



# Drewry Simmons Vornehm, LLP

A T T O R N E Y S

**ICI/INDOT STATEWIDE JOINT  
COOPERATIVE COMMITTEE  
ICI SIDE MEETING**

**Communication and Record Keeping  
Best Practices in Preparation for  
Change Orders and Claims**

Joseph M. Leone

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# Joseph M. Leone

## About me . . .

- BS Civil Engineering, Purdue University
- Project Engineer/Project Manager – Geupel DeMars, Inc.
- JD, Robert H. McKinney School of Law – Indianapolis
- Member AGC of America, ICI, AGC of Indiana
- Past Chair - Construction and Surety Law Section, Indiana Bar Association
- ConsensusDocs Content Advisory Council
- Current Chair - Contract Documents Forum, AGC of America



# Agenda

- **Project Documentation Overview**
- **Contractual Notice Provisions**
- **Changed Conditions**
- **Scheduling and Delay Claims**
- **False Claims Act**



# Project Documentation

- Purpose of project documentation
  - Inform someone of what happened
  - Substantiate and prove changes and claims
  - Prove defenses to claims
- Documentation preserves records and facts that are necessary to support a claim position.

# Good Project Documentation

- Good project documentation is:
  - Accurate
  - Objective
  - Complete
  - Uniform
  - Consistent
  - Timely
- Credible

# What Should You Document?

- Everything. . . or as much as you reasonably can
  - Do not try to determine what is important and what is not important.
  - Things that may not seem to be important today, may be very important down the road in terms of trying to prove a claim or defense.
- Try to document any potential dispute or claim that may be made on a project
  - Be overly broad
  - Experience helps

# How to Document

- Document facts not opinions
- Don't modify existing project field notes
  - If you need to correct something make supplemental notes
- Photos and videos
  - Provide context as much as possible
- Exclude extraneous documents and communications



# Types of Documents



- **Construction Phase**

- Meeting notes
- Daily reports
- Cost reports
- Communications
- Progress photos
- Communications
- Change order logs
- Claim notices
- Labor records
- Material records
- Equipment records
- Schedule updates
- RFIs

# How Documents are Used in Litigation

- Discovery
- Evidence
  - Foundations
  - Recollection
  - Impeachment



# Notice and Claim Requirements

## Contractual Claim Notice Requirements

- Enforced very strictly by Indiana courts
  - See *Starks Mech v. New Albany-Floyd County Consol. Sch. Corp*, 854 N.E.2d 936 (Ind.Ct.App. 2006).
  - Design errors in mechanical plans and specs
  - Starks submitted RFI's identifying various defects
  - School instructed Starks to correct errors, Starks engaged engineer, and implemented changes
  - At end of the project, Starks submits pay app for \$1.3M in extra work



# Notice and Claim Requirements

## Contractual Claim Notice Requirements

- Changed conditions - INDOT standard specs – 105.16
  - Notice before work is begun or costs incurred
  - Must include date of discovery and how discovered, detailed description of nature and circumstances, estimated effect on cost and time
  - If no notice and Engineer doesn't have opportunity to remedy the condition then waived
  - Notice of claim within 15 days of Engineer's determination or waived



# Notice and Claim Requirements

## Contractual Claim Notice Requirements

- Delays – notice based on 105.16
  - Weekly statement – one week

# Changed Conditions Claims

- INDOT 104.02 - Condition which causes the work to substantially differ from the contract
  - Differing Site Conditions
  - Suspensions ordered or delays by Engineer
  - Significant changes in the character of the work
    - ✦ Alterations of quantities
    - ✦ Major item of work (125% - 75%)

# Changed Conditions Claims

- Changed Conditions Documentation Requirements
  - Notice
  - Engineer responds within 2 business days
  - Notice of Claim within 15 days is disagree with Engineer's determination

# Changed Conditions Claims

- If impact is not immediately known
  - Keep daily records of labor, material, equipment costs
  - Keep daily records of affected work
  - Weekly meeting with Engineer to exchange records
  - Notify Engineer within 3 business days of disagreements with Engineer's records
  - Failure to comply with any waives right to challenge Engineer's records



# Changed Conditions Claims

- Must submit Claim within 30 days
- Claim includes:
  - Detailed factual statement
  - Date changed condition occurred or was discovered
  - Copy of original notice
  - Daily records
  - Name and function of each person with knowledge
  - Contract provisions implicated
  - Actions taken to mitigate
  - Communications
  - Basis of costs or time claimed
  - Notarized affidavit



# Changed Conditions Claims

- Claims for Inefficiencies
  - Must use measured mile analysis
  - Engineer can agree to other method
    - ✦ Earned Value Analysis
    - ✦ Published measures
  - May not use total cost
  - No right to home office overhead costs
  - Use current schedule for out of sequence work

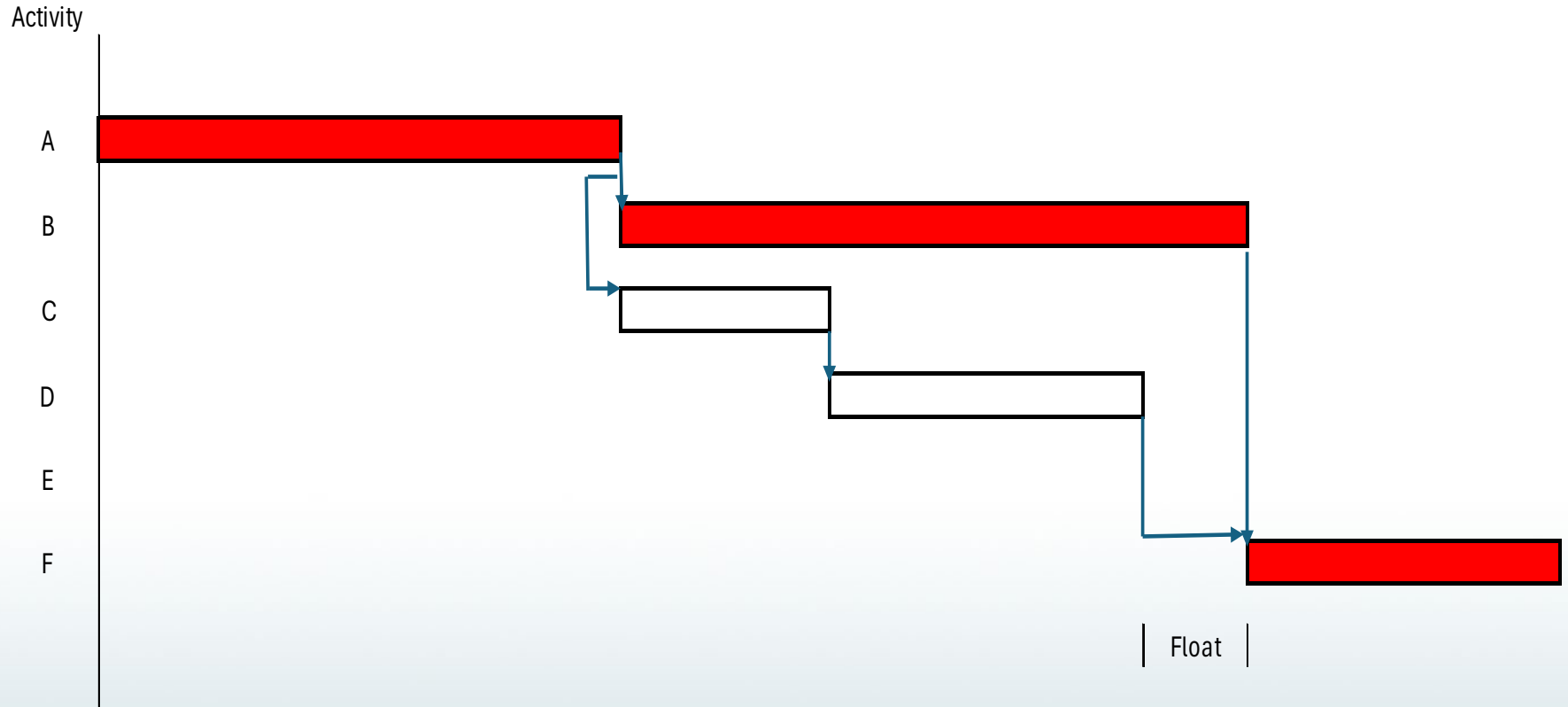
# Delay/Interference Claims

- CPM schedule with logical constraints
- Updates every 30 days
- All activities to be performed by Contractor and Subs
- Activities to be performed by INDOT, agencies, utilities
- Time for submittals, submittal review, material procurement
- Milestones and completion dates
- Weekly statements

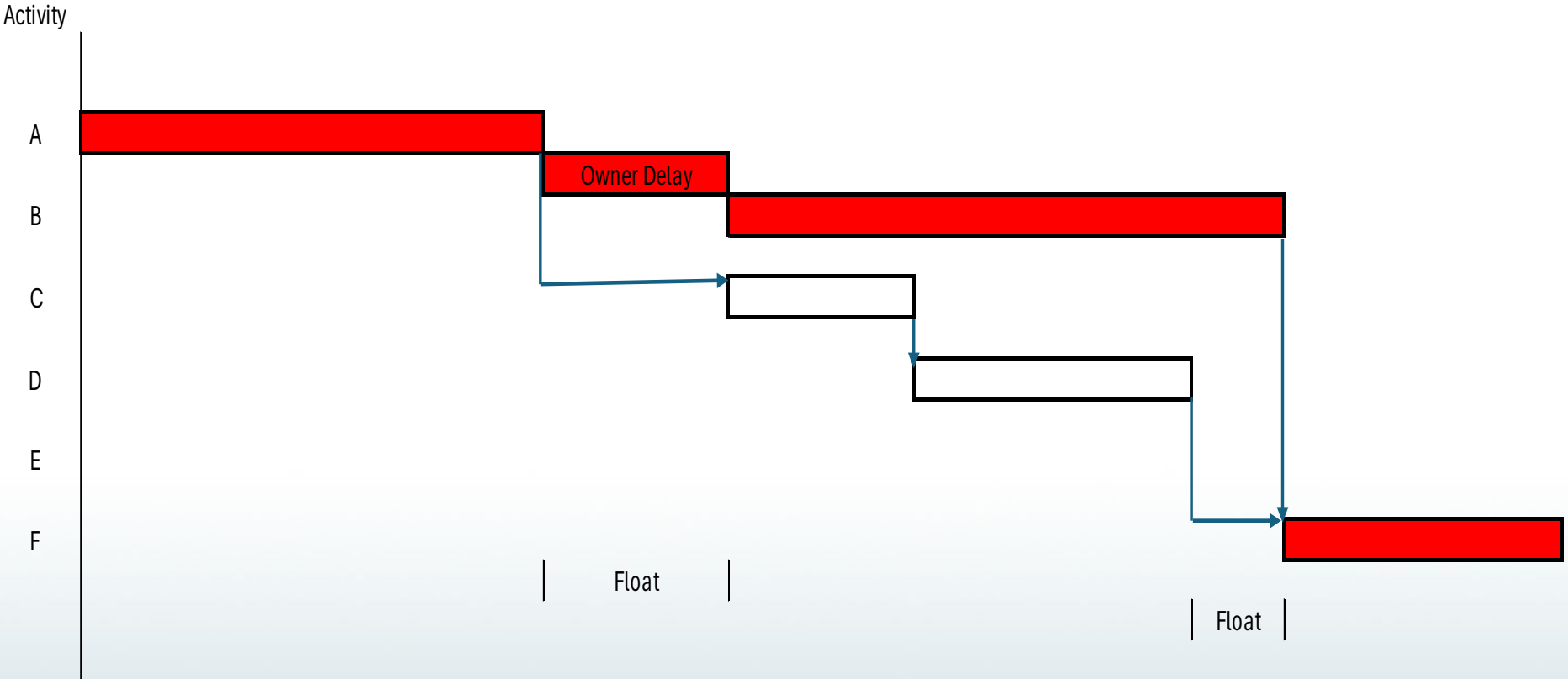
# Delay/Interference Claims

- Types of delays
  - Excusable non-compensable
    - ✦ No fault
  - Excusable compensable
    - ✦ Fault based
  - Non-excusable
    - ✦ Contractor fault
  - Concurrent – separate delays to critical path at the same time
    - ✦ Excusable non-compensable/excusable compensable – time no money
    - ✦ Excusable/non-excusable – no time, no money

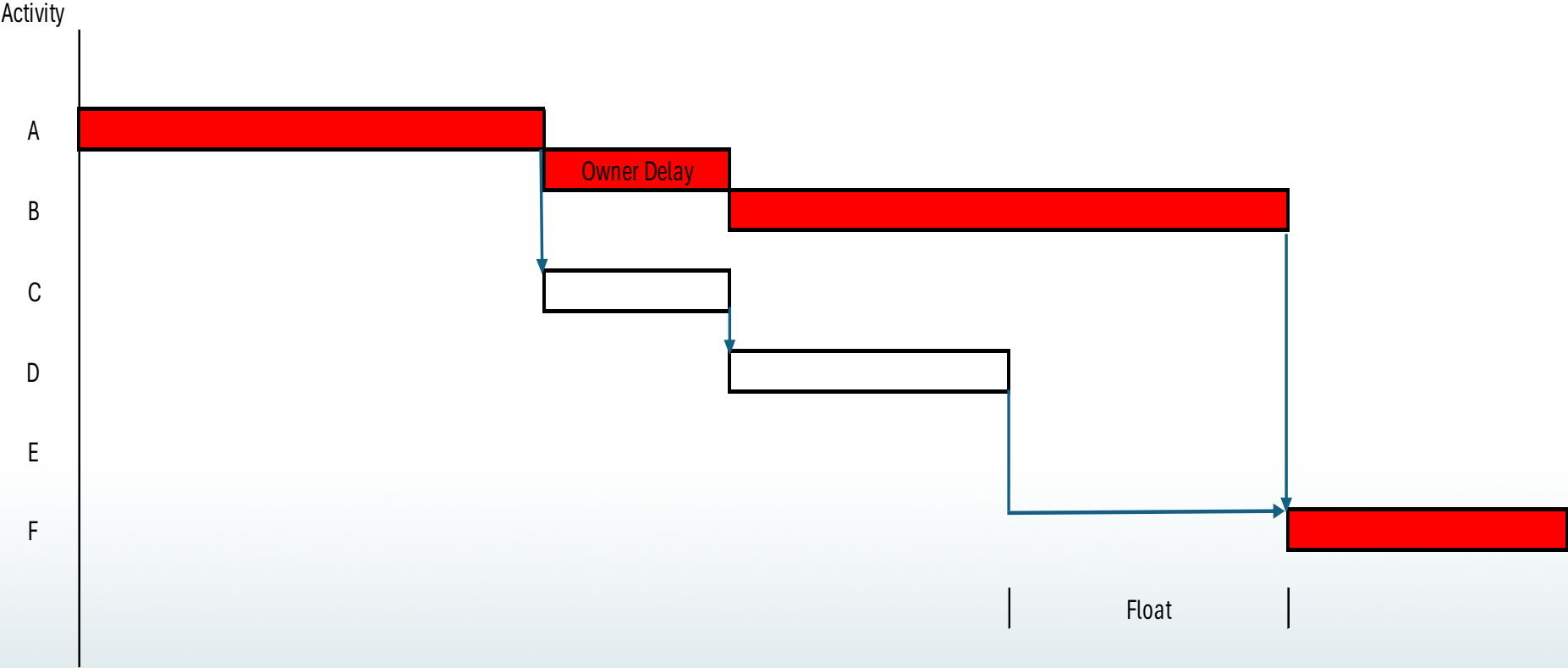
# Delay/Interference Claims



# Delay/Interference Claims



# Delay/Interference Claims



# Indiana False Claims Act

- Ind. Code 5-11-5.5
  - Knowingly or intentionally presents a false claim to the State for payment or approval
  - Uses a false record or statement to obtain payment or approval
  - Liable to the State for a civil penalty of at least \$5,000 and up to 3x the amount of damages sustained by the State plus the costs of a civil action brought to recover damages





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