

# SURETY BONDING & CONSTRUCTION RISK MANAGEMENT 2020 CONFERENCE

January 27-29, 2020 | Bonita Springs, FL



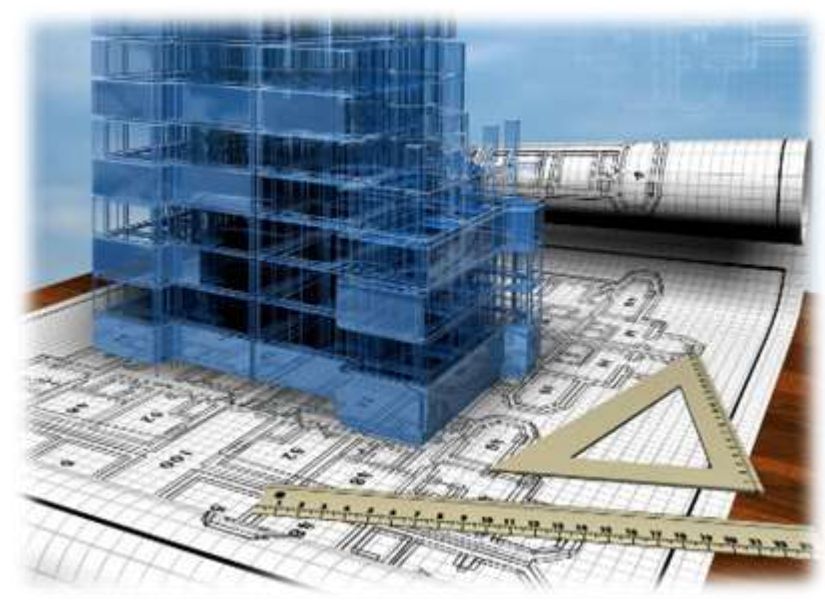
# AGC

THE CONSTRUCTION  
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## AGC's Surety Bonding & Construction Risk Management 2020 Conference

# SHOW ME THE MONEY – NOW! TIPS & CASE STUDIES ON RESOLVING COMPLEX CONSTRUCTION, SURETY & INSURANCE DISPUTES QUICKLY & EFFECTIVELY



### Presented by:

**Scott Gurney**  
Gurney Dispute  
Resolution LLC

**Adrian Bastianelli, III**  
Pecker & Abramson, P.C.

**Leslie King O'Neal**  
Brasfield & Gorrie, L.L.C.

**Steven Nelson**  
SureTec Insurance  
Company

**Lee Shidlofsky**  
Shidlofsky Law Firm  
PLLC

# Arcadis – Global Construction Disputes Report 2018

2018 RANK	MOST COMMON METHODS OF ALTERNATIVE DISPUTE RESOLUTION	2017 RANK
1	Party-to-party negotiation	1
2	Mediation	2
3	Arbitration	3
4	Dispute adjudication board (tied with 3)	New in 2018



# Arcadis – Global Construction Disputes Report 2018

## North America

### DISPUTE CAUSES

For the fifth year running, the most common cause for disputes in North America was errors and/or omissions in the contract documents. For North America, more projects are using design-build and alternative project delivery methods. For these projects, the design process requires a more collaborative and interactive effort, which creates the need for all project participants to be diligent and responsive so that errors and/or omissions, along with delays, do not occur. Better communication and controls during the design process between all parties can be a powerful tool for minimizing the cost of errors and omissions.

Owner/contractor/subcontractor failing to understand and/or comply with its contractual obligation – the top cause globally – moved up from third to second position for North America. Failure to properly administer the contract had been one of the top three causes for the last few years for North America but did not appear in the top three this year.

The three most common methods of Alternative Dispute Resolution that were used during 2018 (the same as it has been the last two years) in North America were:

1. Party-to-party negotiation
2. Mediation
3. Arbitration

These results show that there continues to be a preference towards negotiated outcomes controlled by the parties involved in the dispute resolution process to avoid formal litigation proceedings. They are realizing that the further along a dispute progresses, the higher the value and cost of resolution will become. Expenses, like interest on the claim and the cost of litigation, can exceed the cost of the original claim itself. This demonstrates the value added when proactive dispute avoidance techniques are employed early in the construction process, which can aid in keeping participants away from formal claim proceedings altogether.

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# Arcadis – Global Construction Disputes Report 2018

	DISPUTE VALUE (US\$ MILLIONS)								LENGTH OF DISPUTE (MONTHS)							
	2011	2012	2013	2014	2015	2016	2017	2018	2011	2012	2013	2014	2015	2016	2017	2018
North America	10.5	9	34.3	29.6	25	21	19	16.3	14.4	11.9	13.7	16.2	13.5	15.6	17.7	15.2

2018 RANK	DISPUTE CAUSE	2017 RANK
1	Errors and/or omissions in the contract document	1
2	Owner/contractor/subcontractor failing to understand and/or comply with its contractual obligation	3
3	Poorly drafted or incomplete and unsubstantiated claims	New in 2018



# Key Stats

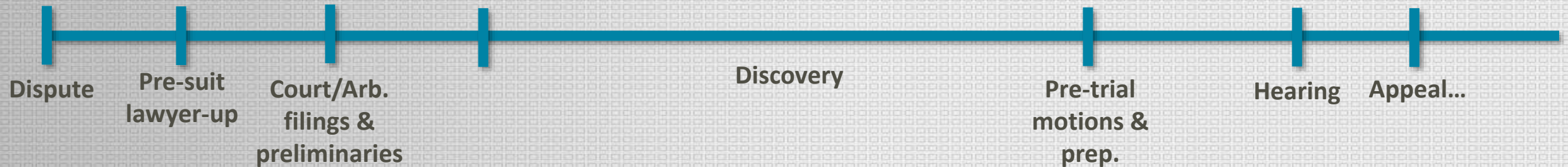


- On average, federal court cases take 24.2 months to trial, and 36.6 months through appeal\*
- On average, AAA arbitrations take 11.6 months to award \*
- Approx. 95% of cases resolve before trial/arb hearing

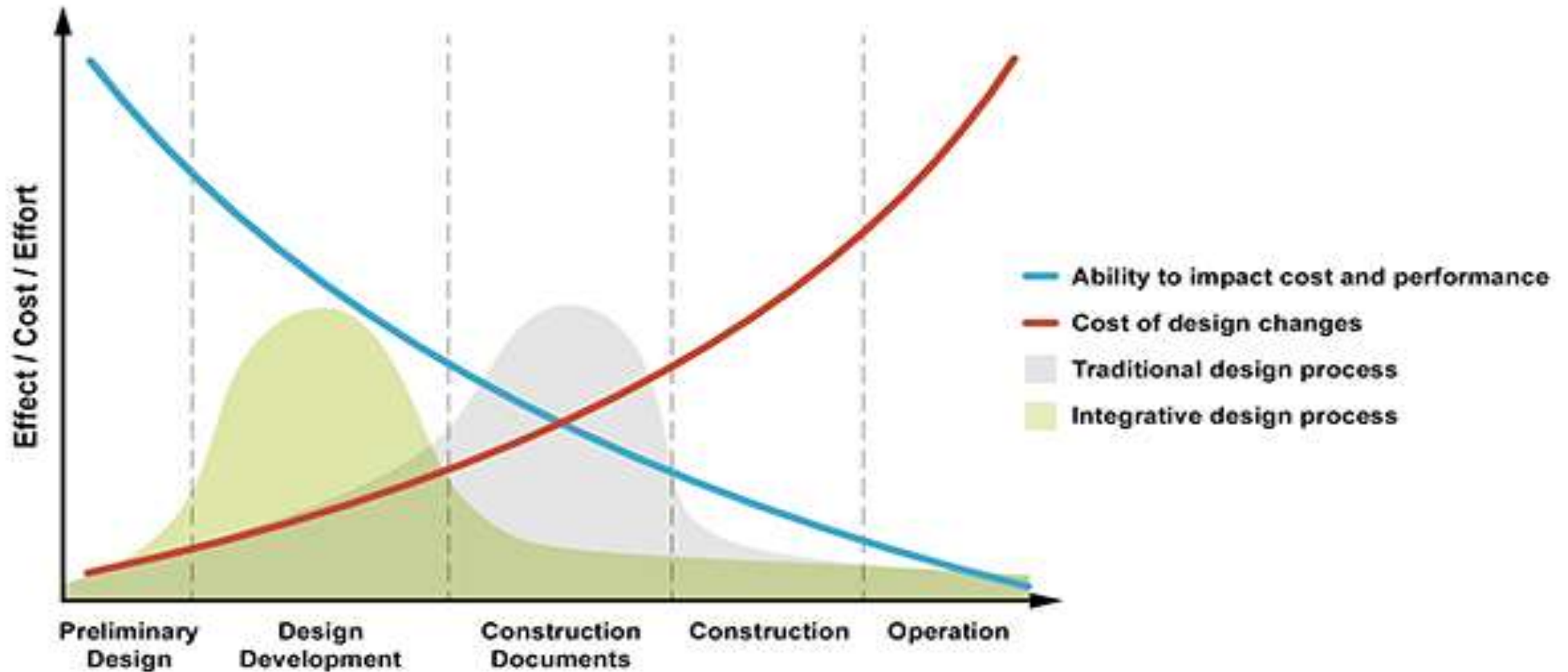
\* Source: "Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings," R. Weinstein, C. Edes, J. Hale, N. Pearsall (Micronomics, March 2017)



# Traditional Dispute Resolution Sequence

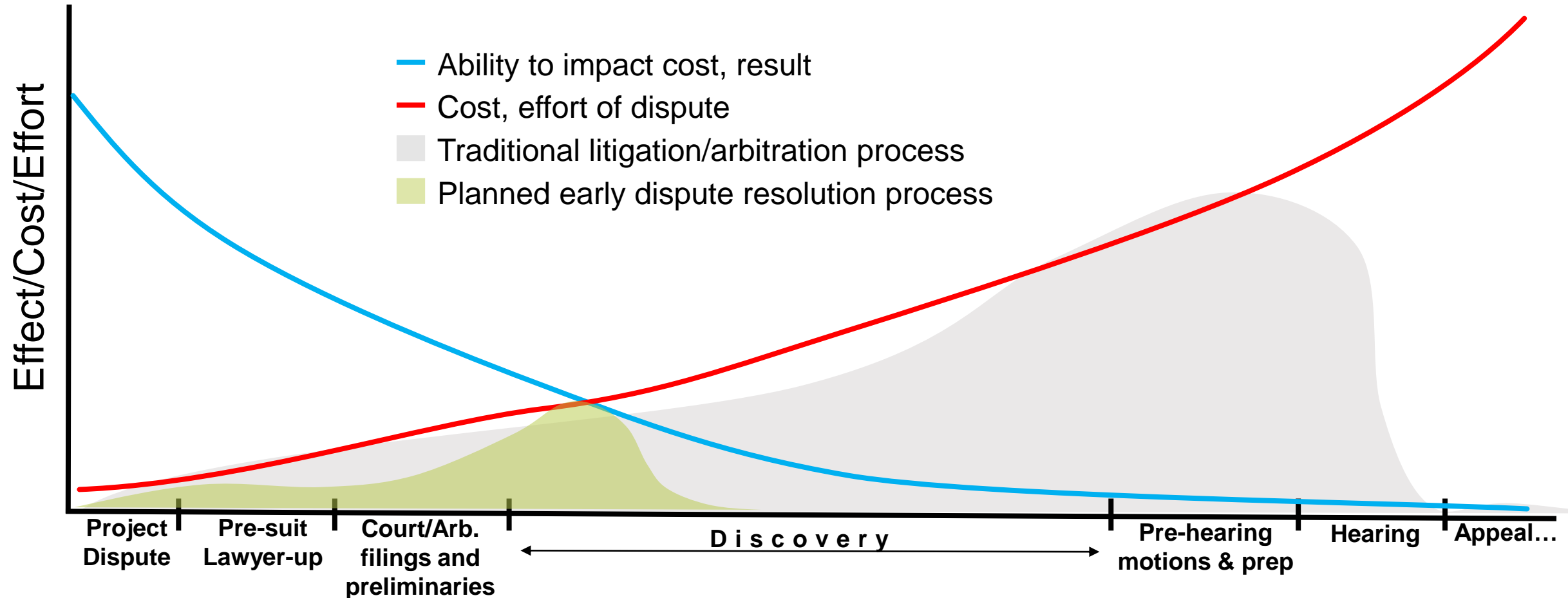


# MacLeamy Design Curve

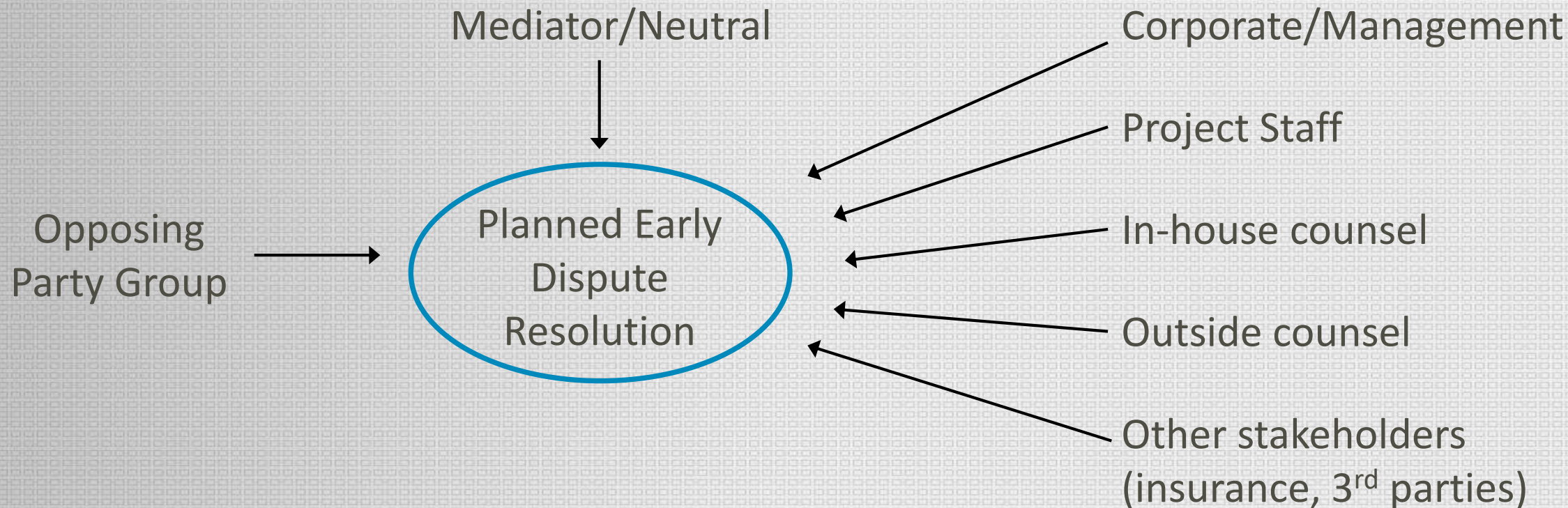




# Early Dispute Resolution Curve

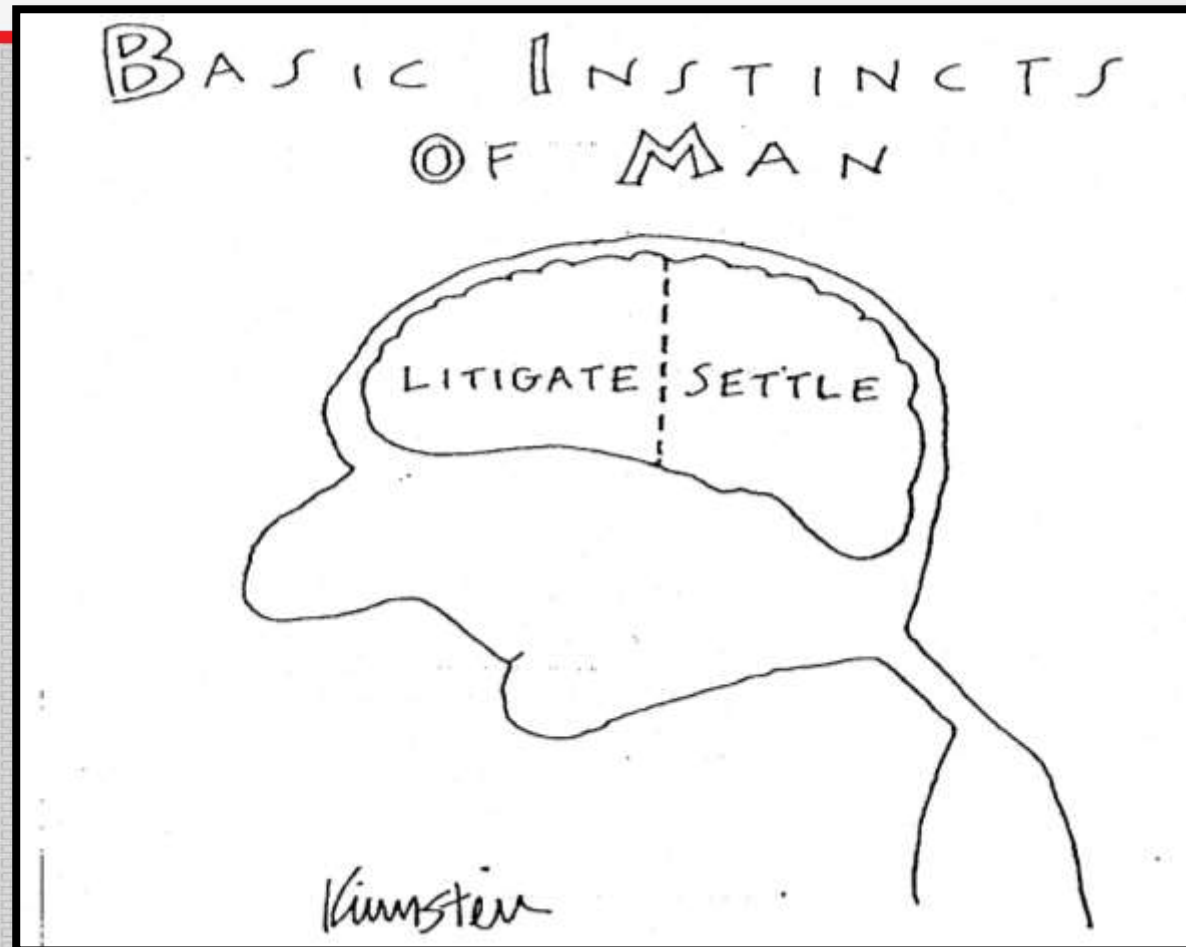


# Planned Early Dispute Resolution Process Alignment





# Some Thoughts



# Mediating Cases with Insurers

## Top 5 Tips



### ● 5 - Prepare





# Mediating Cases with Insurers

## Top 5 Tips



### ● 4 - Be Creative





# Mediating Cases with Insurers

## Top 5 Tips



- 3 - Be Willing to Compromise Your Interest





# Mediating Cases with Insurers

## Top 5 Tips



- 2 – Stay Focused on the Settlement Horizon





# Mediating Cases with Insurers

## Top 5 Tips



### • 1 – Communication





# Mediating Cases with Insurers



- Communication is Key
  - Plaintiff – Spell out your claims, how they may be covered, clear damage model . . . Think Insurance
  - Defendant – Pre-Mediation reports to adjusters in a *timely* manner, verdict range, settlement range, ASK FOR \$\$\$ AUTHORITY, make sure that the umbrella/excess insurers have necessary information
  - Pick the right mediator for the case
- Attendance of Adjusters
  - In person is MUCH better than “on the phone”
  - Provide plenty of notice



# Some Observations



- Facts do matter
- Early mediations are tougher. Why?
- The lower the dollar amount, the harder to settle



# AND REMEMBER: THE INSURER/INSURED RELATIONSHIP NEED NOT BE ADVERSARIAL



# Q & A / DISCUSSION



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