**Construction and Design Law: Managing the Network of Interdependent Relationships**

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**Lesson 1: Construction Law: What and Why**

Practicing lawyers and design and construction industry professionals have long recognized construction law as a specialty. For far too long, however, law schools and legal educators have either treated construction law merely as an aspect of contract law or they have ignored the field altogether. Thus, we consider what construction law is and why students in law, construction science, construction management, engineering, architecture, and related programs should study construction law.

Today, construction law exists as an especially sophisticated and important area of legal practice. This stems primarily from two characteristics inherent in building design and construction activities. First, the construction industry is one of the most important segments of the economy. Second, building design and construction give rise to extraordinary financial and legal risks and implicate important public policy considerations.

To appreciate the evolution of construction law, read sections I-V (pages 207-231) of *Construction Law: Its Historical Origins and Its Twentieth Century Emergence As A Major Field of Modern American and International Legal Practice*, 75 Ark. L. Rev. 207 (2022), by Philip L. Bruner. This introduction to construction law by one of the country’s leading experts should help you begin to understand the legal challenges that the building design and construction industries present. Note especially how the intricacies of the construction process and the extensive network of interdependent relationships among participants in a construction project have influenced the development of a distinct and highly complex body of construction law.

To explore reasons for incorporating construction law into the law school curriculum and scholarly agendas read pages 319-334 (top of the page) of my own *Construction Law Apologetics*, 75 Ark. L. Rev. 319 (2022). Studying construction law not only helps prepare law students to represent clients in the construction industry, but it also introduces them to many skills lawyers use in representing clients in a wide range of complex transactions and disputes. Effective construction lawyers must learn to apply the principles they studied in most of the fundamental courses that make up the core of the law school curriculum, as well as concepts, principles, and practices relating to many other specialized areas of the law. While contractual arrangements typically give birth to the legal relationships involved, design and construction activities regularly implicate a much broader array of subjects and practice fields, including, torts, property, the uniform commercial code, consumer protection, real estate transactions, land use, professional liability, procedure, evidence, remedies, insurance, suretyship, legislation, regulation, agency relationships, litigation, alternative dispute resolution, legal ethics, and even criminal law.

Furthermore, construction law courses can help law schools and law faculty satisfy several of the most important demands they face today. In particular, law schools must graduate students who have learned much more than legal reasoning, case law analysis, and the basic principles and rules that foundational courses cover.

First, law school accreditation standards require law schools to teach skills that prepare students for practice. Several provisions in Chapter 3 of the ABA’s *2024-2025 Standards and Rules of Procedure for Approval of Law Schools* emphasize the importance of a practice orientation. Standard 301(a) requires every accredited school to “maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.” Under Standard 302, learning outcomes must extend beyond imparting knowledge of substantive and procedural law to encompass “professional skills needed for competent and ethical participation as a member of the legal profession.” Construction law courses present ideal opportunities for experiential education as contemplated by Standards 303 and 304. They can be especially effective as simulation courses, defined by Standard 304 as any course that “provides substantial experience not involving an actual client, that is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts and circumstances devised or adopted by a faculty member.” You can find the complete ABA accreditation standards at <https://www.americanbar.org/groups/legal_education/resources/standards/>.

Second, with the NextGen Bar Exam, presently under development, the National Conference of Bar Examiners proposes to tie bar admission to testing that emphasizes lawyering skills at a much deeper level than in the past. Detailed information on this new approach to a law licensing exam is available on the NCBE website (<https://www.ncbex.org/exams/nextgen>). The NCBE aims to “test a broad range of foundational lawyering skills, utilizing a focused set of clearly identified fundamental legal concepts and principles needed in today’s practice of law.” In addition to more traditional multiple-choice questions covering foundational concepts and principles, the exam will feature “integrated question sets” and “longer performance tasks.” Performance testing will cover client counseling and advising, legal writing and analysis, negotiation, dispute resolution, and client relationships. These bar exam developments encourage law professors to incorporate skills-based questions and exercises into their course assessments. Construction law courses present ideal opportunities to achieve many of the learning objectives the NextGen Bar Exam will test.

Finally, more than ever before, in bringing on new lawyers, today’s law firms and in-house legal departments engaged in commercial practices look for prospects who can demonstrate more than knowledge of legal principles. They seek applicants who understand the contexts in which businesses operate and legal relationships arise. Construction law courses can go well beyond teaching law because they can engage students in the kinds of problem-solving, risk management, relational situations, and dispute resolution challenges that lawyers representing commercial clients of all kinds continually face.

As an introduction to a few core aspects of substantive construction law, read *Is there a Doctrine in the House?*, Constr. Law. Summer 2020, at 5, by Marion T. Hack & G. William Quatman. This article provides a good summary of lessons from several leading construction industry cases familiar to experienced construction lawyers. Later in this course, you will encounter each of these doctrines, along with others, in greater depth. For now, learning about these doctrines will help jump start your grasp of construction law basics.

For Review and Discussion

Based on what you have learned so far, consider these questions. Recognize, however, that most of these involve topics you will explore in much greater detail in later lessons.

1. Due to the complex, interdependent relationships involved, are collaborative practices critical to the sound development of construction law and construction industry practices? How well are law and our legal system equipped to facilitate and implement such collaborations?
2. Why has the industry context been so important in the evolution of construction law?
3. In what ways can fundamental legal concepts and principles and foundational lawyering skills be adapted (contextualized) via a construction law course?
4. What are the most significant impacts for construction law that stem from the distinct, and sometimes conflicting, perspectives or mindsets of different participants in the design and construction processes?
5. What are the most compelling reasons for including construction law in the law school curriculum?
6. What are some ways in which construction lawyers help clients manage risks and relationships and solve problems effectively and efficiently?
7. Which of the doctrines that Hack and Quatman discuss are familiar to you based on your law school courses to date, and which are new to you? Which of the doctrines are the most highly contextual?
8. In what ways might lawyers use carefully crafted contract provisions to override certain of the doctrines that Hack and Quatman discuss?