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A BRIEF OVERVIEW OF EMPLOYMENT DISCRIMINATION LAWS

By Michael K. De Chiara, Esq.

Today there is heightened concern over the seemingly incomprehensible multiplicity of lawsuits we hear about every day concerning employment discrimination. As employers and persons in management positions running firms, most people are either operating in fear of not being able to fire unproductive employees because of race, age, sex or sexual orientation or employers are simply ignorant of the very real risks they face if they ignore the growing area of employment law in the daily operations of their businesses.

Generally, employees are considered "employees at will" -- absent an employment contract or some written material -- such as an employee manual which has language which can be construed as an employment contract, or an employment letter offering a job which might also be construed as a contract. Employees at will can be fired at will -- unless the firing is based upon a prohibited act of discrimination. Due to discriminatory practices of the past - on the federal, state and local levels, there are limits to the actions you can take in hiring, promoting and firing employees based on certain criteria. The intent behind the law is good. Unfortunately, the application of the law has been less than perfect. We are still in the settling period of the evolution of the anti-discrimination laws.

A. Federal Laws

Employment Discrimination laws, as we know them, really began with the Federal Civil Rights Act of 1964. Initially, this was a racially motivated law enacted to protect African-Americans against discrimination based upon race - however the number of protected groups and prohibited behavior has been expanding.

Title VII of the Civil Rights Act of 1964 which is the relevant federal statute, prohibits employment discrimination on the basis of race, color, religion, sex or national origin.

The Federal Age Discrimination in Employment Act prohibits discrimination against individuals forty years and older.

The Federal Rehabilitation Act and the Americans with Disabilities Acts prohibit discrimination against individuals based upon a physical disability.

The reach of federal law under Title VII is enormous. In essence, any activity that in any way touches interstate commerce subjects a company to federal discrimination charges under Title VII.

For instance, in a famous case involving a small law firm in Illinois, a federal Court of Appeals -- the Court which is one level below the Supreme Court, found that the law firm was engaged in interstate commerce and subject to the provisions of the act because: (1) the

partners occasionally traveled interstate; (2) the firm purchased some out-of-state office equipment; and (3) the firm owned a few thousand dollars worth of reference books purchased out-of-state. Today, everyone involved in business either uses equipment or materials bought out of state or has partners, officers or employees who work or travel out of state. Title VII claims are brought against companies and organizations -- not individuals! Of course, individuals are subject to other federal claims. However, if your firm has more than 15 employees, federal law Title VII applies.

Federal law is not the only source of law which must be complied with in the area of employment discrimination. There are also state and in some cases local laws. Also, under federal law, an offender can be sued for compensatory damages, punitive damages and injunctive relief.

B. New York State Human Rights Law

Not to be outdone by the Federal Government, New York State, of course, has its own anti-employment discrimination laws. New York State's laws, like the federal laws, cover age discrimination, race discrimination, creed discrimination, color discrimination, national origin, marital status and disability. Please be advised that NY considers AIDS to be a protected disability.

The New York State Human Rights law applies to all employers with 4 or more employees.

State claims must be filed with New York State Commission of Human Rights within one year of unlawful conduct.

Unlike the federal statutes and New York City statutes, the New York State Human Rights Law does not provide for punitive damages, does not provide for attorneys fees for class action suits and affords only a limited right to trial by jury.

C. New York City Human Rights Law

Of course, New York City, must keep pace with both the federal government and the state government. Hence we have the New York City Human Rights Law which provides another basis to bring discrimination claims in the City of New York and is often more generous to plaintiffs than either New York State or federal law.

New York City Human Rights Law has been held applicable to claims arising from conduct which does not occur in New York City as long as defendant maintains offices in New York City and so long as the plaintiff is a resident of New York City. Complainants pursue their rights under the New York City Human Rights Law by seeking a hearing before an administrative law judge through the procedures of the New York City Commission on Human Rights. Complaints must be filed within one year from the date of the alleged discriminatory practice. The New York City Human Rights Commission has authority to award compensatory damages, damages for mental anguish and injunctive relief - that is mandating reinstatement. Most troubling to employers - the New York City Human Rights Law provides for uncapped damages, including uncapped punitive damages.

Employee or Independent Contractor:

A New Look at an Old Question

By: Carol J. Patterson, Esq.

A recent federal court decision raises significant new questions about the ability of employers to distinguish between employees and independent contractors for purposes of determining eligibility for benefits. This decision is a source of special concern to design firms that often rely on temporary employees to help them satisfy project demands without increasing long term payroll expense. They hire CADD operators, drafters and junior designers to help full-time staff meet the demands of a specific charrette. Generally, when the submission is complete, these temporary workers must find new assignments. They may come to the office with the specific understanding that they were hired on a temporary basis as free-lancers or independent contractors.

What happens if a firm decides that some of its temporary workers are so productive that they should be kept on for a longer period, such as the entire duration of a project? Does their status as free-lance workers remain unaffected or do they become employees? The distinction between the two categories is important from many perspectives. An independent contractor is assigned responsibility for payment of his or her own taxes. His or her compensation is not subject to payroll tax or deductions for state and federal income tax, or Federal Insurance Contribution Act ("FICA") tax. Payments of such compensation are reported to the Internal Revenue Service on 1099 forms instead of W-2s. Eligibility for unemployment and workers compensation benefits also depends on an individual's employment status.

Over the past decade, as state and federal tax authorities become increasingly vigilant in assuring that tax revenues are not inappropriately reduced, they have turned a more critical eye on employers' claims that certain individuals are independent contractors exempt from withholding and payroll tax. The determination of whether a worker is an independent contractor or an employee depends on a number of factors: the hiring party's right to control the manner and means by which the work is to be performed, the level of skill required, the source of any equipment used to perform the work, the location of the work, the duration of the

relationship between the parties, whether the hiring party has the right to assign additional projects to the worker, the extent of the worker's discretion over when and how long to work, whether the work is the regular business of the hiring party, and the tax treatment of the hired party. Agencies and courts consider these various factors in analyzing a particular situation, however, the key factors in shaping their decisions relate to the level of direction and control which the firm exercises over the worker. The greater the control that is exercised, the smaller the likelihood that an individual will be considered an independent contractor rather than an employee.

If an individual reports to work at the employer's place of business, works hours specified by the employer and performs work under the supervision and direction of its staff, tax authorities are likely to conclude that he or she is a common law employee rather than an independent contractor. This is especially likely if the work relationship continues for an extended period of time. Employers must carefully evaluate their arrangements with temporary personnel and individual consultants on an on-going basis to avoid the retroactive liability and penalties that may arise as a result of miscategorizing individuals as free-lance workers rather than employees. An individual may start out as an independent contractor, but turn into an employee as the hiring party exercises increased control over his or her efforts. Acceptance of the obligation to pay the required taxes can be well worthwhile to enable a firm to retain a talented individual.

Typically, employers provide that such personnel who are hired for a specific project, or on some other basis which is not permanent, are not entitled to benefits such as vacation or sick pay, insurance or coverage in the firm's pension or 401(K) plan. The federal appellate court deciding Vizcaino v. Microsoft recently cast some doubt on this policy by ruling that Microsoft was obligated to offer certain benefits to employees who were hired as temporary free-lance staffers pursuant to signed agreements expressly acknowledging their status as independent contractors who were not entitled to benefits. These individuals worked for the company on a series of projects for a period one to two years as software testers, production editors, proofreaders, formatters and indexers. They often worked on teams with regular Microsoft employees and performed similar functions under the supervision of the same personnel. They reported to work at Microsoft's offices at the same time as permanent employees.

As a result of an IRS audit, Microsoft agreed to pay withholding taxes and FICA for these individuals and issued them retroactive W-2s to allow them to recover Microsoft's share of their FICA taxes. To clarify the situation in the future, Microsoft offered permanent employment to some of these individuals, while offering others the option of terminating their employment with the company or continuing to report to work, but doing so as employees of a temporary employment agency which would be responsible for payroll and federal taxes, including FICA.

Based on the IRS rulings, these individuals sought other benefits from Microsoft, including participation in its employee savings and stock purchase plans. Despite the fact that these workers had signed agreements acknowledging that they were not entitled to benefits, they successfully argued that, as common law employees, they were entitled to participate in the company's 401(K) (with employer contributions) and stock purchase plans. Since Microsoft conceded that these individuals were common law employees for purposes of tax withholding, the Court ruled that they were entitled to participate in the 401(K) and stock purchase plans which offered benefits to the company's common law employees.

It is by no means clear that other courts would reach the same decision based on these facts. One of the judges who was on the panel deciding this case dissented from the opinion because he concluded that the clear terms of the parties' agreement precluded the plaintiffs from pursuing claims under the 401(K) and stock purchase programs. He did not accept the Court's analyses which determined that the IRS's ruling effectively voided parties' contract. He emphasized that the opinion reflected majority's concern that "[l]arge corporations have increasingly adopted the practice of hiring temporary employees as independent contractors as a means of avoiding payment of employee benefits, and thereby increasing their profits." Although other judges could reach a similar conclusion and enforce parties agreements regarding eligibility for benefits, this decision demonstrates that employers must carefully evaluate their arrangements with free-lance personnel to avoid unexpected disputes and liabilities.

LICENSING ISSUES AFFECTING DESIGN/BUILD PROJECTS

by Matthew S. Quinn, Esq.

The design build ("DB") model of project delivery, in which an owner contracts with a single entity to both design and construct a project, is generally considered to provide greater efficiency as well as advantages. However, there are several legal concerns and obstacles related to DB which continue to restrain its growth within the construction industry. Among these obstacles are professional licensing requirements which vary from state to state. Before becoming involved in a DB project, it is crucial that one be familiar with the licensing requirements of the relevant jurisdiction.

Virtually every state requires that a person or entity providing professional design services meet certain criteria and be licensed by the state to render such services. In addition, many states place restrictions or prohibit altogether the rendering of architectural or engineering services by a general business corporation. Of course, the concern of the states which gives rise to these restrictions is that a professional's independent judgment may be jeopardized if it has a financial stake in the project or if the distinction between design and construction services is eliminated.

en the DB entity includes either a contractor alone or in conjunction with a design professional, the possibility arises for the performance of design services by a party which is not licensed by the state to perform such services. The implications of a design builder rendering services which it

is not licensed to render can be devastating. As a general rule, contracts entered into by persons or entities which are not licensed to perform the services at issue are illegal and unenforceable. If a contract is deemed unenforceable, the design builder will be incapable of compelling the owner to pay for the services rendered. In addition to non-payment, other repercussions for failure to comply with a state's licensing requirements may include injunctions resulting in the shutdown of a project during construction, bid protests, criminal sanctions, as well as possible consequences to existing professional licenses in other states.

The licensing statutes of the various states lack uniformity and many states have failed to keep pace with the public's desire for new and more efficient project delivery systems. The pockets of industry resistance to DB that continue to exist inhibit changes in many states' licensing laws.

Relatively few states expressly authorize DB. On the other hand, there are also few states which expressly prohibit DB. Most states fall somewhere in between in that their licensing statutes make no reference to DB but nonetheless place restrictions on what type of entity may provide professional design services.

An example of a fairly progressive state in the area of DB is Florida. Florida is one of the few states which has a statute that expressly refers to DB. The Florida statute specifically provides that a general contractor need not be licensed as an architect when negotiating or performing services under a DB contract as long as the architectural services at issue are offered and rendered by an architect licensed in the State of Florida. See Fla.Stat.Ann. S481.229(3). Therefore, a design builder doing business in Florida need only employ an architect or a staff of architects who will be exclusively responsible for the rendering of the architectural services to comply with the referenced statute.

However, as alluded to above, some states, including Florida, place restrictions on the type of business entity which may render professional design services. Some states require that a general business corporation offering or rendering professional design services have one or more licensed individuals as stockholders or members of its board of directors. Staying with the example of Florida, a business corporation may render professional engineering services in that state as long as it obtains the required certification, one of its principal officers is a Florida licensed professional engineer and personnel acting as engineers on its behalf are registered pursuant to statute. See Fla.Stat.Ann. S471.023(1).

Other states vary the requirements for engaging in DB. New Jersey, for example, incorporates similar requirements to those of Florida with some twists. As in Florida, a business corporation may render professional engineering services. Also like the Florida statute, the statute in New Jersey requires that any employees of the corporation who are carrying on the actual practice of professional engineering be licensed in the state. See N.J.S.A. 45:8-27. However, there is no requirement that a business corporation elect a licensed professional engineer as an officer or member of its board of directors in order to render professional

engineering services in New Jersey[1]. Instead, the New Jersey statute requires that, prior to rendering or offering to render any professional engineering services in New Jersey, a business corporation must obtain a certificate of authorization which designates an employee of the corporation holding a New Jersey license who will be in "responsible charge" of the engineering activities and decisions of the corporation. N.J.S.A. 45:8-56. In New Jersey, the term "responsible charge" is defined as "the rendering of regular and effective supervision by a competent professional engineer or land surveyor to those individuals performing services which directly and materially effect the quality and competence of the professional services rendered by the licensee." N.J.S.A. 45:8-28(g).

Just from these two examples of Florida and New Jersey, it is obvious that few states will have identical provisions. It is very important, therefore, that the parties involved in a DB project not assume that they meet the licensing requirements of one state simply because they meet the requirements of another. Instead, the requirements of each state where the DB team intends to work must be carefully examined in order to avoid the unfortunate results discussed above.

[1] However, if the corporation uses the word "engineers" or "engineering" in its name, a New Jersey licensee must be an executive officer of the corporation. N.J.S.A. 45:8-27. In addition, the New Jersey licensing requirements for a general business corporation rendering architectural services are much more stringent, mandating that two-thirds of the corporate stock be owned by architects licensed in the state and that two-thirds of the directors of the corporation be licensed in the state. See N.J.S.A. 45:3-18(a).

Licensing laws must be treated seriously but should not be considered as an absolute barrier to the DB method. Even where it seems impossible to meet a particular state's requirements, a simple change in the typical DB method may be enough to satisfy the state's concerns. For example, instead of the contractor and design professional entering into a joint venture or partnership agreement, the contractor may want to consider retaining the design professional as a separate and distinct entity through the use of a subcontract agreement. Similarly, instead of tying the design professional's fee to the profit earned on the project, paying the design professional a fixed sum should ensure that its financial interests are independent to those of the contractor/design builder. While these solutions may eliminate a few of the benefits of DB, they may be necessary to protect the interests of all parties involved in a project and, at the same time, allow such parties to take part in the growing DB trend.

The City's Broad Discretion in Determining the Responsibility of a Low Bidder

By: Michael S. Zetlin, Esq.

In the recent New York case of DeFoe Corp. v. New York City Department of Transportation, the New York's highest court reaffirmed earlier decisions that the City has broad discretion in determining whether a bidder is "responsible". In DeFoe, DeFoe Corporation and America Bridge Company, a joint venture (the "Joint Venture"), was awarded a New York City contract for repairs to the Madison Avenue Bridge based on a bid price of $34 million. The New York City Department of Transportation (NYCDOT) submitted the contract to the New York City Comptroller for registration. The NYCDOT withdrew the contract after learning of troubling information concerning DeFoe. In particular, NYCDOT learned that several of DeFoe's representatives had been previously convicted of criminal tax violations.

NYCDOT then negotiated with the Joint Venture to remove objections and barriers to the Joint Venture's participation in the project. The negotiations led to an agreement by DeFoe to limit the involvement of certain representatives on the project. With NYCDOT's objections satisfied, NYCDOT resubmitted the contract to the Comptroller.

Even though NYCDOT was satisfied with the restrictions agreed to with the Joint Venture, the Comptroller still objected to the registration of the contract. The Comptroller still had concerns about particular representatives of DeFoe controlling the Joint Venture's operations. She also objected to the Joint Venture's failure to disclose prior statutory and OSHA violations. Also, at issue was an outstanding tax lien against DeFoe which DeFoe was contesting. The Comptroller notified the Mayor of her concerns. Based on the Comptroller's objection, the Mayor refused to require registration of the contract.

DeFoe then commenced an Article 78 proceeding seeking, among other things, an order vacating the Mayor's refusal to register the contract. The Court of Appeals cited General Municipal Law Section 103 which requires that all contracts for public work involving an expenditure of more than $20,000 be awarded to the lowest responsible bidder. A responsible

bidder is "one which has the capability in all respects to perform fully the contract requirements and the business integrity to justify the award of public tax dollars." The Court explained that an agency has an obligation to consider the responsibility of the bidder including "its skill, judgment and integrity, and may, on the basis of the prior criminal record of some of its principals, rationally reject that bidder."

The Court then determined that the Comptroller, pursuant to the New York City Chapter, had the duty and the authority to review the contract and object to it. The Court explained that the Comptroller had sufficient reason to believe of the contractor's participation in corrupt activity. She acted lawfully and in accordance with her authority and responsibility. Neither the Comptroller nor the Mayor acted in an arbitrary or capricious manner. Accordingly, the denial by the lower court of the Article 78 proceeding was affirmed.

In DeFoe, the Court of Appeals relied, in part, on its earlier decision in Abco Bus Co. v. Macchiarola. In that case, the Board of Education refused to award a City Contract to Abco Bus Co. to transport handicapped school children. Two of Abco's principals had prior criminal records. The Court of Appeals emphasized that a bidder's "honesty, integrity, good faith and fair dealing are valid considerations" in determining whether a low bidder is a responsible bidder.

Both the DeFoe and Abco decisions reflect difficulties contractors face when challenging decisions of City agencies which question their responsibility as a bidder. The City will be afforded wide latitude in evaluating the responsibility of a bidder. Any attacks on an agency decision must be based on substantial evidence that the decision was arbitrary and capricious. If faced with an agency objection, therefore, actions should be taken to negotiate an acceptable resolution to specific objections of each agency with jurisdiction over the contract.

DESIGN PROFESSIONAL DECREED TO BE FIDUCIARY OF OWNER

By: Michael S. Zetlin, Esq.

In a decision that could have far-reaching implications for design professionals, a court in California recently concluded that a fiduciary relationship existed between an architect and an owner. As a result of the architect's breach of this purported fiduciary relationship, a jury rendered a verdict in favor of the owner for over $8,000,000.

The owner, Lake Merritt Plaza, in the case of *Lake Merritt Plaza v. Hellmuth Obata & Kassabaum*, claimed that the project architect failed to properly monitor and report upon the work of a curtainwall designer and contractor. In particular, Lake Merritt Plaza ("LMP") sued Hellmuth Obata & Kassabaum ("HOK") and the general contractor, Turner Construction Company ("Turner"), for curtain wall defects that arose in connection with the construction of the Lake Merritt Plaza building.

The court apparently relied upon standard language used in American Institute of Architects (AIA) contracts to find that a fiduciary relationship existed between the owner and the architect. As a result, the court expanded the role of the architect beyond the explicit contract terms.

Factual and Procedural Background

Turner retained a curtain wall subcontractor to design and install the curtain wall system. After the work was supposedly completed, the curtain wall leaked continuously. The curtain wall subcontractor performed repairs but leaks continued severely thereafter. LMP then apparently waited several years before investigating the causes of the leakage.

LMP never retained a waterproofing consultant, although its contract with HOK provided that LMP would provide the services of a consultant "when such services [were] deemed necessary by the Owner and the Architect ... for determining ... water conditions, with reports and professional recommendations." HOK recommended the services of a consultant to evaluate the watertightness of the curtain wall. LMP never retained the consultant, however, because it apparently was led to believe by Turner and others (not HOK) that the mock-up test passed. In

fact, the mock-up test failed. One of LMP's primary claims against HOK was that it was never apprised of the failure of the mock-up test. LMP alleged that HOK, as its fiduciary, had the obligation to advise it of the results of the mock-up test.

According to LMP, had it known of the failure of the test, it would have retained a curtain wall waterproofing consultant which would have prevented the leakage that subsequently occurred. LMP also argued that HOK had an obligation to ensure that the remediations prepared at the mock-up tests were incorporated into the shop drawings for the project. HOK countered that it was unaware that LMP never received the report of the mock-up test failure, and it was incumbent upon LMP to provide such information to HOK. In any event, argued HOK, LMP had the independent obligation to retain the waterproofing consultant to inspect the installation. That obligation was not dependent upon the results of the mock-up test. HOK also stressed that the partners of LMP were experienced developers and lawyers. HOK argued, therefore, that it was unnecessary and inappropriate for the Court to impose a higher standard to the relationship than was otherwise imposed by the terms of the contract itself.

HOK's Contractual Responsibilities and the Fiduciary Relationship

HOK's contract with LMP was predicated on standard American Institute of Architects contract language. HOK agreed to "endeavor to guard the Owner against defects and deficiencies in the work of the Contractor." HOK, however, was not responsible "for construction means, methods, techniques, sequences or procedures." Similarly, HOK was not responsible for the acts, omissions or failures of the contractors.

Nothing in the contract explicitly imposed a fiduciary obligation on the architect or a relationship of trust and confidence. Nevertheless, the Court apparently relied on other language in the contract which declared the architect to be a representative of the Owner and other scope provisions to conclude that HOK owed fiduciary obligations to LMP.

The Significance of the Fiduciary Relationship Determination

As a result of the Court's finding of a fiduciary relationship, LMP was given free reign at the trial to present evidence of HOK's "duties" which apparently far exceeded the explicit duties set forth in the contract. LMP presented witnesses who testified about the expectations and understandings of HOK's construction administration services rather than relying on the express terms of the contract.

HOK, therefore, was imparted with considerable responsibility for protecting the interests of the owner with respect to the curtain wall, even though (i) the general contractor was solely responsible for construction means and methods, and (ii) HOK had no explicit contractual responsibility for supervising or inspecting the curtain wall or the mock-up tests.

Even more damaging to HOK's case was a finding that HOK's fiduciary relationship with LMP excused LMP's inaction after discovering the leakage problem. The curtain wall leaked repeatedly and the curtain wall subcontractor attempted to repair the leaks on several occasions. The repair failed and severe leakage occurred but LMP did not actually seek to investigate the cause of the leakage. Had it done so it would have discovered the cause of the leakage several years earlier. The Court excused LMP's delay in taking affirmative steps to discover the cause of the problem of the fiduciary relationship finding, depriving HOK of a possible statute of limitations defense.

Under the circumstances of this case, the Court held a design professional to a higher standard of care than agreed to as part of the contract terms. As a result, in this case, the design professional had to defend against phantom responsibilities never bargained for as part of the underlying agreement.

While this decision does not reflect a trend of courts to expand a design professional's responsibility to an owner, certain precautions are still warranted. In particular, it would be prudent for a design professional to explicitly incorporate in its contract with an owner that nothing contained in the agreement or otherwise is intended to create a fiduciary relationship between the parties. Without taking certain precautions, a design professional will run the risk of being saddled with more responsibility than it anticipated for a project.

New York State Enacts Legislation
Which Impacts Upon Design Professionals' Liability

By: Kenneth H. Lazaruk, Esq.

New York State has recently enacted legislation which impacts the liability of design professionals. The first bill enacted clarifies the statute of limitations for professional malpractice claims, other than those against medical professionals. The second bill helps expedite the dismissal of older non-meritorious cases, ten years or more in certain circumstances.

ARTICLE I.

Statue of Limitation for Professional Malpractice.

New York as well as every other State provide for time limitations in which lawsuits must be brought. Of particular concern to design professionals are two provisions of the Civil Practice Rules and Regulations of the State of New York ("CPLR") which impact upon lawsuits arising out of contracts for professional design services. One section, CPLR §214(6), requires that malpractice suits including those against design professionals must be commenced within three years from the date of the negligent act. Another section, CPLR 213(2), provides that an action arising out of a breach of contract must be commenced within six years from the date of the breach. In claims against design professionals, plaintiffs would usually plead that the design professional had breached a contractual duty to provide services in a non-negligent manner thereby invoking the six year statute of limitation. Design defendant professionals would generally argue that the three year statute of limitations applied because the action arose out of the professional malpractice which was governed by the three year statute of limitations.

It appeared that the Court of Appeals in the case of Sears, Roebuck v. Anco, 43 NY2nd 389, 401 NY2nd 767 (1977) resolved this dispute. This case involved a claim by the owner against an architect for the negligent design of parking lot ramps. The Court of Appeals of the State of New York applied a six years statute of limitations to both the breach of contract claim and plaintiffs' negligence claim arguing that defendant's negligent conduct arose out of a breach of contract. The Court's decision in the Sears case was subsequently upheld in other cases.

It is particularly disturbing to design professionals who regularly contract to provide their services to an owner that the time period in which malpractice claims can be brought against them as opposed to others doubled. However, recent legislation clarified this

paradox. Now all malpractice actions (other then medical, dental, and podiatric) will be governed by the three statute of limitations, notwithstanding whether the theory of the claim is based in contract or tort (negligence). This legislation will have significant bearing on first parties actions (Owner v. Design Professional) and has no bearing on cases involving personal injury, wrongful death and property damage commenced by third parties. Third party claims will continue to have a three year statute of limitations which runs from the date of injury or death notwithstanding the date the design services were rendered. It is important to note that the new legislation applies to design professionals, lawyers, insurance brokers and accountants who were all subjected to a statute of limitations for malpractice claims that was more than twice as long as the period applied to doctors, dentists and podiatrists.

ARTICLE II.

Limitations for Third Party Lawsuits

Many States have enacted a statue of repose for third party suits against design professionals, involved in the design and construction of buildings and other structures. A Statute of Repose imposes a bar to lawsuits against design professionals, which have been commenced after the expiration of a certain period of time since completion of a structure. Design professionals and their professional societies have for many years supported legislation in New York State which would impose a time bar to a lawsuit brought against a design professional by a third party with regard to the completion of improvement to real property. Design professionals have argued that the threat of a potential lawsuit forced them to carry insurance long after a project had been completed and for years after they supposedly retired from the profession. In addition, design professionals argued that the fact remains that there comes a time when the structure passes from a well designed building to a well maintained building.

To support their case, design professional presented the state legislature with statistics which showed that most injuries occur because of poor maintenance. A Statute of Repose or similar legislation would seek to place the person, such as the building owner, in the best position to prevent injury and to relieve the design professional from the threat of potential liability. The argument further states that it is unfair that a design professional should have a life time of potential exposure for injuries that result from poor or improper maintenance, carelessness of a third party or a simple accident. New York State is the only State which does not have a Statute of Repose for a third party suits. The recent legislation in New York while not as strong as hoped for by the design professionals and their professionals societies, does go a long way to accomplish the result intended which is to limit the time after which lawsuits may not be commenced against design professionals by third party after completion of improvement to real property. The recent legislation will expedite the dismissal of all non-meritorious cases ten years or older. The legislation requires the service of a notice for claim ninety days before the commencement of a lawsuit (for lawsuits commenced ten (10) years or more after the completion of a structure) and expedites plaintiff's discovery (i.e., document production, interrogatories, depositions). This discovery can take place immediately following service of the Notice of Claim upon the design professional. The defendant is then authorized to request dismissal of the case if the plaintiff is unable to establish that substantial evidence exists implicating the design professional.
This legislation is more modest than the Statue of Repose the design professionals had wanted.
However, it does represent a step in the right direction.

Overviewing of the Practice of Engineering in New York State

By: Michael K. De Chiara, Esq.

The basic rule in New York State, contained in Section 7202 of the Education Law, is that only licensed professional engineers can practice engineering in New York. This naturally leads to the question of what constitutes the practice of engineering. Section 7202 of the Education Law states:

> "*The practice of the profession of Engineering is defined as performing professional service such as consultation, investigation, evaluation, planning, design or supervision of construction or operation in connection with any utilities, structures, buildings, machines, equipment, processes, works or projects wherein the safeguarding of life, health and property is concerned, when such services or work requires the application of engineering principles and data.*"

The intent of the law is to insure that the public is protected. Before any individual is permitted to practice any profession such as medicine, law or engineering, the law imposes restrictions to help insure that some minimum level of professional competence has been achieved by such individuals. Licensing is the mechanism used to help achieve a minimum level of expertise in the professions, including engineering.

The legislative scheme requiring licensing of engineering is regulated by the Department of Education and serious violations of law relating to the practice of engineering are prosecuted by the State's Attorney General. The most serious violation of the law regulating the practice of engineering is its unauthorized practice. Section 6512 of the Education Law provides that the practice of engineering without a New York State professional engineering license is a felony.

Large Firm Practice

Of course, licensed professional engineers may be employees in large engineering firms which may employ scores of licensed engineers. In such circumstances there are issues regarding which individual licensed professional is actually providing the professional services. A large firm's client's are generally retaining the firm and not an individual engineer and as such, they are usually indifferent as to who actually signs and seals the drawings on a particular project so long as the firm's professional liability insurance is in place.

Large firm practice generally requires a senior engineer to sign and seal the engineering documents for a given project. However, an engineer who signs and seals documents is legally presumed, as a licensed professional, to have either done the engineering work necessary for the preparation of the document, or have reviewed the work of those who actually prepared the document sufficiently so that the professional signing and sealing the documents can adopt such work as his or her own. Generally speaking, it is therefore preferable that the engineer who is responsible for a particular portion of the engineering work relating to a project (e.g. the electrical engineering documents) sign and seal his or her work product or the work product over which such person had overall responsibilities. Whether or not the individual who is actually responsible for the work signs or seals the documents, that individual will nonetheless have potential personal liability for the sufficiency and quality of the engineering work.

Often, the necessities of the practice of providing engineering services at large firms requires that individuals who did not actually participate in the preparation of engineering documents nonetheless sign and seal such documents. This practice is inconsistent with the licensing requirements of the State of New York and should be avoided if possible. As discussed above, the preferred policy is to have the licensed professional who has control over the work sign and seal the documents pertaining to such work. Where there is interdisciplinary work reflected on a single document it is advisable to have separate stamps relating to each major discipline (i.e. Mr. X stamps documents relating to electrical design and Mr. Y stamps documents relating to mechanical design). Where this is impractical or burdensome and one individual signs a document for which the individual did not perform the professional services the law requires that the licensee or an employee under such licensee's direct supervision and control prepare and maintain for a minimum of six (6) years, a thoroughly written evaluation of the professional services represented by the design documents with references to applicable codes. Technically this standard applies to intra-firm work as well as the work prepared by outside experts which is incorporated into the plans and specifications.