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Table of Contents

| | |
|---------------------------------------|---------|
| What Is It? | Page 2 |
| How Does Virtual Practice Differ? | Page 2 |
| What Does the Law Require? | Page 5 |
| – Business Structures | Page 5 |
| – Labor Law Overview | Page 7 |
| – Employee Liability Issues | Page 7 |
| – Licensing Issues | Page 10 |
| – Contractual Cascades | Page 11 |
| Technology and Practice | Page 13 |
| Checklist of Important Considerations | Page 15 |
| Conclusion | Page 17 |

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WHAT IS IT?

Today, a new reality in architectural practice is that most architects are no longer interacting across their workstations. Instead, they are 'virtually' sharing ideas and drawings across digital platforms. Nearly every practicing architect engages in some form of "virtual practice" because the pace and practicalities of life demand it – employees travel or relocate, must limit work time for family responsibilities, or want to take on other enterprises as consultants. The virtual architectural practice model is far more flexible than traditional practice – and may be all but recession-proof since it can grow and shrink with market fluctuations.

The benefits of virtual practice may include near zero fixed overhead expenses – in contrast to substantial costs associated with traditional brick-and-mortar firms such as rent, computer hardware, infrastructure and more. In some cases, employee payroll and benefits become a thing of the past when the firm limits workers to consultants or independent contractors; however, there are important regulations in this area, discussed later, that must be followed. A "cloud-based" practice, where files are stored and managed online, means no servers and likely no expensive software or equipment to purchase or maintain.

Peter Macrae, now a seven-year veteran of virtual practice with 38 years of experience in architectural design, project management, and business development, sees his virtual practice as an "incubator of solopreneurs" who manage themselves. He started practicing virtually at age 58 and particularly enjoys the opportunity to mentor aspiring architects, such as college students using their unique software skills at a relatively lucrative hourly rate, and developing the skill-sets of younger architects who can take on new projects and learn how a virtual practice works without leaving their full-time jobs.

Jason Winters, AIA, principal and founder of Kezlo Group, a small firm in the mid-Atlantic region but working throughout the US, started his own practice to create a flexible work environment for himself and others, especially for the flexibility to be active in his new son's life. Kezlo now has ten people, eight of whom are full-time employees who work remotely but meet regularly for lunch, with project teams meeting in coffee shops or each other's homes. Employees perform on a results-oriented schedule so that everyone can choose how they want to structure their work day. Timesheets are used simply to allocate hours to projects for bookkeeping purposes.

As a new start-up, the Kezlo Group couldn't afford office space initially – and later found that they didn't need it. Without an office, firm employees meet with clients on the clients' own turf, providing better service and engagement, and underscoring how nonessential office space would be. Ultimately, it was advantageous for both client and employees, allowing for better work-life balance and flexibility for employees and greater responsiveness to clients.

For Lira Luis, AIA, principal and founder of Atelier Lira Luis Limited (ALLL), her firm's work is more than fifty percent carried out "in the cloud" through the internet or a global technological network, tempered by both online and offline networking. Luis' staff are not located in one office, nor in one city, and include both employees and contractors.

HOW DOES VIRTUAL PRACTICE DIFFER?

A virtual practice is *virtually* paperless – documents are stored and retrieved virtually – and most work can be conducted via cellphone or laptop. Local print shops can be used to process, sign, and seal drawings. Expenses are directly billed to projects, reimbursable, and profitable with markups. But many of these practices are already common in a variety of architectural firms today. So what are other notable differences in virtual practices from what has been the norm in traditional practices?

Winters considers the most significant difference between a traditional firm and his virtual practice to be the work flexibility it affords him – and not having to commute. He finds that it profoundly impacts his own family life since he can be at home with his son and participate actively in his daily life and school.

The virtual architectural practice model may be ideal for millennials who prefer flexible work arrangements. Parents can raise children and work from home, while others can choose recreational activities in the middle of the day. Macrae, who was 58 when he started his virtual practice, began living his retirement travel dreams while working easily and profitably from anywhere in the world. He highlights a recent “sea-change of less paranoia” about stealing others’ work and clients as an important factor in collaborating with his consultants. In utilizing only consultants or contractors, the elimination of human resources responsibilities and their associated costs is identified as another valuable characteristic of the virtual practice.

Just like traditional firms, virtual firms need project managers, interior designers, draftspersons, engineers, 3-D modelers, and other collaborators and team members are assembled when needed for a project. In Peter Macrae’s firm, he now has six teams that work on various project types around the world, completing 150 US projects in 2016 – in addition to collaboration on projects in Australia, New Zealand, Canada, and Mexico. With every project, he analyzes the requirements then assembles the necessary resources and talent from across the country.

Macrae notes that it’s important to empower one’s workers – which are now, in his case, all contractors to his firm – to identify future projects and then develop them together, sharing both the risks and the rewards. It is noted that from a legal standpoint, it is best that contractors have multiple clients and incorporate or form an LLC to ensure compliance with labor laws and to demonstrate that they are not simply employees who are being treated as contractors. Typically, the individual with the project connection takes the lead on the project. He notes that one’s income is consistent if one works efficiently and effectively; all are paid when the client pays. Importantly, each person performs the tasks for which one is best suited.

For a geographically diverse virtual practice, becoming registered in multiple states is required by law. Macrae is registered in 36 states – a feat accomplished through the National Council of Architecture Registration Boards (NCARB) and its certificate process. Winters holds eight registrations on the East coast where his firm currently does business. Your own state business license may be the only license required as long as the architect is not signing and sealing documents in other states, but state laws will vary. Generally, the architect’s license will be on the line for unlawful practice and there could also be implications for the firm as an entity depending on the nature of the activity. Each state defines what it considers to be “doing business” in that state. If you are doing business in a state, you generally must register as a “foreign” entity so you can be added to the tax rolls and pay income tax and an annual license renewal fee, in addition to the architectural license. Checking with state requirements and acting accordingly is necessary to ensure the firm is not later obligated to pay back fees, taxes and penalties which in many states could be crushing.

For the Kezlo Group, the freedom to structure one’s day and balance personal and family needs, avoiding trade-offs that pit work and life requirements against each other, make the biggest difference. However, maintaining a healthy firm culture when employees are not in the same physical space has provided challenges for his firm, requiring much more consistent communication than originally anticipated. Employee motivation is critical, and employees must be self-starters, motivated without needing much direction or feedback. Therefore, personality fit is crucial for success and must be ascertained before hiring to ensure the employee is able to work independently in a virtual office environment.

Overall, Winters doesn’t find that the services his firm offers are any different than they would be in a traditional practice, and they handle their contractual relationships and service providers the same way as before in a traditional small firm environment, employing most of the design team as consultants for a project including MEP engineering, structural engineering, interior design, etc. As for marketing, the firm

encourages everyone in it to market and work on business development; currently, most of their work is with repeat clients or referrals.

Luis finds that in a virtual practice, one is more “fully aware and in the moment of (where) you are actually located” and that it “evens out the playing field” to seek opportunities to work with people located elsewhere. She identifies the significant difference between virtual and traditional practice to be the diversity of stakeholders found in virtual practice. She finds the opportunity to work with diverse voices meaningful and important when trying to solve some of the most pressing challenges affecting the built environment. In addition, virtual practice offers flexibility not found in traditional practice, including not binding one to an 8 am to 5 pm schedule nor to a geographical location. One downside she noted is a lack of in-person meetings with colleagues.

While there are many benefits of a virtual practice, as with most any enterprise, there are also risks. This overview will touch on many but not all of them – and hiring the right professionals, such as an attorney, a business consultant, and a financial advisor, is the best approach to help you lay the groundwork you’ll need for future success. As the legal principle goes, *ignorance of the law is no excuse*, so it’s vitally important that every practitioner understand what is required so they don’t discover too late what can go wrong.

For example, employment may be handled differently in a virtual practice, but it still must conform to the law. You’ll need to pay close attention to the factors that determine whether a worker is properly classified as an employee or as an independent contractor – or you could face huge fines. Since a virtual practice depends almost exclusively on technology for communications, you’ll need to establish and communicate clear and consistent policies and procedures for how employees and contractors use technology.

When “onboarding” a new employee, one’s role and responsibilities must be communicated and understood by the employee and everyone with a vested interest. If travel is required, those requirements must be clearly understood and agreed to before employment begins. They’ll need to be able and willing to travel to meet clients and prospective clients. Virtual practitioners and their workers must be self-starters, comfortably and productively working independently to be successful. A consistent and regular communications plan for all your workers, whether employees or contractors, is always necessary to avoid misunderstandings or worse – especially when you won’t be seeing them across the water cooler. As for any type of firm, it’s also important to establish employee exit policies and procedures for the firm. Employment related disputes and claims can arise in any work setting. When engaging employees or contractors, it is important to keep abreast of labor laws, and stay educated on workplace harassment and other common claims.

A good understanding of contract law and intellectual property rights as they apply to architectural practice is advisable, and relying on an attorney as well as one’s liability carrier for interpretation and advice as needed, or when a potential claim may arise is also necessary. A virtual practice also means it’s important for you to have a thorough understanding of the business practices and culture wherever your projects and your workers reside.

A virtual practice must be ready to invest in appropriate technology and software upgrades for the security and efficiency that you’ll need to avoid future problems with both, which may likely arise. Project extranets can be utilized to establish relationships, streamline communications, increase accountability, and create a permanent record of project information which could be critical in the event of a future claim.

Importantly, you must be registered in every state where you perform architectural services and obtain state business licenses wherever you may be doing business. You need to maintain adequate insurance for you, your firm, and your employees – and even if you’re a solopreneur contractor. It’s

important to make any necessary changes to your policies to address your current practice and ensure it's adequately covered.

Establishing a financial discipline that includes strategies appropriate for the firm's size and structure is also an important consideration. You need to define appropriate profit margins, time allocations, and staffing models to address your work.

You'll need to think through and plan how you will find work and grow the business from the standpoint of marketing, sales, and business development – whether that's you, your workers, or outsourcing the responsibility. There will be "hidden costs" of starting and running a new business so it's important to organize an appropriate backup plan or stream of alternate income while getting the firm off the ground for the first year.

This overview will highlight the many benefits and risks of a virtual practice, with a checklist at the end to help summarize what you'll need to address. Starting out with a team of professionals with whom you can consult and set plans, will help to ensure your virtual practice is virtually flawless.

WHAT DOES THE LAW REQUIRE?

There is increasing interest recently in "virtual" practice, other non-traditional forms of practice, and project "team" organization. Not everyone has the same understanding of how a "virtual" practice would be structured or how it would perform services on projects – nor of the inherent legal and professional liability concerns.

A solid understanding of the basics of traditional business structures and project team organizations can be crucial for future success. As in many endeavors, understanding pertinent laws and regulations and some proficiency with the fundamentals of business organization and management structures will help one to achieve their desired ends. This section will provide basic information about business structures and labor law and while by no means exhaustive, it should be useful when starting a 'virtual practice'.

Business Structures

While this discussion is applicable to general business entities, some things are different when a business is offering professional services – often radically so – and will be addressed later.

There is a growing type of for-profit entity that caters to many start-ups: the benefit corporation. A growing number of architecture firms have become benefit corporations in the past 10 years, the biggest driver of this growth being startups by Millennials who wish to create public benefits. For Luis, she originally registered her firm, ALLL, as an LLC; however, when the Benefit Corporation Act was passed in her state of Illinois in 2013, she re-registered it as a Benefit Corporation. Some of the advantages of registering as a Benefit Corporation include reduced director exposure in some cases and attracting talent and private investment capital when the organization is focused on the benefit mission, rather than shareholder pressures for dividends or growth.

Sole Proprietorship

This is a business owned by one person, but with any number of employees. (A sole proprietor may sometimes be a "sole practitioner.") The owner is completely responsible for all decisions, is personally liable for all business debts and is liable for his/her own wrongful acts or omissions. If there are any employees, the owner is liable for their wrongful acts or omissions (if made in the course of their employment). The owner is taxed personally on the net income of the business. And, finally, the business usually dies when the owner dies.

If a sole proprietorship wants to offer architectural services to the public, the sole proprietor must be licensed to practice architecture in the applicable jurisdiction—*unless* s/he is performing work not requiring licensure. Importantly, the firm would also need a business license.

General Partnership

When two or more people or entities associate to carry on a business for profit as co-owners, that will generally be treated as a partnership. Each partner is responsible for his/her own wrongful acts or omissions, as well as for those of all other partners and employees, if made in the course of their employment. In other words, your partners can put your personal assets at risk and many attorneys advise that two or more owners form a corporation or an LLC instead of a general partnership. That being said, there are firms that practice successfully as partnerships.

Corporation

A corporation is a legal entity which exists separate from its owners and officers. Once properly established, the corporation is responsible for its debts and obligations. Legally, shareholders (owners) are not personally liable for the corporation's debts. The reality is often different, however. Banks and vendors will often not extend credit to new corporations without a personal guarantee by the owners (shareholders).

If a corporation wants to offer architectural services to the public, the corporation must qualify to do so in the applicable state. Generally speaking, that requires that at least 51% of the ownership interests in the corporation (sometimes more) must be held by registered architects (at least one of whom is authorized to practice architecture in the applicable state). However, this varies by state and the corporation will need to verify its state laws.

Notwithstanding the general rule about liability, licensed professionals are always personally liable for their own negligent acts or omissions. This is true regardless of the legal form of the business entity and there is nowhere to hide in this respect. Remember, licensed professionals are *always* personally liable for their own negligent acts or omissions.

A corporation may exist in perpetuity. Shareholders may come and go, but the corporation will persist. Owners (shareholders) must approve of all fundamental changes in the corporation. They elect the Board of Directors. The Board of Directors is ultimately responsible for the management of the corporation. They elect the Officers. The Officers conduct the day-to-day affairs of the corporation.

If the corporation earns a net profit, it is taxed on that profit and it generally must pay the remainder out to shareholders proportionally as a taxable dividend on each share. This so-called "double taxation" can be avoided either by paying out all gross profits as bonuses or by being an S Corporation. An S Corp is allowed to pass income directly to shareholders, where it is taxed once and only once, avoiding a second tax at the corporation level.

A Professional Corporation is generally just like a regular business corporation, except that all shareholders must be licensed to practice the profession which the corporation will practice. If this is not required in a particular jurisdiction, it is generally unduly restrictive.

Limited Liability Company or Partnership (LLC or LLP)

This entity is a hybrid between a partnership and a corporation. It is an alternative to "S Corp" status, limiting liability with no double taxation; however, a firm may be an LLC and elect to be taxed as if they were an S Corp. An "S Corp" may have no more than 100 shareholders, so an LLC is attractive to firms which might have chosen "S Corp" status but were too big. LLCs can be organized to be very flexible in terms of structure and operations to suit individual needs or desires.

Generally, the foregoing entities can work with just one owner; however, when there are two or more owners, a sole proprietorship is not possible. Importantly, once you initially establish a business entity, you are not locked into that form forever – changes can be made, but there may be tax consequences.

Labor Law Overview

Traditionally, many architects have hired "consultants" for longer or shorter periods of time for a number of reasons and to avoid putting them on the payroll, paying benefits, and withholding taxes.

Whether your practice is set up in a more 'traditional' or a more 'virtual' way, key drivers of claims will continue so your firm's risk management practices should continue as well. There are several key areas that should take on a greater focus in virtual practice, including:

- The use of independent contractors versus employees, and
- The importance of technology in your practice.

The firm's use and selection of employees versus independent contractors is of primary concern. It is not just a consideration of how you want to operate but how the law will affect your practice.

In creating a virtual practice, many firms will replace staff expertise or pursue new service and practice opportunities with that of independent contractors. Architects should take care to avoid the legal and taxation difficulties generated by the *improper* use of independent contractors.

So, who is a "consultant"? You should understand the term to mean an independent contractor and NOT an "employee." This determination is not as simple as it sounds and there can be large financial consequences for getting it wrong. Another way to look at it is: who must be classified as an "employee"?

By way of example, the Commonwealth of Massachusetts has a pretty clear law on the topic. Per M.G.L. c. 149, S 148B, to be considered an independent contractor ("consultant" vs. "employee") each of the following factors must be established:

1. The worker must be free from the "employer's" control and direction in performing the services. (This must be true per the contract and in fact.)
2. The service provided by the worker must be outside the "employer's" usual course of business.
3. The worker must be customarily engaged in an independent trade, occupation, profession or business of the same type.

"Usual course of business test" is the most expansive. Some other state courts have suggested that it does not include services that are i) used occasionally and at irregular intervals and ii) performed outside of the "employer's" place of business.

Again, Massachusetts law is strict on this topic. For example, if you have someone coming to your office to perform services, using your desk and equipment, etc., they are providing drafting and design services and they have no other established place of business with other clients, etc., you should assume they are an employee and treat them as such. This is not to say that a "consultant" cannot be a sole proprietor with many other clients who are billed, etc. However, the lone person between jobs will probably not qualify. If your "consultants" have created an S Corp or LLC for their practices, then there's no problem. The consequences are that the firm may be liable for back workers' compensation payments, for payment of income tax withholding that was not done, plus interest, plus other potential penalties and interest. When contracting with consultants, also consider seeking advice from your attorney on drafting a clear provision pertaining to the non-employee status of the consultant.

Employee Liability Issues

Cost and Flexibility Benefits

Using independent contractors rather than employees can be an effective asset protection tool. A firm properly using the services of independent contractors may benefit because:

- The firm is not required to pay employment taxes or workers compensation insurance on the wages paid to independent contractors; however, there are some exceptions to the independent contractor rules state-by-state that should be examined.
- Benefit and retirement plans of the firm are not required to be extended to these non-employees.
- Some tort liability for the independent contractor can be avoided, although in most instances, the professional liability exposure cannot be limited.
- Record-keeping is simplified because no withholding from wages or employer tax reports is necessary.

However, strict rules must be followed so that workers are properly classified as independent contractors; purposeful mis-classification is unlawful. While a firm may designate a worker as independent, the ultimate classification is not up to the employer. A written employment agreement labeling the worker as an independent contractor is helpful, but a label does not create reality. The law—both tax and agency law—has developed elaborate rules that determine whether a worker is properly classified. If the worker does not meet these rules, the label means nothing. If the worker is “reclassified” by the courts or the IRS, the employer faces significant costs and risks.

The intent and use of independent contractors in a virtual practice may be more complicated when the individuals are project-to-project hires under your direct supervision and control — the most important aspect for a virtual firm to consider as it moves forward.

The Issue of Control

Over the years, the courts have developed approximately 20 factors to test whether a worker is properly classified. For the most part, the IRS follows the same guidelines. Many of these factors can be condensed into one factor—control. With many workers providing professional services to a prime design professional, the control issue is unclear. At times, firms attempt to turn current employees into independent contractors to increase flexibility and cost savings while still directing their actions and often preventing them from pursuing opportunities with competitors. If a worker does not have the ability to determine fees, establish working hours, and offer services to others, it is likely that the worker will be deemed an employee. When the independent contractor works for one firm on a more or less permanent basis, the independence is easy to challenge.

Use of Temporary Employees

For tax purposes, firms often look to IRS “safe harbor” provisions that provide guidance on the reasonable basis for classifying a worker as an independent contractor. While the IRS may have the burden of proving an independent contractor is not truly independent, it is likely that as more firms shed permanent workers to reduce costs, more IRS challenges will be forthcoming. Even the use of workers from an established temporary employment agency is no longer a certain protection. According to the courts, for tax purposes, workers may have two employers and be considered employees of both the temp agency and the company to which they are assigned.

Tort Liability for Independent Contractors

Firms are responsible for the actions of employees within the normal scope of their employment activities. A firm is not normally responsible for torts committed by an independent contractor. In professional liability cases, contrary to the general rule, courts will hold an employer liable for the acts of an independent contractor because the employer has a legal duty that may not be delegated to another. Thus, prime design professionals are not only responsible for their employees but also for the exposures of their sub-consultants, including any individuals providing professional services as independent contractors. In

addition, a firm may be separately liable for the negligent hiring of an independent contractor not qualified to legally perform the services required or for failure to meet the standard of care for these services.

Hiring independent contractors may be an effective way for a firm to remain financially viable in a bad economy. Their use also can assist a firm in meeting new client needs. Care must be taken, however, to avoid a reclassification for tax or employment benefit purposes and for the tort liability of an independent contractor.

Insurance Coverage

Additionally, professional liability policies are set up to cover the entity and the individual principals, partners, and past and present employees of the firm. Some policies, including the policy provided under the CNA/Schinnerer program, cover leased employees under your direct supervision and control. However, policies today do not include coverage for independent contractors who, may be working in a company that your firm hires, e.g., a consulting engineering firm, or working as an individual for your virtual practice, so they would need to provide their own professional liability coverage. **Bringing your carrier and insurance broker into the conversation early in the process is very important to avoid the possibility of coverage gaps or increased risk exposure.**

Leasing Employees

Another angle may be to consider leasing out your employees to other firms during “down time” – but you still must consider the liability that may occur from that practice. When a design firm provides a client with its own professional employees—essentially leasing its employees to the client—and they are employees of the design firm under the direction of the client—all three parties are at great risk. Obviously, the professional employee is responsible for his or her own actions but the design firm, as the employer, has the all-encompassing responsibility for its employees’ actions in their normal course of practice. The design firm’s responsibility could be mitigated by the actions of the client, but this, depends on state statutory and case law.

From a professional liability perspective, a design firm is liable for the negligence of its employees in performing professional services. It can contractually limit its liability to the clients for whom its employees are providing services and be indemnified by clients, meaning secured against legal responsibility for their actions, in situations where a third-party claim can be tied to a supervisory action of a client. A design firm leasing employees may want to check with legal counsel to determine if additional contract language is needed to best address this exposure. The focus of the review is to see if the firm can better confirm who is and should be in control of the employees’ services and providing a waiver of claim to the design firm that does not have control.

Regardless of the firm’s approach, it is very important for professional service firms to have clear policies on the outside professional activities of its employees. The possibility exists that a firm can be held liable for the actions of its employees even though it did not specifically know of or authorize those actions. A firm with no clear policy against moonlighting, and no clear prohibition against using company equipment or premises for outside employment, can find itself with imputed liability and no insurance coverage.

A firm’s exposure to the possibility of loss is decreased if the clients of moonlighting employees—whether the professional services are being provided for a fee or otherwise—acknowledge that the services are being performed solely by the individual, not by the individual’s employer, and that the firm assumes no responsibility for the actions of the individual providing such services.

A firm is also at risk for being held liable for negligence claims arising out of the moonlighting of its employees if it does not clarify rules regarding the use of company equipment or premises for outside employment activities. An absolute prohibition is not unreasonable. A firm could protect itself and assist employees in understanding their responsibilities by having policies that address these situations.

Using Non-Employees Can Create Tax and Liability Issues

Professional service firms are increasingly considering divesting some or all of its employees and may simply lease employees from other firms or staffing businesses. Professional Employer Organizations or PEOs, serve as a co-employer, offering firms the ability to “lease” employees and the PEO generally handles HR-related functions. Firms may lease professional employees to reduce overhead and respond more quickly to variations in work flow without adding administrative complexity. Other firms are turning former employees into independent contractors as a way for firms to cut wages and benefits since many “independent contractors” had no choice but to work for such a reduction in compensation. With the advent of available health insurance coverage for individuals brought about by the Affordable Care Act, many employees are now eager to set themselves up as independent contractors with the goal of eventually working for multiple firms or directly with clients.

In the case of leased employees actually employed by another entity, it is highly likely that the entity will bear most of the legal responsibility for the employees. That does not, however, reduce the professional liability exposure of the firm using and usually controlling the leased employees. If not done correctly, this approach raises the possibility that *both* entities will be found to be “joint employers” sharing business and taxation as well as professional exposures.

The use of independent contractors—who are not employees and therefore not subject to the array of federal, state, and local employment laws and who are treated very differently than employees for tax, unemployment compensation, workers’ compensation, and other purposes—can result in professional and business risks to the firm. Unlike employees, independent contractors are not subject to laws such as the Family and Medical Leave Act, the Fair Labor Standards Act, and relevant tax, workers’ compensation, and unemployment laws. Federal laws exist to ensure that all workers are properly classified as independent contractors or employees depending on numerous factors that include but not limited to, the following:

- the extent to which the worker’s services are an integral part of the employer’s business;
- the permanency of the worker/employer relationship;
- whether the worker uses his own tools or equipment when performing the job;
- the nature and degree of control by the employer;
- the worker’s opportunity for profit and loss; and
- the level of skill required in performing the job and the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent enterprise.

Classifying workers as independent contractors has become increasingly common in recent years, to the point where we are now beginning to see the inevitable regulatory push-back. One example in Pennsylvania is the Construction Workplace Misclassification Act, which severely limits the ability to qualify as an independent contractor and enhances penalties for those firms that misclassify, or knowingly contract with those who misclassify, construction employees as independent contractors. Also, the Internal Revenue Service and U.S. Department of Labor announced a coordinated program of education, audit, and enforcement directed at the misclassification of employees as independent contractors under the federal tax and wage and hour laws.

Mandating proper classification of workers benefits the workforce, regardless of whether an employer chooses to misclassify its employees as independent contractors or sets up a leasing arrangement with an outside organization. Forcing firms to acknowledge workers over whom they have control as employees also levels the playing field so that employers who attempt to circumvent regulations do not receive an unfair competitive advantage. Professional service firms must be careful in leasing professional employees and should not rely on formulaic documents and contracts that deem workers independent contractors if those workers do not truly fit that profile. Misclassification could result in civil and criminal penalties.

Licensing Issues

For a virtual practice to function across state lines, across the country, or even internationally, multiple professional registrations will be required for each jurisdiction in which the architect intends to practice.

As a function of each state's right to govern the health, safety and welfare of its residents, state law governs the practice of architecture. Licensure laws vary by state, but typically contain provisions that define the practice of architecture, its privileges and limitations, and enumerate the minimum education and training requirements to become a licensed architect in the jurisdiction. Like other professions such as medicine or law, practicing architecture without a license in the place where the would-be architect is performing work is unlawful.

To avoid the unauthorized practice of architecture, an architect must maintain a license in each state in which he or she is performing architectural services. This can become confusing to architects working in a virtual practice where they may live in a distant location, be part of a team that is spread out across a geographic region, or take on only certain aspects of architectural services. Likewise, less experienced architecture graduates not yet licensed or not licensed in the state where a project is located may be more likely to engage in work that starts out merely as drafting, rendering or modeling, and unwittingly end up taking on work that amounts to the practice of architecture, or be credited as an architect – especially when engaging in international work. The bottom line is that it is important for the architect to stay up to speed on licensing requirements for each state in which he or she engages in professional services related to the practice of architecture, and where the activities undertaken fall under the statutory definition, be mindful of the law's individual requirements.

One can look to the experiences of large firms that already operate in multiple states to understand the very same regulatory requirements that a virtual practice would face, but also some of the conveniences. Starting with each state's Secretary of State or business licensing body, the architect should investigate the requirements for registering the business, as well as verifying with the state licensing board the individual's requirements to practice architecture. NCARB provides ample resources for understanding state architect licensing requirements and is an essential first stop.

It is worth noting that while a large firm may have an individual or a team solely dedicated to tracking the business aspects of a multi-state practice, for a small firm or sole practitioner this administrative burden may become heavy, e.g., keeping track of state business and professional registrations, continuing education requirements, and the like. When planning for a virtual practice, this should not be an afterthought, but something carefully worked into the business plan, as it will require additional time and administrative overhead.

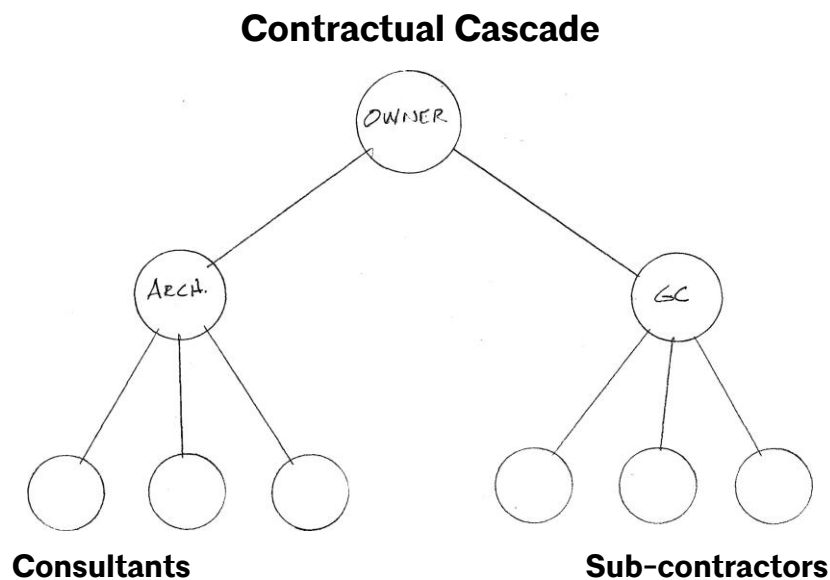
In addition, understanding each state's laws pertaining to signing and sealing drawings is also important. Permitting, construction contract administration, observation, fielding questions by code enforcement officials and managing jurisdictional inspections are factors to consider if the architect is performing design services only. Traditionally, many construction defects happen when communications falter or break down between the design and construction phases of a project. In a virtual practice, the line may be blurred where responsibilities shift or are eliminated. Architects may face client conflicts or complaints if they are in absentia and that may result in complaints to the state licensing board or the AIA National Ethics Council.

In summary, the licensing issues in virtual practice can be observed in firms that already manage multiple offices, virtual platforms, and mobile communication. For the small firm, this may add additional administrative burdens. It is essential to check each state's legal requirements for both business and professional licenses, and check the requirements for code enforcement in the jurisdictions. Finally, depending on the business model and the work involved, licensure issues may be just one hurdle that is "worth it" to pursue work across geographic boundaries.

Contractual Cascade: Traditional Practice

As seen in the diagram on the next page, the "owner" or "client" is at the top of the cascade. On the left, there is a line (representing a contract) connecting the owner to the design professional (this assumes an architect, but it could be any design discipline) who is at the next level down on the cascade. Further, there are one or more lines (again, contracts) connecting the architect to various consultants at the next level down on the cascade. Those entities are often engineers, but they could be any discipline providing services to the architect to support the architect in performing its contract with the owner.

On the right side, the general contractor is at the top of the cascade and various subcontractors at the lower level of the cascade. Regarding the construction side, the principles are the same as those that are applicable to the design side. (In both cases, additional levels of the cascade could be added and the same principles would apply.)



As a rule of thumb, obligations and commitments flow DOWN the contract lines (from the top level of the cascade down to lower levels) and liabilities flow UP the contract lines (from the lower levels of the cascade to upper levels). For example, the owner would contract with the architect to perform services. Whether the architect is a sole proprietor, corporation or LLC, it must be licensed or authorized to offer architectural services to the public, e.g., the owner. The architect (depending on the make-up of the firm and other circumstances) would contract with one or more engineers, landscape architects, acoustical consultants, etc. to perform some of the services that the architect has contracted to perform for the owner. In most cases, in traditional practice, the architect has employees as do the various consultants. If the consultants are individuals, refer to the earlier notes about when "independent contractors" must be deemed to be "employees."

Basically, money flows down the cascade and liability "flows" up the cascade. The owner pays the architect who, in turn, pays the consultants. If a consultant makes a negligent error or omission, they will be liable to the architect who will, in turn, be liable to the owner.

If the architect is potentially going to be liable to the owner for a negligent error made by a consultant, the architect will want to be able to recover from the consultant for damages and expenses caused by such an error. The best source of funds for such recovery is professional liability insurance, so it behooves the architect to be sure that its consultants are properly insured.

Contractual Cascade: Virtual Practice

"Virtual Practice" means different things to different people. In a virtual practice, the cascade diagrammed earlier would remain "operational," but the entities in each position on the cascade would be somewhat different than in traditional practice.

The owner remains at the apex of the cascade. The architect remains at the next level down. However, in a virtual practice, this entity might be a sole practitioner who has few, if any, employees. Nevertheless, the individual must be licensed to practice architecture if the services being offered to the owner qualify as the "practice of architecture" under state law.

The consultants at the next level down may be the same as they were in the cascade for traditional practice or they may be a series of individuals or small firms located anywhere around the world. If some of those consultants are individuals who are taking the place of traditional "staff," the architect must be careful to verify that they are truly independent contractors and will not be deemed to be "employees" for whom the architect must withhold monies for FICA, etc. and for whom workers' compensation insurance must be carried.

Further, since the "staff" may be spread far and wide, supervision and quality control can become difficult. If those individuals are preparing construction documents to which the architect will ultimately apply that architect's stamp and seal, the architect must be cognizant of architectural licensing rules which typically require such documents to be prepared "in the architect's office" or "under the architect's responsible supervision." Typically, an architect cannot stamp previously prepared documents provided by an owner or others.

Just as in traditional practice, the architect will be liable to the owner for the negligent acts, errors and omissions of its consultants. If such consultants are individuals or small firms or located in foreign countries, the architect may have a difficult time pursuing remedies against them. They may be what is referred to as "judgment proof."

TECHNOLOGY AND PRACTICE

Design firms readily accepted CADD systems because they provided faster and more efficient ways to execute traditional design tasks. With the advent of email, firms welcomed the ability to communicate instantaneously. But the transfer and reuse of design documents and the informality of email can pose great risks to design firms. Now project websites can provide collaboration, communication, and documentation opportunities that can add efficiency and protection to design firm efforts.

Technology—and the accelerating pace of communications—are resulting in a redefinition of the roles and risks of all participants in the design and construction process. This fact is amplified when considering a "virtual" practice where the single office mentality is turned on its head, and the ability to "practice locally" while being "virtual", is very important.

In most cases, project websites and other cloud-based solutions offer new levels of collaboration, layers of access to communication and documentation, and records management. However, all technology comes with some risk and consideration of the platform that works best for your firm should be the strongest consideration. Most project extranets using commercial application service providers offer users the opportunity to manage projects more efficiently, streamline communications, increase accountability, and create a permanent record of information, decisions, approvals, and conditions. Caution must be taken, however, to find the right solution for your practice and/or specific project.

While technology is forcing a profound change in how design professionals practice, this redefinition of the industry is not reflected in the base contract documents, primarily B101 and A201. Although the use of such technology may not appear to alter the professional services relationship, it is important to remember that project extranets are more than mere tools for carrying out traditional duties and routine functions. They should be recognized as establishing legal relationships that may differ from the traditional positions and they should accommodate collaborative project delivery responsibilities.

Although internet-based design and management systems do not, by themselves, create a new paradigm for the design, construction, labor supply, material procurement, and operation of facilities, it is clear that they will modify the roles of all construction participants along with the project delivery, contracting, and legal relationships.

Considering a Project Extranet?

Internet-based project management systems vary in sophistication and intent. Design professionals considering a virtual practice should evaluate and consider the following:

- What is the focus and intent of the project extranet?
- Is it meant to share documents, to perform administrative functions, or to serve as an integrated e-business site for contractors?
- Who owns the site and what is the commercial viability of the owner? Will the site remain in existence during the entire project?
- Who controls site security and maintains acceptable layered access protocols?
- How will site documents and data be authenticated and maintained?
- How will the project records be archived upon project completion?
- Who can access the inactive site or obtain a copy of the project records?
- Can the site be “rebuilt” for future dispute resolution purposes?

Addressing Technology Exposures When Employees Depart

Over time, virtual practice firms will have employees leave and the transition process may not be optimal unless the firm properly handles the technology exposures caused by a departing employee. Indeed, this also applies to contractors who are accessing the firm’s extranet and other file-sharing tools. A firm should have an employment manual with technology policies and management procedures to cover any employee or contractor departure. Technology transition policies and procedures should be established based on firm specifics and its use of technology. Due to the proliferation of portable devices, firms need to take care whenever someone departs for any reason.

Taking precautionary steps before employees leave the company, either voluntarily or involuntarily, is basic risk management. A primary reason is to prevent incidents of deliberate sabotage to company data, such as the destruction, alteration, or theft of proprietary information by the former employee. Firms should also make a best practice of following key steps to ensure company information is safeguarded even from well-intentioned employees who leave for better opportunities and who do not understand the confidential nature of firm, client, and project information. Key steps include:

Act quickly on restricting or limiting internet access. Even when you trust the departing employee, lax security practices can expose your entire network. A good first step is eliminating the existing user account and creating a temporary account with limited access to necessary resources and actions. Require company-issued smartphones and other devices to be turned in immediately. Taking a longer time to secure this step could become a costly mistake if the employee accesses the company’s information remotely. Due to the prevalence of password sharing, it may also make sense to force a company-wide password change on a regular interval, including the day access is revoked from an employee.

Make a determination about whether an email account can be retained. In some cases, an email account might remain open with supervision, or emails could be redirected to an account where they can

be held and screened. Care must be taken as to what documents can be copied or downloaded. Although employees departing of their own volition have usually downloaded everything they want before announcing their departure, an effort should be made to ensure other information is not being sent inappropriately.

Keep a list of all hardware, software, and services the departing person uses. It is especially important to find out what templates, documents, and other files have been copied, forwarded, or downloaded, especially when a departing employee goes to a competitor. With information stored in a variety of security levels and locations across the network, access rights are numerous. It is advisable for a company to maintain a document that lists each employee's access to the company's information systems so they can then disable all access rights, limiting the chance of leaving open a forgotten avenue of access. Having a manager make sure that all access rights are disabled with a checklist that must be signed for confirmation is another measure to take to guarantee safekeeping of proprietary information.

Conduct an exit interview. If your firm did not have employees sign a non-compete or non-disclosure agreement in the initial employment stages, it should conduct exit interviews to remind employees that company information is confidential and should not be revealed to an outsider. This practice should be facilitated by a company policy already in place about the prohibition of disclosing company information to outsiders.

Pursue an investigation when an employee is suspected of illegal or unlawful activities. When an employee who has left the company is suspected of stealing company data, deleting files, or sharing information with outsiders, preserve the employee's computer. Activities that occurred on the computer can be traced, but the chances of finding evidence are limited by continued usage of the computer. Companies can hire computer forensics experts to discover evidence that could prove that the employee did indeed perform illegal or unlawful activities.

CHECKLIST OF IMPORTANT CONSIDERATIONS

The permutations for "virtual practice" are endless and evolving so one could never discuss all possible options. There are many considerations and questions to be asked when one is contemplating starting or working in a virtual practice. Relying on a competent business consultant and attorney are good places to start. However, the ground rules for traditional practice also serve to inform those who would like to pursue new and effective ways to conduct a virtual practice.

So, what are the "keys" to a successful virtual practice? Based on experience, here is a checklist of important questions and criteria to keep in mind:

Firm Management Issues

- If you're starting a virtual practice with a partner or a group of people, take great care to ensure that each person's role and responsibilities are communicated and understood by everyone with a vested interest. Friendships are tested in business relationships so clarity of expectations and understanding are of paramount importance.
- Plan how you will consistently and regularly communicate with your firm's employees and/or contractors since you do not occupy the same office space.
- Decide what type of firm culture, product, and career you are trying to build – then focus on matching the appropriate people, projects, and lifestyle choices.

- Gain a basic understanding of contract law and intellectual property rights—a good starting place may be AIA Contract Documents that an architect normally studies for the Architects Registration Exam (ARE). See Appendices A & B for the basics on contract and tort law. Consult with your attorney on questions of law and legal interpretation.
- Study the business practices and culture of the place/country where you have a project or where those you hire for the project reside.
- Have a construction lawyer or intellectual property lawyer as part of your list of third party consultants – which may not be needed but is a wise investment. Consult the AIA Trust LegalLine for more information – and the AIA Trust Legal Network for referrals.
- Let your priorities be driven by the needs of your business operation, which will vary based on the unique size, industry focus, and culture of the architecture team.

Firm Infrastructure Issues

- Invest in and utilize appropriate technology and software upgrades – so you can hold virtual meetings and share documents with an ever-expanding array of apps and software tools such as: GoToMeeting, Skype, WebEx, Slack, WeTransfer, Google Drive, Dropbox and similar tools.
- Utilize project extranets to establish relationships, streamline communications, increase accountability, and create a permanent record of project information.
- Identify appropriate and convenient meeting locations for project team meetings, whether in a restaurant for lunch, at a coffee shop, or in someone’s home. Employees (or contractors) should always be prepared to visit the client’s turf for client meetings.
- Become registered in multiple states if important to the scope of your firm and where required by law. Register with NCARB and utilize their certificate process to achieve other state licenses through reciprocity.
- Be sure to have your own state business license, and investigate other state licenses where you may be doing business – and especially if the firm will be signing and sealing documents in other states.
- Insure yourself. Take care to bring your carrier and insurance broker into the conversation early as you will likely need to make changes to your policies moving forward to address the specifics of your firm’s approach.
- Insure yourself – even as you’re a solopreneur contractor, you need to be covered.

Employee & Contractor Issues

- Find – and develop – successful independent contractors. Seasoned professionals can serve as project managers and less experienced architects can be mentored to grow and develop their own skill sets.
- When you are hiring firm employees, ascertain before hiring the level of employee motivation and whether the potential employee is a self-starter – an imperative for working independently in a virtual office environment.

- Consider outsourcing your payroll – and possibly utilize a Professional Employer Organization (PEO) to handle it along with benefits administration, HR compliance and related needs.
- Pay attention to the 20 factors that determine whether a worker is properly classified as an employee or as an independent contractor. Control is paramount when determining worker status.
- When leasing employees, consider language drafted by an attorney that reduces the design firm's risk to shift it to the client.
- Joining a virtual practice as a part-time contractor may be ideal for younger architects who want to learn how a virtual practice works without leaving their current job, where not prohibited by law or contract.
- Younger architects should have a good understanding of their own strengths in delivering a project so the firm owner is clear as to what talent(s) they will contribute to a project.
- Starting a virtual practice is ideal for experienced, mid-career architects who thoroughly understand the target market, are technically proficient, have a well-developed business acumen, and have built a network of clients.
- Establish employee technology use and transition/exit policies and procedures for the firm.

Marketing Issues

- Determine how you will find work and grow the business from the standpoint of marketing, sales, and business development – and organize an appropriate backup plan to make money while getting the firm off the ground. It's important to identify the "hidden costs" to starting and running a business so you can plan a stream of alternate income for the first year.
- Identify your client base and where the work is going to come from – and equally important, how it is going to get done. Define appropriate profit margins, time allocations, and staffing models that address the defined work stream.
- Employees can be encouraged to become rainmakers for the virtual firm – as are independent firm owners with their own clients and projects then working together as each other's clients.
- Consider outsourcing some business development and marketing efforts.

Financial & Fee Issues

- Focus on results, not hours, and structure fees appropriate to the size and business strategy of the firm.
- Adhere to a financial discipline that responds to the market and pays careful attention to overhead. Consider payment schedules that address the needs of the firm and the design process.
- Understand that as with most businesses, there will be "peaks and valleys" financially. But with negligible overhead, simply be prepared to weather any valleys.

CONCLUSION

There are many benefits of running a virtual practice but as with any enterprise, the risks must also be considered. Many business needs, such as employees, licensing, and infrastructure may be handled *differently* in a virtual practice than in a traditional practice, but they still must conform to the law.

If this overview has inspired you to consider virtual practice, be sure to consider all the requirements. Think through and plan how to set up your practice for success, hiring the professionals you'll need to help you lay the groundwork.

At the Kezlo Group, Winters has employees rather than contractors and says his firm is now like one big family – very social and communal. He pays attention to employee development and career advancement so that employees can learn and grow, becoming more independent and responsible for project outcomes. Since most employees have young families, everyone understands the need not to go into an office every day. He likes to work with people that he considers as friends and avoid the work-life dichotomy that exists in traditional practice – and ultimately achieve greater fulfillment for all his employees.

Luis suggests that one approach a virtual practice with the best of intentions and an open mind – and while it may not be for everyone, there is a growing segment in the architecture profession now practicing this way as a result of advancements in new technology.

Macrae states that going virtual has been the best decision of his career. He works with creative and highly skilled collaborative consultants and these solopreneurs enjoy consistent, meaningful, and lucrative ventures, with everyone achieving real independence. With a virtual architectural practice model, he finds that the world can be your marketplace, no matter where you are located.

For More Information:

Contact the [AIA Trust LegalLine](#) for more information about how they can help your firm, whether virtual or traditional.

Visit the [AIA Trust Legal Network](#) for referrals and the [AIA Trust Professional Liability Database](#) for more information about insurers and pertinent considerations.

Find out whether a Professional Employer Organization (PEO) would work for your firm:
<http://www.theaiatrust.com/peo-hr-outsourcing-for-firms/>

Check out all the free practice resources available to you on theaiatrust.com:
<http://www.theaiatrust.com/practice-resources-and-benefits/>

If you're just starting a firm, visit the section of resources and benefit programs especially geared to you:
<http://www.theaiatrust.com/new-in-practice/>

For more information on Benefit Corporations, visit <http://benefitcorp.net/> .

Appendix A.

CONTRACT LAW

A contract is "a promise that the law will enforce." The elements required to make a contract are:

- Mutual Assent

This is manifested through an offer and acceptance. Offers must be accepted exactly as offered. If modified terms are proposed, they become a counteroffer. Unless otherwise specified, an offer is open for a "reasonable" time. (It is often advisable to specify 30 days or some other time period.) Unless otherwise specified, an offer may be withdrawn at any time prior to acceptance. (It is sometimes advisable to require that offers remain open for "x" days to allow review and action.)

- Consideration

Consideration is "the price, motive or benefit that induces the parties to contract." There must be a bargained-for exchange of something of legal value for there to be a binding contract. Be aware that commercial value is normally irrelevant with respect to valid consideration (e.g., you could purchase my car for \$1). In some states a contract "under seal" is presumed to have proper consideration. (This is not referring to a corporate seal which is something entirely different.)

- Legal capacity to contract - A person is incapable of entering into a contract if:

- Under age (18 or 21, depending on the state),
- Drunk (or unable to understand the action being taken),
- Mentally ill, or
- Under legal guardianship.

(Note that corporations may not be empowered or licensed to sign contracts for specific types of work or services.)

- Legally Permissible Objective

A contract that requires one or both parties to perform illegal acts is unenforceable.

Contracts may be assigned. An assignment transfers one party's rights under a contract to a third party (not originally a contracting party). This is often done at the time of funding of a construction loan when the lender wants a "contingent assignment" of the owner-architect agreement. Generally, an assignment does not discharge the original party's obligations under the contract.

Warranties are a type of contract. They are assurances of the quality or performance of a product or work, or of the duration of satisfactory performance. Warranties are not insurable under professional liability insurance.

Uniform Commercial Code (UCC)

The UCC is a model law governing commercial transactions. It has been enacted virtually intact in all states except Louisiana. Article 2 covers the sale, by a merchant, of goods worth \$500 or more. The UCC does NOT apply to most design contracts and general construction contracts, because services predominate over the sale of goods. UCC concepts like "fit for a particular purpose" or "merchantable" are not transferrable to design contracts, as a rule.

Appendix B.

TORT LAW

Negligence is a tort. A tort is a civil wrong, as opposed to a criminal wrong. Some violations can be both. There are four elements and for an architect to be legally liable, all four elements must be proven. These elements are:

- Existence of a duty. The scope of services in the owner-architect agreement is the first place to look for the scope of duty owed.
- Substandard performance in response to that duty (generally, **the professional standard of care**). This is proven by expert testimony. What would the reasonably competent architect have done under the same circumstances? This does not require perfection. Although the standard of care may be considered as a "stand alone" concept, it is only one element of the tort of negligence.
- Damages; and
- Proof that the substandard performance was the actual and legal (proximate) cause of the damages. BUT FOR the negligence, the damages would not have occurred.

Architects are typically judged by the professional standard of care. Contractors are judged on a breach of contract standard. It is possible that an owner can have a construction problem for which neither the architect nor the contractor is liable.

Generally, speaking, compensatory damages (to compensate for the loss) are awarded as a result of negligence. However, consequential damages (for costs resulting indirectly from the negligent acts or omissions) and punitive damages (to punish past wrongful behavior and to deter such behavior in the future) may be awarded by a court.

Intentional Torts may include:

- Intentional misrepresentation
- Defamation: If written: libel. If spoken: slander.
- Interference with Contractual and Business Relationships
- Strict Liability (i.e., liability without fault.) This generally applies only to abnormally dangerous or hazardous activities.

Vicarious Liability occurs when one person or entity is held legally responsible for the acts or omissions of another person or entity because of the relationship between them (like employer/employee).

The party held responsible may be entitled to indemnity from the other party (indemnity is the right to be held harmless).

Joint and Several Liability

When two or more individuals or entities act in concert to injure another, or they act independently, but their actions cause a single, indivisible injury, they are "joint tortfeasors." The injured party is entitled to recover the full amount of its damages from either or both joint tortfeasors, in any ratio, up to the total amount due. If one joint tortfeasor pays more than its fair share of the damages, it may be entitled to contribution from the other joint tortfeasor(s).