Introduction

*Lawyers know life practically. A bookish man should always have them to converse with.*

--Samuel Johnson

This book is a blueprint or road map for the construction litigator from the first client meeting to the end of a case. We offer the reader general principles that are unique or at least common at the crossroads of substantive construction law and litigation. Our emphasis is placed on practice, not theory, and more on methodology and approach than scholarship. We hope to show how clients, judges, arbitrators, and counsel actually live and breathe contracts, statutes and regulations, and case law precedent. Over decades of experience in this area of the law, we have observed recurrent patterns of behavior that now, in retrospect, seem obvious, but, alas, were not obvious when we, or our adversaries, first encountered them.

This book is not a general treatise on construction law or a manual on trial techniques. There are many books on the shelves that achieve those goals. Rather we select cases, contracts, and experiences that, though many arose in New England and New York, are representative and illustrative of fundamental patterns that all counsel must deal with in this area. For the veteran construction litigator we hope this book is a useful gathering of familiar concepts, and for the new construction litigator a set of new approaches that might offer less expensive lessons than the authors and their adversaries have endured over the years.

Our experience suggests the following guidelines:

- Counsel must simultaneously take words literally and be prepared for a non-literal meaning.
- Counsel must determine at the earliest point when, where, for or against whom, and how he or she MUST act, as opposed to MAY act.
• Counsel then must apply the correct analytical tools to the pros and cons of actions he or she MAY take, assuming first implementation of the mandatory tasks.

• Counsel should determine whether and to what extent contract terms mandate or permit the assertion of claims and defenses under the contract itself, as well as claims and defenses outside the contract.

• Lastly, counsel must focus on delivering the net best practical outcome for the client, and test the strength of this or that claim or defense both theoretically and economically.

Construction litigation forces counsel to be thorough, skeptical, and above all pragmatic; only then can counsel have a chance to enjoy the enthusiasm and confidence that come from good results efficiently attained.