

Streamlining Discovery: Reducing the Waste in the CD Discovery Process

ASCDC/CDCMA Construction Defect Seminar | Dec. 5, 2019

**Introduction:
Attorney**

Alan
Carnegie

Partner

Daniels, Fine, Israel,
Schonbuch & Lebovits



Introduction: Mediation

George
Calkins

Case Manager
JAMS



**Introduction:
Expert Witness**

Pete
Fowler

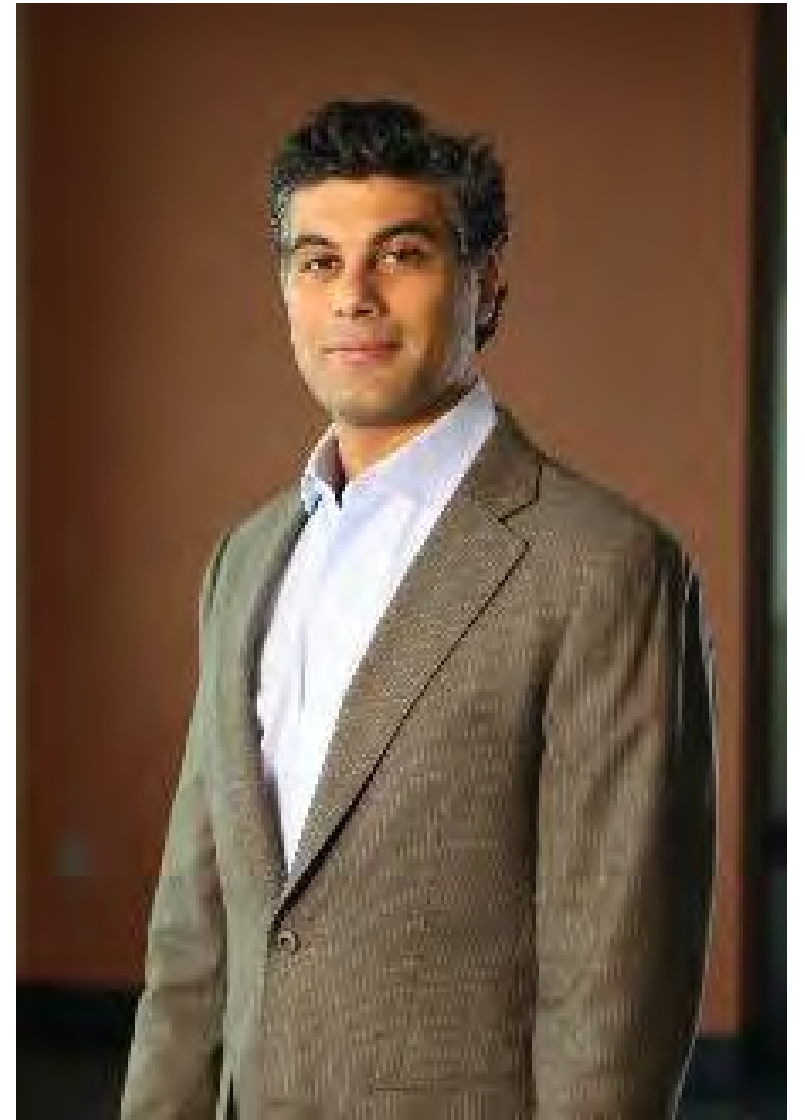
President
Pete Fowler
Construction Services



**Introduction:
DAM & Workflow**

Alon
Israely

Co-Founder
Business Intelligence
Associates, Inc.



Introduction: Court Reporting

Jeff Koller

Legal & Development
Director, Veritext



Jilleen Stelding

Director of Business
Development, Veritext





Mediator's Perspective



General Contractor's Perspective



Expert's Perspective



Property Owner's Perspective

**The Ideal
Conclusion of
CD Litigation**



Plaintiff's Physical Investigation Whack-A-Mole/Scope Creep



Physical Investigation Scope Creep: Nothing Wrong. A Little Wrong. A Lot Wrong. It's a Bloodbath!



Document & Information Collection, Management, and Analysis



Too Little Investigation Early



Too Much Investigation Early



Profound Disagreement About Value



Trial Preparation (Thermonuclear) Discovery

Common Bottlenecks & Pain Points

The Traditional CD Model & New CMOs

Streamlining CD Discovery

The Traditional CD Model & New CMOs

Common Activities in CD Litigation

1. Plaintiff Assessment
2. Litigation Begins/Complaint Filed
3. Case Management Order
4. Discovery
5. Preliminary Defect List
6. Cross Complaints to Subcontractors and Answers
7. Visual Assessment (Non-Destructive)
8. Plaintiff Preliminary Cost Estimate
9. Invasive Investigation
10. Homeowner Repairs
11. Plaintiff Final Defect List, Cost Estimate, Expert Presentation
12. Expert Witness Designation
13. Developer Allocation to Subcontractors
14. Evaluation by all Parties
15. Mediation Settlement Conferences
16. Deposition Preparation
17. Owner & PMK Depositions
18. Mediation
19. Expert Deposition
20. Trial Preparation
21. Trial
22. Settlement or Verdict

The Traditional CD Model & New CMOs

- Other Attempts
 - CA's Calderon
 - Title 40 in Nevada
 - Builder's Right to Repair in Other States
 - Many More

The Traditional CD Model & New CMOs

- Modern Case Management Orders

Ideas to Lower the Total Cost of CD Litigation

Streamlining CD Discovery

Case Management Order

eDiscovery Considerations

✓ **Defendants and Cross Defendants**

- “Diaries and other writings” include:
 - Social Media
 - Internal chat programs (Teams, Slack)
 - Mobile device collections
 - SMS/Text messages
 - Photos from construction site or homeowner locations
- Other systems
 - Warranty records
 - Complaint ticketing systems
- Database dumps from backend systems:
 - Procore, SharePoint

✓ **Plaintiffs**

- Social Media
 - Facebook, Twitter, Instagram
 - Private posts are discoverable w/ court order
- Community bulletin boards *such as*:
 - TownSquare
 - Nextdoor
- Email
 - HOA management email
 - HOA Board email
 - 3P systems such as Property Mgmt



Case Management Order

eDiscovery Production

✓ Production items

- ESI Production Protocol agreed to at meet and confer
- Discovery timelines
 - May need more than 45 days depending on volumes of data and types of systems involved
- Production formats:
 - Physical media contemplated
 - Digital media will speed things up
 - Allows for real-time validation



Advanced Analytics

The Evolution from Exceptional Practice to Commonplace Expectation



Has become common practice

- ✓ *Costs are commoditized*
- ✓ *Acceptance is wide-spread*
- ✓ *Integrations with review platforms have improved*

Best to use...

- Most cases
- Email & document heavy cases
- **Opposing and 3rd Party Productions**
 - *Particularly important in CD matters*

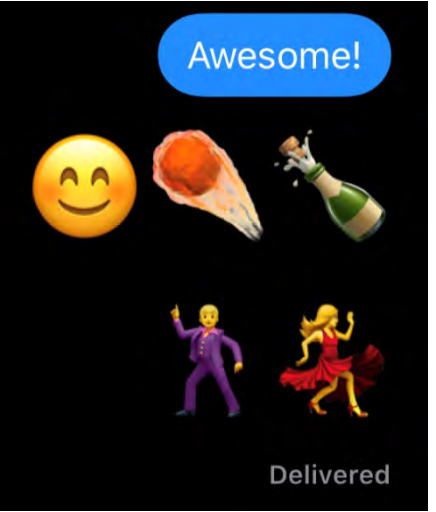
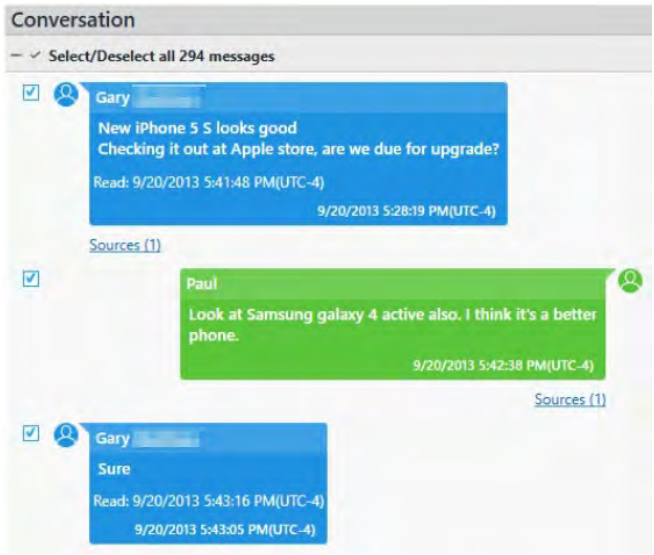
Not well suited for...

- Number intensive cases
- Spreadsheets
- Images, AutoCAD & design documents

The Ever-Expanding Data Universe

Chat, Instant Messages, Texts

Options for review and production:



Instant Message	From	Body	Status	Timestamp: Date	Timestamp: Time	Delivered: Date	Delivered: Time	Read: Date	Read: Time
1	+1222552222	See the email? Can you assist? Let me know if I can help.	Read	1/22/2017	1/22/2017 4:36:00 PM(UTC-6)			1/26/2017	1/26/2017 9:55:51 AM(UTC-6)
2	+1222553999	You around?	Read	1/26/2017	1/26/2017 9:38:56 AM(UTC-6)			1/26/2017	1/26/2017 9:55:51 AM(UTC-6)
3	+1222554444	Just landed in DC. I'll be at the hotel in a little bit. Hard to follow all the different email threads on my phone.	Sent	1/26/2017	1/26/2017 9:57:00 AM(UTC-6)	1/26/2017	1/26/2017 9:57:01 AM(UTC-6)		
4	+1222553333	No worries we're on it	Read	1/26/2017	1/26/2017 9:57:22 AM(UTC-6)			1/26/2017	1/26/2017 9:58:19 AM(UTC-6)
1	+1222557777	can u let me know if we can meet up later?	Read	1/13/2017	1/13/2017 5:35:53 PM(UTC-6)			1/14/2017	1/14/2017 10:23:05 AM(UTC-6)
1	+1222553333	Can I call you later?	Read	12/2/2016	12/2/2016 9:44:34 AM(UTC-6)			12/2/2016	12/2/2016 9:44:49 AM(UTC-6)
2	+1222554444	Sure. I have another meeting at 11:30 but open before that.	Sent	12/2/2016	12/2/2016 9:45:20 AM(UTC-6)	12/2/2016	12/2/2016 9:45:21 AM(UTC-6)		

The Ever-Expanding Data Universe

The Ethics of Social Media Discovery

Do...



**Examine Public
Social Media Profiles**



**Consider in Nearly
Every Case**



**Retain an Expert to
Collect & Preserve**

Don't...



**“Friend” or “Follow”
Op Party or Jurors**



**Simply Print Social
Media Profiles**



**“Hack” Social Media
Accounts**

The Ever-Expanding Data Universe

Notable Social Media Case Law

- “[I]t should now be a matter of professional competence for attorneys to take the time to investigate social networking sites.” *Griffin v. State*, 192 Md. App. 518, 535 (2010).
- Counsel sanctioned \$522,000 for advising client to “clean up” profile, “delete” pictures and deactivate account; client ordered to pay additional \$180,000 for following advice. Attorney’s conduct referred to bar for misconduct investigation; Client’s conduct referred to local prosecutor for potential perjury charges. *Lester v. Allied Concrete Co.*, Nos. CL.08-150, CL09-223 (Va. Cir. Ct. Sept. 1, 2011)
- Adverse inference sanction for deleting Facebook profile. *Hawkins v. College of Charleston* (U.S. Dist. Ct., South Carolina, Nov. 15, 2013) 2013 WL 6050324



BEHIND EVERYTHING WE DO:

SECURITY





HIPAA COMPLIANT



PII COMPLIANT



SSAE 16 CERTIFIED

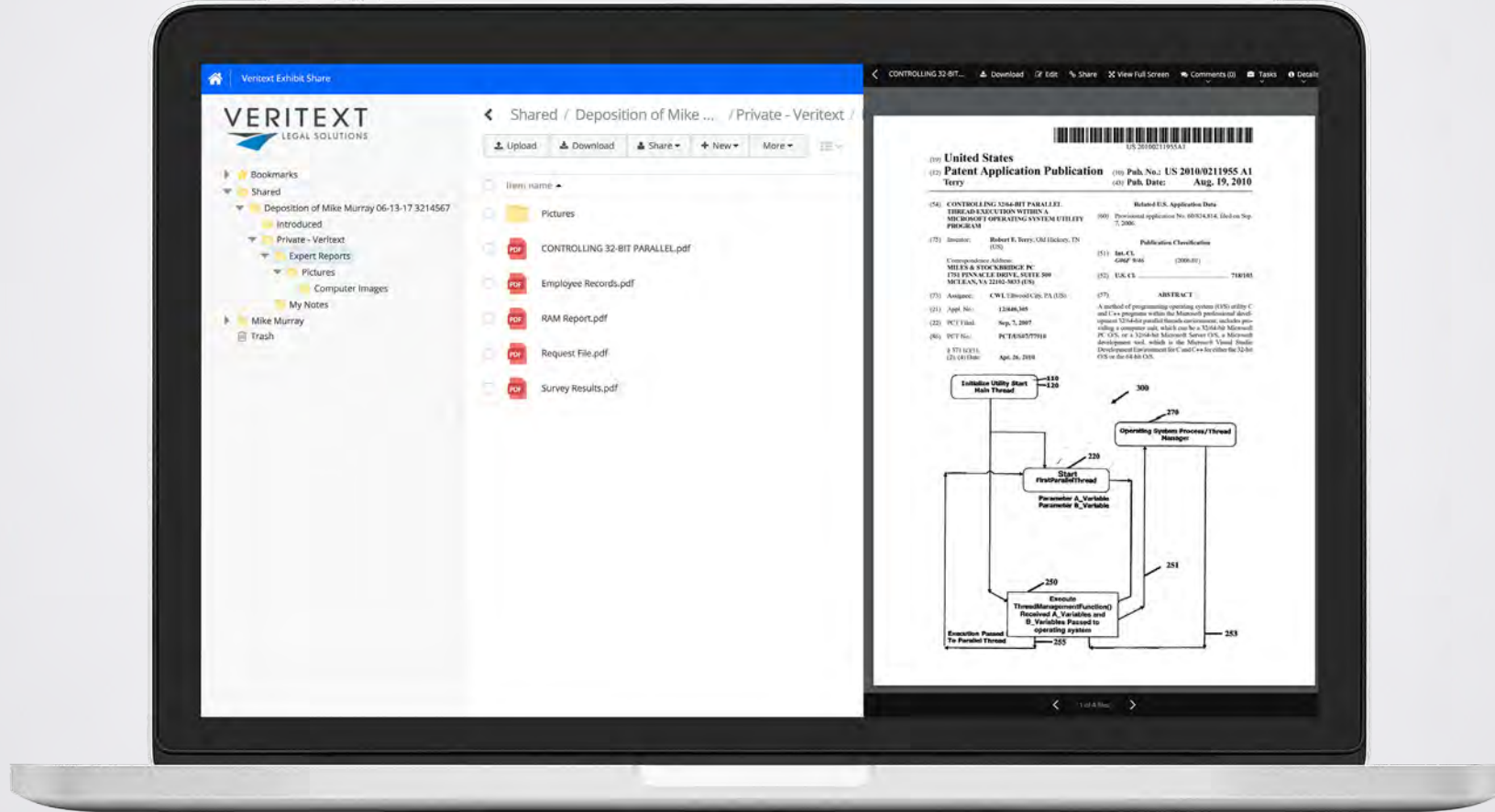


OVER 15,000,000 EXHIBITS!



EXHIBIT SHARE

Paperless Exhibits





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Password:

Login

Login

Password:



< Shared / Deposition of Mike M... ☆

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- Download
- Share
- New
- More

- Bookmarks
- Shared
 - Deposition of Mike Murray 06-13-17 3214567
 - Introduced
 - Private - Veritext
 - Mike Murray
 - Trash

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<input type="checkbox"/>	Introduced	Jun 16, 2017 1:33PM	-	-
<input type="checkbox"/>	Private - Veritext	Jun 16, 2017 1:30PM	-	-



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- ▼ Shared
 - ▼ Deposition of Mike Murray 06-13-17 3214567
 - Introduced
 - Private - Veritext
 - Mike Murray
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< Shared / Deposition of Mike M...

Upload Download Share ▼ New ▼ More ▼

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<input type="checkbox"/>	Introduced	Jun 16, 2017 1:33PM	-
<input type="checkbox"/>	Private - Veritext	Jun 16, 2017 1:30PM	-











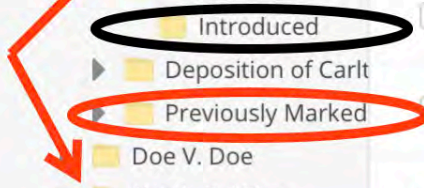
Shared / North Cal Fires / Previously Marked

Search for files...

Upload Download New Folder More

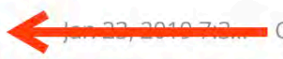
- Recent
- Bookmarks
- Shared
 - Canyon Fires
 - Deposition of Carl
 - Introduced
 - Deposition of Carl
 - Previously Marked
 - Doe V. Doe
 - North Cal Fires
 - Deposition of John
 - Deposition of John
 - Deposition of Peg
 - Deposition of PM
 - Deposition of Scot
 - Previously Marked
 - South Cal Fires
 - Trash

1



<input type="checkbox"/>	PDF	0071-013.pdf	Jan 23, 2019 7:3...	Chad C...	259 KB	0	0
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<input type="checkbox"/>	PDF	0071-019.pdf	Jan 23, 2019 7:3...	Chad C...	50 KB	0	0
<input type="checkbox"/>	PDF	0071-020.pdf	Jan 23, 2019 7:3...	Chad C...	203 KB	0	0
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<input type="checkbox"/>	PDF	0071-022.pdf	Jan 23, 2019 1:4...	Anthon...	159 KB	0	0

2



3



Activity in this folder

- JG uploaded 0086-019.P... a day ago by Jimmy Gab... in this folder
- JG uploaded 0086-020.P... a day ago by Jimmy Gab... in this folder
- JG uploaded 0086-008.p... a day ago by Jimmy Gab... in this folder
- JG uploaded 0086-007.p... a day ago by Jimmy Gab... in this folder
- JG uploaded 0086-024.P... a day ago by Jimmy Gab... in this folder

Recent

Bookmarks

Shared

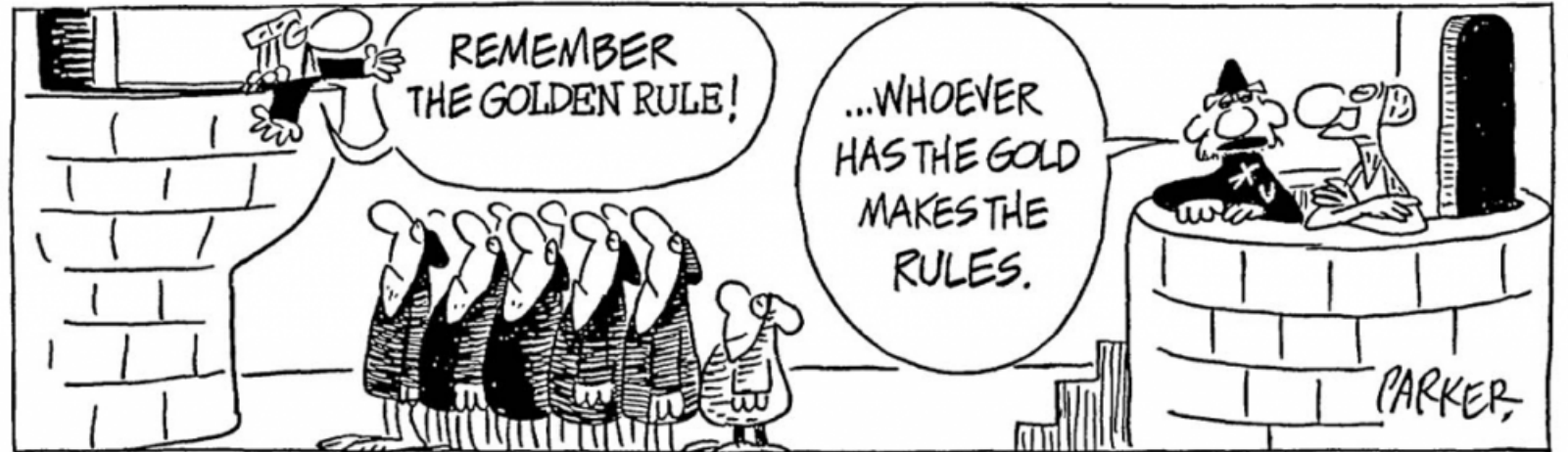
- Canyon Fires
 - Deposition of Carl...
 - Introduced
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 - Doe V. Doe
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 - Deposition of John
 - Deposition of Pegg
 - Deposition of PMQ
 - Deposition of Scott
 - Previously Marked
 - South Cal Fires

Trash

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Ideas to Lower the Total Cost of CD Litigation

The Golden Rule



Ideas to Lower the Total Cost of CD Litigation

“Feedback is the breakfast of champions.” – Ken Blanchard

- Scope
- Budget
- Schedule
- Compare Plan to Actual

	<u>Scope</u>	<u>Budget</u>	<u>Actual</u>	<u>Schedule</u>
1.	Item 1	\$ XXX	\$ XXX	Plan/Actual
2.	Item 2	\$ XXX	\$ XXX	Plan/Actual
3.	Item 3	\$ XXX	\$ XXX	Plan/Actual
4.	Item 4	\$ XXX	\$ XXX	Plan/Actual
5.	Item 5	\$ XXX	\$ XXX	Plan/Actual
6.	TOTAL	\$ X,XXX	\$ X,XXX	

Ideas to Lower the Total Cost of CD Litigation

www.petefowler.com

Construction Contractor Project Level Analysis

8/18/2011

Line	Scenario	Level				
		L1: Spent	L2: Now/ASAP	L3: Small Fight	L4: Big Fight	L5: Trial
1	Attorney Fees					
2	Best Case					
3	Likely Case					
4	Worst Case					
5						
6	Expert Fees					
7	Best Case					
8	Likely Case					
9	Worst Case					
10						
11	Other					
12	Best Case					
13	Likely Case					
14	Worst Case					
15						
16	Settlement/Judgment					
17	Best Case					
18	Likely Case					
19	Worst Case					
20						
21	Total					
22	Best Case	\$ -	\$ -	\$ -	\$ -	\$ -
23	Likely Case	\$ -	\$ -	\$ -	\$ -	\$ -
24	Worst Case	\$ -	\$ -	\$ -	\$ -	\$ -

Ideas to Lower the Total Cost of CD Litigation

Line	Scope of Work/Deliverables	Status*	Plan Estimate		Billed to Date	Cost to Complete	
			Hours	Costs			
1	Level 1: Preparatory Work		0	-			
2	A. Images & Information Memo	TBC				-	
3	B. Document Index	TBC				-	
4	C. Issues List	TBC				-	
5	D. Unit Matrix	TBC				-	
6	E. Site Plan/Map	TBC				-	
7	F. Meetings, Teleconferences & Correspondence	TBC				-	
8							
9	Level 2: Preliminary Investigation		0	-			
10	A. Investigation Recommendations	TBC				-	
11	B. Inspection Request with Random Selection	TBC				-	
12	C. Inspection Documentation	TBC				-	
13	D. Players List	TBC				-	
14	E. Scope of Work Matrix	TBC				-	
15	F. Plaintiff Estimate Summary	TBC				-	
16	G. Project Summary Memo	TBC				-	
17	H. Plan Review Memo	TBC				-	
18	I. Cost Estimate - Order of Magnitude	TBC				-	
19	J. Meetings, Teleconferences & Correspondence	TBC				-	
20							
21	Level 3: Analysis		0	-			
22	A. Issues-Discussion Matrix	TBC				-	
23	B. Testing Request with Random Selection	TBC				-	
24	C. Testing Summary	TBC				-	
25	D. Testing Maps	TBC				-	
26	E. Damage Maps	TBC				-	
27	F. Issues-Locations Matrix	TBC				-	
28	G. Scope of Repair	TBC				-	
29	H. Opinion Letter	TBC				-	
30	I. Research Memo	TBC				-	
31	J. Meetings, Teleconferences & Correspondence	TBC				-	
32							
33	Level 4: Detailed Analysis		0	-			
34	A. Request for Proposal	TBC				-	
35	B. Issues-Summary Report	TBC				-	
36	C. Allocations	TBC				-	
37	D. Meetings, Teleconferences & Correspondence	TBC				-	
38							
39	Level 5: Final Analysis		0	-			
40	A. Deposition Questions	TBD				-	
41	B. Deposition Summaries	TBD				-	
42	C. Presentation Outline	TBD				-	
43	D. Presentation (PowerPoint)	TBD				-	
44	E. Exhibit List	TBD				-	
45	F. Expert Designation	TBD				-	
46	G. Meetings, Teleconferences & Correspondence	TBD				-	
47	Totals		0	\$ -	\$ -	\$ -	
48	*D=Done, IP=In Progress, TBC=To Be Completed, TBD=To Be Determined						

Ideas to Lower the Total Cost of CD Litigation

Higher Expectations for Investigative Discipline

- Adherence to Standards Like ASTM E2128 Standard Guide for Evaluating Water Leakage...
- Adherence to Standards Like The AAMA 511 Voluntary Guideline for Forensic Water Penetration Testing of Fenestration Products
- A Systematic Approach (Apply the Scientific Method)
 - Review of Project Documents
 - Evaluation of Design Concept
 - Determination of Service History
 - Inspection
 - Investigative Testing
 - Analysis
 - Report Preparation

Ideas to Lower the Total Cost of CD Litigation

George Calkins, JAMS

Final Thoughts

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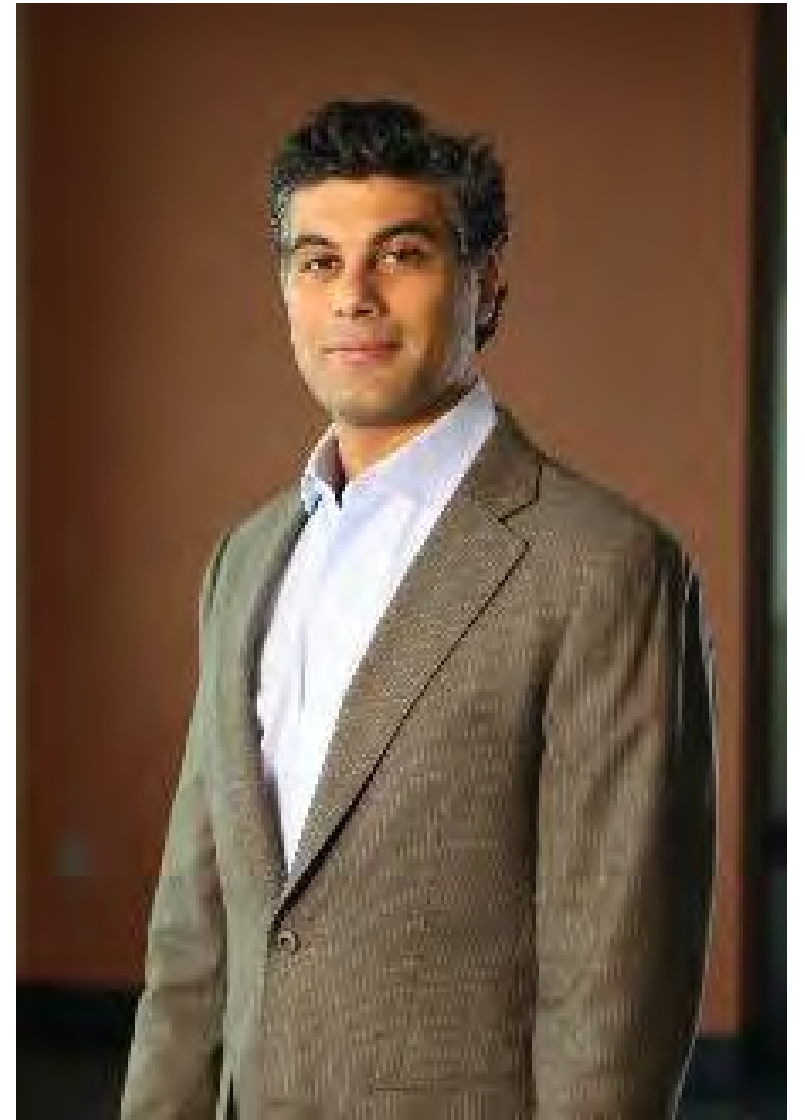
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The End.

Final Thoughts