What Jurors Wish You Knew:
A Lawyer's Journey from Juror to Trial Counsel

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Peremptory Challenges:

- "A defendant's or lawyer's objection to a proposed juror, made without needing to give a reason.

State versus Federal Court

- State Courts
    - Eliminated peremptory challenges in 2022
    - Expands for-cause challenges
- Federal Courts
    - Up to three peremptory strikes in civil cases

Jury Trial Do's

- Repeat. Repeat. Repeat.
    - They. Don't. Know. These. People.
    - Remind them every chance you get about who is on the stand and why they matter.
- Thoughtful Timing
    - Keep to a schedule each day. Be mindful of breaks. Use every minute of the allotted trial schedule. The jury is eager to deliberate and eager to be done.
- Physical Exhibits
    - Hold, watch, see, demonstrate. Anything to get the jurors more involved.

- Credible Experts
    - Need to be able to draw (depending on case needs).
    - Visit the placed discussed.
    - Combine cost and liability when possible.
    - Someone who is familiar with the location you are in.
- Credible Witnesses
    - People who have been there and done that.
    - Unnecessary to have multiple people testify to the same facts (unless disputed).

Jury Trial Don'ts

- Technological Ineptitude
    - Be ready to pivot. If the tech doesn't work, judges and jurors have little patience for it not working.
- Whispering at Counsel's Table
    - For better or worse, we see it and it is distracting.
- Object Strategically
    - Leading objections demonstrate to the jury that your witness is being spoon-fed answers.
    - If you object and are being consistently overruled, the jury starts to view the attorneys as less credible.
- Close Succinctly
    - A two-hour closing should have a point, not be a filibuster to prevent the jury from deliberating. The evidence is already out there.

- Tell a story. Why should the jury find for you or against the other side?

- Criticizing a Witnesses' Lack of Formal Education
  - A "been there done that" person is infinitely more helpful than someone who parachuted in for litigation. For example, someone who has built a pool from the group up is infinitely more credible than an architect.

- Jargon
  - Try and remember that your jurors are totally unfamiliar with the people, locations, and claims in your case.
  - Take your time in the opening to orient your jurors to the who, what, where, when, and why. Although it may feel repetitive to you, it certainly isn't to a jury.

Best Practices for Closing

Plaintiff

- List, chart, graph. Organize the information visually.
- Show the jury where they can find every element of your case.
- Then, hit the elements again.
- The jury should not be confused as to why you win.

Defendants

- Undermine the weakest element(s) rather than half-heartedly undermining all elements.
- Juries LOVE lists – *show them* how the elements weren't met either through exhibits or testimony.
- Highlight any inconsistent testimony.

April 2024

Jurors Look to Their Judicial Colleague

BY HON. ANN A. SCOTT TIMMER

Jury Service by Judges and Lawyers

Effective January 2022, the Arizona Supreme Court eliminated peremptory challenges for all jury trials. The utility of the move has been debated, sometimes hotly. But love it or hate it, this means lawyers can no longer routinely strike lawyers and judges from their panels. How will this affect jury dynamics? Time will tell. My recent experience as a juror, however, might provide some insight.

Before last year, I had never served as a juror. If I was ever fortunate enough to make it out of the juror room, I was summarily booted by one party or the other. “No offense,” one lawyer later told me, “but I never have lawyers or judges on my jury, if I can help it.” Knowing that many lawyers felt this way, I routinely groaned after receiving a jury summons, knowing I was likely in for a wasteful day.

But last February, armed with my summons, I was on equal footing with my fellow jurors. And as soon as I was called up in the jury room as “juror number two,” I knew I was finally going to sit on a jury.

Personally, I was giddy with the opportunity to finally experience a jury trial from

the other side. My fellow jurors were not as enthusiastic but were seemingly resigned to it. Some, with juror numbers in the twenties, were fretting about missing work or school, but I knew it was unlikely that those with higher numbers would be needed now that preemptory challenges had been eliminated.

> **“The jurors were much tougher than I was regarding the performance of the lawyer and the self-represented litigant.**

When we arrived in the courtroom and were seated, the judge came out and greeted us. I knew him socially and resisted the urge to wave. He announced that we were called to potentially serve as jurors on a civil matter in which one party represented himself and the other had counsel. As we went through the shtick and gave our names and occupations, all eyes zeroed in on me when I said I was a justice on the Supreme Court. (From then on, the self-represented litigant would turn and address me personally with a glare whenever he was prevented from introducing evidence due to his failure to follow disclosure rules. Why was I to blame?)

How did voir dire go? Quickly. We were called to the courtroom around 9:15, the jury was selected by 11:00, and opening statements were wrapped up by lunchtime. The judge allowed wide-ranging, open-ended questions and didn’t attempt to rehabilitate jurors with questions like, “But you can be fair despite that, right?” The attorney made only one challenge for cause due to the juror’s distaste for awarding punitive damages (out of the panel’s hearing, but it was obvious to someone familiar with the process), and it was granted. Apparently, no one took issue with my association with the judge, or the judge didn’t think that was sufficient cause to excuse me, because I was seated on the jury.

The trial lasted just a day and a half, and several aspects of jury service stood out.

First, the jurors were all very intelligent and invested in serving to the best of their abilities. They took copious notes and asked the witnesses many relevant questions. Why? Because neither party painted full pictures with direct

questions. Why? Because neither party painted full pictures with direct examinations, and many holes needed filling. I had the sense the parties were rushing to get their stories out, but they would have done better by slowing down and describing events step by step.

Second, discussing the case when we were all together during breaks was very helpful. The discussion focused the issues, often put jurors on the same page, and led to better questions from the jurors to witnesses. It also better prepared us to discuss the case when we retired to deliberate.

Third, the jurors unquestionably, and sometimes uncomfortably, looked to me for guidance due to my judicial position. Sometimes I was helpful. For instance, I explained what the self-represented litigant meant when he complained he couldn't introduce evidence because he hadn't followed disclosure rules. Sometimes I was not helpful. Specifically, I declined requests to explain the governing law and instead told jurors to follow the law as the judge instructed. (It occurred to me then that perhaps lawyers and judges should be cautioned not to substitute their knowledge of the law for the court's legal instructions.) Despite trying to let someone else assume the leadership role, I ended up serving as foreperson. Because I feared jurors would give my opinion too much deference, I reminded them we were on equal footing, and I had everyone else voice their opinions before I did. In the end, my opinion didn't sway anyone as everyone expressed the same opinion before I uttered one word of substance.

Fourth, the jurors were much tougher than I was regarding the performances of the lawyer and the self-represented litigant. It occurred to me that lay people have little appreciation for how difficult it is to try a case, and they hold litigants to lofty standards as seen on television and the movies. I found myself sticking up for the litigants and telling the jurors that sometimes witnesses go astray or surprises happen.

Fifth, at the end of the trial, the jurors came away with greater respect for and trust in the justice system. This was unsurprising to me. Before coming to the court, most jurors likely only knew about the justice system from dim school memories or from sensationalized media reports. Jury service permitted my fellow jurors to see the system through untarnished eyes. And frankly, the court made a good impression. The court staff were professional, courteous, and made

made a good impression. The court staff were professional, courteous, and made sure the jurors were as comfortable as possible in an intimidating environment. The judge, the lawyer, and the self-represented litigant were respectful of the jurors' time and service. We didn't cool our heels often. The judge's wife even baked us cookies.

When the Supreme Court ended preemptory challenges, I didn't think about how doing so would likely pave the way for more lawyers and judges to serve as jurors. After my experience serving on a jury, I believe that juror dynamics can shift somewhat when law-trained jurors are in the mix. It might be for the better or for the worse, depending on the case and particular lawyer or judge. I will be interested in observing whether trial lawyers alter their tactics or style as a result.

VICE CHIEF JUSTICE ANN A. SCOTT TIMMER has served on the Arizona Supreme Court since 2012 and will be sworn in as Chief Justice in July 2024. She serves on several state and national boards and committees and is a highly sought-after speaker on many legal topics, including access to justice. Justice Timmer earned her bachelor's degree from the University of Arizona, her J.D. magna cum laude from Arizona State University Law School (now

her J.D. magna cum laude from Arizona State University Law School (now the Sandra Day O'Connor College of Law) and a Masters in Judicial Studies from Duke University Law School.

April 2024

Jury Service Yields Practice Tips

On my way to jury duty, I vividly recall posting on Instagram, "In all seriousness, if you have the opportunity, participate in your local justice system by appearing for jury duty, it is a critical part of our justice system. You are a part of the group a jury 'peers.' It may be inconvenient for you, but it's incredibly important to someone else."

BY MEGAN CARRASCO

Jury Service by Judges and Lawyers

That day, I was on my proverbial high horse, touting the virtues of American democracy. Little did I know, I was about to eat my words.

To be honest, I was elated to be called for jury duty. I'd been called several times before but ultimately never had to report. Then, I found myself as Juror #5, seated on a three-and-a-half-week civil trial, mere weeks into the start of my career at Snell & Wilmer LLP. "Inconvenient" was an under-statement.

My colleagues were in disbelief. It is common attorney-lore that lawyers are always struck from the jury pool. But no longer. Since Arizona eliminated peremptory strikes, I could only be eliminated for cause. As a former law clerk to Vice Chief Justice Ann Timmer and Judge Dominic W. Lanza, I knew I could be fair

to both sides. And so the attorneys could not find cause to strike me.

For the first week of trial, I soaked it all in. Even as a lawyer, learning a brand-new case from start to finish is difficult. As a law clerk, I was used to attending trial with the benefit of background information— briefs, summary judgment motions, motions in limine, etc. Here, I was flying blind.

It surprised me how unfamiliar everything felt. I struggled to manage the names of the witnesses and their roles. I found myself longing for pictures and spelling and organizational charts—anything to help my brain visualize the picture the lawyers were describing. It was clear the lawyers knew their case and the key players. But for me, I needed them to slow down and spell it out. Imagine I am a brand-new associate working on the case and I have absolutely no background—what do I need to know? Orally listing every witness, you rattle off their titles and scope of testimony. But in doing so, you miss the forest for the trees. I. Don't. Know. These. People.

> **More than anything, I appreciated the lists, the distillation of key points that stuck with me when we deliberated.**

That brings me to the first key takeaway from my jury experience: Openings are essential. In law school, I was taught to draft roadmap paragraphs, i.e., tell the reader where you're going before you get there. The same concept applies to juries. Here's my advice: Distill your case into a 15-slide PowerPoint. The first five slides provide a high-level overview of the general background and claims, including any case-specific jargon. The second five slides use names and pictures of your five most important witnesses, along with a short snippet of their anticipated testimony. The 11th slide shows who else the jury will hear from and their title or relevance. The last four slides highlight key exhibits the jury should pay attention to. And that's it. Now, the jury has an outline to cling to.

A strong opening connects directly to the first witness examination. Remember,

the jury does not have the benefit of briefing or years of intimacy with the case. Therefore, if the first witness is critical to your case (for better or for worse), the jury must understand that before you start.

My second takeaway is both the logical, and literal, follow-up to the opening: the closing. The lawyer in me wants the first words out of your mouth to address the elements of the claims. The judge just spent ~20 minutes reading the legal instructions on how the jury should decide the case. Your next move should walk the jury through those elements and explain how they have, or have not, been met.

After we retired to deliberate, the jury for my case was intensely focused on the instructions from the judge, as they should be. For me, this reinforced the power of closings. I noticed one juror, who had not taken any notes throughout the trial, write furiously to capture both sides' closing thoughts. I appreciated recall to earlier exhibits that aligned with certain elements. I appreciated snippets of testimony highlighted via transcript. I appreciated divisible damages calculations. But more than anything, I appreciated the lists. Lists of why certain testimony was or was not credible. Lists of facts that witnesses did or did not substantiate. Lists of the elements that were or were not proven. It's the distillation of the key points that stuck with me when we retired to deliberate.

This is not to say that other aspects of trial practice don't matter—they do. But as a juror, even as a lawyer–juror, every aspect of trial is so new. Part of the reason a lawyer is able to be seated on a jury is because they don't know anyone and are not intimately familiar with the subject matter, which puts us, in some ways, on equal footing with the rest of the jury. In other ways, we are even more carefully attuned to what you say because we know what matters in the end: whether you met your burden on every element.

Forcing yourself to filter the noise in your case in opening and closing allows the jury to enter the jury room armed with the essence of your case. After that, the decision is theirs.

MEGAN CARRASCO is a commercial litigation associate at Snell & Wilmer LLP. She focuses her practice in general commercial litigation, including corporate governance issues, SEC enforcement actions, construction, and business disputes. Prior to joining the firm, Megan clerked for Vice Chief Justice Ann Scott Timmer of the Arizona Supreme Court and the Hon. Dominic Lanza for the United States District Court for the District of Arizona.

April 2024

Reassured by Thoughtful Deliberation

BY PATRICIA LEE REFO

Jury Service by Judges and Lawyers

“All rise for the jury” is something I have heard scores of times as a trial lawyer. But this time, in 2021, I heard them as a part of a jury.

As the sitting President of the American Bar Association, and in the middle of the pandemic, I got a summons from the U.S. District Court in Phoenix to appear for jury duty.

The court had sent us an online questionnaire in advance asking about scheduling challenges, basic personal information and COVID-19 concerns, plus a few case-specific questions. Presumably, those responses were used to excuse in advance those who were unable to serve for this three-day trial.

I disclosed to the court and the lawyers on the questionnaire that I was (a) a lawyer and (b) currently serving as ABA President, certain that this combination of facts would eliminate any chance of me actually serving on the jury.

When I arrived in the jury assembly room in the Sandra Day O’Connor U.S. Courthouse, there were only 28 of us in the room, with the chairs all in socially

distanced rows. All of us were there for one civil case.

After watching a well done orientation video, we were escorted upstairs to the large ceremonial courtroom—the only other room in the building safe enough to hold that many people under pandemic protocols. We sat in socially distanced and designated seats, answering questions from the court and a few follow-up questions from each side. After a recess during which they sorted out challenges to the venire, eight were called forward to take seats inside the jury box.

To my utter astonishment, I was the last one called up. I was now Juror No. 8.

Pandemic safety procedures made the experience different from "normal" jury service. The jury rooms were not large enough to safely hold all eight of us, so the four of us who sat in the front row of the jury box used one jury room, and the back-row jurors used a different room. For the two days we heard evidence, we front-row jurors got to know one another in our jury room, but we did not interact with the back-row jurors beyond the occasional "Good morning" as we lined up to walk into the courtroom. I should note that we also ate better than nonpandemic juries because the court provided lunch for us every day, not just the day on which we were deliberating.

> **Being a juror made me understand more fully the importance of lawyers being very clear and precise in opening statements and closing arguments.**

Of course, pandemic safety continued inside the courtroom. Everyone was spread out. Everyone wore masks all the time except witnesses, who could remove their masks only for the first 15 minutes of their testimony (from behind plexiglass). I found it frustrating that I could not fully see the witnesses' faces during much of their testimony, but aside from more frequent requests that a witness repeat something she had said, I did not think the masks made any meaningful difference in the trial or the outcome.

Taking in the proceedings from the jury box instead of from my usual spot at

counsel table made me understand more fully than ever the importance of lawyers being very clear and precise—in both opening statements and closing arguments—about their theory of the case, what facts they think are important and, in closing, how those facts relate to the jury instructions.

As an example, I took far more notes than I needed to take because one of the parties had not adequately (to me, at least) explained their theory of the case. Because I was a bit uncertain about which facts were going to be important, I just tried to write down everything! I would have appreciated more clarity in the opening statement.

When closing arguments and instructions were finished, the judge cleared the courtroom and turned it over to us for our deliberations—again, too many people to be COVID-safe in a smaller space.

My fellow jurors wanted me to be the foreperson, but I declined. Right or wrong, I was too fearful that I would over-influence them. They knew from voir dire that I was a lawyer, but I did not think it was appropriate to tell them that I was ABA President. I did tell them that nothing about being a lawyer would make me a better foreperson, because the job of the foreperson was simply to lead the deliberations. We reached a verdict promptly and without any significant difficulty.

Everything about my experience bore witness to the majesty that is the American jury system, even amid the challenges of a pandemic. Eight citizens with nothing in common came together and worked together to deliver justice to the parties. Each listened carefully and respectfully to the views of others, willing to reassess his or her own views when appropriate. We each brought to the deliberations our own disparate life experiences in assessing the credibility of others, and yet those different experiences often got us to the same conclusions.

When there was a question about a fact, we would review our notes and the exhibits and discuss our recollections of the testimony. When there was a question about the law, someone would go back to the language in the instructions—we each had a copy—and find an answer. The discussion was thoughtful, filled with give and take, and driven ultimately by the desire to do justice based upon the law we had been instructed to apply. We moved, during

justice based upon the law we had been instructed to apply. We moved, during those deliberations, from being eight jurors into being one jury.

It is the jury, not the jurors, for whom we rise in respect.

PATRICIA LEE REFO served as the 2020-2021 President of the American Bar Association and is a partner at Snell & Wilmer in Phoenix. Among other honors, she has received the Medal of Honor from the World Jurist Association, the Walter E. Craig Distinguished Service Award from the Arizona Bar Foundation, and the President's Award from the State Bar of Arizona, and she was inducted into the Maricopa County Bar Association Hall of Fame.

April 2024

Surprise for Jurors and Litigants

BY HON. MARY M. SCHROEDER

Jury Service by Judges and Lawyers

Back in the earlier days of this century, before peremptory challenges were abolished in Arizona, I served on a civil jury in Maricopa County Superior Court. At the time I was the Chief Judge of the Ninth Circuit, and my service was sufficiently unusual so as to prompt a blurb on CNN.

The case itself was the product of an automobile accident that resulted in a serious whiplash-type neck injury. Fault seemed clear, but the parties were apparently still at odds over damages.

It was, at the time, almost unheard of for a judge to be seated on a jury. During voir dire, however, it became increasingly apparent that I might be allowed to remain. When asked whether any of us had been involved in a serious automobile accident in the past couple of years, about half the panel members raised their hands. When asked whether those jurors had been involved in more than one accident, multiple hands went up and, as I recall, one responded that he had been involved in 11.

We were then asked whether we had any experience in dealing with injuries resulting from automobile accidents. Again, multiple, but different, hands went

up. It seems our group included at least one doctor and two nurses.

At this point a young woman raised her hand. Although she was not a doctor or a lawyer, she worked in a law office that dealt with automobile accidents. Another hand shot up, that of another woman who explained that she was a lawyer in the Arizona Attorney General's Office that reviewed lots of accident cases.

> **Like other jurors, I said that I was familiar with accident litigation—as the presiding judge contained a guffaw.**

Here I felt obliged to raise my own hand to say that I was a judge, and I, too, was familiar with a lot of accident litigation. I observed the presiding judge pull out a handkerchief to help contain a guffaw.

So who survived to serve on the jury, and who got booted? The multiple accident victims went. The medical professionals went. The lawyers—and the judge—stayed.

The trial itself was brief and straightforward. The plaintiff's lawyer had an effective visual aid in a plastic skeleton that could be disjointed to illustrate the injury. There was not a lot of cross.

When we retired to deliberate, it became clear this was a no-nonsense group. They elected me the foreman, over not very strenuous protests on my part. The initial discussion around the table reflected that we had not found the instructions very helpful in actually putting a figure on the damages, so one of the attorneys volunteered to tell us how her office evaluated such cases. We all thought that was a great idea. The amount she came up with seemed eminently fair to us. In order to convince the attorneys and the judge we had earnestly deliberated in the short amount of time we had put into the task, we sent a question to the judge about one of the instructions, and, as we expected, he responded with nothing very illuminating.

We returned our verdict, which both lawyers appeared to accept as fair. We were

We returned our verdict, which both lawyers appeared to accept as fair. We were out in time for lunch. I ran into the judge at the sandwich shop across the street, who told me that it was a darn unusual jury, and he knew exactly what we were doing by asking a question, in order to appear deliberative.

As for my impressions of the trial itself, I was impressed by the professionalism displayed by the attorneys and the judge. There was no time wasted, something the jurors greatly appreciated. With respect to the deliberations, what was particularly instructive to me was reading the jury instructions as a juror rather than as a judge or lawyer. We sometimes get caught up in making sure the instructions correctly state the law and forget that they must communicate principles that can be understood and applied by lay persons.

As for how I wound up on that jury, I actually had a chance to ask the attorneys that evening, when all three of us attended a Bar event at the University Club.

“Oh,” they said almost in unison, “you were just the lesser of at least a dozen evils.”

MARY SCHROEDER is a Senior Judge of the United States Court of Appeals for the Ninth Circuit who began her legal career as an attorney with the United States Department of Justice in Washington. After moving to Arizona, she practiced law with the firm of Lewis & Roca and became the first woman appointed to the Arizona Court of Appeals. In 1979 President Jimmy Carter appointed her to the Ninth Circuit, where, from 2000 to 2007, she served as its first woman Chief Judge. She and her husband Milton have two daughters and two grandsons.

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UNDER CONSTRUCTION
NEWSLETTER

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Under Construction - February 2024

February 12, 2024

Letter From the Editor

Welcome to the winter edition of Snell & Wilmer's Under Construction newsletter. We hope your new year is off to a great start and the holiday season was warm and joyful.

In this newsletter, we explore a variety of topics and discuss issues related to current construction trends and legal news that may be relevant and helpful to you and your business.

We are pleased to offer information regarding sound construction trial practice, applicable 2024 labor and employment updates for the construction industry, and a timely reminder from the Utah Court of Appeals concerning statutory deadlines as well as clarity on what is considered lienable work in Utah. This edition also covers new Colorado legislation that seeks to eliminate the "significant public impact" requirement

under the Colorado Consumer Protection Act ("CCPA"), a recent Washington State Supreme Court decision that underscores the significance of safety protocol provisions in construction contracts, and useful tips for Arizona contractors and owners regarding mechanics' and materialmen's liens.

We hope you will find these articles informative and enlightening. Please let us know if we can address a specific construction issue in a future newsletter. We hope 2024 is profitable, busy, and safe for you, your company, and your family!

Best Regards,

Jim Sienicki, Editor

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Construction Trial Practice

By Megan Carrasco

For lawyers, serving as a juror is somewhat of a leprechaun moment. But as of January 1, 2023, in Arizona, the Arizona Rules of Civil Procedure no longer permit trial counsel to exercise peremptory challenges — meaning lawyers cannot freely strike whichever

jurors they believe are adverse to their position. So, despite being an attorney and having participated in construction litigation (both for plaintiffs and defendants), I was seated as a juror in a nearly month-long construction trial.

Construction litigation is a deceiving niche for trial practice. As a law clerk, I watched civil trials in federal court, and none of them required the same step-by-step dismantling as construction litigation. As a juror, I initially found myself trying to intuit the answer — who is responsible for what? How should the project have been constructed? But in practice, the lawyers demonstrated that construction is guided by a peculiar set of norms, specific standards, and contractual boundaries, not all of which are obvious to the average (or not-so-average) juror.

From this experience, not only did I learn some practical tips for lawyers (which I've included), but there's a lot a client can do to help the lawyers along the way.

For Clients consider the following:

Hire good people.

Some of the most persuasive witnesses throughout trial were those who were out on the job every day doing the work. Although experts are helpful, and at times necessary, to provide key testimony and to complete your case, your employees know their jobs inside and out. When your people are hardworking and honest, that candor comes through on the witness stand. This also works in reverse. When you hire shady characters, the jury will notice.

Draft carefully from the outset.

Scopes of work are everything. As a juror, a scope of work functions as a rubric: did you meet the expectations of the contract? If we know *exactly* what was agreed to, it is much easier to parse out which portions of the contract, if any, went unfulfilled. It should go without saying that all scopes of work should be memorialized in writing and signed by both parties.

Scopes of work benefit everyone. As the party doing the work, an accurate scope of work can protect you from later liability. On the other hand, if you are the one contracting to have the work done, scopes of work serve as a checkbox to ensure you're getting what you paid for.

As an additional consideration, contractors should also take care to note in their contracts potential issues that are outside their scope of work. This delineation is often difficult to make, but the upfront work can benefit everyone in the long run.

When I was a juror, a significant portion of the contested issues occurred on the perimeter of the contractor's work. So, for those of you drafting the scopes of work, consider who is responsible for any issues performed at the juncture of your specialty. For example, in a roofing project, delineate who is responsible for the adjacent stucco walls, the roof drains, or the scuppers. Or in a landscaping project, allocate responsibility for water damage at the bottom of the stucco, or the cracked concrete on the sidewalks.

While these juncture components may seem intuitive to an experienced employee or business owner, they are not intuitive to a jury. This becomes especially complicated when your business *could* perform the necessary work at the junctures but, for whatever reason, did not contract to do so. Not delineating — or excluding — these portions of work from your scope can leave a project looking unfinished through no fault of your own. A disclaimer in your contract that the company has not agreed to complete any work at the exterior of the project, including [insert areas here] can help a jury confidently allocate responsibility for allegedly unfinished work.

For lawyers consider the following:

Spell it out — literally.

At the beginning of trial, I struggled with terminology. The lawyers were so well-versed in the issues that they used the jargon freely — and assumed the jury knew what they meant. Your jurors are laypeople, and even when they aren't, they're starting from scratch. I'm a visual learner, so for me, it would've been helpful to see the words along with a photo of what was being described. If the jury does not understand you, you are less likely to persuade them.

Bring physical exhibits.

One of my favorite parts of trial, especially a long one, was physical exhibits. Every now and then the lawyers would produce a demonstrative item akin to a sample sheet in a sales meeting. The physical exhibits helped bring the defects to life, meaning we could better envision the construction issues at stake. If your trial has to do with defective caulking, bring in a caulking sample and let the jury touch and feel the difference. It

sparks engagement and understanding. Similarly, experts that can stand up, draw, point, circle, and break apart the stages of a construction matter can be more persuasive and help the jury follow along.

Conclusion

Construction litigation is a team effort. On the front end, clients can help prevent issues by preparing a good contract, keeping good people close, and being meticulous about scopes of work. In the event of litigation, lawyers can help by slowing down and teaching the jury about your specialty from the ground up. [BACK TO TOP]

2024 Labor & Employment Law Updates for the Construction Industry

By Clint Engleson

The New Year often means new labor and employment laws for the construction industry, 2024 is no exception. Federal agencies have been especially active. The Federal Acquisition Regulatory Council, the National Labor Relations Board, and the U.S. Department of Labor have all issued new rules that directly or indirectly target the industry. California, too, has singled out the construction industry with a new, restrictive independent contractor law. Businesses in the industry should be wary and may want to review their existing contracts and practices for compliance with the new rules and laws.

New FAR Rule Requires Project Labor Agreements for Large Federal Projects

On December 22, 2023, the Federal Acquisition Regulatory Council ("FAR Council") issued a new final rule[1] requiring federal agencies to use project labor agreements ("PLA") on "large-scale" federal construction projects, which have an estimated cost of at least $35 million. PLAs are pre-hire collective bargaining agreements negotiated between construction unions and construction contractors that establish the terms and conditions of employment for construction projects. In other words, with few exceptions, contractors on large federal projects are now required to enter into collective bargaining agreements.

The new rule follows President Joe Biden's February 4, 2022, Executive Order on Use of Project Labor Agreements for Federal Construction Projects (Order 14063). That Order