

# Preparing for the Battlefield and Avoiding the War: Recently Released Construction Litigation Resources

by Marie Summerlin Hamm

As one court observed, “*except in the middle of a battlefield, nowhere must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences as in a huge construction project . . .*”<sup>1</sup> It is little wonder that in navigating the minefield of legal issues that litter the landscape of the construction project conflicts arise, negotiations fail, and both sides prepare for battle. Although Sun Tsu’s *Art of War* undoubtedly has some applicability, a few titles recently published by the ABA Forum on Construction Law should also find a place in your war room arsenal.

## ***Building the Construction Case: A Blueprint for Litigators***

This a practice-oriented guide is designed to aid the construction litigator from the initial client meeting to case conclusion. The pragmatic approach offered by authors George Burns and Michael Bosse reflects their decades as practitioners. Readers benefit from the type of insight that generally comes only with experience and expensive mistakes. Case examples illustrate the “general principles typically encountered at the crossroads of substantive construction law and litigation.” Topics covered include: understanding clients, interpreting contracts, litigation concepts including prosecuting and defending damage claims, discovery and document management, handling expert witnesses, as well as settlement, arbitration, and appeals. In essence, the authors emphasize practice and methodology over scholarship and theory and the result is a handy guide applicable to projects of all scales.

## ***Model Jury Instructions: Construction Litigation, 2d ed.***

With its clear presentation of elements and definitions, this insightfully edited and well-organized edition is a superb secondary resource that would be a helpful addition to any construction law practitioner’s bookshelf. This reorganized and expanded compilation begins with a series of instructions covering fundamental elements of contract formation, but tailored, as appropriate, to construction contract disputes. Because of its relevance to recovery where the requirements for contract formation have not been met, instructions addressing the doctrine of promissory estoppel are incorporated. Beyond the basics, included instructions cover contractor’s obligations before bidding, bidding, implied contract terms, changes and extra work, delay and disruption, breach of contract, breach of warranty, termination, defenses, damages, and payment. Virginia practitioners, of course, need to be mindful of jurisdictional distinctions and should consider perusing Kristan B. Burch’s recent article on the topic.<sup>2</sup>

## ***Discovery Deskbook for Construction Disputes, 2d ed.***

Completely revised and updated, the second edition of *Discovery Deskbook for Construction Disputes* addresses every aspect of the discovery process. Acknowledging that the typical construction dispute is seldom tried to verdict, the editors emphasize the critical role discovery plays not only in prevailing in litigation, but also in negotiating settlements. Authored by an impressive collection of noted practitioners, the title covers the discovery process from its inception, including pretrial, and

includes a plethora of practical tips. In addition to addressing interrogatories, depositions, and classic means of document discovery, an overview of electronic discovery is offered, along with suggestions for creating an effective e-discovery plan. Recognizing that construction projects increasingly span international borders, international discovery is explored. The book concludes with a chapter dedicated to discovery in arbitration proceedings.

## ***Green Building and the Construction Lawyer: A Practical Guide to Transactional and Litigation Issues***

The movement towards use of sustainable building methods and materials continues to gain momentum. What was once considered fad is now a foundational consideration as states and municipalities alike adopt green building and energy conservation standards and LEED becomes law. Though many industry watchers predicted an onslaught of litigation, few cases have been filed, with only a handful generating some sort of appellate decision. Written by preeminent experts, the book explores a limited but instructive body of case law and offers invaluable guidance to the lawyer tasked with advising clients about the pitfalls and possibilities inherent in green building projects. The book is divided into five parts. Part I begins with a broad description of green building practices and concludes with a case law survey co-authored by noted Virginia practitioner Christopher G. Hill. Part II focuses on contractual issues, with an emphasis on the importance of managing expectations,

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Institute, CAIR, Tahirih Justice Center, and, of course LHL and various access to justice programs.

All of this has been largely due to the increased financial stability of VACLE and reduced costs to the VLF.

As stated, it is my belief that 2016 will be remembered as a most significant year for the VLF, but also as a springboard for both VLF and VACLE. The future leadership is in place at the VLF with Pia Trigiani, Steve Busch, and Andy Morse set to enjoy and enlarge on the progress that we accomplished these past few years. David Bobzien will continue to contribute his steady hand and experience to lead VACLE. Both the VLF and VACLE will continue to benefit from the creativity, dedication, and thoughtful leadership of Ray White.

Lastly, I think we have continued the efforts of my predecessors in forging better cooperation and relations between the VSB and the VBA.

It has been a privilege and an honor to serve as president. When asked by Frank Thomas to do this, I first refused for fear of not knowing enough to lead the VLF. Now that I know I was right, I also know that when you have Capsalis, Meath, and Epps leading the way and Ray White making certain you keep the train on the tracks, ignorance is easily overcome.

Thank you again and remember, we have an obligation to do good as we do well and a contribution to the Virginia Law Foundation is a great way to achieve that goal.



**Irving M. Blank** is a partner at ParisBlank LLP and a former president of the Virginia State Bar.

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understanding exposure, and clearly allocating the risks. Part III explores insurance and bonding considerations. Part IV delves into the science of green and sustainable development practices and measures, specifically focusing on energy and water performance. The book concludes with an examination of litigation considerations for the project owner, the design professional, the prime contractor, as well as third-party claims.

As Sun Tsu declared, “The supreme art of war is to subdue the enemy without fighting.” Armed with the resources above, the construction law practitioner will be prepared to enter

or perhaps, more ideally, to avoid the courtroom.

Endnotes:

- 1 *Blake Const. Co., Inc. v. C. J. Coakley Co., Inc.*, 431 A.2d 569, 675 (D.C. 1981).
- 2 Kristan B. Burch, *The Effective Use of Jury Instructions in Construction Cases*, 64 VA. LAWYER 22 (2015).



**Marie Summerlin Hamm** is assistant director for collection development at Regent University Law Library, and an adjunct professor of law at the Regent University School of Law. She is a past president of the Virginia Association of Law Libraries.

## Got an Ethics Question?

The VSB Ethics Hotline is a confidential consultation service for members of the Virginia State Bar. Non-lawyers may submit only unauthorized practice of law questions. Questions can be submitted to the hotline by calling (804) 775-0564 or by clicking on the blue “E-mail Your Ethics Question” box on the Ethics Questions and Opinions web page at [www.vsb.org/site/regulation/ethics/](http://www.vsb.org/site/regulation/ethics/).