



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 space. The flashlight beam is bright and focused, creating a strong contrast with the dark background. The hand is visible on the right side, gripping the handle of the flashlight. The background is a gradient of dark blue and black, with a lighter blue area at the bottom.

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.



A large, jagged iceberg floats in the center of the frame, its white surface contrasting sharply with the deep blue sky. The iceberg's reflection is visible in the calm, dark blue water below. In the background, several smaller icebergs are scattered across the horizon. The overall scene is serene and majestic, emphasizing the scale and isolation of the icebergs.

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

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, Oahu, ND Water Intake Pipeline Claim (2016-17)

Dr. Bennett served as expert microtunneling consultant on dispute between Fowler Construction, Contractor for the Oahu Water Intake Pipeline, and its surety insurance firm. Claim involved issues of property caused by flooding of tunnel and shaft during microtunneling construction of 2,700-foot-long intake pipeline into Lake Oahu. Dr. Bennett assisted Wise Janney Elzer 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.

Reference: *Allie Ford, Minter Ellison 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, Cecan and Sawyer, LLP; 856.910.5043; pfontaine@cecscn.com*



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



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

HAZARD

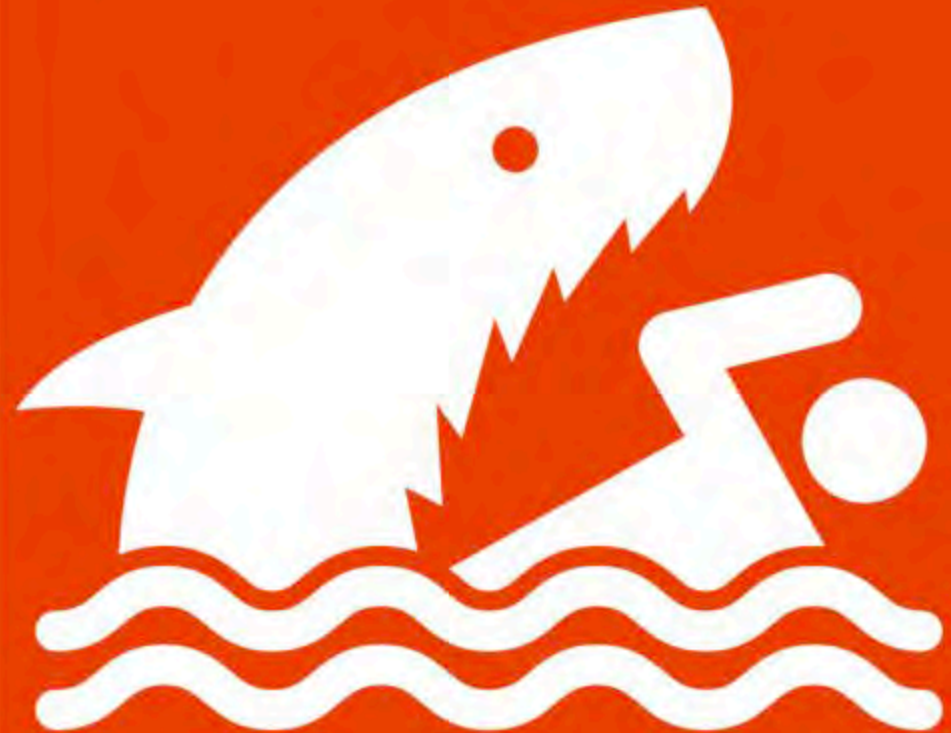
VS

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

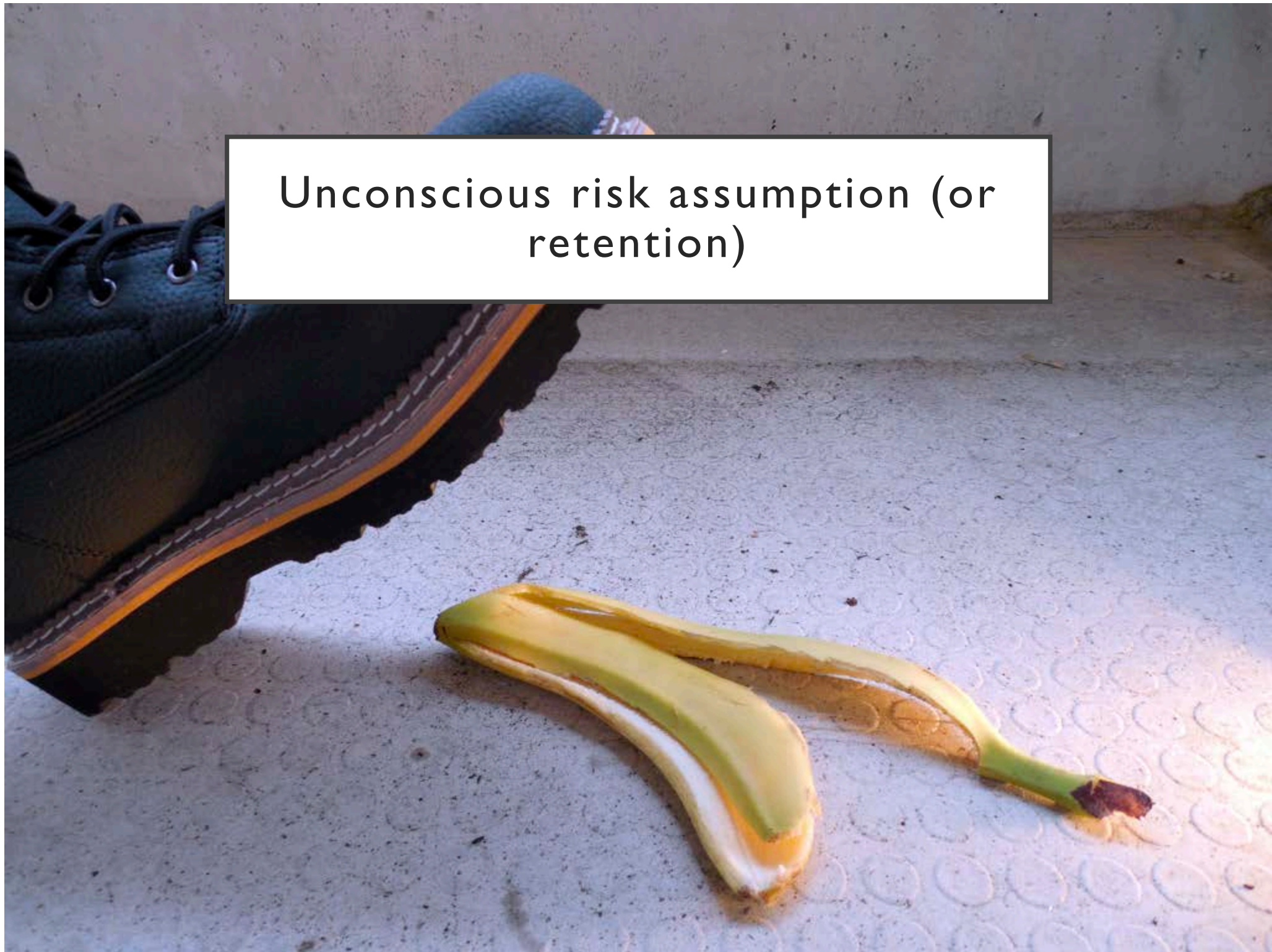


Loss or compromise of a valuable legal right



Litigation

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,



**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 gloves is falling backwards down a snowy slope. They are on a bright red sled, which is tilted upwards. Snow is being kicked up around the sled and the person's legs. The background is a vast, white snowy landscape under a clear sky.

\$1.2M: original contract price.

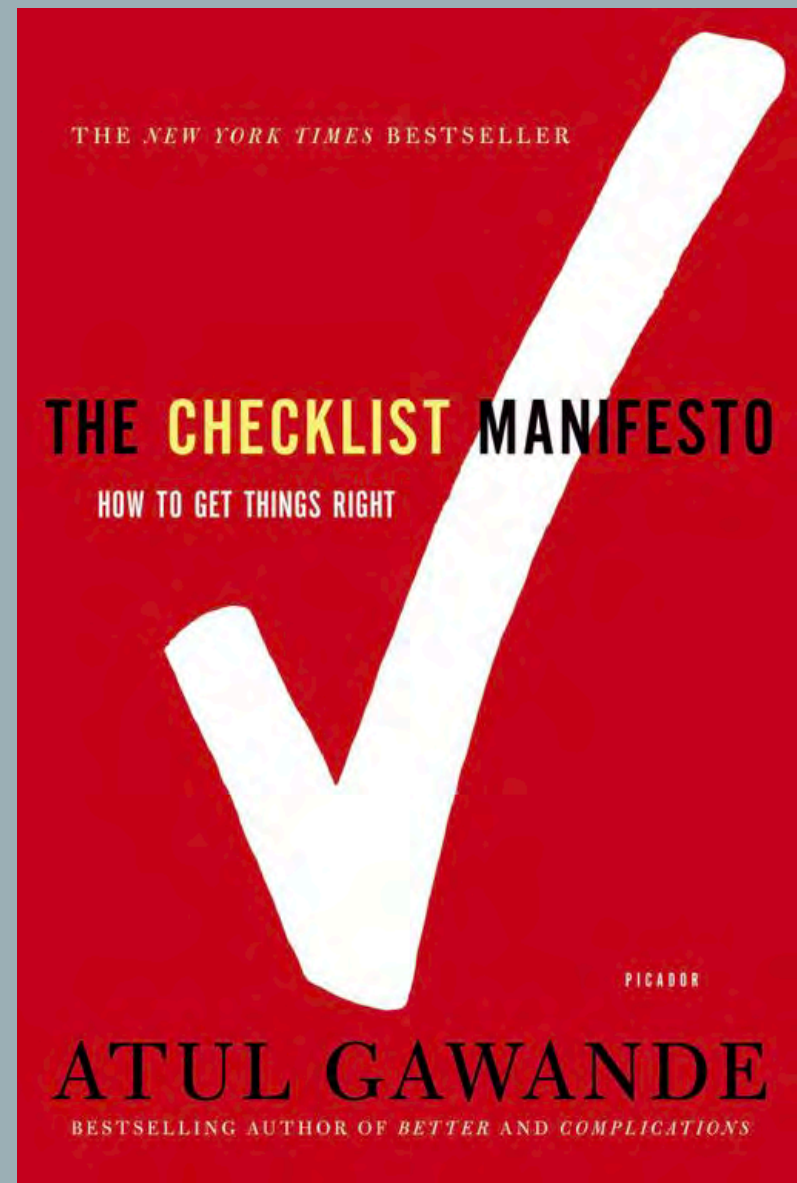
\$1.7M: judgment against city for wrongful termination.

RISK FACTORS & RISK MANAGEMENT

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

Two sources of failure:

- Ignorance
- Ineptitude



An illustration of a large iceberg floating in a blue ocean under a light blue sky with a few white clouds. The iceberg is split horizontally by a dark grey rectangular box containing the text 'Contract literacy'. The top part of the iceberg is above the water, and the bottom part is below the water, illustrating the concept of 'iceberg' in business or law.

Contract literacy

The background of the slide features a stylized illustration of an iceberg. The top part of the iceberg, which is above the water line, is light blue and represents the visible terms of a contract. The much larger part of the iceberg, which is submerged in the water, is a darker blue and represents the 'invisible terms' of the contract. The water is depicted with light blue and white wavy lines. The sky is a pale, hazy blue. The overall theme is the hidden aspects of legal contracts.

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.



LEGAL FLASHPOINTS DURING THE LIFECYCLE OF A CONTRACT

Contract
drafting

Contract
negotiation,
review, and
formation

Due
diligence

Stakeholder
response to
problems

Claim
management

Drafting Dysfunction

9. **Insurance.** The Contractor will provide health, dental, vision, life, and disability insurance, if warranted, relative to any of the Contractor's employees. The Contractor will also provide unemployment insurance to its employees. The Contractor will also provide the Contractor's employees with benefits, social security, and other benefits as may be required by law. The Contractor will also provide the Contractor's employees with other benefits as may be required by law.

10. **Assignment.** The Contractor shall not assign any of its rights or obligations under this Agreement, or delegate the performance of any of its duties hereunder, without the prior written consent of the Contractor.

SIGNATURE

A handwritten signature in blue ink, appearing to be a stylized 'C' or 'K', is written over a horizontal line.

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

4.03 *Differing Subsurface or Physical Conditions*

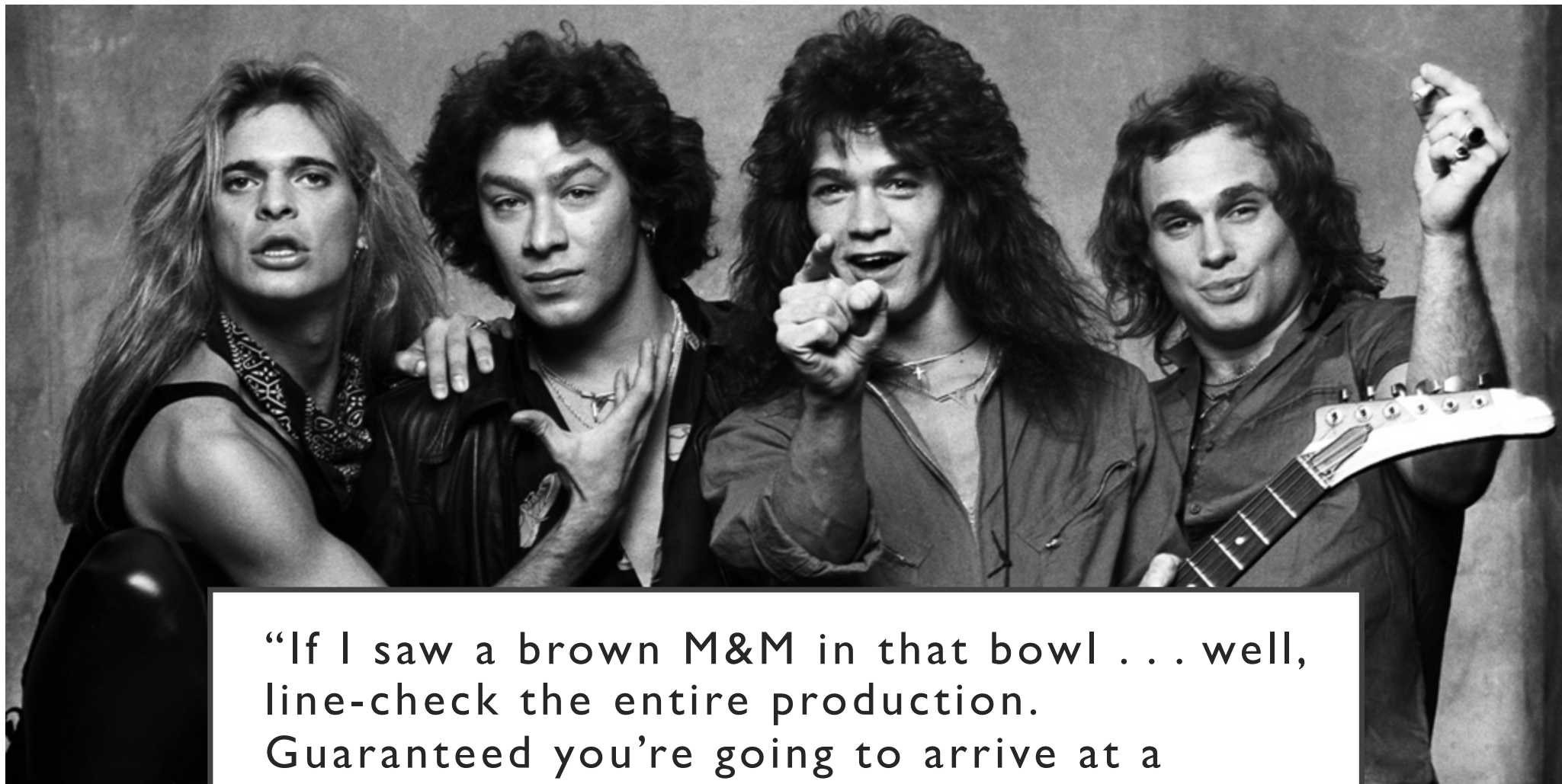
A. *Notice:* If Contractor believes that any subsurface or physical condition that is uncovered or revealed either:

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.”



LEGAL FLASHPOINTS DURING THE LIFECYCLE OF A CONTRACT

Contract
drafting

Contract
negotiation,
review, and
formation

Due
diligence

Stakeholder
response to
problems

Claim
management

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



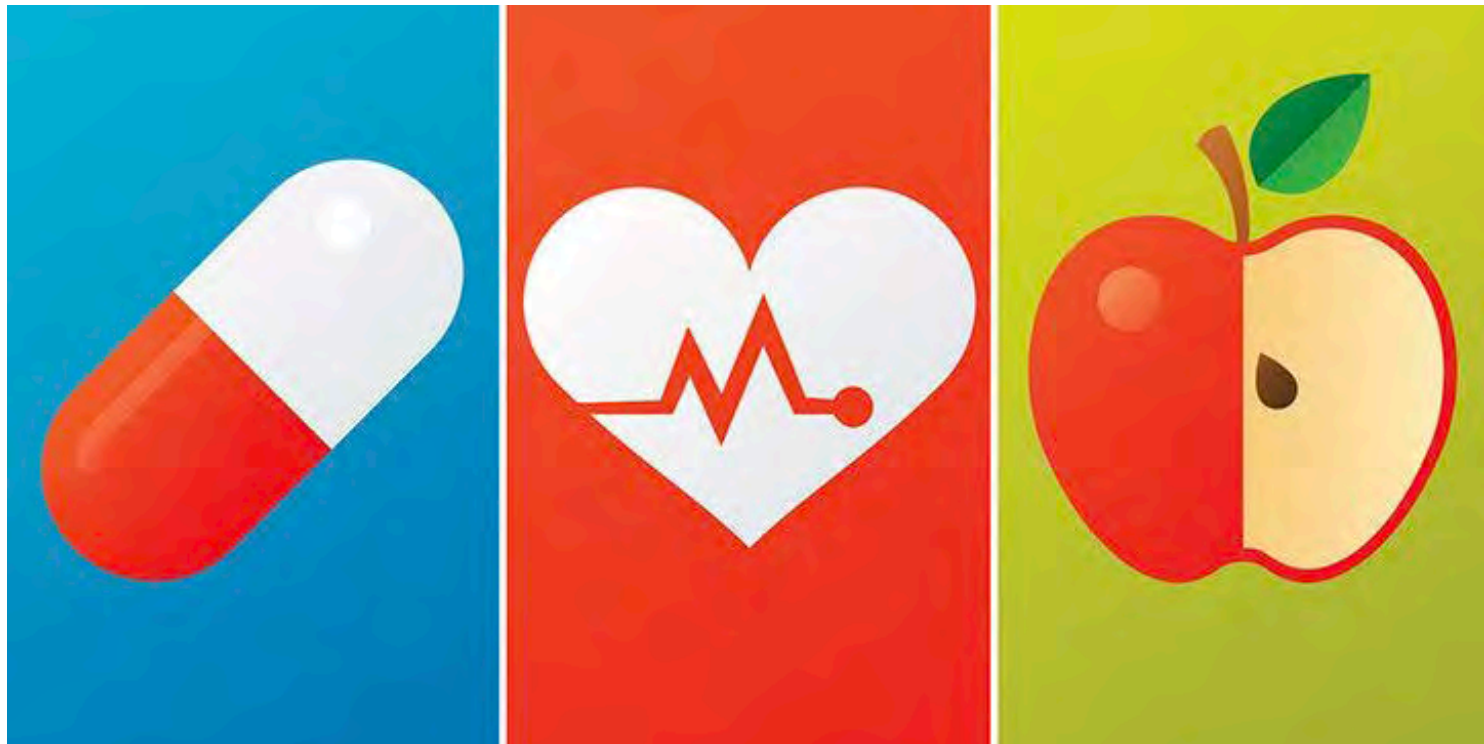
SHANE READ

#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 ...



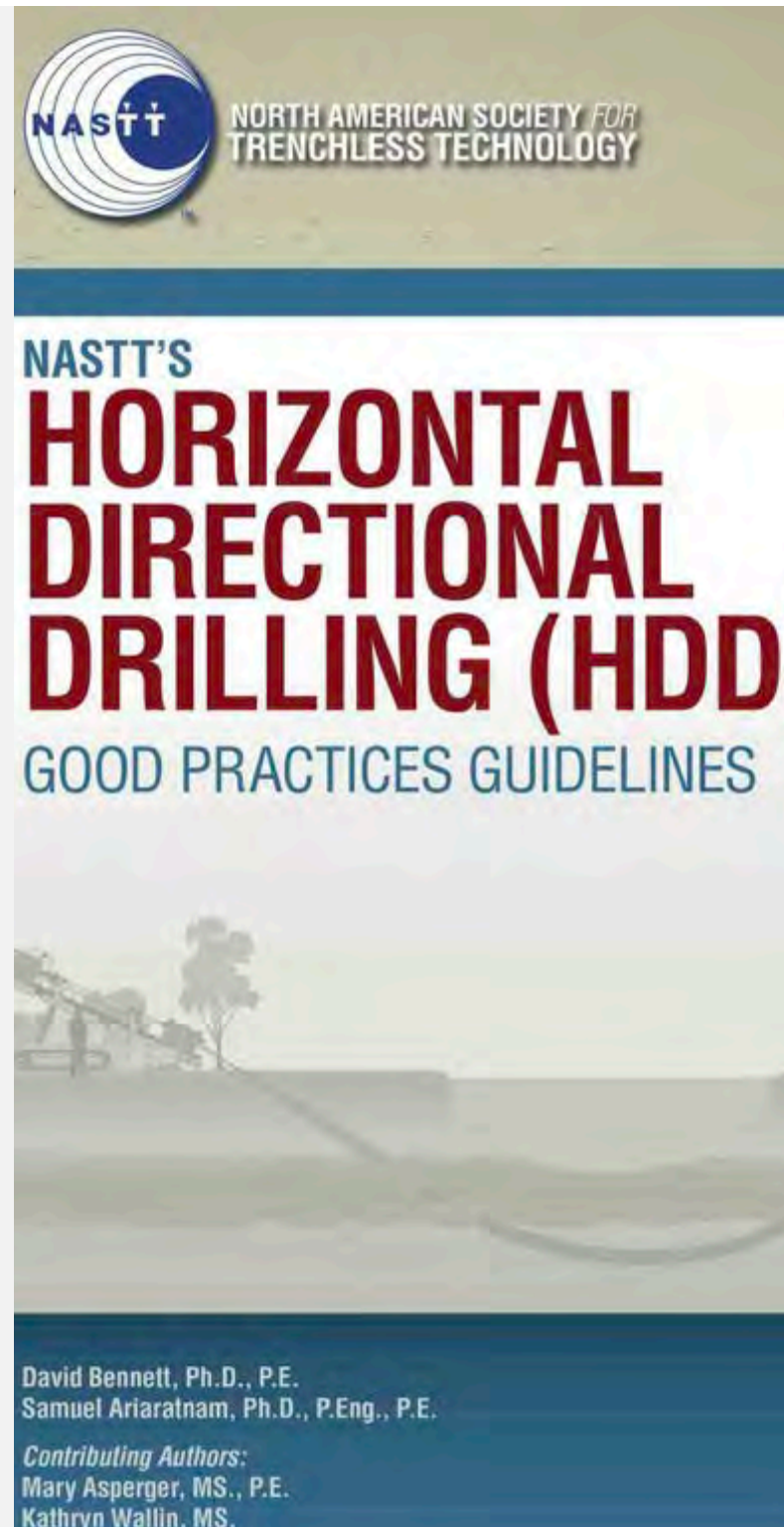
... where the benefits of prevention and early-intervention usually outweigh the costs and risks of a cure.

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



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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TRENCHLESS

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