



The Judge's Toolbox: Lessons Learned from the Bench in Construction Cases. An Interview with Hon. Nancy Holtz

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Hon. Nancy Holtz, of Boston, Massachusetts, graciously agreed to answer questions posed by our editor, Jayne Czik, for publication in *Under Construction*.

Jayne C.: *You were on the Superior Court in Massachusetts for fifteen years. During your time on the bench, did you handle many construction cases?*

Judge Holtz: Yes. We had many construction cases in the Superior Court. These cases covered all types of construction disputes: construction defect, delay damages, design defects, scope of work and change order disputes, terminations for cause and others. We also had worksite injuries of all kinds, including fatalities. But as you know, many of these cases get diverted out of the Court and are either mediated or arbitrated.

Jayne C.: *Why do you think that happens with construction cases?*

Judge Holtz: As in similar court systems in other states, the Massachusetts Superior Court is a court of general jurisdiction – it is not a specialized court. There is no construction litigation session. Which means that as a Superior Court judge, we preside over everything from first degree murder and other criminal trials, when assigned to a criminal session, to a wide variety of civil cases, when so assigned. The latter could range from medical malpractice claims, to reviews of decisions by a myriad of state and municipal agencies, to business disputes such as breach of contracts, and everything in between. Superior Court judges are expected to handle it all.

Jayne C.: *In other words, Superior Court judges are expected to preside over cases in which they do not necessarily possess any particular expertise?*

Judge Holtz: Exactly. Construction lawyers routinely find themselves before judges who are not particularly fluent in this area of the law, and who have incredibly busy sessions.

So there are a couple of things going on which create challenges for the construction lawyer: First, the judge is handling a case in which that judge will be faced with some fairly arcane issues of construction law. Second, the sessions – particularly in Boston where I sat most of the time - are all extremely busy. It is very difficult scheduling a construction case, which may take multiple weeks (or more) to try. Blocking off a large amount of time for the trial of a lengthy construction case is not an appealing prospect to a trial judge whose docket is crowded with cases. The result is that trials of construction cases often get scheduled, like medical malpractice cases, pretty far in the future -- which is not optimal. I am sure that construction attorneys do not relish the thought of telling the client that their case will not be heard for over a year.

Jayne C.: *I guess that explains, at least in part, why mediation and arbitration are popular ways to resolve these cases.*

Judge Holtz: Agreed. If a party to a construction case wants the case resolved quickly and economically, these are far better options than keeping the case in court. But, let's face it, not every case can go the route of mediation or arbitration. Some cases simply have to be tried.

Jayne C.: *For those cases that must be tried, could you give our readers some pointers?*

Judge Holtz: Sure. I know one thing that plagues these cases: the perception that these cases will be very dry and technical. When juries are overloaded with large numbers of exhibits, filled with numbers, they can quickly become overwhelmed and tune out. I would say, beyond the old adage of "keep it simple," is to "keep it visual." So transforming the mind-numbing stacks of exhibits into graphs, charts and other visuals can really help to hold the attention of the jury.

Jayne C.: *As you mentioned, very few states have specialized construction courts, which means construction litigators are often faced with judges who do not necessarily know much about construction law. Any ideas as to how trial lawyers can deal with this challenge?*

Judge Holtz: Good trial lawyers are good teachers of the law. It is helpful to find ways to educate the judge in the relevant areas of construction law without being overwhelming. I would say: avoid jargon and acronyms. No OCIPS and CCIPS! Spell it out. Also, don't refer to what you may consider to be bedrock principles of construction law completely unknown to the judge. For example, all judges know Miranda but few would know what you are talking about if you simply invoke, by case name, Spearin.

Jayne C.: *What about pretrial matters such as motions in limine? I know they are important in all cases; but as for construction cases, do they have any particular significance or value?*

Judge Holtz: I have always viewed motions in limine as an opportunity for trial lawyers. If you want to educate the judge on a particular legal principle of construction law, a motion in limine is a great mechanism. You can use an evidentiary issue as a delivery system for your desired teaching point. But the important thing is to present the motion in a targeted and concise fashion. For example, a motion which consists of little more than a cut and paste of a ten page expert answer to an interrogatory, and riddled with techno-speak, likely be given the same degree of attention used to cut-and-paste. Instead, make it easy for the judge to read and digest. Use a surgical strike, dead on point.

Jayne C.: *In your experience, did most construction cases get tried before a jury?*

Judge Holtz: Not necessarily. Frequently, the attorneys know that the facts might be dense and technical. The attorneys fear that it will be difficult to hold the attention of a jury. So, in my experience, it is not unusual to have the parties waive a jury and go with a bench trial.

Jayne C.: *Do you have any advice for lawyers trying a construction case jury waived?*

Judge Holtz: Yes. Judges are people too! That means, like jurors, judges can get confused, bored, and all the rest. I cannot tell you how many times I have seen the lawyers pack away their demonstrative evidence they were going to show a jury, thinking that a judge doesn't need to see it. Or the attorneys will agree to waive openings and/or closings since its "just" a bench trial. When trying jury waived, don't take the sizzle out of your case. Use your demonstrative evidence for the judge, just like you would with a jury. Paint your word picture through a powerful opening and/or closing for the judge, just like you would for a jury. Also, make it easy for the judge to rule in your favor: jury waived trials involve a lot of post-trial work for the judge. Again, this is a judge who, no doubt, will immediately have moved on after your trial to any number of other time consuming matters. Picture a judge trying to utilize some of what you have provided as the judge tries to address each of the elements of the claims. Has your post trial submission been packaged in an easy manner? Or are there long, unending paragraphs, combining, or worse yet, conflating claims and defenses? Do you really need to pepper your proposed rulings with seemingly infinite string citations? Is the judge going to have to go on a scavenger hunt to find information you have mentioned in your submission without clearly referencing the source? Make sure your proposed findings of fact and rulings of law are crisp, clear and helpful to the judge when it comes time to write the decision.

Jayne C.: *What about presenting witnesses – in either a jury or jury waived trial. Can you share any insights with our readers about ways to make the most of witnesses?*

Judge Holtz: Books have been written on this. For now, I will just offer some advice on presenting your own client on the stand, on direct. This particular advice holds true of any case, not just a construction case. Most judges will give attorneys a fair amount of leeway in the beginning of a direct examination – particularly that of a party. So take advantage of this opportunity: don't leave your witness bloodless by simply taking your witness through the paces regarding education, work history and so on. Have your client talk about civic or charitable work done in the community. Humanize your client. For example, find a way to work in if your witness owns a dog (I know it sounds silly, but let's face it – there are a lot of dog owners out there, including on juries). Make the jury like your client. As for construction cases in particular, when you are representing a company, you need to be cognizant of who you are presenting as the face of your client company. Follow the advice about humanizing this witness as you would any other. Beyond that, if possible, find ways to describe how this company - which will be painted as the Evil Empire by opposing counsel – is in reality a good member of the community. Do they sponsor a Little League team? Provide scholarships to local students? Each judge is different, but if you don't overdo it, you will usually be given enough latitude to evoke an image of your client company as a "good guy" company.

Jayne C.: *Any last thoughts? In particular, how can construction lawyers battle the perception that these cases are unduly cumbersome and overly technical?*

Judge Holtz: First, these cases, when handled properly, are very interesting and quite manageable. Help bolster this view by some preventative steps: When working with opposing counsel on exhibits and possible stipulations, always try for as much agreement as possible. It will streamline the case. As for those items you oppose, think long and hard if it is really worth the fight. Even if you are right, skirmishes over relatively harmless pieces of evidence are frustrating and exhausting to judges and juries alike. Make sure that your construction case is welcome in the session. This will happen if you can give the judge a realistic estimate as to the length of the trial and do everything possible by pre marking exhibits and/or entering into stipulations where appropriate to lessen the specter of a lengthy unwieldy proceeding. Further, as discussed above, make sure that the case is not a web of confusing terms and unknown legal principles. Lastly, given the vast amount of information to be distilled for an effective presentation during a construction trial, preparation is key. I would end with a wonderful quote from the famous trial lawyer, Louis Nizer, in which he observed that "preparation makes the dull lawyer bright, the bright lawyer brilliant and the brilliant lawyer steady."