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“Mediation: Behind Closed Doors”

**I. The Hypothetical Fact Pattern, Liability Defenses, Relevant Codes, and Damages**

**A. The Hypothetical Fact Pattern**

This is a wrongful death action brought by Barbara Jones for the death of her husband Greg Jones. The claim is against ABC Housing, and arises out of a fire at the property. Mr. and Mrs. Jones were tenants in the two story building, and lived on the second floor. A fire started in a first floor hallway. Mrs. Jones was not home, but Mr. Jones was. The fire department found Mr. Jones dead in the stairway leading from the second floor to the first floor. He died of smoke inhalation. Mrs. Jones claims that the building owner and landlord failed to have a sufficient path of egress from the building, which is a violation of building code. Mrs. Jones also alleges that the building stairwells should have incorporated fire doors that shielded the stairwell from the hallways, and that the failure to include such a door is a violation of the Fire Prevention Code. The Defendant claims that many second floor tenants simply used a fire escape that was not involved in fire, and easily escaped. However, they claim that Mr. Jones’ smoke alarm did not work because he did not maintain the batteries, and therefore did not try to escape until the fire had developed. Defendant also questions the damages.

Building History and Occupancy

The fire at issue occurred on February 28, 2009 in the City of Jefferson, Missouri. The records compiled by the Jefferson City Fire Department indicate that the fire department was alerted of the fire at 8:06 a.m. They arrived on the scene at 8:11 a.m., and the last unit left the scene at 1:27 p.m. The involved structure was a two-story building with a one-half basement.

The upper level is serviced by a corridor approximately 44 inches wide. The north end corridor is open to an unenclosed stairwell which opens to the lower level. The east end of the upper corridor leads to a fire escape, which is accessible through an interior stairwell approximately one-half level down. These stairs are enclosed at the top by a

wooden panel door with a self-closure. There is no fire-resistant protection from the floor below. The exterior fire escape is not protected from the elements and is not of fire-resistant construction.

The two front lower-level apartments are serviced by a corridor with one means of egress transgressing the open stairwell servicing the second level. In addition, these apartments have second means of egress directly to the outside. The rear apartment is not serviced by this corridor and has direct egress to the outside.

The single means of egress servicing the second floor was through an unrated, unprotected corridor.

The building was equipped with battery powered smoke alarms in each unit, but it did not have an automatic fire suppression system. It did have smoke alarms in the corridors. The unit smoke alarms were improperly installed 5 feet off the floor. It is believed that some, but not all, alarms activated, but that they were likely delayed due to their location. Mr. Jones' alarm did not activate due to expired batteries.

The building has a brick exterior, and the interior is drywall and plaster on wood framing. According to the Assessor's records and interviews with the building's owner, the building was built in 1927 and underwent major renovation in 1995. During the renovation, it was discovered that the owner removed the fire-rated doors separating the corridor from the stairwell.

### The Fire

The fire department's Investigation Unit began with an inspection of the building's exterior. Heat and smoke damage was noted above the window of the front stairway between the first and second floors. The stairway window between the first and second level was broken out, and there was smoke and soot damage above both of the rear stairway windows and the rear entrance.

The Fire Investigation Unit then moved to the interior of the building. The building's stairway to the second floor sustained extensive fire damage. There was heavy fire damage to the drywall all the way down to the steps, and the damage extended upward to the second floor. The damage to the second-floor common corridor was limited.

The Fire Investigation Unit noted a clean area near the stairwell on the first floor. The report indicated that this clean spot was where a victim's body came to rest.

The most concentrated area of damage was in the second-floor common corridor. There was extensive heat and smoke damage in this area resulting from a "flashover." The wood framing for all apartment doors located on the first floor were charred down to the floor. The portion of the "floating" or "Pergo-style" wood floor directly below this area was the most severely damaged area of flooring in the second floor corridor.

The Fire Investigation Unit noted the charred remains of a sofa, loveseat and office chair on the south side near the center of the second floor corridor. The fire damage to the wall that would have originally been protected by this furniture was less pronounced than that of the rest of the corridor. The previously mentioned ceiling and floor portions that sustained the most damage were directly adjacent to the furniture. The space between the furniture and the north corridor wall was less than three feet. Upon investigation of the furniture remains, it was concluded that all combustible materials of this furniture were consumed except for the parts of the bottom wood frames, which were heavily charred.

In the course of their examination of the scene, the Fire Investigation Unit made findings regarding the cause and origin of the fire. They ruled out the three florescent light fixtures mounted on the ceiling of the second floor corridor, due to their condition and position in relation to the fire damage. They were not able to identify any potential causes of the fire in the most heavily damaged portion of the corridor. Finally, an electrical junction box mounted on the wall of the second floor was ruled out as a potential cause because there was no electrical service running to the box at the time of the fire.

Ultimately, the Fire Investigation Unit identified the origin of the fire as the area underneath the northeast section of the couch along the central portion of the south wall of the common corridor. They identified the introduction of an open flame ignition source to the ordinary combustibles of the area of origin as the cause of the fire. The fire was deemed incendiary in nature.

It is unclear what ignition source caused the fire.

#### Furniture in the Corridor

The Fire Investigation Unit identified the furniture in the second floor corridor as the fire's area of origin. The following will provide a history of that furniture's presence in the building. Fire Investigators conducted a series of interviews with a number of tenants following the fire. It was stated that the sofa and loveseat had been in the corridor for three to four weeks. It was stated that they belonged to a second-floor tenant, but they had been unable to get them into the desired unit. The landlord had previously told the tenant that she needed to get the furniture out of the corridor, and he had knowledge the furniture was in the corridor.

Fire Investigators also interviewed the maintenance person, who stated that the furniture had been in the corridor for about two and a half or three weeks. He verified that the couch belonged to the tenant, and it was in the corridor because she could not get it into her apartment unit. The maintenance person reported that he had spoken to the tenant the week before the fire about moving the furniture out of the corridor, but he never heard back from her.

It was also reported by another tenant that the couch had been in the corridor for roughly three weeks prior to the fire. This tenant confirmed that he heard the landlord tell the tenant owner that she needed to remove the furniture from the corridor, but she was apparently waiting for someone to purchase it.

### Interviews

In addition to their examination of the scene, the Fire Investigation Unit conducted interviews with a number of first responders and tenants. One first responder stated there was heavy smoke and fire coming from the front and rear center windows of the building. He observed several people trying to raise a ladder to the front of the building, and he noticed a severely burned individual on the front lawn of the property.

The Battalion Chief stated that firefighters were provided access to the building through the front door by one of the building's occupants. They encountered heavy fire and smoke throughout the building and removed one unconscious victim that was found at the east end of the second-floor corridor. One victim had jumped out of an apartment window, and another ran down the building's rear stairway through extensive heat and fire.

One occupant of the north second-floor unit escaped through the window. At 8:03 a.m., he received a phone call from another tenant that a smoke detector was going off in the building. He opened the door and looked into the second-floor corridor and saw a small fire underneath a section of a couch sitting in the corridor. He closed his door to get a bucket of water. When he returned to the door he noticed that it was hot, and after slightly opening the door, he quickly closed it again due to high heat and heavy smoke in the corridor.

It is also fact that the hallway and stairwell smoke alarms did activate, but not the smoke alarm in Mr. Jones' apartment unit. While smoke alarms were provided, it appears the batteries were not functional. Mrs. Jones denies ever being told by the landlord that they (the tenants) needed to change the smoke alarm batteries. The owner maintains that they do advise the tenants of this obligation, and also provided written materials to the owner about the obligation, but have not actual record of such.

#### **B. What are the Liability Defenses?**

- 1. The tenants failed to maintain the smoke alarm batteries.**
- 2. The fire originated underneath a couch belonging to another tenant, and Defendant repeatedly told said tenant to remove the couch from the hallway.**

## **C. What are the relevant codes and were there any violations?**

### **1. Means of Egress**

Chapter 25.01 of the Revised Codes of the City dictates that the 2003 edition of the International Building Code is adopted as “The Building Code of the City. As such, the 2003 International Building Code (“Code”) is the authoritative text governing building rules and regulations in the City.

The Code dictates that dwellings with a required occupant capacity of 50 or less shall have a minimum corridor width of not less than thirty-six (36) inches. A “corridor” is defined as “[a]n enclosed exit access component that defines and provides a path of egress travel to an exit.” By this definition, the building’s common corridors leading to the north and south stairwells would certainly qualify as “corridors.” The Code also requires that obstructions not be placed in the required width of a means of egress. Therefore, for the corridor to meet the Code requirements, the couch that was set on fire must have allowed for at least thirty-six (36) inches of clearance for foot traffic.

Numerous photographs of the property following the fire include various images showing tape measures extended across the corridor. The photographs suggest the subject corridor is roughly five to six feet wide. That being the case, the couch could have been between two and three feet deep, and there could still have been a sufficient path of egress to comply with the Code’s requirements.

Other applicable and relevant Code provisions that would need to be complied with in the event of a new construction or remodel include:

- The means of egress could not be exposed to unprotected vertical openings;
- The interior stairways would be enclosed with 20-minute fire barriers;
- Exterior stairs would be reasonably protected against blockage by fire;
- Interior finish would be a minimum of Class A or B in the means of egress areas;
- Smoke detectors would be installed in accordance with NFPA 74;
- Fire exit drills would be required at sufficient frequencies to familiarize all occupants as to how to exit a building safely; and
- Apartments would be separated from a corridor by smoke-resistant walls and self-closing doors.

### **2. Fire Prevention Code**

The City Revised Code has adopted the 1999 BOCA National Fire Prevention Code (“Fire Code”) as its governing text for fire prevention and precaution. The Fire Code states the general rule that “[a]ll interior shafts shall be enclosed with approved assemblies, except as provided for in Table F-304.1.” Table F-304.1 makes various exceptions to this general rule, including “where connecting not more than three floor levels with not more than four dwelling units per floor and the structure is equipped throughout with an approved automatic sprinkler system.” The subject building fits this

description, except for the fact that it was not equipped with an automatic sprinkler system. Therefore, it appears that the property would be obliged to follow the general rule that all interior shafts be enclosed with approved assemblies. Based on the above, the Fire Code required doors to be installed at the end of the common corridors of both floors of the subject building. The building did not have such doors.

### **3. Smoke Detectors**

#### 25.52.040 Location requirements.

The owner of each existing dwelling or newly constructed or rehabilitated unit shall install at least one (1) smoke detector to protect each sleeping area. In an efficiency, the owner shall install the smoke detector in the room used for sleeping. In all other dwelling units, the owner shall install the smoke detectors outside the bedrooms, but in the immediate vicinity of the sleeping area. An owner subject to this chapter shall install each smoke detector on the ceiling at a minimum of four inches from the side wall to the near edge of the detector or on a wall located four to twelve inches from the ceiling to the top of the detector and within fifteen feet of all rooms used for sleeping purposes, with not less than one detector per level containing a habitable room and in the basement or cellar. The smoke detector shall not be installed in dead air space, such as where the ceiling meets the wall. Where one or more sleeping areas are located on a level above the cooking and living area, the smoke detector for such sleeping area(s) shall be placed at the top of the stairway. An owner shall also install not less than one smoke detector on the uppermost ceiling, not less than four inches from any wall, or on a wall, located four to twelve inches from the uppermost ceiling of all interior stairwells. For good cause shown, the Director of Public Safety or his designated department representatives have the authority to modify the location requirement of this chapter. (Ord. 59376 § 4, 1985.)

#### 25.52.050 Type of detector.

The owner shall install a smoke detector which is capable of sensing visible or invisible particles of combustion and emitting an audible signal and may be wired directly to the building power supply, or may be powered by a self-monitored battery. The smoke detector shall comply with all the specifications of the Underwriters Laboratories, Inc. Standard UL217 (Standard for Safety-Single and Multiple Station Smoke Detectors) 2nd Edition October 4, 1978 as revised May 19, 1983 or any recognized standard testing laboratory that certifies the detector meets the requirements of the National Fire Protection Association (NFPA) Standards 72E and 74. Smoke detectors shall bear the label of a nationally recognized standards testing laboratory that indicates that the smoke detectors have been tested and listed under the requirement of UL217 2nd Edition or NFPA 72E and 74. (Ord. 59376 § 5, 1985.)

#### 25.52.060 Owner responsibility to install, test and maintain.

It shall be the responsibility of the owner to supply and install all required detectors. The owner shall be responsible for testing and maintaining detectors in common stairwells. It shall be the responsibility of the tenant to provide and maintain functional batteries for each detector, to test and maintain detectors within dwelling units, and to notify the owner or authorized agent in writing of any deficiencies. The owner shall be responsible for providing each tenant with written information regarding detector testing and maintenance. (Ord. 59376 § 6, 1985.)

#### 25.52.070 Enforcement and inspection.

The Director of Public Safety or his designated department representatives shall have jurisdiction to inspect dwelling units for the installation of any smoke detector required to be installed under this or any other ordinance. Said inspections may be held between the hours of 9:00 a.m. and 5:00 p.m., Monday through Friday. (Ord. 59376 § 7, 1985.)

#### 25.52.080 Battery removal prohibited.

It shall be unlawful for any person to remove batteries or in any way make smoke detectors inoperable. (Ord. 59376 § 8, 1985.)

### **D. What are the Damages?**

#### **1. Economic Damages**

The damages are for the death of Plaintiff's husband. Plaintiff's husband was 45 years old at the time of death and unemployed. He previously worked as a union electrician, but it had been seven years since he had substantial income. However, when he was gainfully employed, he was earning approximately \$50,000 per year, along with union benefits. Plaintiff's economist opines that the economic loss is \$1,200,000, and uses the decedent's past income when the economy was strong, as the support for his opinions. Defendant disputes all claims for financial support and cites to decedent's lack of employment in the past seven years, and also claims that decedent has been arrested multiple times for drug use in the five years preceding his death, and claims that his lifestyle, not only the economy, are the reason for plaintiff's lack of income. Union records support the argument that while the economy is down, union electricians have received sporadic work over the past seven years.

#### **2. Damages for Pain and Suffering (pre-death)**

Also, Missouri law allows Plaintiff to recoup pain and suffering of the decedent. It is opined by the coroner's office that Mr. Jones died of smoke inhalation, and that he would have suffered pain and suffering.

### **3. Loss of Society, Consortium etc.**

Plaintiff is entitled to damages for loss of society, companionship, and consortium under Missouri law.

## **II. What Should Your Mediation Goals Be?**

### **A. Determine a Reasonable Settlement Range**

#### **1. Verdict range**

One goal for mediation is to determine a verdict range. In the present case, the economic damages are miniscule, despite what Plaintiff claims for economic damages since the husband was not employed and showed little sign that he would be gainfully employed. However, the damages for pain and suffering are significant since Mr. Jones does of smoke inhalation. Moreover, there will be damages for some loss of society, companionship, and consortium under Missouri law. The verdict range would be difficult to assess since the majority of the damage exposure is subjective. However, \$500,000 to \$1,500,000 is not an unreasonable verdict range in this venue, before comparative fault.

#### **2. Percentage of defense verdict**

This venue is pure comparative fault. Because of Defendant's code violations, and the emotional aspect of a death case, a defense verdict is unlikely. However, decedent's failure to keep the smoke alarm batteries in good order is a direct cause of his death. As such, decedent is likely to bear comparative fault.

#### **3. Percentage of comparative fault**

Decedent is likely to be assessed somewhere between 10% and 50% comparative fault for his own failure to keep the smoke alarms in good working order.

#### **4. Cost of defense**

Trial through jury verdict will be in the \$75,000 range.

#### **5. Other factors: insured's cooperation, publicity, etc...**



**B. Posturing for future settlement negotiations**

Sometimes mediation is a good place to posture for future settlement negotiations. If plaintiff comes to mediation with an unrealistic demand, a mediation may be a place to temper those demands, and make plaintiff realize that he or she will not be getting paid voluntarily the type of money he or she desires. The goal would be that the plaintiff reassess expectations, and that future settlement negotiations are more fruitful.

**III. How Should You Conduct a Successful Negotiation?**

**A. Determine who your mediator will be**

It is important to know who your mediator is. Background on a mediator will not only tell you whether he or she is conservative or liberal, but also how he or she handles mediations. Often a mediator begins with a hard hand, posturing about bad elements of the case, and telling you your offers are too low, and that you are not even in your own verdict range. But why be in your own verdict range if plaintiff is miles away from your own verdict range? Hopefully the mediator is in the other room being equally difficult with plaintiff's counsel and plaintiff. However, once the mediator believes he or she has received the authority you have, his or her stance often changes. This is when you can get a better idea of what the mediator actually thinks the case is worth.

**B. Decide whether or not you should give opening statements**

**1. Too much a divide or is Interaction with plaintiff is invaluable?**

Typically there is a choice to be made between opening statements or no opening statements. The decision that must be weighed is whether the opening will divide the parties, and actually backtrack the mediation. Opening statements can be valuable if the plaintiff's counsel is not accurately assessing the case to his own client, or explaining legal issues that might be relevant. In those cases, you will have a direct path to speak to the plaintiff and describe why the case has less value than their own lawyer tells them. On the other hand, an opening statement might set back the negotiations. Plaintiffs tend to believe their own lawyer, not you. So advising them they have a bad case, or their injury is not as bad as they think and is worth less, may actually wedge a divide in the negotiations right from the start.

**C. Inflated initial demands**

Inflated initial demands now seem commonplace. How do you respond to such a demand? Your choices are not to respond, and require plaintiff to bid against himself or herself. Often this can result in a conclusion to the mediation. You can start with an equally insulting offer, and advise the mediator that you have real money, not fake money, and if plaintiff wants the money, then they need to get into a verdict range. Often this leads to a move into the verdict range, if not after the first round, the second. There is also a five move approach. This would be organizing five moves at the first demand. You then make your five offers completely independent of plaintiff's moves. At the end of your five moves, you walk. Using this method, you are not dependent on plaintiff's outlandish demands, and are actually responding to the value of the case, not plaintiff's demand.

**D. Policy limits demands**

With policy limit demands could come additional evaluation since the insured is potentially exposed. Is there extra value on the case if the demand is within the policy limits and the case has limit exposure? Often the answer is yes. In this case, the exposure is in excess of the limit, and if a demand is made within the limit, and not settled, and a verdict is rendered in excess of the limit, you are likely facing a claim for bad faith. On the fact of this case, there must be extra consideration given for potential excess exposure.

**E. The tri-partite relationship and the insureds involvement**

It is critical that the insured be kept in the loop regarding all demands, and all responses to those demands. Moreover, it is critical the insured's input be sought regarding their respective positions on the demands. Here, the landlord should either be at the mediation, or kept in the loop regarding the excess exposure, and given an opportunity to state what his desire is relating to settlement.

**F. Determine who is steering the ship on the plaintiff's side**

Sometimes in mediation the actual settlement is being driven by someone other than the plaintiff. For example, if the mediation takes place four years after the spouse dies and the living spouse is now dating someone else by the time trial comes around, then that someone could be steering the negotiations. This poses a significant problem sometimes in death cases, and also in cases involving elderly people, where the children are actually driving the lawsuit. It is important for the mediator and you to recognize if this is occurring.

## **G. Bridging the gaps**

### **1. Brackets**

Bracketing is a method that can be used to bridge the gap during the mediation by establishing a zone of potential agreement – an upper and lower limit between which the parties are willing to negotiate. You can solicit a bracketed offer or counteroffer by suggesting that you will put “X” amount on the table if plaintiff will reduce his or her demand to “Y” amount. This technique keeps the mediation moving and tests the difference between your and the plaintiff’s bottom line. In this case, bracketing may be an option if the plaintiff’s counsel is unreasonable, and stays in a range well above the value of the case. However, often bracketing signals to the other side where your settlement range is. As such, one needs to be cautious when bracketing.

## **H. Structured moves**

Prior to the mediation, one could determine the moves/offers you are going to make. As mentioned previously in section C, if you know exactly what moves/offers you are going to make before going into the mediation, it gives you complete control of the situation so long as you walk after the end of your moves. Again, utilizing this structured moves mentality will enable you to respond to the value of the case and not the plaintiff’s outlandish demands.

## **I. Settlements – memorialization, costs, liens, confidentiality**

If a settlement is reached during the mediation, it is important to memorialize it in writing. The settlement agreement should release the insured from all liability claims, include a provision indicating that the plaintiff is responsible for satisfying all outstanding liens (i.e., Medicare), and indicate which parties are to cover what court costs. The settlement agreement should also include a confidentiality provision.

## **J. Leaving the unsuccessful mediation**

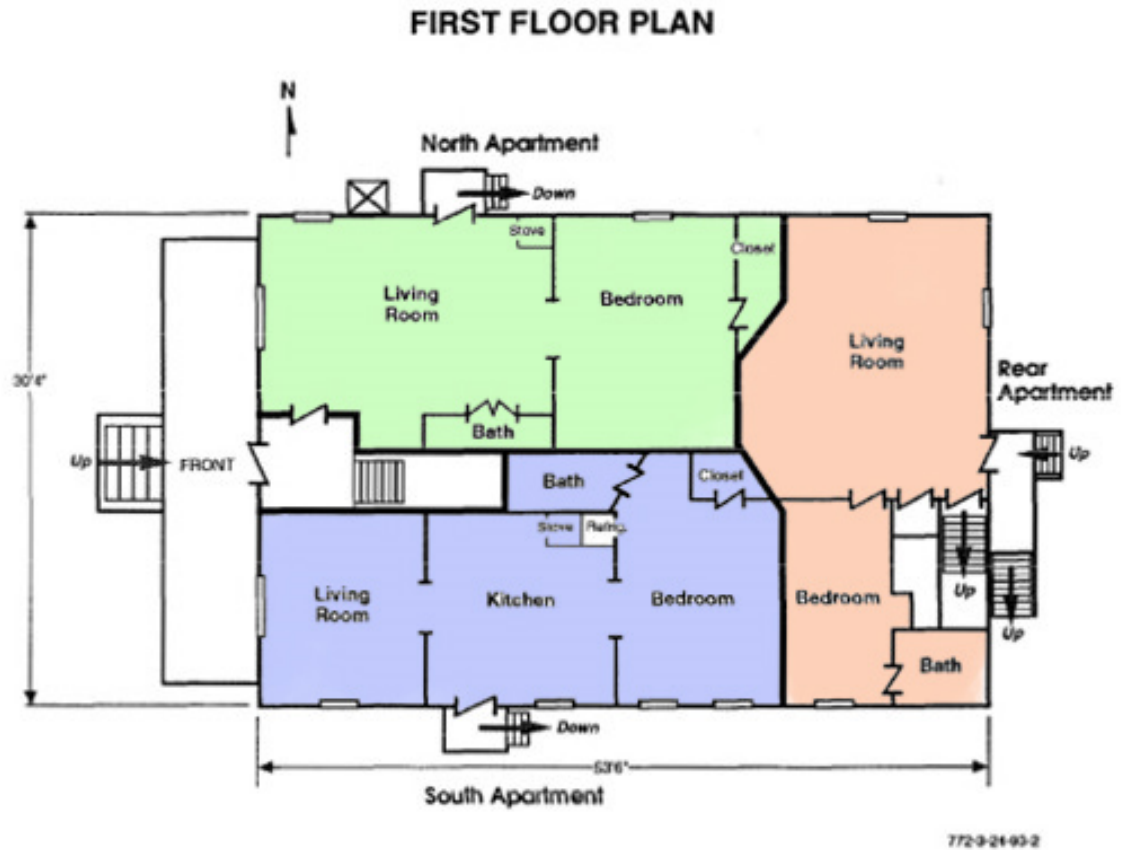
If the mediation is not successful, you should consider leave an offer on the table with a time limit in which the plaintiff must respond. That way, even though the mediation was unsuccessful, you still keep the negotiation moving forward.

## Appendices

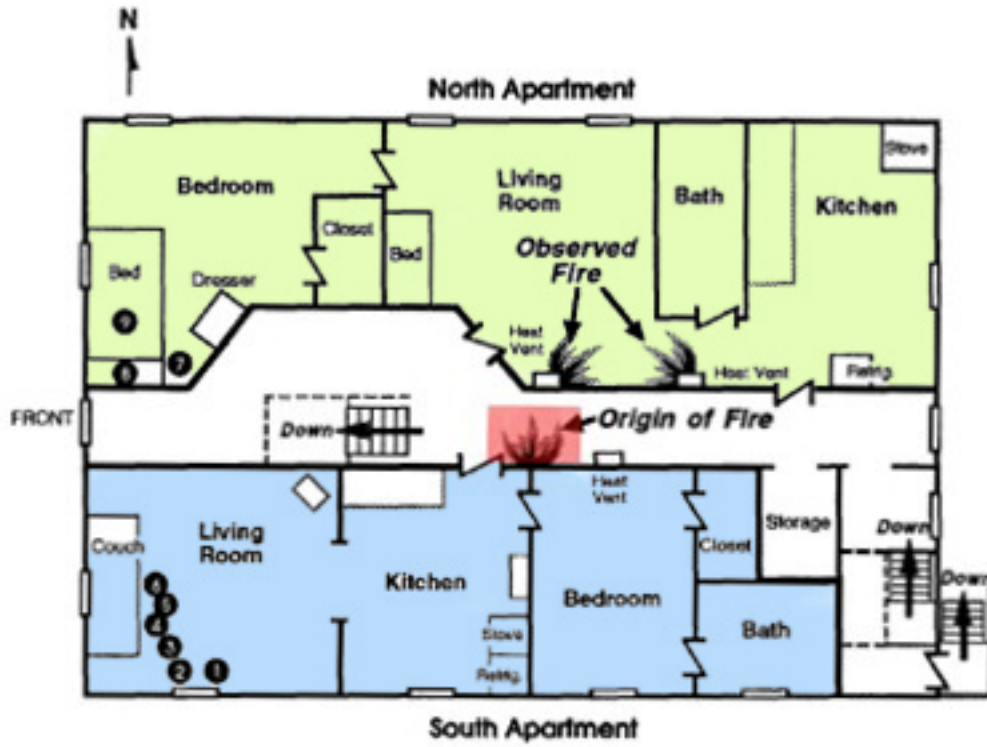
### A. Building Floor Plans for 1/2 the Suspect area of the Building

#### Appendix A

#### Building Floor Plans



## SECOND FLOOR PLAN



FATALITIES	
①	3-year-old girl
②	2-year-old boy
③	3-year-old boy
④	1-year-old boy
⑤	6-year-old boy
⑥	13-year-old girl (babysitter)
⑦	1-year-old
⑧	18-year-old woman
⑨	2-year-old boy