LBC&C

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With a practice group comprised of nineteen lawyers whose combined experience approaches two centuries, we are the most experienced group of attorneys in the area, dedicated exclusively to representing design professionals.

L'ABBATE, BALKAN, COLAVITA & CONTINI, L.L.P.

Legal Counsel

for the Design Professional

DEFAMATION AT THE JOB SITE

(Sticks And Stones May Break My Bones But Call Me Names And I'll Sue You)

By: Douglas L. Pintauro, Esq.

THERE WAS A TIME when an architect or engineer ("A/E") could call a contractor "incompetent" or reject a contractor's payment requisition on the grounds that it was "overstated" or "misrepresented the percentage of work completed" and suffer no greater repercussion than perhaps compelling a now angered contractor into complying with the contract documents. Today, however, contractors' reactions to such comments are becoming more and more contentious and counter-productive. Among the trendier contractor responses is the commencement of a lawsuit against the A/E for defamation. Of course, to anyone who has been involved in a construction project, or even witnessed typical job site banter between an A/E and a contractor, this response may seem ludicrous, if not frivolous. Whatever your view, not only are contractors continuing to file such lawsuits, but in some instances they are reaping substantial awards. As a point of reference, the following is a sample of some of the statements (in addition to those noted throughout this article) which have been the subject of such lawsuits:

- This contractor is notorious for delaying projects.
- Is this good faith practice in bidding?
- In my opinion, the contractor is not a "responsible" bidder.
- This contractor cannot be trusted.

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• This contractor's job performance is fraudulent.

While it may be relatively simple to initiate a defamation claim, such lawsuits are generally defensible and in some instances difficult to maintain once discovery (i.e., depositions and the exchange of documents) is completed. Generally, the first hurdle that must be addressed is whether or not the particular words are actually defamatory. This is a legal question which must be resolved by the court. In doing so, the words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader. If the words are not reasonably susceptible to a defamatory meaning under this analysis, the words are not actionable and cannot be made so by a strained or artificial construction. Ultimately, whether a statement is considered defamatory depends upon whether or not it tends to harm the contractor's reputation by exposing the contractor to public hatred, contempt, or ridicule, or deters others from associating or dealing with the contractor. So, while comments such as "the contractor is neglectful in his job", and "the contractor is not doing his job" may cause the contractor to sue the A/E, such statements are typically considered mere expressions of unhappiness or dissatisfaction with the contractor's performance and are generally not considered defamatory per se. Similarly, commenting that cabinets installed by a particular contractor were a "total misfit" has also been considered a mere expression of dissatisfaction with the contractor's performance and therefore not defamatory per se.

The requirement that the court determine whether or not certain words are defamatory by viewing them fairly and in context should not be minimized since this analysis should compel the court to consider the statements in the context of a typical construction project. As such, the court should also consider the A/E's contractual obligations which often require the A/E to regularly evaluate the contractor's compliance with the plans and specifications in order to protect the owner against defective construction work and overcharges. Of course, since the court is required to employ a degree of subjectivity in performing this analysis, the outcome is not always predictable.

Among the trendier contractor responses is the commencement of a lawsuit...for defamation.

Even if the court determines that a statement is defamatory, if it is found to be an expression of "pure opinion", it will not be sufficient to sustain a defamation claim inasmuch as expressions of opinions are constitutionally protected. In this regard, a "pure opin-

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In This Issue ...

Firm News

• David B. Kosakoff, a partner in the firm's Design Professionals Practice Group, has recently been appointed to the arbitration/mediation panel of the American Arbitration Association. Mr. Kosakoff was selected based upon his experience in arbitrating and mediating disputes. In addition, he has been invited to participate in round table discussions with the American Arbitration Association in order to promote alternative dispute resolution options as an effective means of resolving disputes in a cost-efficient and timely manner.

• Firm partners David B. Kosakoff and Paula M. Gart have joined The Cooper Union Continuing Education Faculty, offering courses on Effective Contract Negotiation for Design Professionals and How to Limit Risks in the Design Professional's Practice.

• LBC&C is pleased to announce that Martin A. Schwartzberg and Annalee Cataldo-Barile of the Design Professionals Practice Group have been named as partners to the firm.

Attention to Insurance Requirements May Prevent Financial Ruin

By Orin J. Ketyer, Esq.

THE PROLIFERATION of litigation in the construction industry requires the design professional to take affirmative steps to provide added levels of protection. Insurance is an important and effective tool to shield personal assets and manage risks in response to these trends. More than ever, attention to the contractor's compliance with insurance obligations is urged to protect both the design professional and the client. The peril of insufficient insurance coverage requires greater scrutiny of the coverage available in order to avoid the potential for financial ruin.

The peril of insufficient insurance coverage requires greater scrutiny of the coverage available in order to avoid the potential for financial ruin.

Many standardized contract documents require the contractor to name the owner and its consultants (e.g., architect, engineer) as additional insureds on the liability insurance policies required of the contractor. If the contractor fulfills its insurance obligations, the contractor's general liability insurer may be required to defend and indemnify the design professional in the event of a claim. In addition to having greater coverage available to defend or settle a lawsuit, having the contractor's insurance carrier respond to a claim may yield ancillary benefits. For example, the design professional may be able to preserve some, if not all of the costs of its deductible obligation that many elect or are forced to carry in order to defray insurance expenses. Moreover, the contractor's insurer's agreement to defend and indemnify the design professional results in fewer claims against the design professional's own liability policy which could impact future premiums.

In the past, if a contractor breached its contractual obligation to obtain insurance for the design professional, the contractor could be required to indemnify and defend the design professional in the event of a lawsuit. Due to a recent change in the law, however, the damages the design professional may recover if the contractor fails to procure insurance covering the design professional have been severely curtailed. Now, if the design professional obtained its own insurance, it may recover only the "out-of-pocket expenses" it paid as a result of the contractor's failure to procure coverage for the design professional, such as the insurance policy premiums incurred as a result of the contractor's breach, deductibles and increased future premiums. Since most design professionals carry insurance (not merely because it is prudent to do so, but because owners invariably require it), meaningful indemnification from the contractor typically will not be available.

Regardless of the measure of damages, the potential for recovery is often limited by the financial viability of the contractor, since the design professional's claims against the contractor for such failure are not generally covered by insurance. Accordingly, the implementation of measures to ensure that the contractor fulfills its insurance procurement obligations is of paramount importance. The owner, the party controlling the project's funding, wields considerable clout. It therefore behooves the design professional to enlist the owner as its ally when seeking these protections. Since most insurance procurement clauses also benefit the owner, any

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Disciplinary Proceedings

THE NEW YORK STATE OFFICE of Professional Discipline and the City of New York Department of Buildings, Department of Investigation have the authority to suspend or revoke your license or your filing privileges. If these offices send you an inquiry, or a request for information, you should take the matter seriously. These are not situations you should approach without the guidance of counsel. Our office is experienced in appearing before these agencies and can effectively assist and guide you through this process.

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ion" is generally defined as a statement which is accompanied by a recitation of the facts upon which it is based. An opinion which is not accompanied by such a factual recitation, however, may nevertheless be viewed as a "pure opinion" if it does not imply that it is based upon undisclosed facts.

In order to identify opinion statements, the courts have established certain parameters. The specific factors defining these parameters are as follows:

(1) whether the specific language used has a precise meaning that is readily understood or whether it is indefinite and unambiguous;

(2) whether the statement is capable of being objectively characterized as true or false; and

(3) whether the full context of the entire communication or the broader social context surrounding the communication, including any custom or convention, signals to the audience that the communication is opinion.

In short, the court's determination of whether the statement in issue expresses an opinion must be based upon what the average person who heard or read the communication would take it to mean.

With these parameters in mind, as well as the A/E's typical contractual obligation to regularly evaluate the contractor's compliance with the plans and specifications, the A/E's assessment of the quality and quantity of the work performed by the contractor should generally be viewed as opinion and therefore, not actionable.

Even if the A/E's statements are not expressions of opinion, and are in fact defamatory, they may nevertheless not be actionable. In this regard, New York courts have consistently recognized that even though statements may be defamatory, the public interest is best served by shielding certain communications from litigation, rather than risk stifling them altogether. To these ends, the courts have noted that in some instances, a privilege may shield certain communications made in the discharge of a private or public duty. Also known as the "common interest privilege", this privilege extends to communications that are fairly made by a person in the discharge of some public or private duty upon any subject matter in which that person has an interest, provided it is made to a person or persons with a corresponding interest or duty. By way of example, this qualified privilege has been extended to statements made by a construction manager to a project owner regarding a general contractor's past performance on other projects. Since it is only a qualified privilege, however, it can be overcome by proof that the statements were made

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LBC&C is a full service law firm that serves all of your legal needs

LEGISLATIVE UPDATE

NEW YORK STATE Assembly Bill A01035 (same as New York State Senate S. 530) is currently before the Committee on Corporations, Authorities and Commissions of the New York State Assembly and in the New York State Senate. This legislation would permit the ownership of New York design profession corporations by non-design professionals as long as the non-design professional's ownership is less than 25% of all shares held. As such, the current form of the Bill requires that more than 75% of the shares must be held by New York licensed design professionals, which include New York licensed engineers, architects, landscape architects, land surveyors or any combination thereof. While this legislation is supported by the New York State American Institute of Architects, The New York State Society of Professional Engineers and the New York Association of Consulting Engineers, the Bill may not be acted upon until next year or later, according to the office of Assembly Member Ron Canestrari, the prime sponsor of this legislation.

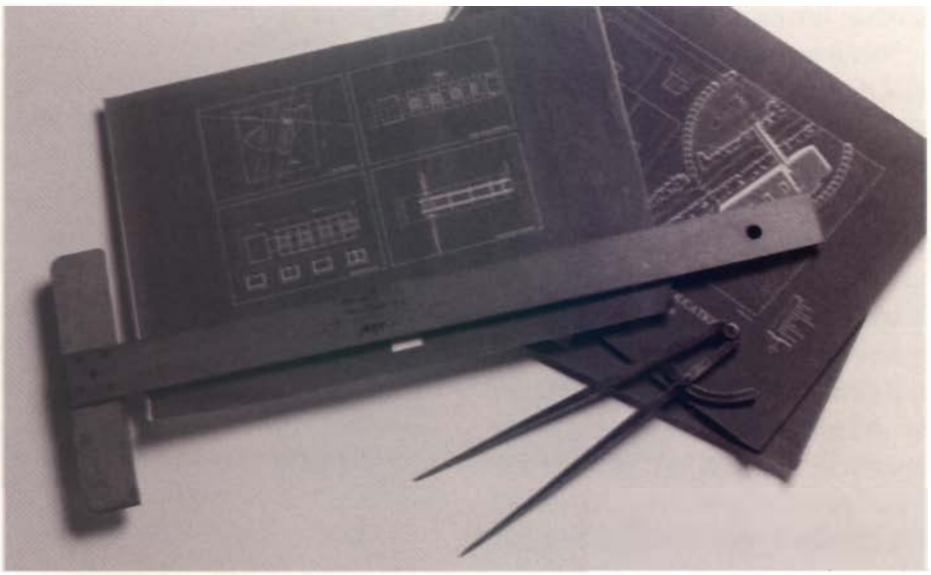
The Bill also requires that greater than 75% of the directors and officers must be New York licensed design professionals and that the president, chief executive officer and the chairman of the board of directors must be design professionals. According to Assembly Member Canestrari, the change in the law is justified to accommodate ownership of a company by such key persons as human resources managers, computer information specialists and others who are not licensed design professionals. The current law prohibits a professional design firm from offering an equity share in the company to those who are not New York licensed design professionals. New York is one of only three states in the country that restricts the ownership of design firms to licensed design professionals only. The introduction of this Bill will allow design professional firms to attract and retain key personnel and compete on more equal footing with design firms in other states on both a national and international level.

No Good Deed Goes Unpunished

By David B. Kosakoff, Esq.

ALL TOO OFTEN, architects and engineers are contacted by their clients directly or through counsel, seeking information relative to a completed project. These requests may be couched in the form of a pleasant phone call or letter, or a subpoena asking for the entire project file or deposition testimony. While the initial reaction may be to graciously respond in order to solidify or even rehabilitate a good relationship with the client, the recipient of such a request is urged to exercise extreme caution.

The client who innocuously asks for records or retains the services of an attorney has either commenced litigation, or is seriously considering pursuing a lawsuit for problems associated with the project. It is important to understand that the exchange of information, either by correspondence or testimony, could significantly impact the design professional's defense in any subsequently asserted claim. Certainly, it is not unusual for an unsuspecting design professional to unwittingly testify at a deposition to please a client. To do so without the advice of counsel, however, may result in his own testimony implicating him in a lawsuit.



The client who innocuously asks for records or retains the services of an attorney has either commenced litigation, or is seriously considering pursuing a lawsuit for problems associated with the project.

Once the architect or engineer responds, or more significantly testimony is recorded at a deposition, it can be anticipated that the response or testimony will be carefully scrutinized and invariably used to undermine his defense to any claim which is subsequently asserted. In recognition of the problems that could befall design professionals, many professional liability insurers have instituted programs to provide protection in these types of situations. Utilizing preclaim programs, these carriers may elect to assign legal counsel to evaluate the perils associated with requests for information and prepare the design professional to respond to the client.

Those who are concerned that their reluctance to respond to client requests may be perceived as a lack of cooperation, or may compromise a previously favorable relationship, should recognize that the good will sought by promptly responding to requests for documents or testimony may be far outweighed by the liability that may be created by acting without the advice of counsel. What the design professional does after the project is completed can actually have a greater impact on the ability to defend his or her position than what was done during the project. ■

Seminar Bulletin

LBC&C recently presented a seminar for architects and engineers entitled "The Top 10 Contract Rules" to the American Institute of Architects Design and Technology Expo 2003 at the Hilton Rye-Town Hotel in Westchester, New York. Co-sponsored by CNA Global Specialty Lines and Design Insurance Agency, Inc., the seminar was presented by firm partners Paula Gart and David Kosakoff, along with Tom Coghlan from Design Insurance. This topical seminar which LBC&C offers to various professional associations, was also presented by LBC&C and Greg Kumm from Prosurance/Redeker Brokerage Associates, Inc. to the Long Island Chapter of the American Institute of Architects. Additional information regarding this seminar can be obtained by contacting Margie Morabito at 516.294.8844 or e-mail at mmorabito@lbcclaw.com.

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with malice, knowledge of their falsity or reckless disregard for their truth.

There are, of course, other defenses to defamation claims, the most common of which is that the statements were true. Unfortunately, while you may know in your heart that the contractor is a "crook", obtaining evidence to verify your suspicions or knowledge is often a difficult task since key witnesses are usually reluctant to testify, and documentary proof is hard to come by. Accordingly, in the event you are unable to establish the truth of the statements in issue, an alternative defense is to establish that the contractor's reputation was so poor to begin with that whether or not the statements in issue were defamatory is irrelevant since the contractor's reputation was already damaged.

While A/Es cannot prevent a defamation lawsuit from being commenced, they can minimize the viability of those claims that are asserted. To do so, the A/E should: adhere to the contract obligations; remain mindful that the project, like any other, is just business and not personal; and recognize that calling someone names (i.e., "negligent", "notorious", "irresponsible", "inferior", "deceptive", etc.) neither serves the A/E nor the project. ■

LBC&C Moves Its New York City Office

LBC&C HAS RELOCATED its New York City office to larger quarters at One Battery Park Plaza. The new office, occupying 7,700 square feet of the fourth floor of the downtown building, features two conference rooms, offices for 12 attorneys and ancillary support service space. Presently there are eight attorneys and a support staff resident in the office. The firm's state of the art communications and computer systems seamlessly link the New York City office to both the Garden City office and the Livingtston, New Jersey office.

Located in lower Manhattan, the office is within walking distance to major financial institutions, City and Federal administrative offices, the downtown insurance center and the State and Federal Courthouses. This expanded facility provides a comfortable and convenient location for the firm's attorneys to hold conferences and meet with clients.

ATTENTION TO INSURANCE REQUIREMENTS MAY PREVENT FINANCIAL RUIN

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measures that improve the contractor's compliance with insurance requirements will likely be well received and appreciated by the owner.

The owner should be advised to insert appropriate contract language in the construction contract requiring the contractor to indemnify the owner and the design professional if the contractor fails to fulfill its insurance procurement obligations. This not only provides added protection to the owner and the design professional, but may serve to motivate the contractor to obtain the required insurance.

The design professional should also recommend that the construction contract include provisions requiring the contractor to provide complete copies of its insurance policies as a precondition to commencing work. While many owners accept a Certificate of Insurance to confirm that adequate coverages are in place, a Certificate of Insurance does not necessarily confirm that the contractor procured the appropriate insurance. Obtaining the contractor's insurance policy at the earliest possible stage is one way to determine whether the required coverage is in place prior to the emergence of potential claims. In addition, the identity of the contractor's insurance carrier will be known at the outset so that it can be immediately notified of a claim in order to minimize the potential for a disclaimer based on late notice.

While there is no substitute for performing services in a proper manner, there is certainly no downside to ensuring the contractor's compliance with insurance requirements. The design professional's insistence on these prophylactic measures not only renders a valuable service for its client, but furnishes an added level of protection that could make the difference between profitability and economic disaster. ■

About Our Newsletter

Legal Counsel for the Design Professional addresses current legal developments affecting architects and engineers. The articles contained in this publication are for your information. You are advised to consult with legal counsel to address whatever specific issues you may have. Your questions, comments and suggestions are appreciated and should be directed to Douglas L. Pintauro, Esq., L'Abbate, Balkan, Colavita & Contini, L.L.P., 1050 Franklin Avenue, Garden City, New York 11530, telephone no. 516.294.8844, email: dpintauro@lbcclaw.com.

Our business is helping and protecting your business

Design Professionals Benefit from Skilled Contract Preparation

AS LONG-TIME counsel for the design profession practicing in the construction industry, LBC&C is uniquely qualified to assess construction issues concisely and address them directly and practically. We often see situations that could have been avoided, or at least minimized, with more favorable, or clearer contractual provisions. Of course, at that point it is too late to change the agreements, erase the confusion or revise the history of events leading up to those situations.

Many design professional firms have, over the years, benefitted from LBC&C's preparation, review and negotiation of their design services agreements and proposals. We have now expanded our capabilities to enable other architectural and engineering firms to take advantage of this service.

LBC&C's Contract Development Group's recognized strength in preparing, reviewing and negotiating contracts and providing guidance and advice, allows you the freedom to focus on your profession, with the assurance that your legal concerns have been appropriately addressed. Headed by one of the A/E Group's partners, Paula M. Gart, LBC&C's Contract Development Group's lawyers understand your business, the documentation requirements of a construction project and, importantly, the construction process itself.

We concentrate on your business and professional needs from the project's inception through to its completion.

We concentrate on your business and professional needs from the project's inception through to its completion. Issues such as the preparation and negotiation of professional services agreements, general and supplementary conditions, the owner's construction contracts, and various other project documents, are approached with the skill and expertise that comes only from experience steeped in long-term, quality representation of design professionals.

In addition to offering contract preparation services, LBC&C can help you develop a contractual program leading to growth and economic stability, while avoiding the pitfalls lurking in every construction endeavor. The Contract Development Group's strength lies in its advice and guidance regarding available protections, problem avoidance, solutions and acceptable alternative positions. This Group's attorneys are readily equipped to respond quickly to inevitable construction headaches involving on-site disputes, payment certification, change orders, the submittal process, default and termination because we understand the construction process. Experienced in the design professionals' copyright and electronic document transmittal issues, your practice can also become competitive in the burgeoning technological aspects of construction. Significantly, we offer seminars for your key personnel to enable your firm to effectively prepare and negotiate the contracts that are central to your practice. For further information about this aspect of our practice, contact Paula Gart directly or any of the firm's partners. ■

DESIGN PROFESSIONALS PRACTICE GROUP

Partners Douglas L. Pintauro, Esq., Paula M. Gart, Esq. and David B. Kosakoff, Esq.

Trusts and Estates Practice Group Joins LBC&C

WHETHER YOU are a sole practitioner, partner in practice, or an employee at a firm, sooner or later you will need to think about wills, trusts, health care proxies, retirement plans, business succession, and elder law issues. The new group of lawyers joining LBC&C has the knowledge and experience to help you with all of these issues, as well as many others.

Mark S. Charwat, a highly respected trusts and estates lawyer will join LBC&C as a partner, adding yet another dimension to the firm's servicing capability. Joining the firm along with Mr. Charwat are his colleagues, Deborah S. Barcham, who will also be a partner, Ilene D. Samuel who will be an associate and Michael R. Klein who will be of counsel.

Mr. Charwat, with over 35 years experience, offers counseling in estate planning, business succession and many other areas that concern today's professionals. Well known for his expertise in the field, Mr. Charwat has been a frequent lecturer to many business groups and was President of the Estate Planning Counsel of Nassau County and Chairman of the Tax Law Committee of the Nassau County Bar Association.

Sooner or later you will need to think about wills, trusts, health care proxies, retirement plans, business succession, and elder law issues.

Deborah S. Barcham holds a Masters of Law in Taxation from New York University and has over 22 years experience in estate and trust planning and administration, tax, business and corporate planning and transactions, and in establishing and maintaining charitable foundations. Ms. Barcham is currently Vice Chairman of the Tax Law Committee of the Nassau County Bar Association.

Ilene Samuel has worked extensively in the trusts and estates field, helping clients achieve both long and short term objectives through trust agreements, living wills, health care proxies and powers of attorney.

Michael Klein has extensive knowledge and experience in both real estate law and elder law matters and is a full time professor at Nassau Community College.

Whether it is a simple will or a complicated trust, a small estate proceeding or a complex estate administration, the sale of a business or the development of a succession and retirement plan, the protection of your assets or simply minimizing your tax burden, LBC&C has experienced, knowledgeable and highly respected lawyers to guide you through the process. ■

About The Firm

LBC&C, founded in 1981, has offices in Garden City, New York, Livingston, New Jersey and Manhattan. From these three locations, the firm provides a wide array of legal services to design professionals throughout the New York Metropolitan area, Long Island and upstate New York counties and central and northern New Jersey. In addition to representing design professionals, the firm also has a recognized practice in other areas of professional liability, as well as environmental, product liability and insurance law. As a full service law firm with a total staff of more than 100, LBC&C provides legal counseling, as well as litigation services, on matters affecting its clients from business issues to employment and labor practices. Always on the alert to new trends in business and changes in the law, LBC&C is continuously striving to keep its clients ahead of their competitors. Working in conjunction with each other, the Practice Groups at LBC&C provide a network of legal experience that can meet any needs faced by today's design professional. For additional information visit our website at www.lbcclaw.com.

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