

The newsletter of the ABA Forum on the Construction Industry

UNDER CONSTRUCTION

DON'T LEAVE HOME WITHOUT IT -

A Strategy for Complying with Interstate Architectural Practice Rules

By: [Christopher L. Noble, Esq.](#)

Each of the fifty states regulates the practice of architecture. All states prohibit non-licensees from calling themselves "architects" and nearly all prohibit the performance of architectural services (or the offer to render such performance) by non-licensees. By statute, each state defines the "practice of architecture" for the purpose of regulating it within the state's borders; establishes the requirements and standards under which a license may be obtained; identifies exceptions to the licensing requirements; and establishes penalties for violating the statutory prohibitions.

A few states, such as New Hampshire, do not refer to the business organizations (e.g., partnerships, corporations, LLC's) through which individual licensees may practice architecture. The great majority of the states, however, do have rules, restrictions, and, often, administrative procedures governing "firm practice" within the state. An architectural firm must comply not only with the requirements of its own state, but also with the requirements of any other state in which it performs or plans to perform services. Some states expressly permit the offer of services by an architect registered in another state, as long as the architect obtains a local license before actually performing any services within the state. Other states require an architect to obtain a license before making an offer of services

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NOMINATING COMMITTEE ANNOUNCED

Pursuant to Article 6 of the Bylaws, Allen Gibson has appointed the following people to serve on the Nominating Committee for the annual election of the Chair-Elect and three Governing Committee Members-at-Large:

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The election will be held on Friday, April 19, 2002, in San Francisco at the Forum's Town Hall Meeting during its Annual Meeting. Please forward your nominations or expressions of interest, along with a curriculum vitae including details of the nominee's activities in the Forum, the ABA and its Sections and Divisions, and in the legal profession generally, to Deborah S. Ballati by **January 14, 2002**.

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on the Construction Industry

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MESSAGE FROM THE

CHAIR

Deborah S. Ballati,
Chair-Elect

ELECT



As I begin writing this column, my first for *Under Construction* since being named Chair-

Elect of the Forum at the Annual Meeting last spring in New Orleans, I am in Denver with many of our members at the Fall meeting, [Getting it Right: How to Structure Complex Projects To Allocate Risks And Minimize Disputes](#). It is the first day of that program, and also exactly one month after the horrible events which occurred in New York and Washington, D.C. on September 11, 2001.

In thinking these past months about matters I might address in this first column, never did I imagine that it would be necessary or appropriate to start it, as we started our program in Denver, with a reference to those sad and world-changing events, with condolences to those who suffered through them, and with encouragement to all who now are dealing with the aftermath. As we all try to return to our normal lives, we still carry with us the images of destruction and rebuilding, pain and heroism, loss and perseverance which have filled our days since September 11. The tasks facing those who will rebuild after the devastation is cleared away are enormous; but the construction industry we serve has already begun to mobilize for challenge.

The Fall program in Denver was a tremendous success. While

focused largely on the process of initiating, developing and completing large, complex projects, it also provided much useful information to practitioners who routinely deal with smaller, less complex projects. For those who missed the program, I commend the program materials to you; an outline of those materials, and copies of the slides from the oral presentations, can be found on our website. You can also purchase the program materials online or by calling 800-285-2221 and using order number PC#557077.

During our Governing Committee meeting in Denver, we discussed what the Forum might do to support the relief, repair and rebuilding going on in New York, and we approved two motions in that regard. First, at the suggestion of one of our members whose offices are near the World Trade Center site, we agreed to supply a set of our program materials to a library or other repository in New York for use by those who might benefit from them. Second, we are exploring ways through the ABA to donate a portion of every registration fee from our Midwinter program in New York on January 24, 2002, to a relief fund to help those directly affected by the events on September 11. We hope to have record attendance at the Midwinter program, [Passing the Buck: Legal Limitations on Transferring Construction Risks](#), to show support for those who are working so hard to rebuild the economy and infrastructure in New York. This year, the Midwinter

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(e.g., a presentation or proposal after having been short-listed).

[The National Council of Architectural Registration Boards \(the "NCARB"\)](#), a private organization to which all of the state registration boards belong, has imposed some order on the potential chaos of state regulation. The NCARB has, for instance, standardized the written examination that is a precondition to initial registration in every state, and has established commonly recognized procedures for reciprocal licensing of individual architects. The NCARB has also published [Legislative Guidelines](#) that contain suggested statutory approaches to other regulatory issues, such as firm practice. The [Legislative Guidelines](#), the addresses and phone numbers of state registration boards, and summary information on state requirements for firm practice are on the NCARB web site, www.ncarb.org. While some states have adopted the NCARB firm practice standards, most states impose their own idiosyncratic rules on the practice of architecture by any legal entity other than an individual. The wide variation in such rules creates a strategic challenge for any architectural firm contemplating or conducting an interstate practice.

In general, every architectural firm must identify, analyze, and comply with the provisions of applicable state laws and regulations that address the following firm practice issues:

- **Definition of practice.** *Is what the firm proposes to do in the state generally defined as the practice of architecture, or does it fall under an exception?* (Even

if the services in question fall outside the definition or within an exception, a nonregistrant cannot call himself an "architect" in connection with such services.)

- **Permitted entities.** *Is the firm's legal form expressly permitted or contemplated by the applicable state statute?* New York, for example, permits practice by professional corporations but not business corporations (except for some grandfathered firms). [N.Y. Education Law §7307\(4\)](#). Many state statutes do not yet mention practice by limited liability companies. Some states permit practice by legal entities, such as corporations, only if their governing documents (e.g., articles of organization) contain specified provisions.
- **Demographic rules.** Do the right people within the firm have the right licenses? Many states require licensees to hold certain defined positions within the firm. This is the area of greatest variation between and among states. For firms organized as corporations, for instance, the applicable state law may require that a certain number or percentage of stockholders, directors, and/or officers be registered as architects (or, sometimes, as engineers or landscape architects) in the state in question (or, sometimes, in other states). As an illustration of this principle, see the [NCARB Legislative Guidelines, §VA](#).

Some states, such as Massachusetts, do not care if the stockholders or directors of an architectural firm are registered anywhere in the country, as long

as every contract is signed by an officer who is registered in Massachusetts. [Mass. Gen. Laws ch.112, §606\(8\)](#). California only requires that an employee of the firm be registered in California. [Cal. Bus. & Prof'l Code §5580](#). Nevada, on the other hand, requires that all of the stockholders, directors, and officers of a corporation practicing architecture in Nevada be registered as architects in Nevada. [Nev. Rev. Stat. §623.350](#)

- **Permitted Names.** *Can the firm operate in its own name, with its own stationery, etc.?* Some states regulate the name through which a firm can practice architecture (focusing, for example, on whether or not the named principals are registered in that state). Other states do not care about firm names as long as any firm that includes the word

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Message

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program will include both panel presentations and mini-debates, which will explore policies and competing interests behind the limitations on transfer of construction risks. This program promises to be both interesting and informative.

As always, the Forum continues to look for ways to serve its members better through our programs, publications and projects. Tell us about topics you would like us to address in the future; our success depends on input from our members. 

[Deborah Ballati](#) is a partner with [Farella, Braun & Martel, LLP](#) in [San Francisco, CA](#).

WHAT'S NEW AT THE AMERICAN INSTITUTE OF ARCHITECTS IN CONTRACT DOCUMENTS?

The [AIA Contract Documents](#) program may be more than 100 years old, but it's getting an exciting new look. My primary goal as the new Managing Director & Counsel for the program is to make the program more user-friendly, customer-driven and market-based in the 21st century.

In my first six months on the job, everything about the documents program has been, and will continue to be, reevaluated with an eye toward the future. This includes changes in how the AIA Contract Documents Committee develops content, from the drafting of the legal language to the forging of a consensus interpretation of that language among affected industry groups. The ongoing reevaluation also includes updating copyright and licensing policies, improving the Contract Documents Electronic Format software, and making a number of support documents available for free distribution at the AIA's website.

WHAT'S HAPPENING NOW?

We are implementing changes in the way forms and agreements are produced by the AIA Contract Documents Committee. Shifting away from paper production and toward remote, electronic drafting, the process should become more efficient and more responsive to market needs. The drafting change has the collateral benefit of directing the AIA's focus away from the documents as physical "things" and toward what the AIA does best—producing intellectual property that incorporates industry knowledge and legal precedent into the

content of the documents. Copyright and licensing policies for use of AIA Contract Documents are also being updated and expanded to keep up with technology and industry changes, thereby better responding to customers' varied delivery needs.

We are also working on improvements to our Contract Documents software, Electronic Format 3.0. If you're an EF 3.0 user, you may obtain the latest upgrades in Service Release 2 by downloading it from our website at www.aia.org/documents.

To make it easier for subscribers to use and customize AIA Contract Documents, we offer free guides and commentaries on how best to use the documents. At the AIA website, you will find downloadable PDF files of the following AIA Documents:

- [A511, Guide for Supplementary Conditions](#)
- [B511, Guide for Amendments to AIA Owner-Architect Agreements](#)
- [A201-1997 Commentary](#)
- [B141-1997 Commentary](#)
- [A201 Comparison of 1987 and 1997 Editions](#)
- [B141 Comparison of 1987 and 1997 Editions](#)
- [G612-2001, Owner's Instructions to the Architect.](#)

WHAT'S IN STORE?

Before the end of the year, AIA will publish several new documents. You will be able to obtain them in print version, if you are an EF 3.0

user, to download them from our AIA website. Included in this release are ten new or revised G Series Documents for construction administration and one new contract, the A114-2001, *Standard Form of Agreement Between Owner and Contractor where the Basis for Payment is the Cost of the Work Plus a Fee Without a Guaranteed Maximum Price.*

Next year, AIA is working on several new or updated families of documents, including Interiors, International, Design-Build and Construction Management. An extra effort is also being made to produce several of the Scope of Services documents to accompany the B141-1997, *Standard Form of Agreement Between Owner and Architect with Standard Form of Architect's Services.*

I am looking forward to talking with members in every Division of the Construction Forum. I would like to hear from you. If you're a Division Chair or member, contact me at arackas@aia.org. I would appreciate hearing your comments and suggestions about how we can work together to benefit the construction industry now and in the future. 

Ann Rackas, Esq. is Managing Director & Counsel, [AIA Contract Documents for the American Institute of Architects in Washington, DC](#)

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"Architect" in its name meets the state's demographic requirements. California permits a wide variety of firm names, but requires that firms identify individual licensees in letterheads, title blocks, and the like. [Cal. Code Regs. Tit. 16, §§134-135.](#)

- **Administrative Requirements.**

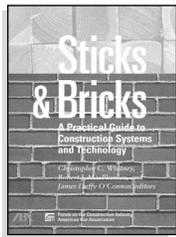
Does the firm have to take any specific administrative steps in order to practice in the state? Most states require compliance with their firm practice requirements, but no express approval or certification of compliance by state regulatory authorities. Some require the issuance of an

approval or certificate of authority as a precondition to firm practice. The applications for such approvals or certificates may be lengthy and complex, and approval periods may be long. As a precondition to receiving licensing board approval, some states require the firm to qualify to do business in the state by obtaining a Certificate of Authority from the state's Secretary of State. In some states, the individual licensing process and the firm approval process may proceed concurrently. In others, the former must precede the latter.

- **Plan Stamping Rules.** *Who must be in responsible charge of the services, and sign and seal drawings and other documents?* Even if a particular state permits a firm to practice architecture, it still has to pay attention to the registration status of the individuals within the firm who are performing or supervising the services. If, for instance, Smith & Jones Associates, Inc. is permitted to practice because Smith is licensed, Jones also has to become licensed if she is the principal in charge of a project in the state, particularly if the

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Two New Books from the ABA FORUM ON THE CONSTRUCTION INDUSTRY

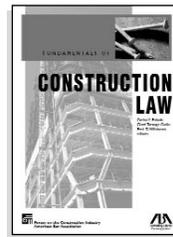


[Sticks & Bricks: A Practical Guide to Construction Systems and Technology](#)

[Christopher C. Whitney](#), [Robert J. MacPherson](#), and [James Duffy O'Connor](#), editors

Sticks and Bricks, based on the successful series of programs presented by the ABA's Forum on the Construction Industry, brings together in one volume the expertise of nationally recognized engineers, architects and contractors who explain in clear language their areas of building technology. No matter what your level of expertise, this guide pulls together the basics of constructing a building and presents it in a practical format.

2001, 306 pages, 7 x 10, Paper
Product Code: 5570075
Regular Price: \$144.95
Construction Forum Member Price: \$119.95



[Fundamentals of Construction Law](#)

[Carina Y. Enhada](#), [Cheri Turnage Gatlin](#), [Fred D. Wilshusen](#), editors

This book is written by widely regarded attorneys practicing in the field of construction law, and

is packed with thirteen chapters of useful information and insights. A "must have" for any lawyer tackling the area of construction law. This book should be of particular interest to lawyers new to the area of construction law, and will definitely assist any lawyer in becoming more efficient and cost effective in prosecuting or defending construction disputes.

2001, 381 pages, 6 X 9, Paper
Product Code: 5570078
Regular Price: \$129.95
Construction Forum Member Price: \$109.95

To order - Phone: 1-800-285-2221 Fax: 1-312-988-5568
E-Mail: service@abanet.org; Online: www.ababooks.org

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services in question require the signing and/or sealing of drawings and specifications. (Florida, for instance, has detailed rules and procedures under which a licensee can sign and seal documents produced within the office in which the licensee works, or in another office of the same or another firm. [Fla. Stat. Chs. 481.221\(4\) and \(5\).](#))

Of all the above rules, requirements, and standards, the most restrictive and onerous likely are to be the demographic rules governing firm ownership. A firm can always give a licensee the title of vice president if that is all that is required. A firm can often form a wholly owned subsidiary that has the requisite number of registered directors if that is all that is required. But, for instance, if more than 50% of the firm's stock is not owned by Ohio registrants, or more than 50% of the individual owners of such stock are not Ohio registrants, then neither the firm nor a wholly owned subsidiary of the firm will be permitted to practice architecture in Ohio. [Ohio Rev. Code §4703.18\(J\).](#)

What can a firm do under such circumstances? The most common solution, formally or informally sanctioned in many states with restrictive firm practice requirements, is for an individual principal or senior employee of the firm who is registered in the state in question to enter into the contract for architectural services, and to assign to the firm all of the individual's rights and obligations under that contract. The Owner may require the firm to provide a financial guarantee of the individual's contractual obligations. The firm may also be required to operate with stationery, title blocks, and other documentation that omits reference to its actual legal form (e.g., Smith & Jones Associates [without an "Inc."]). Additionally, the firm and the individual would be well advised to enter into an agreement dealing with matters such as the assignment and assumption of rights and duties, indemnification of the individual by the firm, copyright in drawings and other documents, and the maintenance of professional liability insurance covering the individual and the firm.

Are there potential problems with this "fronting" strategy? Of course. The firm must reach a comfort level with regard to the permissibility of the strategy in the particular state. The individual must reach a comfort level with the increased liability assumed by executing a contract in her own name, even with an indemnity from her employer. State and federal tax complications must be considered and minimized through careful documentation. The potential discontinuity between the parties to first tier (owner-architect) and second tier (architect-consultant) agreements must be managed. Finally, a contingency plan must be made in anticipation of the possible death, disability, or termination of employment of the individual.

These issues intensify when firms from different states form design teams to provide services for major projects. There may be a separate design architect and production architect, there may be separate architects for different components of the project, or there may be two or more architects who are jointly and severally responsible, as joint venturers, for all of the architectural services for the project. Compliance with firm practice rules must be coordinated with liability and risk management concerns, with the business terms of the parties' relationship, and with the needs and requirements of the project owner. In these circumstances one is less likely to be asked the otherwise common question, "Why do architects need lawyers, anyway?" 

Chris Noble is a member in Hill & Barlow, Boston, MA, and chairs Division 2 of the Forum.

The Forum on the Construction Industry

CALENDAR OF MEETINGS

Forum on Construction/TIPS Joint Midwinter Meeting

January 24, 2002

The Waldorf-Astoria Hotel
New York, NY

Forum on Construction Annual Meeting

April 18-19, 2002

The Sheraton Palace
San Francisco, CA

Forum on Construction Fall Meeting

October 3-4, 2002

The Hilton
Minneapolis, MN

*See you
there!*

Announcement Corner

20 YEAR MEMBERS

The Forum is pleased to honor the following members who are celebrating their twentieth year with the Forum:

Emanuel F Abbate, Camarillo CA
Philip Otis Allen, Lakeland FL
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K Gerard Amadio, Philadelphia PA
Daniel E Angius, Walnut Creek CA
L Michael Ashbrook, Monroe LA
Leland Eugene Backus, Las Vegas NV
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Harvey C Barragar, Portland OR
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Season Pass Program

The Forum announces its new Season Pass Program. Here is how it works. A season pass entitles you or someone from your firm to attend all three Forum programs held in 2002. One pass (3 programs) costs \$1,305 (a savings of 10% or \$145). Two passes (6 programs) cost \$2,320 (a savings of 20% or \$580). Three passes (9 programs) cost \$2,610 (a savings of 40% or \$1,740). To order, send your name, firm name, address, and phone number or e-mail address, along with number of passes desired and payment (or your credit card information) by fax to 312-988-5677 or by mail to the ABA Forum on the Construction Industry, Attention: [Kate Marvich](#), 750 N. Lake Shore Dr., Chicago, IL 60611.



Don't Miss the Next Forum Meeting!

WHEN: JANUARY 24, 2002
WHERE: The Waldorf-Astoria Hotel, New York, NY
TITLE: [Passing the Buck: Legal Limitations on Transferring Construction Risks](#)

TELL ME MORE: Sessions include:

- Restrictions on Risk Allocation for Design Inadequacies and Changes in the Law
- Restrictions on Risk Allocation for Unexpected Conditions
- Time of Performance - Restrictions on Risk Allocation
- Restrictions on Allocation of Insurable Risks
- Limitations on Allocating Risks of Financial Ability to Perform

To register for the program call the American Bar Association at 312-988-5666 to request a brochure or download a registration form from the Forum's website at www.abanet.org/forums/construction/html/registration.html.

A large part of construction contracting involves risk allocation and the transfer of construction risks. This year, the ABA's Forum on the Construction Industry and the TIPS Fidelity & Surety Law Committee will present a joint program focusing on common law and statutory restrictions on risk allocation in the areas of contract scope, time of performance, bodily injury and property damage, and financial ability to perform. We invite you to attend this program at the beautiful Waldorf-Astoria Hotel in New York City.



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UNDERCONSTRUCTION

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