

# The Illegal Practice of Engineering or Architecture by Companies in New York - A Compliance Guide [Part Two]

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*The laws governing the practice by business entities of engineering and architecture in New York are among the most restrictive in the country – but in many cases a solution to operate legally is available. This article consists of Part 1, which addresses the regulatory framework, compliance requirements and the risks arising from non-compliance, and Part 2, which offers possible compliance strategies.*

## PART 2 – POSSIBLE COMPLIANCE STRATEGIES FOR NON-COMPLIANT ENGINEERING AND ARCHITECTURE SERVICE PROVIDERS

### *Possible Compliance Solutions*

If an engineering or architecture corporation does not meet the criteria necessary to perform engineering services in New York, do not despair. A number of possible solutions are available. Some of these solutions are explored in more detail below, and it may be possible to combine some of them. For a corporation or other business entity that already meets the general requirements for a professional corporation or other professional entity, the simple path to compliance is to apply for a certificate of authorization. If the engineering/architecture corporation is not in a position to apply for a certificate of authorization, other possible solutions are described below.

### *Grandfathered Corporations*

One possible solution is available in the form of a so-called "grandfathered" corporation. Such grandfathered corporation may provide engineering and architecture services in New York, even when some of the shareholders are not engineers or architects.

A finite number of corporations incorporated or qualified to do business in New York on or before April 15, 1935 are permitted to practice engineering, if they have continuously thereafter practiced engineering in New York and have a chief executive officer who is a professional engineer licensed in New York.<sup>1</sup> Only approximately 100

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such grandfathered engineering corporations exist in New York. These corporations typically sell for \$300,000 to \$500,000, if sold without any assets or liabilities, except for the certificate of authorization to provide engineering services.

A similar exception exists for a finite number of grandfathered architecture corporations incorporated or qualified to do business in New York on or before April 12, 1939, that have continuously practiced architecture in New York and have a chief executive officer who is an architect licensed in New York.

Even fewer grandfathered corporations exist with dual permissions to practice both engineering and architecture.

A business entity not licensed to practice engineering or architecture in New York can acquire a grandfathered corporation as a subsidiary, change the name of the grandfathered corporation and have such grandfathered entity provide the professional services.<sup>2</sup> The grandfathered corporations do not have requirements that their shareholders, directors, or officers (except for the chief executive officer) be engineers/architects.<sup>3</sup>

Once a grandfathered corporation has been acquired, it is important that a New York licensed engineer/architect be appointed as the grandfathered corporation's chief executive officer. Thereafter, the grandfathered corporation can provide engineering/architecture services in New York.<sup>4</sup> New contracts for engineering/architecture services in New York should be entered into by the grandfathered corporation and not by the acquiring business entity. Typically, restructuring will be appropriate, especially if the acquiring business entity is an active business entity. One possibility is to merge the acquiring business entity into the grandfathered corporation. Such a merger would typically transfer most contracts without the need for consents from customers to the grandfathered corporation. Alternatively, the acquiring business entity could (i) transfer its assets and activities relating to engineering and assign all of its engineering/architecture contracts to the grandfathered corporation and retain the remainder of its business (the non-engineering/architecture activities) for itself; (ii) transfer all its New York engineering/architecture activities; or (iii) transfer all its assets to the grandfathered corporation, leaving the acquiring business entity as a mere holding entity. In each case, the acquiring business entity would need to consider the effects of the chosen restructuring on its activities in other states, the laws of such states (e.g., compliance with licensing requirements in such states), and its contracts in such states. An asset transfer would typically require the consent of contract parties and might draw attention to the precarious situation of the acquiring business entity's contracts. In addition, because the grandfathered corporation may be subject to unknown liabilities for past activities, a complete transfer of all assets, whether by merger or by assignment, may not be an attractive solution for an acquiring business entity with many other activities or many assets.

### *Reorganizing the Existing Corporate Structure: Creating a Professional Entity*

Sometimes, a corporation may be able to reorganize its internal structure in order to meet the criteria for a professional engineering or architecture corporation in New York. Generally, that will require a merger into or transfer of assets into a newly established professional corporation in the same or a different state. If only a few

shareholders are not engineers or architects, the corporation may be able to offer cash or other incentives to buy them out. With respect to employees, instead of stock or stock options, the corporation may be able to provide bonus arrangements or phantom stock plans to reward employees. Phantom stock would probably not be an option for non-employees because it would most likely run afoul of the fee splitting prohibition. The corporation can appoint a board of directors and officers consisting exclusively of professional licensed engineers or architects. If the engineers and architects owning the corporation are not all licensed in New York, it will be necessary to look at which jurisdictions might permit a corporation owned by the particular combination of such shareholders to incorporate and obtain an authorization to provide engineering services in such states, and thereafter obtain the authorization and qualification in New York. If all the professionals are licensed in New York, it may be reconstituted as a New York professional corporation, although it should be noted that such a solution would prevent the corporation from including engineers licensed in states other than New York among its shareholders in the future. A typical advantage of a professional corporation incorporated in a state other than New York, and then qualified in New York, is that only the engineers/architects that are to perform services in New York would be required to be licensed in New York, while the other engineers/architects could be licensed in the jurisdiction of incorporation, or in another jurisdiction.

One of the advantages of creating a new professional corporation, as opposed to acquiring a grandfathered corporation, is that it does not come with hidden or unknown liabilities. One of the disadvantages of professional corporations, however, is that under the New York Business Corporation Law, they are prohibited from engaging in any business other than the rendering of professional services for which they were incorporated, and the attorney general may bring an action to the courts in New York who have authority to dissolve (or, in the case of out-of-state corporations, annul the authority of) such professional corporations for non-compliance with this prohibition.<sup>5</sup> Accordingly, some corporations that are not exclusively engaged in engineering or architecture may consider maintaining a number of parallel corporations or subsidiaries rather than transferring all activities to a professional corporation. This prohibition would not apply to a professional corporation's activities outside New York if it is not a New York professional corporation (unless similar restrictions apply under the law in such jurisdictions). Professional corporations are also expressly allowed to invest funds in real estate, mortgages, stocks, bond and other type of investments.<sup>6</sup> Ancillary activities, e.g., publication of articles and books (for profit) on engineering, the rendering of expert testimony on engineering issues etc., which may not directly constitute the practice of engineering but which are closely related to such practice, are not directly addressed in the Education Law as an exception. While it would seem unduly restrictive to prevent a professional corporation from engaging in non-professional activities closely related to its business activities, there is no express exception for such ancillary activities. However, it appears that there is no published case law involving the dissolution of professional corporations for engaging in activities outside the narrow scope of the profession for which they are qualified. The restrictions only apply to professional corporate entities and do not apply to the personal activities of individual engineers.<sup>7</sup>

An out-of-state professional corporation that has no engineers or architects licensed in New York may be able to meet the New York requirements by employing or admitting as a partner a New York licensed engineer/architect, and appointing such

engineer/architect as the person who is in "responsible charge" of the corporation's engineering/architecture activities in New York.<sup>8</sup>

If the Bill discussed in Part One of this article is passed, it may also be possible after January 1, 2011 to incorporate a domestic design professional service corporation.<sup>9</sup> This new form of entity could be attractive to engineering or architecture firms whose current owners are all licensed in New York, but who wish to include other employees as minority shareholders, and for engineering or architecture firms with owners who are all engineers or architects but with a concentration (more than 75 percent) of them being licensed in New York.

### *Contractual Arrangements with a Professional Entity*

Under limited circumstances, a non-professional entity can set up a contractual arrangement with a newly created (or existing) independent professional engineering/architecture corporation (or other professional entity or with an independent individual engineer/architect). This solution is primarily effective and advantageous for corporations whose professional engineering or architecture services in New York would constitute a relatively small percentage of their overall activities. It can also be useful if the non-professional entity has many shareholders and members of the management who are not licensed architects/engineers and a grandfathered corporation is not available or comes with too many latent liabilities.

The contractual relationship between the professional entity, the non-professional entity and their clients would need to be carefully structured. The professional entity would enter into engineering contracts in New York and perform all engineering services in New York. The non-professional entity would need to assign all its existing engineering contracts in New York to the professional entity.

The assignment of the existing contracts from the corporation to the professional entity would need to be structured to avoid violation of the rules prohibiting payment for referrals and fee-splitting.<sup>10</sup>

The non-professional entity would be able to provide secretarial, management, general marketing, superintendence and other personal services to the professional entity as well as office space, office equipment, other equipment, mail and telephone services. The non-professional entity would need to charge the professional entity for such services in a way that would not depend on the profit of the professional entity, since that would be in violation of the fee-splitting rules described above. Furthermore, any marketing and management fee arrangement would need to be carefully structured to avoid violations of the rule against paying fees for referrals including fees for obtaining specific engineering contracts in New York.<sup>11</sup>

The non-professional entity would also be permitted to operate under specific exceptions in the Education Law further explored in the next chapter of this article.

Engineering contracts with government entities such as public authorities are often structured with three components: hourly fees for the engineers, a certain percentage fee for overhead and a certain percentage as profit or multiples of direct personnel expenses. The contracting government entity generally has a right to audit the contractor and thereby review the actual overhead and salaries. Unlike a fixed

fee structure, this payment structure defines the element of profit and the factor of the overhead in the contract. It would be necessary for the non-professional entity and the professional entity to incorporate that structure in their arrangement in a manner that would not violate the fee-splitting prohibition.

The non-professional entity and the professional entity may enter into a separate management contract that provides for payment of management fees from the professional entity to the non-professional entity. Such an arrangement, however, must reflect that the non-professional entity provides actual management services to the professional entity and the fee can be more or less than the overhead but cannot be structured simply to transfer overhead under an engineering/architecture contract. Otherwise, the fees the non-professional entity collects for management services may be seen as a function of the professional entity's profit, and the arrangement may be characterized as a circumvention of the rule against fee splitting. The bottom line is that each entity must operate as an independent profit center.

In such a contractual relationship between a professional and a non-professional entity, it would be important to have the professional entity be the employer of the engineers/architects licensed and practicing in New York in order to prevent a situation where the licensed professional and the non-professional entity split fees. The professional engineering entity is not prevented from employing engineers licensed in other states and support staff (e.g., secretaries, accountants, technical assistants and other necessary employees). In addition, the professional engineering entity may employ non-engineers for technical support and individuals who have at least a bachelor's degree based on a program in engineering as junior or assistant engineers, as long as the work of such individuals is supervised by a New York licensed engineer.<sup>12</sup> Individuals who are not licensed as architects in New York may work as employees of the professional entity under the instruction, control or supervision of New York licensed architects but cannot use titles such as architects or junior or assistant architects.<sup>13</sup>

Other terms of the contractual arrangement between the parties, such as the term and termination of the contract, would need to be considered carefully.

Some disadvantages of this model are the inability of the professional entity to pay dividends or otherwise share profits with the non-professional entity.<sup>14</sup> In addition, the professional entity would operate more independently, as its relationship with the non-professional entity would be a contractual relationship, and the relatively small group of owners of the professional entity might not always have interests closely aligned with those of the non-professional entity. Furthermore, setting up and maintaining the contractual relationship would entail expenses and ongoing administrative burdens.

Careful attention must be paid to what type of entity to set up and what the ownership structure will be like. Issues that should be taken into consideration are discussed below.

1. Licensing requirements are applicable for the owners and management of the independent professional entity.

2. The professional entity will need to employ New York licensed engineers/architects to provide the services in New York.
3. Tax considerations: The selection of a specific form of entity may have different tax consequences. The non-professional entity and the engineers/architects setting up the professional entity should seek appropriate tax advice prior to electing a specific form of entity.
4. Number of owners: The selected form of a professional entity may have a limited number of owners with whom the non-professional entity believes it can cooperate. If such a limited group of engineers/architects sets up the new entity, the professional entity will need to employ the engineers/architects who perform engineering/architecture services in New York or who work on engineering/architecture projects that are to be completed in New York. Alternatively, all the engineers/architects that would be able to qualify as shareholders/members under the legislation for the selected form of a professional entity could become shareholders/members.

#### *Living With and Performing Under the Exceptions*

Business entities that cannot qualify as professional entities in New York may engage in some specifically permitted excepted activities.<sup>15</sup> Some of these activities and exceptions are discussed below. Some of these exceptions may not be available (at least not directly) to an entity that is not eligible to become authorized to do business as a general corporation (or other business entity) in New York because of references in its Certificate of Incorporation or in its name to architecture or engineering.<sup>16</sup>

#### *Exception for Non-Engineering and Non-Architecture Activities*

New York courts have held that the purpose of licensing architects and engineers is to safeguard the life, health and property of New York residents.<sup>17</sup> That concern is also the cornerstone of, and reflected in, the definition of engineering and architecture in New York.<sup>18</sup>

Non-professional entities may engage in activities in New York that do not fall within the scope of the definition in the Education Law of professional engineering or architecture (provided they can register with the Secretary of State to do business in New York). It would appear that some technical support and management services would fall outside the scope of the definition of engineering services. Contractors and builders that engage in construction management and administration of construction contracts are expressly listed as an exception to the activities reserved for professional engineering and architecture corporations.<sup>19</sup> Non-professional entities may also execute work designed by a professional engineer or a professional entity and perform the superintendence of such work as a superintendent, foreman or inspector.<sup>20</sup> Preparation of details and shop drawings by persons other than architects for use in connection with the execution of their work is also permitted.<sup>21</sup>

#### *Exception for Interstate and International Commerce*

Another exception is the "commerce clause" exception based on the principles of the so-called "commerce clause" in the United States Constitution. This principle is reflected in the Education Law, which expressly exempts persons from the licensing requirements in the case of the "practice of engineering ... or having the title 'engineer' ... solely as an officer or an employee of a corporation engaged in interstate commerce."<sup>22</sup> The provision has been in the Education Law since before 1934 and traditionally is linked to railroads.<sup>23</sup> However, other activities may also fall within the "interstate commerce" exception. No express interstate commerce exception has been included with respect to architects in the Education Law; however, it should be safe to assume that the reach of this federal constitutional principle would be considered with respect to architecture activities as well.

For instance, where an engineer in New York prepares relevant drawings, designs and calculations based on engineering principles for the design of vessels<sup>24</sup> or other constructions, it appears the engineer would be in a position to establish that the practice has been in "interstate commerce" and therefore lawful under New York<sup>25</sup> law if (1) the construction or vessels designed by the engineer have all been built outside the State of New York and (2) in the case of vessels, the vessels designed by the engineer have all been registered outside the State of New York. If the customers for whom the vessels or constructions have been designed are located outside the State of New York, that might be an added element to help establish an interstate commerce exception.

With respect to safety surveys/inspections of vessels that have taken place outside the State of New York, it would appear that they also would fall within the interstate commerce exception and therefore not be illegal under New York law, although local law requirements might be applicable.<sup>26</sup>

*Design-Build Contracts, Subcontracting, and Use of Licensed Professional by Professional Entity Without a Certificate of Authorization*

Case law in New York upholds the proposition that a company not licensed to practice engineering in New York will likely not run afoul of the prohibitions discussed in this article when it enters into design-build contracts that are not primarily engineering or architecture contracts, so long as its service contracts provide explicitly that the company will engage a licensed engineer or architect to perform the engineering or architecture services required to be performed under the contract.

This type of exception is generally referred to as the so-called "design-build" contract, where a general contractor is contracted to provide all construction services, including engineering services. It is possible that the principle applied in the design-build contracts may be applicable outside the scope of design-build contracts, although it would be highly unlikely that this principle could be stretched to apply to contracts exclusively for engineering or architecture.

In current market practice for design-build contracts, the parties expressly name a third-party licensed engineering entity or individual as responsible for the engineering work, and the portion of the price allocable to the engineering firm is specifically stated in the contract, so as to avoid a violation of the fee splitting rule. This exception is not expressly recognized in the law, and there is some uncertainty as to whether it may be a valid exception. In *Charlebois v. J.M. Weller Assoc., Inc.*,<sup>27</sup>

the New York Court of Appeals held that such a contract was not invalid where an engineering and architecture firm was specifically named to provide such services. However, the court did not address the fee-splitting prohibition, although the case summary indicates that the fee for the architecture and engineering firm might not have been specified in the contract.<sup>28</sup>

In *SKR Design Group, Inc. v. Yonehama, Inc.*,<sup>29</sup> the First Department took *Charlebois* one step further and did not void payment obligations under a design-build contract where the contractor had expressly provided that design services would be provided by qualified architects, engineers and other professionals selected and paid for by the contractor, despite the fact that the contract did not name the engineering or architecture firm. Once again, the fee splitting prohibition was not expressly addressed in this case. Accordingly, the safer approach is to name the designated engineering/architecture firm in the contract and specify the fee owed to the professional entity.

It can be difficult to distinguish between permitted design-build contracts and regular sub-contracting of engineering services, but the EDSNY's Office of Professions expressly takes the position that an entity not authorized to provide professional engineering services in New York (e.g., a general contractor) cannot subcontract with a licensed professional engineer in order to provide such services.<sup>30</sup> The Office of Professions explains that the basis for the professional regulation is that the service of the professional must be provided directly from the professional to the client without any unlicensed third party between the client and the professional.<sup>31</sup> This unlicensed third party may have other interests (such as financial) that could jeopardize the level and/or quality of the professional service received by the client. The Office of Professions does not address the possible design-build exception on its website.

*Charlebois* and *SKR Design* may permit companies that are not qualified in New York as professional entities to act as intermediaries between clients and licensed engineers in contracts that are not primarily for professional services.<sup>32</sup> However, the cases do not go so far as to permit such companies to employ their own licensed engineers as employees and provide such services through such employed engineers.

However, after the *Charlebois* case was decided, *Tetra Tech., Inc. v. John C. Harter*<sup>33</sup> was decided by the U.S. District Court for the Southern District of New York. In *Tetra Tech.*, a Texas licensed engineering corporation had its work in New York supervised by a locally licensed engineer.<sup>34</sup> The court found that the New York Education law was silent with regard to any requirement that employers or contractors have separate licenses in addition to those held by engineering employees, and that requiring an engineering contractor to obtain a New York engineering licensing, despite supervision of work by a locally licensed engineer, would run counter to the commerce clause.<sup>35</sup> The court also relied on the *Charlebois* decision, although that decision had a narrower scope because it dealt with a design-build contract.<sup>36</sup>

The decision in *Tetra Tech.* was based on the premise that the New York Education Law was silent as to any requirement that employers or contractors have separate licenses.<sup>37</sup> This silence was broken and the premise removed, at least with respect to engineering firms, when the requirement that professional engineering entities

obtain a Certificate of Authorization came into effect on January 1, 2000.<sup>38</sup> Furthermore, the Office of Professions has taken the position that the person who is locally licensed to practice engineering in New York is not allowed to do so in the capacity of an officer or employee of a corporation licensed in states other than New York.<sup>39</sup> Accordingly, the Office of Professions' current position is that an out-of-state professional engineering corporation cannot render engineering services in New York through employees that are locally licensed in New York, without having the corporation qualify for and obtain a Certificate of Authorization.<sup>40</sup> While this requirement of a Certificate of Authorization possibly could be challenged under the commerce clause exception, few business people would be interested in engaging in litigation to test the legality of the requirement of the Certificate of Authorization. In an old case, *Sackman v. Ioscue*,<sup>41</sup> a New York Supreme Court set aside a similar requirement for a professional correspondence school. However, New York State's interest in the protection of the life, health and property of its citizens probably provides New York State with a stronger basis for its requirement for professional engineering entities.

In *Jaidan Indus., Inc. v. M.A. Angeliades, Inc.*,<sup>42</sup> Jaidan had agreed to manufacture windows for M.A. Angeliades. An arbitrator awarded Jaidan \$78,000 for the "design and engineering of new aluminum windows," and Angeliades sought to vacate the arbitration award on the grounds that the award was in violation of the Education Law.<sup>43</sup> The Court of Appeals refused to vacate the award because an arbitration award only may be vacated "on public policy grounds only where it is clear on its face that the public policy precludes its enforcement."<sup>44</sup> The court did not find that to be the case and instead found that an award for the "design and engineering of new aluminum windows" does "not necessarily violate public policy."<sup>45</sup> The court cited *Charlebois* as one example of a situation where a contract that included the rendition of professional services did not violate the Education Law licensing protections or the public policy which underlies them.<sup>46</sup> Despite the reference in the arbitration award to "engineering," it is not clear the extent to which actual engineering services were provided under the contract, and it appears that the case may have been brought based on the description in the award rather than the contents of the contract.

In *Lombardo v. Sagistano*,<sup>47</sup> the defendant hired a building contractor who was not a licensed engineer to provide services. The contract was also signed by a licensed engineer and clearly delineated the payment schedule, the needs of each project and the structural design services.<sup>48</sup> Citing to *Charlebois*, the *Lombardo* court found that key factual determination was whether the part of the plaintiff's work requiring a licensed engineer was the "mere incident of a larger work" provided to the defendant or if the contractor provided the defendant with engineering services and merely hired licensed engineers to seal the designs.<sup>49</sup> The court found that the latter would be a violation of the Education Law.<sup>50</sup> Unfortunately, the court did not clearly distinguish between engineers hired as independent contractors and engineers employed directly by the contractor. However, it should be noted that *Charlebois* sanctioned only the use of independent contractors and not the use of employed licensed engineers in design-build matters.<sup>51</sup> While the use of employed licensed engineers by an unlicensed corporation was accepted in *Tetra Tech.*, legislation requiring independent licensing (a Certificate of Authorization) had come into effect approximately three months before *Lombardo* was decided, but presumably after the services in *Lombardo* had been rendered.<sup>52</sup> However, *Lombardo* did not make a decision on this point and merely refused to render a summary judgment. No subsequent decisions in this matter appear to have been published.

*Delegation Exception*

In the Rules of the Board of Regents, the Office of Professions expressly acknowledges the so-called delegation exception.<sup>53</sup> However, this exception requires the involvement of three parties: (1) a group of New York licensed professionals or a New York registered professional entity that delegates through (2) an intermediary non-professional entity or person (typically a contractor) to (3) a delegatee.<sup>54</sup> The delegatee must be a New York licensed professional employed or retained by the intermediate entity.<sup>55</sup> The components of work that can be delegated have to be specifically defined and can only be ancillary to the main components of the project.<sup>56</sup> The delegating entity must provide written parameters for the design, and must review and approve the design.<sup>57</sup> The exception appears to have more relevance for professional engineering entities that seek supplemental expertise in another field of engineering.

*Other Exceptions*

Limited permits may be granted by the EDSNY for an engineer for a specific project.<sup>58</sup> Such permits are only available to engineers who are not residents in New York and who have no established place of practice in New York.<sup>59</sup> In addition, such an engineer must be legally qualified to practice in "his own" state.<sup>60</sup> It appears that such a limited permit would not be available to an engineer who already has an established place of practice in New York, nor is it available to corporations or other business entities.

The Education Law also has an exception for the use of the titles "port of customs surveyor" and "ship surveyor," which would indicate that any work ordinarily done by an individual with such a title, if in the State of New York, would not be illegal under New York law.<sup>61</sup>

Other exceptions are applicable with respect to engineers (1) for employees of public service corporations under the supervision of a federal regulatory body, (2) for junior engineers with a bachelor level in engineering who are supervised by licensed engineers, and (3) for engineers employed by manufacturing corporations in connection with goods produced or sold by or non-engineering services rendered by such corporation.<sup>62</sup>

With respect to architects, employees of lawfully practicing architects may also act under the supervision, instruction and control of their employers.<sup>63</sup>

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**RESOURCES:****Websites:**

Office of the Professions: <http://www.op.nysed.gov/>

Use this link to verify the professional licensing of corporate entities and individuals, find decisions of disciplinary sanctions and find the Education Law and the Rules of the Board of Regents.

EDSNY: <http://www.nysed.gov/>

This is the website of the EDSNY.

New York State Department of State:

[http://appsex8.dos.state.ny.us/corp\\_public/corpsearch.entity\\_search\\_entry](http://appsex8.dos.state.ny.us/corp_public/corpsearch.entity_search_entry)

Use this link to verify if a corporate entity is registered to do business in New York.

The New York Business Corporation Law, the Limited Liability Company Law and the Partnership Law can be accessed on [www.bloomberglaw.com](http://www.bloomberglaw.com).

**Primary Governing Laws and Regulations:**

Education Law (e.g., Article 130 General Provisions, Subarticle 3, Professional Misconduct, and Subarticle 4, Unauthorized Acts; Article 145, Engineering and Land Surveying; and Article 147, Architecture).

Business Corporation Law (Article 15, Professional Service Corporations, and Article 15-A, Foreign Professional Service Corporations).

Limited Liability Company Law (Article 12, Professional Service Limited Liability Companies, and Article 13, Foreign Professional Service Limited Liability Companies).

Partnership Law.

Rules of the Board of Regents.

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1N.Y. EDUC. LAW § 7209(6).

2*Id.*

3*Id.*

4*Id.*

5N.Y. BUS. CORP. LAW §§ 1101(a)(2), 1111, 1303, 1506, 1513, 1528, and 1529.

6*Id.*

7*Id.*; § 1528.

8 § 1526.

- <sup>9</sup>See Part One, notes 16-20 and accompanying text.
- <sup>10</sup>See Part One, notes 30-32 and accompanying text.
- <sup>11</sup>*Id.*
- <sup>12</sup>N.Y. EDUC. LAW § 7208(k); *see also Tetra Tech., Inc. v. Harter*, 823 F. Supp. 1116, 1124 (S.D.N.Y. 1993).
- <sup>13</sup>N.Y. EDUC. LAW §§ 7302, 7306.
- <sup>14</sup>N.Y. COMP. CODES R. & REGS. Tit. 8, § 29.3(a)(6).
- <sup>15</sup>N.Y. EDUC. LAW §§ 7208, 7306.
- <sup>16</sup> Such references will result in the corporation being automatically designated as a professional corporation by the Department of State pursuant to BUS. CORP. LAW § 1525(b) and EDUC. LAW § 6509 and Articles 145 and 147 and will result in a rejection, because the corporation does not meet the requirements for professional corporations under BUS. CORP. LAW § 1525(d) and § 1530(b)(2).
- <sup>17</sup>*Vereinigte Osterreichische Eisen Und Stahlwerke, A.G. v. Modular Bldg.*, 64 Misc. 2d 1050, 316 N.Y.S.2d 812 (Sup. Ct. N.Y. Co. 1970).
- <sup>18</sup>See N.Y. EDUC. LAW § 7201 ("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 service or work requires the application of engineering principles and data.") and N.Y. EDUC. LAW § 7301 ("The practice of the profession of architecture is defined as rendering or offering to render services which require the application of the art, science, and aesthetics of design and construction of buildings, groups, of buildings, including their components and appurtenances and the spaces around them wherein the safeguarding of life, health, property and public welfare is concerned. Such services include, but are not limited to consultation, evaluation, planning, the provision of preliminary studies, designs, constructions documents, construction management, and the administration of construction contracts.").
- <sup>19</sup>N.Y. EDUC. LAW §§ 7208(p), 7306(g).
- <sup>20</sup> § 7208(h).
- <sup>21</sup> § 7306(b).
- <sup>22</sup> § 7208(j).
- <sup>23</sup>*E.g., Barlow v. Lehigh Valley R. Co.*, 07 N.E. 814, 214 N.Y. 116, *rev'd*, 37 S. Ct. 51, 244 U.S. 183, 61 L. Ed. 1070 (N.Y. 1915) and *McCauliffe v. New York Cent. & H.R.R. Co.*, 158 N.Y.S. 922, 172 A.D. 597 (N.Y.A.D. 2 Dept. 1916).
- <sup>24</sup>See 51 State Dept. 133 (1934) in which the attorney-general opined that the "design and responsible supervision of construction of ships within the State of New York constitutes the practice of engineering."
- <sup>25</sup> This article does not cover whether such activities would be legal under the laws in any other state affected, for instance New Jersey law, but I note that many states have restrictions and licensing requirements similar to those applicable in New

York. For instance, New Jersey exempts engineers from the licensing requirements if they are employees of the federal government, or if they are officers or employees of a corporation engaged in interstate commerce as defined the Interstate Commerce Act, 49 U.S.C. §§ 105101-16101 (2000), unless the same affects public safety or health.

26 *Id.*

27 72 N.Y.2d 587 (1988) (4-3 decision).

28 *Id.*

29 230 A.D.2d 533; 660 N.Y.S.2d 119.

30 NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF PROFESSIONS, GUIDELINES FOR PROFESSIONAL ENGINEERING PRACTICE IN NEW YORK STATE, <http://www.op.nysed.gov/peguide2-forms.htm>.

31 *Id.*

32 72 N.Y.2d at 549; 230 A.D.2d at 537.

33 823 F. Supp. 1116 (S.D.N.Y. 1993).

34 *Id.* at 1118.

35 *Id.* at 1124.

36 *Id.* at 1118.

37 *Id.* at 1118.

38 N.Y. EDUC. LAW § 7210(3).

39 NEW YORK STATE EDUCATION DEP'T, *supra* note 30.

40 *Id.*

41 36 N.Y.S.2d 625, 178 Misc. 759 (Sup. Ct. N.Y. Co. 1942).

42 97 N.Y.2d 659 (2001).

43 *Id.* at 660-61.

44 *Id.* at 661.

45 *Id.*

46 *Id.*

47 184 Misc. 2d 301, 708 N.Y.S.2d 241 (2d Dep't 2000).

48 *Id.* at 302.

49 *Id.* at 303.

50 *Id.*

51 72 N.Y.2d at 594.

52 *See supra* note 38 and accompanying text.

53 N.Y. COMP. CODES R. & REGS. Tit. 8, § 29.3(b)(2).

54 *Id.*

55 § 29.3(b)(3)(iii).

56 § 29.3(b)(2)(i).

57 § 29.3(b)(2)(ii), (v).

58 N.Y. EDUC. LAW § 7207(2).

59 *Id.*

60 *Id.*

61 § 7208(o).

62 § 7208(f).

63 § 7306(b).