A young woman carries two cups of coffee into the World Trade Center. The elevator doors squeeze to a close just before she can hop aboard to surprise her mother working on the 72nd floor. She waits patiently for another ding. You know what happens next. The 9/11 attacks shake the building and force her to safety and a long day of worrying before she finally learns her mother is safe. This story has a happy ending. If the line at the coffee shop is a little shorter, or the barista a little faster, the young woman is aboard that elevator and life is forever changed.1

The woman is Earlyne Alexander and she shares the above story on The Moth. Others who got on that elevator before the doors shut did not survive. So while Ms. Alexander’s story stems from a once-in-a-lifetime situation and a real-world example of life and death, litigators daily experience examples of a fascinating phenomenon her story illustrates – one action can cause a sequence of cascading, unexpected consequences...some good, others potentially harmful in your case. If you have tried cases to a jury, you know too well that one unexpected trial event can send ripples throughout the remainder, changing perceptions and leading jurors to surprising conclusions. In this article, we explore how the ripple effects of change and delay converge with the ripple effects of jury persuasion in the context of construction litigation.
Construction professionals and their lawyers know well how the ripple effect of change orders “flow[s] from the synergy of the number and scope of changes issued. The underlying theory is that numerous changes cause a cascading, ripple-type impact on performance time and efficiency...”\(^2\) Others also offer advice that the most effective way to deal with delays in construction projects is to “prepare for the ‘ripple effect’ or ‘cumulative impact’ to minimize the uncertainty of change.”\(^3\) This is often the same way we help trial attorneys preparing for jury trial: identifying the worst-case scenario and anticipating how the trial dominoes may fall. So how do jurors react to the evidence of change orders, delays, and the ripple effects that result?

**Jurors Assume the “Expected”**

Jurors expect corporations to be profit motivated. They expect patents to be technical and detailed. They assume and expect changes and delays in construction projects. Their personal experiences make it nearly impossible for them to assume otherwise. One mock juror hearing the impacts of delay in a construction dispute said, “This reminds me of the phone calls I got that said, ‘Oh, we have an issue with the foundation and so that’s going to push back blank, which is going to push back…’ and the more you talk to them the more you realize everything was connected. The snowball effect.”\(^4\) And as the mock trial research data below reveals, jurors believe that if they expect delays and changes, contractors should not only expect them, but should anticipate them and prepare accordingly.

“**A general contractor should build in expenses for unforeseen changes when making his project bid to the homeowner.”**

-Male Mock Juror Response

Denying the expected or presenting your case as if the changes and delays came as a shock is a good way to cause a harmful first ripple in jurors’ perceptions of your construction delay defense. That jurors assume and expect delay is a given, the more important issue is how jurors parse and assign responsibility for the delays and resulting consequences.
Jurors Use Power to Evaluate Responsibility

More perceived power means more control. More control means a greater ability to anticipate and avoid (or account for) problems and make choices to protect bad outcomes. Construction jurors assess the parties’ power through the following four key filters, each of which can serve as a ripple that leads to further conclusions about responsibility.

**Contracts**

• What does the paper say?

Construction jurors look to understand the parties’ contractual responsibilities in the deal. They are a signal – but not the only signal – as to who is ultimately in charge.

The Potential Ripple Effects: If you deny or minimize the paper in the case, you risk enhancing the importance of witness testimony and create a greater burden on your witnesses.

**Conduct**

• Who behaves like the party in charge?

The general contractor often behaves as the controlling party. Jurors look to who responds reasonably to delays and changes, and importantly to who is communicating sufficiently and effectively when evaluating the parties’ conduct. In some situations a specialist or subcontractor assumes the greatest control over a specific aspect of the work and jurors view them as the party in charge, and therefore as the party most responsible.

The Potential Ripple Effects: Perceived unreasonable or unfair conduct in one aspect of the project (i.e. poor communication between subcontractors) often snowballs into more negative perceptions of other unrelated conduct.
Control

Who is ultimately making decisions?

The owner (often the plaintiff) frequently has financial power and the final say on key decisions, leading some jurors to perceive the owner as having the most power and responsibility to oversee a successful project. Jurors look to who is asserting control and making decisions to determine who should be held most responsible. In short, if jurors believe the buck stops with a contractor, they are more likely to attribute responsibility to that contractor.

The Potential Ripple Effects: Asserting meaningful control over significant aspects of the project creates the expectation that you will play the same role in all aspects of the project. Be mindful of how you place boundaries around your responsibilities and your control.

Compensation

Who is being paid like the boss?

On some occasions, jurors look to the party making the most money on the project as a shortcut for who should assert the most power and responsibility.

The Potential Ripple Effects: Higher fees often connote greater expertise and therefore greater control while also creating a higher expectation for conduct. If you earn more but perform less, jurors will be more likely to see fault in your actions. Consider how you can make your work consistent with the perceived level of compensation.
How Do Jurors Assign Responsibility?
In our mock trial experience, jurors leverage responsibility among parties in a typical construction delay case in a few exemplary ways.

**OWNER**
The owner because he/she/it dictated changes or failed to anticipate that changes would be required.

"The money always has more control."

**GENERAL CONTRACTOR**
The GC because they adopted responsibility for the subs.

"They’re in charge of the plans and it says so in the contract."

**SUBCONTRACTORS**
The subcontractor with specialized expertise because they had the most power to anticipate problems in that niche.

"The engineer should have known...that there would be a permitting issue."

**CONTRACTORS**
The contractor that does not accept any responsibility and points the finger elsewhere.

"Let’s blame this guy because he is not here anymore, blame that guy because he is dead...as long as it is not me. This whole case should be illegal."
Persuasive Communication To Stop the Ripples

Manage the ripple effects of jury persuasion by accomplishing four key things in your trial presentation.

Demonstrate Role Control

Jurors need to see that a defendant contractor took control and responsibility for their role in the project – both for the project’s successes as well as the delays. The best presentation is often a story of differing but coordinated roles among the defendant parties – not unlike the coordinated roles of actors in a play. Even the best actor cannot astonish the audience in the story’s pivotal scene until the story is ripe for that scene’s events. A contractor or subcontractor cannot effectively perform and complete its role until the time and site conditions are right. Be clear about role first, articulating the obligations each party accepted; then demonstrate role control, delineating how you effectively performed your role as much as possible before, during and after the project goes off course. And remember that when a contractor has contributed to a delay, it is often most persuasive to own up to its portion of the problem so jurors can look to the other parties to own up to their responsibility for lengthier or more impactful delays.

Align Appropriately

As we discussed in this prior post, consider your alignment with co-defendants by focusing on agreement with other parties more than disagreement, aligning yourself with a collective narrative of the reasonable or truly unexpected sources of delay that will equate to a finding of limited or no liability rather than apportionment of greater liability. Persuade jurors with a smart sequence such as:

(1) The Project Goal;
(2) The Project Roles;
(3) The Reasonable Delays that Affected Everyone (i.e. your aligned message);
(4) Your Role Control and Performance;
(5) The Unavoidable Consequences of Delay/Change

Show a Deference Plan

In order to know why one party should be assigned greater responsibility than another, jurors need to understand the flow of work and how one party must defer priority (and therefore responsibility) to another in the critical path. Use a demonstrative to create a visualization of when and how other parties’ responsibility supersedes yours at key moments in the timeline. Specifically, develop a visual hierarchy of the superseding parties’ obligations in the critical path, putting your work at the literal bottom of the heap – equating to the least responsibility.

Avoid (Overt) Finger-pointing

Put your house in order first, and then strategically shift focus only as necessary. If jurors perceive you as pointing fingers of blame, they will only assume that blame is justified and their job is to figure out how and where to assign it. The best strategy is to emphasize your positive case first by showing how you exercised appropriate control and performance within your role, met your obligations, and behaved reasonably, then, and only then, will you have the credibility to suggest any of the other parties (including the plaintiff) may have failed to uphold their responsibilities.
Dr. Kevin Boully has been active in litigation consulting since 2001. His doctorate in legal communication focuses on persuasion, small group influence, and jury decision making. Dr. Boully has led jury research and provided strategic advice to litigation counsel on a full range of cases. Dr. Boully has been Associate Editor and advisor to the American Society of Trial Consultants’ jury research and courtroom communication publication, The Jury Expert. Dr. Boully is an avid writer and published author including a book entitled Patently Persuasive for the American Bar Association Section of Intellectual Property. Outside of work, Kevin likes to fly-fish, climb mountains, spend time with his family, and watch the dogs hog the furniture.