THE AMERICAN INSTITUTE
OF ARCHITECTS

The Diminishing Scope of Practice

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Analysis: All states regulate the practice of architecture but how each state handles exemptions[1] to their practice laws varies from state-to-state. Depending on the state, exemptions are granted by law to non-architects based on building size, types of use and/or occupancy, project costs, or whether project is publicly or privately funded.

The most recent troubling change occurred in Texas in 2011.[2] The Texas legislature further narrowed the "practice of architecture" by adding the enumerated list of services and acts constituting "practice" – services previously listed exclusively as "architectural services"[3] – to the engineering practice statutes.[4] As a result, the practice definitions of "architecture" and "engineering" include, in parts, identical services; however, the performance of these services pursuant to the *engineering* statutes requires licensure, but the architecture statute has no such licensing restriction.[5] This begs the question: why are they treated differently? The manner in which state legislatures seeking guidance from Texas in order to resolve their own issues surrounding the scope of practice interpret this change is unknown, but should be a major concern for the AIA.

The Texas Legislature also, in *unprecedented national history*, "grandfathered" engineers who could demonstrate to the Architectural Board that (1) they had been breaking the law by practicing architecture without a license and (2) did so competently.[6] The law, illogically, then allows for the "grandfathered" engineers to practice architecture under the *exclusive* jurisdiction of the Texas Board of Professional Engineers.[7] Again, how legislatures from across the country will respond when faced with determining whether engineers should be authorized to practice architecture, and whether architects should be regulated by an Engineers Board in order to streamline government remains to be seen, but the crippling potential of this complex and misunderstood issue is evident.

In a similar – though less damaging – approach as Texas, the New Jersey Legislature has also addressed the issue of engineers practicing architecture. In 1989, the Legislature passed the Building Design Services Act,[8] an act which enumerates, by occupancy classification, the types of buildings lawfully permitted to be designed by engineers.[9] On the surface, this approach may seem appealing to other states who are managing the disputed distinctions between architecture and engineering, but this seeming "quick-fix" is not a solution, nor an approach the AIA should promote or endorse. This method is detrimental to the profession since it fails to acknowledge the key distinctions in education, training, and examination between architects and engineers, and advances the abstract and mischaracterized notion that "building design" is different and separate from architecture. The Act's building classification table which dictates what building types "may" be designed by architects versus those that "may" be designed by engineers also wrongfully assumes architectural plans and specifications are the same as engineering plans and specifications.[10] Architects design buildings regardless of building type. Engineers, however, design engineering systems. By using the nomenclature "building design" rather than architecture, the Legislature perpetuates the concept that "building design" is not architecture. It is a subtle distinction, but a distinction that nonetheless deserves AIA attention. State components managing this issue must not get pulled into these legislative battles allowing such assumptions to remain. If a state component chooses to pursue negotiations with engineers, it is critical these negotiations are framed clearly from the start so legislators understand the issue at hand is whether

[1] States may categorize such services as being exempt from, or outside of the scope of, the practice of architecture; despite the differences in statutory construction, they both result in persons without architectural training or licensure to lawfully perform the functions of an architect.
[2] *See* Act of June 17, 2011, ch. 1157, 2011 Tex. Sess. Law Serv.1157 (West).
[3] TEX. OCC. CODE ANN. §§ 1051.001(7), .0016(a)-(b) (West 2012).
[4] OCC. §§ 1001.003, .0031(d)-(e), 1051.001(7), .0016(a)-(b).
[5] *Compare* OCC. §§ 1051.701(A) *and* 1051.001(7) *and* 1051.0016, *with* 1001.301(a) *and* 1001.003(b)-(c) *and* 1001.0031.
[6] OCC. § 1051.607.
[7] *Id*. §1051.607(h).
[8] Building Design Services Act, 1989 N.J. Sess. Law Serv. 277 (West) (codified at N.J. STAT. ANN. § 45:4B-1 to -14 (West 2012)).
[9] Building Design Services Act, § 7 (codified at N.J. STAT. ANN. §§ 45:4B-7 (West 2012)).
[10] *See* N.J. STAT. ANN. §§ 45:4B-3, -7 (West 2012).

engineers should be authorized to prepare certain architectural plans and specifications *in addition* to engineering plans and specifications.

With architectural engineering advancing as its own degreed program at twenty-four colleges and universities,[11] AIA state components must be vigilant in maintaining clear distinctions between architecture and engineering.

As a leader of a growing national trend, Illinois has the most comprehensive body of law regulating the profession of structural engineering.[12] The Structural Engineering Practice Act includes a law defining the profession's scope of practice that is remarkably similar to the definition of architecture.[13] It broadly encompasses the design of structures and buildings, oversight of construction, and even references the overlay in the two scopes of practice.[14] The Act further blurs the distinctions between the two professions by exempting persons engaged in the practice of structural engineering from the purview of architectural regulation.[15]

Around the rest of the country, approximately one-third of states allow engineers to practice architecture to the extent it is "incidental"[16] to their engineering work; however, the extent to which services are regarded as "incidental" varies greatly.[17] Laws specifying services or acts which may be performed by architects *or* engineers have been implemented by some states.[18] Engineers in several states are also are able to become bona fide architects through relaxed licensure regulations.[19] Several states use one overseeing body to regulate the two professions, further obscuring their legal distinctions.[20]

The scope of practice is also being reduced by broad exemptions allowing unlicensed and untrained persons to perform the functions of architects. This is particularly true when states have laws, enacted to protect the health,

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[11] See ABET, ABET.ORG, http://main.abet.org/aps/Accreditedprogramsearch.aspx (last visited Nov. 13, 2012), for information on the accredited architectural engineering programs at Cal. Polytechnic State Univ. – San Luis Obispo, Drexel Univ., Ill. Inst. of Tech., Kan. State Univ., Milwaukee Sch. of Eng'g, Mo. Univ. of Sci. & Tech., N.C. A&T State Univ., Okla. State Univ. – Stillwater, Penn. State Univ., Tenn. State Univ., Tex. A&M Univ. – Kingsville, Univ. of Colo. – Boulder, Univ. of Kan., Univ. of Miami, Univ. of Neb. – Lincoln, Univ. of Okla., Univ. of Tex. at Austin, and the Univ. of Wyo.; and the accredited architectural engineering technology programs at Bluefield State Coll., State Univ. of N.Y. – Coll. of Tech. at Farmingdale, Univ. of Cincinnati, Univ. of Hartford, Univ. of S. Miss., and Vt. Techn'l Coll..

[12] *See* Structural Engineering Practice Act of 1989, 1989 Ill. Legis. Serv. ch. 111, ¶¶ 6601-6638 (West) (codified at 225 ILL. COMP. STAT. ANN. 340/1 to /38 (West 2012)).

[13] *Compare* 225 ILL. COMP. STAT. ANN. 340/5 (West 2012) (defining the practice of structural engineering), *with* 225 ILL. COMP. STAT. ANN. 305/5 (defining acts constituting the practice of architecture).

[14] 225 ILL. COMP. STAT. ANN. 340/5 (West 2012).

[15] 225 ILL. COMP. STAT. ANN. 340/3 (West 2012).

[16] See the engineering practice definitions for the states of: Ala., Ariz., Conn., Del., Fla., Ga., Ky., Mass., Mich., Mo., Mont., N.M., Pa., S.D., Utah, V.I., Va.; Ala. has a similar statute.

[17] *See Verich v. Fla. State Bd. of Architecture*, 239 So.2d 29, 30 (Fla. Dist. Ct. App. 1970) (expert testified project was 75% architectural, 25% engineering, but court still found it to be within the scope of the "practice of engineering"); *Rosen v. State Architects Licensure Bd.*, 763 A.2d 962, 964 (Pa. Commw. Ct. 2000) (according to expert witness, project at issue was 80% the practice of architecture, 20% engineering, yet was determined to be within the scope of the "practice of engineering").

[18] KY. REV. STAT. ANN. § 323.033(4) (West 2012); MICH. COMP. LAWS ANN. § 339.2011 (West 2012); N.J. STAT. ANN. § 45:4B-7 (West 2012); TENN. CODE ANN. § 62-2-102(b) (West 2012); TEX. OCC. CODE ANN. §§ 1001.0031, 1051.0016 (West 2012).

[19] MASS. GEN. LAWS. ANN. ch. 112, § 60C (West 2012) ("In lieu of evidence of graduation from an accredited school of architecture, the applicant may submit satisfactory evidence of such other academic experience, practical experience, or both, as the board may by regulation prescribe."); N.J. STAT. ANN. § 45:3-5.1 (West 2012) (State licensed professional engineers with a degree in engineering are "entitled to be licensed to . . . practice architecture . . . upon satisfactorily passing the [examination] parts pertaining to site and building design . . . .").

[20] ALASKA STAT. ANN. § 08.48.011 (West 2012); ARIZ. REV. STAT. ANN. § 32-102 (2012); HAW. REV. STAT. § 464-6 (West 2012); Kan. Stat. Ann. §§ 74-7003 to -7005 (West 2012); MICH. COMP. LAWS ANN. § 339.2002 (West 2012); MINN. STAT. ANN. § 326.04 (West 2012); NEB. REV. STAT. ANN. § 81-3428 (West 2012); S.D. CODIFIED LAWS § 36-18A-14 (2012); TENN. CODE ANN. § 62-2-201 (West 2012); VA. CODE ANN. § 54.1-403 (West 2012).

safety, and property of its people, declaring architects unnecessary in the construction, alteration, or addition of 200,000 square foot mercantile buildings – the size of a "big-box" superstore – or a sixty-four unit hotel or motel.[21] The same goes for Texas where architects are not required on commercial buildings less than 20,000 square feet.[22] The residential market, a mainstay for small firms, is also diminishing. Though typically not required for single-family dwellings,[23] architects are also not required for other, multiple-family dwellings, such as eight-, twelve-, sixteen-, or even thirty-two-family residences.[24] Statutes emphasizing aesthetics could be misperceived as downplaying the usefulness and importance of the profession's role in the built environment, opening the door for more exemptions or other reductions in the scope of licensed practice in the future.[25] Even states maintaining their seemingly innocuous regulatory schemes may pose threats to the profession, since failing to protect architects in the current legal climate could just as easily produce unfavorable results.

Despite some significant exemptions to the practice of architecture, the threat and reality of other professions subsuming the practice is perhaps the most pressing issue. Texas and Illinois may be extreme examples of the legal issues the profession faces, but they demonstrate the significant impact law has on the practice of architecture. With many states already employing regulatory schemes which blur the distinctions between the practices of architecture and engineering, any further melding of these professions will result in an increasing amount of work historically performed by architects to become that of another profession, regulated by those professions and performed by their licensed professionals.

The laws of Illinois, Texas, and other states that contain ambiguous language and references to other professions make determining where the scope of one profession ends and the other begins difficult, if not impossible, even for a trained eye. Courts, legislatures, and other reviewing bodies attempting to resolve this confusion have only further muddied the practice of architecture's identity. What remains clear is that the legal delineation between architecture and engineering requires action by the AIA. Absent action, these and other laws will continue to reduce the role of architects in the building and construction process, and the industry as a whole.

Recommended Strategies:

- Due to ambiguous and confusing statutes – and the confusion that has resulted in their interpretation, the Institute should seek to create a more appropriate model definition for the practice of architecture. The AIA should encourage broad definitions of practice, consistent with NCARB's model definition. Narrow definitions of practice are unfavorable. Broad practice statutes are widely used and encouraged by other learned professions, including the legal and medical professions. The expansive range of services provided by, and evolving nature of, these professions (and, arguably professions as a whole) make it recognizably difficult, if not impossible, to craft a precise definition of their practices. The changing role and services architects provide is not dissimilar; however, the profession has faced unique challenges in maintaining the legal bounds of its practice.

- Enumerating the services constituting the practice of architecture is unfavorable for two primary reasons. The first is that attempts to more concisely define the scope of the practice can lead to misinterpretation, such as those where clarification attempts have been misconstrued as an inclusive list of services, or as limiting the scope of practice while simultaneously broadening the scope of another profession. The second is that attempts to clarify the scope of practice in this manner often use vague language that further confuses those already confused, *e.g.*, the use of similar language in

[21] OKLA. STAT. ANN. tit. 59, § 46.21b (West 2012).
[22] TEX. OCC. CODE ANN. § 1051.606(a)(4)(D) (West 2012).
[23] However, this exemption may be limited through square footage, height, personal use, or other constraints, such as in: Alaska, Ark., Cal., Idaho, Haw., Iowa, Mich., Neb., Nev., N.M., Penn., Utah, and Va.
[24] IOWA CODE ANN. § 544A.18(1) (West 2012) (buildings with twelve or fewer family dwelling units); MONT. CODE ANN. § 37-65-103(4)(c) (West 2012) (residential structures of less than eight dwelling units); N.C. GEN. STAT. ANN. § 83A-13(c)(1) (West 2012) (family residence with up to eight dwelling units attached); OKLA. STAT. ANN. tit. 59, § 46.21b(5)(e) (West 2012) (residential buildings or structures "containing no more than thirty-two dwelling units"); TEX. OCC. CODE ANN. § 1051.606(a)(4)(C) (West 2012) (multifamily dwelling(s) not exceeding sixteen units per building).
[25] See generally, the "practice of architecture" definitions in Conn., Haw., Ill., Ind., Me., Mass., Minn., Miss., Mo., N.Y., and Tex..

describing the services of architecture and engineering statutes being misinterpreted as the services actually being the same.

- The AIA should highlight the role of architects in the built environment. In a broad sense, these problems demonstrate a fundamental lack of understanding of the practice and profession of architecture by both the legislatures writing and enacting these laws and the courts and other reviewing bodies interpreting them. At minimum, these branches of government must recognize the distinctions in services provided by the professionals involved in the planning, design, and construction of buildings and structures. Without any such understanding, the practice of architecture will continue to be practiced by those without architectural education, training, and licensure, and regulated outside the purview of the profession. Accordingly, the Institute should create information on the distinctions between the practices of architecture and engineering, particularly, the unique roles they play, and services they provide in the planning and design of buildings and structures. This would ideally include the presentation of this information in a visually appealing format that would show the overlay of construction documents starting with the architectural plans and specifications. These materials could be used by members during Lobby Day to demonstrate to their elected officials that the two professions are distinct, and should be statutorily constructed as such; and incorporated into amicus briefs for future litigation.

- Expand the profession's understanding of the problem with continuing education. Those in jurisdictions with already "narrow" practice statutes should use the blurring between and among other professions to their advantage. The legal overlay in services provides architects opportunities to lawfully expand their scope of practice into this gray area just as other professions have done. While competence in these perhaps untraditional and unchartered areas comprising the evolving scope of architecture should be attained before professionals provide these services, this can achieved through a variety of methods, including already-required continuing education courses.

Courts view architecture and engineering the same

Analysis: Judicial opinions, particularly the two following cases from Florida and Pennsylvania are particularly instructive because they provide the profession with a barometer of current jurisprudence as the profession strategizes for the future. Each case further blurs the relevance of an architect's role in the design and construction of buildings.

In *Verich v. Florida State Board of Architecture*, a registered engineer prepared the architectural and engineering plans and specifications for a shopping mall.[26] The State's Board of Architecture filed a complaint asserting Mr. Verich's work constituted the practice of architecture.[27] The court concluded that due to the absence of any statutory demarcation between the professions, the conflict could only be resolved by determining that an architect can plan, design, and supervise the construction of a building as the practice of architecture, and a professional engineer can plan, design, and supervise the construction of a building as the practice of professional engineering.[28]

In *Rosen v. State Architects Licensure Board*, an attorney sought to convert a building, previously used as a night club, into law offices.[29] An engineer, Mr. Murray, was subsequently hired to survey the building and prepare the construction documents based on the attorney's concept of its renovation.[30] In order to obtain the necessary building permits, a licensed design professional was required to approve Mr. Murray's plans.[31] Another engineer, Mr. Rosen,

[26] *Verich*, 239 So.2d at 30 (although the case was decided in the 1970, it continues to be instructive for courts around the country in how to handle the legal overlay between the professions of architecture and engineering).
[27] *Id*. at 30.
[28] *Id*. at 30-32.
[29] *Rosen*, 763 A.2d at 963.
[30] *Id*. at 964.
[31] *Id*.

was ultimately hired to review and seal Mr. Murray's plans.[32] The State's Architects Licensure Board subsequently filed a complaint asserting the engineers had unlawfully engaged in the practice of architecture.[33]

The court held that neither the architecture regulatory law nor the engineering regulatory law "establish[ed] a clear, mutually exclusive, delineation between the two."[34] Instead, the court found that both licensure boards "could each view the same work as being essentially within the purview of its own governing statute[ ]" and noted the real issue was not whether the engineer's work was the practice of architecture, but rather whether it was encompassed within the practice of engineering.[35] As a result, the court concluded the engineers' planning and design work was part of the practice of engineering, and not the practice of architecture.[36]

The analysis in *Rosen* demonstrates the confusion courts have in distinguishing the professions of architecture and engineering. Courts are misconstruing vague practice statutes, statutes which admittedly fail to explicitly differentiate the services of the two professions. The *Rosen* court perceived an "overlap" of services simply because both professions prepare plans and specifications for the construction of buildings. That "plans and specifications" for buildings always involve architectural plans, as distinctly separate instruments of service from engineering plans, was completely overlooked. This deep-rooted misunderstanding that the professions are essentially one in the same because they both involve the "design and planning of building and structures" is akin to believing the services of medical doctors and veterinarians are indistinguishable because they both deal with the diagnosis, prevention, and treatment of disease. What is missing is a simple understanding of the process of design: that *building* plans and specifications involve *both* architectural and engineering plans and specifications and that the architectural plans, by necessity, are developed first with the subsequent overlay of engineering plans and specifications following suit. That one simple fact explained in a simple way to policymakers and judges could make the most appreciable difference.

Recommended Strategies: Generally, as compared to other branches of government, influencing jurisprudence can be most challenging. Overall, the AIA should dissuade components from challenging the demarcation within courts of law. However, in the event there are no other reasonable options, AIA should immediately be apprised of the legal effort and weigh in as an amicus curiae.

Design-Build and other Emerging Project Delivery Methods Put Architects at the Bottom of the "Food Chain"

Analysis: States are enacting project delivery laws for public construction that diminish the role of the architect from the traditionally-held role of owner-representative-designer to contractor/financier sub-consultant. This role-change is significant for the *business of architecture* because it contracts the scope of architectural services. It is also significant for *taxpayers* because it undermines the value of architectural services and quality public construction outcomes.

Why is this trend happening? The Great Recession crippled many state and local governments who have a growing backlog of unmet public facility needs and limited funds (or means of funds) to pay for them. These governmental entities and state lawmakers are looking for creative ways to streamline costs, reduce administrative oversight, and utilize private sector financing options. DB and P3 are attractive ideas because the contractual structure of both (see diagrams above), *at least by appearance*, simplify government oversight/responsibilities, reduce administrative costs and enable financing (in the case of P3). What is <u>not</u> apparent, however, are the consequences of expunging the owner-architect relationship.

[32] *Rosen*, 763 A.2d at 964.
[33] *Id*.
[34] *Id*. at 965.
[35] *Id*. at 968-969.
[36] *Id*. at 969-970.

Organizations such as the Design Build Institute of America, National Council of Public Private Partnerships, Association for the Improvement of American Infrastructure and others are aggressively advocating for the expansion of both project delivery methods on behalf of large contractors (e.g. Balfour Beatty, Skanska) developer/financiers, law firms representing developers (Rutan & Tucker, Cohn Reznick) and some A/E firms, most notably AECOM, Leo Daly and RTKL.

To understand how quickly this trend is moving with DB, in 2000, a majority of states and territories had NO design-build authority for public buildings. Now a super-majority of states and territories have design-build authority for public buildings. To understand how quickly the P3 trend is moving, in 2010 only one state authorized broad use of P3 for public buildings, now five (5) states (VA, TX, MD, FL, NC) and one territory (PR) enables its use. In just *this* year alone ten (10) additional states have active P3 bills pending – all of which diminish the role of the architect to sub-consultant of the contractor and fail to provide the government-client with any owner-representative dramatically reshaping the delivery and development of public buildings. Couple this trend with the fact that *more than one quarter* of our members' firms billings come from state and local public construction,[i] it is clear that the AIA has an obligation, if not a mandate from the Repositioning effort, to alter this course in the interests of our members and future members (i.e. emerging professionals). If DB and P3 continue to develop traction at its current pace, our members will indeed experience a dramatic decline in firm billings, dissatisfaction in professional purpose, new potential risk and liability issues and, in most cases, the public will experience a significant decline in quality public construction.

Recommended Strategies: AIA National must strategically lead AIA member components out of this downward project delivery spiral with policy solutions that *reclaim* the role of the architect, *reinforce* the relevance of architects in the built environment, and that *safeguard* taxpayer investment in public buildings with a procurement process that enables quality, long-term decision-making. To fully realize success, however, the solutions will require an aggressive and disciplined implementation plan that will involve education of our members as well as the general public, public officials, government clients/end users, and all industry stakeholders in the public construction arena.

Implementation Plan:

Step 1: Message Content Development
Over the last two years, the state and local government team dedicated significant resources to researching and analyzing national and international best practices with DB and P3, including the implications on the architectural profession. As a result of this in-depth research and analysis, policy solutions were developed with input from volunteers from the State Government Network and the convening of two separate task forces: the Design-Build Reform Task Force (2012-13) and the P3 Task Force (2013-14). Each Task Force had representation from relevant Knowledge Communities and each developed proposed legislative solutions including, respectively: (1) the Design-Build Reform Toolkit and (2) a "Legislative Resource Guide" on PPP for state lawmakers.

The AIA DB legislative toolkit offers better ways for governmental entities to utilize DB without sacrificing quality and owner-representation with provisions that:
(1) enable qualifications-based selection of DB teams rather than utilizing design competitions as the procurement method;
(2) restore architects to the position of owner-representative for the government client who can advise (without conflicts of interest) throughout the procurement process and through construction; and
(3) enable a bridging-architect provision, as an alternative option.

The "Legislative Resource Guide" enables and encourages public entities to creatively design and construct public facilities using intergovernmental planning and partnerships in way that reduces financial burdens on taxpayers, makes full use of land resources and buildings, reduces wasteful construction spending, optimizes performance of buildings, and minimizes government expenses and public Risk. It also codifies a project delivery method that:
(1) keeps architects relevant and engaged directly with the government client through "professional advisor" provisions;

(2) acknowledges the unique aspects of enabling one single private entity to design, build, finance, operate and maintain a public building by creating an oversight agency with expertise in the financial and long-term viability of construction projects that house public services, and
(3) prioritizes whole of life costing of buildings as part of a formulaic and objective value for money analysis for governmental entities.

Step 2: Internal Execution
With the solutions developed, AIA National should aggressively, and with great discipline, across all relevant departments (especially outside of GCR) ***acknowledge*** and ***highlight*** this issue as a priority for National and our members. Staff who interface with our members should know that this is a priority so that our members can see and experience *palpable* change in light of Repositioning. By doing this and incorporating this "theme" of change in numerous educational offerings and trainings, AIA National will be viewed as "keeping its promise" to help steer the architectural profession through troubled waters.

Step 3: External Execution
Some of our members understand the gravity of the situation, but most do not, nor do they have the bandwidth and/or interest to take heed of the warning signs without repeated and simple messaging. It is crucial that the AIA creates an "appetite" for engagement by our members. If we don't do everything we can to saturate our membership with the problem and the solution options, we can expect continued decline in billings by small and mid-sized firms in the area of public construction.

It is important to note that no other industry organization at the National level has taken the initiative to develop a legislative resource guide on the issue of P3 project delivery. It is an issue of great interest not only in the US but globally. Since developing this guide, the AIA has been sought out by The World Bank and the United Nations Commission on International Trade Law as a resource to help them revise international model law.

We have an opportunity, if we choose, to demonstrate leadership among our national industry peer groups as well. The reality is: single-point contract delivery ("turn-key") for public construction will grow whether the AIA substantively engages membership or not. We have an opportunity *now*, however, to influence and shape the outcomes so that architectural services remain integral to public construction regardless of the choice of delivery method.

[i] 2012 AIA Survey Report on Firm Characteristics, *The Business of Architecture*