Trying Construction Cases

By Mark McAlpine

Nobody likes a trial in a case involving a construction claim—not the judge, not the jury, and especially not the attorneys faced with the nearly impossible task of communicating the inscrutable to the disinterested. This is because they are inherently boring events involving hours of complex, arcane, highly technical evidence presented by generally dry and colorless witnesses. They typically include a mountain of documents but few obvious smoking guns. The professional experts will likely cancel each other out, and the jury may well get lost during opening arguments. Of course, this is not unique to complex commercial cases, but construction cases present their own peculiar challenges.

It goes without saying that in trying a construction case, a well-thought-out trial plan is critical. Like most complex cases, it must be reduced to two or three key points. Identifying these themes early in discovery is critical to ensuring efficient trial preparation. They will be articulated in the opening, emphasized during the testimony, and, if all goes well, trumpeted in closings. But you will be howling in the wind if the judge or jury gets lost along the way. There are several ways to manage this issue.

Unfortunately, most construction cases involve highly specialized issues and purely economic losses that must be proven through technical and formulaic analyses which are difficult to explain to finders of fact. These types of cases frequently arise when changes that occurred during a construction project caused one of the parties to spend more than expected when they agreed to a lump-sum price for the work. These are typically contract-based cases in which the performing party experienced an unexpected event or series of events, which may entitle the damaged party to recover losses. These cases require the jury to be able to grasp certain basic concepts and be shown how to apply those concepts to the facts of the case. For example, teaching a jury the concept of critical path scheduling, the importance of float in a construction schedule, or the need for linear construction efficiency is daunting at best. Moreover, the idea of cross-examining an opposing expert on such technical topics while remaining on message and keeping the attention of the judge or jury can keep even the experienced construction attorney up late at night. The key to managing this kind of case, therefore, is a complete mastery of the underlying subject matter and a keen awareness of the need to educate your most important audience.

As with all cases, success at trial starts with jury selection. While the law is still evolving, a strong argument can be made for using social media in the selection process and during trial.[1] In some cases, focus groups and jury pool questionnaires will be needed in the jury selection process and during trial. While not unique to construction cases, the education level of the jurors, coupled with their basic understanding of the thematic issue of the case, will be a critical building block in assessing the need to educate the jury. The ultimate objective is to harness the expectations of the jurors, who will want to relate what they hear to their own experiences. Although jury selection is crucial, the reality is that you rarely get the jurors you want. Tying trial themes to the everyday experiences of the jury is therefore important to establishing the key elements of the case. Using the core principle of trial practice, primacy and recency often require an example from everyday life. For instance, preparing a turkey dinner is like a construction project in that everything has to happen in a certain sequence for it to turn out right. Jurors will be receptive if a central theme for the trial is presented using these types of similes in the opening and referencing them again in the closing.

Perhaps even more important than jury selection is choosing the messengers to tell the story. Picking the right lead witness who can articulate the whole story is paramount. Depending on the jury pool, it is often best to have the lowest-level participant be the key witness. Executives and experts may be the most authoritative witnesses, but field workers often make the best key witnesses to communicate to a jury. The best witness tells it like it is, and jurors know that. Find that witness and the case will go well.

Regardless of which form of evidence is presented, it is critical to ground the case in the facts. This requires an attorney to know the case in detail, know that he or she is absolutely right about the facts, and be prepared to prove it. There is nothing more impressive to jurors than conviction; they sense it and make decisions based on it. If the jury can't understand the case, the case can't be won. Keep it simple and based on facts that can be established by the evidence. If jurors feel their decision rests on facts, they will share the attorney's conviction. In this context, it is also important not to overlook the effect of stipulated facts and admissions. In most jurisdictions, such stipulations can be read to the jury. Careful pretrial practice can eliminate the need for time-consuming examinations concerning evidentiary foundations and allow for effective witness examinations. The jury will appreciate any time saved at trial.

Since these types of cases frequently depend on key factual findings, optics in the presentation of evidence is critical. It is possible to succeed in proving a key fact and

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lose the perception war. Deep down, juries want fairness. So among all the proofs, attention should always be given to the fairness factor. Ultimately, the case must be built around the expectations of the jurors, and trial optics must be considered from their point of view. In this context, effective demonstrative exhibits are critical. Of course, care should be given to admissibility; after all, a well-crafted exhibit will be one of the first things the jury will want to see during deliberations. Without a stipulation of the parties, however, the jury is not likely to see the exhibit in the jury room. Tying an exhibit to admissible evidence will benefit an argument in support of letting the jury have the exhibit during deliberations. Arranging to allow the jurors to keep notes will also help in closing; the jurors can be instructed to write down key exhibits arranged in chronological order in a closing demonstrative exhibit in case the court disallows the jury's receipt of the exhibit.

As always, a picture is worth a lot—maybe even an entire case. Construction claim cases often consist of events occurring over an extended period. Unlike defect and personal injury cases, which often involve a discreet event (something falls or breaks), many changed-event cases include the consequences of a series of events over time. For instance, a delayed work item means future work is delayed and more expensive to perform. Showing the jury what was supposed to happen versus what actually happened is often the key to success. In this context, nothing succeeds like a before-and-after illustration followed by showing the resulting damages. Animations are great teaching devices and often captivate the jury and even the judge, as do time-lapse videos showing the progress of construction. Time-lapse videos are often the norm on larger construction projects and can be edited to further assist in the educational process.

Many larger projects also employ BIM (Building Information Modeling) technology, which involves 3D computer models that show all the project's design elements. The software allows the jury or judge to be "flown" through the model to examine points of interest in the trial. While it is often necessary to produce graphics from data amassed in discovery, using actual project videos and models is very compelling. Not to overemphasize the importance of demonstrative exhibits, a multimedia approach to trial is often required. In the Internet age, the jury expects to see pictures—preferably moving, animated pictures. Because the trial details may be boring, these images can be critical in forming juror perceptions. Most major construction projects use 3D models to coordinate the work, which should be used at trial. Jurors like the break in the testimony, and these 3D models scratch the jurors' "want-to-solve-it" itch. Just make sure the models reflect reality and that there is a proper foundation in place to get them admitted.[2]

Because of the abstruse nature of the concepts involved in construction cases, experts must have both the ability to act as effective assistants in the preparation of the case and testify with integrity. As ethical advocates, attorneys advance those expert opinions they believe to be true and discredit those which are not. This must happen long before trial, and experts help do this. By the time of trial, attorneys must tighten their positions to those the experts support, even at the expense of less meritorious parts of the case. Hopefully, what is left at trial are only the most defensible positions, most of which can be agreed on by the other side's expert. There is nothing more satisfying at trial than having the opposing expert agree with your central theme. This, of course, requires complete mastery of the expert testimony and wise expert selection.

Procedurally, it is worth noting that a number of trial courts have used recent Supreme Court guidelines during trial in which the jury is invited to ask questions after each witness is fully presented.[3] The questions are written and collected by the judge, and the lawyers are involved in formulating a response to the questions, either by court statement or further examination of the witness. While both sides benefit, each can gauge the effectiveness of the educational process and react by bringing forth proofs that correct misperceptions. By advocating for such procedural approaches, one can at least judge how the proofs are affecting the jury, which should assist in both trial planning and, hopefully, ongoing settlement discussions. In addition, while motion in limine practice is important, it is often unsatisfying. Appellate considerations aside, making an offer of proof (MRE 103) on a lost argument can sometimes turn the trial court your way. Judges and juries change their minds during such exercises, so the opportunity should not be lost.

Ultimately, when addressing the jurors, it is crucial to tell the truth, if only because they will inevitably sniff out misstatements and respect your honesty. If the case is weak, it is wise to counsel the client to settle. Attorneys have an ethical obligation to tell their clients the truth; if their position is weak, they must be informed. On the other hand, if a client's position is strong, there is no justification to settle just to avoid a trial. If discovery was done properly, the opposing side should realize its vulnerability. It's also important to concede weak points in front of the jury and not overreach. Demanding too much given the proofs will turn off jurors. They want to do the right thing, and can be convinced to do so.

Trying construction cases can be fun and rewarding if an attorney is fully prepared. Being an effective teacher and communicator and using key documents and testimony to support core themes are the surest ways to success. ■

Mark McAlpine has nearly 35 years of experience as a construction litigation attorney. He has been instrumental in the review and drafting of various families of standard construction contract documents, such as those published by EJCDC, AIA, and ConcensusDoc. He has been a member of the adjunct law faculty at Wayne State University Law School, is widely published in the construction law field, and serves as a frequent lecturer to construction industry organizations.

ENDNOTES

1. See ABA Comm on Ethics and Prof Responsibility, Formal Op 466 (2014).
2. See generally *Lopez v Gen Motors Corp*, 224 Mich App 618; 569 NW2d 861 (1997).
3. See generally Press Release, Michigan Supreme Court Office of Public Information, *National Jury Innovation Award Honors Michigan Supreme Court, Trial Court Judges for Michigan Jury Reform Project* (September 12, 2012) <http://courts.mi.gov/News-Events/press_releases/Documents/Munsterman Award2012.pdf> (accessed May 18, 2017).