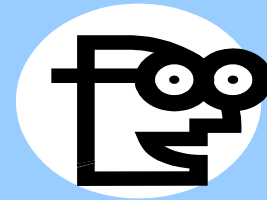
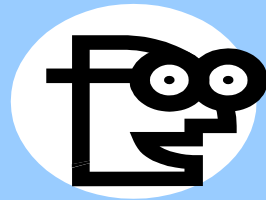
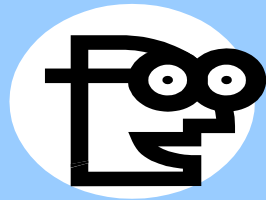




CE 401 CE Seminar General Questions:



It's QUESTION TIME !!



CE 401 Civil Engineering Seminar

Cost of Litigation

CRW INSTRUCTIONS

The next 2 weeks we will do the Conflict
Resolution Workshop

We will NOT meet here the next 2 weeks

We will begin the Sessions in **228 OHR**



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Cost of Litigation

DISCUSSION GROUP ACTIVITY

Timely Initial Posts: 98.8%

Last Update 24-Mar-23 12:20 AM

Section 2 Week 10 Discussion Question Activity Report

| Question | Group | Leader | 1 | 2 | 3 | 4 | 5 |
|----------|-------|----------------|-----------------|------------|------------------|-----------|---------|
| 1 | B | Robertson | Demaree | Ham | Makinen | Robertson | Rodgers |
| 1 | D | Al Kharusi, Sr | Al Kharusi, Sr. | Hadgu | Kayat | McCrary | |
| 1 | F | Kilcoyne | Graves, Jr. | Hamilton | <i>Hernandez</i> | Kilcoyne | O'Neill |
| 2 | A | Dockemeyer | Burch | Dockemeyer | Hagan | Lockhart | Wong |
| 2 | C | Rogers | Gough | Harres | Rogers | Vargas | |
| 2 | E | Williams | Graham | Lee | Todd | Williams | |
| 3 | B | Ham | Demaree | Ham | Makinen | Robertson | Rodgers |
| 3 | D | Kayat | Al Kharusi, Sr. | Hadgu | Kayat | McCrary | |
| 3 | E | Todd | Graham | Lee | Todd | Williams | |
| 4 | A | Burch | Burch | Dockemeyer | Hagan | Lockhart | Wong |
| 4 | C | Gough | Gough | Harres | Rogers | Vargas | |
| 4 | F | Graves, Jr. | Graves, Jr. | Hamilton | Hernandez | Kilcoyne | O'Neill |
| 5 | B | Makinen | Demaree | Ham | Makinen | Robertson | Rodgers |
| 5 | C | Harres | Gough | Harres | Rogers | Vargas | |
| 5 | E | Lee | Graham | Lee | Todd | Williams | |
| 6 | A | Lockhart | Burch | Dockemeyer | Hagan | Lockhart | Wong |
| 6 | D | Hadgu | Al Kharusi, Sr. | Hadgu | Kayat | McCrary | |
| 6 | F | Hernandez | Graves, Jr. | Hamilton | Hernandez | Kilcoyne | O'Neill |

Font Legend

non-bold No post made, time for posting remains

Bold Post made within Time

Non-Bold Leader-No Consensus Posted, -5 Points

non-bold

Bold

Ital. non-bold

Late Post before consensus, 20% loss

Post is made after consensus, 60% loss

No Post Made, 100% loss



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Quiz 9

Range: 4-10; Average 8.8

W/ Text Historic 4-10; Average 8.9

45% (23 of 51) Got 10/10 on Quiz 9



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Question 6:

[*True* or **False**] Construction is risky for all involved, and participants in the construction process can and should take actions **to eliminate their risk before starting construction projects.**

•If the question said, “ ... to manage and reduce ...” instead of “... eliminate ...” it would be true.



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FACTS ABOUT THE CONSTRUCTION INDUSTRY

- How risky are design/construction projects?



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Cost of Litigation

FACTS ABOUT THE CONSTRUCTION INDUSTRY

- How risky are design/construction projects?
- Is it possible to eliminate all project risk?



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Cost of Litigation

FACTS ABOUT THE CONSTRUCTION INDUSTRY

- How risky are design/construction projects?
- Is it possible to eliminate all project risk?
- If a person's risk management plan is to not start a project until all risk has been eliminated, how many projects will that person do?



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Cost of Litigation

FACTS ABOUT THE CONSTRUCTION INDUSTRY

- **Construction is major part of the economy**
 - Employs more than 5% of the total non-farm workforce
 - Contributes 8.4% of the nation's GDP
- **Construction is Very Risky**
 - Construction generates more litigation than any other industrial segment of the economy
 - Litigation consumes vast resources
- **Construction is Very Dangerous-Details in Chap. 14**



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Cost of Litigation

FACTS ABOUT THE CONSTRUCTION INDUSTRY

- Risk Management is essential for the industry and its participants because **these Risks Cannot be eliminated!!**
- Risk Management must:
 - Avoid Risk;
 - Mitigate Risk;
 - Transfer Risk; and
 - Accept Risk that can't be avoided, mitigated or transferred.



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Cost of Litigation

FACTS ABOUT THE CONSTRUCTION INDUSTRY

- **Disputes are virtually assured in construction**
 - Complex array of relationships and disputes invariably involve multiple parties
 - Projects are complex
 - Projects are unique (prototypical) You get one chance
- **Despite your best efforts to avoid disputes, disputes will occur because construction is a **COMPLEX AND RISKY** activity!!!!**



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Cost of Litigation

FACTS ABOUT THE CONSTRUCTION INDUSTRY

- Construction generates more litigation than any other industrial segment of the economy
 - Each party to the dispute pays systemic costs
 - Out of each \$1 paid by insurers on claims,
 - \$0.67 paid to lawyers, experts and other systemic costs
 - \$0.33 paid to fix the problem
 - 90%+ of all claims are settled prior to final binding adjudication



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Cost of Litigation

HOW CAN I AVOID DISPUTES AND LIABILITY LOSS

- Participate in Organizational Peer Review
- Participate in Report Reviews/Blind Testing Studies
- Have One Person In Firm Responsible for Loss Prevention
 - Train Every Staff Member
 - Maintain Eternal Vigilance



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Cost of Litigation

HOW CAN I AVOID DISPUTES AND LIABILITY LOSS

- Do Good Work Within Your Area of Expertise
- Apply Strong Dispute Avoidance and Loss Prevention measures in your daily practice
 - Must Be Able To Recognize Risk Before It Occurs
 - Must Use Internal controls to minimize errors
 - Assign capable staff to projects
 - Check work for errors,
 - **Strengthen communication skills, and**
 - Check Work For Use of Loss Prevention Techniques



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Introduction & Incident At Morales

Discussion Question #1

Assume for this question that your engineering company does \$2,000,000 per year in gross revenues and there is a 40% likelihood of 1 claim, a 10% probability of a second claim against your firm during the year, and a 1% probability of a third claim against your firm during the year. Assume each claim would have a total liability of \$750,000 should it occur. Your insurance options are:

1) No Insurance: (Going Bare)

No Insurance Premium

All prospective losses are self-insured, \$750,000 @ 40% probability; plus \$750,000 @ 10% probability; plus \$750,000 @ 1% probability

2) Insurance: \$50,000 Deductible and \$5,000,000 aggregate Limit for 5.5% of gross revenue

Insurance premium = \$110,000

Deductible for Claims: 40% probability of \$50,000; 10% probability of \$50,000; 1% probability of \$50,000

Excess Liability = \$0

3) Insurance: \$50,000 Deductible and \$2,000,000 aggregate Limit for 4.0% of gross revenue

Insurance premium = \$80,000

Deductible for Claims: 40% probability of \$50,000; 10% probability of \$50,000; 1% probability of \$50,000

Excess Liability:

\$0 if only 1 claim

\$0 if only 2 claims

\$250,000 if 3rd claim occurs

4) Insurance: \$10,000 Deductible and \$2,000,000 aggregate Limit for 5.0% of gross revenue

Insurance premium = \$100,000

Deductible for Claims: 40% probability of \$10,000; 10% probability of \$10,000; 1% probability of \$10,000

Excess Liability:

\$0 if only 1 claim

\$0 if only 2 claims

\$250,000 if 3rd claim occurs

| | |
|----------|-----------------------|
| B | Robertson |
| D | Al Kharusi, Sr |
| F | Kilcoyne |



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Discussion Question #1

Of the 4 options identified,

- 1) Indicate which approach to insurance or no insurance you would consider prudent for your engineering company.**
- 2) Explain in 2 to 3 sentences why you would selected this option, and**
- 3) Explain in 2 to 3 sentences, explain whether going bare satisfies the engineer's ethical responsibilities to its client and the public**

| | |
|---|----------------|
| B | Robertson |
| D | Al Kharusi, Sr |
| F | Kilcoyne |



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Cost of Litigation

RESPONSES TO QUESTION 1

| Option | Question 1 | | |
|----------------|------------|-----------|-------|
| | Section 1 | Section 2 | Total |
| 1 No Ins | 0 | 0 | 0 |
| 2 Ins 1 50K-5M | 1 | 4 | 5 |
| 3 Ins 2 50K-2M | 6 | 6 | 12 |
| 4 Ins 3 10K-2M | 5 | 3 | 8 |

This is a very personal choice, based on a person's risk tolerance balanced against a person's ability to pay for the amount of insurance they prefer



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Cost of Litigation

RESPONSES TO QUESTION 1

According to insurers, each year between 1994 and 2005 there were between 15 and 21 professional liability claims filed for every 100 firms. (15% to 21% rate of claims/insured)

Some engineers/engineering companies practice without Professional Liability Insurance, e.g. “Go Bare”

Why do engineers decide to “go bare”?

- 1. they think the risk is low on small projects,**
- 2. they believe their assets are so limited that they don't have much to lose, or**
- 3. their clients haven't required it.**



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Cost of Litigation

RESPONSES TO QUESTION 1

Strictly as a cost-benefit analysis, design professionals generally overestimate the costs of insurance while underappreciating the benefits.

The most valuable benefits of professional liability insurance are:

- 1. Coverage for legal costs to defend against a claim. The insurance company can provide a lawyer to help the design professional gather and retain necessary documentation and avoid taking subsequent actions that could weaken the DESIGN PROFESSIONAL'S defense. When a claim does go to trial, a small firm can be bankrupted just trying to get a dismissal. Legal assistance may be even more valuable than having coverage to pay for actual negligence.**
- 2. In addition, professional liability insurers offer ongoing risk management services to insured firms. These include legal review of standard and client-provided contracts, and targeted continuing education on ways to reduce or avoid unnecessary liability.**

What about the ethics of going bare?



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Cost of Litigation

RESPONSES TO QUESTION 1

What about the ethics of going bare?



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Cost of Litigation

RESPONSES TO QUESTION 1

What about the ethics of going bare?

- 1. Purpose of insurance: To protect stakeholders against the risk of design professional negligence.**
- 2. Who are Stakeholders:**



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Cost of Litigation

RESPONSES TO QUESTION 1

What about the ethics of going bare?

- 1. Purpose of insurance: To protect stakeholders against the risk of design professional negligence.**
- 2. Who are Stakeholders: The Design Professional?**



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Cost of Litigation

RESPONSES TO QUESTION 1

What about the ethics of going bare?

- 1. Purpose of insurance: To protect stakeholders against the risk of design professional negligence.**
- 2. Who are Stakeholders: The Design Professional? Its Employees?**



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Cost of Litigation

RESPONSES TO QUESTION 1

What about the ethics of going bare?

- 1. Purpose of insurance: To protect stakeholders against the risk of design professional negligence.**
- 2. Who are Stakeholders: The Design Professional? Its Employees? Its Clients?**



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Cost of Litigation

RESPONSES TO QUESTION 1

What about the ethics of going bare?

- 1. Purpose of insurance: To protect stakeholders against the risk of design professional negligence.**
- 2. Who are Stakeholders: The Design Professional? Its Clients? Its Employees? What about the public?**

Should there be a law mandating design professional's purchase PLI?



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Cost of Litigation

RESPONSES TO QUESTION 1

What about the ethics of going bare?

- 1. Purpose of insurance: To protect stakeholders against the risk of design professional negligence.**
- 2. Who are Stakeholders: The Design Professional? Its Clients? Its Employees? What about the public?**

Should there be a law mandating design professional's purchase PLI?

- There are laws requiring drivers to purchase auto insurance to protect prospective victims of negligent driving**
- These laws specify minimal coverage that often provides inadequate protection for the stakeholders the law intends to protect**
- Would a legal mandate for PLI specify limits of coverage and deductibles that would protect the stakeholders?**
- Would the government have to create "high risk pools" for design professionals unable to get PLI in the private market?**



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Cost of Litigation

RESPONSES TO QUESTION 1

Is it appropriate for a client to mandate PLI as a condition of hiring a design professional?



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Cost of Litigation

RESPONSES TO QUESTION 1

Is it appropriate for a client to mandate PLI as a condition of hiring a design professional? **Many clients do this**

Can such a mandate provide long-term protection to the client?



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Cost of Litigation

RESPONSES TO QUESTION 1

Is it appropriate for a client to mandate PLI as a condition of hiring a design professional? **Many clients do this**

Can such a mandate provide long-term protection to the client?

- What about claims that may occur after the current policy terminates, and the design professional does not buy another PLI policy?



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Cost of Litigation

RESPONSES TO QUESTION 1

Is it appropriate for a client to mandate PLI as a condition of hiring a design professional? **Many clients do this**

Can such a mandate provide long-term protection to the client?

- What about claims that may occur after the current policy terminates, and the design professional does not buy another PLI policy? **A client cannot force the design professional to buy PLI after the contract ends**
- What about if the design professional cancels the PLI policy as soon as the client's project is substantially complete?



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Cost of Litigation

RESPONSES TO QUESTION 1

Is it appropriate for a client to mandate PLI as a condition of hiring a design professional? **Many clients do this**

Can such a mandate provide long-term protection to the client?

- What about claims that may occur after the current policy terminates, and the design professional does not buy another PLI policy? **A client cannot force the design professional to buy PLI after the contract ends**
- What about if the design professional cancels the PLI policy as soon as the client's project is substantially complete? **A client cannot force the design professional to keep the PLI in place after the contract ends**
- What if the design professional organization under contract to the client terminates business activity?



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Cost of Litigation

RESPONSES TO QUESTION 1

Is it appropriate for a client to mandate PLI as a condition of hiring a design professional? **Many clients do this**

Can such a mandate provide long-term protection to the client?

- What about claims that may occur after the current policy terminates, and the design professional does not buy another PLI policy? **A client cannot force the design professional to buy PLI after the contract ends**
- What about if the design professional cancels the PLI policy as soon as the client's project is substantially complete? **A client cannot force the design professional to keep the PLI in place after the contract**
- What if the design professional organization under contract to the client terminates business activity? **A client cannot demand a business to remain in business after the contract ends**
- What if the design professional involved closes his current business and organizes under as a new business after completion of the client's project?



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Cost of Litigation

RESPONSES TO QUESTION 1

Is it appropriate for a client to mandate PLI as a condition of hiring a design professional? **Many clients do this**

Can such a mandate provide long-term protection to the client? **NO!!!!**

- What about claims that may occur after the current policy terminates, and the design professional does not buy another PLI policy? **A client cannot force the design professional to buy PLI after the contract ends**
- What about if the design professional cancels the PLI policy as soon as the client's project is substantially complete? **A client cannot force the design professional to keep the PLI in place after the contract**
- What if the design professional organization under contract to the client terminates business activity? **A client cannot demand a business to remain in business**
- What if the design professional involved closes his current business and organizes under as a new business after completion of the client's project? **A client cannot prevent an engineer from reorganizing a business in a legal manner.**



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Introduction & Incident At Morales

Discussion Question #2

These are some of the many traits and characteristics that can distinguish clients; however, in a general sense, some clients have traits and characteristics that make them better clients than others with different traits and characteristics.

1. In 2 to 3 sentences each, identify how these client traits and characteristics impact an engineer's risk
2. Explain whether and why a client is either always a good client or always a bad client, regardless of the nature of the client's projects and regardless of the design professional that the client employs for a given project.
3. Explain whether it is likely, or even possible, for an engineering company to have a clientele consisting exclusively of "high quality clients?"

| | |
|----------|-------------------|
| A | Dockemeyer |
| C | Rogers |
| E | Williams |



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Introduction & Incident At Morales

Discussion Question #2

Low risk clients have certain qualities, including but not limited to:

- They understand that quality pays for itself by generating lifecycle cost effectiveness and short-term risk reduction.
- They know that retaining a quality-oriented engineering company is the best insurance of all.
- They know that mutual development of a comprehensive scope of service is the best way to begin each project.
- They are willing to pay higher fees to achieve these benefits.

As such, these **high-quality clients** have learned that it is not what you pay, it's what it costs, and often these clients have learned this lesson the hard way.

High risk clients are the **antithesis of** the qualities that define a **high-quality client**. **Low quality clients** have either ignored the lessons or not yet learned the lessons that "It's not what you pay, it's what it costs" that matters.



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Discussion Question #3

Once involved in a dispute, a party will incur direct costs that insurance will not pay. These direct costs can be extraordinarily high. However, despite the magnitude of these direct costs, these monetary values may be minor compared to indirect costs caused by the dispute including attitudinal impacts, frustration, aggravation, uncertainty, self-doubts, delays, lost productivity, impact on the staff, etc.

Clearly, it is in the interest of an engineering company to avoid disputes to the extent that it can by focusing on loss prevention and dispute avoidance in all aspects of the business management and operations.

Identify and describe at least two management/operations strategies an engineering firm can use to prevent loss and avoid disputes.

B

Ham

D

Kayat

E

Todd



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Introduction & Incident At Morales

Discussion Question #3

Strategies an engineering firm use to avoid some of these disputes.

- DO GOOD WORK
- WORK ONLY IN AREA OF EXPERTISE AND EXPERIENCE
- SELECT CLIENTS WITH CARE AND BE WILLING TO WALK AWAY
- APPLY LOSS PREVENTION AND DISPUTE AVOIDANCE ON EVERY PROJECT
- RESOLVE CONFLICTS AS QUICKLY AND AMICABLY AS POSSIBLE
- USE MEDIATION, SPECIAL MASTERS, ETC. TO FIND COMMON GROUND IF CONFLICT GROWS INTO A DISPUTE TO AVOID BINDING ADJUDICATION PROCEDURES.

For those who said binding arbitration is a strategy to avoid disputes, binding arbitration is a formal, process driven binding adjudication alternative to litigation, and parties only use binding arbitration after they face a dispute, not a strategy to avoid disputes.



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Discussion Question #4

Members of the construction industry have used mediation, binding arbitration, and litigation to resolve disputes. Create a comparison of these three dispute resolution methods by completing in the following table for mediation and binding arbitration, using the provided responses for litigation as a guide: (You should be able to copy the following table, paste it into a word processor, prepare your answers, copy it from that document and paste it into a reply box in CANVAS)

| | |
|----------|--------------------|
| A | Burch |
| C | Gough |
| F | Graves, Jr. |



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Discussion Question #4

Factor

Mediation

Binding Arbitration

Litigation

What is the neutral party in the method called?

Mediator

Arbitrator or
Panel of Arbitrators

Judge and Jury

What are the neutral's top 2 responsibilities during the process?

The Judge maintains order in the court, and enforces rules of procedure, rules of discovery, rules of evidence and the law. If a bench trial occurs, the judge decides who wins and awards damages

Is the method slower, faster, or about the same as litigation?

Usually takes several years to conclude



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Introduction & Incident At Morales

Discussion Question #4

Factor

Mediation

Binding Arbitration

Litigation

What is the neutral party in the method called?

Mediator

Arbitrator or
Panel of Arbitrators

Judge and Jury

What are the neutral's top 2 responsibilities during the process?

To remain neutral and help the parties find a resolution of their own making

To control the arbitration process and receive the evidence, Then the Arbitrator decides the case by assigning liability and damages

The Judge maintains order in the court, and enforces rules of procedure, rules of evidence and the law. If a bench trial occurs, the judge decides who wins and awards damages

Is the method slower, faster, or about the same as litigation?

Usually takes several years to conclude



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Discussion Question #4

Factor

Mediation

Binding Arbitration

Litigation

What is the neutral party in the method called?

Mediator

Arbitrator or
Panel of Arbitrators

Judge and Jury

What are the neutral's top 2 responsibilities during the process?

To remain neutral and help the parties find a resolution of their own making

The control the arbitration process and receive the evidence, Then the Arbitrator decides the case by assigning liability and damages

The Judge maintains order in the court, and enforces rules of procedure, rules of evidence and the law. If a bench trial occurs, the judge decides who wins and awards damages

Is the method slower, faster, or about the same as litigation?

Faster

About the same

Usually takes several years to conclude



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Discussion Question #4

| Factor | Mediation | Binding Arbitration | Litigation |
|--|----------------|---------------------|--------------------------------|
| Is the method more expensive, less expensive, or about the same cost as litigation | Less Expensive | About the same | Very expensive for all parties |
| Who determines how the dispute will be resolved? | | | Jury and/or Judge |
| Does the process end in a binding decision of liability? | | | Yes |
| Do the parties have a right of appeal upon completing the method? | | | Yes |



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Discussion Question #4

| Factor | Mediation | Binding Arbitration | Litigation |
|--|----------------|--|--------------------------------|
| Is the method more expensive, less expensive, or about the same cost as litigation | Less Expensive | About the same | Very expensive for all parties |
| Who determines how the dispute will be resolved? | The parties | The arbitrator or panel of arbitrators | Jury and/or Judge |
| Does the process end in a binding decision of liability? | | | Yes |
| Do the parties have a right of appeal upon completing the method? | | | Yes |



CE 401 Civil Engineering Seminar Introduction & Incident At Morales

Discussion Question #4

| Factor | Mediation | Binding Arbitration | Litigation |
|--|--|--|--------------------------------|
| Is the method more expensive, less expensive, or about the same cost as litigation | Less Expensive | About the same | Very expensive for all parties |
| Who determines how the dispute will be resolved? | The parties | The arbitrator or panel of arbitrators | Jury and/or Judge |
| Does the process end in a binding decision of liability? | It can but can also end with no resolution. If the parties agree to a resolution, the terms are written, signed, and are enforceable | Yes | Yes |
| Do the parties have a right of appeal upon completing the method? | | | Yes |



CE 401 Civil Engineering Seminar Introduction & Incident At Morales

Discussion Question #4

| Factor | Mediation | Binding Arbitration | Litigation |
|--|---|--|--------------------------------|
| Is the method more expensive, less expensive, or about the same cost as litigation | Less Expensive | About the same | Very expensive for all parties |
| Who determines how the dispute will be resolved? | The parties | The arbitrator or panel of arbitrators | Jury and/or Judge |
| Does the process end in a binding decision of liability? | It can but can also end with no resolution. If the parties agree to a resolution, the terms are written and are enforceable | Yes | Yes |
| Do the parties have a right of appeal upon completing the method? | There is nothing to appeal and no body to make an appeal to | No | Yes |



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Discussion Question #5

All disputes are eventually resolved.

- The parties to a dispute could settle early (prior to any litigation),
- The parties to a dispute could settle early in the litigation process (before completing all discovery),
- The parties to a dispute could settle upon completion of discovery but prior to trial, or
- The parties to a dispute could allow the court (or arbitrators) to resolve the dispute for them.

1) Please explain why most parties settle their disputes upon completion of discovery rather than settle early in the dispute.

2) Compare and contrast the cost and risk of negotiating a settlement early in the life of the conflict

with the cost and risk of negotiating a settlement after the completion of discovery.

| | |
|----------|----------------|
| B | Makinen |
| C | Harres |
| E | Lee |



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Discussion Question #5

- 1) Please explain why most parties settle their disputes upon completion of discovery rather than settle early in the dispute. **They believe that they can get a better settlement after discovery occurs than they can get before discovery occurs.**
- 2) Compare and contrast the cost and risk of negotiating a settlement early in the life of the conflict with the cost and risk of negotiating a settlement after the completion of discovery.

The risk of settling too early is that the cost of the settlement will be greater than the cost of a future settlement plus the cost of going through discovery.

The cost of going through discovery are:

- **The direct cost for lawyers, experts, and other systemic cost**
- **The indirect cost incurred by the party including but not limited to damaged reputation, damaged business relationships, lost productivity, declining morale, etc.**

Just as with ethical decision making, people tend to underestimate these costs and overestimate the potential saving for the actual settlement terms.



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Discussion Question #6

Based on your reading of the case study in the handouts entitled “It’s not what you pay; it’s what it costs you,” explain in 3 to 4 sentences citing the facts and events in that case, explain why the paper's title is a true statement.

| | |
|----------|------------------|
| A | Lockhart |
| D | Hadgu |
| F | Hernandez |



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Discussion Question #6

It is not relevant in the big picture how much the owner would have paid to get proper geotechnical work, because the project would have ended up costing the owner much less.

The important factor is total cost, not what the owner would have paid for proper geotechnical work for the project.

What approach yields the lowest/highest cost long term? It is not what it costs today but what you must pay tomorrow due to the choice.



CE 401 Civil Engineering Seminar

Cost of Litigation

WHAT HAPPENS IF YOU GET SUED?

- You Will Spend More Time/Money Defending the suit Than You Were Paid to design the project
 - Direct costs:
 - Lawyers and Experts
 - Systemic Costs: Stenographers, Filing Fees, Duplication, Travel
 - Lost Productivity for you and your staff due to time diverted from paying work to non-productive litigation



CE 401 Civil Engineering Seminar

Cost of Litigation

WHAT HAPPENS IF YOU GET SUED?

- You Will Spend More Money Defending the suit Than You Were Paid to design the project
 - Indirect costs can dwarf the direct costs:
 - Damaged reputation
 - Loss of self esteem
 - Loss of Clients
 - Difficulty finding new clients
 - Damage to staff morale-Best Employees Leave, Poor stay



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Cost of Litigation

What does it cost you if you are sued?

You are the principal of a two-year-old consulting geotechnical engineering firm with 20 persons on staff. Your profits for the year are projected at \$80,000, \$30,000 of which you intend to distribute to employees on long-overdue bonuses. Prior to doing so, you are notified of a professional liability claim against your firm by a client whose \$40,000 fee payment you were counting on. The amount sought is \$500,000 and there is a basis for a claim. However, actual damages are probably no more than \$5,000. The firm has a \$1 million professional liability insurance policy with a \$50,000 deductible. The plaintiff has indicated that he will settle for no less than \$50,000 plus waiver of your fee. Your insurance company urges you to settle and will not cover you if you decide to fight. However, if you do fight, the case probably will not be heard for three years. How do you analyze alternatives? What action do you decide upon relative to the claim? What do you do about employee bonuses'



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Cost of Litigation

Does your engineering firm agree that there is a problem?



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Cost of Litigation

Does your engineering firm agree that there is a problem? **Yes, the engineer agrees there is a problem.**

How much will it cost to fix the problem?



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Cost of Litigation

Does your engineering firm agree that there is a problem? **Yes, the engineer agrees there is a problem.**

How much will it cost to fix the problem? **\$5,000 or less can fix the problem.**

How much is the Plaintiff demanding from you?



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Cost of Litigation

Does your engineering firm agree that there is a problem? **Yes, the engineer agrees there is a problem.**

How much will it cost to fix the problem? **\$5,000 or less can fix the problem.**

How much is the Plaintiff demanding from you? **The demand is \$500,000**

Is the Plaintiff willing to settle, and for how much



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Cost of Litigation

Does your engineering firm agree that there is a problem? **Yes, the engineer agrees there is a problem.**

How much will it cost to fix the problem? **\$5,000 or less can fix the problem.**

How much is the Plaintiff demanding from you? **The demand is \$500,000**

Is the Plaintiff willing to settle, and for how much **Yes, for \$50,000 and waiver of your unpaid \$40,000 fee.**



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Cost of Litigation

What does your insurance company say about the claim?



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Cost of Litigation

What does your insurance company say about the claim? **Settle and if you don't, the insurance company will not defend you.**

What do you think about the insurance company's position?



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Cost of Litigation

What does your insurance company say about the claim? **Settle and if you don't, the insurance company will not defend you.**

What do you think about the insurance company's position? **Does not seem fair!!!**



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Cost of Litigation

How can they do that after accepting about \$100,000 premiums for 2 years to protect against this suit?



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Cost of Litigation

How can they do that after accepting about \$100,000 premiums for 2 years to protect against this suit?

If there is a bona fide offer to settle within the policy limits that the insurer wants to accept but the insured refuses to accept, the insurer's financial exposure in the case is capped by the offer.



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Cost of Litigation

How can they do that after accepting about \$100,000 premiums for 2 years to protect against this suit?

If there is a bona fide offer to settle within the policy limits that the insurer wants to accept but the insured refuses to accept, the insurer's financial exposure in the case is capped by the offer.

The \$50,000 offer to settle is at the policy deductible, and the insurer has no financial risk if the case moves forward.



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Cost of Litigation

How can they do that after accepting about \$100,000 premiums for 2 years to protect against this suit?

If there is a bona fide offer to settle within the policy limits that the insurer wants to accept but the insured refuses to accept, the insurer's financial exposure in the case is capped by the offer.

The \$50,000 offer to settle is at the policy deductible, and the insurer has no financial risk if the case moves forward.

The \$40,000 waiver of fee is not an insured risk.



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Cost of Litigation

What do you do about the employee bonuses?



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Cost of Litigation

What do you do about the employee bonuses?

You must cancel bonuses at this time!

Do you settle now, or do you fight this claim?

That is the question of the day!!!



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Cost of Litigation

Exercise Procedures

Group Activity:

- I will describe the step, and the group decides how much time (cost) for the step and put your cost for the step on the Board.
- Do this as quickly as you can, no more than 5 minutes per step, and **THERE ARE NO RIGHT OR WRONG ANSWERS! DO THE BEST YOU CAN IN THE TIME ALLOWED**
- **AFTER THE DEPOSITIONS STEP, ALSO PUT TOTAL ON BOARD**



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Cost of Litigation

Research Phase

A Principal **receives** notice of suit

After calming down, Principal researches appropriate files

Principal interviews key members of staff (Project Manager & Engineer)

Principal directs Project Engineer and Project Manager to prepare a report explaining why the company has been sued

B. Report is prepared

Project Engineer writes first draft

Clerical types and gives to Project Manager for review

Clerical makes changes directed by Project Manager until PM and PE agree the report is ready

C Principal **reviews report with PM and PE**



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Cost of Litigation

Research Phase

| | Person | Principal | Project Engineer | Project Manager | Clerical | Expert | Attorney | Other At Cost | Estimated Cost of Phase |
|-----------------------------------|--------|-----------|------------------|-----------------|----------|--------|----------|---------------|-------------------------|
| Hourly Cost | | 100 | 50 | 75 | 25 | 150 | 200 | | |
| Research Phase | Hours | 4 | 6 | 6 | 4 | | | | ✓ \$1,250 |
| Engagement of Attorney and Expert | Hours | | | | | | | | ✓ \$0 |
| Production of Documents | Hours | | | | | | | | ✓ \$0 |
| Interrogatories | Hours | | | | | | | | ✓ \$0 |
| Depositions | Hours | | | | | | | | ✓ \$0 |
| Subtotals | | ✓ 4 | ✓ 6 | ✓ 6 | ✓ 4 | ✓ 0 | 0 | | \$1,250 |
| Subtotals | | \$400 | \$300 | \$450 | \$100 | \$0 | \$0 | \$0 | |



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Cost of Litigation

ENGAGEMENT OF ATTORNEY AND EXPERT

A Principal confers with peers to obtain
Suggestions for attorneys ·

Principal calls two or three lawyers to determine experience.
availability. fees

Principal selects an attorney

Principal, PM and PE meet with attorney to provide general
background of case, and deliver project documents

One Banker's Box full of documents

Attorney makes cursory review of documents only at this time



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Cost of Litigation

ENGAGEMENT OF ATTORNEY AND EXPERT

A Principal confers with peers and key staff members to obtain Suggestions for experts

Principal calls two or three experts to determine experience. availability. fees

Principal with attorney selects an expert

Expert meets with Attorney to get basic information on case

Expert reviews the box of documents, does a site inspection, and develops a preliminary opinion about the strengths and weaknesses of the case.

Expert delivers the preliminary opinion to the lawyer verbally.



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Cost of Litigation

Engage Lawyer and Expert Phase

| | Person | Principal | Project Engineer | Project Manager | Clerical | Expert | Attorney | Other At Cost | Estimated Cost of Phase |
|--|-----------------------------------|-----------|------------------|-----------------|----------|--------|----------|---------------|-------------------------|
| | Hourly Cost | 100 | 50 | 75 | 25 | 150 | 200 | | |
| | Research Phase | Hours | 4 | 6 | 6 | 4 | | | ✓ \$1,250 |
| | Engagement of Attorney and Expert | Hours | 8 | 2 | 2 | 0 | 16 | 8 | ✓ \$5,050 |
| | Production of Documents | Hours | | | | | | | ✓ \$0 |
| | Interrogatories | Hours | | | | | | | ✓ \$0 |
| | Depositions | Hours | | | | | | | ✓ \$0 |
| | Subtotals | | ✓ 12 | ✓ 8 | ✓ 8 | ✓ 4 | ✓ 16 | ✓ 8 | \$6,300 |
| | Subtotals | | \$1,200 | \$400 | \$600 | \$100 | \$2,400 | \$1,600 | ✓ \$0 |



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Cost of Litigation

DISCOVERY-PRODUCTION OF DOCUMENTS

Production of Documents is a Discovery process whereby each side in a lawsuit requests certain files from the other. All materials in these files must be provided. It is illegal to tamper with these files after they have been **requested**.

Principal, key staff members, and expert meet to determine which files to request

Principal and expert meet with attorney to discuss

information to be requested, and

Policy relative to firm's files when plaintiff pursues discovery

After files obtained, lawyer makes cursory review, and distributes them to Principal and Expert for review

Comments developed individually

Comments developed jointly by Principal, key staff members. And expert

Principal and expert meet with attorney

In-house files reviewed as per attorney's instructions

Copies made and furnished to attorney who copies and provides them to plaintiff's attorney

Usually multiple rounds of document production.

We will assume on one time for this case



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Cost of Litigation

Discovery Phase

| | Person | Principal | Project Engineer | Project Manager | Clerical | Expert | Attorney | Other At Cost | Estimated Cost of Phase |
|-----------------------------------|-------------|-----------|------------------|-----------------|----------|---------|----------|---------------|-------------------------|
| | Hourly Cost | 100 | 50 | 75 | 25 | 150 | 200 | | |
| Research Phase | Hours | 4 | 6 | 6 | 4 | | | | ✓ \$1,250 |
| Engagement of Attorney and Expert | Hours | 8 | 2 | 2 | 0 | 16 | 8 | | ✓ \$5,050 |
| Production of Documents | Hours | 8 | 4 | 4 | 4 | 8 | 8 | | ✓ \$4,200 |
| Interrogatories | Hours | | | | | | | | ✓ \$0 |
| Depositions | Hours | | | | | | | | ✓ \$0 |
| Subtotals | | ✓ 20 | ✓ 12 | ✓ 12 | ✓ 8 | ✓ 24 | ✓ 16 | | \$10,500 |
| Subtotals | | \$2,000 | \$600 | \$900 | \$200 | \$3,600 | \$3,200 | ✓ \$0 | |



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Cost of Litigation

DISCOVERY-INTERROGATORIES

Interrogatories are formal written questions which each party to a lawsuit asks the others. Responses are in written form, under oath and penalty of perjury.

Principal, key staff members, and expert confer to develop questions

Questions furnished to attorney for review

Attorney finalizes questions

Finalized questions reviewed by Principal, key staff members and expert

Answers received and reviewed by lawyer, Principal, key staff members, and expert

Principal, Expert and attorney confer to discuss answers and perhaps submit additional questions

Plaintiffs questions received and Principal, key staff members and expert develop responses jointly, but the official answers are signed by the principal

Principal and Expert meet with attorney to finalize responses

Attorney sends responses to Plaintiff's attorney

Usually multiple rounds of interrogatories.

We will assume on one time for this case



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Cost of Litigation

Discovery Phase

| | Person | Principal | Project Engineer | Project Manager | Clerical | Expert | Attorney | Other At Cost | Estimated Cost of Phase |
|-----------------------------------|-------------|-----------|------------------|-----------------|----------|---------|----------|---------------|-------------------------|
| | Hourly Cost | 100 | 50 | 75 | 25 | 150 | 200 | | |
| Research Phase | Hours | 4 | 6 | 6 | 4 | | | | ✓ \$1,250 |
| Engagement of Attorney and Expert | Hours | 8 | 2 | 2 | 0 | 16 | 8 | | ✓ \$5,050 |
| Production of Documents | Hours | 8 | 4 | 4 | 4 | 8 | 8 | | ✓ \$4,200 |
| Interrogatories | Hours | 8 | 2 | 2 | 2 | 8 | 8 | | ✓ \$3,900 |
| Depositions | Hours | | | | | | | | ✓ \$0 |
| Subtotals | | ✓ 28 | ✓ 14 | ✓ 14 | ✓ 10 | ✓ 32 | ✓ 24 | | \$14,400 |
| Subtotals | | \$2,800 | \$700 | \$1,050 | \$250 | \$4,800 | \$4,800 | ✓ \$0 | |



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Cost of Litigation

DISCOVERY-DEPOSITIONS

Depositions are questions which attorneys ask of other parties and witnesses under oath with court reporter present to develop complete transcript.

Questions would be asked as if a cross-examination in court.

Basic questions can be formulated beforehand.

Attorney's clients usually are present to suggest other questions to attorney based on deposed individual's responses.

Depositions can last between a few minutes to several days depending upon the witness and the subject

Cases may involve a limited number of depositions or as many as 100 or more witnessed

For this case, assume:

Each side takes four (4) depositions:

Your Principal, PM, PE, and Expert

The other party's Principal, PM, PE, and Expert

Assume Depositions will average 4 hours of testimony each, plus preparation and review



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Cost of Litigation

DISCOVERY-DEPOSITIONS

Time Requirements:

Attorney attends all 8 depositions

Must prepare questions for 4 and prepare witnesses for 4

Must review transcripts when finished

Principal attends all 8 depositions

Must prepare for own deposition

Must review own transcript

Project Manager attends own deposition

Must prepare for own deposition

Must review own transcript

Project Engineer attends own deposition

Must prepare for own deposition

Must review own transcript

Expert attends own deposition and deposition of opposing expert

Must prepare for own deposition

Must review own transcript

You will pay for court reporter for 4 depositions, assume \$500 each, \$2,000



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Cost of Litigation

Discovery Phase

| | Person | Principal | Project Engineer | Project Manager | Clerical | Expert | Attorney | Other At Cost | Estimated Cost of Phase |
|-----------------------------------|--------|-----------|------------------|-----------------|----------|--------|----------|---------------|-------------------------|
| Hourly Cost | | \$100 | \$50 | \$75 | \$25 | \$150 | \$200 | | |
| Research Phase | Hours | 4 | 6 | 6 | 4 | | | | \$1,250 |
| Engagement of Attorney and Expert | Hours | 8 | 2 | 2 | 0 | 16 | 8 | | \$5,050 |
| Production of Documents | Hours | 8 | 4 | 4 | 4 | 8 | 8 | | \$4,200 |
| Interrogatories | Hours | 8 | 2 | 2 | 2 | 8 | 8 | | \$3,900 |
| Depositions | Hours | 35 | 7 | 7 | 11 | 16 | 56 | \$2,000 | \$20,250 |
| Subtotals | | 63 | 21 | 21 | 21 | 48 | 80 | \$2,000 | \$34,650 |



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Cost of Litigation

SETTLE OR FIGHT?

Do you settle now, or do you fight this claim?

Settle now for \$90,000, but

**Will cost you in excess of \$20,000 through discovery,
but after discovery, the plaintiff's position may
soften, and**

**Let's assume the Plaintiff now agrees to settle for
\$10,000 and waiver of your \$40,000 fee.**



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Cost of Litigation

SETTLE OR FIGHT?

Assume that after discovery, you can settle for \$10,000 and waiver of your fee.

Have spent at least \$20,000, so total cost of claim is \$30,000 to date plus waiver of your fee if you settle now.

Do you settle for \$10,000 Yes _____ No _____

If you settle now, case ends at a cost of \$70,000



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Cost of Litigation

SETTLE OR FIGHT?

If you don't settle, you will have to fight at trial:

Assume Trial Preparation and Trial will cost you \$20,000

What is the best outcome you can get at trial?



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Cost of Litigation

SETTLE OR FIGHT?

If you don't settle, you will have to fight at trial:

Assume Trial Preparation and Trial will cost you \$20,000

What is the best outcome you can get at trial?

Verdict in your favor, \$0 Liability and court orders payment of fee

Total Cost \$40,000 and you get your \$40,000 fee

What is the worst outcome you can get at trial?

.



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Cost of Litigation

SETTLE OR FIGHT?

If you don't settle, you will have to fight at trial:

Assume Trial Preparation and Trial will cost you \$20,000

What is the best outcome you can get at trial?

**Verdict in your favor, \$0 Liability and court orders payment of fee
Total Cost \$40,000 and you get your \$40,000 fee**

What is the worst outcome you can get at trial?

**Verdict for Plaintiff for \$500,000 and no fee payment ordered
Total Cost \$540,000 and you also lose your \$40,000 fee**

After the trial, does the case end at a cost of \$0 to \$580,000.



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Cost of Litigation

APPEALS?

Either party may appeal a trial outcome

About 2 years for appeal to be heard

Additional cost at least \$10,000

Court of Appeals can

Affirm the trial court (Over unless appeal to Supreme Court), or

Reverse the trial court (Over unless appeal to Supreme Court)

**Best case \$50,000 and you get your \$40,000 fee,
total \$10,000**

**Worst case \$550,000 and you lose your \$40,000 fee,
total \$590,000**

Find error and send case back for retrial, case not over!



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Cost of Litigation

APPEALS?

If Case must be retried, Court Costs will occur again.

Assume Trial Preparation and Trial will cost you \$20,000

What is the best outcome you can get at trial?

Verdict in your favor, \$0 Liability and order for payment of fee

Total Cost \$70,000 and you get your \$40,000 fee

What is the worst outcome you can get at trial?

Verdict for Plaintiff for \$500,000, and no order on fee

Total Cost \$570,000 and you lose your \$40,000 fee

Even if you win, you have already lost!!!



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Cost of Litigation

**TIME DOES NOT PERMIT THE FOLLOWING
DISCUSSIONS**

***SUGGEST STUDENTS TAKE A LOOK
AT THE SLIDES THAT FOLLOW***



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Cost of Litigation

DISPUTE AVOIDANCE AND LOSS PREVENTION

- ***TYPICAL PROJECT-GONE AWRY***

- *Who does a Plaintiff Name as defendants?*

- *PRIVATE SECTOR: ?????*



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Cost of Litigation

DISPUTE AVOIDANCE AND LOSS PREVENTION

• *TYPICAL PROJECT-GONE AWRY*

• *Who does a Plaintiff Name as defendants?*

• *PRIVATE SECTOR: Engineering Company, Engineer Employee, or Both*

• *PUBLIC SECTOR: ????*



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Cost of Litigation

DISPUTE AVOIDANCE AND LOSS PREVENTION

• *TYPICAL PROJECT-GONE AWRY*

- *Who does a Plaintiff Name as defendants?*
 - *PRIVATE SECTOR: Engineering Company, Engineer Employee, or Both*
 - *PUBLIC SECTOR: The Engineer Only*
- *Why?*



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Cost of Litigation

DISPUTE AVOIDANCE AND LOSS PREVENTION

• *TYPICAL PROJECT-GONE AWRY*

• *Who does a Plaintiff Name as defendants?*

- *PRIVATE SECTOR: Engineering Company, Engineer Employee, or Both*

- *PUBLIC SECTOR: The Engineer Only*

• *Why?*

- *Because The State has Sovereign Immunity.*

- *In Kentucky, Counties also have Sovereign Immunity*

- *In Kentucky, Cities do not have this protection*



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NATURE OF PROFESSIONAL LIABILITY RISK

- *It Is A Personal Liability-Not a Corporate Liability*
- *Companies are often sued*
 - *Individual Engineer is Their Agent*
 - *Liability derived from the Agency*
- *Individual Engineers sometimes named a Defendant*
 - *Company/Its Insurer Often Defend Named Engineer*
 - *Company/Its Insurer Not Obligated to do so*
- *If Legal Interests of Company and Engineer Diverge, each must provide their own defenses*



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Cost of Litigation

NATURE OF PROFESSIONAL LIABILITY RISK

- *When Does Liability Exposure End?*



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NATURE OF PROFESSIONAL LIABILITY RISK

- *When Does Liability Exposure End?*
 - *As we saw, it may depend upon the Statutory Framework:*
 - *If Statute of Repose-Set Time After Project Done*
 - *If Statute of Limitation-No Specific Time due to Latent Defects because time starts when defect is discovered*



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NATURE OF PROFESSIONAL LIABILITY RISK

- *When Does Liability Exposure End?*
 - *Statutory Framework notwithstanding, Does It End When You Retire?*



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NATURE OF PROFESSIONAL LIABILITY RISK

- *When Does Liability Exposure End?*
 - *Statutory Framework notwithstanding, Does It End When You Retire?*
 - *No It Does Not*
 - *Can buy Liability Insurance for post retirement years*



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NATURE OF PROFESSIONAL LIABILITY RISK

- ***When Does Liability Exposure End?***
 - ***Statutory Framework not withstanding, Does It End When You Retire?***
 - ***No It Does Not***
 - ***Can buy Liability Insurance for post retirement years***
 - ***Does it End When You Die?***



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NATURE OF PROFESSIONAL LIABILITY RISK

- ***When Does Liability Exposure End?***
 - ***Statutory Framework not withstanding, Does It End When You Retire?***
 - ***No It Does Not***
 - ***Can buy Liability Insurance for post retirement years***
 - ***Does it End When You Die?***
 - ***Depends but It May Not***
 - ***Cause of Action (not yet filed) Dies with the Defendant***
 - ***Ongoing Lawsuit does not end with Defendant's death***



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Cost of Litigation

FACTS ABOUT THE CONSTRUCTION INDUSTRY

| U. S. Construction annual spending in the public and private sectors, 1996 to 2017 in U.S. Dollars | | | | |
|--|---------------|----------------|-------|--|
| | Public sector | Private sector | Total | |
| '96 | 147 | 453 | 600 | |
| '97 | 153 | 478 | 631 | |
| '98 | 155 | 534 | 689 | |
| '99 | 169 | 575 | 744 | |
| '00 | 181 | 621 | 802 | |
| '01 | 202 | 638 | 840 | |
| '02 | 213 | 634 | 847 | |
| '03 | 216 | 675 | 891 | |
| '04 | 220 | 771 | 991 | |
| '05 | 234 | 870 | 1,104 | |
| '06 | 255 | 912 | 1,167 | |
| '07 | 289 | 863 | 1,152 | |
| '08 | 309 | 769 | 1,078 | |
| '09 | 315 | 592 | 907 | |
| '10 | 304 | 505 | 809 | |
| '11 | 286 | 502 | 788 | |
| '12 | 279 | 571 | 850 | |
| '13 | 271 | 636 | 907 | |
| '14 | 276 | 730 | 1,006 | |
| '15 | 290 | 823 | 1,113 | |
| '16 | 287 | 899 | 1,186 | |
| '17* | 280 | 951 | 1,231 | |



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Cost of Litigation

FACTS ABOUT THE CONSTRUCTION INDUSTRY

- Disputes are virtually assured in construction
 - Complex array of relationships
 - Projects are unique (prototypical)
 - Projects are complex
 - Disputes invariably involve multiple parties
- Despite your best efforts to avoid disputes, disputes will occur



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Cost of Litigation

FACTS ABOUT THE CONSTRUCTION INDUSTRY

- In 2017, \$1,231 Bil in construction in N. America
 - A nice online calculator of litigation cost at:
<https://www.justresolve.com/tcl-calculator/> Check it out



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Cost of Litigation

FACTS ABOUT THE CONSTRUCTION INDUSTRY

•Main Categories of Construction Disputes:

| | |
|--------------------------|-------|
| •Owner Related: | 8.1% |
| •Design Related: | 30.2% |
| •Contractor Related: | 25.4% |
| •Contract Related: | 25.9% |
| •Human Behavior Related: | 2.7% |
| •Project Related: | 3.7% |
| •External Factors: | 4.0% |

•https://ac.els-cdn.com/S1877042813050738/1-s2.0-S1877042813050738-main.pdf?_tid=a02fd011-9de0-4e8e-ae8c-0c4d413f5103&acdnat=1552831948_4caa549b3a4f1375288c76f0b3e89215

•Construction generates more litigation than any other industrial segment of the economy

- Corporations paid their litigating attorneys \$20 bil/yr
- Out of each \$1 paid by insurers on claims, \$0.67 paid to lawyers, experts and other systemic costs
- 90% of all claims are settled prior to final binding adjudication



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FACTS ABOUT THE CONSTRUCTION INDUSTRY

- The traditional approach to dispute resolution in the construction industry:
 - Owner and Contractor submit their dispute to the Design Professional for a determination
 - Binding Arbitration or Litigation if either the Owner or Contractor disagree with Design Professional's decision.
- This Creates Liability Exposure for Design Prof!!



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FACTS ABOUT THE CONSTRUCTION INDUSTRY

- **This Creates Liability Exposure for Design Professional:**
 - **Creates an appearance of conflict of interest**
 - If Engineers holds for the Owner, the Contractor says the engineer is simply knows who butters his bread
 - If Engineer holds for the Contractor, the Owner says the engineer must be trying to cover up his design error.
 - **May actually be a conflict of interest**



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Cost of Litigation

**THESE ARE THE REASONS WHY
DISPUTE AVOIDANCE AND
LOSS PREVENTION
MUST BE AN ENGINEER'S PRIORITY**