



AMERICAN COUNCIL OF ENGINEERING COMPANIES

of Indiana

Legal Forum Meeting Notes

Feb. 5, 2019 from 11- 1 p.m.

Hilton Garden Inn, 50 East Market St.

Indianapolis, Indiana 46204

Facilitator, Greg Cafouros, Kroger, Gardis & Regas

1. Contracts

- a. Duty to defend under professional liability claims and does that duty continue even after the indemnitee has been dismissed from a case.
- b. Best Contract templates - Inclusions and Exclusions in addendums
 - i. "Defend to the extent due to damages" or "arising out of damages" or "to the extent insurable"
 - ii. Look for resources available from [AIA](#) and [ACEC, EJCDC documents](#)
- c. Case resolution
 - i. 75-80 percent of cases are resolved in mediation
 - 1. Urged to include language to initiate mediation before litigation in contracts: "The parties agree that any dispute in any way arising out of or relating to this contract will be resolved pursuant to the law of Indiana, commencing with mediation as a condition precedent to arbitration."
 - ii. 10 percent of cases are resolved the day before the trial
- d. In most cases, an apology is not an acceptance of guilt
 - i. Discussion within a settlement conference in privileged content and protected under trial rules
- e. Important note for subs
 - i. Always ask to see the prime's contract with the owner, the sub's contract reflects a lot of the same text included in the prime's contract as bound to the owner

2. Counsel selection by Insurance Companies

- a. Utilized at sometimes half the cost of counsel selected by the firm
- b. Can run the gamut in experience of counsel and experience in the area of expertise
- c. Can always request a specific attorney, insurance company may be able to secure on the panel

3. Limitation of Liability
 - a. Include in the contract or else it's not included!
 - b. Examples of limitation: "limited to the amount of insurance" or "no more than XX amount or total fee, whichever is greater"
 - c. Whether this applies to attorney fees or just damages depends upon the contract language
 - d. If subs are being asked by primes to carry coverage over their certificate of insurance, they can get a rider to make up the difference for that one project or the subs can negotiate with the prime to lower their required coverage
4. Economic Loss
5. Labor & Employment Law
 - a. [Employment Law presentation from Kroger, Gardis & Regas](#)
 - b. [Employee Documentation Exercise from Kroger, Gardis & Regas](#)
6. Document Retention (Statute of Repose)
 - a. Legally, a client can't bring a claim after 10 years from when the final plans are delivered, plus two years depending upon when construction starts. Therefore, firms should hold plans for at least 12 years.
 - b. If data is deleted/ missing, the jury is instructed to assume that lost materials as a detriment to defense.