

CONSTRUCTION LAW UPDATE

Attorneys work from cubicles (left) opposite space for informal meetings, collaboration, and recreation. Photo by Candidly Yours Photography. Use courtesy NEXT Architecture.



Photo by Candidly Yours Photography.

You only need to look as far the real estate to get a sense of how much the legal profession has changed over the past decade. Stately, mahogany paneled offices and massive law libraries have given way to clean modern finishes and more open floor plans. Workplace amenities that had previously been viewed as the frivolous domain of tech companies now dot law offices all over America. Yet, for all that has changed in recent years, more disruption is sure to follow as new technologies and attitudes work their way into all aspects of business.

Technology has been the most obvious driver of the changes in the practice of law. Digital libraries and services that allow for case precedent researching – once known as “Shepardizing” – have reduced the utility of the law library to that of a decoration. Likewise, office software greatly increased the productivity of administrative and support staff. Law firms have been able to dramatically reduce their footprint at the same time they grow billings and staff.

Construction, as an industry, has also been going through disruptive changes over the past decade. The increasing role of technology has changed how projects are documented, delivered, and maintained. An increasing gap between the number of workers retiring and the number of those entering the industry has created a potential crisis for construction, inspiring the need for even more change to keep up.

The space where these two professions intersect, construction law, has been less disrupted than you might think, given the changes in the respective industries. There is some logic in that inertia. Both construction and law are industries with significant liability. Both industries are understandably reluctant to change methods that are effective and safe, even if those methods are not efficient.

Looking forward to 2030, it is obvious that the next generation of construction and legal professionals

will practice in a more dynamic environment. Some of Pittsburgh’s construction lawyers, including those who will still be practicing in 2030, were asked about what they thought the state of construction law would look like ten years hence. Most saw a significant change in some aspect of the two industries. None saw things remaining unchanged from 2019. Perhaps because of the more conservative nature of construction and law, no one expressed a radically different vision of construction law in 2030. That may be the clearest indication that radical change is coming.

Technology: The Obvious Change Agent

A decade ago, digital technology was on the verge of making big changes in practicing law. Software applications for office functions gave attorneys the ability to streamline the administrative resources to support their core function of representing clients. Services like LexisNexis had become reliable digital resources for case citation, greatly reducing the time and space needed for researching precedent in volumes of legal resources like the venerable Shepard’s Citations.

Advancing technology changed how law was practiced. New norms were accepted for discovery of digital information. Evidence came in broader forms. Wider use of technology by clients meant that attorneys had to adapt to advances in other industries that had not been accepted in the practice of law. The changes had a big impact on staffing. Partners needed fewer associates. Lawyers needed fewer administrative staff.

Technology also had a leveling effect on law firms. The competitive advantage that resources gave to a large firm was eroded when computers could do the work of many people. Like with other industries, technology increased competition. Clients pushed back on fees. Differentiating law firms became more difficult.

Beginning in the 2000s, the cumulative effect of these

changes made their way into the physical plant of law firms. As legacy leases expired, the footprint of law offices changed dramatically. Between 2005 and 2018, the size of the average law firm was reduced by between 20 and 25 percent. The average space occupied per lawyer fell by more than 30 percent, according to Cushman & Wakefield. In an October 2016 report by JLL, the office of an attorney declined to 760 square feet on average, down from 976 square feet prior to the Great Recession. The same report forecasted that law firms were trending towards an average of 625 square feet.

The technology changes yet to come are likely to be much more disruptive to the legal profession. In particular, the application of artificial intelligence (AI) has the potential to turn the practice of law on its ear.

Construction lawyers spend significant amounts of time on repetitive tasks like contract preparation and review, or claims documentation, which could be performed by devices that would recognize the repetitive situations under review. Contract forms are already standardized, and the number of provisions that are customized are relatively few. Proponents of AI believe that machines will learn those variables at a higher rate than humans and predict when non-standard provisions should be included in agreements. Moreover, the promise of AI is that the machines will begin to understand what provisions are most effective – or ineffective – at mitigating risk and will therefore know better when to include them in the

contract negotiations.

Studies have already been done that showed current machine learning technology is capable of more accurately detecting errors or red flags in legal documents at a fraction of the time. Futurists have seized upon these kinds of theoretical showdowns to predict the demise of the legal profession. That scenario sees legal services of the future as a commodity. Attorneys see advances in AI as an opportunity for the profession.

“The buzz in the legal world has been the coming commoditization of the practice of law, meaning that clients are able to choose between multiple lawyers and law firms without sacrificing quality of services,” says Scott Cessar, member and attorney at Eckert Seamans Cherin & Mellott LLC. “Except for some limited areas of litigation, I do not see that as likely in terms of construction industry legal work. In my view, construction law is more specialized than say a lease or a buy sell agreement or a financing deal and, as such, less susceptible to commoditization. I also think that construction industry clients will still want individualized counseling particular to their situation and built on knowledge and experience which are a function of long-term relationships.”

“Technology will make our job more efficient. There’s been a lot of talk about the use of intelligence when reviewing documents or preparing documents. I think that’s going to continue to be explored,” says Lori Wisniewski Azzara,

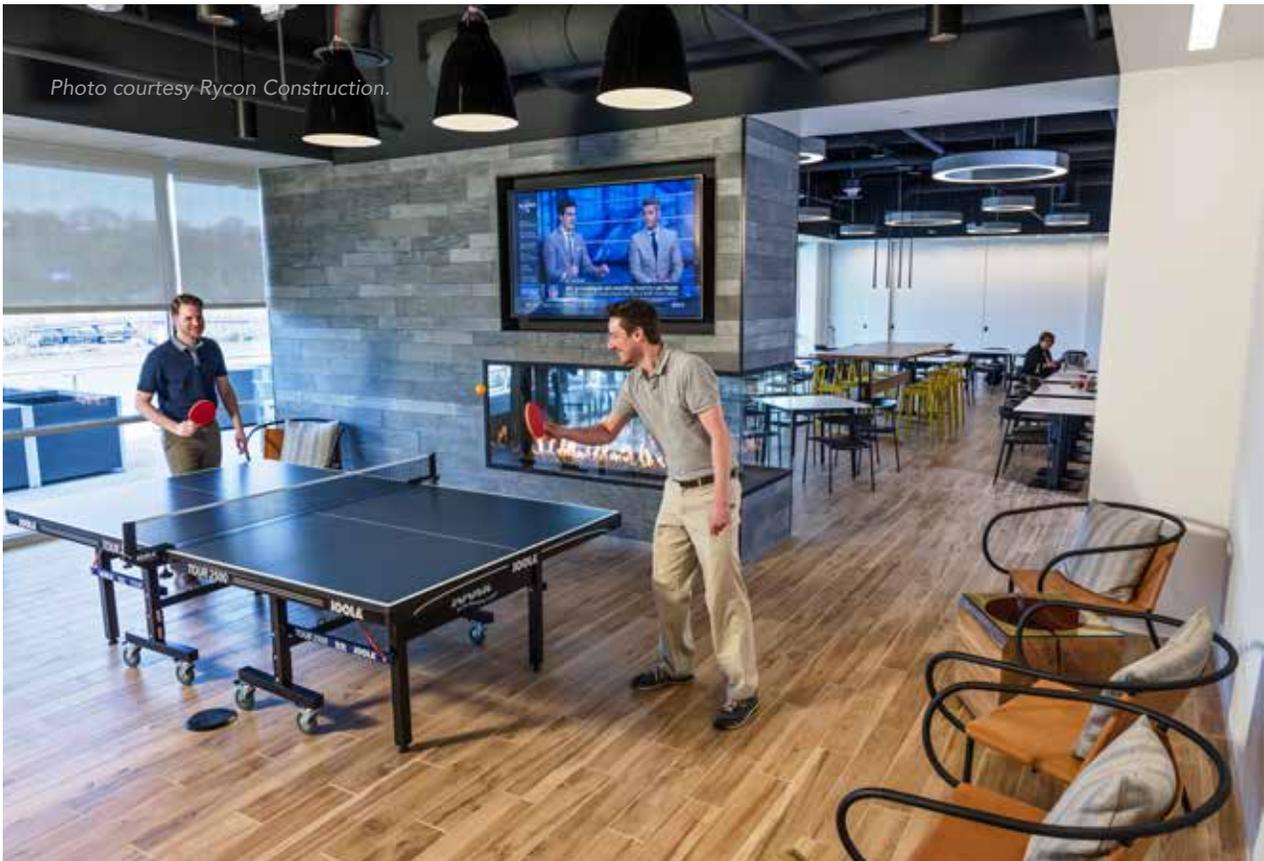


Photo courtesy Rycon Construction.



Law firms have reallocated space historically used for law libraries. Photo courtesy Reed Smith.

partner at Cohen Seglias Pallas Greenhall & Furman in Pittsburgh. "I also think there will be some automation of services, more forms that people are using instead of reinventing the wheel. I think because firms will be able to provide the same kind of services, the practice will be more about the relationships you build."

Azzara is part of the Millennial generation of construction attorneys. She notes that when she started practicing, she had a Dictaphone for composing letters. Today she uses Siri to instruct word processing apps to revise a client's document from her phone. Her administrative assistant can add Azzara's digital signature and reply within minutes of receipt of the instructions. And Azzara need never touch the document. She has experienced a full arc of technology's impact in a decade but shares the same belief about technology elevating the value of construction law with attorneys who have practiced for decades longer.

"Technological advancements will continue, and we will see automated processes in the legal world that will replace what was previously done by humans. Attorneys will need to be nimble and adapt in order to stay ahead," says Joseph J. Bosick, partner at Pietragallo Gordon Alfano Bosick & Raspanti LLP. "Legal counsel who are knowledgeable about the industries that they represent,

who are well-versed in the operations of their clients, and who keep pace with technological advances will have success in not only the 2025 to 2030 time frame but also in the long-term future."

"It is amazing to me the degree to which the practice of law has become much more electronically-driven. Voluminous boxes of documents are replaced now by thumb drives with PDF's," says Matt Jameson, shareholder and head of the Construction Law practice at Babst Calland. "Our ability to search for relevant documents has become so much quicker because of our use of technology. That will only continue to evolve and expand, especially in construction law as that industry becomes more digital.

"My sense is that our region is behind other areas of the country in terms of our use of BIM. That will certainly grow as more and more projects utilize BIM. By BIM's very nature everything will be digital. If you aren't prepared to understand that technology, you will not be well positioned to serve that industry."

The benefit to human endeavor from AI is opportunity to focus human potential on higher-value work. Attorneys spend an additional three years and thousands of dollars after earning an undergraduate degree. The time invested

might be better returned using the expertise gained from the education and experience.

“I think for construction the big change will be with contracts. It will be more streamlined to review contracts and draft contracts because of the technology that I think will be available,” says Azzara. “We will have more time to differentiate ourselves from other lawyers.”

“There’s a technology already that can review leases that the landlord has already done and can identify where the landlord has given concessions or made revisions on a specific paragraph or item,” explains Dusty Elias Kirk, partner at Reed Smith. “It notes how the lease has been altered previously and asks if the landlord wants to revise that paragraph. I think we can use technology to elevate discussions. Attorneys have to be able to think about [their clients] more as a trusted advisor. We have to use the artificial intelligence in a way that elevates the discussion.”

Construction has experienced its own technological disruptions. Many of those have also been administrative improvements that have reduced the number of people it takes to document and deliver construction projects; however, recent technology changes have much more promise. Building information modeling (BIM) holds the promise of solving one of construction’s biggest unseen problems: waste. BIM allows all participants in a project

to share information and retain that information – and the decisions related to it – as part of the construction documents as the project progresses.

BIM offers many improvements to the design and documentation process alone, but the ubiquitous use of BIM – something which is far from occurring – also holds the potential to unlock the value of other emerging technologies.

Robots could play a key role in construction. The use of a machine to prefabricate or install components, particularly in dangerous or high-volume situations, could greatly improve the productivity and safety of a construction jobsite. For an industry struggling with human resource shortages, using machines to supplement humans is a potential long-term solution. Considering that construction sites are among the more dangerous workplaces, machines can also limit that exposure humans have to tiring or unsafe conditions.

An even greater advancement in construction might occur on the soft side of the industry, if BIM and AI are integrated more fully. AI is highly effective at identifying trends in large amounts of data that humans would struggle to analyze, and then predicting what that data indicates will happen. Construction is ripe with information that is highly decentralized between various parties. All parties to a construction project have a manager of some sort for



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the job. Each keeps their own record of what is occurring during the project. That data, collected on millions of projects, is a treasure trove for predictive analytics. It's also the source that attorneys must mine to press or defend a claim on a project. How much more efficient would construction become if the data assembled on any project were available to all stakeholders?

"The big issue I see is the impact of big data on construction. The construction industry is way behind on that," says Chad Michaelson, member at Meyer Unkovic & Scott LP. "Think about all the big owners that do a lot of projects and get a lot of cost-plus contracts. They get a lot of information, like resource-loaded schedules. At some point, if you are a smart owner, bids are no longer like a black box. They will have enough data to know how much time the work should take and how many people should be doing it. And they will begin to dictate some of the terms."

"Now people are starting to realize the importance of, and struggling with, digital data at the contracting stage. There will need to be protocols in place for how we are going to manage this data we're collecting on construction projects," Michaelson continues. "It's not like having a bunch of drawings out to bid. There are beginning to be issues about relying on the BIM model compared to hard copies. Companies are starting to ask how they are going to protect themselves for what they

contribute to the model."

Michael Klein, partner in Blumling & Gusky's Construction and Surety Industry Practice Group, sees technology pushing delivery systems forward. He predicts that smart firms will take advantage of that to mitigate their risks.

"I think construction law will be more about project risk control and establishing the appropriate delivery systems for bringing jobs in on time and on budget at the front end," Klein says. "I think the days of fighting are long gone. Clients are much better off spending time on the front end of a project understanding the risk. I always say, give me three things: focus on scope, time, and price and you never have to worry about the contract. If people focus on the front end, there are fewer issues on the back end."

Construction Law: Changes in Resources and Attitude

For students of math, it may have seemed odd that the floor area of the average lawyer was "only" 760 square feet. That's enough space for five workers in an average office (or 50 in a tech startup). While the average space per attorney was once somewhat representative of the grand offices in which they worked individually, today's ratio reflects the increasing real estate devoted to the kinds of amenities that might be expected in an office for Google or Uber. There are no slides or volleyball nets, but you can walk into law offices in Pittsburgh in 2019 and see lounge

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areas with pool tables or Ping Pong tables. The reason that is true is the same reason you'll find recreational amenities at tech companies: talent attraction.

For individual attorneys, there is a real trend in downsizing office space. The managing partners of some of the nation's largest law firms began this trend as part of real estate programs after the last recession. In firms like New York's Paul Hastings and Pittsburgh's Burns White, partners and associates have the same sized offices. On average today, that's 140 square feet, about the size of the office of a corporate entry-level manager in 1985.

Part of the motive for the downsizing is economics. Shared conference rooms and amenity-filled common areas have mitigated the need for partners to have space for meeting with or entertaining clients in their private offices. The shift has also been influenced by a change in attitude about human resources. Law firms believe that attorneys under the age of 40 expect to work remotely more often and to have more space to collaborate outside a private office. Smaller private offices also mean being able to offer more amenities while keeping the firm's footprint reasonable. Like with the general office inventory, it's an article of faith that legal real estate needs to be modern, transparent, and fun to attract the best talent. The best talent usually wins.

Talent attraction is an equally urgent problem for the construction industry. In fact, when asked about their vision of construction law, about the biggest risk they felt their clients faced to flourish in 2025, the answer was almost unanimous.

"Perhaps the most serious concern for our contractor clients is the attraction and retention of employees, both craft labor and supervisory and management. This will increase in the coming years as the percentage of the labor force entering the construction industry declines," says Cessar. "As a result, more and more of our clients are contacting us to discuss employee retention programs like Phantom Stock plans, bonus plans and ESOPs as a means to compensate and to retain employees and to develop succession plans for the next generation. This is a recognition that, notwithstanding the advance of technology, human capital remains paramount to success."

"I think the volume of construction and the availability of skilled labor is one of the most significant risks to the construction industry, especially in this part of the world. That is both from the standpoint of labor on site and for project management," agrees Klein. "I think our priority in the industry needs to be educating young people that a career in construction is a good choice. I think the number one job is educating people on a career in the

construction industry whether it is architecture engineering or the trades. Frankly, there are more high paying jobs in the construction industry than in professional services and we need to get that message out.”

Changing attitudes was a common theme among the lawyers looking to the future. The way construction clients look at their attorneys has changed since the downturn, influencing how law firms operate.

Chad Michaelson says that his firm’s clients expect them to be collaborative using the same technological tools. Dusty Elias Kirk notes that Reed Smith has a Client Value Team that is tasked with justifying its costs compared to the tasks budgeted for the client. She even suggested students considering the law learn how to budget time and tasks.

“I think for younger lawyers, being a project manager is going to be extremely important. We are asked all the time to look at budgets and to budget time for tasks internally,” Kirk says. “We have to be able to estimate the number of public planning meetings we’ll attend or drafts that we will produce. And we are expected to track that. If I were a young lawyer, I would be learning how to manage projects. That is not something they teach at law school.”

The next ten years should also see the courts have an opportunity to provide some clarity to changes in the law to which construction companies have not fully reacted. The Pennsylvania legislature has responded to changes in the business environment by passing laws that are meant to make it easier for companies to get paid. Amendments to the Mechanics’ Lien and the Contractors and Subcontractors Payment Act (CASPA) were made in 2017 and 2018 respectively. Those laws have seen little litigation.

“The major revisions in the Mechanics’ Lien law happened but there is still not a lot of case law out there,” says Danny Cerrone, partner with Clark Hill. “One of the issues that contractors always bring up to me is if they get a bond on a project, will it cover them in the case that the prime contractor does not pay them. The answer is not 100 percent clear there. I hope that case law clarifies that in the next five years.”

Cerrone also sees the potential for changes in two major public construction areas. He can foresee the provisions for prompt payment in the private sector in the CASPA



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amendments putting pressure on the public procurement code. Cerrone also sees public fiscal pressures creating the political cover for Pennsylvania to amend its procurement policy with regard to the Separations Act.

“There has been a move to repeal the Separations Act since before I started practicing law 15 years ago. And it has always gone nowhere,” Cerrone notes. “It seems there is more of a groundswell support at this point to move it forward. I think a lot of public entities are questioning whether the Separations Act or the public bidding process is best for their project. For design-build to get going you will need the Separations Act to be repealed or you will need legislation that says that public entities can do design-build. Public entities are going to have to stay competitive and not spend money that they don’t have anymore.”

Publicly owned design-build projects would represent a sea change in methodology. Such a dramatic change is probably, therefore, less likely to pass through a political body in Pennsylvania. As fiscal pressures build – as pension funding reaches a crisis level for example – municipal government bodies are more likely to press the legislature to give them the flexibility to try alternative delivery methods as they see fit. In the private sector of the construction industry, the use of alternative delivery methods is already growing. Construction companies that want to flourish will be able to deliver a variety of services with more flexibility.

“As time moves on, the lines between design, construction management, and construction will continue to blur with the more sophisticated players providing more services under one roof, not fewer,” says Joe Bosick. “Companies that navigate the broader service offerings – providing more of a full-service menu – will be able to grab a larger market share.”

Construction companies that want to fit that description will have to embrace alternative methods, changing work attitudes, flexibility, and constantly adapt to the influence of new technology. Much of what is being contemplated for 2025 or 2030 seems as foreign to the construction industry and construction law today as paying for lunch with our phone must have seemed in 2000. Better to imagine what might be in 2030 than to hold close to what will not change.

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“Electronic contract preparation and the use of AI in putting together contracts, that’s going to happen,” predicts Michaelson. “I’ve seen hundreds of construction contracts and there are a lot of redundant provisions. I think you’ll have contract milestones and the payment process as part of the BIM model. Think about your resource-loaded schedule. When you hit a milestone and update that schedule, it can generate the pay application and the payment can be done. That might be 2030, but you have to question why we are doing all this manually. I don’t know why it won’t happen. There are cost savings in it for the architect, the owner, the contractor, for everyone.”

Michael Klein sees the preciousness of resources changing the attitudes of clients, shifting their focus from pursuing disputes to avoiding risk. He acknowledges that emerging technology will be an important tool to accomplishing that, but he expects that his responsibility as an attorney is to point his clients in the right direction.

“For construction lawyers I think the days of fighting are over. Frankly it’s become too expensive to fight, so you’re better off convincing your client to spend time on understanding the risks of a project,” Klein says. “Project risk control is far more important in today’s world. The cost of fighting, both in the investment in their time as well as the cost of construction litigation, is just unproductive. I can stay busy working with my clients on the front end keeping them out of trouble instead of trying to win lawsuits.”

“I think we will see in another ten years that construction law will be more collaborative. I would think that our role as a construction lawyer will be that of resolving disputes in a non-litigious manner,” agrees Jameson. “I think that the model of everybody hunkering down, looking for changes and trying to assign blame is becoming outdated. There seems to be more recognition from all parties that changes are going to occur on jobs and the question is how we most equitably manage them. The next client that I get that enjoys spending money on litigation will be the first.” 

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