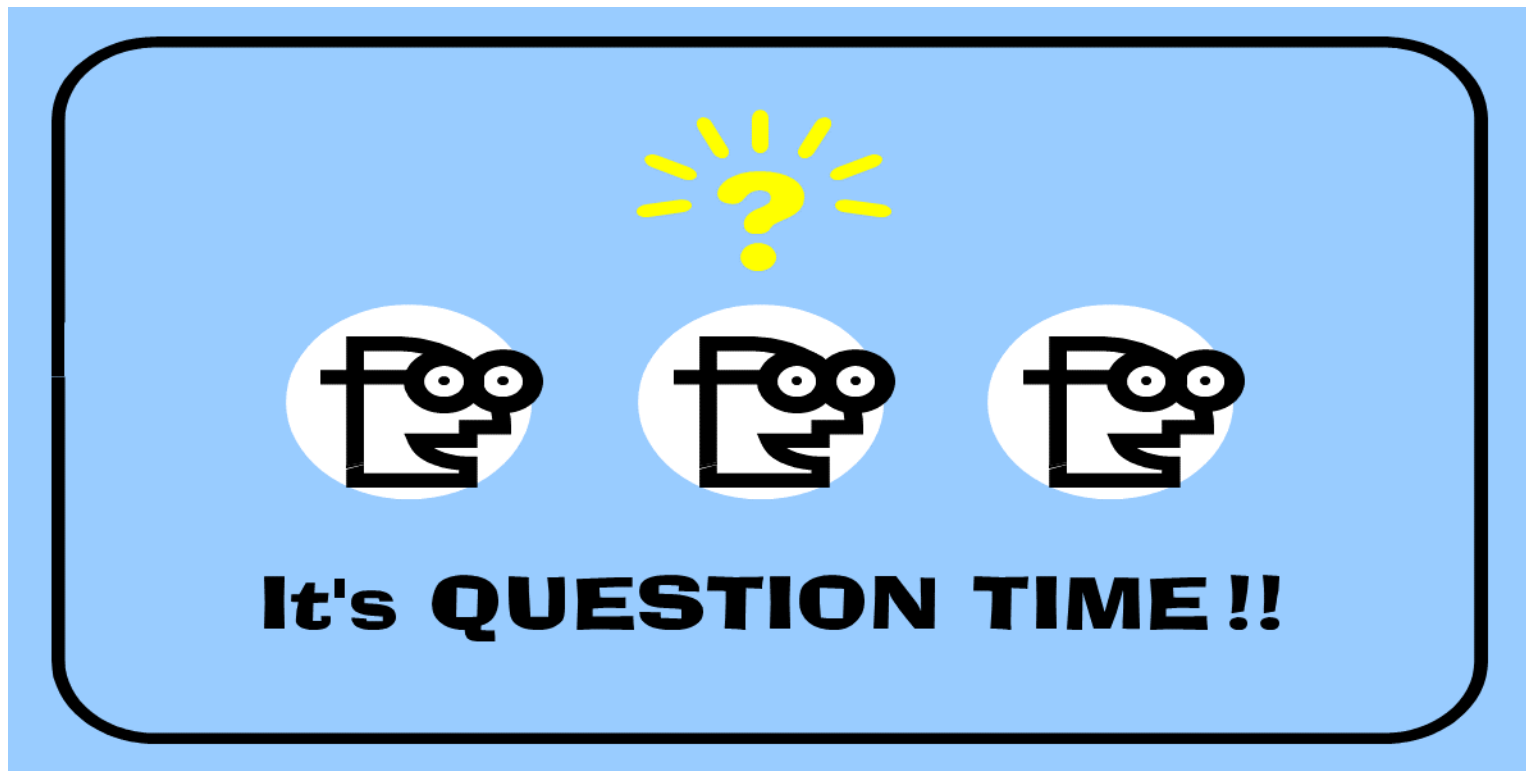




CE 401 CE Seminar General Questions:

- Start ZOOM Session





CE 401 Civil Engineering Seminar

The Law and Contract Law

DISCUSSION GROUP ACTIVITY

Timely Initial Posts: 100.0%			Last Update 2-Mar-23 11:48 PM					
Section 2			Week 8	Discussion Question Activity Report				
Question	Group	Leader	1	2	3	4	5	
1	B	Makinen	Demaree	Ham	Makinen	Robertson	Rodgers	
1	D	McCrary	Al Kharusi, Sr.	Hadgu	Kayat	McCrary		
1	F	Hernandez	Graves, Jr.	Hamilton	Hernandez	Kilcoyne	O'Neill	
2	A	Burch	Burch	Dockemeyer	Hagan	Lockhart	Wong	
2	C	Rogers	Gough	Harres	Rogers	Vargas		
2	E	Lee	Graham	Lee	Todd	Williams		
3	B	Demaree	Demaree	Ham	Makinen	Robertson	Rodgers	
3	D	Hadgu	Al Kharusi, Sr.	Hadgu	Kayat	McCrary		
3	E	Graham	Graham	Lee	Todd	Williams		
4	A	Wong	Burch	Dockemeyer	Hagan	Lockhart	Wong	
4	C	Vargas	Gough	Harres	Rogers	Vargas		
4	F	Hamilton	Graves, Jr.	Hamilton	Hernandez	Kilcoyne	O'Neill	
5	B	Ham	Demaree	Ham	Makinen	Robertson	Rodgers	
5	C	Harres	Gough	Harres	Rogers	Vargas		
5	E	Todd	Graham	Lee	Todd	Williams		
6	A	Hagan	50 Burch	Dockemeyer	Hagan	Lockhart	Wong	
6	D	Kayat	0 Al Kharusi, Sr.	Hadgu	Kayat	McCrary		
6	F	Graves, Jr.	50 Graves, Jr.	Hamilton	Hernandez	Kilcoyne	O'Neill	

Font Legend			
non-bold	No post made, time for posting remains	non-bold	Late Post before consensus, 20% loss
Bold	Post made within Time	Bold	Post is made after consensus, 60% loss
Non-Bold Leader	No Consensus Posted, -5 Points	<i>Ital. non-bold</i>	No Post Made, 100% loss



CE 401 Civil Engineering Seminar
The Law and Contract Law

QUIZ RESULTS

Quiz 7

Range: 4-10; Average 8.6

W/ Text Historic 1-10; Average 8

53% (27 of 51) Of quizzes scored 10/10.



CE 401 Civil Engineering Seminar

The Law

OUR LEGAL SYSTEM

•Today forward, focus of class shifts:

- The Law
 - The Legal System (Hierarchy of Law)
 - Its Major Components (Organization of System)
 - How it Functions (Malfunctions)
 - The Cost of Using It (Time, Money, Indirect Costs)
- Loss Prevention/Dispute Avoidance
- Dispute Resolution



CE 401 Civil Engineering Seminar

The Law

OUR LEGAL SYSTEM-MISCONCEPTIONS

- Many people have misconceptions about our law, the legal system and how it operates**
- Over the next few weeks, I hope to dispel some of those misconceptions about contracts, negligence, and the way our civil justice system operates.**

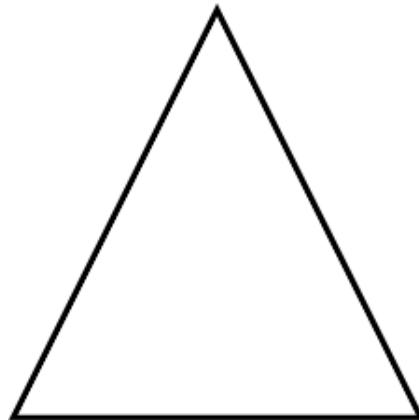


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The Law

HEIRARCHY OF THE LAW

If you think of US LAW as a triangle, with the highest principles at the peak, and lesser principles progressing to the base of the triangle, What is at the top of the triangle?

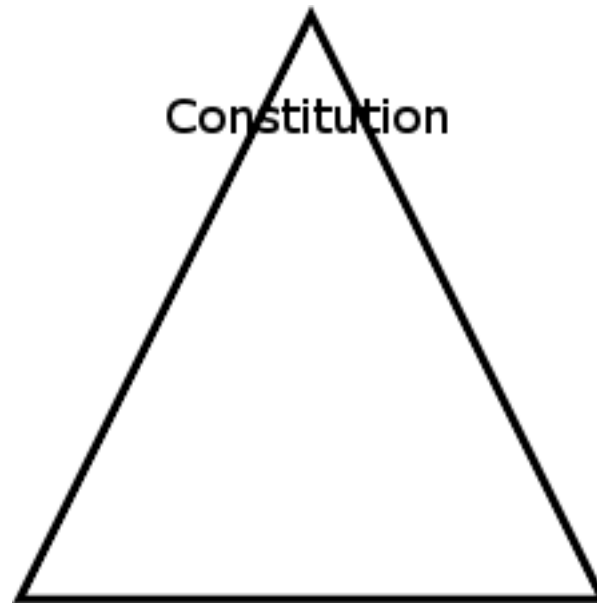




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The Law

1. Constitution-Founding First Principles



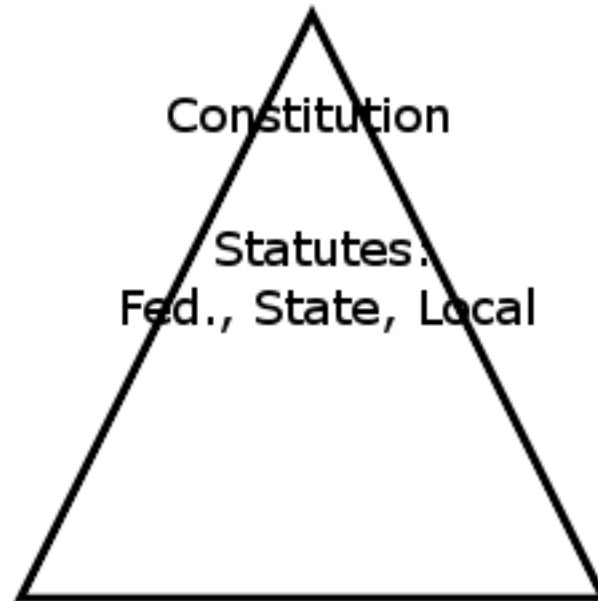
What would be next in order of importance?



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The Law

- 1. Constitution-Founding First Principles**
- 2. Statutes (fed., then state, then local)-Legislative**



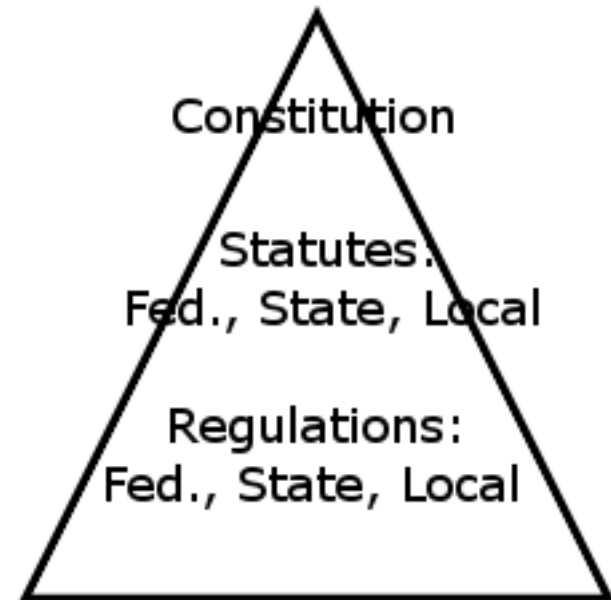
What would be next in order of importance?



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The Law

- 1. Constitution-Founding First Principles**
- 2. Statutes (fed., then state, then local) Legislative**
- 3. Regulations (fed., then state, then local) Executive**



What would be next?



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The Law

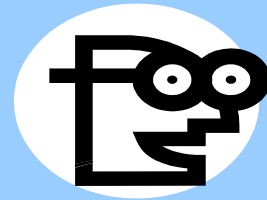
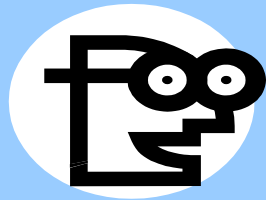
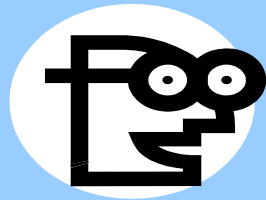
1. **Constitution-Founding First Principles**
2. **Statutes (fed., then state, then local) Legislative**
3. **Regulations (fed., then state, then local) Executive**
4. **Judicial Precedence (by court rulings)-Judicial**





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The Law:



It's QUESTION TIME !!



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The Legal System

- **The Legal System:**

- **Two Major Bodies of Law:**

- **Criminal Law**

- **Civil Law**

What is the difference between the two?



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The Legal System

- **The Legal System:**

- **Two Major Bodies of Law:**

- **Criminal Law**

- **Civil Law**

What is the difference between the two?

In criminal law, the government is the plaintiff representing The People against a defendant charged with a criminal violation.



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The Legal System

- **The Legal System:**
 - **Two Major Bodies of Law:**
 - Criminal Law
 - Civil Law

What is the difference between the two?

In criminal law, the government is the plaintiff representing The People against a defendant charged with a criminal violation.

In civil law, two parties engage each other, one as plaintiff and the other as defendant alleged to have violated some legal duty owed to the plaintiff.



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The Legal System

- **The Legal System:**

- **Two Major Bodies of Law:**

- **Criminal Law**

- **Civil Law**

Civil Law has two major divisions. What are they?



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The Legal System

- **The Legal System:**

- **Two Major Bodies of Law:**

- **Criminal Law**

- **Civil Law**

Civil Law has two major divisions. What are they?

Contract Law

Tort Law

WHAT IS A TORT?



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The Legal System

- **The Legal System:**

- **Two Major Bodies of Law:**

- **Criminal Law**

- **Civil Law**

Civil Law has two major divisions. What are they?

Contract Law

Tort Law

WHAT IS A TORT? A civil wrong for which a court will grant a remedy (Bachner).



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The Legal System

- **The Legal System – Criminal Law**

- **Not a major factor in the practice of engineering**

- **Does appear on occasion**

- **Gilbane Gold touched upon it**

- **Inspector goes to Prison for 18 months for taking bribe**

- **Engineer jailed for 10 years for wrongful death in collapse**

- **Road Builders indicted for bid collusion, fraud**

- **ALI-ABA Seminar-Criminal Enforcement-Envr. Laws**

- **For Engineers, Major focus is on Civil Law**

- **Today's focus is Contract Law**

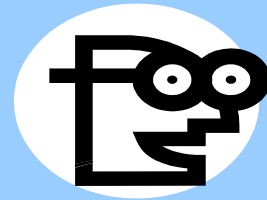
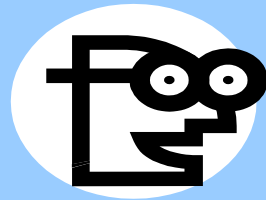
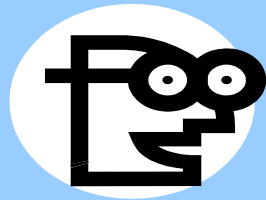
- **Will look at Tort Law and Tort Reform**

- **Will look at Loss Prevention, Dispute Avoidance and Resolution**

- **Will Look at Construction Job Site Safety issues**



CE 401 CE Seminar The Legal System:



It's QUESTION TIME !!



CE 401 Civil Engineering Seminar

Contract Law

- **Can one party impose a contract on another party?**



CE 401 Civil Engineering Seminar

Contract Law

- **Can one party impose a contract on another party?
No, there must be an OFFER and ACCEPTANCE**
- **Is it an enforceable contract if I promise to take you to
Disney Land next Tuesday?**



CE 401 Civil Engineering Seminar

Contract Law

- **Can one party impose a contract on another party? No, there must be an OFFER and ACCEPTANCE**
- **Is it an enforceable contract if I promise to take you to Disney Land next Tuesday? No, there must be CONSIDERATION (Something bargained for and given)**
- **A child signs an agreement at the store to pay for a new bike from his newspaper earnings in six monthly installments, and the store gives him the bike. When the child wrecks and destroys the bike on his way home from the store, the child refuses to pay for the bike. Does the store have an enforceable contract?**



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Contract Law

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No, a child is NOT A COMPETENT PARTY**



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Contract Law

- **Is it an enforceable contract if one party induces the agreement of the other with threats of violence, fraud, or other forms of intimidation or coercion?**



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Contract Law

- **Is it an enforceable contract if one party induces the agreement of the other with threats of violence, fraud, or other forms of intimidation or coercion? No, there must be MUTUAL ASSENT, freely given**
- **Will a Court enforce a contract between two drug traffickers for delivery of and payment for contraband?**



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Contract Law

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- **Will a Court enforce a contract between two drug traffickers for delivery of and payment for contraband? No, the agreement must be for a LEGAL PURPOSE**
- **I tell you I will sell you my farm for \$1 and a bottle of bourbon. You accept my offer, then we shake hands on the deal. Is it an enforceable contract? Will a court order me to deliver the deed to you for the agreed price?**



CE 401 Civil Engineering Seminar

Contract Law

- **Is it an enforceable contract if one party induces the agreement of the other with threats of violence, fraud, or other forms of intimidation or coercion? No, there must be MUTUAL ASSENT, freely given**
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- **I tell you I will sell you my farm for \$1 and a bottle of bourbon. You accept my offer, then we the shake hands on the deal Is it an enforceable contract? Will a court order me to deliver the deed to you for the agreed price? No, the contract must be of PROPER FORM, and a contract to sell real property must be in a WRITING**



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Contract Law

•**CONTRACT IS:**

- Binding Agreement by two or more parties**
- To perform or pay for performance (Quid Pro Quo?)**
- Breach of which is enforced by Courts**

•**ENFORCEABLE CONTRACTS SATISFY 6 REQUIREMENTS**

- Agreement – Offer and Acceptance**
- Consideration – Something bargained for and given**
- Competent Parties**
- Mutual Assent – Absence of fraud, etc.**
- For Legal Purpose**
- Proper Form – Some types of agreements must be a writing**



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Contract Law

CONTRACT LAW-MISTAKES

Consider the case when a contractor submits the following bid that wins the contract:

Total Bid \$380,000.00

Three Hundred Eight Thousand dollars and no cents

What is the economic value of the ensuing contract?



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Contract Law

CONTRACT LAW-MISTAKES

Consider the case when a contractor submits the following bid that wins the contract: ***Total Bid \$380,000.00***

Three Hundred Eight Thousand dollars and no cents

What is the economic value of the ensuing contract? **\$308,000!!!**

The discrepancy between the numerical bid \$380,000, and the written amount bid, \$308,000, occurs due to a clerical mistake whereby a clerk failed to type a “y”.

The contractor upon discovering this mistake at the bid opening, wants to withdraw his bid. May he withdraw his bid based on having made an obvious mistake?



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Contract Law

CONTRACT LAW-MISTAKES

Consider the case when a contractor submits the following bid that wins the contract: ***Total Bid \$380,000.00 Three Hundred Eight Thousand dollars and no cents***

What is the economic value of the ensuing contract? ***\$308,000!!!***

The discrepancy between the numerical bid \$380,000, and the written amount bid, \$308,000, occurs due to a clerical mistake whereby a clerk failed to type a “y”.

The contractor upon discovering this mistake at the bid opening, wants to withdraw his bid. May he withdraw his bid based on having made an obvious mistake? ***No, mistake is not an excuse under contract law.***



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Contract Law

- **Can a contract be written in plain English, or must it be written by lawyers in legalese?**



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Contract Law

- **Can a contract be written in plain English, or must it be written by lawyers in legalese?**
 - **Can be written in plain English, AND**
 - **Probably preferred when done that way**
 - **Legalese is not required**
 - **A lawyer is not required**



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Contract Law

- **How will a Court interpret a contract?**
 - **As written?**
 - **As intended by the parties?**
 - **As the court concludes is fair?**



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Contract Law

- **How will a Court interpret a contract?**
 - **As written?**
 - **As intended by the parties?**
 - **As the court concludes is fair?**
- **A court interprets a contract AS WRITTEN by Giving words their usual, ordinary meaning by applying the plain language of the contract unless:**
 - **Agreement violates a rule of law, or**
 - **Agreement violates public policy, or**
 - **Agreed performance is a violation of a law**



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Contract Law

CONTRACT LAW

- **What happens when an agreement differs from common law convention?**



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Contract Law

CONTRACT LAW

- **What happens when an agreement differs from common law convention? The contract will be enforced as written because Parties have freedom to contract as they wish**
- **What happens to an agreement made before the contract is signed but not included in the written contract?**



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Contract Law

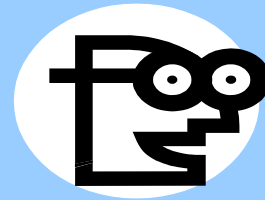
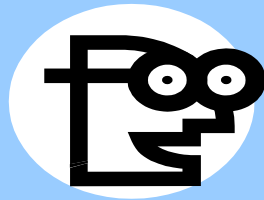
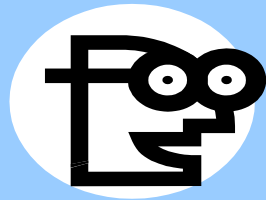
CONTRACT LAW

- **What happens when an agreement differs from common law convention? The contract will be enforced as written because Parties have freedom to contract as they wish**
- **What happens to an agreement made before the contract is signed but not included in the written contract? The previous agreement dies and is not enforceable since it is not in the writing**



CE 401 CE Seminar

Contract Law:



It's QUESTION TIME !!



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Contract Law

Discussion Question #1

Clients often require engineers to agree to a variety of Unfair Contract Terms, and Indemnities are perhaps the most onerous of such unfair terms. Bachner discusses "Indemnities" as being "too hot to handle" because indemnities often work to void the engineer's insurance coverage because the indemnity creates liability that is contractually assumed. Therefore, engineers will assume unreasonable liability under the terms of an indemnity without insurance protection.

There are three forms of indemnity agreements used in contracts:

Limited Form Indemnity looks something like this: CONSULTANT agrees to hold harmless and indemnify CLIENT from and against liability to the extent caused by CONSULTANT'S sole negligent performance of the Services.

Intermediate Form Indemnity looks something like this: CONSULTANT agrees to hold CLIENT harmless from damages arising from CONSULTANT'S negligence, whether it is sole or in concert with others, arising from provision of the services enumerated herein.

Broad Form Indemnity looks something like this: CONSULTANT agrees to hold CLIENT harmless from damages arising from the project, without regard to CONSULTANT'S or CLIENT'S negligence.

1. In 2 or 3 sentences, discuss why an "intermediate form" indemnity creates liability exposure for the ENGINEER (indemnitor) that exceeds the liability exposure for the ENGINEER under the TORT of NEGLIGENCE.

2. In 2 or 3 sentences, discuss address whether negotiating for the use of a "limited form" indemnity resolves all of the ENGINEER'S concerns about liability exposure.

B	Makinen
D	McCrary
F	Hernandez



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Contract Law

Discussion Question #1

- **What risk does a limited form indemnity address in the contractual relationship between a client and the design professional?**



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Contract Law

Discussion Question #1

- What risk does a limited form indemnity address in the contractual relationship between a client and the design professional? **The limited form indemnity imposes by contract the same duty on the engineer as imposed by Tort Law**
- If Tort law requires a party to compensate another party for damages caused by the first party's negligent acts, why are limited form indemnities ever needed in contracts?



CE 401 Civil Engineering Seminar

Contract Law

Discussion Question #1

- What risk does a limited form indemnity address in the contractual relationship between a client and the design professional? **The limited form indemnity imposes by contract the same duty on the engineer as imposed by Tort Law**
- If Tort law requires a party to compensate another party for damages caused by the first party's negligent acts, why are limited form indemnities ever needed in contracts? **They are not needed in order to provide legal protection for an engineer's negligence because the owner can sue in Tort to collect damages for negligence.**



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Contract Law

Discussion Question #1

- **If a professional liability insurance policy excludes coverage for contractually assumed liability (e.g. a limited form indemnity), then what advantage does the clause provide a client?**



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Contract Law

Discussion Question #1

- If a professional liability insurance policy excludes coverage for contractually assumed liability (e.g. a limited form indemnity), then what advantage does the clause provide a client? **None because the engineer owes the same duty to the client under Tort Law as under the Contract, and the Contractual Liability could void insurance coverage for negligence**
- Why does an intermediate form indemnity increase the liability for the indemnitor?



CE 401 Civil Engineering Seminar

Contract Law

Discussion Question #1

- If a professional liability insurance policy excludes coverage for contractually assumed liability (e.g. a limited form indemnity), then what advantage does the clause provide a client? **None because the engineer owes the same duty to the client under Tort Law as under the Contract, and the Contractual Liability could void insurance coverage for negligence**
- Why does an intermediate form indemnity increase the liability for the indemnitor? **The Contract imposes higher legal duties than tort law.**



CE 401 Civil Engineering Seminar

Contract Law

Discussion Question #1

Remember when I shared the ideas of comparative negligence with you a few weeks ago?

The intermediate form indemnity is a way for a party to avoid the law of comparative negligence by shifting the dispute from tort law to contract law.

With an intermediate form indemnity, an engineer whose negligence caused a small part of the damage (perhaps as low as 1%) must pay for all the damage.

Some believe that a limited form indemnity is OK because it does not require the engineer to pay for any damage not created by the engineer's own negligence.

That solves the comparative negligence part, but it still shifts the dispute from a matter of Tort Law to a Contract Law matter, AND

Most PLI policies EXCLUDE coverage for contractually based liability

Some individual answers were not very responsive to the question or consistent with the readings.



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Contract Law

Discussion Question #2

For the purposes of this two part question, Answer Part 1 before considering the subsequent facts presented for Part 2 of the questions.

Parties A and B enter into a contract that includes the following Broad Form Indemnity:

PARTY B agrees to hold PARTY A harmless from damages arising from the project, without regard to PARTY B'S or PARTY A'S negligence.

Subsequently, PARTY A sustains a \$1,000,000 loss on the project due to PARTY A's own negligence.

PARTY A seeks to recover the \$1,000,000 loss from PARTY B despite the absence of any negligence or other wrongdoing by PARTY B based on their Broad Form Indemnity.

1) Assuming PARTY A successfully enforces the Broad Form Indemnity against PARTY B in court and Party A spent \$20,000 to obtain the court judgment, how much does PARTY A believe the court judgment will be worth,

- a) \$0
- b) \$1,000,000
- c) \$1,020,000
- d) \$_____ (Some other amount of your choosing)

and explain why.

2) Assuming PARTY B declares bankruptcy after the court judgment has been entered, how much is the judgment worth to PARTY A?

a) The full amount awarded by the Court in 1 above, which was \$_____

- b) \$0
 - c) A small amount after liquidating Party B's assets and distributing the funds to all creditors
- and explain why.

A	Burch
C	Rogers
E	Lee



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Contract Law

Discussion Question #2

This question requires some practical thinking about the real-life consequences of certain events.

If an INDEMNITEE sustains a loss and believes the INDEMNITOR should pay for the loss, it is likely the INDEMNITEE believes the INDEMNITY AGREEMENT is worth the full value of the loss, in this example, \$1 million, which the INDEMNITEE asserts via a CONTRACT claim.

However, if the INDEMNITOR subsequently declares BANKRUPTCY, the INDEMNITEE is probably unable to collect any significant amount of the loss from the BANKRUPT INDEMNITOR (pennies on the dollar)

However, If a PLAINTIFF'S loss is due to the DEFENDANT'S NEGLIGENCE, and NO INDEMNITY EXISTED, the claim would be made based on the TORT LAW of negligence for the real damages, presumably \$1 million.

Then, if the negligent DEFENDANT subsequently takes bankruptcy, the bankruptcy would NOT CANCEL the DEFENDANT'S PLI coverage, and the only portion of the judgment at risk to for the PLAINTIFF is the uninsured portion of the damage award (Deductible and Excess Liability)

CE 401 Civil Engineering Seminar

Contract Law

Discussion Question #3

- a) What conditions must exist to make a contract term unconscionable?
- b) In 3 to 4 sentences, discuss how a stronger party can use its “Disparate Bargaining Power” to impose unconscionable contract terms on a weaker contracting partner.
- c) What are the weaker party's options when the stronger party insists upon unconscionable contract terms on a take it or leave it basis?
- d) When and how must a weaker party assert that the stronger party has imposed unconscionable contract terms due to its “Disparate Bargaining Power”?

B	Demaree
D	Hadgu
E	Graham



CE 401 Civil Engineering Seminar

Contract Law

Discussion Question #3

A contract term is unconscionable when:

- a) It is UNFAIR
 1. Prepared by one side before speaking with the other side;
 2. Prepared by the side with the most power in the relationship; and
 3. Not negotiated before signing
- b) The Party insisting on the UNFAIR TERMS has superior bargaining strength

The court presumes parties will negotiate contracts that are acceptable to them following negotiations between independent parties on equal footing.

Arms-Length Negotiations

Freedom of Contract

The principle of Disparate Bargaining Power is one way to overcome the Court's presumption

The existence of Disparate Bargaining Power must be established at the time of signing the unfair contract.



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Tort Law

Discussion Question #4

Negligence is the most common type of tort.

- What are the four elements of negligence, and which of them must a plaintiff prove with a preponderance of the evidence to win a negligence claim in court?
- Define a professional's "Standard of Care" under negligence law, and which of the four elements of negligence depends upon a clear definition of the standard of care?
- In 2 or 3 sentences, explain whether it is possible for a client to successfully increase an engineer's "Standard of Care" by specifying a higher "Standard of Care" in the contract signed by the engineer.
- In 2 or 3 sentences, explain whether it is possible for an engineer to successfully reduce his/her "Standard of Care" by specifying a lesser "Standard of Care" in the contract signed by the client.

A	Wong
C	Vargas
F	Hamilton



CE 401 Civil Engineering Seminar

Tort Law

Three types of Torts:

Intentional Torts

Strict Liability

Negligence

Our focus is primarily on Negligence, but engineers can get crossways with intentional torts and strict liability torts from time to time.



CE 401 Civil Engineering Seminar

Contract Law

Discussion Question #4

See pages 139-140 for the Tort Law definition of Standard of Care:

The ordinary skill and competence exercised by members of a profession is good standing in the community at the time of the event creating the cause of action

Requires the ORDINARY SKILL AND COMPETENCE

Does NOT require ZERO DEFECTS or PERFECTION

Does NOT require you to perform at the STATE OF THE ART

If you promise to deliver more than the Standard of Care under Tort Law requires, you must deliver what you promise!

See Page 140 for how a contract can modify the Standard of Care

Many tort law, statutory law, and common law duties can be modified in contracts



CE 401 Civil Engineering Seminar

Hired Guns

Discussion Question #5

Hired gun experts are a subset of all experts who are willing to express opinions in court that have no basis or relevancy to what a reasonably prudent design professional would have done.

- 1) In the context of dispute resolution procedures, define a hired gun expert.**
- 2) Do hired gun experts work:**
 - A. Only for non-engineer plaintiffs suing design professionals,**
 - B. Only for design professionals, whether when being sued or when suing others, or**
 - C. For or against the interests of engineers during the dispute resolution process depending upon which party employs a hired gun expert?**
- 3) In 2 to 3 sentences, explain why it is important to recognize and then disarm the hired gun.**

B	Ham
C	Harres
E	Todd



CE 401 Civil Engineering Seminar

Hired Guns

Discussion Question #5

In 2 to 3 sentences, and in the context of dispute resolution procedures, define a hired gun and explain why it is important to recognize and then disarm the hired gun..

- Is the hired gun expert always employed against the design professional in a case, or do design professionals accused of negligence sometimes engage a hired gun expert of their own?**
- Are all experts (paid to give their opinion in a case) hired guns?**
- How does a hired gun's effectiveness change with improved communication skills?**
- Does the hired gun merely breach an ethical duty, or does he violate the law?**



CE 401 Civil Engineering Seminar

Hired Guns

Discussion Question #5

An expert witness says, “The standard of care requires a civil engineer to supervise the execution of their plans to ensure worker-safety, even if they do not have a contractual responsibility to do so, and even if they are not paid.”



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Hired Guns

Discussion Question #5

An expert witness says, “The standard of care requires a civil engineer to supervise the execution of their plans to ensure worker-safety, even if they do not have a contractual responsibility to do so, and even if they are not paid.”

- Is this the standard of care that should apply to civil engineers?



CE 401 Civil Engineering Seminar

Hired Guns

Discussion Question #5

An expert witness says, “The standard of care requires a civil engineer to supervise the execution of their plans to ensure worker-safety, even if they do not have a contractual responsibility to do so, and even if they are not paid.”

- Is this the standard of care that should apply to civil engineers?
- Is this the standard of care that should apply to your work?



CE 401 Civil Engineering Seminar

Hired Guns

Discussion Question #5

An expert witness says, “The standard of care requires a civil engineer to supervise the execution of their plans to ensure worker-safety, even if they do not have a contractual responsibility to do so, and even if they are not paid.”

- Is this the standard of care that should apply to civil engineers?
- Is this the standard of care that should apply to your work?
- Why would an expert witness say such a thing?



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- Should the jury/judge believe it?



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- Is this the standard of care that should apply to civil engineers?
- Is this the standard of care that should apply to your work?
- Why would an expert witness say such a thing?
- Should the jury/judge believe it?
- **Is this what a reasonably prudent civil engineer would do?**



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Contract Law

Discussion Question #5

In professional liability actions, expert witness testimony is needed to determine whether a duty exists and whether the defendant professional violated that duty.

Expert opinions can also address causation and the value of the damages

Expert Witnesses are the only witnesses allowed to give opinion testimony, and the opinion is given the same weight of evidence as fact witness testimony

However, the judge must determine prior to the testimony that the expert is qualified and the opinions the expert will express are relevant. (Rule 702)



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Contract Law

Discussion Question #5

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

All Expert Witnesses are paid to study the issue, appear in court and testify

Expert Witnesses should be unbiased, and committed to the truth

Every witness takes an oath to tell the truth, but not all witnesses tell the truth while under oath.

Some Expert Witnesses are willing to lie for a fee to advance the client's cause

No Expert Witness should have a "real connection" to the case (creates bias)



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Real Damages

Discussion Question #6

The fourth element of Negligence is "Real Damages" and damages cannot be anticipatory, speculative, and must be caused by the defendant's breach of a legal duty to the Plaintiff.

Consider the following facts:

- The Design Professional makes an error and omits an elevator that is required by the building code from a building design .
- The owner's contractor submits a change order request for \$50,000 to add the required elevator to the project after realizing this design omission.
- If the Design Professional had not omitted the elevator, the contractor's original bid would have been \$50,000 higher.
- The owner demands a \$50,000 reimbursement from the Design Professional due to the design professional's failure to comply with the building code (negligence per se)
The Design Professional refuses to make compensation, and the Owner sues, taking the case to trial, spending an additional \$10,000 for legal, expert, and other costs.

Selecting from the following choices, how much are the Plaintiff's "Real Damages" in its lawsuit against the Design Professional?

- \$0
- \$10,000
- \$50,000
- \$60,000
- Some other amount = \$ _____

In 2 to 3 sentences, explain your selection.

A	Hagan
D	Kayat
F	Graves, Jr.



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Real Damages

UNJUST ENRICHMENT

- **Trying to get SOMETHING FOR NOTHING**
- **In the example:**
 - **The owner must have an elevator because the building code requires it**
 - **If the engineer included the elevator in the design (did not breach his duty), the bid would have been \$50,000 higher**
 - **Since the engineer failed to include the elevator, the contractor is requiring \$50,000 to add it to the contract**
 - **The Owner now wants the engineer to pay for his elevator, thus wants to get the elevator for nothing**
- **Courts will not give a party unjust enrichment (Something for nothing)**



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Real Damages

Damages must be real, not anticipatory or speculative

Damages must not be “unjust enrichment” e.g. getting something for nothing

In the situation presented, real damages are \$0 because of unjust enrichment.

The engineer had a duty to comply with the building code

The engineer breached this duty by failing to include the elevator in the design

The omission of the elevator caused the contractor to submit the change order request for the \$50,000 to add the elevator.

There are no real damages, thus the negligence claim against the engineer must fail



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Real Damages

Unjust Enrichment Analysis

It is the owner's building

The contractor's bid did NOT include any money for an elevator, and if the elevator had been required at the time of bidding, the bid would have increased by \$50,000

The contractor requires \$50,000 to add the elevator after the contract award

If the owner wants an elevator, the owner must pay for the elevator

If the owner expects someone else to pay for its elevator, then the owner is seeking the elevator for nothing, e.g. UNJUST ENRICHMENT

The issue is HOW MUCH SHOULD THE OWNER PAY FOR THE ELEVATOR?



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Real Damages

Many plaintiffs will seek unjust enrichment when making negligence claims against a design professional. The purpose of this information is to alert you to examine all damage claims made against you with an unjust enrichment test.

The Real damages would be the difference between the cost of the change order price and the cost of the work had the engineer not omitted it from the design in breach of a duty.

If the omission of an item does NOT violate some legal duty, then the negligence analysis ends there, and the engineer cannot be liable for the cost of the omission.

If the omission of some item that does violate a legal duty, but the omission of that item does not cause the extra project cost, the negligence claim ends there, and the engineer cannot be liable for the cost of the omission.



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Real Damages

The last issue is the owner's cost to litigate its claim, \$10,000.

In our system, each party to a lawsuit pays its own way

Therefore, win, lose or draw, the Owner is not entitled under law to recover its legal cost from the engineer.

Similarly, the engineer had to spend money for lawyers, experts, etc. to defend against this lawsuit, and given that the Owner loses its negligence action, the engineer is NOT entitled to recover its cost to defend this action

If the contract between the owner and engineer had included a "Loser Pays" provision, then the winning party would be entitled under the law to recover its cost of advancing or defending the action.



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Frivolous Lawsuits

OUR LEGAL SYSTEM

•Stella Awards: Be Aware Of Sponsors' and Critics' Agendas

- <http://www.stellaawards.com> – Sponsor
 - Want to see changes in Civil Justice System
 - Uses Absurd Legal Cases To Illustrate current folly
- <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/2011.htm> - Critic in Chief-ATLA
 - Want to protect the current system
 - Find flaws/errors in the Examples cited by their opponents



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Frivolous Lawsuits

OUR LEGAL SYSTEM

- **Other Anecdotal Examples – Judicial Branch:**
 - **Man Fired For Obesity Awarded \$1 Mil.**
 - **Family Seeks \$25.5 Mil in “Attack of Cabbage Patch Doll”**
 - **Woman Sues IHOP for \$1 Bil over frustrated breakfast Special**
 - **NYC Transit Authority Must Pay for Man’s Failed Suicide Attempt**
 - **Dead man’s family sues restaurant owner for unsafe conditions after man killed by patron during armed robbery escape**
 - **New York Woman Sues KFC for \$20 Million Over Amount of Chicken in her \$20 Fill-Up**



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Frivolous Lawsuits

OUR LEGAL SYSTEM

- **What's Wrong With This Picture?**
 - Shows how ridiculous legal system can be
 - Shows how litigious Americans can be
 - Shows how legal system can be the Lottery for some
 - But, Anecdotes are not proof, only anecdotes



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Frivolous Lawsuits

Information About Civil Lawsuits

Notes/Outline Prepared by JRC:

https://uk.instructure.com/courses/1964240/files/folder/Construction%20Disputes-Costs?preview=94001003&sort=created_at&order=desc

Interesting Article on Civil Litigation in the US:

https://uk.instructure.com/courses/1964240/files/folder/Construction%20Disputes-Costs?preview=94001008&sort=created_at&order=desc

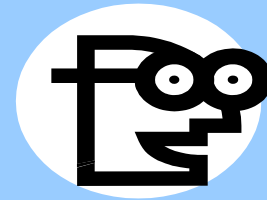
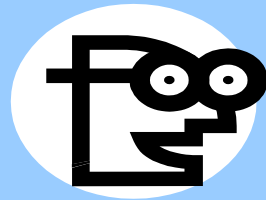
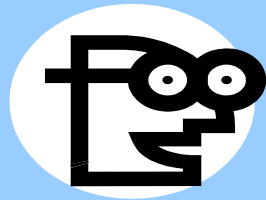
ADMINISTRATIVE OFFICE OF THE COURT DOCUMENTS ON FILINGS AND TIME:

https://uk.instructure.com/courses/1964240/files/folder/Construction%20Disputes-Costs?preview=94001006&sort=created_at&order=desc

https://uk.instructure.com/courses/1964240/files/folder/Construction%20Disputes-Costs?preview=94001005&sort=created_at&order=desc



CE 401 CE Seminar General Questions:



It's QUESTION TIME !!