



Architects & Engineers Claims

Keys to Navigating Disputes from
Notice to Resolution

GREAT EXPECTATIONS

“Ask no questions, and you'll be told no
lies.”

— **Charles Dickens, Great Expectations.**

INSURER EXPECTATIONS

- Typical policy requirements
- Consequences of Failure to Tender
- Case Scenarios



TRIGGER – MULTIPLE POLICIES

- Varying triggers of duties to defend and coverage available
- Varying self-insured retentions
- Varying limits of liability



It is a capital mistake to theorize before one has data. Insensibly one begins to twist facts to suit theories, instead of theories to suit facts.

Arthur Conan Doyle (1891) *A Scandal in Bohemia*

PRE-LITIGATION STRATEGIES

- Concerns when construction still in progress
- Tolling Agreements
- Attorney-client privilege
 - *Who is subject to it*
 - *Upjohn warning*
 - *Plaintiff tricks and tactics*
- Preserving evidence
 - *Litigation Hold; People v. Miller, 6/1/2017*
Counsel "had a duty not to allow false statement of material fact - in the form of the omission from client's affidavit regarding the deletions that took place the day prior - to be presented to the Court."

RETAINING EXPERTS



"I know nothing about the subject,
but I'm happy to give you my expert opinion."

RETAINING EXPERTS

- Key issues in timing of expert retention
 - *When to retain*
 - *Communications with experts*
- Consulting vs. Testifying experts
 - *Maintaining privilege*
 - *What happens when you convert*
- Creating conflicts in experts
 - *Ethical?*
 - *Mitchell v. Wilmore, 981 P.2d 172 (Colo. 1999), two part analysis to create a conflict*

EARLY AND MULTI-PARTY RESOLUTION

- **Joint defense agreements**
 - *U.S. v. Gonzalez*, 669 F.3d 974, 979 (C.A.9 (Cal.),2012), no written agreement is required
 - *Kenyon & Kenyon LLP v. SightSound Technologies, LLC*, 151 A.D.3d 530 (N.Y.A.D. 1 Dept.,2017), preserves the privileged status only if the communication was shared in furtherance of a common legal interest in pending or reasonably anticipated litigation.
- **Pros and cons of early mediation**
 - Exposure for additional claims
 - Indemnification claims
- **Settlement involving less than all parties**

ETHICAL CONSIDERATIONS

- Demands under policy limits
 - *What is the effect*
- Insured refusal to settle
- Handling cross claims
- Use of hammer clauses in settlement

Freedman v. United Nat. Ins. Co., 2011 WL 781919, at *1 (C.D.Cal., 2011). The “Hammer Clause” may be invoked only if the insured *unreasonably* refuses to consent to a settlement.



QUESTIONS?