

University of Michigan Journal of Law Reform

Volume 6

1973

The Roles of Architect and Contractor in Construction Management

John E. Lehman

University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Construction Law Commons](#), [Legislation Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

John E. Lehman, *The Roles of Architect and Contractor in Construction Management*, 6 U. MICH. J. L. REFORM 447 (1973).

Available at: <https://repository.law.umich.edu/mjlr/vol6/iss2/8>

This Note is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mLaw.repository@umich.edu.

THE ROLES OF ARCHITECT AND CONTRACTOR IN CONSTRUCTION MANAGEMENT

For the architect and building contractor the most significant aspect of modern commercial construction may not be the design but rather the management, consisting of coordination and administration, of large-scale building projects. Despite the importance of construction management, especially in mammoth and complex projects such as New York's World Trade Center, legislatures have been slow to respond to the needs and practices of the construction industry. Although the skills involved indicate that the role of construction manager is more appropriately assumed by a contractor, the laws of several states provide that only a licensed architect can take responsible charge of construction. Legislatures should recognize that the performance of construction management may include the assumption of some obligations traditionally assigned by law to the exclusive domain of the architect. Moreover, it would appear from a cursory view of actual practices that professionals other than architects are acting in the role of construction manager. If legislatures are concerned with the actual needs and practices of the architectural profession, and their enacting of licensing statutes indicates that such is the case, legislatures should clarify the various licensing statutes to take account of these adjustments in the architect's role in construction.

I. TRADITIONAL DIVISION OF RESPONSIBILITIES

A. Ranges of Responsibilities

An architect is one whose profession it is to devise plans and draw up specifications for buildings and to superintend their construction.¹ The historical role of the architect includes all phases

¹ BLACK'S LAW DICTIONARY 136 (4th ed. rev. 1968), citing *Payne v. De Vaughn*, 77 Cal. App. 399, 246 P. 1069, 1071 (1926); *Stephens County v. J. N. McCammon, Inc.*, 122 Tex. 148, 52 S.W.2d 53 (1932); *Sugarman Contracting Co. v. Phoenix Finance System*, 243 N.W. 369, 370 (Iowa 1932).

It is sometimes said that the mere supervision of construction of a building is not, of itself, the practice of architecture within the scope of licensing statutes. Annot., 82 A.L.R. 1013 (1962); *Gastaldi v. Reuter*, 345 Ill. App. 510, 104 N.E.2d 115, 117 (1952).

of building, including drafting, engineering, and construction.² The architect was the master builder who blended aesthetics, function, space, and materials to form the finished product.³ During the European Renaissance it became clear that demands of time and building complexity would compel the architect to concentrate on design and planning, allowing him only supervisory control of the construction process. The actual erection of a physical structure became the province of the builder whose specialty emerged as a distinct role.⁴ In later centuries, additional inputs from professionals such as engineers and urban planners became necessary. Because the sociological, technological, and financial aspects of building have become increasingly complex, the practice of architecture today requires a knowledge of ecology, economics, physical science, and business management.⁵

While viewing the contractor as a businessman who takes risks and works for profit,⁶ the architect considers himself the professional whose presence is the unifying thread in a project from

McDowell v. City of Long Beach, 12 Cal. App. 2d 634, 55 P.2d 934 (1936). Therefore it is arguable that responsibility for construction supervision may legally be given to someone not a licensed architect. The authority cited above, however, indicates that the term supervision is narrowly construed so as to encompass merely the practical construction superintendence by the builder. A builder is able to pursue customary construction activities without having to be licensed as an architect, but his construction work is subject to the approval of a licensed architect. Thus the statute of no state requires the day-to-day supervisor of building construction to be licensed as an architect. At the same time statutes are not generally interpreted to permit one other than an architect to have *overall* charge of construction. See *Dorsk v. Spivack*, 107 Cal. App. 206, 236 P.2d 840 (1951); *Gastaldi v. Reutermann*, 345 Ill. App. 510, 104 N.E.2d 115, 117 (1952); *Clement S. Crystal Inc. v. Denberg*, 237 N.Y.S.2d 102, 105 (Sup. Ct. 1962); *Wahlstrom v. Hill*, 213 Wis. 533, 252 N.W. 339 (1934). A few licensing statutes are less broad in scope and would permit the contractor to assume broader construction responsibility. For an interpretation of such a statute, see *Holiday Homes v. Briley*, 122 A.2d 229 (D.C. Mun. App. 1956); *Dunn v. Finlayson*, 104 A.2d 830 (D.C. Mun. App. 1954). This aspect of statutory interpretation is developed in part III *infra*.

² AMERICAN INSTITUTE OF ARCHITECTS, *ARCHITECT'S HANDBOOK OF PROFESSIONAL PRACTICE* [hereinafter cited as *HANDBOOK*] ch. 4, at 3 (Mar., 1972 ed.).

³ *Id.*

⁴ The Architect began to concentrate in the area of design and planning, enjoyment, and admiration and while retaining control of the construction processes, he began to delegate responsibility to others for the day-to-day functions of actual construction. As this separation widened, specialties became more clearly defined: the Architect retained responsibility for the development of the design, both in functional and esthetic terms, through drawings and specifications that would define the arrangement of spaces and the physical appearance of the structure, and the builder—our modern contractor—became responsible for translating these concepts of the Architect into that final physical structure for use, enjoyment, and admiration. The building itself was still the end product of the Architect's skill.

Id.

⁵ *Id.*

⁶ Lammers, *Construction Manager: More Than a Hard-Hat Job*, 55 AM. INST. OF ARCHITECTS J., May, 1971, at 31-32; W. SADLER, *LEGAL ASPECTS OF CONSTRUCTION* 163-64 (1959).

design to completion.⁷ During a project, in his capacity as the trained professional whose talent enables him to see the construction project in its totality,⁸ the architect arbitrates various disputes between the contractor and the owner regarding methods and materials, checks progress, inspects work, and establishes standards.⁹

The contract between the owner of the project and the architect typically makes the architect the agent of the owner and defines the specific responsibilities of the architect during the design and construction of a given project.¹⁰ This contract, which is usually based upon standard forms prepared by the American Institute of Architects (AIA),¹¹ specifies that the architect shall administer as well as prepare the construction documents, which include the plans and specifications.¹² The terms of the standard contract make the architect responsible for construction contract administration while at the same time giving the contractor responsibility for "construction superintendence."¹³

The records kept by the architect form the basis of his administration of the construction contract. Examples of these records include the field reports, which are registers of the architect's actions and observations, change orders, approvals of shop drawings, interpretations of the plans and specifications, and certifica-

⁷ W. FOXHALL, PROFESSIONAL CONSTRUCTION MANAGEMENT AND PROJECT ADMINISTRATION 2 (1972); HANDBOOK, *supra* note 2, ch. 2, at 3 (Sept., 1969 ed.).

⁸ HANDBOOK, *supra* note 2, ch. 2, at 3.

⁹ American Institute of Architects, General Conditions of the Contract for Construction, A.I.A. Doc. A201, in HANDBOOK, *supra* note 2 (12th ed. 1970); HANDBOOK, *supra* note 2, ch. 18, at 3 (Sept., 1969 ed.).

¹⁰ Miller, *The Liability of the Architect in His Supervisory Function*, 1 FORUM, Jan., 1966, at 29; J. SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS 55 (1970).

¹¹ American Institute of Architects, Owner-Architect Agreement, A.I.A. Doc. B131, in HANDBOOK, *supra* note 2, (Apr., 1970 ed.), at 3-4; American Institute of Architects, General Conditions of the Contract for Construction, A.I.A. Doc. A201, in HANDBOOK, *supra* note 2, at 5-6.

¹² American Institute of Architects, Owner-Architect Agreement, A.I.A. Doc. B131, in HANDBOOK, *supra* note 2, at 3-4; American Institute of Architects, General Conditions of the Contract for Construction, A.I.A. Doc. A201, in HANDBOOK, *supra* note 2, at 5-6.

¹³ HANDBOOK, *supra* note 2, ch. 18, at 3; American Institute of Architects, Owner-Architect Agreement, A.I.A. Doc. B131, in HANDBOOK, *supra* note 2, (Apr., 1970 ed.), at 3-4; American Institute of Architects, General Conditions of the Contract for Construction, A.I.A. Doc. A201, in HANDBOOK, *supra* note 2, at 5-6. The architect, in addition to preparing the drawings and specifications, follows through by making periodic visits to check on progress and to see that work is generally proceeding in accordance with the construction documents. As the owner's agent, he endeavors to guard the owner against deficiencies in the contractor's work, and he has authority to reject work which he feels fails to conform to the contract documents. The architect's function is one of standard-setting and enforcement; and, by general and periodic inspections, as distinguished from the continuous personal supervision by the contractor of the construction details, he keeps the owner informed of the status of the work. In performing contract administration duties, however, the architect is not required to make extensive inspections

tions for payment and substantial completion of the project.¹⁴ This procedure serves as a check on the contractor's activities relating to the excavation, electrical, concrete, frame, finishing, and closing (doors, windows, roofing) aspects of his work.

The function of the contractor, as construction superintendent, is to construct a building according to the architect's plans and specifications.¹⁵ The standard contractor-owner document defines the relationship between these two parties, making the contractor responsible for providing materials and labor necessary to complete the project.¹⁶ By coordination of the subcontractors and the sequences of operation on a construction site, the contractor endeavors to assure that the requirements of the architect's plans and specifications are met with accuracy, speed, and efficiency.¹⁷ Such facets as discipline among the workers and safety precautions are also included in his superintendence responsibility.¹⁸

The standards set by the AIA require that the architect, as the agent of the owner, represent him on the project, assuring its progress according to the construction documents and serving as guarantor of its general integrity by guarding against deficiencies

into the quality and quantity of work nor is he responsible for the contractor's failure to carry out the construction work in accordance with the contract documents. These latter responsibilities are the contractor's under his duty to superintend construction. *See generally* American Institute of Architects, General Conditions of the Contract for Construction, A.I.A. Doc. A201, in *HANDBOOK, supra* note 2. *See also* note 21 *infra*.

¹⁴ *HANDBOOK, supra* note 2, ch. 18, at 5.

¹⁵ *Id.* at 3.

¹⁶ American Institute of Architects, Owner-Contractor Agreement, A.I.A. Doc. A101, in *HANDBOOK, supra* note 2 (Sept., 1967 ed.); American Institute of Architects, General Conditions of the Contract for Construction, A.I.A. Doc. A201, in *HANDBOOK, supra* note 2, at 5-9. The contractor purchases building materials and equipment and employs mechanics and laborers to accomplish the job as efficiently as possible. W. SADLER, *supra* note 6, at 158-59.

¹⁷ *HANDBOOK, supra* note 2, ch. 18, at 3.

¹⁸ *Id.* at 9. If a scaffold without a proper railing leads to an injury, it will generally be considered the fault of the contractor, unless the architect specifically involves himself in the activity. Construction techniques, such as the manner of support for a floor or ceiling, are the contractor's responsibility. Furthermore,

[f]ailures may . . . result from faulty design, materials, or workmanship. If the design can be proven to be sound, the Contractor is generally liable. For instance, among the most common defects in building construction are leaks through roofs or walls, which are usually due to faulty or improper workmanship. It is obviously impossible for Contractor's, Architect's or Owner's representatives to make sure that every brick is laid properly. It is generally up to the Contractor to stop any leaks which do not result from improper design. Settlement failures may be of somewhat different nature, however. In such cases the design is frequently assumed to be at fault because it is impracticable to discover whether the cause is faulty design or failure to follow the design.

HANDBOOK, supra note 2, ch. 19, at 9 (Sept., 1969 ed.). Judges have sometimes strained to find the architect liable when a faulty construction technique has led to injury, often citing inadequate inspection by the architect. *See generally* note 27 *infra*.

in the contractor's performance.¹⁹ Because of the fact that it is in the contractor's interest to complete the project at as low a cost as possible, it is necessary to employ a system whereby a contractor does not give final approval to his own work. This would appear to be the policy behind the AIA standards and the typical statute regulating the practice of architecture. Thus in the interest of public safety, an architect inspects the construction work to insure that it conforms to high standards.²⁰ Concurrently, however, the architect disclaims all responsibility for the means and methods of the contractor, leaving to him the day-to-day supervision defined as construction superintendence responsibility.²¹ Because of this division of responsibility and because of the general contractor's expertise in construction techniques and procedures, it would be possible for some contract administration responsibility, such as routine inspections and reports, traditionally in the architect's province, to be discharged by a general contractor acting in a construction manager's role. A limited transfer of administrative functions to a general contractor which are akin to those presently performed by him could occur without jeopardizing safety or quality. This adjustment would, however, require some alteration in the nature of the obligations currently allocable by law to the architect and general contractor.

B. Ranges of Legal Liabilities

Implicit in both the standard contract documents and the language of the architectural licensing statutes²² is the notion that the profession of architecture and the business of building construc-

¹⁹ American Institute of Architects, Owner-Architect Agreement, A.I.A. Doc. B131, in HANDBOOK, *supra* note 2, at 3-4; American Institute of Architects, General Conditions of the Contract for Construction, A.I.A. Doc. A201, in HANDBOOK, *supra* note 2, at 5-6; HANDBOOK, *supra* note 2, ch. 18, at 3.

²⁰ W. SADLER, *supra* note 6, at 163-64.

²¹ HANDBOOK, *supra* note 2, ch. 18, at 3; American Institute of Architects, Owner-Contractor Agreement, A.I.A. Doc. A101, in HANDBOOK, *supra* note 2; American Institute of Architects, Owner-Architect Agreement, A.I.A. Doc. B131, in HANDBOOK, *supra* note 2, at 3-4; N. WALKER AND T. ROHDENBURG, LEGAL PITFALLS IN ARCHITECTURE, ENGINEERING, AND BUILDING CONSTRUCTION 45-46 (1968).

The actual wording of the General Conditions of the Contract for Construction does not draw a precise distinction between the duties of the architect and those of the contractor regarding adherence to the contract documents. The architect is not responsible "for the Contractor's failure to carry out the Work in accordance with the Contract Documents." Yet, by the terms of the General Conditions, the architect is to visit the site periodically "to determine in general if the Work is proceeding in accordance with the Contract Documents." Concurrently, "[t]he Contractor warrants to the Owner and the Architect that . . . all Work will be . . . in conformance with the Contract Documents." American Institute of Architects, General Conditions of the Contract for Construction, A.I.A. Doc. A201, in HANDBOOK, *supra* note 2, at 5-7.

²² The statutes are discussed and cited in noted 73-77 and accompanying text *infra*.

tion must be distinguished. Each has special functions and responsibilities which complement the other.²³ The architect as the agent of the owner is responsible for the artistic integrity of the project, and the builder assures efficiency through his skill as to the means and methods of construction. In terms of legal consequences, the architect may be held liable for a design defect or for negligent administration of the contract documents.²⁴ The scope of the architect's professional liability has expanded to include liability to third parties, notwithstanding the lack of privity of contract, for injuries resulting from construction defects which are considered to be caused by his negligence as construction contract administrator.²⁵ The theory that the legal responsibility of the architect should be commensurate with his control of the construction project²⁶ has resulted in this expansion of the architect's liability to third parties.²⁷ The demands and complexity of modern building, however, might well dictate a more responsible role in construction for a general contractor willing and able to assume the role of construction manager.²⁸ As the traditional roles of contractor and architect change in response to the needs of the construction industry and society,²⁹ legal definitions should reflect these changes. If the architect maintains his construction role despite the view held by some experts that most architects are not capable of effective construction management,³⁰ his legal responsibility will remain undiminished. Yet a tempering of the archi-

²³ W. SADLER, *supra* note 6, at 163-64.

²⁴ J. SWEET, *supra* note 10, at 742; *see* notes 11-18 and accompanying text *supra*.

²⁵ J. SWEET, *supra* note 10, at 740-41; *see* notes 11-18 and accompanying text *supra*.

²⁶ "The power of the architect to stop the work alone is tantamount to a power of economic life or death over the contractor. It is only just that such authority, exercised in such a relationship, carry commensurate legal responsibility." *United States v. Rogers & Rogers*, 161 F. Supp. 132, 136 (S.D. Cal. 1958).

²⁷ In *Miller v. DeWitt*, 37 Ill. 2d 273, 226 N.E.2d 630 (1967), an action brought by employees of the contractor against the architect for construction injuries, the court held the architect liable on the theory that his supervisory responsibility subjected him to the same duties as the contractor. In *Clemens v. Benzinger*, 211 App. Div. 586, 207 N.Y.S. 539 (1925), an action for wrongful death against the contractor and architect, the architect was found negligent. The court stated that the finding of negligence could have been based upon three failures, one of them being the faulty performance of his supervisory duties, for the architect failed to notify the contractor of unhardened cement after directing activities which required solid cement for support. *Id.* at 590, 207 N.Y.S. at 543. One commentator has written in regard to the *Clemens* case: "The real basis for the finding against the architect in this case appears to be his negligent approval of an improper type of bolt and his lack of proper supervision in allowing the use of the bolt in unhardened cement." *Miller*, *supra* note 10, at 34. *See also* *United States v. Rogers & Rogers*, 161 F. Supp. 132 (S.D. Cal. 1958), in which the court denied an architect's motion for summary judgment, holding that there was an issue of fact as to whether the architect who was responsible for the supervision of the work had been negligent in his supervisory capacity, even though there was no privity of contract between the architect and prime contractor.

²⁸ *See* discussion in part II *infra*.

²⁹ HANDBOOK, *supra* note 2, ch. 4, at 3.

³⁰ J. SWEET, *supra* note 10, at 122.

tect's construction function, at least as to some technical aspects, might well lead to a parallel reduction in his legal liability to third parties. This reduced responsibility could only follow a modification of the pervasive view that contractors must be monitored carefully to insure proper performance.³¹

II. CONSTRUCTION MANAGEMENT

The construction manager is a professional manager who works for a fee, as distinguished from the general contractor who makes entrepreneurial profits on a construction project. The construction manager's duties vary according to the needs of a particular project, but they may consist of any combination of the following services, among others: scheduling and coordinating work to be performed by separate subcontractors; maintaining a supervisory inspection staff at the job site; observing the work in progress to assure compliance with the architect's specifications; revising estimates as construction proceeds and incorporating changes in the building plans; assuring that the work complies with both the schedule and the budget; expediting a prompt cash flow to the contractors; and maintaining cost accounting records.³² The skills which may be required on a project include computer programming and analysis, the ability to estimate the amount of work necessary to complete a project, the knowledge necessary to supervise the subcontractors, design comprehension, and an understanding of engineering, economics, and accounting.³³ It thus appears that the functions of the construction manager include many of the functions exercised by the general contractor and some few of the functions exercised by the architect.

The role of construction manager is usually performed by one who has expertise in the business of contracting, although the same services may be provided by an architect or a management consultant.³⁴ In spite of the fact that the law purports to limit the contractor's role in construction, the exigencies of modern construction have demanded that the contractor's services be expanded from day-to-day supervision of construction to the more sophisticated and comprehensive services of construction management. While there are differences between the role of the

³¹ W. SADLER, *supra* note 6, at 163-64; J. SWEET, *supra* note 10, at 122.

³² W. FOXHALL, *supra* note 7, at 29-30.

³³ *Id.*

³⁴ Lammers, *supra* note 6, at 32.

general contractor and the role of the construction manager,³⁵ the organizational and technical resources of a large general contractor, including his experience in coordinating subcontractors³⁶ and his familiarity with local conditions, enable him to assume the duties of construction manager without substantial difficulty.³⁷ The fact that the manager, who may be a general contractor on other projects, does not have a direct entrepreneurial stake in this project tends to assure that he will not be influenced by self-interest.

A number of important factors has contributed to this recent development of the use of construction management in large-scale construction. Because of the inflationary economy of recent years, one of the primary concerns of an owner is rising cost. Speed and efficiency become as important as aesthetic values, for if a project is not completed within a short period, it is impossible for it to stay within a budget.³⁸ Moreover, the productivity of available manpower may fluctuate as a result of interruption of the work schedule because of delays or improper phasing of the project.³⁹

³⁵ Typically, the construction manager guarantees neither project cost nor completion time. Since he assumes no risk in respect of either, he expects no related profit. The construction manager thus shifts such risks from contractor to owner.

Construction management contracts, representing a professional service, are usually negotiated. Prime contractors—many of whom were formerly subcontractors to a general contractor—now have a direct contractual relationship with the owner, possibly negotiated by the construction manager as the owner's agent. The prime contractors' prices include their own overhead and profit; but overhead and profit for the general contractor are replaced by the construction manager's fee.

The construction manager ordinarily is thus the owner's professional agent, operating alongside the architect/engineer and the several trade contractors.

Lambert, *Legal and Professional Aspects of Construction Management*, at 1 (unpublished, n.d.). This source comprises materials distributed for use with an Advanced Management Research Seminar. It is on file with the *University of Michigan Journal of Law Reform*.

Because the construction manager's fee is not subject to fluctuations resulting from unforeseen conditions, as a general contractor's profit would be, it might be lower than the general contractor's profit. The general contractor must make a guess as to long-range cost when the system on which he is bidding is likely to be scheduled for installation years in the future. He will then protect himself by adding a substantial cushion in his bid for inflation and uncertainties in the ordering and delivery of materials. W. FOXHALL, *supra* note 7, at 37; Lammers, *supra* note 6, at 32. For these reasons one with expertise in the business of contracting would be impartial in the role of construction manager, whereas the general contractor with an interest in the project might not be. W. SADLER, *supra* note 6, at 163-64.

³⁶ Lammers, *supra* note 6, at 32. The general contractor already assembles and schedules trade subcontractors (such as bricklayers, carpenters, or trade subcontractors), supervising both their work and the sequence of their arrival on the job. W. FOXHALL, *supra* note 7, at 25.

³⁷ W. FOXHALL, *supra* note 7, at 25.

³⁸ *Id.* at 3.

³⁹ *Id.* at 37.

The subcontractor is forced by economic necessity to include in his bid a factor for unforeseen conditions. This factor will decrease in direct proportion to the confidence the subcontractor has in the management of the project, for the subcontractor is gambling on the skill of the manager to keep the job on schedule over a long period.⁴⁰

Another important factor has been the increased prominence in modern large-scale projects of the institutional client, who requires greater efficiency and economy in the design and construction phases of building. Professional management expertise is needed for greater efficiency in a field where "one-man clients who can speak with a single responsible voice"⁴¹ are increasingly rare in the larger projects. These new clients emphasize the business aspects of building; they build with other people's money for other people's use, and they require a high level of performance.⁴² Strict budgets frequently require that the building be completed as quickly as possible, and raise the danger of a compromise in quality.⁴³

The complexity of modern construction also increases the need for construction management. Large projects require the input of varied skills from many disciplines, and many architectural firms are not equipped to supply the expertise.⁴⁴ As projects increase in size, the number of general contractors who are qualified to coordinate the different prime contractors or who can post sufficient bond decreases as well. The degree of risk may preclude general contractors from bidding, forcing the job to be divided into numerous segments under the supervision of separate contractors, so that the need for someone to coordinate all the seg-

⁴⁰ *Id.*

⁴¹ *Id.* at 2:

[T]he ever-larger works of man are now commissioned by the public client, the corporate client, the hospital board, the school board, the development consortium—a hydra-headed host of groups spending the money of other groups to whom they must report and be responsive. The consequences in make-shift checks and balances and in safe-action compromise have accumulated over the years . . .

⁴² AMERICAN INSTITUTE OF ARCHITECTS, *COMPREHENSIVE ARCHITECTURAL SERVICES—GENERAL PRINCIPLES AND PRACTICE* 92–94 (W. Hunt ed. 1965); W. FOXHALL, *supra* note 7, at 2.

⁴³ AMERICAN INSTITUTE OF ARCHITECTS, *COMPREHENSIVE ARCHITECTURAL SERVICES—GENERAL PRINCIPLES AND PRACTICE* 92–94 (W. Hunt ed. 1965); W. FOXHALL, *supra* note 7, at 2.

⁴⁴ W. FOXHALL, *supra* note 7, at 2. Foxhall believes, however, that despite these burdens the medium-sized firm can handle complex construction problems:

The multi-client and the multi-disciplined commission do indeed imply obvious burdens . . . that . . . would be beyond the scope of any one-man office. But the small-to-medium-sized office today is no stranger to consultation and joint venture. These are but two of the many modes of marshalling expertise.

Id.

ments emerges.⁴⁵ In many large-scale projects of recent years, it has been the construction manager who has provided full-time administration and quality control. This has resulted in a new construction model: instead of the architect and owner jointly perfecting the building plans and then watching the project become reality, construction sometimes is commenced before the plans are complete,⁴⁶ and therefore constant coordination between planning and construction is required to keep the project running smoothly.⁴⁷ To meet these higher performance requirements without a sacrifice in quality is the goal of construction management.

When a contractor serves as construction manager, the quality of the architect's services may be improved, for the construction manager provides both construction and cost information which an architect normally would not have. The construction manager's relationship with subcontractors, suppliers, and labor and his practical knowledge of construction may influence the design at the planning stage.⁴⁸ By advising the architect of the practical consequences of design options, site conditions, material alternatives, and feasibility of various systems for construction, and by revising cost estimates, the construction manager provides data and expertise before construction commences.⁴⁹ In addition, the architect is thereafter provided with needed help in scheduling and coordinating construction.⁵⁰ The result is the participation of the general contractor in a more direct managerial capacity as a professional member of the construction venture.

The architectural profession faces the dilemma of mounting technical complexity and increasing legal liability with ambivalence. The architect has been advised that he is "the constant and essential professional presence from start to finish of any project."⁵¹ Reluctant to let anyone infringe on his traditional responsibilities,⁵² the architect may retreat to the standard AIA division of responsibility between the architect and contractor, between

⁴⁵ Lammers, *supra* note 6, at 32.

⁴⁶ W. FOXHALL, *supra* note 7, at 3, 16; Lammers, *supra* note 6, at 32. Overlapped design and construction and condensed scheduling are being utilized to combat cost pressures. W. FOXHALL, *supra* note 7, at 3.

⁴⁷ Lammers, *supra* note 6, at 32.

⁴⁸ *Id.* at 31-32.

⁴⁹ W. FOXHALL, *supra* note 7, at 27-28.

⁵⁰ Lammers, *supra* note 6, at 31-32.

⁵¹ W. FOXHALL, *supra* note 7, at 2.

⁵² "[T]he construction manager's responsibilities overlap and may even preempt the contractor's and the architect's in certain respects." Lambert, *supra* note 35, at 5.

contract administration and contract superintendence,⁵³ and claim sole responsibility for every phase of administration. Others have pointed out, however, that the "construction manager may attract the liabilities of the architect and contractor, since his role embraces many of their major activities while adding new dimensions in planning, scheduling and cost control services."⁵⁴ Furthermore, most architectural offices do not have the expertise to handle large-scale construction problems. For these reasons, if for no other, the team approach to construction management finds some support among architects.⁵⁵

In accepting construction management by contractors the architect does not abdicate his professional responsibility. The architect continues to be the guiding influence on the project,⁵⁶ although he is complemented in areas where he lacks expertise. While serving as construction manager expands the contractor's traditional contract superintendence function and consequently limits the architect's role in this area, the construction manager does not completely usurp the architect's construction function. The architect is still responsible for on-site inspections sufficient to assure that the technical and aesthetic intent of the contract documents is being achieved.⁵⁷ He still interprets the drawings, approves all manufacturers, materials, and supplies, and reviews inspection reports.⁵⁸ In fact, rather than severely diminishing the architect's responsibility as the owner's agent, the construction manager might be regarded as providing additional input to the project, for

[i]n theory at least, the construction manager does not seek to supplant the functions of architect or contractor but to guide and coordinate their activities on behalf of the owner. The construction manager may therefore be said merely to pro-

⁵³ American Institute of Architects, General Conditions of the Contract for Construction, A.I.A. Doc. A201, in HANDBOOK, *supra* note 2, at 5-7; HANDBOOK, *supra* note 2, ch. 18, at 3. See text accompanying notes 11-18 *supra*.

⁵⁴ Lambert, *supra* note 35, at 19-20. Furthermore:

On a complex construction project . . . the construction manager may exercise a degree of discretion over design, scheduling, and site operations which could enable the architects . . . to shift liability to him in the event of . . . design failure, injury . . . or similar occurrences.

Id. at 20. Moreover "cases such as [Miller v. DeWitt, 37 Ill. 2d 273, 226 N.E.2d 630 (1967)] may indicate the desirability from a liability standpoint of reducing some of the overall powers given a design professional in a construction project." J. SWEET, *supra* note 10, at 759.

⁵⁵ Lammers, *supra* note 6, at 31-32; Foxhall, *Professional Construction Management and Project Administration*, 149 ARCHITECTURAL RECORD, June, 1971, at 69-70; see generally W. FOXHALL, *supra* note 7.

⁵⁶ W. FOXHALL, *supra* note 7, at 2.

⁵⁷ *Id.* at 31.

⁵⁸ *Id.*

vide an additional level of responsibility—to increase total accountability rather than reallocating it.⁵⁹

The construction manager may handle such matters as approving payment requests and change orders and handling routine inspections.⁶⁰ Much of the routine work conventionally handled by the architect or his project representative is taken up by the construction manager.⁶¹ While this may be seen by some architects as impinging on the architect's traditional contract administration function,⁶² it appears to alter the traditional division of responsibility between architect and contractor in minor details only. By sacrificing certain construction-related duties, without giving up overall professional control and responsibility, the architect is free to concentrate on planning and design areas where he is expert.⁶³

III. LICENSING STATUTES

An architect is a professional who must be licensed under state law in order to practice. The various states statutes establish licensing requirements and administrative boards while exempting certain practices from their coverage.⁶⁴ The objective of these licensing statutes, generally explicitly stated in each statute itself,⁶⁵ is to safeguard life and property.⁶⁶ The professional architect's presence is deemed necessary to assure quality and protect the public from the hazards of faulty design or construction.

A survey of statutes in the fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands reveals some variation in the form of licensing provisions. By far the largest category is the "practice" statutes, which make unlawful the practice of architecture without meeting the requirements set forth in the statute.⁶⁷

⁵⁹ Lambert, *supra* note 35, at 20.

⁶⁰ Lammers, *supra* note 6, at 31.

⁶¹ W. FOXHALL, *supra* note 7, at 31.

⁶² Lammers, *supra* note 6, at 31.

⁶³ *Id.*

⁶⁴ See notes 73–77 *infra*.

⁶⁵ See, e.g., MICH. COMP. LAWS ANN. § 338.551 (1967):

In order to safeguard life, health and property, any person practicing or offering to practice the profession of architecture . . . shall hereafter be required to submit evidence that he is qualified so to practice and shall be registered as hereinafter provided . . .

⁶⁶ *But see* note 91 *infra*.

⁶⁷ See, e.g., MICH. COMP. LAWS ANN. § 338.551 (1967):

[I]t shall be unlawful for any person to practice or to offer to practice the profession of architecture . . . unless such person has been duly registered or exempted under the provisions of this act.

Four states have statutes prohibiting the use of the title architect by one who has not complied with the appropriate act; these may be termed "representation" statutes.⁶⁸ Practice of architecture, as defined by the practice statutes, typically includes the responsible supervision of construction as well as consultation, planning, design, and preparation of specifications in connection with the construction of private or public buildings or additions or alterations thereof.⁶⁹ Standard exceptions to coverage, found in most practice statutes, generally provide that licensing is not required for draftsmen or other employees of the architect when they are acting under his supervision⁷⁰ or for supervisors of construction acting under the immediate supervision of the architect.⁷¹ Exceptions from coverage also typically include farm construction, construction of a one- or two-family residence, and construction of buildings with less than a designated area of floor space.⁷²

Most jurisdictions utilize practice statutes, containing both the standard definition of architecture and the standard exceptions to coverage outlined above.⁷³ Three practice jurisdictions have a less comprehensive definition of the architect's role, which includes only acts done in connection with the design of a building.⁷⁴ A third variation in practice statutes occurs in nine states which

⁶⁸ See, e.g., TEX. REV. CIV. STAT. ANN. art. 249a, § 14 (1959):

This Act shall not apply . . . [t]o any person or firm who prepares plans and specifications for the erection or alteration of a building, or supervises the erection or alteration of a building . . . , but does not in any manner represent himself, herself, or themselves to be an architect

⁶⁹ See, e.g., ILL. REV. STAT. ch. 10½, § 2 (1971).

⁷⁰ See, e.g., GA. CODE ANN. § 84-321 (1970).

⁷¹ *Id.*

⁷² *Id.*

⁷³ ALASKA STAT. §§ 08.48.150, .420, .430(5) (1968); ARIZ. REV. STAT. ANN. §§ 32-101(3), -143 to -145 (Supp. 1972); CAL. BUS. AND PROF. CODE §§ 5500.1, 5536, 5537.1-.7, 5538, 5540 (West 1962), *as amended*, (West Supp. 1972); COLO. REV. STAT. ANN. §§ 10-1-1, -2, -17, -18 (Supp. 1971); FLA. STAT. ANN. §§ 467.09, .17 (Supp. 1972); GA. CODE ANN. §§ 84-301, -321 (1970); HAWAII REV. STAT. §§ 464-1, -3, -5, -13 (Supp. 1972); IDAHO CODE § 54-309 (Supp. 1972); ILL. REV. STAT. ch. 10½, §§ 2, 4, 15.1 (1971); IND. ANN. STAT. §§ 25-4-1-1, -17, -18 (1971); KAN. STAT. ANN. §§ 6-101, -102, -119 (1964); KY. REV. STAT. §§ 323.010, .030 (1971); ME. REV. STAT. ANN. tit. 32, §§ 102, 201 (1964); MICH. COMP. LAWS ANN. §§ 338.551, .552, .569 (1967), *as amended*, (Supp. 1972); MISS. CODE ANN. §§ 8632-01, -02, -19 (1956); MO. REV. STAT. §§ 327.091, .101 (Supp. 1972); NEB. REV. STAT. §§ 81-839, -840, -853, -855 (1971); NEV. REV. STAT. §§ 623.040, .330, .340 (1971); N.H. REV. STAT. ANN. §§ 310:1, :26 (1966); N.M. STAT. ANN. §§ 67-12-1.1, -7, -8 (1961), *as amended*, (Supp. 1971); N.C. GEN. STAT. § 83-1 (1965), § 83-12 (Supp. 1971); OKLA. STAT. ANN. tit. 59, §§ 45.3, .3a, .4 (1971); ORE. REV. STAT. §§ 671.010, .020, .030 (1971); PA. STAT. ANN. tit. 63, § 28 (1968); S.C. CODE ANN. §§ 56-50, -63 (Supp. 1971); S.D. COMPILED LAWS ANN. §§ 36-18-4.1, -5, -7 (1967); UTAH CODE ANN. §§ 58-3 to -6 (Supp. 1971); VA. CODE ANN. §§ 54-17.1, -37 (1972); WIS. STAT. ANN. §§ 443.01(1), (2), (9), (10) (Supp. 1972); P.R. LAWS ANN. tit. 20, §§ 682, 709 (Supp. 1972); V.I. CODE ANN. tit. 27, §§ 282, 291 (1970).

⁷⁴ D.C. CODE ANN §§ 2-1014, -1017, -1026 (1967); MD. ANN. CODE art. 43, §§ 515, 516, 520, 522, 526 (1957); MONT. REV. CODES ANN. §§ 66-103, -107 (1970).

make unlawful the practice of architecture without a license but do not define that practice.⁷⁵

Further variations are found in six practice jurisdictions whose statutes differ in the exceptions to coverage which they permit. These six all have a comprehensive definition of practice and a broader than normal exception to the coverage of the act. Four of these states extend an exemption for superintendence by builders, or properly qualified superintendents employed by them, of construction of buildings or structures.⁷⁶

The two remaining practice jurisdictions, Massachusetts and New York, amended their statutes in 1971 and 1972 respectively. As a result, in these states the contractor is specifically permitted to perform the duties of construction management.⁷⁷ Notably, construction management had been specifically included in the definition of the practice of architecture in 1971 amendments to both the New York and Massachusetts architect licensing provisions,⁷⁸ thus broadening the definition of architecture to include construction management services presently being offered by some architects. Correspondingly, both states, recognizing that contractors and consultants, although unlicensed as architects, are qualified to serve as construction managers, have added provisions allowing the contractor broad construction responsibilities by exempting him from the purview of the statute when engaged in construction management activities.⁷⁹

Thus most jurisdictions, by defining the practice of architecture to include the services of a construction manager, limit the per-

⁷⁵ ALA. CODE tit. 46, § 8 (1958), § 9 (Supp. 1971); ARK. STAT. ANN. § 71-302 (1957); DEL. CODE ANN. tit. 24, § 301 *et seq.* (1953), *as amended*, (Supp. 1971); IOWA CODE §§ 118.15, .18 (Supp. 1972); LA. REV. STAT. ANN. §§ 37:145, :160 (1964); N.J. STAT. ANN. 45:3 to :10 (Supp. 1972); N.D. CENT. CODE 43-03-02, -09 (1960); OHIO REV. CODE ANN. §§ 4703.17, .18 (Supp. 1971); TENN. CODE ANN. §§ 62-201, -216, -217 (1955).

⁷⁶ CONN. GEN. STAT. ANN. § 20-290 (1958), §§ 20-288, -298 (Supp. 1972); MINN. STAT. ANN. § 326.02, subd. 1 (1966), subd. 2, 5 (Supp. 1973); R.I. GEN. LAWS ANN. §§ 5-1-1, -15 (1956); WASH. REV. CODE ANN. §§ 18.08.110, 18.08.250 (1972).

⁷⁷ MASS. ANN. LAWS ch. 112, §§ 60A, 60K, 60L(3) (1965), *as amended*, (Supp. 1971); N.Y. EDUC. LAW §§ 7301-2, 7306(g) (McKinney Supp. 1972).

⁷⁸ MASS. ANN. LAWS ch. 112, § 60A (Supp. 1971); N.Y. EDUC. LAW § 7301 (McKinney Supp. 1972).

⁷⁹ The New York statute now contains the following provision:

This article shall not be construed to affect or prevent . . . [c]ontractors or builders from engaging in construction management and administration of construction contracts.

N.Y. EDUC. LAW § 7306(g) (McKinney Supp. 1972). The regulatory statute in Massachusetts includes the following exception:

Nothing . . . shall be construed to prevent . . . the administration of construction contracts by persons customarily engaged in contracting work . . .

MASS. ANN. LAWS ch. 112, § 60L(3) (Supp. 1971).

formance of the construction manager's role in large-scale building projects to licensed architects. Only in New York and Massachusetts is it clear that a general contractor can perform construction management services without a license. The majority of jurisdictions, which have practice statutes with the standard definitions and exceptions,⁸⁰ require that one must be licensed as an architect to be in responsible charge of construction. Even in states where practice is not defined in the statute,⁸¹ court decisions generally indicate that, as applied, practice includes both design and construction supervision functions.⁸² Furthermore, by analogy to the states which define practice, most of which include responsibility for construction supervision in the definition of practice of architecture,⁸³ it would appear that practice of architecture should have none other than its standard meaning unless specifically defined otherwise.

In the District of Columbia, one of the three jurisdictions with a narrow statutory definition of practice, it has been held that the statute "does not extend to the actual construction or superintendence of construction of a building."⁸⁴ In these jurisdictions one apparently need not be licensed as an architect to be in responsible charge of construction. Yet this is only a by-product of the narrow definition employed in the statute and does not result from a legislative recognition of a need for modern construction management systems under the direction of some professional other than an architect.

Furthermore, those practice statutes employing both a comprehensive definition of the practice of architecture and a broad exception for construction superintendence⁸⁵ seem at best to be

⁸⁰ See note 73 and accompanying text *supra*.

⁸¹ See note 75 and accompanying text *supra*.

⁸² *State Bd. of Architects v. Bank Bldg. & Equip. Corp. of America*, 225 Ark. 889, 894, 286 S.W.2d 323, 326 (1956), defines an architect as one who devises plans and designs, draws up specifications for buildings or structures, and superintends their construction. *Davis, Body, Wisniewski v. Barrett*, 253 Iowa 1178, 115 N.W.2d 839 (1962) similarly defines an architect to be a person skilled in the art of building, a professional student of architecture, or one who makes his occupation to design buildings and to superintend their execution. *Accord, Rabinowitz v. Hurwitz-Mintz Furniture Co.*, 19 La. App. 811, 133 So. 498 (1931).

⁸³ See notes 73 and 76-77 and accompanying text *supra*.

⁸⁴ *Dunn v. Finlayson*, 104 A.2d 830 (D.C. Mun. App. 1954). See also *Holiday Homes v. Briley*, 122 A.2d 229 (D.C. Mun. App. 1956) (discharge of general supervisory duties in construction business did not constitute practice of architecture within the meaning of the licensing statute).

⁸⁵ See, e.g., CONN. GEN. STAT. ANN. § 20-298 (1958): "The following activities are exempted from the provisions of this chapter: . . . (e) the superintendence by builders, or properly qualified superintendents employed by such builders, of the construction or structural alteration of buildings or structures." Rhode Island provides that its statute shall not prevent "any person from making plans, specifications for or supervising the erection . . . of a building . . . to be constructed by himself or his own employees . . ." as long

ambiguous. While appearing to allow construction management by someone other than an architect, these statutes do not explicitly provide for construction management or administration of the construction contract by a contractor as do the recent amendments in New York and Massachusetts.⁸⁶ Moreover, the exception may actually be aimed at the day-to-day supervision by the contractor as is conventional now in traditional building projects and which follows the standard division of responsibility delineated in the AIA Standard Forms,⁸⁷ without affecting the architect's contract administration responsibility. If the intent is to permit some shift of contract administration responsibility to the builder, and thereby to facilitate the exercise of comprehensive construction management responsibility by the builder, it should be made clear as in the New York and Massachusetts amendments.

Complex modern building projects, with new operational, planning, and coordinating techniques and with a construction manager who is not necessarily an architect,⁸⁸ demonstrate that the contractor's actual or potential construction management role encompasses more than traditional superintendence. Legislatures should make an explicit exemption from the licensing requirement for contractors engaged in construction management, if this substantial change in the traditional roles is contemplated.

The representation statutes do not regulate the practice of architecture but merely prohibit the use of the title of architect by one who has not complied with the statute.⁸⁹ The practice statutes are regulatory in that they have the public welfare and safety as

as he does not use the title "architect". R.I. GEN. LAWS ANN. § 5-1-15 (1956). In the typical construction situation, the prime contractors are hired by the owner, and the building is not constructed by the construction manager's employees. If not a licensed architect, supervision of the project by the construction manager might well be deemed unlawful. See also ILL. REV. STAT. ch. 10½, § 4 (1971).

⁸⁶ See note 77 and accompanying text *supra*.

⁸⁷ American Institute of Architects, General Conditions of the Contract for Construction. A.I.A. Doc. A201, in HANDBOOK, *supra* note 2, at 5-7.

⁸⁸ Lammers, *supra* note 6, at 31-32; see generally W. FOXHALL, *supra* note 7; Lambert, *supra* note 35, at 1-20.

⁸⁹ TEX. REV. CIV. STAT. ANN. art. 249a, §§ 1, 14 (1959), § 10 (Supp. 1972); VT. STAT. ANN. tit. 26, §§ 121-122, 124 (1959); W. VA. CODE ANN. §§ 30-12-2, 30-9-10 (1971); WYO. STAT. ANN. §§ 33-24, -34, -35 (1957). Two of these statutes define practice comprehensively and make it unlawful to practice architecture without a license, but include as an exception those persons who do not represent themselves to be architects when not licensed according to the statute. TEX. REV. CIV. STAT. ANN. art. 249a, §§ 1, 14 (1959), § 10 (Supp. 1972); WYO. STAT. ANN. §§ 33-24, -34, -35 (1957). The Vermont and West Virginia statutes contain narrow definitions of the practice of architecture and broad exceptions similar to the statutes discussed in note 79 and accompanying text *supra*, and in addition have a section making unlawful only representing oneself to be an architect when not properly licensed.

their objective,⁹⁰ while the representation statutes appear to have less of a regulatory tone, prohibiting only the use of the title of architect and not restricting the actual practice of architecture.⁹¹ While this lack of regulation in the representation statutes has the advantage of not prohibiting a contractor from acting as a construction manager, so long as he does not falsely represent his position,⁹² it has the disadvantage of leaving unregulated many activities which should be regulated in the public interest.⁹³ Instead of a comprehensive licensing statute with a precise exception for contractors engaging in construction management, which protects the public safety while permitting qualified persons to supervise construction, these states exempt everyone from coverage unless there is a misrepresentation involved.

In order to permit and encourage the general contractor to adopt the role of construction manager, there is a need for progressive legislation modeled on the New York and Massachusetts amendments. This would signal legislative recognition of the practical reality of modern large-scale construction. Some states, in addition to licensing architects, have statutes which require the licensing of contractors.⁹⁴ Thus an alternative means by which

⁹⁰ See note 66 and accompanying text *supra*; see also *Dunn v. Finlayson*, 104 A.2d 830, 831-32 (D.C. Mun. App. 1954).

⁹¹ See *Dunn v. Finlayson*, 104 A.2d 830, 831-32 (D.C. Mun. App. 1954), where the court, in construing a former version of the Architect's Registration Act which restricted only the use of the title of architect where one was unlicensed, found that although the Act purported to regulate architecture, it made only a "half-hearted" attempt at regulation. Stating that the Act's purpose could not have been the protection of the public welfare, the court held that the wrongful use of the title of architect, while unlawful and subjecting the user to criminal liability, did not deprive a person of the right to recover for services rendered under a contract. In contrast, the court noted that a person who rendered services in violation of the amended Act, a true regulatory measure embodying a strong public policy and designed to protect the public welfare, would have no right to recover under a contract. *But see Farha v. Elam*, 385 S.W.2d 692, 695 (Tex. Civ. App. 1965), where in a suit by a member of an architectural partnership for a partnership accounting, the court characterized a Texas statute similar to the unamended District of Columbia statute as regulatory, in that its purpose was the protection of the public against the irresponsible practice of architecture. The court, however, did recognize the ambiguity of the statute. *Id.* at 695.

⁹² *Farha v. Elam*, 385 S.W.2d 692 (Tex. Civ. App. 1965). The court noted that the exception providing that the statute does not apply to one who does not represent himself to be an architect was "designed to permit ordinary carpenters and contractors, and other persons who make no pretense of being architects, to draw house plans and to build or supervise the building of structures." This exception does not, however, permit architects to practice their profession without a license simply by explaining to their clients that they have no license. *Id.* at 694-95.

⁹³ The distinction between independent projects and the responsible supervision of construction as a business, while made in some statutes, e.g., ILL. REV. STAT. ch. 10½, § 4 (1971), is not apparent in the representation statutes, thus allowing free range to self-proclaimed designers and builders as well as to responsible contractors.

⁹⁴ E.g., CAL. BUS. AND PROF. CODE § 7000 *et. seq.* (West 1964), *as amended*, (West Supp. 1966). These statutes have been upheld as a reasonable regulation of a business clothed with a public interest. *State ex rel. Reynolds v. City of St. Petersburg*, 133 Fla. 766, 183 So. 304 (1938); *Hunt v. Douglas Lumber Co.*, 41 Ariz. 276, 17 P.2d 815 (1933); see *Annot.*, 118 A.L.R. 676 (1939).

legislatures could recognize construction management would be to expand contractor licensing statutes to provide for licensing of contractors as construction managers.

IV. CONCLUSION

It is clear that most statutes reflect the historical role of the architect and have not been changed in response to the realities of modern, large-scale construction. Only New York and Massachusetts affirmatively recognize construction management, including it within the statutory definition of the practice of architecture while concurrently permitting the contractor to perform responsible construction functions. In most states legislation is based on traditional patterns of construction, with the duties of the architect and contractor separately delineated in architecture and contractor licensing statutes, and whether a general contractor can lawfully function in a new framework in which he has expanded construction responsibility is unclear. Representation statutes, which would allow a contractor to serve as construction manager, offer insufficient protection to the public welfare.

The public would be best protected by a comprehensive licensing statute, similar to the New York legislation, with a narrowly delineated exemption for those considered qualified to serve as construction managers. Legislative clarification of the contractor's broader role will eliminate any legal obstacles which might impede the development of new relationships between the architect and those responsible for translating his design into the completed physical structure. Because of the increased efficiency which results from its implementation, construction management benefits the public as well as the architect and contractor. More efficient management can only result in a better standard of quality and a fuller realization of the architect's design.

—*John E. Lehman*