surety is deemed in default under the bond. AIA A312–2010 §§ 3–6.

These procedures create a deliberate sequence. The surety is not obligated to choose a completion option before it receives sufficient notice of the default, understands what work remains, and knows what contract funds will be available. Conversely, the obligee cannot ordinarily complete the work first and present the surety with a bill later if doing so destroys the options for which the surety bargained. The bond therefore establishes a claim-resolution schedule even though it does not prescribe a specific number of days for every step.

Courts frequently treat compliance with this sequence as a condition precedent to the surety's obligation. In *W. Sur. Co. v. U.S. Eng'g Const., LLC*, 955 F.3d 100, 105–06 (D.C. Cir. 2020), the obligee terminated its subcontractor, completed the remaining work, and waited almost nine months before notifying the surety. Although the bond did not state an express deadline for the termination notice, the D.C. Circuit held that timely notice before unilateral self-help was necessarily implied. Otherwise, the bond's performance options would be largely meaningless. The surety was discharged because it had been denied the opportunity to mitigate its losses.

Other courts have followed the same reasoning. In *Wildewood Operating Co. v. WRV Holdings, LLC*, 303 A.3d 1273, 1283–85 (Md. App. Ct. 2023), the bonded work had already been performed by a third party before the obligee formally declared default and demanded performance from the surety. The Maryland Appellate Court held that the obligee's delayed compliance deprived the surety of its ability to select a remedy and constituted prejudice as a matter of law.

These decisions show why scheduling cannot be separated from bond procedure. Timely notice matters not merely because the bond demands a particular formality. It matters because the surety's opportunity to mitigate delay and completion costs disappears as work proceeds without it.

II. The Obligee Moves First

The obligee nevertheless faces a difficult choice. A termination for default is a serious act. If the obligee terminates without adequate contractual grounds or fails to comply with applicable cure procedures, the termination may be converted into a termination for convenience or treated as a breach. Because under most bond forms, the surety's obligation depends on a valid principal default and proper termination, an improper termination can also defeat the bond claim. The obligee therefore has good reason to proceed carefully.

The longer the obligee tolerates deficient or delayed performance, the more the project may deteriorate. The contractor may consume remaining float, lose subcontractors, exhaust contract funds, or create defective work that must later be remediated. Yet if the obligee supplements the contractor, enters replacement agreements, or permits the bonded scope to reach completion before involving the surety, it may extinguish or diminish the very bond rights it hoped to preserve.

The New York Appellate Division's decision in *JDS Development LLC v. Parkside Construction Builders Corp.*, 231 A.D.3d 223 (N.Y. App. Div. 2024), presents the dilemma in unusually stark terms. The principal was more than a year late in completing the bonded portion of a high-rise project. The obligee considered replacing the principal but concluded that doing so would create an even greater schedule impact because a replacement contractor could not mobilize immediately. It therefore continued with the principal, paid it in full for the bonded work, and did not invoke the bond procedures until approximately six months after that work had been completed. The obligee later sought approximately $78 million in delay-related costs under a bond with a penal sum of nearly $25 million. The court held that the claim was barred because the obligee had not complied with the bond's notice and termination procedures while the bonded work remained in progress.

The obligee's decision in *JDS Development* may have been rational from a project-management perspective. Terminating the contractor could have made the construction delay worse. But the decision also meant that the obligee chose continued contractor performance over the performance remedies available under the bond. The court refused to permit the obligee to retain the operational benefit of that choice while later seeking the bond's financial protection without satisfying its conditions.

III. The Surety's Investigation

Once the bond is properly triggered, the surety has a legitimate need to investigate, especially if the purported default is disputed. The principal may contend that the obligee failed to make payment, interfered with performance, issued defective plans, delayed access, mismanaged predecessor work, or any other number of defenses. The surety must also determine the remaining scope of work, available contract balance, status of subcontractors and suppliers, defective work, completion cost, schedule status, and feasibility of the available bond options.

The need to investigate, however, does not answer how long the investigation may take. For example, the AIA A312 form uses standards such as "promptly," "reasonable promptness," and "as soon as practicable," rather than a fixed investigation period. Those standards should be applied in light of the project's circumstances. A thirty-day investigation may be reasonable where productive work is continuing and the claimed default involves disputed accounting issues. The same period may be entirely inadequate where the issues involve alleged defects in the work or design, the default involves specialized expertise, or any other number of factors that make the investigation more time-intensive.

A surety should not be charged with delay created by the obligee's failure to provide essential information. A demand letter accompanied only by a conclusory assertion of default may not permit a responsible remedy election. But the surety should not convert its right to investigate into an indefinite sequence of document requests. It should identify the core information required for an initial decision, distinguish essential information from material relevant only to final quantum, and make interim decisions where possible.

The claim investigation should itself be scheduled. At the beginning of the process, the surety and obligee should establish target dates for the site inspection, principal interview, production of schedule and cost records, preparation of the remaining-scope estimate, receipt of completion proposals, remedy election, and mobilization. The schedule should identify which decisions depend on unresolved information and who is responsible for providing it. As facts change, the parties should update the claim schedule in the same way that a contractor updates a construction schedule. This does not transform the surety into the project scheduler before it elects a performance option. It recognizes that claim handling consumes time and that the surety should understand the schedule consequence of each investigative step.

IV. Allocating the Post-Default Period

Treating the bond claim as a second schedule permits the parties and the court to divide the delay into analytically distinct windows.

A. Delay Before the Bond Is Triggered

The first window may consist of delay caused by the principal before the obligee completes the steps necessary to trigger the surety's obligation. This may include late procurement, insufficient manpower, defective work, poor sequencing, abandonment, or failure to meet contractual milestones.

The surety's potential responsibility for this period depends on the language of the bond and bonded contract. Some bonds expressly encompass liquidated damages or actual delay damages caused by the principal's delayed performance. Others are more narrowly written around completion costs. Courts have therefore reached different outcomes based on the particular bond language. The Florida Supreme Court held in *American Home Assurance Co. v. Larkin General Hospital, Ltd.* 593 So. 2d 195 (Fla. 1992), that a surety could not be held liable for contractor-caused delay damages where the bond did not expressly cover them. By contrast, the California Supreme Court concluded in *Cates Construction, Inc. v. Talbot Partners*, 21 Cal. 4th 28 (1999), that the language of the bond at issue obligated the surety to pay damages attributable to the principal's failure to complete by the agreed date.

Even when contractor-caused delay is covered, it remains distinct from delay caused by the surety's own claim handling. Combining the two may lead to the mistaken assertion that every day after termination is a new surety breach.

B. The Notice Gap

The second window begins when the obligee knows that a serious default exists but has not yet provided the notice required by the bond. Delay during this period is ordinarily difficult to attribute to the surety because the surety has not been given the contractual opportunity to act.

The obligee may be responsible for some or all of this period if it silently supplements the work, negotiates replacement contracts, allows the bonded scope to be completed, or withholds information that would have permitted earlier surety involvement. The consequences may extend beyond a reduction of damages. Depending on the bond and governing law, failure to provide timely notice may discharge the surety entirely. However, not every act taken before formal termination necessarily obtains that result. The obligee may need to protect life and safety, secure the site, prevent water intrusion, preserve materials, or perform

emergency work. The parties should distinguish emergency mitigation from a wholesale assumption of the principal's scope. Prompt notice of any emergency action allows the surety to evaluate whether the work preserves the project or improperly forecloses a bond remedy.

C. Reasonable Investigation Time

The third window is the period reasonably necessary for the surety to investigate and select a response. The existence of this window reflects the basic structure of suretyship. The surety is not required to accept either the obligee's or the principal's account without inquiry, and immediate payment or takeover may be imprudent.

Reasonable investigation time should be analyzed to determine whether it constitutes compensable surety delay. If a diligent investigation is necessary because the default, remaining scope, contract balance, or obligee performance is genuinely disputed, some passage of time is inherent in the bond process. The relevant question is whether that period was reasonably necessary under the circumstances and whether the project would have completed sooner even if the surety had selected its eventual remedy earlier.

D. Unreasonable Indecision or Failure to Act

A fourth window may arise when the surety has sufficient information to proceed but fails to make a decision with reasonable promptness. Potential factors could include repeated requests for information already supplied, failure to retain necessary technical assistance, refusal to identify the issues preventing a decision, prolonged internal approval without project-related justification, or failure to consider temporary measures despite an obvious critical-path emergency.

Under the AIA A312–2010 form, the obligee ordinarily must provide the additional Section 6 notice before the surety is deemed in default for failure to proceed with reasonable promptness. That notice is not a substitute for the initial triggering requirements. It is a final demand made after those conditions have been satisfied and the surety has failed to act. A claimant that omits this additional step may create another avoidable condition-precedent dispute.

Even after a surety breach is established, the obligee must prove causation. The period of unreasonable inaction is not necessarily equal to the resulting project delay. Work elsewhere on the project may have continued, replacement procurement may have required the same period regardless of the surety's conduct, or another independent delay may have controlled completion.

E. Completion and Remobilization

The final major window begins when a completion path has been selected. A takeover, tender, or obligee-completion agreement does not cause the remaining work to restart instantaneously. The successor must investigate existing conditions, validate completed work, resolve design and quality issues, secure labor and materials, negotiate subcontracts, obtain required bonds and insurance, and develop a workable schedule.

Some transition delay may be an unavoidable consequence of the principal's default. Other delay may arise from the surety's chosen remedy or the completion contractor's performance. The analysis should examine whether the remedy selected was reasonable when chosen, whether the parties cooperated with mobilization, and whether the completion effort was prosecuted in accordance with a credible recovery schedule.

The fastest theoretical option is not always the best scheduling decision. Financing the principal may preserve manpower and project knowledge but leave failed management in place. A takeover may give the surety greater control but require substantial contracting work. A tender may transfer operational responsibility efficiently but still require pricing, obligee concurrence, and bonding. Allowing the obligee to complete may be fastest in some circumstances, particularly where the obligee has already developed a replacement plan, but the surety will require cost controls and protection against unrelated or betterment expenses. Remedy selection should therefore consider the expected completion date and execution risk, not merely the lowest initial completion estimate.

V. Proving That Claim Handling Delayed Completion

An obligee seeking damages for surety-caused delay must do more than demonstrate that time passed while the claim was pending. It must connect the surety's conduct to the project's controlling sequence of work. The starting point is the most reliable contemporaneous schedule available when the principal default occurred. That may be the accepted baseline schedule, but on a troubled project the baseline may no longer describe the sequence actually controlling completion. Updated schedules, progress records, meeting minutes, daily reports, procurement logs, and contemporaneous recovery plans may provide a better picture of the critical path at default.

The schedule analysis should address at least five questions. First, what work remained when the bond was triggered? The analysis should distinguish incomplete

work, defective work requiring correction, disputed scope, and work that had been reassigned before the surety became involved.

Second, what sequence controlled the earliest achievable completion date? A defaulted trade may be important without being critical. If other work independently prevented project completion, the bond-claim period may have consumed float or complicated the project without extending final completion.

Third, when did the alleged surety-caused delay begin and end? A generalized assertion that the surety delayed the project "during its investigation" is insufficient. The analysis should identify the date by which a reasonable surety would have made the relevant decision and the date on which the delaying condition actually ended.

Fourth, what would have happened absent the challenged conduct? The obligee should identify the counterfactual completion plan that could reasonably have been implemented. That requires more than assuming that a replacement contractor would have started immediately. The analysis must account for procurement, contracting, investigation of existing work, bonding, mobilization, and material lead times.

Fifth, were there concurrent causes of delay? The principal's defective work, the obligee's design changes, late decisions by the architect, delayed work by other contractors, permitting issues, or material shortages may have affected the same period. The legal treatment of concurrent delay varies, but factually the schedule analysis should identify all causes operating during each window rather than assigning the entire period to the bond claim.

A windows analysis is often well suited to this task because the critical path may change during the claim and completion process. For example, the initial critical issue may be drying-in the building, followed by energization, equipment procurement, testing, and final inspections. An investigative delay that affects one window may have no effect in another. The purpose of the analysis is not to produce an artificially precise number of obligee-caused or surety-caused days. It is to develop a defensible explanation of which decisions affected completion, during what periods, and by how much.

VI. Recoverable Delay Damages and Contractual Limits

After causation is established, the obligee must identify which damages fall within the bond. The AIA A312–2010 form expressly addresses certain additional legal, design-professional, and delay costs resulting from the contractor's default and from the surety's action or failure to act. It also addresses liquidated damages

or, where the construction contract does not specify liquidated damages, actual damages caused by delayed performance or nonperformance. AIA A312–2010 § 7.

The obligee should separate damages caused by the principal from incremental damages allegedly caused by the surety. A surety may be responsible under the bond for covered contractor delay without having mishandled the claim. Conversely, damages from the surety's own breach may arise only after the surety failed to proceed as the bond required. Combining the categories obscures the contractual basis and causation for each component.

The incorporated construction contract may expand or restrict the principal's, and consequently the surety's, responsibilities. Liquidated damages clauses, consequential damage waivers, no-damage-for-delay clauses, notice provisions, limitations of liability, and definitions of substantial completion may all affect recovery. The bond's penal sum must also be considered, together with any language addressing whether the cap applies differently depending on the remedy the surety elects.

A surety's responsibilities are generally not greater than those stated in the bond and incorporated contract. At the same time, a surety that independently breaches the bond should not assume that every consequence is necessarily treated in the same manner as the principal's underlying default. The availability of extra-contractual remedies, damages exceeding the penal sum, attorney's fees, or bad-faith damages varies significantly by jurisdiction. Those questions should be analyzed separately from whether project delay was actually caused.

VII. Managing the Claim as a Schedule-Recovery Project

The best opportunity to reduce delay occurs before the parties begin litigating who caused it. Several practices can make the claim process more efficient and create a clearer record if a dispute follows. The obligee should provide early notice when default is being seriously considered. Its initial submission should include the bonded contract and bond, default and cure notices, payment history, current contract balance, schedule updates, daily reports, pending change orders, deficiency lists, remaining-scope description, procurement status, and any proposed emergency or completion work. The obligee should identify which activities it believes are critical and the date by which a surety decision is needed to avoid further delay.

The surety should respond by identifying its claim team, acknowledging the procedural status of the claim, requesting genuinely necessary information, and establishing target dates for investigation and remedy selection. It should promptly retain scheduling, engineering, or estimating assistance where the project requires it.

If information is missing, the surety should explain how the missing information affects its ability to choose among its bond options.

The principal should be required to produce its schedules, subcontract records, procurement logs, cost reports, correspondence, and recovery plans promptly. Because the principal may dispute the declaration of default, its participation should not be understood as an admission. Nevertheless, the surety cannot effectively evaluate financing, takeover, or tender options without reliable information from the contractor.

If feasible, the parties should also develop an interim work protocol. That protocol can authorize emergency measures, preservation work, limited supplementation, continued procurement of long-lead items, or payment of critical subcontractors without waiving the parties' positions. The objective is to prevent avoidable project deterioration while preserving the surety's ability to investigate and elect a remedy.

Finally, for projects of appropriate size and complexity, the surety should consider preparing a completion schedule as part of its remedy evaluation. A completion estimate that addresses only cost is incomplete. Each proposed option should be evaluated by expected mobilization date, achievable completion date, major schedule risks, critical procurement, and the assumptions necessary to meet the projected dates.

VIII. Conclusion

A performance-bond default does not stop the project clock. The project continues to incur costs, consume float, lose labor, encounter weather, and affect successor activities while the obligee, principal, and surety determine what will happen next. Yet the passage of time alone does not establish who is responsible for the resulting delay.

The better approach recognizes two interrelated schedules. The construction schedule establishes what work controlled completion and how the principal's default affected that work. The claim-resolution schedule establishes when notice was given, what information was exchanged, how long the surety reasonably required to investigate, when a remedy should have been selected, and how quickly completion could realistically begin.

Responsibility should then be allocated by discrete delay windows. The principal may be responsible for certain delays preceding default. The obligee may bear the consequences of delayed notice, premature self-help, owner default, or interference with completion. A reasonable investigation period is an inherent part

of the bond process and in certain circumstances, may constitute compensable delay in favor of the surety. The central question is not simply how many days elapsed after default. It is who controlled each period, what each party was contractually required to do, and whether the challenged conduct actually changed the project's completion date.

ESI MANAGEMENT AND STREAMLINING DISCOVERY

I. INTRODUCTION

A. Overview of ESI in Modern Litigation

Electronically stored information ("ESI") is no longer a specialized category of evidence encountered in a subset of cases; it is the default form in which nearly all modern business and personal communication is created, stored, and exchanged. Email, cloud-based document platforms, chat and collaboration tools, mobile devices, and enterprise databases now generate the evidentiary record that once consisted primarily of paper files. As a result, virtually every civil matter of any complexity now involves the identification, preservation, collection, review, and production of ESI in some form.

This shift has changed both the mechanics and the stakes of discovery. Counsel can no longer treat electronic discovery as a back-office function to be handled entirely by vendors after the pleadings are filed. Courts increasingly expect litigants to have a functional understanding of where relevant information lives, how it is generated and preserved, and how it can be produced in a usable and defensible form. Missteps at any stage of that process can lead to discovery disputes, motions to compel, adverse inferences, or sanctions.

B. The Cost and Complexity Problem: Why Discovery Streamlining Matters

The volume and variety of ESI have made discovery one of the largest cost drivers in modern litigation. Every additional custodian, data source, or communication platform multiplies the potential universe of discoverable information and the corresponding cost of collection, processing, and review. Left unmanaged, this dynamic can make discovery disproportionate to the value or complexity of the underlying dispute, a result the Federal Rules of Civil Procedure are specifically designed to prevent.

Streamlining discovery is not simply a matter of doing less. It requires early, deliberate choices about scope, methodology, and sequencing so that the effort expended is proportional to what is actually at stake in the case. Well-drafted ESI agreements, defensible collection methodologies, disciplined search and review protocols, and realistic cost controls all serve the same underlying goal: allowing the parties and the court to reach the merits of a dispute without discovery becoming the dispute itself.

II. ESI FUNDAMENTALS

Electronically stored information is now the ordinary evidentiary record of business. The practical challenge is no longer deciding whether electronic information is discoverable; it is identifying the right sources, preserving the right context, and selecting a collection and production method that is proportional to the dispute. A sound ESI process therefore begins with a shared technical vocabulary and a disciplined framework for moving from information governance to presentation.

A. What Is ESI? Defining Electronically Stored Information

Federal Rule of Civil Procedure 34 uses an intentionally broad formulation. It reaches writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained. The rule is technology-neutral: email, a spreadsheet, a database table, a collaboration message, a mobile-device record, a cloud audit event, and an application log may all be ESI. The same rule also

recognizes that the form of production matters, because ESI ordinarily should be produced as maintained or in another reasonably usable form. See Fed. R. Civ. P. 34(a)(1)(A), 34(b)(2)(E).

ESI is more than what a user sees on the screen. A single communication may include visible content, attachments or linked files, sender and recipient identifiers, timestamps, thread structure, edits, reactions, permissions, audit events, and system-level records. Some of that information resides inside the file or message; some exists only in the source system. Treating a printout, screenshot, or flattened PDF as the whole record can therefore remove information needed for searching, sorting, deduplication, authentication, or explanation of the item.

Native data is maintained in the format used by the originating application or system. Near-native data is exported in a structured form that preserves much of the source content and metadata. A rendered image or PDF is a visual representation. A load file carries fielded metadata and relationships into a review platform. A forensic image is a sector-by-sector copy of a storage medium. These are not interchangeable products; the correct choice depends on the source, the issues, and the agreed form of production.

The word "original" also requires care. Under Federal Rule of Evidence 1001(d), an original of ESI includes any printout (or other output readable by sight) if it accurately reflects the information. That evidentiary rule does not mean that every printout preserves the same metadata or investigative value as the source data. A rendered copy can accurately present content while still omitting system context. Practitioners should separate three questions: whether the content is accurate, whether the data is complete for the intended use, and whether the source and handling can be explained.

B. The Electronic Discovery Reference Model (EDRM) as a Framework

The EDRM provides a common map for the ESI lifecycle: Information Governance, Identification, Preservation, Collection, Processing, Review, Analysis, Production, and Presentation. The current model is conceptual and iterative, not a rigid waterfall. Teams may move backward and forward as facts develop, search results are tested, new custodians emerge, or production issues require a revised approach. (EDRM Model 2.0, Version 2023.)

EDRM stage	Central question	Common failure
Information Governance	What information exists, where is it kept, who controls it, and how is it retained?	Unknown systems, inconsistent retention, or data that cannot be located promptly.
Identification	Which custodians, systems, date ranges, and data types may contain relevant information?	Over-collection, missed nontraditional sources, or no distinction between likely and merely possible sources.
Preservation	What must be protected from alteration or deletion, and how will compliance be monitored?	Late holds, unaddressed auto-delete settings, departing employees, or cloud retention gaps.
Collection	Which method will capture the required content and metadata from each source?	Using a convenience export where a source-level or API collection is

EDRM stage	Central question	Common failure
		needed, or imaging everything without a case-specific reason.
Processing	How will data be normalized, extracted, deduplicated, indexed, and exception-handled?	Silent processing errors, lost relationships, incorrect time-zone treatment, or unsupported file types.
Review	How will responsiveness, privilege, confidentiality, and issue coding be decided?	Inconsistent coding, poor sampling, and no quality-control plan.
Analysis	What patterns, timelines, communication networks, or anomalies matter to the case?	Drawing conclusions from incomplete data or uncorroborated metadata.
Production	What content, metadata fields, load files, and native items will be delivered, and how will integrity be checked?	Unusable formats, missing attachments, broken families, or unexplained changes.
Presentation	How will the evidence be authenticated, explained, and used in deposition, motion practice, or trial?	No evidentiary bridge from the source system to the exhibit.

Using EDRM as a practical guide

The model is most useful when it becomes a decision log rather than a poster. For each stage, the team should record the scope decision, the person responsible, the source of the decision, the known limitations, and the quality-control step. That record helps counsel explain why a collection was reasonable, why a data source was deferred, why a production form was selected, and how the team responded when facts changed.

> **Start with the claim and defense theories.** Translate the pleadings and anticipated issues into people, systems, time periods, and transaction types before selecting tools or search terms.
> **Use cost gates.** Estimate volume and complexity at Identification, Collection, and Processing; then narrow or phase work before the cost of full review is incurred.
> **Build feedback loops.** Use custodian interviews, samples, exception reports, and review results to test whether the original scope is capturing the right information.
> **Preserve decisions as well as data.** Document why the team chose one source, method, or production form over another. Defensibility depends on the reasoned process, not on claiming perfection.

C. Common Data Sources and Their Unique Challenges

Modern matters rarely involve a single repository. The same business event may appear in an email, cloud document, chat thread, mobile device, ticketing system, database, and/or an audit log. The collection plan should identify the authoritative source for each type of information and the relationships that must be preserved.

Source	Potentially relevant components	Recurring challenges
Email and calendar	Message bodies, MIME/header data, recipients, attachments, calendar events, mailbox folders, threading fields.	Distribution lists, aliases, duplicate copies, embedded or linked cloud files, encrypted items, personal archives, and time-zone display.
File shares and DMS (Document Management Systems)	Documents, versions, paths, permissions, check-in/check-out history, document IDs.	Migrated data, shortcuts, stale copies, inherited permissions, version history outside the file, and inaccessible legacy formats.
Microsoft 365 / Google Workspace	Mail, Teams or Chat, SharePoint/Drive content, cloud attachments, audit records, retention and hold data.	Content is distributed across services; a message may point to a living cloud document rather than contain a fixed attachment.
Slack and collaboration platforms	Channels, direct messages, threads, reactions, edits, files, user profiles, canvases, workflow or app content.	Plan-dependent export rights, retention settings, Slack Connect or guest identities, JSON reconstruction, and file links maintained elsewhere.
SMS and mobile messaging	Message databases, contacts, attachments, device and backup timestamps, group membership.	Device ownership, encryption, deleted or ephemeral content, application-specific databases, and limited user-created exports.
Databases and SaaS applications	Structured records, transaction history, object relationships, audit logs, configuration, and reports.	A report is not the database; queries, filters, schema, time zones, and business logic determine what the export means.
Endpoints and removable media	Local files, artifacts, application data, system logs, deleted data, and external-device history.	Volatility, encryption, shared devices, sync behavior, and the need to distinguish a targeted logical collection from a full forensic image.

1. Email and traditional document repositories:

Email remains important, but "the email" may include more than a message body and a visible attachment. Header fields, message IDs, conversation indexes, distribution-list expansion, calendar data, and mailbox context can affect search and interpretation. A modern email may contain a cloud hyperlink rather than a static attachment; the linked file may have changed after the message was sent. The team should decide whether the issue requires the current file, the version that existed at the time of communication, the access history, or all three.

2. Chat and short-form messaging:

Short-form communications are conversational, distributed, and context-dependent. A relevant statement may be separated from its answer by hours of unrelated messages, nested in a thread, clarified by an emoji reaction, or followed by an edit. Identity can be obscured by display-name changes, guest accounts, shared channels, telephone-number reassignment, or cross-organization collaboration. Collection specifications should address thread context, edits and deletions, reactions, attachments, linked files, user mapping, time-zone normalization, and the unit of review.

Platform behavior matters. Microsoft describes Teams content as messages or conversations in eDiscovery outputs and treats many shared documents as cloud attachments maintained in SharePoint or OneDrive. Slack's available exports and Discovery API access vary by plan, permissions, retention, and workspace configuration. Google Vault exports matching content with associated metadata and, for Chat, may include surrounding context needed to understand the conversation. (Microsoft Purview; Slack Help Center; Google Vault Help—see Appendix DD.)

3. Metadata preservation and chain-of-custody considerations:

Metadata is often described as "data about data," but the phrase is only a starting point. File-system metadata may record path, size, and timestamps; application metadata may record author, revision, comments, formulas, or document properties; message metadata may record participants, IDs, thread relationships, delivery information, edits, and reactions; cloud and security systems may record permissions, audit events, login or access activity, and version history. Collection metadata then records what the forensic or eDiscovery process did to the item.

The evidentiary value of metadata depends on its source and context. A creation date may mean the date a file was created on a particular volume rather than the date its content was first authored. An author field may reflect a template, account profile, or software license. Access times can be changed by ordinary system activity or may not be recorded consistently. Conversion, copying, synchronization, antivirus scanning, Bates numbering, and export can add, change, or remove fields. These possibilities do not make metadata useless; they make corroboration and documentation essential.

Chain of custody is the contemporaneous record of who or what handled evidence, when, where, how, and with what verification. For cloud collections, the "handler" may include an administrator account, an API, an export job, secure storage, and a processing platform. A defensible record identifies the source, collection method, date and time, collector, tool and version, scope, transfer path, storage location, access controls, hash or other verification where applicable, and any deviations. It should be detailed enough for a qualified reviewer to understand what happened without turning every routine step into ceremony.

D. Technological and Evidentiary Pitfalls That Drive Cost and Dispute

Most ESI disputes are not caused by a single dramatic technical failure. They arise when small, unrecorded assumptions accumulate:

- Counsel assumes a custodian's laptop contains cloud files
- A vendor assumes a PDF is an adequate substitute for native data
- A reviewer assumes a message timestamp is in local time
- An expert assumes an unusual metadata field proves intentional manipulation.

The resulting re-collection, reprocessing, motion practice, and expert work can cost far more than an early technical conference.

Pitfall	Practical control
Preservation begins after ordinary deletion has continued	Identify auto-delete, retention, sync, and departing-employee workflows as soon as the duty to preserve is reasonably anticipated.
The team collects from the easiest source rather than the authoritative source	Ask where the data is generated, where its system metadata lives, and whether the convenience copy can be tied back to that source.
Rendered copies are treated as native evidence	Preserve the native or structured export when metadata, formulas, versions, hidden content, or relationships may matter.
Messages are produced without context or linked content	Define thread boundaries, surrounding messages, reactions, attachments, cloud links, and user identity mapping.
Metadata anomalies are equated with misconduct	Test ordinary workflow explanations, compare source-system records, and corroborate them with testimony or other evidence before inferring intent.
Collection and processing are not validated	Use manifests, counts, date-range checks, error logs, hash verification where appropriate, and targeted sampling.
Tool output is treated as self-proving	Record tool version, settings, filters, exceptions, and validation. A tool can automate a process; it cannot supply the missing evidentiary foundation.
The ESI agreement is silent on form and scope	Address sources, custodians, time periods, search method, metadata fields, native items, load files, family relationships, and privilege handling at the Rule 26(f) stage.

Five questions to ask before collection:

- What source is most authoritative?
- What information will the selected method preserve or omit?

- How will completeness and integrity be checked?
- What limitations must be disclosed?
- What less burdensome alternative would still satisfy the case need?

Those questions connect Rule 26 proportionality with technical defensibility.

III. EARLY CASE ASSESSMENT AND ESI AGREEMENTS

Courts impose sanctions under Rule 26(g)(3) when attorneys fail in their duties "to make a reasonable investigation to assure that their clients have provided all available responsive information and documents." *Bernal v. All Am. Inv. Realty, Inc.*, 479 F. Supp. 2d 1291, 1333 (S.D. Fla. 2007). FRCP 26(g)(3) contemplates that sanctions must be imposed not only on attorneys who fail to conduct a reasonable investigation, but also upon clients if they are complicit in the violation of the rule. So, when attorneys and their clients are equally culpable, they can be equally sanctioned. *DR Distributors, LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839, 953–54 (N.D. Ill. 2021). The duty to preserve ESI can arise before any lawsuit is filed. As soon as litigation is reasonably anticipated, safeguards must be put into place to ensure the preservation of ESI. In *Freeman v. Giuliani*, 691 F.Supp.3d 32 (2023), the court found that vague steps such as turning off "auto-delete" on an unidentified number of devices, without more systematic preservation measures, did not establish reasonable efforts to preserve ESI. Counsel should work with individuals that are knowledgeable regarding the client's information technology systems and individuals that have relevant information regarding the dispute to craft and circulate an appropriate litigation hold letter.

Once litigation has commenced, depending on the size and complexity of the case, it is often important to engage outside technical experts that can assist with the collection and preservation of relevant ESI. Such experts can help to understand the scope, logistics, and cost of collecting potentially relevant ESI from different sources. These experts can provide valuable insight when counsel is conducting initial interviews of document custodians and IT personnel. These steps are necessary precursors to the development of an ESI Agreement.

Under the Federal Rules, litigants are encouraged to work together early in the process to develop an ESI Agreement. Failing to cooperate in facilitating and reasonably limiting discovery often raises litigation costs and contributes to the risk of sanctions. In fact, under FRCP 37(f), entitled Failure to Participate in Framing a Discovery Plan**,** "[i]f a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure."

By entering into an agreed ESI Agreement, parties can establish baselines for accountability and head off costly discovery disputes. A party should understand its own capabilities and willingness to incur costs before it starts making technical discovery requests and commitments. The United States District Court for the Western District of Washington has an excellent Model Agreement Regarding Discovery of ESI ("Model Agreement")[1] that can be used as a starting point for negotiations.

[1] https://www.wawd.uscourts.gov/sites/wawd/files/ModelESIAgreement.pdf

Under the Model Agreement, parties have 30 days to disclose the following sources of potentially relevant ESI:

1. Custodians most likely to have discoverable ESI (the project personnel that prepared, sent and received relevant documents and emails);
2. Non-custodial ESI sources (servers and shared drives);
3. Third-Party ESI sources (third-party email providers, mobile device providers, cloud storage);
4. Inaccessible ESI sources; and,
5. Any applicable data privacy laws.

The Model Agreement also establishes agreed procedures for on-site inspection, ESI search methodologies or sampling procedures to develop agreed search terms, metadata fields, production formats, and obligations regarding de-duplication and email threading. Parties can establish production file types, date restrictions, and any AI or technology-aided review processes. The parties can also designate categories of documents or ESI sources that need not be collected or produced.

Furthermore, the ESI Agreement should include a provision addressing inadvertent disclosure of privileged information under FRE 502(b), and procedures for designating and challenging designations of confidentiality and privilege. Such "claw-back" agreements can allow parties to significantly reduce the scope of their privilege review in favor of an agreement to return inadvertently produced privileged documents.

When opposing counsel lacks the experience or technical know-how required in a given case, it is helpful to have technical experts on hand who can add as much clarifying detail as possible to the ESI Agreement. It is important to clarify the opposing party's technical limitations, such as the ability to run complex Boolean searches, before agreeing on search terms. For example, if one party intends to run the searches on their own internal email system, they may be far more limited in their ability than an outside ESI vendor that collects entire custodial email files before running search terms. If parties can agree, it may be helpful to set up a shared ESI database with a single ESI vendor, who can perform collections and run search reports while limiting each party's access to their own documents and those produced from the other parties.

ESI Agreement negotiations often stall based on the perceived costs of adding additional ESI search terms, sources or custodians. In addition to relevance, under FRCP 26(b)(1), discoverable ESI must be "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." It is difficult to make a case for proportionality without the underlying data to establish the potential cost of the discovery sought. Beginning the process with a defined search term sampling method and period is an excellent way to start establishing proportionality and to avoid runaway discovery costs.

IV. SEARCH AND REVIEW METHODOLOGIES

A. Keyword Search: Best Practices and Common Pitfalls

1. Drafting effective search terms; sample-driven narrowing

Keyword search remains the most widely used method for narrowing an ESI collection to a reviewable population. Effective search term development begins with the pleadings and anticipated issues, not with a generic list of subject-matter words. Counsel should work with custodians, IT personnel, and, where appropriate, a technical consultant to identify the vocabulary actually used by the people who created the relevant documents, including project names, product codes, internal shorthand, and the names of individuals and entities involved in the dispute.

Search terms should be tested against a sample of the data before they are finalized and disclosed. Sample-driven narrowing allows the parties to assess hit counts, identify overbroad or underinclusive terms, and refine Boolean connectors and proximity limitations before committing to a final term list. This iterative testing process is itself a form of documentation that supports the reasonableness of the eventual search methodology.

2. Handling acronyms, slang, and medium-specific language in chat/messaging data

Search terms developed for email do not translate cleanly to chat and short-form messaging. Participants in Slack, Teams, or SMS conversations often use abbreviations, emoji, slang, and medium-specific shorthand that would never appear in a formal email. A search methodology limited to formal or technical vocabulary risks missing substantively relevant chat content. Counsel should supplement traditional search terms with a review of sample chat data to identify the informal vocabulary actually used, and should consider whether stemming, fuzzy matching, or synonym expansion is necessary to capture medium-specific language.

3. Iterative testing and validation of search queries

Search term validation is not a one-time event. As review proceeds, counsel should track which terms are generating responsive documents, which are generating principally false positives, and whether new terms should be added based on documents or issues identified during review. Recall and precision statistics from sampling, along with reviewer feedback, should inform whether the search methodology needs to be revised, and any revisions should be documented so the overall process remains defensible.

B. Technology-Assisted Review (TAR) and Predictive Coding

1. Overview and evolving case law

Technology-assisted review uses a combination of human review and machine learning to identify responsive documents within a larger population, typically by training a model on a set of human-coded example documents and then using that model to rank or classify the remaining documents. Courts have increasingly accepted TAR as an appropriate, and in some instances the preferred, method of review, particularly in matters involving large document populations, provided the methodology is applied consistently and its results are validated.

2. Transparency, disclosure, and methodology requirements

Disputes over TAR most often arise from disagreements about transparency rather than from the technology itself. Courts and opposing parties frequently expect disclosure of the general workflow, including the composition and size of the training set, the classification or ranking approach used, the cutoff or threshold applied to determine what is reviewed or produced, and the validation methodology used to test the results. The degree of disclosure appropriate in a given case is often addressed directly in the ESI agreement or through a technical meet-and-confer early in the case.

3. Contentiousness and strategies to mitigate disputes

TAR disputes can be minimized by raising the intended use of TAR early, ideally before or during the Rule 26(f) conference, and by agreeing on a validation protocol in advance rather than after review is complete. Sharing a statistically appropriate sample of the review population, or agreeing on recall and precision targets ahead of time, allows the parties to assess the reasonableness of the process without requiring wholesale disclosure of privileged review decisions.

C. AI-Assisted Sampling and Emerging Tools

1. Current capabilities and limitations

Generative AI and large language model tools are increasingly used to assist with search term generation, document summarization, early case assessment, and preliminary issue coding. These tools can accelerate early review and help identify patterns that might not be apparent from keyword search alone. However, they are not a substitute for a validated review methodology, and their outputs, like the outputs of any classification tool, require testing against a known sample before they can be relied upon for substantive determinations such as responsiveness or privilege.

2. Methodological rigor and repeatability requirements

As with TAR, the use of AI-assisted tools in search and review should be documented: the tool and version used, the prompts or configuration applied, the validation sample and results, and any human quality-control review. Where an AI tool materially affects the scope of what is reviewed or produced, that use should be disclosed to the extent necessary to allow the process to be tested, consistent with the same principles of transparency and repeatability that apply to TAR and to expert methodologies more generally.

V. FORENSIC COLLECTION, METADATA, AND EXPERT EVIDENCE

Forensic collection and eDiscovery collection overlap, but they are not identical. A forensic examination may seek deleted data, system artifacts, user activity, or a complete storage image. An eDiscovery collection may be targeted to active records from defined custodians, systems, and dates. The defensible method is the one that is reasonable for the evidentiary question, proportionate to the case, technically appropriate for the source, and documented well enough to be tested.

A. Forensic Collection Best Practices

1. Defensible collection methodologies:

"Defensible" does not mean collecting every byte from every possible source. It means that the team can explain what it did, why it did it, what it preserved, what it did not collect, and how it verified the result. Rule 26(b)(1) makes proportionality part of the scope of discovery, while Rule 26(f) requires the parties to address preservation and the form of ESI production in their discovery plan. Technical rigor and proportionality should therefore be designed together, not treated as competing objectives.

NIST, SWGDE, and ISO guidance consistently emphasize identification, preservation, controlled acquisition, integrity, documentation, and repeatable analysis. Those principles support multiple collection methods. A bit-stream image may be appropriate when deleted data, local artifacts, unallocated space, or the full device state is relevant. A targeted logical collection may be better for active files on a custodian endpoint. A platform-native export or API collection may be the only practical way to preserve structured cloud content. The method should follow the evidence question and the architecture of the source. (NIST SP 800-86; SWGDE 2025; ISO/IEC 27037.)

Define the evidentiary objective. Identify the claims, defenses, time period, custodians, data types, and metadata needed. State whether the objective is discovery, authentication, reconstruction of activity, recovery of deleted data, or some combination.

Map the source environment. Document systems, accounts, devices, repositories, retention rules, synchronization, encryption, ownership, administrators, and known migrations. Confirm the source with someone who understands the environment.

Preserve before testing. Suspend relevant deletion or modification where reasonable; issue and monitor holds; preserve volatile data when necessary; and avoid exploratory actions that could change the source before the collection method is selected

Choose a source-appropriate method. Select imaging, targeted collection, native export, API collection, database query, or another method based on the source and the required evidentiary attributes. Record alternatives considered.

Acquire under controlled conditions. Record the collector, date and time, tool and version, credentials or authority, settings, filters, time zone, output location, error messages, and deviations. Use write protection when interacting with physical media where direct access could alter evidence.

Verify and inventory. Generate a manifest; record item and size counts; use cryptographic hashes when they meaningfully establish bitwise identity; confirm date coverage, attachment or family relationships, and expected user or custodian scope.

Secure originals and work from copies. Restrict access, encrypt in transit and at rest, preserve the received collection package, and conduct processing or analysis on verified working copies or controlled platform instances.

Perform quality control. Review exception logs, unsupported items, password-protected content, truncation, API limits, skipped locations, duplicate behavior, and representative samples. Reconcile results against source-side reports where available.

Report limitations and changes. Disclose gaps, unavailable data, assumptions, tool limitations, transformations, and any re-collection. A clear limitation is more credible than an unsupported claim of completeness.

2. Chain-of-custody documentation:

A chain-of-custody log should be tailored to digital evidence. The point is not merely to list human possession; it is to establish provenance, continuity, and integrity across devices, administrators, cloud services, export jobs, transfers, storage systems, and processing tools. For routine civil discovery, the documentation can be concise. For disputed authenticity, suspected alteration, deleted data, or expert testimony, it should be more granular.

Minimum record	What to capture
Evidence identifier	Unique item, device, account, mailbox, export-job, or collection-package identifier.
Source and custodian	System, tenant, device, path, account, owner or business custodian, and administrator or data steward.
Authority and scope	Request, consent, court order, hold, custodians, date range, locations, filters, and exclusions.
Acquisition event	Date/time/time zone, collector, tool/version, method, settings, credentials or role used, and output format.
Integrity verification	Hash values where appropriate, signed manifests, platform job reports, counts, source-versus-output reconciliation, and re-verification after transfer.
Transfer and storage	From/to, date/time, medium or secure transfer method, encryption, storage location, access controls, and recipient.
Work copies and processing	Copy identifier, processing platform, ingestion date, tool settings, transformations, exception logs, and resulting productions or exhibits.
Deviations	Interrupted jobs, damaged media, unavailable content, failed items, re-collections, or justified departures from the plan.

A cryptographic hash can indicate whether two bitstreams are identical or whether a particular file has changed. It does not establish who authored the file, whether the content is true, whether the

file existed at a claimed earlier time, or whether a converted copy faithfully preserves every source-system attribute. Use modern algorithms such as SHA-256 when practical; explain any legacy MD5 or SHA-1 use and pair it with other verification. (SWGDE, Position on the Use of MD5 and SHA-1.) This is a forensic tool to validate that the files delivered, processed and utilized are identical without changing any data or metadata.

3. Collection validation and quality control:

Validation should be designed before the collection begins. A cloud export may need reconciliation to a platform job report; an email collection may require mailbox and date-range checks; a chat collection may require user mapping, thread counts, attachment reconciliation, and sampling of edits or reactions; a file-share collection may require path, extension, size, and exception analysis. The validation record should allow another practitioner to distinguish a source limitation from a collection failure and a collection failure from a processing error.

B. Metadata: Preservation, Importance, and Risks

1. Types of metadata and why they matter:

Metadata category	Illustrative fields	Why it matters
File-system	Name, path, size, allocation, created/modified/accessed times, owner, permissions, volume or device information.	Locating files, understanding storage context, comparing copies, and reconstructing activity—with file-system-specific limitations.
Document or application	Author, company, revision, comments, tracked changes, formulas, hidden rows, document IDs, PDF XMP, media properties.	Reviewing content not visible in a rendering, identifying versions, interpreting calculations, and explaining document assembly.
Email and messaging	Sender, recipients, message ID, conversation or thread ID, sent/received time, reactions, edits, channel, attachment or link references.	Threading, participant mapping, chronology, family relationships, and platform-specific authentication.
Cloud, audit, and security	User IDs, permissions, version history, access events, sharing, login events, retention or hold state, application logs.	Establishing source-system context, access, version, and corroboration beyond the file itself.
Collection and processing	Collector, job ID, tool/version, filters, export time, hashes, Bates numbers, extracted text, custodian and review fields.	Reproducing the workflow, tracing transformations, and tying productions or exhibits to the source collection.

Metadata is often probative because it supplies context that visible content lacks. It can help locate a document, establish sequence, group a family, identify a source, compare versions, support authentication, or expose inconsistencies. But the weight of a field depends on how the system generates and maintains it. A reliable opinion should identify the field, its source, the system behavior, the collection path, and the corroborating evidence.

The most common error is to treat a metadata anomaly as self-explanatory. A date sequence that looks impossible may reflect copying between volumes, time-zone conversion, a template, a software upgrade, an export, a system clock, or a later-generation production copy. A different hash may reflect Bates stamping or re-rendering rather than a substantive change. Conversely, a normal-looking field does not guarantee authenticity. Metadata should be analyzed as one component of a larger evidentiary record, not as a substitute for provenance.

2. Export and conversion pitfalls:

Every export is a transformation. The question is whether the transformation preserves the information needed for the case and is documented well enough to explain what changed. Printing to PDF may flatten comments, formulas, hidden content, links, signatures, or document structure. Copying a file may change the file system's timestamps without changing its content. A chat export may reconstruct a conversation from multiple underlying records. A database report may reflect filters and business logic that do not appear on the face of the output.

Source or format	Common transformation	Control
Microsoft Teams	Messages may be represented as conversations or individual items; shared files may remain in SharePoint or OneDrive as cloud attachments.	Collect message context and the linked file or relevant version; preserve IDs, participants, timestamps, and the export or review-set settings.
Slack	Exports differ by plan, permissions, retention, legal hold, and whether a Discovery API or standard export is used. JSON may require reconstruction.	Record workspace and organization scope, channel and DM coverage, retention, threads, reactions, edits, files, Slack Connect identities, and export method.
Google Chat / Vault	Vault exports matching messages with metadata and may include surrounding context; conversation grouping can depend on product rules.	Preserve the metadata files, search query, matter/export identifiers, context rules, user mapping, and any linked Drive content.
WhatsApp / SMS	A user-created text export or screenshot may be a convenience copy rather than a complete device or backup acquisition.	State the source and method; preserve attachments and participant data where available; document time zones, device/account ownership, and known omissions.

Source or format	Common transformation	Control
PDF and image productions	Rendering can preserve appearance while stripping or changing source metadata and object relationships.	Keep the native or structured source when those attributes matter; document conversion settings; compare the rendering to the source; hash both products separately.

Official platform documentation confirms that eDiscovery exports are product-specific:

- Microsoft separately handles Teams content and cloud attachments
- Slack distinguishes standard exports from Discovery API access
- Google Vault provides metadata and corroborates information with its exports.

Collection specifications should therefore name the platform, export type, permissions, retention state, and output components rather than simply request "all chats." (See Appendix DD.)

Before converting or exporting, it is recommended to follow these steps:

- Preserve the source or an authoritative export
- Record the platform, tenant or workspace, account and role used
- Capture the search or filter criteria; record the tool and version
- Identify the time zone(s)
- Retain job reports and error logs
- Create a manifest and verification record
- Validate attachments, links, threads, and counts
- Preserve the unaltered output before processing or Bates numbering

C. Expert Qualifications and Expert Reports for Collections

1. Qualifications must match the opinion:

Federal Rule of Evidence 702 asks whether the witness is qualified by knowledge, skill, experience, training, or education and whether the proposed opinion satisfies the rule's reliability requirements. The relevant question is not whether the expert has the longest list of credentials. It is whether the expert's background fits the specific task: collection architecture, file-system analysis, mobile forensics, database interpretation, cloud audit analysis, document authentication, statistical validation, or another defined subject.

Tool certifications can demonstrate familiarity with a product; professional certifications can demonstrate broader study or testing; practical experience can demonstrate judgment in real environments. None is dispositive alone. A highly credentialed witness can use an unreliable method, and a less credentialed witness can offer reliable testimony within a well-supported area of expertise. The report should connect qualifications to each opinion and identify any work performed by other team members.

2. Rule 702, Daubert, and Kumho:

The current Rule 702 requires the proponent to demonstrate to the court that it is more likely than not that the expert's specialized knowledge will help the factfinder; the testimony is based on sufficient facts or data; the testimony is the product of reliable principles and methods; and the

opinion reflects a reliable application of those principles and methods to the facts. Fed. R. Evid. 702. Daubert identifies nonexclusive reliability considerations such as testability, peer review, error rate, standards, and general acceptance. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593–94 (1993). *Kumho Tire* confirms that the gatekeeping obligation applies to technical and other specialized expertise, not only laboratory science. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141, 147–49 (1999).

Digital forensic work often combines standardized acquisition steps, tool-assisted extraction, and expert interpretation. A court cannot assess that work from conclusions alone. The report should make the data path and reasoning visible: what the expert received, how it was preserved, which tools and settings were used, what the tool output showed, what alternative explanations were considered, and why the evidence supports the stated conclusion. In *United States v. Ganier*, the Sixth Circuit treated the interpretation of computer-generated reports that require specialized knowledge as expert testimony subject to the expert disclosure rules. 468 F.3d 920, 925–27 (6th Cir. 2006).

3. Expert report requirements and methodological clarity:

For a retained expert, Rule 26(a)(2)(B) requires a written report containing a complete statement of opinions and their bases and reasons; the facts or data considered; exhibits used to summarize or support the opinions; qualifications and publications from the preceding ten years; prior testimony from the preceding four years; and compensation. A report that lists tools but omits the actual process does not satisfy the practical need for reliability testing. Nor does a report become repeatable merely because another examiner owns the same software.

Report component	**What a reviewer should be able to find**
Evidence foundation	Items received; source and custodian; native, rendered, or extracted status; chain of custody; collection method; hashes or manifests; known transformations.
Scope	Questions asked; systems, custodians, and dates included; items excluded; sample selection; assumptions; unavailable data; material limitations.
Environment	Hardware or cloud environment; operating system; application and tool versions; locale and time zone; configuration; licenses or modules used.
Method	Step-by-step acquisition and analysis; filters and queries; scripts; prompts if AI was used; parsing and normalization; validation and quality control.
Results	Observed facts distinguished from interpretation; tables or screenshots tied to evidence IDs; counts reconciled to source or collection records.
Reliability	Testing; repeatability or reproducibility; known limitations and potential error; standards followed; deviations and reasons; peer or technical review.

Report component	What a reviewer should be able to find
Reasoning	How the facts support each opinion; alternative explanations considered; corroboration; degree of certainty stated without overstating the evidence.
Team contributions	Who performed collection, processing, scripting, review, or drafting; qualifications of contributors; supervision and quality assurance.

4. Documented, repeatable steps as the foundation:

Repeatability does not require that two experts use identical software or produce a word-for-word identical report. It requires enough information for a qualified person to follow the same evidence path, understand the transformations, test the observations, and assess whether the conclusion is supported. Reproducibility may involve a different tool reaching a consistent result. Both concepts depend on preserved inputs, documented settings, and disclosed limitations.

The report should also distinguish acquisition from analysis and fact from inference. "The export contained 14,210 messages" is an observation that should be tied to a manifest or tool output. "The user intentionally deleted relevant messages" is an inference that may require retention settings, audit logs, user activity, testimony, alternative explanations, and evidence of intent. The more consequential the inference, the more explicit the evidentiary bridge should be.

5. AI-assisted forensic and expert workflows:

Generative AI may assist with drafting queries, classifying data, summarizing logs, identifying patterns, or creating preliminary chronologies. Its use does not automatically make a workflow reliable or unreliable. The controlling questions are whether protected data was handled under authorized terms and controls, whether the model and workflow were documented, whether outputs were independently validated against primary evidence, and whether the material steps can be reconstructed.

A defensible AI-assisted workflow should preserve the model or service name, version or release date, date of use, relevant settings, system and user prompts, input source identifiers, outputs relied upon, validation steps, human reviewer, and known limitations. The team should evaluate contractual data-use terms, retention, training settings, access controls, confidentiality, and jurisdiction before submitting case data. An AI output should be treated as an analytical lead or work product until verified, not as proof of provenance or authenticity. NIST's Generative AI Profile provides a useful risk-management structure for governing, measuring, and documenting these uses. (NIST AI 600-1.)

Any use of any AI platform from a forensic expert standpoint and included in any reports must include the exact prompts to facilitate analysis, along with the responses received, and accommodate for any hallucinations.

Expert-report bottom line

The report should let the court and opposing expert answer four questions:

- What evidence was examined?
- What exact process was used?
- How was the process checked?
- Why do the observed facts support the opinion rather than a plausible alternative?

- When those answers are visible, methodological disputes become testable instead of rhetorical. This is a core strength test for any expert and can be easily challenged.

VI. CONTROLLING SCOPE AND COST

A. Proportionality Under the Federal Rules

Rule 26(b)(1) defines the scope of discovery in terms of proportionality, not merely relevance. Discoverable information must be "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). Proportionality is not a self-executing limitation; it requires the party asserting burden to come forward with concrete information about volume, cost, and complexity, and it requires the party seeking discovery to be able to explain why the requested scope is necessary to the claims and defenses at issue.

B. Practical Tips for Limiting ESI Scope

1. Custodian tiering and data source prioritization

Not every custodian with potentially relevant information warrants the same level of collection and review effort. Tiering custodians into groups based on their likely centrality to the disputed issues allows the parties to prioritize full collection and review for the most important custodians while using lighter-touch approaches, such as targeted searches or declarations, for peripheral custodians. The same logic applies to data sources: a shared drive or database that is central to the dispute may warrant a full collection, while a source with only marginal relevance may be addressed through a narrower, negotiated approach.

2. Date range limitations and phased discovery

Limiting the relevant time period to what is reasonably necessary is one of the most effective and least controversial ways to control scope. Where the appropriate date range is unclear at the outset, phased discovery, beginning with a defined period or a subset of custodians and expanding only if warranted by what is found, allows the parties to test assumptions about scope before committing to the cost of a full collection and review.

3. De-duplication and near-duplicate identification

Global de-duplication across custodians, and the use of near-duplicate and email-threading technology to group substantially similar documents, can materially reduce the volume of documents that must be individually reviewed. These techniques should be addressed in the ESI agreement, including whether de-duplication will occur at a custodian level or across the full population, and how suppressed near-duplicate content will be handled if a related document requires production.

C. Involving Technical Specialists to Reduce Disputes and Costs

Many of the disputes that drive up discovery cost stem from a mismatch between the technical realities of a data source and the assumptions the parties or the court make about it. Involving a technical specialist early, at the custodian interview stage, during ESI agreement negotiations, and

again when collection methodology is selected, helps ensure that scope and cost decisions are grounded in an accurate understanding of the underlying systems rather than in generic assumptions. The cost of engaging a specialist at the outset is typically far lower than the cost of re-collection, additional motion practice, or expert rebuttal work required after a flawed process has already been executed.

D. Cost-Shifting and Cost Allocation Considerations

Where discovery from a particular source is disproportionately burdensome relative to its likely value, courts retain discretion to allocate or shift costs, condition further discovery on cost-sharing, or limit the scope of what must be produced. Parties seeking to shift costs should be prepared to quantify the burden with specificity, including estimated volume, the technical difficulty of collection, and the availability of less burdensome alternatives, since generalized assertions of burden are rarely sufficient. Addressing cost allocation early, ideally as part of the ESI agreement itself, can avoid the need for later motion practice over which party should bear the expense of a particular collection or production effort.

VII. SANCTIONS, ETHICS, AND COURT EXAMPLES

Spoliation involves the destruction or failure to preserve evidence relevant to ongoing or reasonably foreseeable litigation. ESI complicates traditional spoliation analysis due to its volume, ease of alteration, and challenges in preservation. Parties typically have a duty to suspend routine data destruction when litigation is reasonably anticipated and to issue litigation holds directing preservation. Courts may impose sanctions on parties who negligently or intentionally fail in these duties, even absent a showing of bad faith, particularly under federal standards emphasizing proportionality and reasonableness of preservation efforts.

FRCP 37(e) was amended in 2015 to establish a uniform standard for ESI spoliation sanctions in federal court. Where Rule 37(e) applies, it provides the exclusive remedy, foreclosing reliance on the court's inherent sanction authority. *Bistrian v. Levi*, 448 F.Supp.3d 454 (2020). FRCP 37(e) states:

> **(e) Failure to Preserve Electronically Stored Information.** If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
> **(1)** upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
> **(2)** only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
> **(A)** presume that the lost information was unfavorable to the party;
> **(B)** instruct the jury that it may or must presume the information was unfavorable to the party; or
> **(C)** dismiss the action or enter a default judgment.

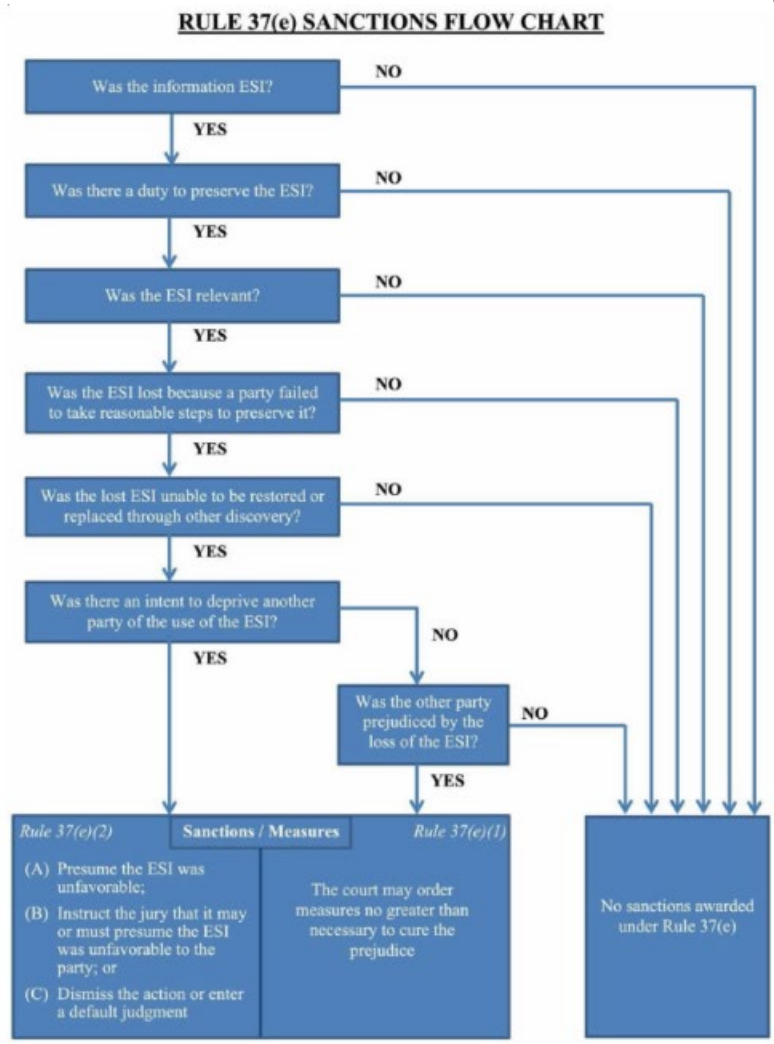
This rule creates a two-tiered structure for dealing with spoliation. The sanctions available under FRCP 37(e) are determined based on five threshold requirements: (1) the information must be ESI; (2) there must have been anticipated or actual litigation that triggers the duty to preserve ESI; (3)

the relevant ESI should have been preserved at the time of the litigation was anticipated or ongoing; (4) the ESI must have been lost because a party failed to take reasonable steps to preserve it; and (5) the lost ESI cannot be restored or replaced through additional discovery.

The court offers curative measures to a party that is prejudiced by the negligent loss of ESI. Curative measures under Rule 37(e)(1) may include additional discovery, a requirement for the spoliating party to pay costs, or other remedial steps proportionate to the prejudice suffered. *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litigation*, 341 F.R.D. 474 (2022). The main focuses of an (e)(1) analysis are prejudice and an absence of *mens rea.*

However, when a party **intentionally** deprives the opposing party of the ESI sought, severe sanctions are available. Such severe sanctions include adverse inference jury instructions, precluding the party from offering evidence in support of its claims or defenses, dismissal, or default judgment. Unlike the curative measures in (e)(1), where the court finds intent, the court need not find prejudice before applying these severe (e)(2) sanctions.

This sanction structure can be summarized with the following helpful flowchart.



See Hon. Iain D. Johnston & Thomas Y. Allman, *What Are the Consequences for Failing to Preserve ESI: My Friend Wants to Know,* Circuit Rider 57-58 (2019).

Relatedly, a robust body of federal case law has developed establishing attorneys' independent ethical and professional duties related to technological competence and active supervision over ESI collection and production. Sanctions may also be directed at counsel personally where counsel's own failures (rather than the client's) caused the non-production of ESI.

Courts are showing less patience with counsel who plead ignorance regarding ESI or technology in general. ABA Model Rule of Professional Conduct 1.1, Comment 8, requires attorneys to keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology. Just as lawyers have a professional responsibility to keep abreast of changes or developments in the law, it is now clear in this "digital age" that attorneys should have basic competency in working with digital evidence and understand how ESI is created, stored and retrieved. *United States v. Montague*, No. 14-CR-6136-FPG-JWF, 2016 WL 11621620, at *3 (W.D.N.Y. May 17, 2016). Attorneys appearing in federal court have been warned; either be competent and cooperative in discovery about ESI, or partner with someone with ESI expertise. *See Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 569 F. Supp. 3d 626, 630 (E.D. Mich. 2021). Attorneys who lack experience in electronic discovery practice do not get a free pass to avoid complying with their obligations. Attorneys have an ethical duty to become competent, associate themselves with attorneys who are, or to decline the representation. *Waskul v. Washtenaw County Community Mental Health*, 569 F.Supp.3d 626 (2021).

An attorney's obligation of competence in discovery includes having a general understanding of how discovery rules apply to the types of ESI a client may have, and a more specific understanding of how the client's information technology systems and ESI are structured. The understanding of the client's information systems allows counsel to create a systematic process and plan for responding to discovery requests. Part of the process and plan includes monitoring of the identification, preservation, collection, and production of ESI. The absence of a process and a plan, or reasonable monitoring, constitute strong evidence that counsel did not conduct a reasonable inquiry. *DR Distributors, LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839, 964 (N.D. Ill. 2021).

In *DR Distributors,* sanctions were imposed against defense counsel personally because counsel had failed to issue a written litigation hold, failed to follow up after learning that the client had not preserved ESI from web-based accounts, and failed to take action after learning of the need to obtain and preserve chat application ESI. As the court bluntly stated, "[i]t is no longer amateur hour. It is way too late in the day for lawyers to expect to catch a break on e-discovery compliance because it is technically complex and resource-demanding."

Notably, Courts do not require perfection in preservation to avoid spoliation sanctions. A party that employs processes fairly calculated to preserve data, such as using a third-party vendor to preserve ESI, may satisfy the reasonableness standard even if some ESI is ultimately lost. *See United States ex rel. Staggers v. Medtronic, Inc.*, No. 15-CV-392 (TSC/GMH), 2026 WL 1475372, at *10 (D.D.C. Mar. 12, 2026). However, an attorney's obligations extend beyond simply hiring an ESI vendor. In *DR Distributors,* the court rejected counsel's attempted reliance on an ESI vendor when counsel provided the ESI vendor an improperly limited scope. Parties are expected to select competent partners, such as service providers or vendors, but hiring a competent vendor is only the first step. Counsel must appropriately supervise that vendor throughout all phases of discovery and should not assume that the vendor is proceeding as counsel thinks the vendor should proceed. Disconnects can happen at all stages including what sources are searched and what data is collected. Rather, counsel must confirm that the vendor is actually following counsel's instructions, and that such instructions are appropriate.

VIII. CONCLUSION — CLOSING THOUGHTS

A. Key Takeaways for Practitioners

ESI disputes become manageable when counsel treats technical decisions as part of case strategy rather than as a vendor task performed after requests are served. The strongest teams identify the authoritative sources early, preserve context as well as content, select collection methods that fit the actual evidentiary question, and document the reasoning behind scope and form decisions. They do not assume that more data is always better or that a native file, a PDF, a screenshot, and a database report carry the same information.

Metadata is powerful but not self-interpreting. It can corroborate provenance, chronology, identity, and relationships, but ordinary system behavior can also create fields that look unusual outside their technical context. The responsible approach is to identify the source of the field, understand how the system generates it, preserve the collection path, test alternative explanations, and corroborate important conclusions.

Defensibility is a process quality, not a brand name or a tool feature. A reasonable, proportionate, source-appropriate collection with clear limitations is generally more useful than an undocumented "forensic" process that cannot be audited. The same principle applies to experts: qualifications matter, but the opinion ultimately stands or falls on sufficient data, reliable methods, reliable application, and transparent reasoning.

B. The Future of ESI: AI, Emerging Technologies, and Evolving Standards

The next generation of discovery will involve less self-contained "documents" and more dynamic systems: collaborative cloud files, linked content, ephemeral messages, application events, generated summaries, automated decisions, synthetic media, and AI agents acting across platforms. The evidentiary unit may be a conversation plus a linked file version and an audit trail, not a single attachment. Preservation and collection protocols will need to capture relationships, identities, versions, prompts, system outputs, and provenance at the time those records are generated.

AI will accelerate search, review, analytics, and reporting, but it will also raise the value of disciplined logging and human validation. The practical standard should not be "no AI." It should be controlled use: authorized data handling, documented inputs and settings, preserved outputs, testable validation, and clear disclosure when AI materially affects an expert opinion or evidentiary conclusion. As tools change, the durable requirements will remain the same: integrity, transparency, proportionality, and the ability to explain the process.

APPENDIX AA. Forensic ESI Collection and Chain-of-Custody Checklist

This checklist is adapted from the collection-process and guiding-principles materials included as Exhibits B and C to the filed expert report, with updates and qualifications drawn from the current Federal Rules, NIST, SWGDE, and platform documentation.

Matter and scope

☐ Identify the claims, defenses, information sought, relevant period, and anticipated uses of the data.

☐ Identify custodians, noncustodial repositories, administrators, third parties, and authoritative systems.

☐ Record proportionality decisions, phased sources, inaccessible sources, privacy or cross-border limits, and alternatives considered.

☐ Define required content, metadata, attachments, links, versions, deleted data, audit logs, and form of production.

Preservation

☐ Issue and monitor legal holds; address departing employees, auto-delete, retention, sync, mobile backup, and ephemeral features.

☐ Preserve volatile or at-risk information before routine investigation changes the source.

☐ Document preservation steps, responsible personnel, dates, exceptions, and source-side confirmations.

Collection plan

☐ Select imaging, targeted logical collection, native export, API, database query, or other method based on the source and evidentiary objective.

☐ Identify tools, versions, modules, settings, credentials or administrative roles, time zone, output format, and secure destination.

☐ Create a test and quality-control plan before full collection; define success criteria and re-collection triggers.

Execution and custody

☐ Assign an evidence identifier; record source, custodian, collector, date/time/time zone, method, scope, and output location.

☐ Use write protection when appropriate for physical media; document whether and why it was or was not used.

☐ Record each transfer, recipient, storage location, encryption, access control, and integrity verification.

☐ Preserve the unaltered acquisition or export and conduct downstream work on verified copies or controlled platform instances.

Verification and QC	Reporting and production
☐ Generate manifests and hashes where appropriate; reconcile item, size, date-range, custodian, attachment, and thread counts. ☐ Review job reports, skipped items, unsupported types, password failures, truncation, API limits, and processing exceptions. ☐ Sample source-to-output accuracy; verify time-zone normalization, identity mapping, family relationships, and linked content. ☐ Document deviations, limitations, remediation, and the reason any gap was accepted.	☐ Describe the collection in terms another qualified practitioner can understand and test. ☐ Identify transformations: extraction, conversion, OCR, normalization, deduplication, threading, redaction, Bates numbering, and export. ☐ Produce agreed metadata and load files; keep families intact; identify native items; validate delivery and retain a production copy. ☐ Preserve the evidence path from source to collection package to review item to production or exhibit.

Minimum chain-of-custody record

☐ Evidence ID / collection package ID	☐ Matter and request or authority
☐ Source system / tenant / device / path	☐ Custodian / account / data steward
☐ Collector and supervising professional	☐ Collection date, time, and time zone
☐ Method, tool, version, settings, and filters	☐ Output format and storage path
☐ Manifest and hash values, if applicable	☐ Item/size counts and source-side reconciliation
☐ Transfer history and recipients	☐ Encryption and access controls
☐ Work-copy or processing identifiers	☐ Exceptions, deviations, re-collection, and final disposition

APPENDIX BB. Western District of Washington Model ESI Agreement — Practitioner Reference

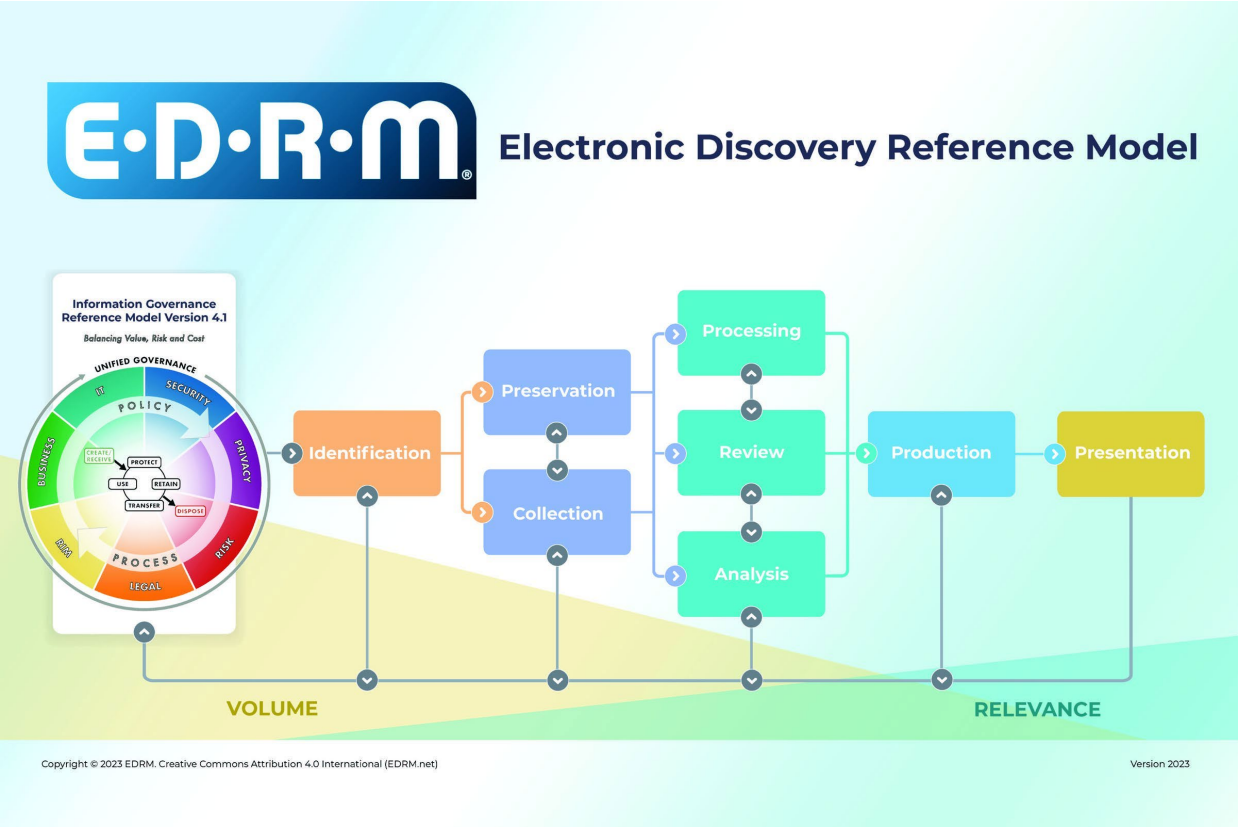
The Western District of Washington's model agreement is a useful starting point because it converts proportionality and cooperation into operational terms. It should be adapted to the case, the governing local rules, the systems involved, and the court's orders, rather than adopted mechanically.

Provision	Questions to resolve
Cooperation	State that zealous representation is consistent with cooperative discovery; identify technical liaisons; provide enough information to resolve problems without unnecessary motion practice.
Proportionality	Require requests and responses to be targeted, clear, and specific; identify phased discovery and conditions for expanding scope.
Custodians and data sources	List initial custodians, noncustodial repositories, third-party systems, and sources not reasonably accessible; provide a process for additions or substitutions.
Preservation	Address holds, routine deletion, backup media, transient data, departing employees, collaboration platforms, and the preservation of linked or versioned content.
Search methodology	Specify whether the parties will use search terms, structured queries, TAR, analytics, or custodian-directed review; provide a testing, sampling, and revision process.
Production form	Specify native, near-native, image, text, load files, family relationships, color, redactions, hidden content, spreadsheets, databases, audio/video, and linked cloud files.
Metadata	Identify the fields needed for review and evidentiary use; distinguish source metadata from processing fields; agree on time-zone treatment and field definitions.
Deduplication and threading	Define global or custodian-level deduplication, duplicate-custodian tracking, email threading, near-duplicate handling, and treatment of suppressed content.
Privilege and clawback	Coordinate logging, categorical logs where appropriate, redaction metadata, Federal Rule of Evidence 502(d), and procedures for inadvertent production.
Dispute process	Use technical meet-and-confers, samples, test exports, and written issue statements before seeking court intervention.

Official court resources: Court forms page | Model ESI Agreement (PDF)

APPENDIX CC. EDRM Reference Chart

The chart below illustrates the iterative relationship among Information Governance, Identification, Preservation, Collection, Processing, Review, Analysis, Production, and Presentation. It should be used as a planning and communication framework, not as a rigid sequence.



EDRM Model, Version 2023. © 2023 EDRM; Creative Commons Attribution 4.0 International (EDRM.net).

APPENDIX DD. Selected Case Law, Rules, Standards, and Platform Resources

The following authorities provide a compact research path for the issues discussed in Sections II, V, and VIII. This is not an exhaustive case-law survey.

Federal rules and cases

Fed. R. Civ. P. 26	*Rules 26(b)(1), 26(f), and 26(a)(2)(B).* Proportional scope; preservation and ESI planning; retained-expert report disclosures. Open official source
Fed. R. Civ. P. 34	*Rules 34(a) and 34(b)(2)(E).* Broad definition of discoverable ESI and form-of-production requirements. Open official source
Fed. R. Civ. P. 37(e)	*Loss of ESI that should have been preserved.* Reasonable steps, replaceability, prejudice, and intent requirements for remedies or sanctions. Open official source
Fed. R. Evid. 702	*Expert testimony.* Qualification, helpfulness, sufficient facts or data, reliable principles and methods, and reliable application. Open official source
Fed. R. Evid. 901, 902, 1001	*Authentication, self-authentication, and originals of ESI.* Authentication through evidence of identity or process; certifications for electronic processes and copied data; accurate outputs as originals. Open official source
Daubert	*Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).* Trial-court gatekeeping and nonexclusive reliability considerations.
Kumho Tire	*Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).* Gatekeeping applies to technical and other specialized knowledge.
Ganier	*United States v. Ganier, 468 F.3d 920 (6th Cir. 2006).* Specialized interpretation of computer-generated reports may be expert testimony.
Lorraine	*Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534 (D. Md. 2007).* Comprehensive discussion of evidentiary foundations for ESI.

CAT3	*CAT3, LLC v. Black Lineage, Inc., 164 F. Supp. 3d 488 (S.D.N.Y. 2016).* Metadata alteration, preservation, and Rule 37(e) analysis in a disputed-email setting.

Frameworks and technical references

EDRM Model	*EDRM Model 2.0, Version 2023.* Conceptual and iterative lifecycle from information governance through presentation. Open official source
NIST IR 8387	*Digital Evidence Preservation: Considerations for Evidence Handlers (2022).* Preserving digital evidence and maintaining its integrity. Open official source
NIST SP 800-86	*Guide to Integrating Forensic Techniques into Incident Response (2006).* Practical forensic phases, data sources, and evidence-handling concepts. Open official source
SWGDE	*Best Practices for Digital Evidence Collection, Version 2.0 (June 30, 2025).* Trained personnel, source-appropriate collection, integrity, documentation, and deviations. Open official source
ISO/IEC 27037	*ISO/IEC 27037:2012.* Guidelines for identification, collection, acquisition, and preservation of digital evidence. Open official source
ISO/IEC 27042	*ISO/IEC 27042:2015.* Guidelines for analysis and interpretation of digital evidence. Open official source
NIST AI 600-1	*Artificial Intelligence Risk Management Framework: Generative Artificial Intelligence Profile (2024).* Govern, map, measure, and manage risks associated with generative-AI use. Open official source
Sedona Principles	*The Sedona Principles, Third Edition, 19 Sedona Conf. J. 1 (2018).* Reasonableness, proportionality, preservation, production, and cooperation in ESI discovery.

Current platform documentation

Microsoft Purview	*Microsoft Learn: Teams content, review sets, exports, and cloud attachments.* Teams conversations and related SharePoint/OneDrive content require coordinated collection. Open official source
Slack	*Slack Help Center: export tools, Discovery APIs, legal holds, and retention.* Export scope and preservation depend on plan, permissions, retention, and configuration. Open official source
Google Vault	*Google Vault Help: export contents and reviewing exported messages.* Exports include content, metadata, and corroborating information tied to Google's systems. Open official source
W.D. Washington	*Model Agreement Regarding Discovery of ESI.* Practical template for cooperation, proportionality, sources, search, production form, metadata, and privilege. Open official source

Source material supplied for this draft

Filed expert report	*Brian J. Rice, Expert Rebuttal Report, Barron v. micromobility.com, Inc., No. 1:20-cv-04703-PKC (S.D.N.Y. Jan. 30, 2026), ECF No. 409-4.* General discussion of EDRM, metadata, collection methodology, chain of custody, authentication, and repeatability; Exhibits B and C provide collection-process and guiding-principles material.


Pearlman
CONFERENCE

PEARLMAN 2026 • PANEL DISCUSSION

Attorney Client Priv. Document

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

Professional responsibility • Discovery • File strategy

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.

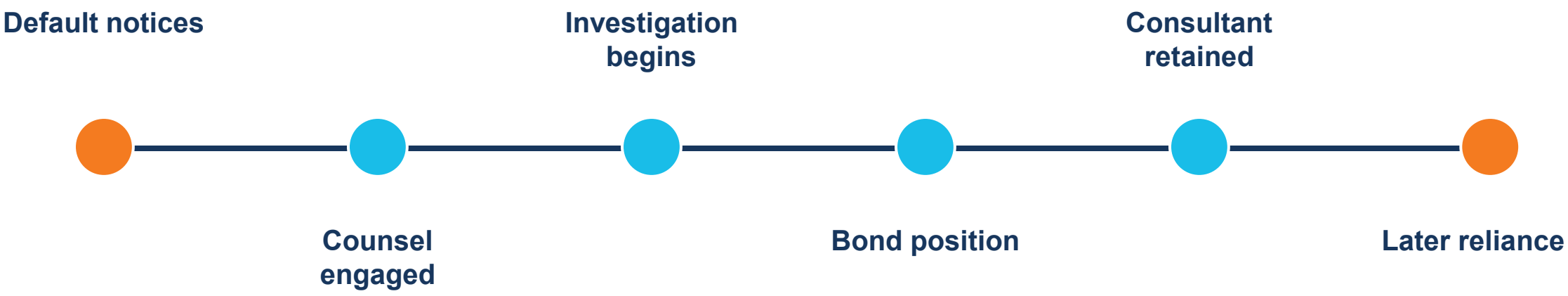
Ordinary business records remain ordinary

- 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



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

Pearlman CONFERENCE

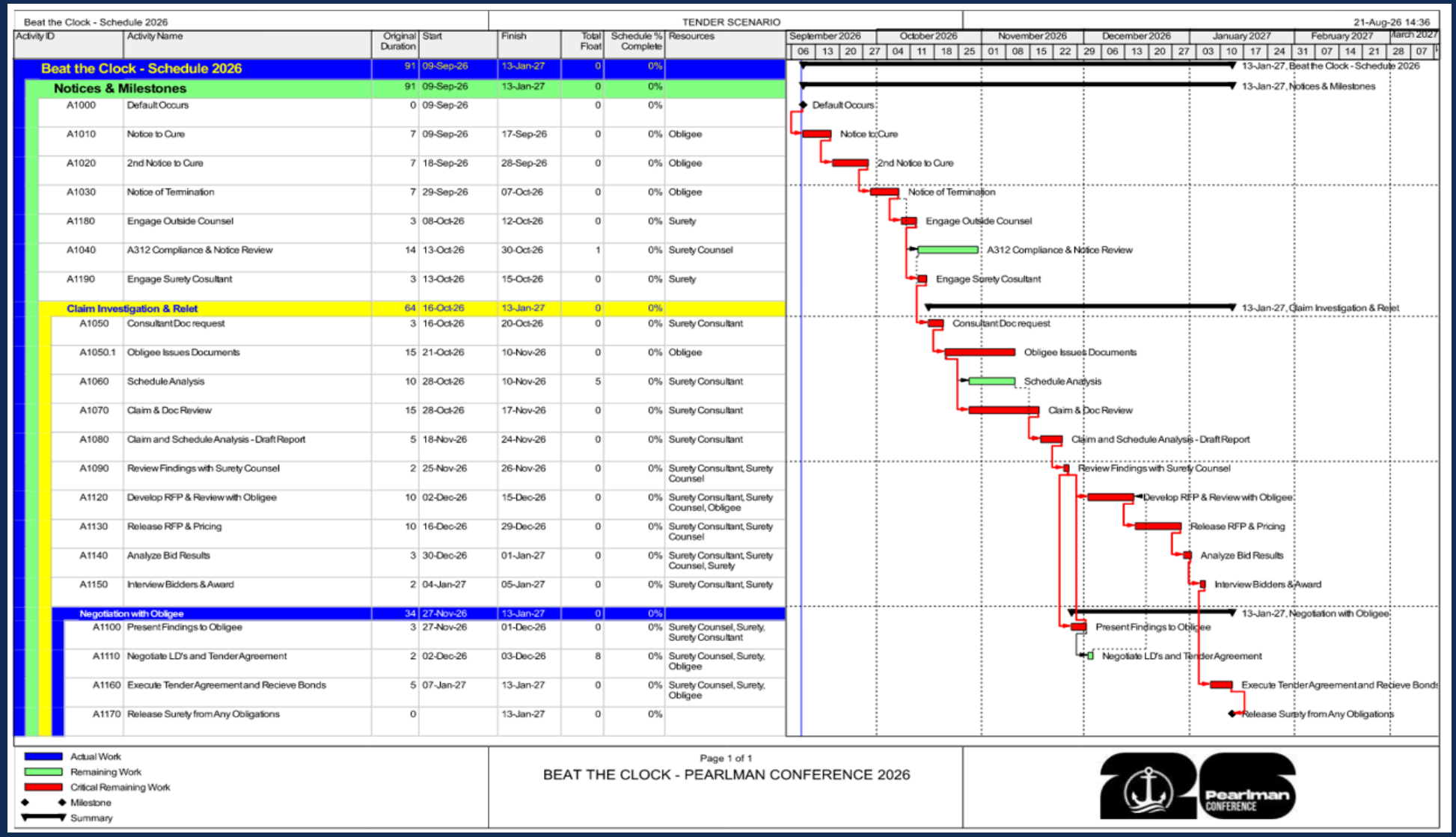

Beat the Clock
SURETY BOND CLAIM
A STRATEGIC OBLIGATION. A SHARED OBJECTIVE.
SURETY
INVESTIGATE
EVALUATE
RESERVE RIGHTS
COLLABORATE
ACT IN GOOD FAITH
OBLIGEE
NOTIFY
PROVIDE INFORMATION
MITIGATE DAMAGES
COOPERATE
ACT IN GOOD FAITH
00:58
00:00
SURETY. PARTNER. PERFORM.
COMMUNICATE. COOPERATE. RESOLVE.
SUCCESS THROUGH COLLABORATION
TIMELY COMMUNICATION.
TRANSPARENT PROCESS.
STRONGER OUTCOMES.
SURETY OBLIGATIONS
DILIGENT REVIEW
FAIR EVALUATION
TIMELY RESPONSE
OPEN COMMUNICATION
OBLIGEE OBLIGATIONS
PROMPT NOTICE
FULL DISCLOSURE
REASONABLE MITIGATION
ONGOING COOPERATION
STRONGER TOGETHER.
BUILT ON TRUST.

Notices & Milestones

The Obligee Starts the Clock

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BEAT THE CLOCK



Beat the Clock - Schedule 2026 — TENDER SCENARIO — 21-Aug-26 14:36

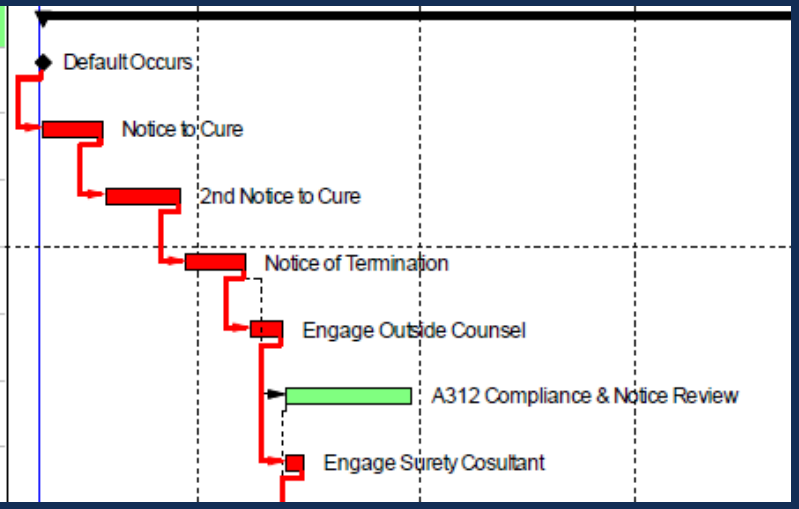
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A1040	A312 Compliance & Notice Review	14	13-Oct-26	30-Oct-26	1	0%	Surety Counsel
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Actual Work
Remaining Work
Critical Remaining Work
Milestone
Summary

BEAT THE CLOCK - PEARLMAN CONFERENCE 2026

Obligee Starts the Clock

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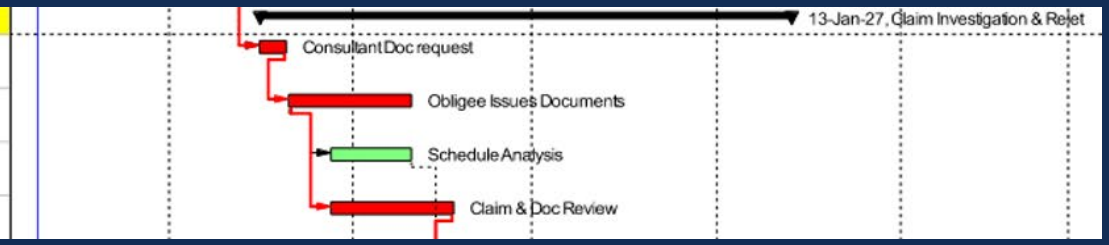
Document Request & Claim Verification

The Consultant's First Steps in a Default Analysis

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Document Request

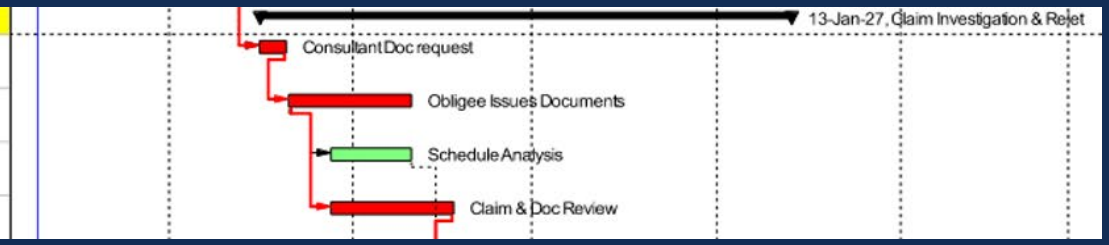
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- Payment Applications — All pay apps including rejected or modified pay app, per project
- Change Orders — Approved, Rejected and Potential Change Orders, per project
- Contracts — Contract documents per project
- Plans & Specifications — Access to plans and specifications per project
- Project Acct. Summary — Invoices to Obligee and payment history, per project
- Job Cost Reports — Internal Accounting of Costs to Date, per project
- AP & AR Reports — Accounts Payable and Accounts Receivable, per project
- Project Schedules — Project Schedules from start to current, per project
- Notices and Key Corresp. — Notices from Obligee's and related correspondence from principal (per project).
- RFI's, CCD's, Directives — Contract stipulated documents, initiating disputed or changed scopes of work

Schedule Analysis

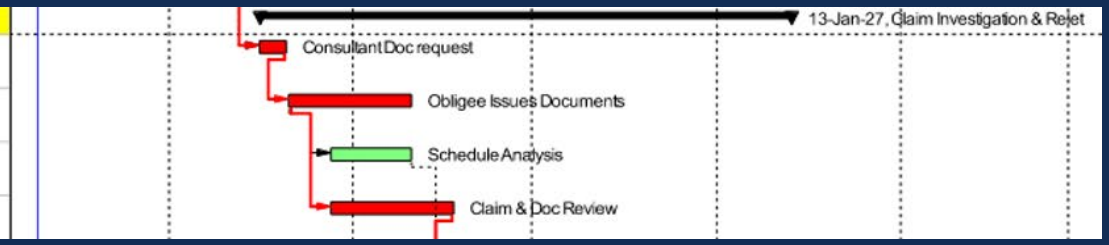
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1. Obligee's master schedule analysis
2. Subcontractors near term schedules
3. Concurrent delays
4. Separate claims from obligee to project owner
5. Problem projects: schedules not updated, ghost schedules
6. Who owns the float?

Claim Analysis

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A1050	Consultant Doc request	3	16-Oct-26	20-Oct-26	0	0%	Surety Consultant
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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

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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).

O

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.

S

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.
- Obligee's 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

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Three Numbers, One Balance

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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

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O 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

→

P 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

→

S 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 ≠ Penal Sum

P

PENAL SUM

Maximum stated amount of the Surety's obligation under the Bond.

**review bond and contract for penal sum changes*

|

C

CONTRACT BALANCE

Remaining Contract funds available to finance completion.

—

$

COST TO COMPLETE

Reasonable cost necessary to complete and/or correct bonded Work.

=

E

POTENTIAL SURETY EXPOSURE

Completion shortfall, subject to Bond terms and defenses.

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

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Who Owns the Defects?

Alleged non-conforming work and defects

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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

1 PRINCIPAL

2 DESIGN

3 OTHERS

4 UNRESOLVED

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

Investigate the Claim

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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

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O 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?

P 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?

S OPINION TO SURETY: CATEGORIZE THE CONDITION

PRINCIPAL RESPONSIBILITY

NOT PRINCIPAL RESPONSIBILITY

UNRESOLVED

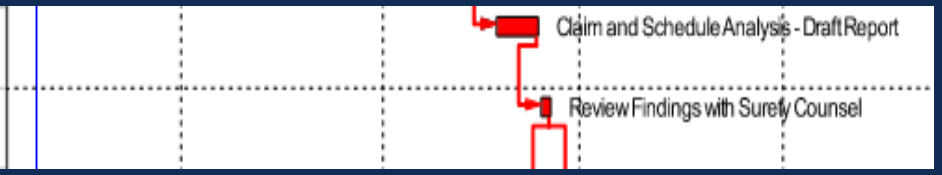
Reasonable Investigation Period

Factors Affecting the Timeline

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Complexity of Claim

A1080	Claim and Schedule Analysis - Draft Report	5	18-Nov-26	24-Nov-26	0	0%	Surety Consultant
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1. Location & End User
2. Portfolio Failures
3. General Contractors
4. Subcontractors
    1. Shell & Structure
    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.

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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.

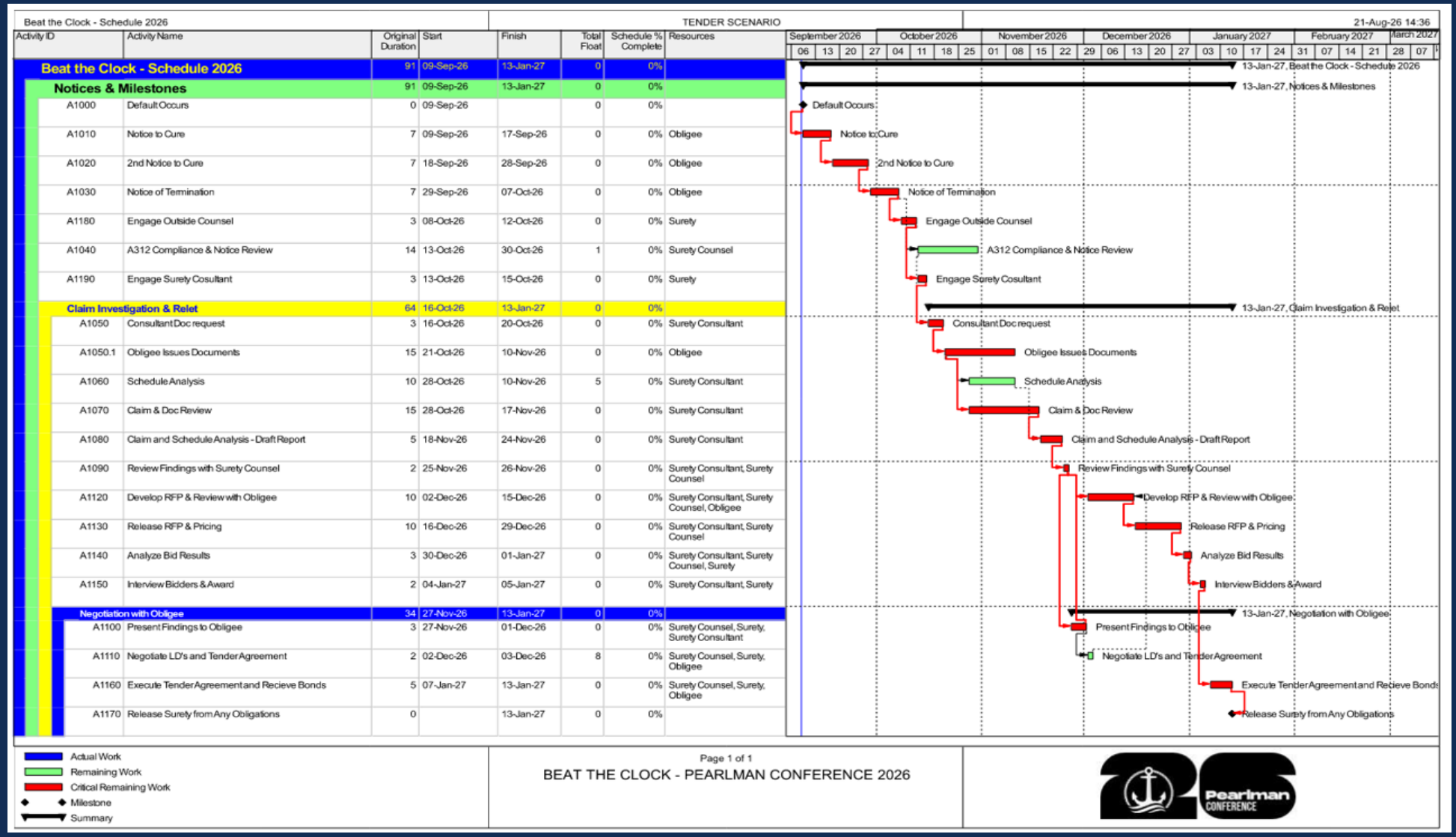
3 COMPENSATION STRUCTURE

- 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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BEAT THE CLOCK - PEARLMAN CONFERENCE 2026


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PEARLMAN 2026 | MATCHDAY SESSION

ESI MANAGEMENT: FROM KICKOFF TO FINAL WHISTLE

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

PANEL FORMATION | 40 MINUTES

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

OPENING WHISTLE

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.



OPENING WHISTLE

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.
ONSIDE	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.

SECTION 1

01 KNOW THE PITCH

ESI overview and types of collections

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

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SECTION 1 | SOURCE MAP

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.

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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.

SECTION 1 | AUTHORITY

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.



VISIBLE COPY

Screenshot, printout, synced laptop file, user-created export

Fast to obtain, but often incomplete



SYSTEM OF RECORD

Mailbox, cloud tenant, collaboration platform, database, source device

Where content and source metadata are maintained



CORROBORATION

Version history, audit events, access logs, export job reports, administrator records

Explains identity, timing, and system behavior

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

SECTION 1 | DECISION TEST

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?

APPENDIX | COLLECTION REFERENCE

Source and collection method reference

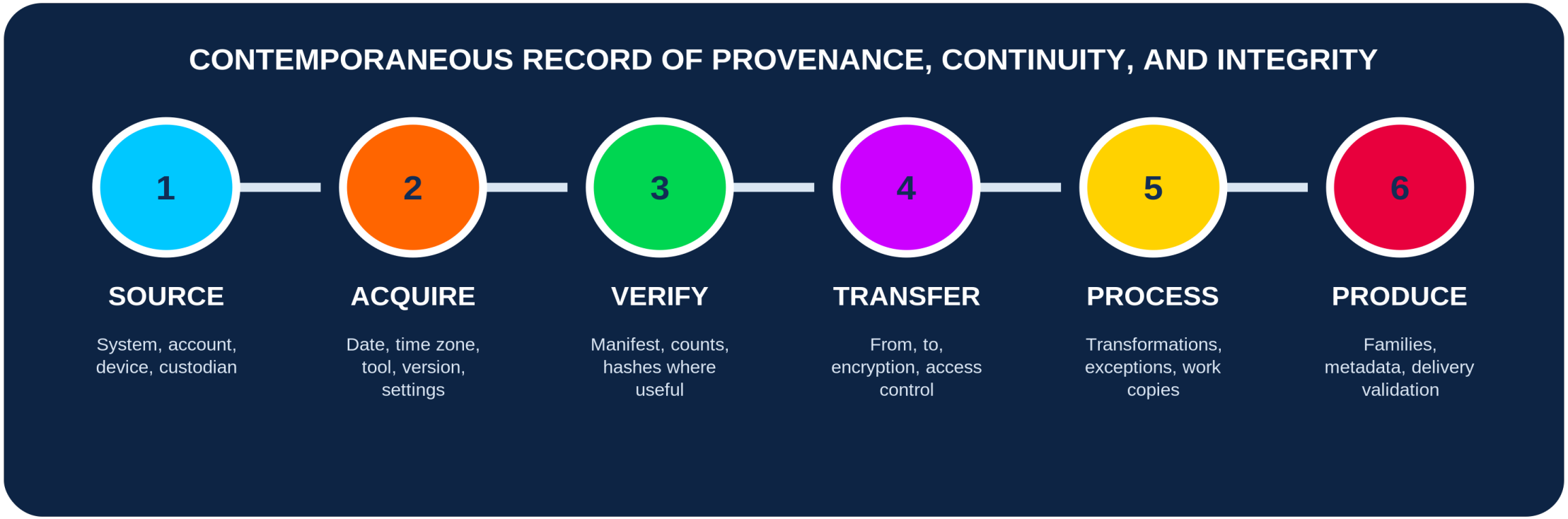
The appropriate method depends on the evidence question, source architecture, required attributes, and proportionality.

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

SECTION 1 | CHAIN OF CUSTODY

Chain of custody is the official match report.

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



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

SECTION 1 | VALIDATION

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.

SECTION 2

02 BRIEF THE SQUAD

Talking to your client: issues and pitfalls

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

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APPENDIX | CLIENT INTERVIEW

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

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SECTION 2 | WHO IS IN THE ROOM

Do not interview only the custodian.

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

Business custodian

What happened, who communicated, and which records matter?

IT / system administrator

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

Legal / records / privacy

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

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.

SECTION 2 | INTERVIEW QUESTIONS

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?

SECTION 2 | RED FLAGS

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.

SECTION 2 | PRESERVATION SEQUENCE

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.

1 TRIGGER + SCOPE

Identify the duty, claims, defenses, people, dates, and immediate risks.

2 ASSEMBLE THE TEAM

Bring together counsel, client, IT, records, privacy, and technical support.

3 MAP SOURCES + RISKS

Locate authoritative systems, retention rules, auto-delete, and access limits.

4 SUSPEND DELETION

Preserve volatile data and stop routine loss where reasonable and available.

5 DOCUMENT + EXECUTE

Record decisions, issue instructions, collect appropriately, and track exceptions.

6 VERIFY + MONITOR

Confirm execution, reconcile gaps, follow up, and adjust as facts develop.

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

SECTION 2 | RESPONSIBILITIES

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.

SECTION 3

03 WRITE THE RULES

ESI agreement section

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

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SECTION 3 | OPERATING SYSTEM

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.

SECTION 3 | CORE PROVISIONS

Twelve clauses that keep discovery on the field.

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

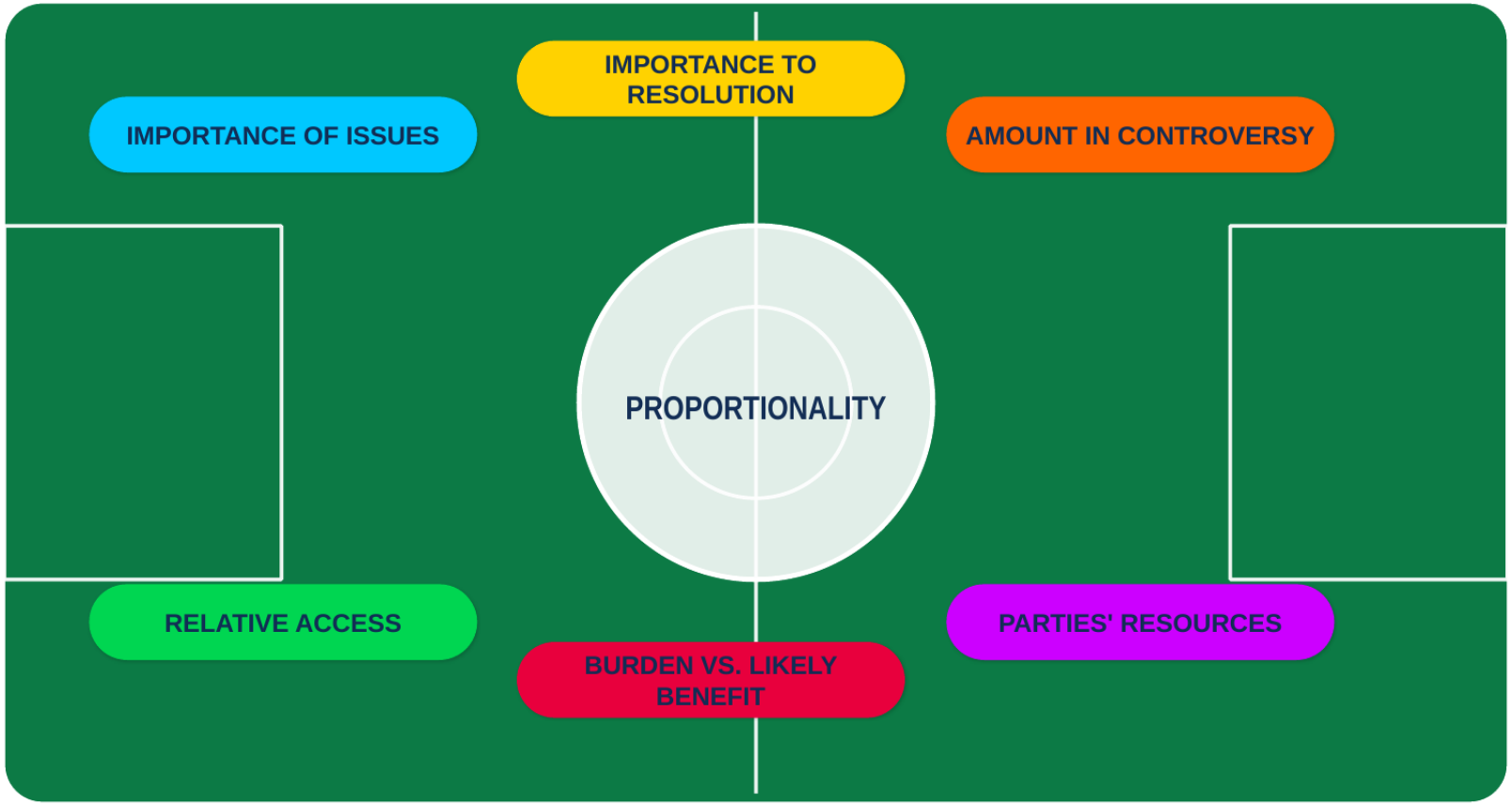
01 Cooperation + liaisons	02 Custodians + sources	03 Third-party + inaccessible
04 Preservation + deletion	05 Privacy + cross-border	06 Search / TAR / AI
07 Date + file limits	08 Production form	09 Metadata + families
10 Dedupe + threading	11 Privilege + 502(d)	12 Disputes + cost

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

SECTION 3 | PROPORTIONALITY

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

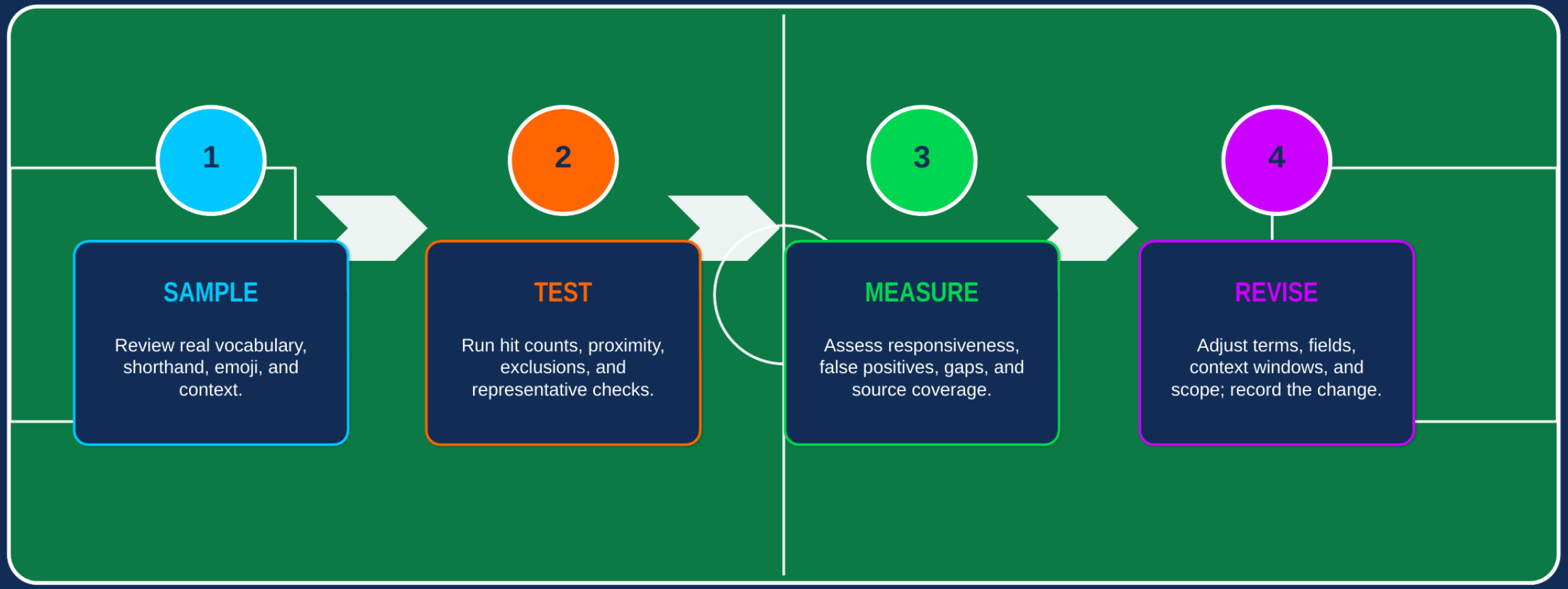
- Volume + custodian count
- Collection difficulty
- Processing complexity
- Review cost
- Security + privacy
- Less burdensome alternatives

FRCP 26(b)(1)

SECTION 3 | SEARCH PROTOCOL

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.

SECTION 3 | PRODUCTION FORM

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.

SECTION 3 | PRIVILEGE PROTECTION

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.

SECTION 3 | EXECUTION TEST

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?

SECTION 4

04 AVOID THE CARDS

Sanctions and spoliation

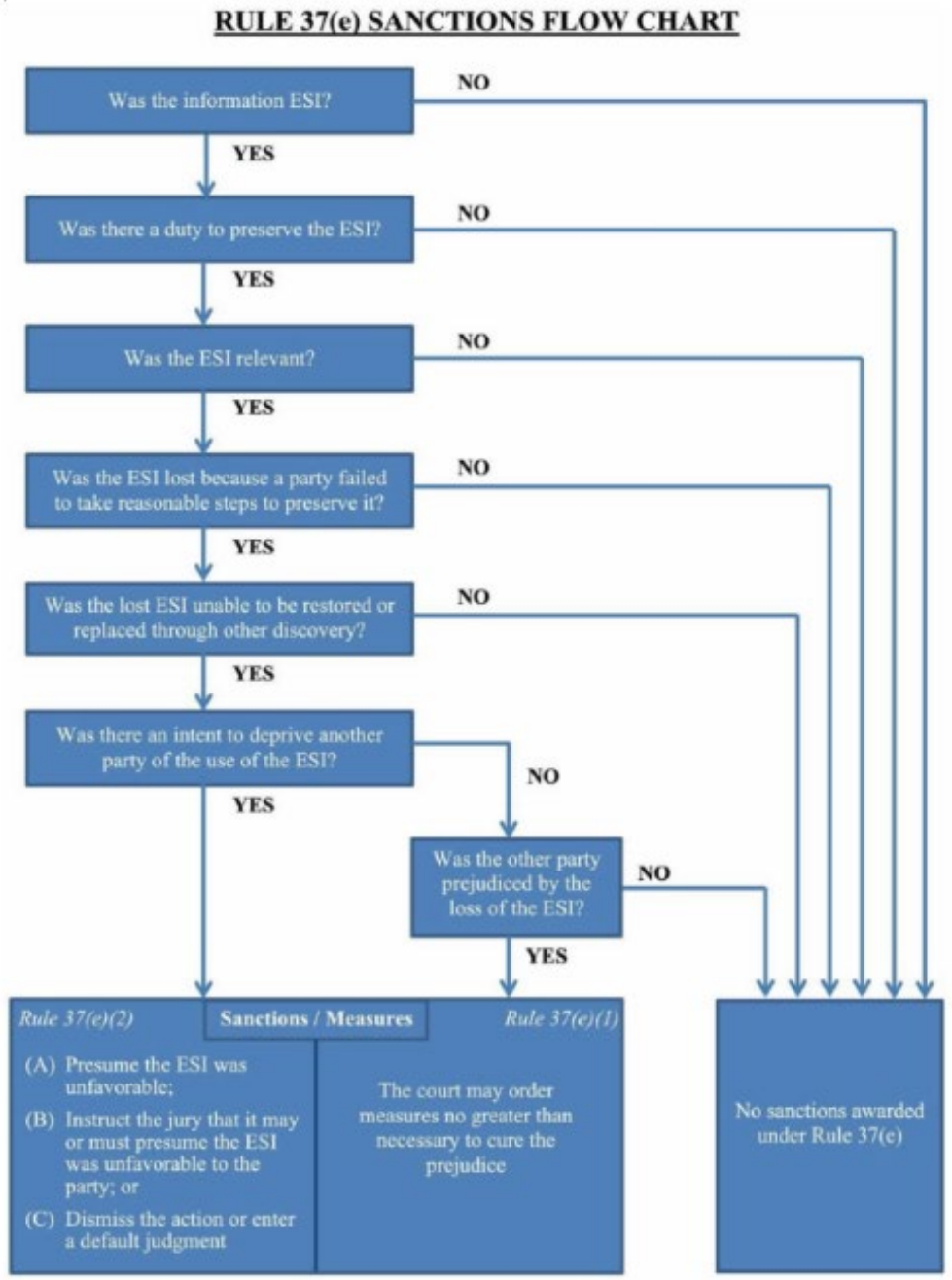
The goal is a reasoned, documented process that can be explained later.

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SECTION 4 | RULE 37(E)

Determining Available ESI sanctions.

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



FRCP 37(e)

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.

SECTION 4 | JUDICIAL REVIEW

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.

SECTION 4 | INTERACTIVE CASE FILE

The 89th-minute deletion.

- **78:00** — Demand letter identifies the dispute
- **82:00** — Legal tells one manager to save messages
- **86:00** — Chat auto-delete remains active
- **89:37** — Relevant messages disappear
- **90+2** — Vendor is engaged and finds no backup

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



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AI 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

Pressure
Need speed + cost savings

↔

Trust
Without losing fairness + enforceability

Need speed + cost savings without losing trust + fairness

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

01

Case record

Review + organize submissions
Summarize claims + evidence
Build a clean case record

›

02

AI analysis + draft

Analyze issues + positions
Generate a proposed draft award
Surface structure, speed, and consistency

›

Human arbitrator final award

Independent judgment
Validate and revise
Final authority + signed award

Faster + lower cost — with trusted outcomes

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.

01
Party submissions

Claims, evidence, and legal authority enter the record.

›

02
Party validation

Parties confirm the AI summary is accurate before analysis.

›

03
AI analysis + draft

Case summary, issue analysis, and proposed draft award.

›

Human arbitrator review + final award

Approve, edit, or rewrite — then issue the award.

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%+

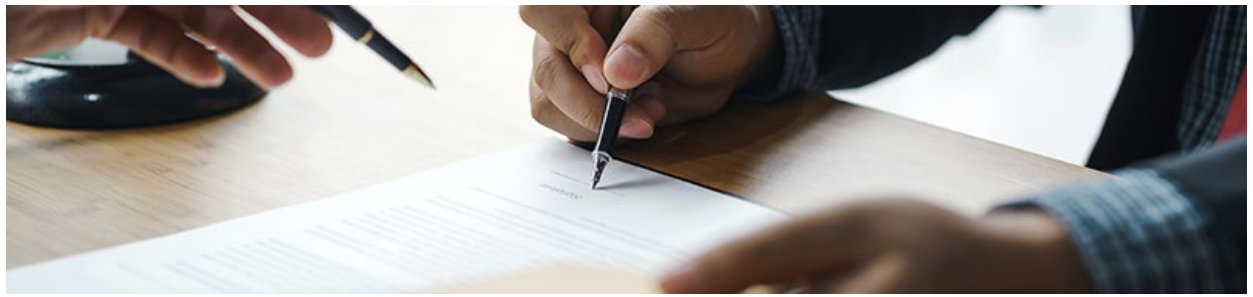
cost savings
in documents-only
construction cases

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

210-998-5750
bartona@adr.org



Mike F. Pipkin
Weinstein Radcliff Pipkin LLP
Attorney, Mediator & Arbitrator
214.865.7012
mpipkin@weinrad.com



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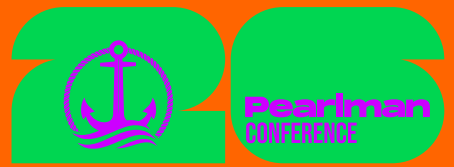
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Welcome Remarks

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Amanda Marutzky

Watt Tieder



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Bryce Holzer

Travelers



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Drew Brouwer

Nicholson Professional Consulting



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The Playbook — Marketing Trends & Insights

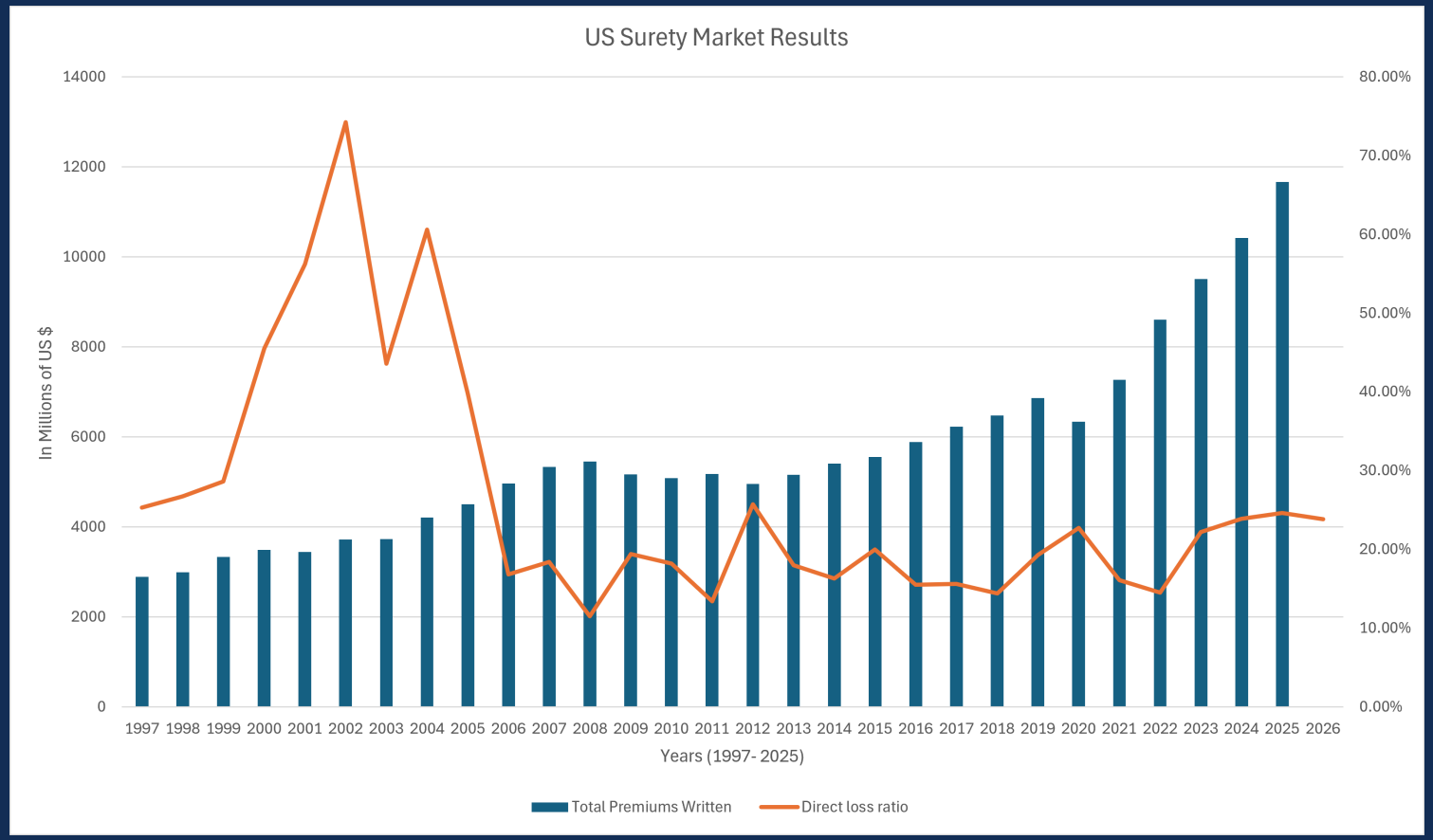
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Topics

- 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

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Loss Ratio Trends

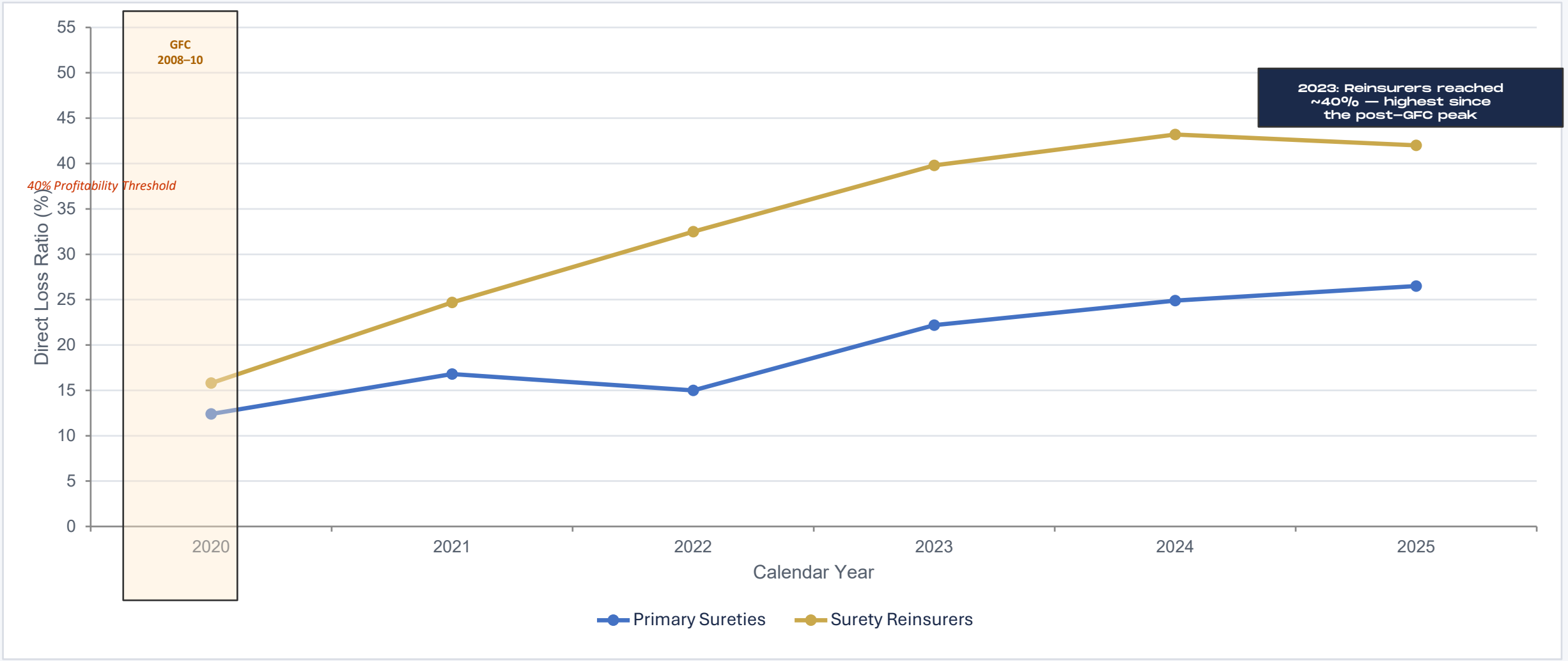


Large Losses and Impact on Underwriting

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

Source: SFAA Annual Reports / Industry Publications

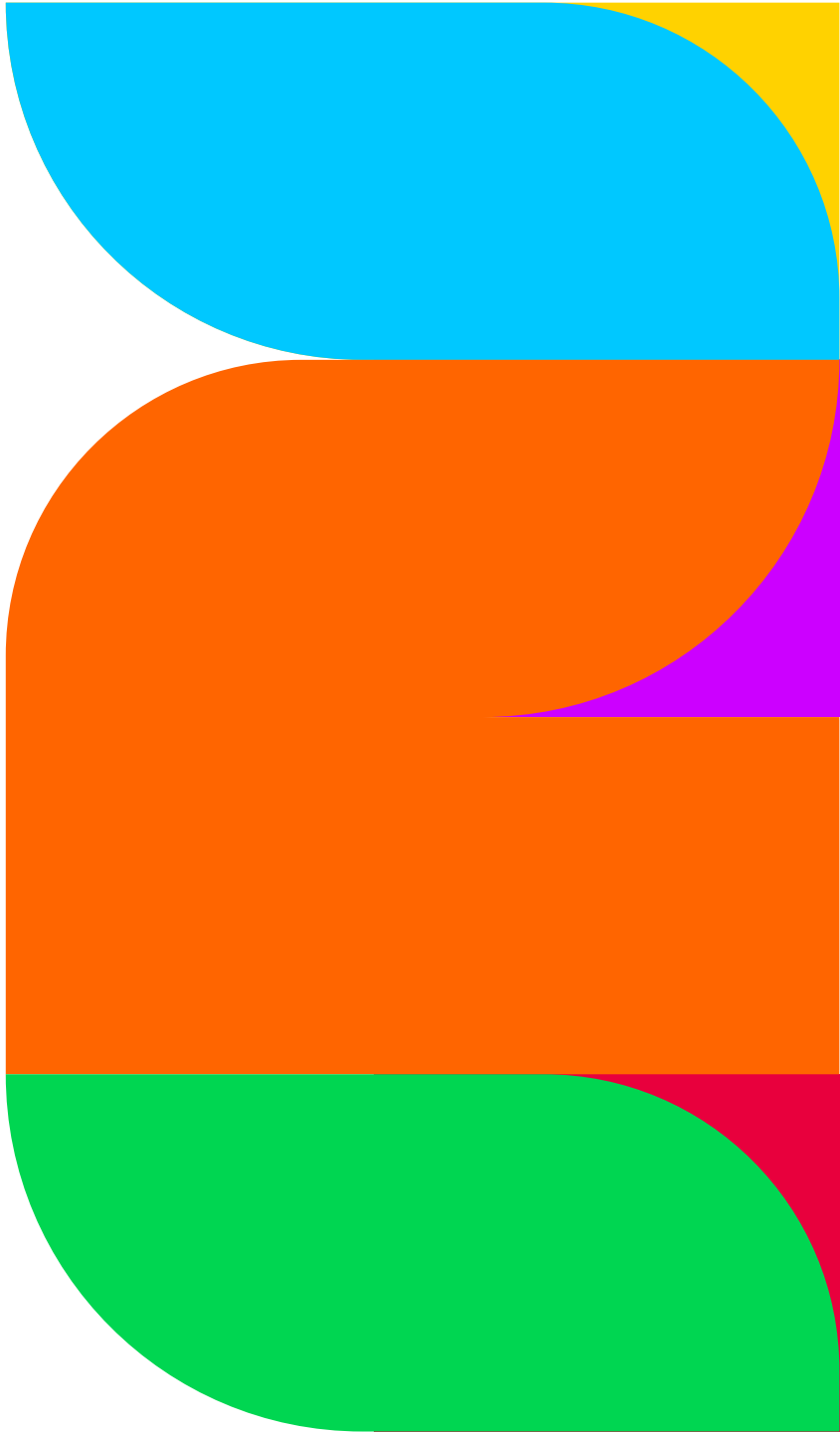


Notes: Direct loss ratios reflect direct premiums earned vs. direct losses incurred per SFAA statistical data and industry publications. Reinsurer figures represent a market composite and incorporate greater year-to-year volatility due to adverse development recognition. 2024–2025 data are preliminary/estimated.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



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Underwriting Considerations on Long-Term Projects

Ownership Transition

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

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Utility and Impact of AI



Broker Relationship




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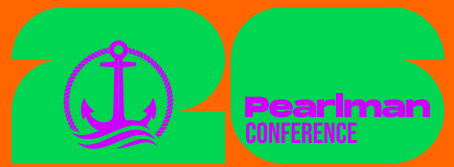
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PLAYING TO WIN

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

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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

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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


Arsenal
Arsenal
Arsenal

The World Cup Final

DEFAULT

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

WHO HAS THE BALL?

YELLOW CARD • PARALLEL DECISION-MAKING

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

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• 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

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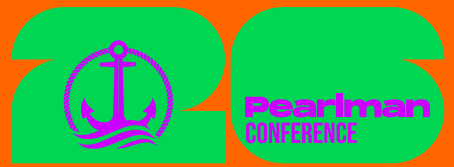
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Blowing the Whistle on the Vanishing Contract Balance

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.

Respond at
pe.app/masonfleming

Poll Everywhere

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

0 0

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

Edit

Choices Results Lock Correctness

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
pe.app/masonfleming

Poll Everywhere

Which missing payment safeguard would you investigate first?

0 0

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

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

Poll Everywhere

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0 0

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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

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
pe.app/masonfleming

Poll Everywhere

What Should the Surety Do First?

0 0

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

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.

Respond at
pe.app/masonfleming

Poll Everywhere

What call should be made?

0 0



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.*


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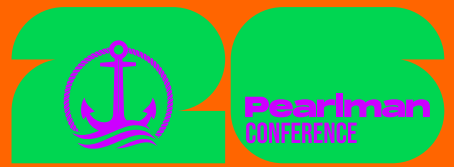
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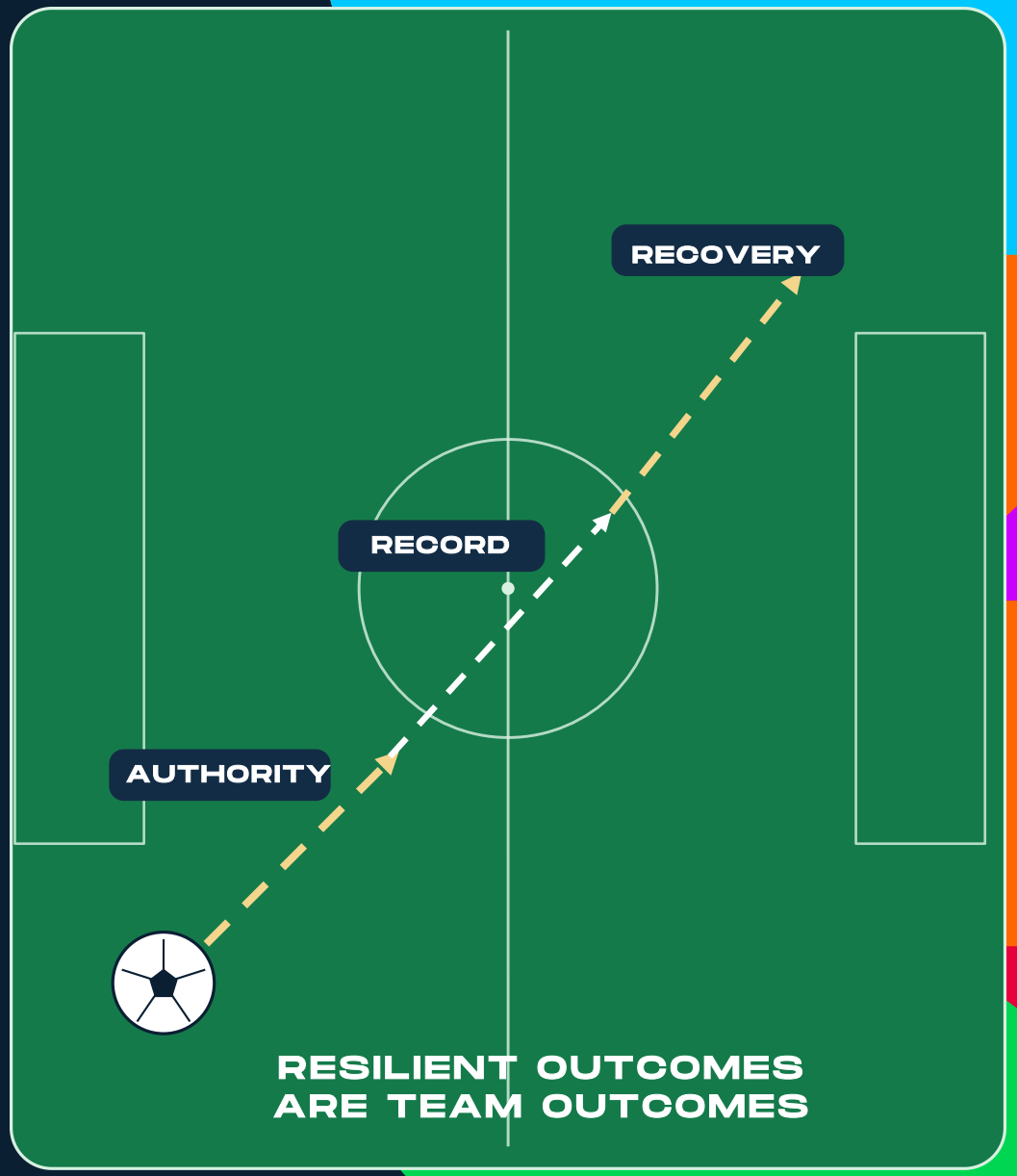
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PEARLMAN 2026
THE BEAUTIFUL GAME OF SURETY

PLAYING THE FEDERAL PITCH

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

Sunny Lee • Matt Drake
Patrick Weller • Guy Armfield



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The Match Plan

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.

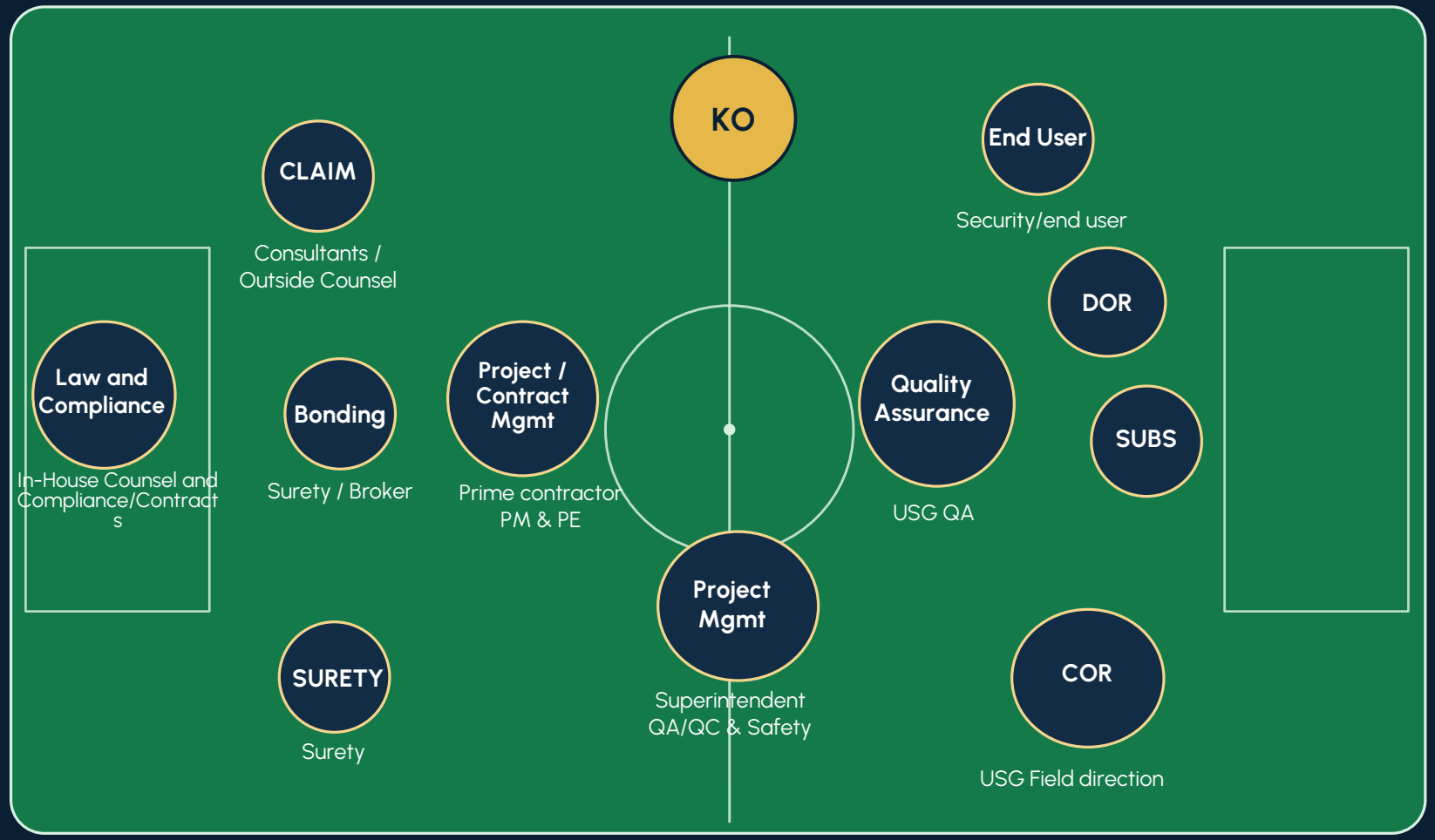
Training Camp

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

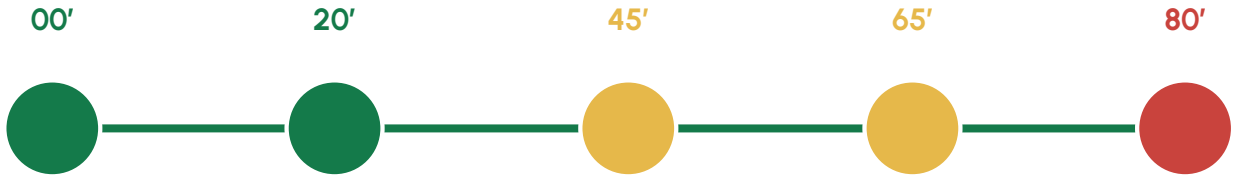
An active facility, multiple government voices, and a project record still being written.

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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



Access	Direction	Delay	Pressure	Notice
Phasing limits work fronts	Field team changes sequence	Critical sub slips	Lower tiers seek payment	Cure / show cause

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.

CONTRACTING OFFICER	COR	PROJECT MANAGER	INSPECTOR	SECURITY / END USER	DESIGNER / FACILITIES
YES—within delegated authority	Field voice—confirm authority	Field voice—confirm authority	Field voice—confirm authority	Operational input—not modification authority	Technical input—confirm authority

PRACTICAL RULE

Respect the field team. Confirm authority with the Contracting Officer.

Promptly identify who directed what, when, the work affected, and any potential time or cost impact.

WHISTLE TEST

A COR directs weekend acceleration. Security changes access. The inspector rejects the planned sequence.

What do you confirm—and how quickly?

FAR 1.602-1; FAR 1.602-2; FAR 43.102

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.

FAR 52.243-4

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

Contemporaneous facts — Entitlement — Causation — Time — Cost

Documentation — Contract Documentation — Project Documentation

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.

Halftime Huddle: Who Owns the Next 24 Hours?

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

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

FAR 52.233-1

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.

FAR 52.233-1; FAR 33.211

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.

FAR 49.402-3; FAR 52.249-10

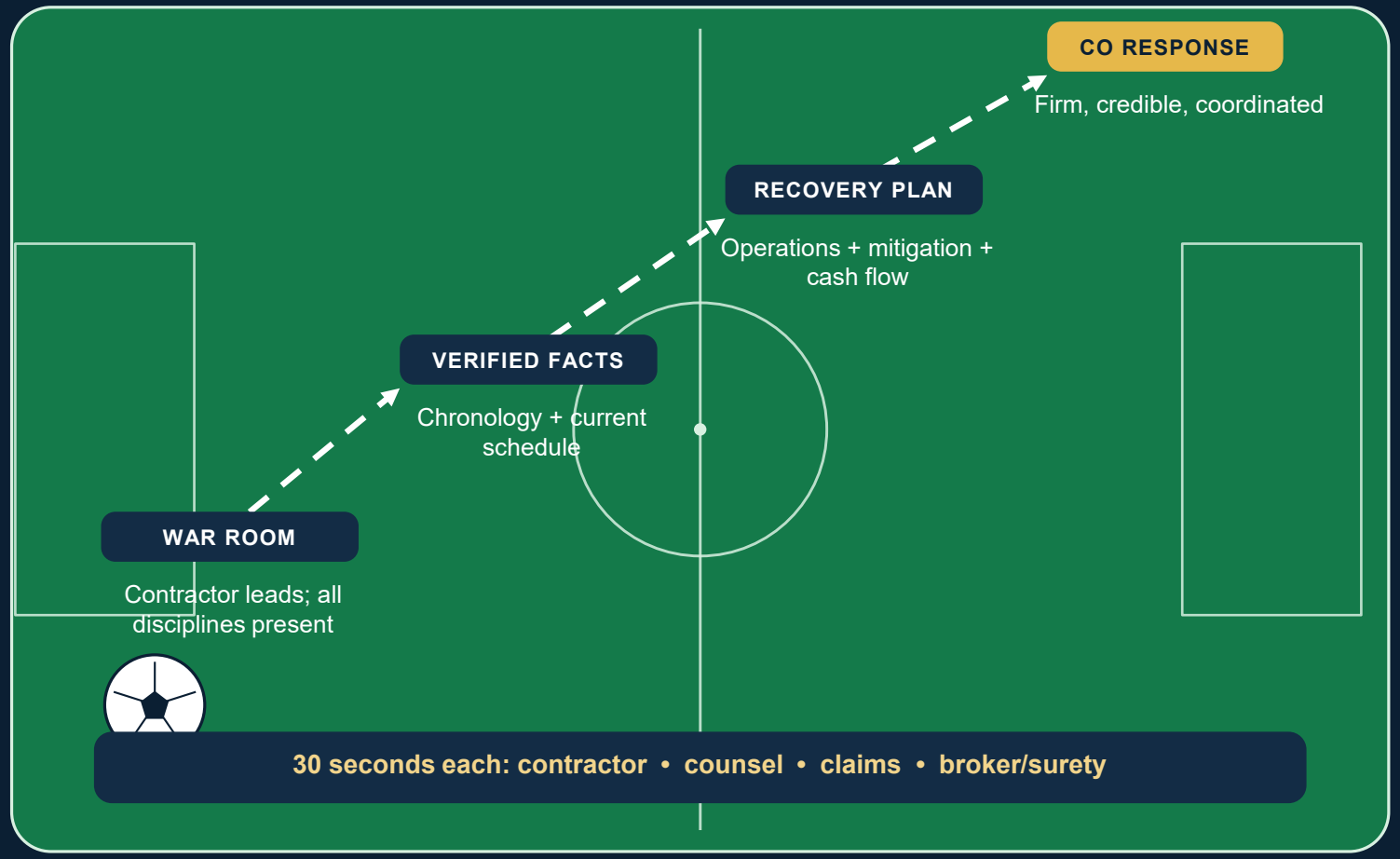
The 48-Hour Response Drill

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

Sunny Lee · Matt Drake · Patrick Weller · Guy Armfield

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.


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Financials: The Underrated Key to Strategy

The Pearlman Conference 2026

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

September 10, 2026

Pearlman CONFERENCE

FIRST HALF

READING THE SIGNALS

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

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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

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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

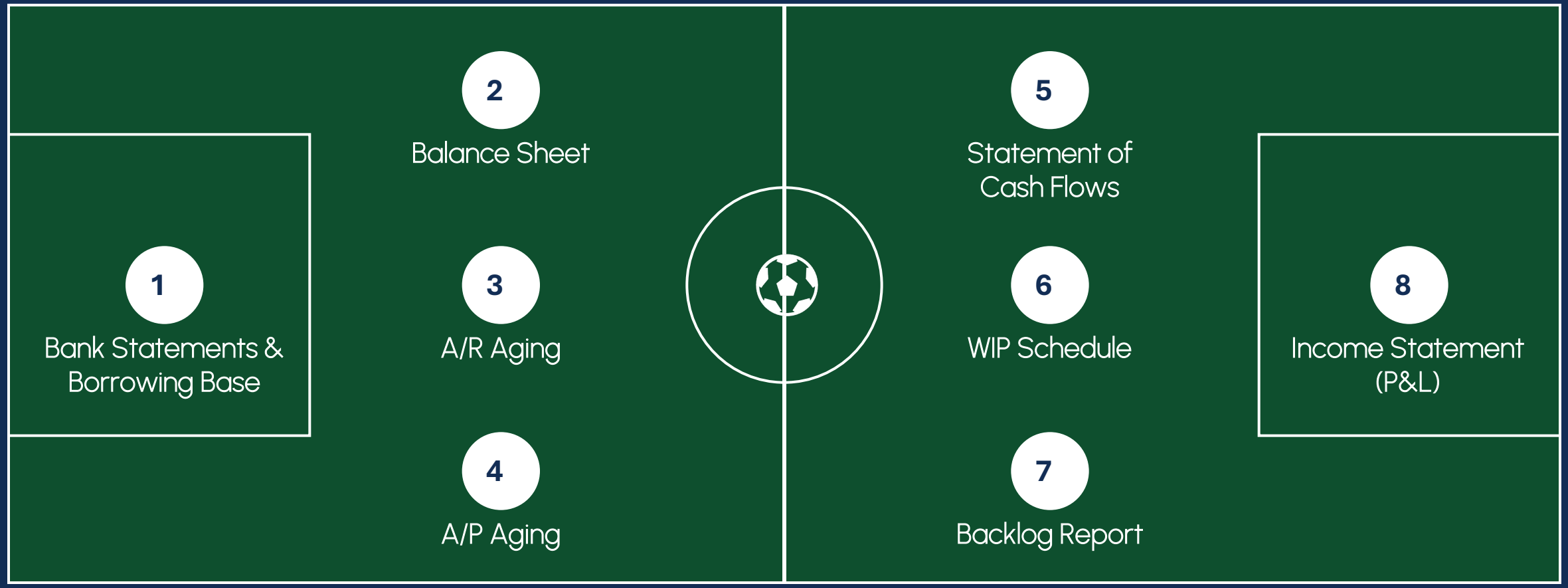
The financial team should work closely with the claims team to identify possible sources of funds and recovery. This may include review and analysis of:

- 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

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Strategic Timing: Should we stay or should we go?

KICK-OFF 0' | HALF TIME 45' | FULL TIME 90'+

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

Step 1 — Is the contractor deteriorating?

Step 2 — Is the problem temporary or structural?

Step 3 — Can management execute a credible stabilization plan?

Step 4 — Is additional funding economically justified?

Step 5 — Are legal rights and contractual remedies preserved?

Step 6 – Consider:
· Stabilize / finance
· Management Supplementation
· Completion Options

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!

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

PRESENTED BY

MICHAEL PRISCO

GINA LOCKWOOD

MARC BROWN

BEN CHAMBERS

Pearlman CONFERENCE

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THE PLAYERS

EVERGREEN CONSTRUCTION, INC.	NATIONAL SURETY COMPANY	JOHN ELLIS	STATE UNIVERSITY	APEX MECHANICAL
• GENERAL CONTRACTOR • $50 MILLION UNIVERSITY CONSTRUCTION PROJECT	• PERFORMANCE AND PAYMENT SURETY BROAD AGREEMENT OF INDEMNITY	• EVERGREEN'S PRINCIPAL • INDIVIDUAL INDEMNITOR • OWNS SIGNIFICANT REAL ESTATE	• PROJECT OWNER	• 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

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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

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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

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Hon. Nancy Holtz (Ret.)
JAMS, Boston

Michael Carson
Nationwide Mutual Insurance Company, Philadelphia

Bryan Kelley
Balfour Beatty, Seattle

Jonathan Burwood
Watt Tieder, Boston

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“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

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Three Important Questions to ADRess

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

And How Do We Screw It Up?

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Why Isn't Construction Arbitration Actually Efficient?

And What Is Our Role In Fixing It?

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How Do You Define Success?

More Importantly, How Do I Define Success?

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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



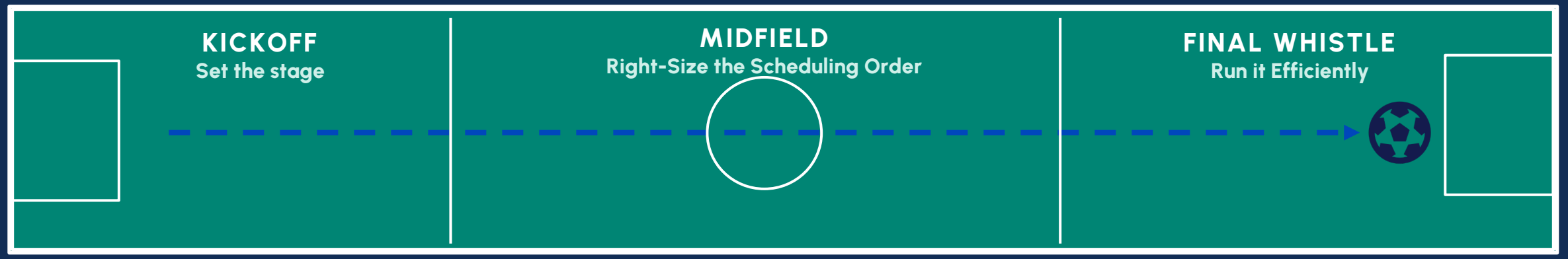
FRUSTRATED PLAYERS

Work With The Mediator



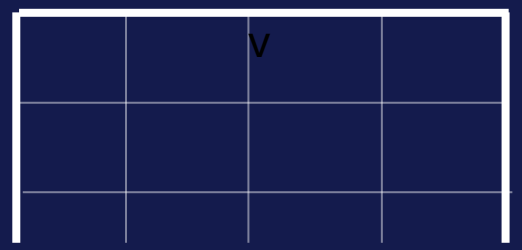
- ❑ Encourage Direct Communication Between Mediator and Client
- ❑ Engage in Candid Discussions
- ❑ Ask for Mediator's Thoughts on Moves & Messaging

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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“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

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