PRO-DEMNITY
INSURANCE COMPANY

VIA EMAIL
Jennifer.Smart@Ontario.ca

CRR Working Group
c/o Jennifer Smart
Ministry of the Attorney General

June 16, 2025

Dear Civil Rules Review Working Group,

Re: Pro-Demnity Response re: Civil Rules Review Phase 2 Consultation Report

The Civil Rules Review Phase 2 Consultation Report (the "**Phase 2 Report**") prepared by the Civil Rules Review Working Group (the "**Working Group**") advises with humility that "[w}e are not so bold as to believe that we have all the answers" and invites Responses including comments and suggestions by June 16, 2025.[1] Please consider this letter as the response of Pro-Demnity Insurance Company ("**Pro-Demnity**")

About Pro-Demnity

Pro-Demnity is the mandatory professional liability insurer for architects licensed to practice in Ontario. We are architects' trusted professional ally and authority on risk. Amongst lawyers, we are sometimes colloquially referred to as the LawPro for Architects.

Our origins trace back to 1987, when the Ontario Architects Association (the "OAA"), the self-regulating authority for Architects, established an "Indemnity Plan" to ensure all architectural practices could obtain professional liability coverage made mandatory under the *Architects Act*.[2]

In 2003, the Indemnity Plan was replaced by Pro-Demnity Insurance Company, a wholly owned subsidiary of the OAA which is regulated by the Financial Services Regulatory Authority of Ontario (FSRA) and is overseen by a Board of Directors that operates at arm's length from the OAA.

Today, Pro-Demnity insures approximately 1,585 architectural practice holders, and as a result, upwards of 6,000 architects are insureds under their architectural firm's policy with us.

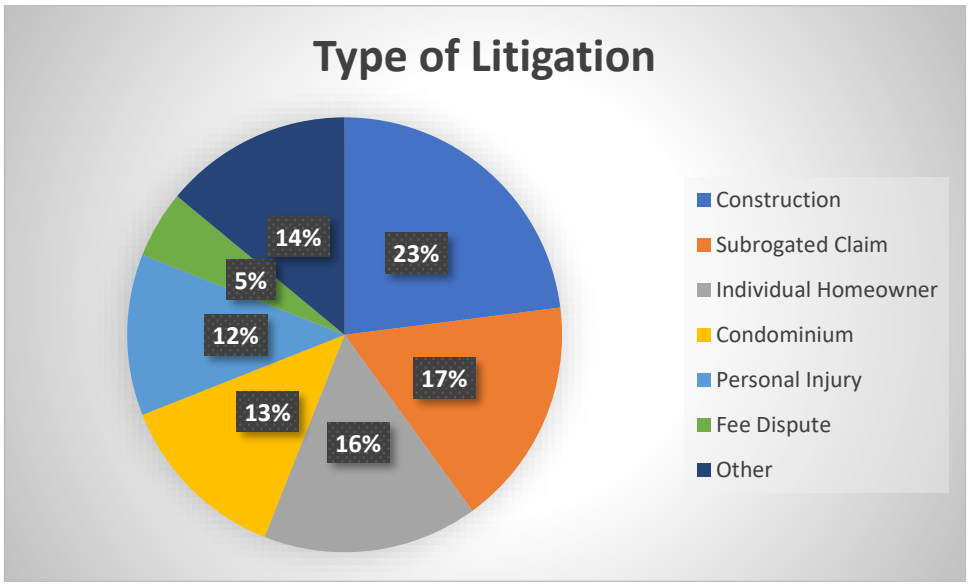
[1] Phase 2 Report, page 7.
[2] *Architects Act*, R.S.O. 1990, c. A.26. The insurance requirement is set out at section 40 of the *Act*. The requirement for all architects to carry professional liability insurance with mandatory minimum coverage was first introduced in the mid-1980s.

Our unique perspective on the *Rules* as the mandatory insurer for architects

Pro-Demnity is involved in every litigated case involving architects in Ontario, giving us a global perspective on the nature of lawsuits facing an entire profession. As there is an obligation under our policies for architects to notify Pro-Demnity of potential claims, we are also made aware of, and often participate in, many situations where disputes resolve prior to litigation.

In the last four years, there have been an average of 189 claims reported by architects each year, resulting in 85 new litigated cases per year, and an average portfolio of 422 ongoing litigated disputes. In 2024, our in-house legal department presently handled 45% of all our litigated cases, with our four external panel firms handling most of the rest.

The types of litigation involving architects is diverse, and Pro-Demnity's litigation lawyers interact with very different subsets of the Ontario bar. Statistics kept by our in-house litigation department show that the cases they handle presently break down as follows:



Given this diversity of claims, we see how the *Rules* play out differently across various contexts.

One consistent feature across all these types of disputes is that litigation involving construction projects is often heavily multi-party. There are three primary groups of parties involved in these cases: (1) project owners/developers, (2) construction contractors, and (3) project consultants including design professionals. Each of these will usually look to include their subcontractors or subconsultants in the litigation. These disputes often grow more complex with the involvement of municipalities, inspection agencies, Tarion, and product suppliers as other frequent parties to these disputes.

Other design professionals play a similar role

Other design professionals, including engineers, landscape architects, interior designers, urban planners, face similar forms of litigation to architects, but do not have a regulatory requirement to obtain insurance coverage with a specific insurer.

Without a mandatory insurer, there is no unified voice representing those who defend other design professionals. The Working Group ought to consider that Pro-Demnity's concerns raised in this letter are largely applicable to them.

Author of this response

The primary author of this response is Philip Ghosh, Managing Counsel, In-House Litigation. He leads Pro-Demnity's in-house team of 4 litigators and three support staff, while retaining a personal litigation case load. It has been prepared in consultation with senior management, and he is duly authorised to submit this on behalf of the company.

The Phase 2 Report gets some big things right

The diagnosis

First and foremost, the Working Group's diagnosis that our civil justice system is in crisis is correct, as is its finding that "Absent impactful reforms, our civil justice system risks becoming irrelevant."[3]

At the outset of litigation, we meet with architects who usually feel they have done nothing wrong. When our lawyers explain to them that it is a permitted for parties to be sued whether or not they are liable and for liability to be resolved by the court, they can accept it. But when we then follow by explaining that most civil cases in Ontario will take more than five years to reach trial, they are bewildered. As the Phase II Report notes, the costs and delays of our present system give rise to frustration and cynicism.[4]

Furthermore, while nearly ninety-nine per cent of our cases resolve or settle absent trial, Pro-Demnity agrees with the Working Group that:

> A settlement driven primarily by the need to stop the drain of resources is not rooted in justice. Rather it is an implicit acknowledgment that our justice system is, in many ways, incapable of resolving substantive disputes in a fair and meaningful way.[5]

Given that the civil justice system faces such large, deep-rooted problems, we agree with the Working Group's conclusion that "Reform is not just long overdue—it demands sweeping, comprehensive changes to the way we litigate civil claims in this province."[6]

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[3] Phase 2 Report, page 2.
[4] Phase 2 Report, page 3.
[5] Phase 2 Report, page 3.
[6] Phase 2 Report, page 4.

Reliance Standard

The Phase 2 Report correctly identifies the Complete Discovery Model as a factor that adds complexity, delay and substantial cost to proceedings and that "Proportionality and pragmatism dictate that we move away from a process model that promotes the maximalist approach associated with complete discovery."[7]

Examinations for discovery can be expensive, but also serve useful purposes, and our thoughts on them are addressed later in this Response. However, what is undeniably expensive with little benefit is the overproduction of documents.

The files which Pro-Demnity handles in-house are significantly less expensive than those handled by external counsel. In 2024, the 45% of cases handled in-house accounted for only 17% of Pro-Demnity's litigation expense. The single greatest consideration in which files must be referred to external counsel is not the complexity of the case, liability, or even number of parties, but the anticipated volume of documents.

With complicated construction projects, there can be tens of thousands of documents. However, in cases with a narrowly defined issue, there may be no more than a couple dozen that are material, even though thousands could be deemed relevant.

In heavily multi-party disputes, if each party produces hundreds or thousands of documents where two dozen would suffice, the time to sort through and analyze these productions can require magnitudes more time than are proportionate to the scale and nature of a dispute.

Moving to a reliance standard of documentary production will reduce expense, provided that adequate mechanisms are in place to help discover adverse interest productions.

One Year Scheduling Conferences

It is Pro-Demnity's experience that active judicial management is helpful in nearly every case. The proposal to hold One Year Scheduling Conferences is likely to help keep litigation on track, reduce the ability for plaintiffs to file "placeholder" actions they do not intend to actively pursue, or for defendants to cause undue delay, and address a range of issues which may have arisen that would impact the litigation schedule. By so doing, these conferences may in fact decrease the need for subsequent directions conferences and motions and save judicial resources.

Reforming Motions Practice

Not all motions are created equal; some are important and necessary to safeguard substantive rights of litigants, others are necessary but merely procedural, and yet others are tactical. We agree with the working group that "Treating all motions equally does a disservice to the parties and the Court".[8]

[7] Phase 2 Report, page 28.
[8] Phase 2 Report, page 49.

Pro-Demnity is supportive of the proposed Directions Conferences. Case conferences and chambers appointments presently serve a valuable purpose, but their availability and the materials which can be submitted in advance of them differs across the province. Standardizing these practices as Directions Conferences and permitting Judges to make a wide range of orders at them, as proposed by the Working Group, will enable the necessary but procedural motions to be determined in a less costly manner while minimizing their delay.

Standardizing the materials for use at a Directions Conference to a Notice of Relief and Directions Conference Submissions (limited to 5 pages) will be an improvement over the current patchwork of practice directions.[9]

For formal motions, the elimination of a Notice of Motion that is duplicative of factums, and simplified "One Document" approach to evidence will reduce the unnecessary volume of materials for use on motions and result in time and cost savings.[10]

Province-Wide Mediation

While cases regularly resolve at any stage of a dispute, it is Pro-Demnity's experience that the most frequent forum for resolution is mediation. Pro-Demnity litigates disputes across the province and supports the expansion of mandatory mediation to every jurisdiction, rather than their present limitation to Toronto, Ottawa and Windsor.

In our experience, many of the cases which do not settle at mediation settle during the judicial settlement conference phase of a Pre-Trial. As such, we would prefer if this aspect of Pre-Trials were retained rather than eliminated, as proposed by the Phase 2 Report. However, we do understand that trade-offs are required to free up judicial resources and are pleased that the Report does permit the Court discretion to order judicial settlement conferences in appropriate cases.[11]

Areas of Concern to Pro-Demnity and Proposed Solutions

Pro-Demnity's primary concerns with the proposals outlined in the Phase II Report include: preserving the value of examinations for discovery, whether in their current form or a reformed version; the risks associated with the presumptive retention of joint liability experts; the burdens imposed by the up-front evidence model on both the architectural profession and Pro-Demnity; any potential changes to the limitation period; and ensuring that non-liable parties in complex, multi-party litigation are not unduly burdened by the costs of the up-front evidence model.

We recognize the value of following the approach suggested by the Working Group, that "identifying problems with the proposals is most helpful if paired with proposed solutions" and below attempt to do just that.[12]

[9] Phase 2 Report, page 52.
[10] Phase 2 Report, pages 53 – 54.
[11] Phase 2 Report, pages 59 – 61.
[12] Phase 2 Report, page 7.

Examinations for Discovery & Discovery of Adverse Interest Documents

While there is a non-marginal cost to attending examinations for discovery, particularly in heavily multi-party disputes where there are many deponents, the costs are not as significant as the expense of an overproduction of documents.

In fact, much of the expense of preparing for discovery is the review of documents, which should be mitigated by the move away from the relevance standard of complete discovery to production of reliance and adverse documents only.

Regardless of the expense, there are significant benefits to examinations for discovery as well. They permit parties to assess not only credibility, but for many cases, even more importantly, the bearing, persuasiveness and likeability of key witnesses. They enable parties to determine the documents in the care and control of the opposite party which are required to prove one's own version of the case and ensure that their anticipated trial narrative is plausible.

What is extraneous and could be eliminated from examinations for discovery is the pursuit of admissions. If the use of discovery transcripts at trial were curtailed, that alone might reduce the length of examinations for discovery.

Where discoveries undoubtedly cause delay, however, is in securing dates where counsel and witnesses are all available. These can be many months or even more than a year away. Often even just the minutia of scheduling itself (i.e. emails between offices back and forth about dates) can take months.

Pro-Demnity suggests that the Working Group should consider ways to preserve what is good about examinations for discovery, while eliminating what causes delay and expense.

Proposed Solution: A truncated oral examination could achieve many of the goals of examinations for discovery without the drawbacks.

For instance, this could take the form of a limited cross-examination against the parties' Affidavits of Documents and pleadings. Video recordings of examinations, which now take place in large part virtually, could replace the need for transcripts, provided that the deponent's affirmation to tell the truth is made on video.

The delay caused by scheduling could be mitigated by having examination dates set during the One Year Scheduling Conference (which could be moved to take place earlier than a year since this proposal would remove the need for and time associated with written interrogatories). Counsel would be required to know their clients' availability at the time they attend such conferences.

The right to bring any motions arising from examinations could be eliminated or heavily curtailed.

Expert Witnesses

With respect to expert witnesses, the Phase 2 Report proposes measures to reduce the number of experts to be produced at trial. While this is a commendable objective, Pro-Demnity is concerned with the actual effect of the reforms as proposed.

For instance, while the presumption that certain litigation experts be retained jointly makes sense for certain types of experts, Pro-Demnity strongly disagrees that this presumption ought to apply to issues of liability analysis and professional judgment, such as standards of care and engineering analysis experts.[13]

The main liability issue in most disputes involving architects is whether they met their standard of care, being whether their architectural services were delivered to the standard expected of a reasonably competent architect performing services on a project of a similar nature in accordance with the standards of the profession in place at the time of the project.

Different experts may have different views on whether an architect met this standard of care, and the trial will centre around whether the Court accepts the views of one or the other expert. If only a single joint expert were presented to the Court on this issue, the entire question of liability would be delegated to that sole expert, who would in essence be the *de facto* trier of fact.

Other issues arise from the presumptive joint retainer of a standard of care expert who would be the single most important witness at a trial. Opposing parties may not be able to agree on the choice of expert, and where the stakes are so high, this could lead to a proliferation of motions on the matter. It would also be difficult to resolve situations where opposing sides propose retaining experts who charge vastly different sums for their analysis.

Pro-Demnity's other concern with the Phase 2 Report's proposal on experts is the requirement for hot-tubbing of opposing litigation experts.[14] While hot-tubbing is appropriate in some circumstances, requiring it in all cases will very greatly increase the cost of retaining experts. This burden will fall most heavily against non-liable defendants who will not be able to recover such costs in most settlements, or indeed at any trial victory that results in only partial indemnity costs. The expense of expert hot-tubbing alone, given that experts charge significantly more for their work than do defence counsel in Pro-Demnity's areas of litigation, could significantly exceed all the expense savings to parties that the balance of the Working Group's proposals might afford.

A final concern is that the timing proposed by the up-front evidence model will require more cases to be trial ready prior to the most common settlement opportunities arising such as mediation. This may result in experts needing to be retained in a far greater number of cases and increasing the overall cost of defending cases.

Proposed Solution: Pro-Demnity agrees with the Working Group that it makes sense for joint experts to be presumptively required for issues which "are standardized, involve mathematical calculations,

[13] Phase 2 Report, page 70.
[14] Phase 2 Report, page 72.

or are otherwise amenable to a joint litigation expert". However, this does not include standard of care or engineering experts, which should be removed from the list of presumptive joint retained experts.

Expert hot-tubbing should be discussed between the parties and the Court, either at the One-Year Scheduling Conference or the Trial Management Conference, but not required in all cases.

Burden on Architects of Affidavit Evidence in Up-Front Evidence Model

The requirement in the up-front evidence model for parties to produce sworn witness statements at the close of pleadings[15] will place a significant burden on the architectural profession with respect to all construction-related cases in which they are not themselves a party.

Architects are only sued in a fraction of construction cases; many proceed as owner-contractor, or contractor-subcontractor disputes. However, in these other forms of dispute, including the vast number of lien claims, architects are necessary trial witnesses. Presently architects only become involved in the small number of such cases that have not resolved before the eve of trial; in the up-front evidence model, they will be asked to spend significant time, for which they may not get paid, assisting counsel to prepare witness statements in many more cases.

Further, architects have an obligation to report any potential claim to Pro-Demnity,[16] and in many cases, it would be prudent for them to report the instances where they have been asked to give a witness statement, even if they are not sued. If the limitation to bring a claim for contribution and indemnity has not yet expired, Pro-Demnity will likely need to, as a precaution, retain counsel to review any witness statement the architect is asked to swear or affirm. This will be at significant expense to Pro-Demnity, which would have no choice but to pass those costs along to the profession through higher premiums.

Proposed Solution: The up-front evidence model could function without requiring witness statements from all trial witnesses. If cross-examinations on affidavits and pleadings were permitted (as suggested by Pro-Demnity, above), then eliminating witness statements, or only requiring them from party witnesses, could be sufficient for the functioning of the model and mitigate the cost witness statements would otherwise impose on non-parties.

Service of Originating Process

Pro-Demnity is concerned that the service of Statements of Claim via email rather than personal service may result in architects missing, or misunderstanding the importance and nature, of pleadings served upon them.

Further, there is a risk of architects' lawyers, who will now be a target for service, of accepting service of a Statement of Claim where there are coverage issues or that are in excess of policy limits.

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[15] Phase 2 Report, page 29.

[16] This forms part of the standard wording of our insurance policies. We would be willing to share our standard policy terms with the Working Group should that be of assistance.

Proposed Solution: The rules pertaining to service should require standard eye-catching wording for the subject line of service emails (ex: SERVICE OF CLAIM UPON YOU), and that language advising those served of their obligation to confirm receipt, defend the claim, and consider retaining counsel be included in the body of the email, and not only the attached pdf of the issued claim.

In fact, mandating specific wording for the subject line of all service emails, including service of court documents upon counsel, could be a helpful change to today's practice.

Additional Time Required for Statements of Defence

One of the goals of the reforms proposed by the Working Group is to make civil litigation proceed quicker. This will best be served by having the presumptive timelines set out by the rules to be reasonable ones. Otherwise, we will be back in the present situation, where requesting waivers of defence becomes a standard and required practice imbedded in the litigation culture.

Plaintiffs have as much time as they need, be it months or even up to two years, to prepare to issue a statement of claim, provided they do so prior to the expiry of the limitation period. The requirement for defendants and third or subsequent parties to deliver a defence within 45 days of service is unreasonable and will be unachievable in practice.[17]

Clients are not always diligent in reporting claims immediately. Once reported, it can take time to retain defence counsel, who then have to perform conflict checks. Once this is complete and counsel assigned, it can take a few weeks just to obtain documents from clients and hold an initial meeting with them. By the time counsel are in a position to even begin drafting, 45 days or more may have elapsed. Where third party claims are to be brought, further investigation is required, as is time for insurers (who are often involved in defence) to consider options and provide instructions.

Meanwhile, plaintiffs, who will now be able to serve originating processes via email, will have just as much time – 45 days – to send a single email as defendants would have from the date of first notice, through investigation and much of the work involved in preparing their entire case.

Proposed Solution: More time is required for defendants to deliver their pleadings. However, recognizing that those served should not be permitted to sit on a claim, a two-tiered defence deadline could make sense. A shorter period, perhaps 20 days, for defendants to serve a Notice of Intent to Defend which would appoint counsel of record, and then a longer period of 90 days from the date of the Notice to serve a Statement of Defence and issue any Third Party Claims.

Limitation Periods

The Phase 2 Report contains very little discussion of limitation periods, beyond the following comment:

> To promote the introduction of PLPs [Pre-Litigation Protocols] and to better accommodate their time requirements, the Working Group proposes to

[17] Phase 2 Report, page 40.

> recommend to the Attorney General that the basic limitation period for civil actions in Ontario be increased from two to three years.[18]

Pro-Demnity has recently had reason to conduct significant research with respect to limitations periods, which we would be willing to share with the Working Group, if of assistance.[19]

The imposition of a universal two-year limitation period in the *Limitations Act, 2002*[20] (the "***Act***") was the result of a long and carefully considered process of more than 30 years.[21] An important purpose of limitations reform was to replace the many limitation periods that preceded the change with one, in order to eliminate complexity, create certainty, and make the limitations regime more easily understood to laypeople.

In the 21 years since the *Act* came into force in 2004, knowledge of the two-year limitation period has become ingrained in Ontario, and well known even to non-lawyers. A change two a three-year limitation period could be seen by members of the public as arbitrary and cause confusion. Any change to the limitations regime should not take place without significant study into the potential consequences.

Proposed Solution: The working group's proposal already includes a satisfactory mechanism to address the impact of PLPs through the ability to place appropriate cases on the Inactive List.[22] Pro-Demnity recommends that the carefully considered two-year basic limitation period not be altered. Alternately, any change to the limitation period ought to be studied in a manner that considers its global impact beyond the interaction with PLPs.

Exacerbated Cost of Up-Front Evidence Model in Multi-Party Disputes

Many of Pro-Demnity's cases involve heavily multi-party disputes. We are concerned that the Working Group's proposal may work well for complex commercial litigation involving a few targeted parties, but could have undesired effects on other forms of litigation, and especially heavily multi-party litigation, where the up-front evidence model will require many non-liable parties to spend exponentially more to prepare cases for trial which presently get settled while in a state where much less could have been spent on the defence.

In the majority of cases involving Pro-Demnity, liability primarily rests with other parties, most frequently a contractor or engineer. However, it can be difficult to convince the opposing parties of this early in the life of the file.

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[18] Phase 2 Report, page 20.

[19] Research on the legislative history of limitations periods was conducted for submissions on how the ultimate limitation period behaves with respect to claims for contribution and indemnity; see *Lower William Properties v. Santaguida*, 2025 ONSC 1132. The appeal of *Santaguida* is set to be heard November 10, 2025.

[20] S.O. 2002, c. 24, Sched. B

[21] The efforts to reform Ontario's limitations regime began with the Report of the Ontario Law Reform Commission on Limitation of Actions, 1969, was further considered through successive reports to the Attorney General of the day in 1977 and 1991 and involved multiple failed efforts to introduce a bill in the 1980s and 1990s before the bill to enact the *Limitations Act, 2002* was debated and passed.

[22] Phase 2 Report, page 41.

The need to obtain and record all evidence early, including expert evidence not only on liability but damages, will increase the cost of defending these claims, even where it is abundantly clear that the architect is not liable. Such costs will increase not just for architects, but for all of the many parties implicated in multi-party construction disputes.

In fact, it is worth noting that the expense of an up-front evidence model is one of the reasons why Pro-Demnity prefers to avoid arbitration, which we find to be, contrary to the opinion of commercial litigators, frequently a more expensive and less desirable means of resolving disputes.[23]

Proposed Solution: The Working Group has recognized that summary judgment motions are not working as they were supposed to post-*Hyrniak*, but similarly that in appropriate cases an expedited hearing, now to take the form of the Paper Record+ process, has value.[24]

One of the problematic aspects of the prevailing summary judgment jurisprudence is the presumption against partial summary judgments that would resolve liability issues with respect to one party but not others. Pro-Demnity proposes that partial summary judgment through the Paper Record+ process ought to be explicitly endorsed and written into the *Rules* to enable non-liable parties to extricate themselves from multi-party litigation without incurring the expense of being dragged through trial.

A second solution worth considering is to introduce a Pre-Litigation Protocol for claims involving construction professionals, based on the process presently in place in 12 states in the United States.[25] It is common to require an "Affidavit of Merit" completed by an individual of the same profession, to be obtained before a claim can be commenced against certain professionals, including architects. Introducing this to Canada would reduce the number of unmeritorious claims against professionals and reduce the number of parties unnecessarily included in construction litigation.

Conclusion / Summary

Pro-Demnity commends the Working Group on the significant time, effort and thought which has gone into preparing the Phase 2 Report. It is evident that the Working Group recognized the scope of the problem and was genuine in its desire to improve civil justice in Ontario.

The stakes are high. For Pro-Demnity alone, getting reform wrong could mean a significant increase to the cost of defending claims, while getting reform right could mean the opposite. Given that Pro-Demnity spends significantly more on legal and claims expense than it does on indemnity, any change to defence costs will directly impact the premiums charged to architects.

We believe that the solutions we have proposed in response to the concerns raised would be of benefit to all system participants, and not just Pro-Demnity.

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[23] https://prodemnity.com/mandatory-arbitration-jeopardizes-your-coverage-with-the-stroke-of-a-pen/
[24] Phase 2 Report, page 46.
[25] An "Affidavit of Merit" or "Certificate of Merit" by an architect or engineer is a requirement to commence a claim against these professionals in Pennsylvania, Oregon, New Jersey, Nevada, Minnesota, Maryland, Georgia, Colorado, California, Arizona, South Carolina, and Texas.

This includes our recommendations to:

- Provide adequate time for defendants to respond to claims (20 days to go on record, followed by 90 days to defend)
- Remove standard of care experts from the list of those to be presumptively jointly retained
- Explicitly permit partial summary judgments to be heard through the Paper Record+ process
- Require an Affidavit of Merit, as is common in the United States, to be completed by an architect as a PLP pre-requisite to commencing a professional liability claim against an architect (and similarly by an engineer for claims against engineers)
- Replace examinations for discovery with cross-examination of affidavits of documents and pleadings and mitigate the delay inherent to scheduling examinations by setting them at the One-Year Scheduling Conference
- Reduce the use of witness statements to party witnesses and other voluntarily given witness statements

As we have noted in this Response, the Working Group has gotten a lot right. The Civil Justice System is not functioning, and Pro-Demnity agrees with the Working Group that "Bold reforms are required. The stakes are high. The system needs to be re-thought from the ground up."[26]

Of course, at Pro-Demnity, anything rethought merely from the ground up risks becoming a claim if it failed to address foundation and subsoil conditions. Joking aside, Pro-Demnity does believe it important for the reforms to be duly considered from every angle. We hope that our Response is of assistance with that effort.

We thank the Working Group for its consideration of these submissions and would welcome the opportunity to expand upon any of the points touched on in this response, or to participate in the Civil Rules Review project in any manner possible as it proceeds.

Yours truly,

Philip E. Ghosh
Managing Counsel, In-House Litigation
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Copy: Rosemarie Hurst, Senior Vice President, Legal & Claims, Pro-Demnity Insurance Company
Bruce Palmer, President & CEO, Pro-Demnity Insurance Company

[26] Phase 2 Report, page 5.