Trials: Tribulations, Triumphs, or Both?

Making Smart Decisions About Taking Cases to Trial

By Pete Fowler

Taking a construction-related case to trial should not be "rolling the dice." Regardless of whether you are defending or pursuing a claim, the decision to take a case to trial should, theoretically, be simple once you have realistically analyzed the value of the claim, plus or minus the cost of a trial. The cases that proceed to trial are usually complicated by something, or a hundred somethings.

This article should help you to create a decision-making framework for deciding who is on your trial team, analyzing and evaluating individual claims, planning and managing the process, making sure the team is in sync and communicating in a simple and compelling way, and thinking through what winning and losing look like, before making an expensive decision to proceed.

The Team

"Who is on the team?" is the most important question, because we all know that the only reasonable predictor of future performance is past performance. I once listened to a motivational speaker ask, "What comes out when you squeeze an orange? Juice, of course! And why is that? Because that's what's inside!" What comes out of the people on your team when they get squeezed? Is it confidence, professionalism, kindness, strength, and determination for the cause?" Because trials are stressful, and some people, when put under stress, fold like a lawn chair.


IN GOD WE TRUST

The stars in a trial are the attorneys and those offering testimony, including expert witnesses. So evaluating these folks, as well as the support teams that will help them prepare, is critical. Is there sufficient evidence, from past performance, to bet that they will not flounder when push comes to shove?

In short: Define what good performance looks like, make sure the prospect has on-topic experience in successfully doing what you need done, and verify that experience with calls to references. The discipline to perform due diligence is often the difference between success and failure.

The Math

Making smart decisions about taking construction claims to trial is a combination of math and professional judgment. First, do some math.

There are lots of things humans do well, and some things not so well. Humans are great pattern-recognition machines. We readily spot things that are contrary to the pattern. We are not as good at decision-making when facts are a jumbled mess. So the more structure, sense, and consistency that we bring to complex decision-making, the better.

Here is a simple ABC=D decision-making framework you can apply:

A. The first variable is a realistic assessment of the value of the claim.
B. Then determine a realistic budget through trial, including attorneys, experts, and any other costs and fees.
C. Then apply some value judgment about what should be added (or subtracted) for the risk of uncertainty.
D. If you are defending a claim, and you ignore the complication of recuperating attorney fees and costs, then A + B + C = D, where D is your theoretical maximum settlement value. If we are pursuing a claim, it's simply A - B - C = D.

If we are defending a claim that has been:

A. Thoughtfully evaluated at $100,000.
B. The total trial budget is $50,000.
C. We decided to add 20 percent ($150,000 x .2 = $30,000).
D. The baseline, then, is $100,000 + $50,000 + $30,000 = $180,000. If the other side won't settle for less, then trial should be considered.

If we are pursuing that same claim:

A. $100,000 claim value from a defendant or cross defendant.
B. Subtract the $50,000 in costs.
C. Subtract 20 percent of the investment ($50,000 x .2 = $10,000).
D. Sadly, the baseline is down to $40,000 (= $100,000 - $50,000 - $10,000). This is a tough business decision to have to make, and possibly a key reason we do not see more insurance companies subrogating claims against smaller players that refuse to pay their fair share, even when they are clearly responsible.

Professional Judgment

Of course, the math gets complicated when we factor in all of the real-life messiness that every case has, including attorneys' fees and costs. Our experience with fee and cost awards is very mixed, even for the best of lawyers with which we have done business. For the sake of brevity, we won't address it further, but you'll need to consider it.

A detailed discussion of calculating the $100,000 claim value in our example is beyond the scope of this article. Typically, you have to evaluate the property, and then design, contract for, and execute a repair. We consider all costs from A to Z. If we have done this analysis well, it is exactly what we present in trial.

It's our experience that easy cases almost never go to trial. For the cases that do go to trial, sometimes you are trying to set a precedent, like standing up to bullies who will sue you again if you overpay this time. The national homebuilders, and many others, face these decisions every day. You need to consider the worth and the potential downside. Sometimes, not giving a bully your lunch money hurts in the short term, but is worth it in the long run.

Ultimately, you need to apply some philosophy to your decision-making. I like the idea of being kind and strong: We pay when we should pay, but we don't get bullied. You'll have to apply whatever philosophy you see fit. After all of this thinking, you might need to reconsider the math.

Planning and Cost Control

Like the decision to have a child, going to trial is fun to conceive, but the delivery can be very painful. To manage, you must measure. You should plan your work in quantifiable chunks; estimate the costs to accomplish those milestones, in writing; and then compare performance to plan, also in writing, throughout the journey. My experience is that many attorneys, even great ones, are not great managers. Many struggle at realistic budgeting. Let this serve as a framework for your plans and controls.

We have never seen an opposing attorney, in response to a compelling argument from us, say, "OK, you're right. Let's just do whatever you think." So change, and sometimes dramatic change, is the rule in litigation, and your planning tools must accommodate.

It helps to create a simple budget spreadsheet, like a construction contractor's schedule of values. Columns would include line number, description, original budget, current budget, spent dollars to date, and cost to complete. Rows could include mediation, discovery, trial preparation, trial, and post-trial. Each row entry would have the following subsections: attorneys, experts, and fees and costs. For example, for "mediation," values could be entered for attorneys, experts, and fees and costs as they relate to the original budget, the current budget, how much has been spent to date, and the cost to complete. This process would then be repeated for each row item.

Remember the Ken Blanchard quote:

"Feedback is the breakfast of champions." If you arrange to have this budget updated monthly (or quarterly, at least) and meet with the team, using the budget as the primary agenda, then you'll see where you stand and be able to course-correct if necessary. If you add to this budget update a narrative memo, discussing the case status and plans going forward, you'll create a thoughtful feedback loop that will keep the team on track.

Explain it to My Mom

In our office, when a technical expert is not explaining himself well, we often say "I don't think my mom would understand what you're saying." It is code for, "If you can't explain it simply, then you don't understand it well enough," which is often attributed to Einstein.

My mom is a smart, but non-technical person; she knows nothing about construction or cost estimating other than the painting and decorating she has done to her homes and businesses. We know that someone like her is going to have to use the information we give them to make a smart, informed decision. This is also what juries need to do. In the case of a jury, it is even more extreme. We really need to work hard to explain ourselves.

The famed 60 Minutes producer Don Hewitt would say to the best journalists in the world, "Tell me a story." We need to explain, in story form, what the case is about and why we are right. A firm grasp of the case's theme is a must.

It's not easy to communicate simply and concisely. It takes time and hard work. Our trial communication should be thoughtfully considered and practiced. Recognize that the general public's learning styles are widely varied, and attorneys' learning styles are much less varied. Multimedia is best: visual, auditory; kinesthetic. When we think about communicating in this varied way, it brings the facts to life in a more interesting presentation for the judge, jury, or arbitrator. Don't commit the "Death by PowerPoint" sin—just because you have created a presentation does not mean it is going to be interesting. Consider having witnesses get up and explain complex subjects to the jury using a flip chart or physical samples.

Naturally, the communication styles we use for a jury are going to be different if it is a bench trial, or to a highly technical arbitrator. A jury requires a story with bells and whistles due to limited attention spans and boring material, so a "sexy" story keeps their attention (making drywall sexy is not an easy task). For a bench trial, where the judge is deciding, you should focus more on the legal issues. In arbitration, the rules of evidence are looser, and they are often very technical, so we can go deeper into the weeds in a way that would lose most jurors.

No current discussion of trial-communication strategy these days is complete without considering the reptile brain strategy that is so widely discussed in legal circles. CLM has handled the subject so well elsewhere, we will not consider it here, but you should seek out those resources.

When Winning Is Losing

"The only thing I'm addicted to right now is winning."—Charlie Sheen.

Sometimes you can "win" and still lose. Sometimes you can "lose" and still win.

We recently "won but lost" on a case of a commercial building that was purchased from a city and leased back to that same city for 10 years. The city had a contractual obligation to maintain the property, but failed to do so and refused to make or pay for repairs at the termination of the lease. My client was the owner who "won," but was only awarded $40,000 after we asked the jury for $250,000. It was a bummer, but the amount was above a statutory offer to compromise and there was an attorneys'-fee clause, so we assumed the client would be made whole for the cost of pursuing the matter through trial. But the judge, in violation of any precedent, awarded no fees or costs. The case remains on appeal. Therefore, this was a terrible economic loss for my client.

We worked on another case where a simple private school building was constructed using a slab-on-grade and site-cast concrete tilt-up walls (just like a "big box" store). I worked for the concrete subcontractor. It was a typical construction-defect litigation, so there were lots of claims against the general contractor and other trade contractors related to poor-quality construction. Our client sub-subcontracted the sealant work to another contractor and that work was defective, leading to leakage and property damage. The sealant sub-subcontractor would not participate in the settlement, so my client settled the claim with the owner and general contractor, and sued the sub-sub, ultimately winning 100 percent of the settlement, plus attorneys' fees and costs for the trial. Obviously, our side was happy with the results. I have come to know the defense attorney who was brought in late in the game and who "lost" at trial. He assures me that his insurance-company client expected the result, was entirely pleased with his work, and continues to send him new cases.

Being willing and able to go to trial is an important factor in being able to negotiate from a position of strength. Remember that, as with most of life, who is on the team is the most important thing. The math is pretty simple, but the judgment calls often are not. Good planning and cost controls are not inherently difficult to structure, but the discipline to regularly re-direct the entire team back to the plan for a comparison to actual performance can be. Success is worth it. In trial, you have to explain things simply, and that takes elbow grease. And finally, sometimes you might win but still lose, and other times you can lose but still win. ■

This article was inspired and informed by a 2019 CLM Webinar, "Trial and Arbitration Strategies for Winning Your Construction Case."

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