2019 CONSTRUCTION CONFERENCE
September 25 – 27, 2019
San Diego, CA

Trial and Arbitration Strategies for Winning Your Construction Case

1. Reptile Theory on Its Head

a. Overview:

There is rarely a case that doesn't demand defense counsel prepare for the “Reptile” tactic – a favorite with the Plaintiff Bar. The four key phases of litigation where the "Reptile" is most commonly employed are in depositions, voir dire, opening statements and during defendant’s trial testimony itself.

While defense counsel is the primary defense to these tactics, adjusters need to recognize them when employed and be part of the defense team to combat these strategies

b. Deposition:

The key is ***how*** you prepare your client. It will take numerous meetings and mock depositions. In the construction context, there is a tremendous amount of documentation. Furthermore, in contrast to most tort cases, construction defect cases involve series of events – sometimes over the course of several years – as opposed to a single incident. Therefore, deposition preparation meetings can last several sessions and dozens of hours just to walk through the timeline and relevant materials. Throughout this time, it is important to frequently put your client on the spot and ask the tough questions you anticipate plaintiff’s counsel will ask, then to discuss with your client where she may have gone above and beyond the straightforward truthful response, and exposed herself to plaintiff’s counsel spinning the response to further his reptilian objective at trial. Defense counsel should not, of course, give witnesses a "scripted" answer to reptile questions, since you never know exactly how they'll be asked in deposition. On the other hand, defense counsel can certainly tell witnesses how **not** to answer a question.

One tactic plaintiff’s bar will use is to say the contractor, builder, etc. sacrificed safety for profit. 99.9% of the time, your client will tell you safety is the #1 priority. However, it is not uncommon for your client to forget this when he is on the spot at deposition.

Attorneys can do the same thing. Usually, your defense focuses on your client following the plans and specs, but it should not be assumed or forgotten that, in doing so, your client only followed said plans so long as it would not impose a dangerous condition. At the same time, it is important to highlight that

your client, whether it be a designer, general contractor, subcontractor or supplier, plays one of several roles in the project and they cannot ensure the other trades have acted adequately or safely.

c. **Voir Dire:**

Plaintiff's attorneys use "priming" during voir dire by establishing terms, language, and definitions from the get-go. Rather than fight fire with fire, defense attorneys instead should ask questions in order to identify "plaintiff" jurors. By the end of jury selection, a plaintiff's counsel has "primed" a jury for his or her opening statement. Asking key questions to identify pro-plaintiff jurors is critically important during voir dire. Not taking the time to "strip and re-prime" jurors with defense terms, language, and definitions can give a plaintiff a sizable advantage entering opening statements.

d. **Opening Statements:**

Perhaps the most apparent area of a defense attorney's weakness is opening statement preparation and execution. Plaintiff's attorneys keen on the "reptile" strategy understand that the better story wins, not necessarily the better facts or evidence. Defense attorneys too often don't utilize this. The result is often a simple, understandable plaintiff's story that immediately connects with a jury against a complex, confusing defense explanation that focuses on science/engineering rather than jury friendly themes.

To combat this (and take an offensive approach), the defense attorney should (in this instance) fight fire with fire. Identify simple, identifiable themes within your defense theories and focus your opening statement on succinctly and powerfully delivering that message. For example, if your case involves a condominium conversion project and the purchase agreements (and possibly even the CC&Rs themselves) include an "as-is" or similar assumption-of-risk provision, showcase this fact to the jury during opening statements. Instill in the jurors' minds that the plaintiffs (or HOA as the case may be) willingly bargained for a property that is not "new" or even free of defect in exchange for a reduced price (i.e. "used car" is a common and influential example).

e. **Client-Witness Trial Testimony:**

Regardless of how much time and effort was spent preparing your client/witnesses for deposition and trial, it is impossible to anticipate every question that will be asked. This "gotcha" moment, when a defense witness gets boxed in by a plaintiff's counsel and begins to respond emotionally creates a mess that is difficult to clean up during a defense counsel's rehabilitation efforts. The irony here is that the witness goes into survival mode. Many argue jurors award damages to protect themselves and the community from the dangers posed by the defendant. Others argue jurors award damages to punish a defendant that breaks the rules, not to protect themselves or the community.

To combat this, it is important to paint your client as the "hired hand" or, even better, the "working man." Without losing focus on safety and quality being #1 (of course!), paint a picture of your client as someone who had a job to do and did it correctly. She should not be responsible for whatever events / defects manifest later on.

2. <u>Theme Theme Theme!</u>

a. Theme Begins at Opening Statements:

Opening is a time to grab the jury attention so the last thing you want to do is to start by telling them who you are. There is time for that later. Right away people will begin to tune out. The other thing you do not want to do is to start by telling either the arbitrator or a jury about how the process works. Boring. You want to start by grabbing them from the very first sentence. Sometimes I use movie quotes or other famous quotes to start. I also make liberal use the rule of three. Think about it.

People recall things in threes:

- "Life, liberty, and the pursuit of happiness"
- "Government of the people, by the people, for the people"
- "Friends, Romans, Countrymen"
- "Blood, sweat, and tears"
- "Location, location, location"
- "Father, Son, and Holy Spirit"
- "Faith, Hope, and Charity"
- "Mind, body, spirit"

So for example, you can start a single family home construction case with something like this: "Mr. Smith poured his blood, sweat, and tears into building the perfect home for a homeowner that was never going be happy, and yet he tried again, again and again." Or in a commercial case: "This case is about greed, money, and power….it's what makes the world go around, but you have the chance to make a difference and decide who wins, greed or truth, money or facts, power or honesty…"

b. Get a Theme and Stick to It:

Pick something you can relate to and can anchor your case to. For example, I am beginning a binding arbitration soon, in perhaps most boring case ever: a London syndicate suing their TPA for mishandling claims. In that case, the TPA royally screwed up. I represent the TPA. My defense: causation. Do I start out and say, "this case is about causation'? No. Boring. I say, "this case is about an insurance company, that so long as they were raking in the dough worried little about how their claims were handled, but the minute they have to do their job, they looked to pass the buck and make it someone else's fault…."

c. **Closing Arguments:**

This is your chance to sum it all us. Use the jury instructions to tell the jury how to use the instructions and how they apply to your case. But don't make the mistake in either opening or closing of using and reading from a power point. That is a killer. You are better off forgetting things than putting a bunch of words on the screen. Talk to your audience. If you believe in your case, then they will too. You don't need to be the best or smartest or most experienced lawyer in the room to win. You just need to be the most honest, sincere and prepared. So, along those lines, be yourself.

I won my last construction trial for a general contractor that had lost his license over the construction work on the Plaintiffs home. Not a great case to get in the door. The jury heard all about the CSLB case. But I used that to spin the case into a case of a vindictive, angry, hateful homeowner. I believed in my case. I had a hard time keeping it together during closing because I thought the homeowners were truly evil. I got choked up. In closing, I told the jury that when I first got the case in the door, that I read the complaint and looked at the documents and said to myself, OMG I don't want this case. The GC called me up yelling at me. I said, what the hell, you are the guy who lost your license, why are you yelling at me? Then I got to know him, and his family and I thought OMG this is a travesty of justice by a

homeowner who used money, power, and political clout to ruin this guy. It was evil. Afterwards when the verdict came in, my client cried, and jury cried with him. I was not the best lawyer in the room. I was not the most experienced lawyer in the room or the smartest. But I was sincere, honest, and prepared.

3. **<u>Who Is Your Audience?</u>**

a. Jury

When addressing the jury, approach them from the perspective that you have a single and sincere desire to be helpful to the court. Indeed, you are sincerely trying to help a group of people reach an important decision. Undoubtedly, you believe in the righteousness of your client's position, and your role is to help the jurors understand how you came to that belief and guide them into reaching the same conclusion on their own.

In order to do so, know the legal conclusions you want the jury to reach, then establish the factual conclusions they must first reach in order to reach the legal conclusions. While presenting your case, remember to navigate between the big picture, and the granular details, so the jury specifically understands why you are presenting them with a certain item of evidence, and how it fits into your theory.

Do not neglect the importance of making powerful and impactful Opening and Closing statements, as the laws of primacy and recency provide that what we hear first, and last, make the biggest impressions. Use your opening statement as road maps to tell the jury where you are going, what evidence you will produce, and how it all fits together. In turn, the closing argument should be used to highlight not only your own arguments, but also the evidence that your opponent failed to produce. Make a list of what the opponent promised during opening statements, so you can keep track of their omissions throughout trial.

Finally, remember that juries are more oftentimes more impassioned finders of fact than judges. Thus, emphasize the psychology and humanity behind your client's position rather than just the nuts and bolts of legal reasoning.

i. <u>Case Study: Do Jurors Understand "Bad Faith"?</u>

First Court recently completed jury research projects on a handful of bad faith cases and developed some insight on how jurors understand and interpret the concept of bad faith. Since this can be a tricky topic for regular people to understand, we will share a few insights on what we learned, and how to effectively communicate the important points to the laypeople in the jury box.

The question that we have found determines the outcome in a bad faith case: "What do these folks understand 'bad faith' actually means?"

The question was posed to jurors in venues around the country was: ***"What does it mean for an insurance company to act in a way that shows 'arbitrary, reckless, indifferent or intentional disregard for the interests of its insured?"***

Key themes for plaintiff-leaning jurors were selfishness, disregard, and hurting others.

Nearly half of the jurors (43%) summed up their understanding of "bad faith" with the concept of selfishness, i.e. that the claim handler cared only, or too much, about what was best for the insurance company. Another 37% understood "bad faith" to mean that the claim handler acted against the interests of the insured.

Mike Liffrig of First Court concludes, plaintiffs should avoid legalese when talking to a jury about bad faith. Instead, they should seek to boil down the jury instructions to the basic ideas of selfishness and hurting others. Conversely, defense counsel should keep the focus on how the law defines bad faith, and how each element of that definition must be met. This can be hard to convey, so consider visual aids that explain how each element is not met (see discussion of visual aids below).

In conclusion, for difficult-to-understand concepts such as bad faith, use simpler language and graphics to activate the key messaging for your side.

b. Judge/Mediator

The sworn duty of a judge is to apply the existing written, law, as enacted by the legislature, and developed by many centuries of common law. Thus, your primary goal in communicating with the judge is to convince them that both precedent and policy support your client's position. In order to do so, it is of the utmost importance to have a hands-on mechanical understanding of the facts and issues governing the case, so that you may organize and articulate them as best as possible from the perspective of your client.

While judicial decisions rest on precedent, policy, and logic, the best way to persuade judges that these factors weigh in your client's favor is through the telling of a convincing and effective story throughout the entire litigation process, not just during the opening and closing statements. You want them to view the underlying events from the viewpoint of your client.

Judges have an absolute duty to resist the temptation to substitute their own personal political and moral values for the applicable legal rules. However, judges are still human, and if you can convince them that as a factual matter, justice is on your side, the judge is more likely to approach precedent and policy from that perspective. For example, judges are provided with a certain measure of discretion, and he/she may exercise their discretion to interpret specific statutes narrowly to enforce the plain legislative language, or broadly to enforce the purpose behind the statute, depending upon the factual circumstances.

Finally, keep in mind that judges to not like to be reversed, and building a reputation for appealing decisions may make the difference in determining close questions of law.

c. Clients

Oftentimes, what clients want the most is stability and security. However, due to the volatile and unpredictable nature of litigation, your trajectory is going to be unavoidably uncertain. Even when a judgment is rendered, you are not yet completely out of the woods. Thus, the best service we can provide for them is to provide them with a reasonable estimate of the probabilities based on the law, and the facts as we understand them. Explain to them the situation, your familiarity with the opposition, and the pros and cons of the various legal options that can be pursued. Sometimes a client must be pushed and prodded before they render a decision. Once a client makes a determination, always root out the reasons why. Sometimes people make decisions based upon inaccurate factual or legal knowledge, and you want to make sure that your client's decision is well-founded. Remember, always operate with a high level of transparency, and integrity, so that your clients can always know exactly what you are doing, and why you are doing it.

d. Appellate Court

The best strategic choice to make for an appellate argument is preparation. You and your opponent will be considered as the experts on the facts, issues, and policies governing the case, and the justices will require your help in understanding these complexities. Thus, approach them with the mindset of being a teacher rather than an advocate. The oral argument will be more like a conversation between you and the justices, and like all good conversations, they cannot be charted in advance. New insights and arguments will undoubtedly arise throughout the course of the exchange, and you must possess the adaptability and versatility to quickly acquire and apply new knowledge to promote your client's positions within the facts and circumstances of the case.

Most importantly, trial attorneys must tailor their case to the appellate court from the very first Motion in Limine through post-judgement proceedings.

4. <u>Client Perspective:</u>

Perhaps the single most important aspect to client relations is "No Surprises!" Of course, trial always has been and will always be unpredictable. However, by considering all the possible contingencies (or as many as you can), discussing them with your client, and clearly laying out your plan of action should something unexpected transpire, you will not only be better prepared for trial generally, but also it will show your client you are prepared and ready for anything.

Of course, you will never be truly ready for anything, as there are an infinite number of things that can happen you could not possibly anticipate, be it something a witness says, ruling on a motion, an objection sustained, etc. Therefore, it is vital to carefully set expectations for your client. Your client should be prepared for the worst possible outcome, but it goes beyond simply keeping your client's

expectations low. The attorney should give their client a thorough breakdown of the strengths and weaknesses of their case, and a reasonable percentage of recovery or range of estimated liability. At each step in the process, inform your client what the stakes are, what your recommended approach is, why you believe it to be the most effective for the client and, importantly, the risks associated with the recommended action.

Do not forget: your estimated attorney's fees is a critical part of setting client expectations. Be sure to consider the costs of going to trial when setting expectations or discussing a settlement offer.

5. Jury selection

From a defense perspective, seated juries have changed for the worse. Current extreme positions in society render plaintiff's traditional voir dire questions more effective in that they skew toward emotional and moral decision making. Furthermore, now, jurors previously considered "non-entities" are now often influential. It is quite apparent jurors are increasingly of the belief that the function of juries is to send messages to corporations and large organizations to improve their behavior. Plaintiff's attorneys recognize this and take advantage by requesting longer trial settings, performing "mini-openings" and getting rid of high-income, educated individuals from the panel.

a. The Rise of Millennials:

Millennials are now the largest population subgroup (25%). Millennials are the most educated generation, but they lack life experience. They also have a more anti-corporate mentality than any previous generation, resulting from a more liberal upbringing (think: everyone gets a trophy). Furthermore, while millennials tend to be the least vocal in voir dire, they also tend to be the most activist in their beliefs. As a result, millennial jurors hold corporations to an unreasonable standard and probably more than any other generation desire to "send a message." Things seem to be growing more and more dire for the defense. However, there are tools defense attorneys can use to combat this, or even use millennials to their advantage. For example, millennials tend to be vocal advocates for the "little guy." Therefore, use the voir dire process to paint your client as a "working man" and maintain this *theme* throughout the trial.

6. Picture is worth 1000 words

a. Visual Aids:

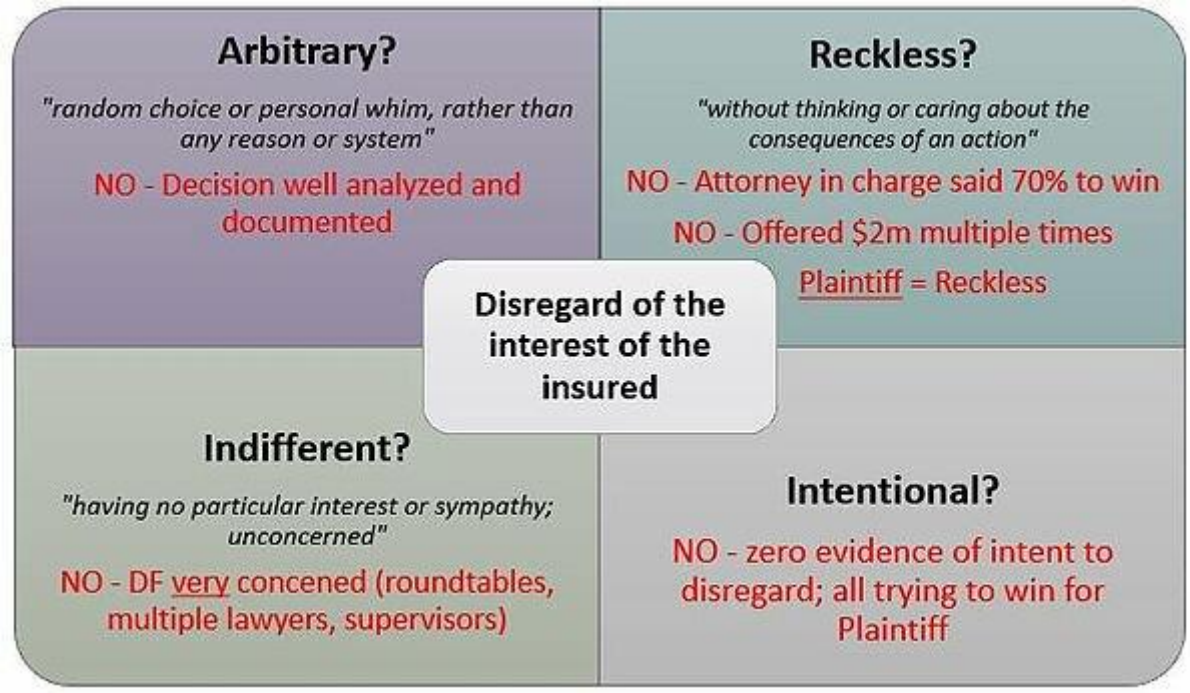
A trial attorney's primary task is persuasion, and the art of persuasion need not be limited to the spoken words of attorneys and witnesses. Jurors are much more likely to remember a visual aid that explains the significance of a particular evidence or testimony to them, than the words of attorneys and witnesses. Furthermore, they can add kinetic energy and color to highlight testimony and arguments that would otherwise be static and/or undifferentiated. Thus, images can serve as invaluable tools for demonstrating the concept of proof to a jury. Moreover, in addition to making an immediate visual impact, images can oftentimes be used with multiple witnesses, and left in the view of jurors for long periods of time, reinforcing their effect. Furthermore, images are versatile, and can be used to prove your case, as well as to disprove your opponent's case.

Keep it interesting by using a variety of aids to keep attention. The hardest part of a construction case is to keep it interesting and understandable. The key in these cases are visual aids. But mix it up. For

example: a construction case involving rebar. So boring but, to capture the fact finder's attention, built a model of the rebar installation color coated and the various pieces can be moved to show how it all fit together. We also used paper to write down big points. Finally, depending on how big the case is, you can use computer animations or video reconstructions as well. By switching up the types of aids, and the way you use them you can keep people engaged and involved. You can also demonstrate you are credible in various mediums.

b. **Case Study Revisited: Understanding Bad Faith**

Earlier we discussed the simplifying concepts for the jury, using bad faith as an example. Sticking to this theme, see the following example of visual aid:

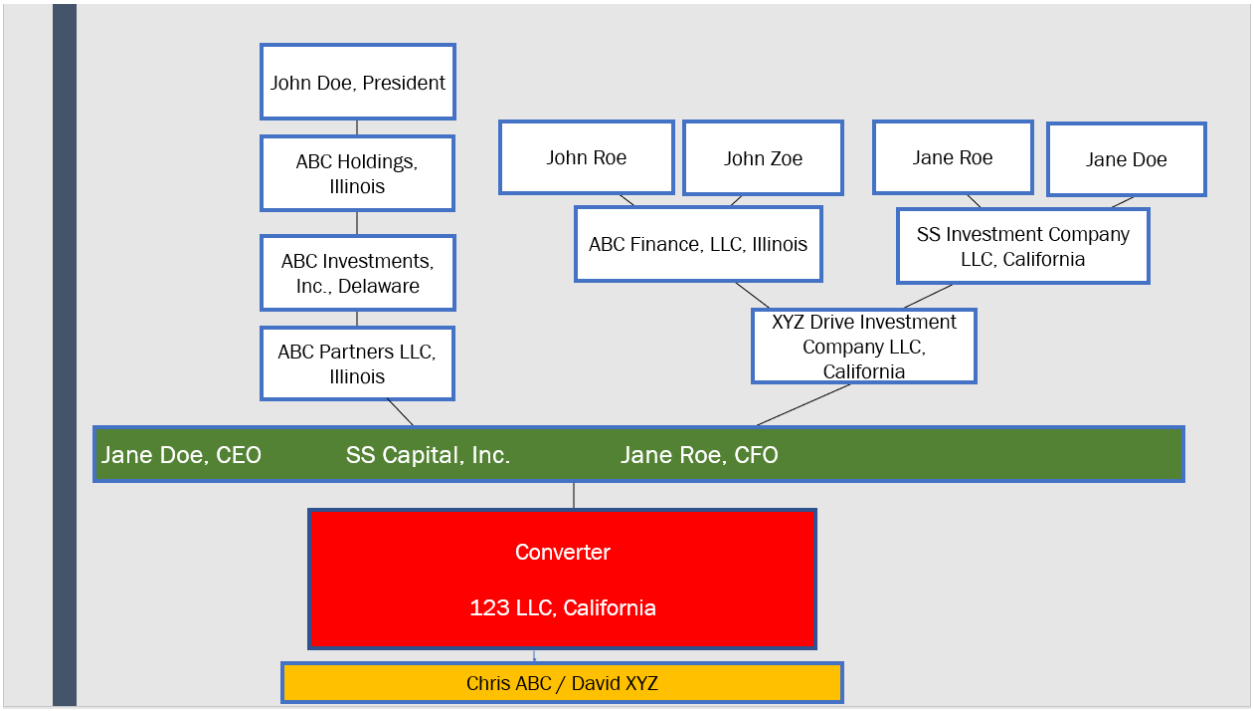


c. Real Case Example: 2019 Construction Defect Trial (San Diego, CA)

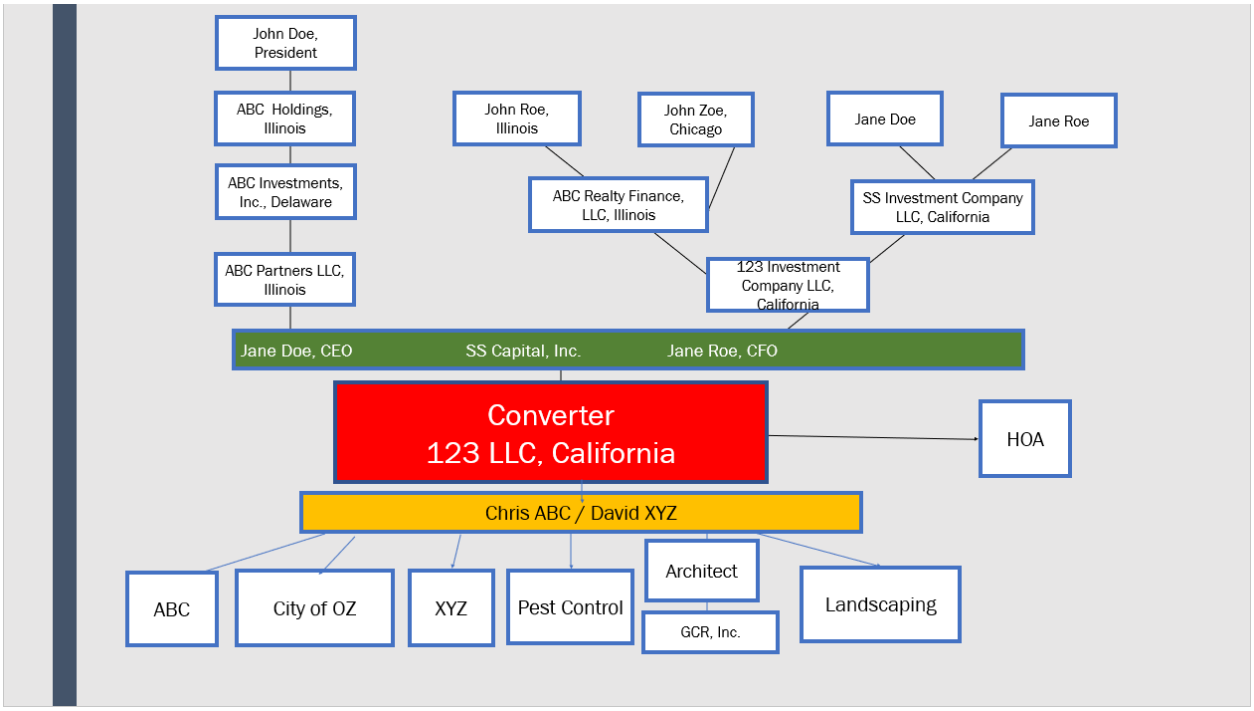
A construction defect case arising from a condominium conversion of 14 units in Imperial Beach, California. The general contractor, GCR, Inc. The Plaintiff was the Homeowners Association. The Converters named were 123 LLC and SS Capital, Inc. The Converters made all decisions of what to fix and what to leave in a 40 year old building, but the General (the only one with insurance and assets) was the target.

Throughout the trial Plaintiff's counsel painted the GC as the primary decision maker who the converters and later the HOA relied on at each stage in the conversion process. We wanted to make the GC a small player – the one who simply does the work as directed and has no more authority or responsibility. A simple working man who does his best.

During closing argument, we used the visual below to show the converters were not unsophisticated, but rather, a large and powerful conglomerate tracing its financing to Chicago investment entities.



On the next slide showed the jury a second flow chart, this time with all the interested parties. The purpose of this visual aid was to show the GC (that small box at the bottom right) was in fact a small player, with decisions regarding scope and quality of work being made by others either above them or unrelated to the GC.



In the end the jury returned a verdict of $1 million against the Converters and an absolute defense verdict in the GCs favor, finding no negligence on their part. When interviewing the jury, many stressed that these two visual aids were extremely influential in reaching the verdict they did.