



Sun Tzu

- Chinese Military Commander and Philosopher
- Historians unsure of date of birth: 722-481 BC
- Read and quoted by Kissinger, Schwarzkopf, Patton, MacArthur and even Tony Soprano.

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Do Design Professionals
ever really go to War?

YES

Every Stinking Day!

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WARS

- Battles for Work (is begging for work a battle?)
- Battles to Hammer out Contracts
- Battles With Owners for Fees, V/E, Delays, etc.
- Battles With Contractors and Subs
- Battles with Gov't Officials and Inspectors
- Battles with Your Own Employees

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Litigation is War

- “It is said that if you know your enemies and know yourself, you will not be imperiled in a hundred battles; if you do not know your enemies but do know yourself, you will win one and lose one; if you do not know your enemies nor yourself, you will be imperiled in every single battle.” *Sun Tzu*

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First, it must be noted that Sun Tzu never had to engage in litigation in California....or New York.....or Texas....or.....

Indeed, there are (or were) “Stella Awards” for outrageous lawsuits and verdicts named after Stella Leibeck who was awarded nearly \$3 million when she spilled hot McDonald’s coffee on her lap. But I digress.....

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Who Is Your Enemy?



Who Are You??

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Look in a mirror. You are your own worst enemy.

- Per a prominent A/E insurer, studies have shown the genesis of most lawsuits, in one way or another, is a communications problem.
 - No or poorly drafted contracts;
 - Failure to manage owner’s expectations;
 - Failure to document file and follow up (delay); and
 - Not staying on ahead of issues/problems.

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Contracting

- “For to win one hundred victories in one hundred battles is not supreme excellence. To subdue the enemy without fighting is the essence of excellence.”
- “The general who wins the battle makes many calculations in his temple before the battle is fought. The general who loses makes but few calculations beforehand.”

Sun Tzu

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Win Without Litigating

- Understand that your contract is your friend.
- It is the single most critical thing on a project.
- Never give contract negotiation short shrift.

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Contracts in Writing

- Contracts should be in writing and many states require it, including specified provisions.
- “An oral contract is not worth the paper on which it is written.”
- Please, please, please get the contract signed!!!!

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Contracting

- Gosh Dang it, read your contract!!!
- No A/E ever said, at the end of litigation, they regretted reading their contract before they signed it.

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A Contract Is Your Castle

- A contract is a defensive placement to protect your assets in battle.



- Words are like mortar and clauses like bricks.
- Paragraphs are like walls and moats.
- Attachments and Exhibits are like fixed defenses and armament.

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Contractual Armament

- A. Detailed Scope of Work Language.
- B. Construction Administration or Inspection Services Language.
- C. Third Party Beneficiary/Non-Assignment Language.
- D. Ownership of Plans and Specs (Copyright).
- E. Limitation of Liability Clause.

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A. Detailed Scope of Work

- “If words of command are not clear and distinct, if orders are not thoroughly understood, the general is to blame.”
Sun Tzu

The scope of work is the most important contract language. It defines EXACTLY what you are going to do (and not do) as the A/E. Make these orders “clear and distinct.”

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Scope of Work

- Always attach a scope of work letter to the contract.
- Make sure the proposal you send is adopted or that everyone understands what scope of work controls. Avoid confusion.
- Make sure there is a method of payment for work outside the agreed scope.

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The Following is According to a Prominent Insurance Company

- This is what gets an A/E in trouble most often:

“Failure to manage the owner’s expectations; failure to explain the scope of work and exclusions thereto; bad choice of client (owner tends to litigate frequently); failure to determine if owner has funds to pay for project; and the owner leaves the A/E out of the loop in project changes, value engineering, etc.”

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*Failure to manage the owner’s expectations;

*Failure to explain the scope of work and exclusions thereto.

Needless to say, these two observations by the insurance representative are very much related.

But, for the general in battle, the second is the most important and the first then follows throughout a project.....SO, WHAT TO DO?

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Sample Attachments to Contract

Scope of Services
Date: 5/19/09
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Other:	FULL BASIC SERVICE BY ARCHITECT	NOT INCLUDED	ABBREVIATED BASIC SERVICE BY ARCHITECT	OTHER
A. Additional Service By Architect				
B. Outside Services By Architect				
C. By Owner and Coordinated By Architect				
D. By Owner				
14. Preliminary Civil Engineering Analysis		X		
15. Preliminary Landscape Design	X			
16. Preliminary Building Code Analysis		X		
17. Governmental and Regulatory Agency Review		X		
18. CEMC Energy Calculations Coordination		X		
19. Design Review Submittal Documents	X			
20. Attend Design Review Meetings	X			
21.				
(CONSTRUCTION DOCUMENTS PHASE (55% of overall fee)				
22. Architectural Site Plan (PARTIAL)		X		
23. Architectural Site Details	X			
24. Civil Site Plan (by Consultant)		X		
25. Civil Site Plan (by Architect)	X			
26. Utilities Site Plan (by Consultant)		X		
27. Utilities Site Plan (by Architect)		X		

Sample Attachments to Contract

Item	Service Description	To be provided by Architect / Engineer	
		Architect / Engineer	Engineer
0	Services		
0.1	The professional services to be furnished by the Architect / Engineer shall include:		
0.1.1	Full Program of Requirements Validation, and Follow-up	yes	
0.1.2	Full As-built, Existing Conditions Surveys and Verifications	yes	
0.1.3	Full Architectural Aesthetic and Functional Design, Production, and Construction Administration	yes	
0.1.4	Full Mechanical Engineering (HVAC, Plumbing, Medical Gases and all similar systems) Design, Production, and Construction Administration	yes	
0.1.5	Full Electrical Engineering (Generation, Distribution, Communications, Security, and all similar systems)	yes	

Sample contract language:

Article 1

Consultant's Services and Responsibilities

1.1. Consultant's scope of work is more particularly described in Exhibit A, which is incorporated herein as if fully set forth. Consultant shall complete all tasks within the time constraints for such tasks. **GOOD!!**

1.2. Solely upon receipt of written authorization from _____, Consultant shall perform additional services, outside of the scope established herein. Such additional services shall be requested by way of a written change order from an authorized representative of _____. Consultant shall have no right to payment for any extra work if it begins work without first securing a written change order from _____.

1.3. Consultant at all times shall comply with the terms of the Owner Contract, including without limitation, the specifications and standards incorporated therein. Any duty owed to the Owner under the Owner Contract shall constitute a duty owed by Consultant to Owner and to _____ and any right enjoyed by Owner thereunder shall constitute a right enjoyed by _____ with respect to Consultant. In no event shall Consultant's level of competence, skill and professionalism fall below the level required by the Owner Contract, or if such contract is silent on a particular matter, below the level of recognized firms in the United States performing tasks of similar difficulty and sophistication. **REALLY BAD!!**

Article 2

B. Construction Administration

- “Management of many is the same as management of few. It is a matter of organization.”
- “A leader leads by example, not by force.”

Sun Tzu

“Once a project has started, CA is the quickest way to expose yourself to liability.”

John Broghammer

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Construction Administration

- Construction observation is the periodic observation of completed work to determine general compliance with the plans, specifications and other project documents.
- It is NOT an inspection or an A/E guarantee of compliance by the contractor.
- Make sure the owner/client knows what you are going to do and NOT do.

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Guidelines for Special Inspection and Engineering Observation.

- Engineering *Observation* is the visual observation of the engineering system for general conformance with the approved plans and specifications.
- Engineering *Inspection* is the monitoring of materials and workmanship that are critical to the integrity of the building engineering to ensure compliance with the approved plans, specs and ordinances.

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Construction Administration

- Construction administration is like deploying your troops for battle. You send out soldiers into the field to engage the enemy (and make no mistake, you see the contractor as the enemy).
- But, the enemy when doing CA is the owner, not the contractor.

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Sample Problem Language:

Terms from Contractor's contract for major home remodel project (\$1.5 million). Standard of care for contractor raised significantly.

2. Performance Standard. The Work must be performed and completed in accordance with all requirements of law and no Work shall be undertaken until Contractor has been issued all required permits. "Completion" includes obtaining all certificates of occupancy or amendments or existing certificates, as the case may be. Unless otherwise specified in the Details, the Work must be performed in accordance with the best modern practice and with materials and workmanship of the highest, best and first class quality. Contractor shall check and verify all dimensions, grades, and levels before commencement of performance and whenever necessary during the progress thereof. Contractor in executing this Contract acts as an independent contractor and will provide all labor, tools



"best modern practice...highest, best and first class quality."

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Sample Problem Language:

Contract terms from Architect's contract with owner on same home remodel project.

2.0 ARCHITECT'S SERVICES AND RESPONSIBILITIES

Architects will provide the following services:

1. Preliminary design including floor plan and exterior elevations for review and approval by the Owner

If the Architect can fit it into his schedule he shall provide the following services. He is not obligated to perform this work:

2. Construction drawings suitable for bidding, obtaining a building permit and construction.
3. Construction administration when requested by Owner.

What does this mean???

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C. Third Party Beneficiary/Non-Assignment of Rights

- “Being unconquerable lies with yourself; being conquerable lies with your enemy.”

Sun Tzu

Do not concede contractual rights to the enemy. Avoid providing contractual ammunition for your enemy to use to conquer you.

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Third Party Beneficiary Language:

- Nothing contained in this agreement shall create a contractual or legal relationship with, rights in favor of, or a cause of action in favor of any third party against the Engineer. The Engineer's services under this Agreement are being performed solely for the Client's benefit, and no other party or entity shall have any rights or a claim against the Engineer because of this Agreement or the performance or nonperformance of services hereunder.
- This provision may be waived only by express written consent of the Engineer.



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Non-Assignment Clause

- The Client and Engineer, respectively, bind themselves, their partners, successors, assigns, and legal representatives with respect to all covenants of this Agreement. Neither the Client nor the Engineer shall assign this Agreement without the express written consent of the other. The Client may without written consent but with notice in writing, assign this Agreement to an institutional lender providing financing for the Project. In such event, the lender shall assume all of the Client's rights and obligations under this Agreement. Consent to assignment by either party shall not be unreasonably withheld.

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D. Ownership of Plans and Specs
(copyright issues)

E. Limitation of Liability

- “Concentrate your energy and hoard your strength.” *Sun Tzu*

If you can, maintain ownership of your work product (i.e hoard). Regardless, limit your responsibility for subsequent use of your plans.

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Sample Language From Contract

“LIMITATION OF LIABILITY. Client agrees that [consultant’s] liability for damages due to any cause or causes, including but not limited to negligence, errors or omissions, strict liability, or breach of contract or warranty, will be limited to a sum not to exceed \$50,000 or [consultant’s] total fee, which ever is greater.

In the event Client does not wish to limit [consultant’s] liability to this sum, [consultant] agrees to raise the limitation of liability to a sum not to exceed \$500,000 for increased consideration....”

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Contract Language to Avoid:
INDEMNITY CLAUSES


- “O divine art of subtlety and secrecy! Through you we learn to be invisible, through you inaudible and hence we can hold the enemy’s fate in our hands.” *Sun Tzu*

There is NOTHING subtle or secret about indemnity clauses. They are vile beasts spawned by the devil (who was the father of all lawyers). Avoid indemnity clauses at all costs.

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Red Flag Indemnity Language:

- “To the fullest extent provided by law” and “sole” or “solely” are immediate red flag language!! Proceed with extreme caution!!
- Indemnity duties not tied to negligent conduct. “Arising out of” or “connected with” covers any type of conduct related in any way to the services provided.



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Enemies Other Than Yourself

- Owners
- Contractors
- Subconsultants
- Government Inspector and Bureaucrats
- Third parties

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Owners: Friend or Foe?

- Owners deserve special consideration when engaged in battle (aka, litigation).
- In a tight economy the owner will be your friend on day one and your foe on day two.

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Remember: According to a Prominent Insurance Company

- This is what gets an A/E in trouble most often:
“Failure to manage the owner’s expectations; failure to explain the scope of work and exclusions thereto; bad choice of client (owner tends to litigate frequently); failure to determine if owner has funds to pay for project; and the owner leaves the A/E out of the loop in project changes, value engineering, etc.”

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Owners: Friend or Foe?

- “Engage people with what they expect; it is what they are able to discern and confirms their projections. It settles them into predictable patterns of response....”
Sun Tzu
- Being victorious in battle against an owner starts with your contract and managing expectations LONG before the battle is engaged.

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Managing Expectations

- Hidden expansion of the scope of work (aka: “No good deed goes unpunished”).
- Communications following meetings (aka: CYA letters and memos).
- Either being out of the loop or making decisions without the owner’s consent.

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Managing Expectations

- “Be extremely subtle, even to the point of formlessness. Be extremely mysterious, even to the point of soundlessness.”*Sun Tzu*

When dealing with and client’s expectations, Sun Tzu was an idiot. Blunt, clear, explicit, repeated communications. Think of your client as a child.

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Scope of Work—No good deed goes unpunished

- An extra word about scope of work.
- Don’t be Pavlo’s dog. If whenever the owner rings a bell expecting free work, you respond, soon the owner EXPECTS you to respond with more free work.
- Clients sue because they assume, expect or believe you have agreed to greater duties that you actually have agreed to do.

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Communications

- Telephone discussions are a great way to create misunderstandings.
- E-mails are much better—provided you **THINK** twice about the content.
- Confirm verbal communications: “This is to confirm my understanding of our discussion.... If any of the above does not meet your understanding, please let me know immediately.”

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Communications

- A word about e-mails:
 - Would your mother be proud of what you wrote?
 - Would you be comfortable having it read in front of a judge or jury?

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The Battle is Engaged..... Now What???

- Prior to a lawsuit, you are the general. After the lawsuit, the A/E becomes the prince in charge of his/her kingdom. You (or your insurance carrier) hires a lawyer as your general for battle.
- Do not hire a lawyer or consent to one without knowing whether he or she is a good general.

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What is the goal in litigation?

- “What is essential in war is victory, not prolonged operations.”
- “There is no instance of a nation benefitting from prolonged warfare.”

Sun Tzu

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“In the wise leader’s plans, considerations of advantage and disadvantage will be blended together. If our expectation of advantage be tempered this way, we may succeed in accomplishing the essential part of our schemes.” *Sun Tzu*

Understanding what a “victory” means will aid you in your business.

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What is the goal in litigation?

- DO NOT mistake “victory” with paying nothing, getting a defense verdict or punishing the plaintiff.
- Understand with your lawyer what your goal is with the lawsuit.
- But remember, your lawyer is YOUR general, not your boss.

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Your Lawyer

- “The general who advances without coveting fame and retreats without fearing disgrace, whose only thought is to protect his country and do good service for his sovereign, is the jewel of the kingdom.”

Sun Tzu

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Your Lawyer

- By and large, lawyers are arrogant, abrasive, annoying, lying, thieving, self-absorbed, demanding peacocks...And those are our good qualities.
- “To begin by bluster, but afterward to take fright at the enemy’s numbers, shows a supreme lack of intelligence.” *Sun Tzu*

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Your Lawyer

- Make sure you or your insurance carrier hire a lawyer who has experience defending design professionals.
- You go to a pediatrician for your child, a dermatologist for your skin or a rheumatologist for arthritis. Specialists serve a purpose.

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Your Lawyer

- Specialist or no, make sure your lawyer does not control you.
- Too many lawyers want to engage in scorched earth tactics, win at all costs.
- Do you want to engage in a death match and get the reputation which goes with that?

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Your Lawyer

- OKAY, you've found your lawyer and she knows how to defend A/Es.
- "Now the reason the enlightened prince and the wise general conquer the enemy whenever they move and their achievements surpass those of ordinary men is foreknowledge." *Sun Tzu*

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Your Lawyer

- All professionals have a well deserved sense of pride. Don't let it get in the way of a beneficial settlement.
- When your pride and a lawyers arrogance join, you have violated Sun Tzu's warning the prolonged war is almost a poor decision.

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The Lawsuit

- As a team, REALISTICALLY assess the strength and weaknesses of your case with your lawyer.
- Understand that most insurance policies have deductibles that must be met.
- Insurance policies have limits that almost always are declining limits. Fees and costs reduce limits available to pay a judgment or settlement.

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The Lawsuit

- “The true object of war is peace.”
- “He who wishes to fight must first count the cost. When you engage in actual fighting, if victory is long in coming, then men’s weapons will grow dull and their ardor will be dampened.” *Sun Tzu*

Settlements are often business decisions, not moral decisions. WHY??

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The Lawsuit

- Understand the hidden costs of a lawsuit:
 - Deductibles and raised insurance premiums;
 - Exposure of your business AND personal assets;
 - Devours your otherwise productive time;
 - Devours your energy and emotions;
 - Physical toll (loss of sleep, anxiety, stress, etc.);
 - Damages business relationships; and
 - Potential loss of professional reputation.

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The Lawsuit: Experts

- To prove a claim against any professional requires a plaintiff to have an expert to establish a breach of the professional standard of care.
- In almost all cases, you will need to hire an expert to defend you.

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The Lawsuit: Experts

- “Subtle and insubstantial, the expert leaves no trace; divinely mysterious, he is inaudible. Thus he is master of his enemy’s fate.” *Sun Tzu*

If you thought lawyers were arrogant S.O.B.s, wait until you meet your expert.

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The Experts

- Participate in the choice of your expert.
- Most lawyers who specialize in the representation of A/Es know experts, but a quality lawyer should ask for your input.
- Judges and juries can see through a hired gun.

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The Experts

- The point of a quality expert is to help you and your general (lawyer) realistically assess the lawsuit—not to simply be your blind advocate.

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Your Deposition

- An under oath examination of what you know and don't know.
- You are a "goalie." Your deposition is to prevent the other side from scoring points, not to try to score points for your side.

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Your Deposition

- Can be very intimidating.
- Is always stressful.
- Memorization is not key. "I don't know" and "I don't remember" are perfectly suitable answers.

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Your Deposition

- "He who is prudent and lies in wait for an enemy who is not, will be victorious." *Sun Tzu*

Prudence dictates that you NEVER volunteer harmful information. Compel the other lawyer to do his or her own work by asking probing questions.

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Your Documents and Files

- Paper and electronic communications are key to lawsuits against design professionals.
- Cases turn on scraps of paper, notes and memos.

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Your Documents and Files

- Recall the prior admonition: Follow up verbal exchanges with a letter or e-mail.
- “This is to confirm our telephone discussion concerning the changes to the project. You asked for A & B. We agreed to B & C, but not A. You agreed to do perform X, Y, & Z. If this does not meet with your understanding of our discussion, please let me know immediately.”

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Your Documents and Files

- Write letters, reports and memos as if you might need them for litigation.....chances are you will. The documents will be trial exhibits.
- Agree to be responsible for note taking as that way you control the narrative.

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Your Documents and Files

- Keep your files intact for at least 10 years.
- You never know when lawsuit will pop up.
- Missing documents within files are always hard to explain away.

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The Trial (aka The Final Battle)

- The point of this webinar is not to address the trial itself.
- I will conclude the presentation with some words of wisdom from Sun Tzu in the event you get to trial.

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The Trial

- “Thus it is that in war the victorious strategist only seeks battle after the victory has been won, whereas he who is destined to defeat first fights and afterwards looks for victory.”
Sun Tzu

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The Trial

- In sum, if you have been sued you have already lost. If you have spent months or years in litigation and are now in trial, you have lost many times over.
- “To subdue the enemy without fighting is the epitome of success.” *Sun Tzu*

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Final Thoughts: A/E Mistakes that Lead to War

- From the insurance company: PROJECTS
- “A/E takes a project outside his/her main area of expertise; A/E takes project outside his/her geographic area; A/E signs on to project that has had several A/Es terminated or changes in contractors; A/E loses track of critical path schedule.”
- **IS THIS YOU?!!**

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Final Thoughts: A/E Mistakes that Lead to War

- From the insurance company: PROJECT TEAM.
- “A/E doesn’t know project team or project team’s capabilities; A/E doesn’t know contractor’s history of litigation or of issuing change orders; Coordination issues arise or changes made and A/E not in the loop.”
- **How about this one. IS this you?????**

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Final Thoughts: A/E Mistakes that Lead to War

- From the insurance company: FINANCIAL
- “A/E doesn’t follow up when owner stops paying. A/E doesn’t learn that contractor is not paying subs; Failure to determine if owner has funds to pay for project before project commences; Value engineering work done without full explanation to owner.”
- **This one? IS THIS YOU???**

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The Art of War

- Avoid the mistakes that lead to war.
- Leading causes of litigation are NOT design errors, but contractual issues, documentation problems, communications issues and job control problems.
- The Art of War is to avoid war.

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QUESTIONS AND ANSWERS



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