



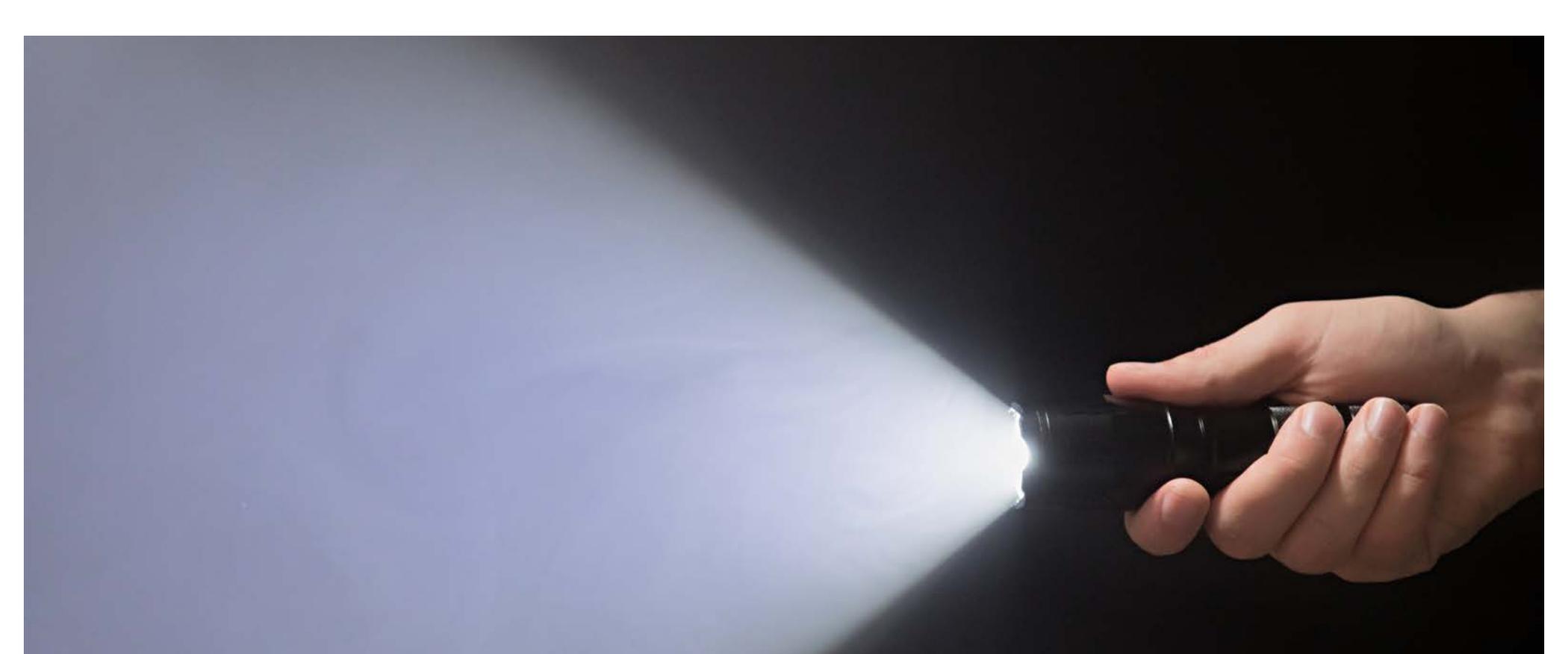
Handling Legal Risk: Tips for Avoiding Legal Disputes on Trenchless Projects



Presented by:
Ted Roberts, J.D.

TRENCHLESS
LEGAL SERVICES

INTRODUCTION

A hand holding a flashlight, illuminating a dark area. The flashlight beam is focused on a dark surface, creating a bright spot. The background is dark, and the hand is visible on the right side of the frame.

A focus on construction risks
overlooks other sources of loss.

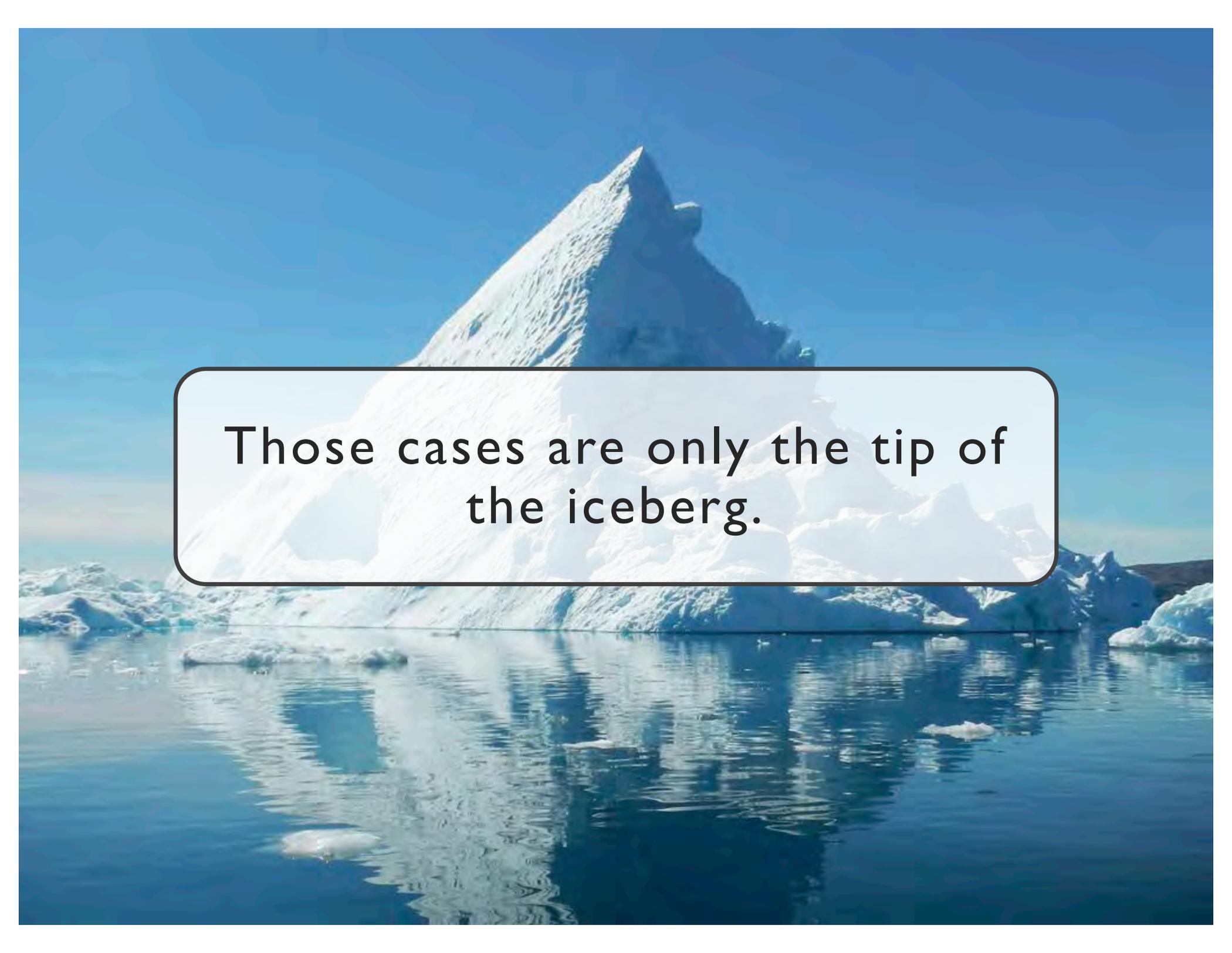


Claims, cost overruns, and delays open the door to even more losses, this time originating in the project's contracts and legal relationships.



In 2004, I couldn't find any trenchless cases. Since then, a lot has changed.





Those cases are only the tip of the iceberg.

Mears v Kiawah Island Utilities, Inc
D. Bennett Expert Report: Evaluation of FPVC
Failure on 6,944' HDD Bore Beneath Kiawah River

Date: September 19, 2018



Construction Claims, Expert Witness

Through September, 2018, Dr. Bennett had served as trenchless consultant/expert witness on 52 cases involving differing site conditions, utility strikes, property damage, loss of life, etc. He has served as an expert retained by Owner Agencies on 18 cases, Engineers on 2 cases, Contractors on 27 cases, and 3rd parties on 5 cases. He has testified at trial 4 times, has been deposed 20 times, and has participated in 8 mediations and numerous Dispute Review Board hearings. He has served on Disputes Review Boards on two projects. Claims and cases are summarized below.

Michels v Denver Water Board (2018)

Dr. Bennett as an expert witness for Michels, the tunneling contractor, reviewed documents and conducted independent analysis regarding a claim of differing site conditions on a tunnel crossing of I-70. Case is ongoing.

City of Glendale v. Fugro (2018)

Dr. Bennett provided expert witness services to City of Glendale regarding a claim against Fugro, the geotechnical consultant during design of the trenchless gravity sewer pipeline project. He reviewed documents, conducted independent analysis, and advised the City regarding the merits of the case. Case settled during mediation, prior to testimony.

Layne Heavy Civil v H&H HDD Claim (2018)

Dr. Bennett reviewed documents, conducted independent analysis, and prepared a report summarizing expert opinions on this case involving a dispute regarding an HDD bore in Georgia. He provided testimony at deposition. Case is ongoing.

San Luis Obispo County Flood Control and Water Conservation District v A. Teichert and Son, Inc., HDD Company, Northwest Pipe, Inc.; HDD Steel Pipe Failure Claim (2016-present)

Dr. Bennett served as expert witness retained by OTMK law firm, representing defendant Teichert (General Contractor), on case involving leaks of 30" diameter steel water main pipeline installed by HDD method beneath Nacimiento River. Dr. Bennett testified at deposition. Case is ongoing.

Longboat Key Lift Bridge HDD Claim (2017-present)

Dr. Bennett served as expert witness and evaluated merits of claim brought against HDD Contractor by ICA, contract bridge operator, for damages alleged to have been caused by HDD pipe installation parallel to bridge. Dr. Bennett reviewed documents, conducted independent analysis, and prepared report summarizing expert opinions. He testified at deposition. Case is ongoing.

Boyd and Company v Tom's Backhoe Service and Prairie Winds Services, Manion-Stigger/Brainerd, MN Airport Utility Extension Project, HDD Claim (2017-present)

Dr. Bennett served as expert witness for Manion-Stigger Law firm, representing claimant Boyd and Company, HDD subcontractor on claim against general contractor Tom's Backhoe Service, and Prairie Winds Services. Case involved gravity sewer and water main pipelines constructed using HDD. Dr. Bennett reviewed documents, conducted independent analysis, and prepared

Mears v Kiawah Island Utilities, Inc
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and successfully completed the pipeline project. The issue was resolved without formal claim or trial.

City of Eureka v Apex Drilling (2016)
Dr. Bennett served as expert witness/HDD consultant for Cincinnati Insurance, surety firm for HDD contractor, Apex Drilling, on a claim brought by City of Eureka, CA, involving problems encountered on a force main pipeline project constructed using HDD method. Dr. Bennett reviewed documents, conducted independent analysis, prepared a report summarizing expert opinions, and participated in mediation hearing. Case settled before trial.

Fowler Construction, Ohio, ND Water Intake Pipeline Claim (2016-17)
Dr. Bennett served as expert microtunneling consultant on dispute between Fowler Construction, Contractor for the Ohio Water Intake Pipeline, and its surety insurance firm. Claim involved losses of property caused by flooding of tunnel and shaft during microtunneling construction of 2,700-foot-long intake pipeline into Lake Oahe. Dr. Bennett assisted Wise Junney Eber Engineering in conducting analysis of possible causes of flooding, and recommended detailed autopsy investigation. Claim status unresolved/unknown.

Coe v. Gladstone Area Water Board, Brisbane, Australia HDD Differing Site Condition Claim (2015)

Dr. Bennett served as the HDD technical expert for Gladstone Area Water Board on a claim arising from multiple HDD crossings of the bay between Curtis Island and the mainland in Brisbane, Australia. The Contractor alleged that a latent condition was encountered which caused delays and extra costs to complete the project. Dr. Bennett evaluated ground conditions, construction records, correspondence, conducted independent analysis, participated in teleconference calls with all parties, and prepared joint and individual technical expert reports for arbitration. The case settled just prior to arbitration.
References: Allan Ford, Minter-Edison Law Firm

Cross Country HDI v Placer County Facilities Services Department I-80 HDD Claim (2013-2015)

Dr. Bennett served as HDD expert for CCHDI on a differing site condition claim involving an HDD crossing beneath I-80 near Applegate. The claim centered on the contract indications of soft, weathered rock, vs the extremely rock encountered. Dr. Bennett reviewed geotechnical investigation information, design documents, correspondence and daily construction logs, conducted independent analyses, and prepared expert reports. Dr. Bennett participated in settlement negotiation meetings and in mediation. Case settled in mediation, April, 2015.

South Jersey Gas (2014)

Dr. Bennett served as a technical expert to evaluate alternative gas pipeline alignments to an existing coal-fired power plant, including evaluation of potential construction risks and environmental consequences associated with the alternative routes. Dr. Bennett prepared an expert report summarizing his opinions which was appended to the application for route approval filed by South Jersey Gas.
Reference: Peter Fontaine, Esq, Cocon and Sawyer, LLP; 856.910.5043; pfontaine@cocon.com



Compared with other types of construction, trenchless appears especially vulnerable to costly legal disputes.



**LEGAL HAZARDS:
3 DIFFERENT WAYS TO LOSE**

HAZARD

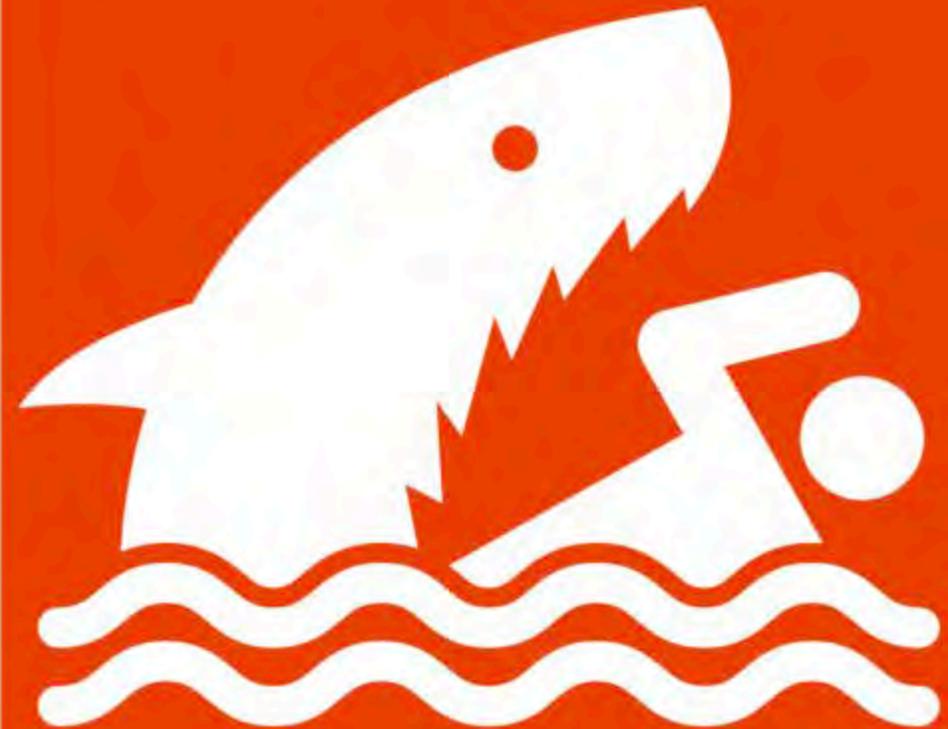
VS

RISK

A **HAZARD** is something that has the potential to harm you



RISK is the likelihood of a hazard causing harm



The Three Legal Hazards



Unexpected assumption of risk or liability



Loss or compromise of a valuable legal right



Litigation

A black boot with a thick, treaded sole is stepping on a banana peel on a metal floor. The banana peel is partially broken, with the fruit inside exposed. The floor has a circular pattern. A white text box is overlaid on the image.

Unconscious risk assumption (or
retention)

Loss or compromise of a valuable legal right (or defense) to a claim for additional time or money (or both).



The losses and
uncertainty of
litigation.





Litigants often find themselves stuck in a financial quagmire from which escape is difficult.

EXPERT WITNESSES,

A still from the movie Toy Story showing Woody and Buzz Lightyear. Woody is on the left, looking slightly concerned. Buzz is on the right, wearing his green and purple space suit, holding a purple ring on his right hand. The background is a simple indoor setting with a door and some yellow stars floating in the air.

**EXPERT WITNESSES
EVERYWHERE!**



“If you could come in this weekend and teach our lawyers about mud management and down-hole failures that’d be great.”

A person wearing a dark winter jacket and black gloves is sliding down a snowy slope on a red sled. The person's face is partially visible, and they appear to be enjoying the activity. The background is a bright, snowy landscape with some shadows cast on the snow.

\$1.2M: original contract price.

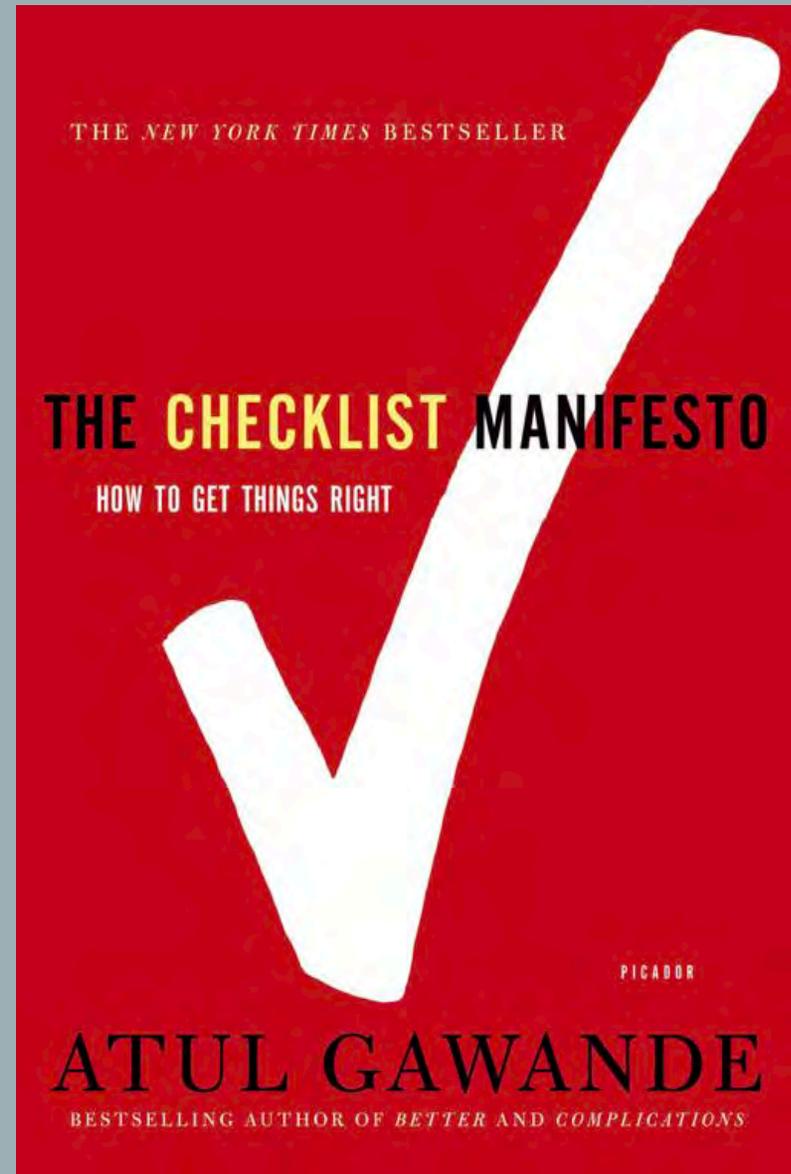
\$1.7M: judgment against city for wrongful termination.

RISK FACTORS & RISK MANAGEMENT

- Contract literacy
- Contract drafting
- Negotiation & review
- Claim management

Two sources of failure:

- Ignorance
- Ineptitude



An illustration of an iceberg floating in a blue ocean under a light blue sky with a few white clouds. The iceberg is a large, dark blue mass with a sharp, triangular peak. The water is a lighter blue, and the sky is a pale cyan. The text 'Contract literacy' is centered on a dark grey rectangular background that is overlaid on the iceberg.

Contract literacy

Seeing the “invisible terms” in your written contract

- Public law vs. “private law”
- Common law duties
- State and federal statutes
- Principles of interpretation.
- Legal consequences of “extra-contractual” words and conduct.

Contract drafting

Contract negotiation, review, and formation

Due diligence

Stakeholder response to problems

Claim management

LEGAL FLASHPOINTS DURING THE LIFECYCLE OF A CONTRACT

Unmodified industry form contracts may increase the odds of a dispute when applied to trenchless projects

4.03 *Differing Subsurface or Physical Conditions*

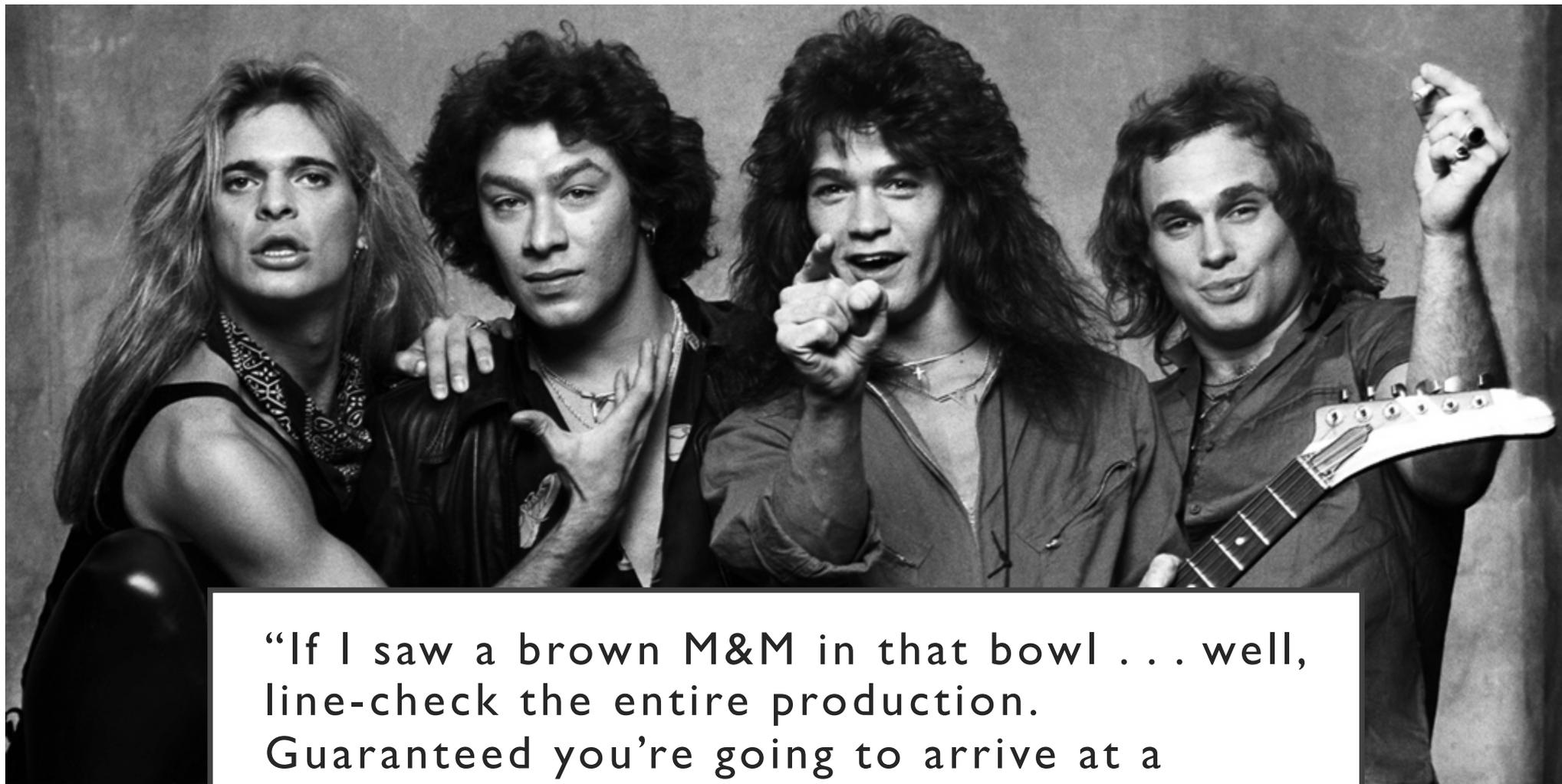
A. *Notice:* If Contractor believes that any subsurface or physical condition that is uncovered or revealed either:

1. is of such a nature as to establish that any “technical data” on which Contractor is entitled to rely as provided in Paragraph 4.02 is materially inaccurate; or
2. is of such a nature as to require a change in the Contract Documents; or
3. differs materially from that shown or indicated in the Contract Documents; or
4. is of an unusual nature, and differs materially from conditions ordinarily encountered and generally recognized as inherent in work of the character provided for in the Contract Documents;

then Contractor shall, promptly after becoming aware thereof and before further disturbing the subsurface or physical conditions or performing any Work in connection therewith (except in an emergency as required by Paragraph 6.16.A), notify Owner and Engineer in writing about such condition. Contractor shall not further disturb such condition or perform any Work in connection therewith (except as aforesaid) until receipt of written order to do so.



**Contract negotiation,
review, and formation**



“If I saw a brown M&M in that bowl . . . well, line-check the entire production. Guaranteed you’re going to arrive at a technical error. They didn’t read the contract. Guaranteed you’d run into a problem.”

Contract drafting

Contract negotiation, review, and formation

Due diligence

Stakeholder response to problems

Claim management

LEGAL FLASHPOINTS DURING THE LIFECYCLE OF A CONTRACT

Stakeholder
Response to
Problems



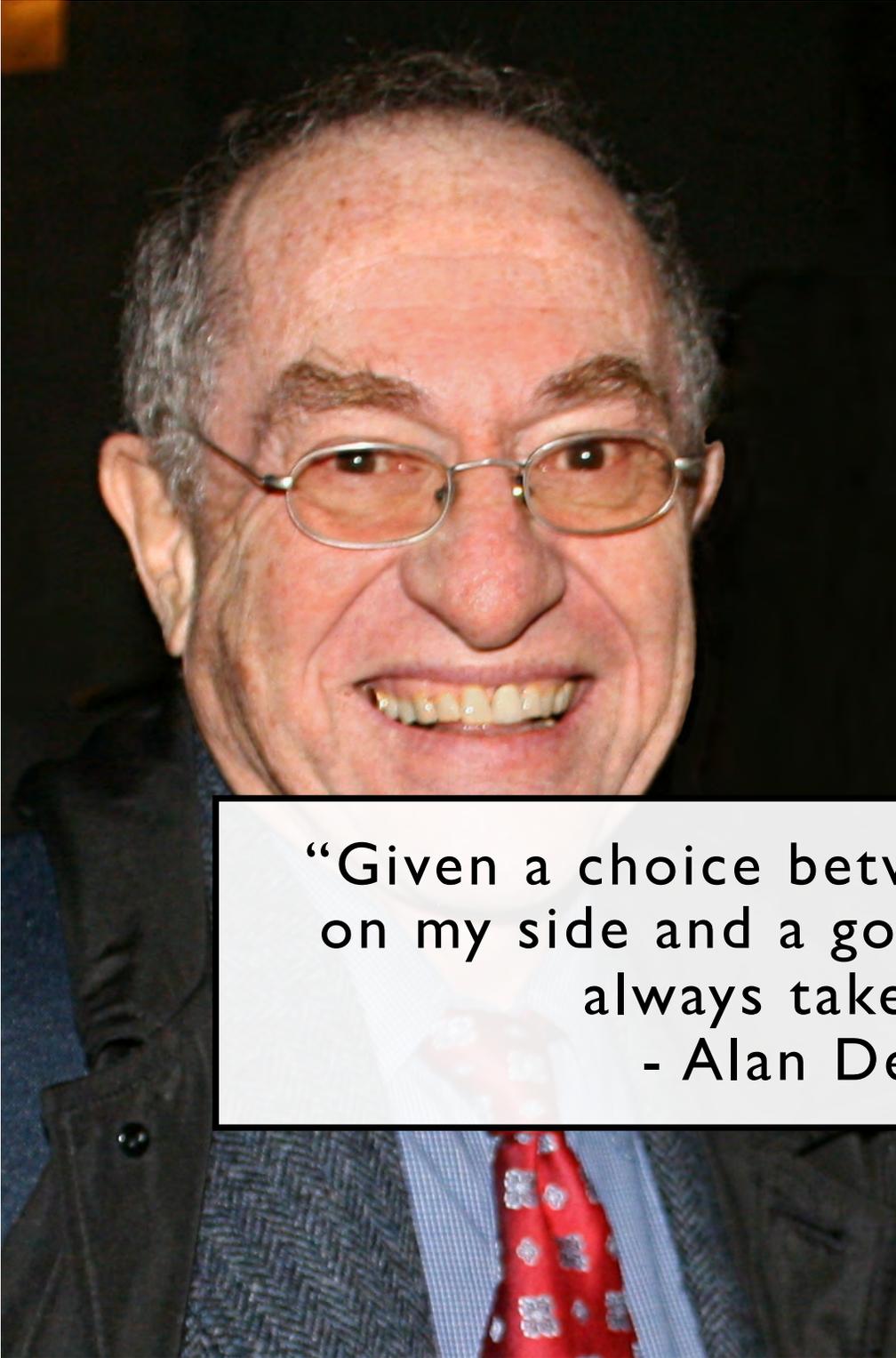
Claim (or Defense) Management Practices



Clearing Procedural
Hurdles



Satisfying
Substantive/Evidentiary
Requirements

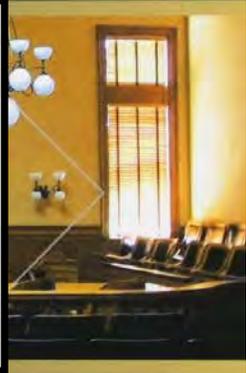


TURNING POINTS AT TRIAL

**Great Lawyers Share Secrets,
Strategies and Skills**

“Given a choice between having the facts
on my side and a good lawyer, I think I’d
always take the facts.”

- Alan Dershowitz



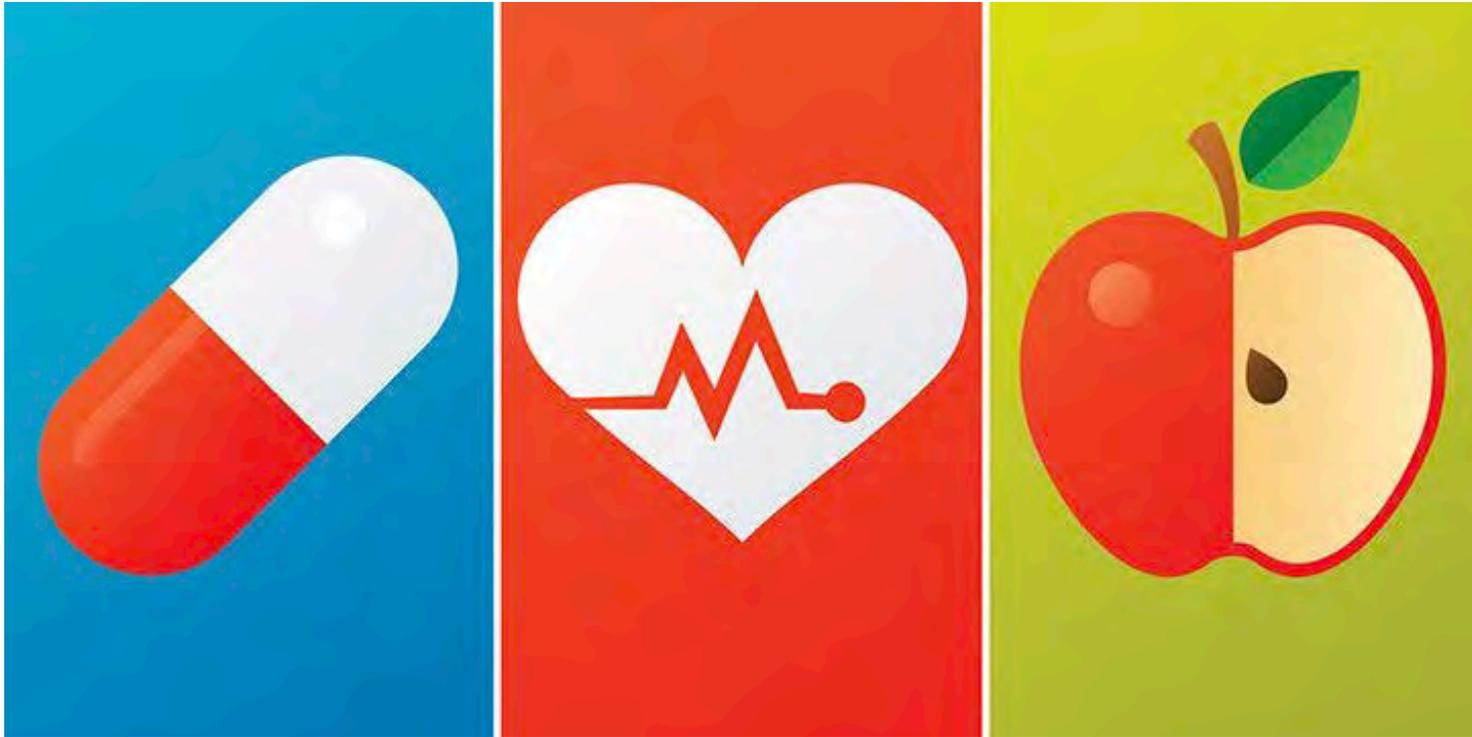
SHANE READ

#1 BEST-SELLING AUTHOR OF *WINNING AT DEPOSITION*

BETTER *LEGAL* RISK
MANAGEMENT: SOME
SUGGESTIONS

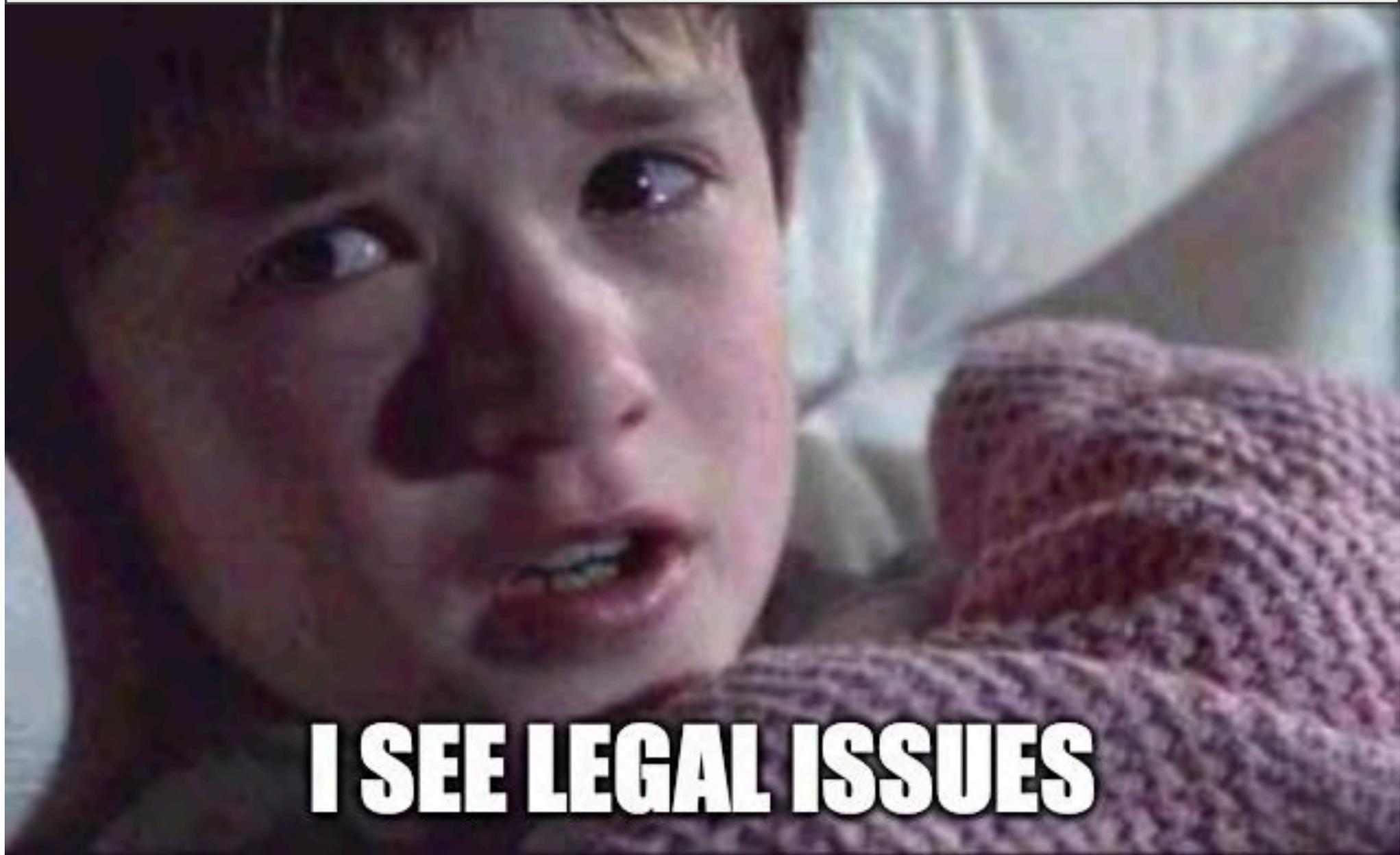


Heart attacks and litigation are both low-frequency/high-impact events ...



... where the benefits of prevention and early-intervention usually outweigh the costs and risks of a cure.

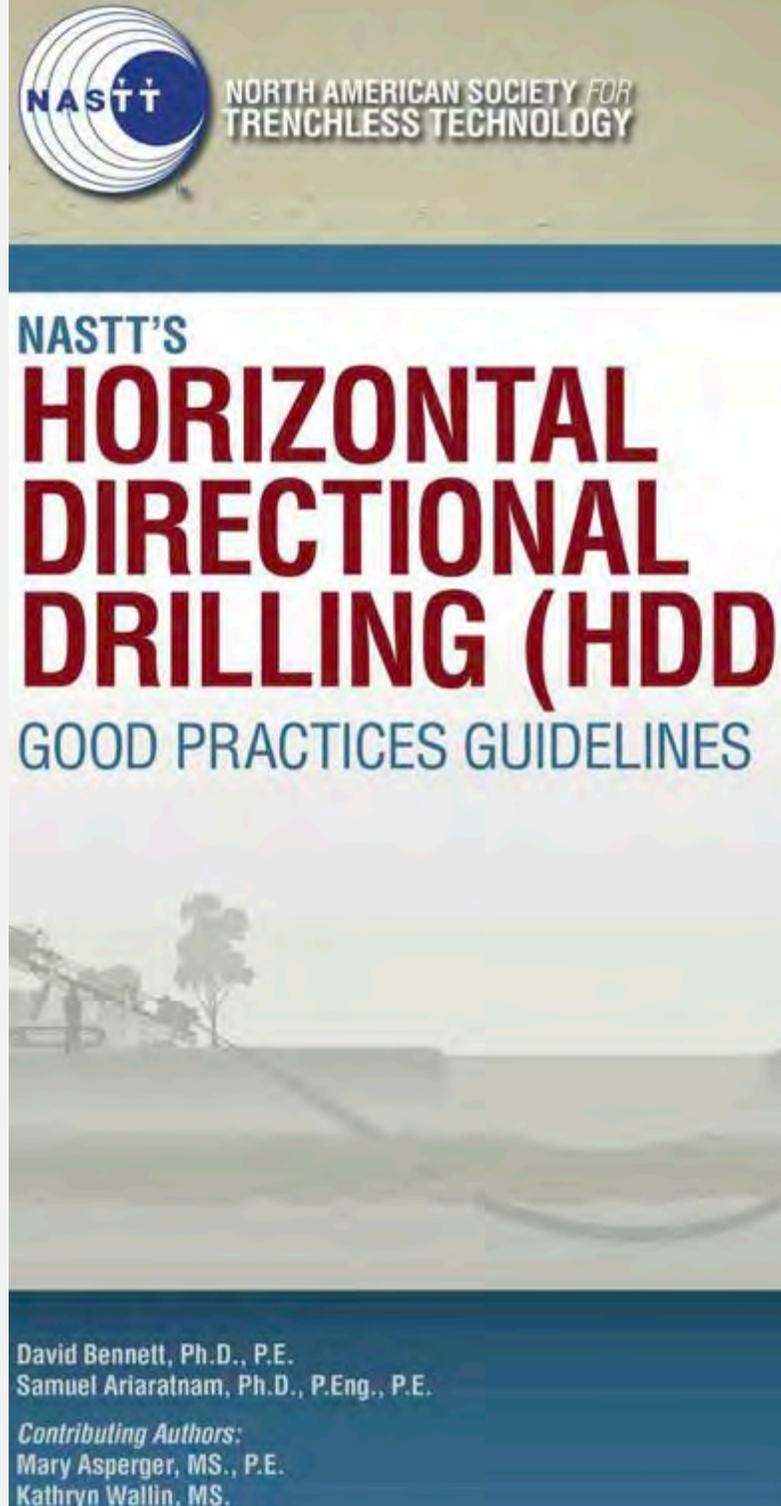
Proactive legal services tend to deliver the highest value at the lowest cost.



I SEE LEGAL ISSUES

Expand the Scope of “Good Practices”?

- Form contracts and contract clauses
- Geotech & site investigations
- Contractual risk allocation
- Evaluation and resolution of DSC claims
- Contract & claim management
- Insurance
- Contract literacy



Further reading
(Pub. 1998; info
may be dated)

Chapter 4:

Eldon L. Abbot, P.E.,
PREPARATION OF
CONTRACT
DOCUMENTS
FOR SUBSURFACE
PROJECTS

SUBSURFACE CONDITIONS

Risk Management for Design and
Construction Management Professionals

Edited by
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