officeinsight

Interior Design: Victorious in Florida

by Brad Powell

Hanging in my office since graduating from law school is a calligraphed quote given to me by a friend to remind me of my place:

> *First thing we do, let's kill all the lawyers.*
> *-William Shakespeare, Henry The VI, Part 2*

But not so fast. For all of its frustrations and follies, at times the legal system manages to get something, if not right, at least better. Such is the case – getting it better – with a couple of Federal court decisions dealing with the subject of interior design legislation. The most recent case in the U.S. Federal Court for the Northern District of Florida was championed by the nemesis of interior design legislative advocates, the Institute for Justice, which, in this case, helped the profession get it . . . better. The result was a stunning victory for interior design and interior designers: The court upheld the Florida practice act.

At the same time, the court sharply limited the practice act's reach, removing its anti-competitive and counterproductive (vis-a-vis the interiors sector) aspects by holding that the exclusive area for interior design is limited to:

> *professional design services provided to a client relating to nonstructural interior elements of a nonresidential building or structure. (Emphasis Added)*

As indicated below, this removes the offensive application of the statute to mere space planning involving furniture, including systems, that the Florida Board of Architecture and Interior Design (**FBAID**) had been encouraging, and the chilling of competitive development that resulted from this. In short, the interiors profession benefited by each aspect of the ruling.

However, both cases, *Roberts v. Farrell* (630. F Supp. 2d 22 (D.CT 2009)) and *Locke v. Shore* (U.S. District Court, (N.D. FL 2010), overturned the ban on the use of the term "interior designer" by non-licensed designers.; these decisions were based upon the commercial free speech protections of the First and Fourteenth Amendments.

After these two decisions, it is safe to say that, for now, interior design title legislation designed to limit the use of the terms "interior design" and "interior designer" is dead on arrival. Indeed, even the ASID (**American Society of Interior Designers**), which, for years, has championed interior design legislation, changed its policy in early 2009, announcing that it would no longer support legislation that restricts the use of the title "interior designer." (See officeinsight 3.9.09, ASID's New Legislation Policy.) In the end, the legislative struggle has been a learning experience. ASID has kept its mind open and, fighting the slings and arrows of sometimes outrageous fortune and accusations, has emerged the victor and deserves the gratitude of the profession as a whole.

a stunning victory for interior design and interior designers

The "title" issue was the central issue in the Connecticut decision and a secondary issue in the Florida decision, which focused on the limitations of interior design practice. In Florida, the interior design practice statute requires a license to practice non-residential interior design. (While allowing unlicensed persons to practice residential interior design, they could not advertise or hold themselves out as being "interior designers.") As applied by the FBAID, many contract furniture dealerships, sales reps and related service companies have been subjected to prosecution and fines for "space planning" and similar services that the FBAID and interior designers in Florida have considered "practicing interior design." With the holding in *Locke*, this prosecution should now cease.

The Florida Federal court decision, *Locke*, upheld the Florida interior design practice act, but sharply limited its application. In no uncertain terms, the court held that:

> *In sum, the statute prohibits an unlicensed person from providing design services to a client relating to nonstructural interior elements of a nonresidential building or structure. It sweeps no more broadly than that. (Emphasis added.)*

While some interior designers in Florida may seek to find some wiggle room in this decision, any such

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"THE SECRET OF GETTING AHEAD IS GETTING STARTED."
—MARK TWAIN

opinion: a random walk

attempt would be ill advised for several reasons:

>First, too many local advocates of interior design legislation attempt to use this movement as a sword and a shield. Although the impetus for interior design legislation was to give interior designers the right to practice their profession (the sword) where local architecture legislation might have prohibited it, most of the resulting legislative propositions have also attempted to limit others (the shield) from engaging in any aspect of the activities that were of the type engaged in by interior designers. This "turf guarding" approach in effect mimicked the architecture statutes, but had at least two fatal flaws: (i) its restrictive aspects ran counter to cultural values in the U.S. and threatened the livelihood of many existing businesses and (ii) by equating anything that interior designers do (e.g., space planning) with "practicing interior design," the legislation necessarily created ridiculous and harmful and uncompetitive results.

The previous FBAID interpretation of the Florida practice act raised questions such as, if an interior designer consults regarding the placement of furniture or fixtures in an office to avoid violating laws or ordinances regarding access and egress, does this prohibit a lawyer from doing so? If an interior designer plans the layout of spaces, does this mean that a wedding planner cannot sketch out the table layout for a wedding reception? . . . and so on.

>The fact is that the hallmark of human behavior is to design, or as **Charles Eames** put it, "arrang[e] elements to accomplish a particular purpose," in other words, to act with intent according to a plan. It follows, that the tendency to try to define interior design, usually by including a description of interior design activities, will almost certainly create additional constitutional issues. While one may create a list of activities typical of a profession in order to ensure that persons practicing that profession can engage in those activities – and this approach is helpful where architecture regulations might otherwise be thought to prohibit certain practices – using that same list as a barrier to prohibit others from engaging in any of the listed activities is usually disastrous. [This is the old logic error: given, if A then B, conclude that if B then A; thus, if it is snowing, then it's winter; conclude, if it's winter, it's snowing. Not!] To avoid this fallacious reasoning, for example, the Florida statutes regarding certified public accountants expressly provide that the professional restrictions on non-certified accountants do not prohibit others from engaging in, say, bookkeeping.

The Locke decision should put to rest much of the troubling consequences to contract furniture manufacturer dealerships and rep firms caused by the past application of Florida interior design statutes.

Equal protection, due process, vagueness and over-breadth were part of the plaintiff's challenge in *Locke*, but the Florida Federal court knocked those theories down with its very narrow construction of the Florida statute. Everything describing interior design in the statute, according to the court, is limited by the phrase, *relating to nonstructural interior elements of a nonresidential building or structure*.

While there may be some close issues remaining, the court made clear that it interpreted the statutory language as meaning interior elements "of" a … building…, not interior elements "in" a …building….

Thus, the court stated explicitly that:

> *The concluding phrase "relating to nonstructural interior elements of a building or structure" modifies each of the listed items. "Interior design" thus encompasses only items "relating to nonstructural interior elements* ***of*** *a building or structure." A fixture ordinarily is a "nonstructural interior element* ***of*** *a building or structure." A table or other piece of stand-alone furniture ordinarily is not. (Emphasis added.)*

Insofar as space planning and the other specific activities mentioned in the statute are concerned, the practice of these activities is limited only if they relate to *nonstructural elements* ***of*** *a building or structure*. Some will, and some won't. Thus the court observed that, "[r]eflected ceiling plans, space planning, design services relating to furnishings, and design services relating to the fabrication of nonstructural elements [all itemized in the statute as constituting interior design] thus are covered by the term "interior design" *if and only if* they "relat[e] to nonstructural interior elements of a building or structure." (Emphasis added.)

The *Locke* decision should put to rest much of the troubling consequences to contract furniture manufacturer dealerships and rep firms caused by the past application of Florida interior design statutes. However one might feel about the court's perception of interior design, as restricted by statute or as actually practiced by interior designers in other states, the limitation in Florida appears to relate to matters such as fixtures and nonstructural walls, and so on, and not to furniture, including most, perhaps all, systems. Thus, as the court indicated in its decision, "[a] fixture ordinarily is a 'nonstructural interior element of a building or structure." The court also cited, with approval, the Florida statute that states that "preparing specifications of 'fixtures and their location within interior spaces' falls under the umbrella of interior design."

In reading the Florida decision, it is

important to understand that the term "fixture" is a term with a recognized legal meaning and with specific legal ramifications, depending upon law of a particular State. If the Florida Federal court did not get too specific in its decision regarding the exact demarcation of what type of equipment or appurtenance might full under the "interior design" parameter, it is probably because this is a murky area of the law. Generally, the law divides property into real property or personal property. Fixtures are property that fall in between, essentially personal property that is or becomes so affixed or attached or rooted in real property that an interest therein can arise under a state's real property law.

Fixtures clearly constitute "non-structural elements of a building or structure," not just property *in* the real estate or building. But the question of what constitutes a fixture requires some careful consideration. The answer depends on state law, and even then may depend on the nature of the property, the manner to which it is affixed or becomes part of real estate (including a building), its importance to the operation of the building, and, for some purposes, the intent or expectation of the parties involved.

There will be no intellectually pure answers here, since interior design, as a field, is not well understood by the general populace, or even the educated legal community. For example, there is a well recognize classification of property call "trade fixtures." Fixtures to be sure (well, kind of), but not usually fully treated as such under the law. One example is grocery store refrigeration units; another would be the usual machinery found in a factory. Should an interior designer with no knowledge of factory layout be required to design a factory? Are the usual industrial and systems designers used for factory lay-out violating Florida law? Common sense says no, and I think the FBAID will agree.

In accordance with the court's decision, it follows that, if the service, e.g. space planning, involves fixtures or permanent/fixed (non-structural) walls, or similar items, then a licensed interior design is required. For example, under this reading, a licensed interior designer would be required to create plans involving fixed (non-structural) walls and most dropped ceilings, since these elements would normally be considered, upon installation, to be part of the real estate; the same would apply to HVAC equipment. (This, of course, suggests a scope of activity permitted to interior designers that may not have previously been thought.) Tables, desks, and normal systems products, generally, would not, and this should also include moveable walls. Accordingly, space planning with them would not require a licensed interior designer.

>While Florida interior designers may not be happy with this decision, they should appreciate that the court stretched mightily to find a rational under which it could uphold the interior design statute. Throw out the limitation that the court imposed, and the alternative is to strike down the statute totally. As the opinion clearly states:

> *The state has advocated the limited construction adopted by this order partly to obtain a favorable ruling in this case. As the state concedes, it will not be free in later case to disavow the limited construction it has successfully advocted here.*

That is about as strong and direct a warning as you are likely to see in a Federal court opinion.

>Supporting its position and cited by the court, the State of Florida pointed to the statutory definition of "interior decorator," taking the position that interior decoration and interior design are mutually exclusive:

> *Interior decorator services" includes the selection or assistance in selection of surface materials, window treatments, wallcoverings, paint, floor coverings, surface-mounted lighting, surface-mounted fixtures, and loose furnishings not subject to regulation under applicable building codes.*

These activities are clearly not within the the court's and the state's construction of interior design, although the statement that the two activities are mutually exclusive, of course, makes no sense as a matter of practice (as opposed to regulation): interior designer do do the "decorating" part of interior planning and design (using that term in the generic sense).

The danger here is that the state FBAID and licensed interior designers will be tempted to define interior design with the interior decoration definition as the starting point. Thus, instead of a correct reading – interior decoration activities are clearly not interior design – one may be tempted to read this as saying that *everything but* interior decoration activities *is* interior design. But this is clearly inconsistent with the court's basis of the opinion, i.e. that everything related to interior design is limited by the phrase, *relating to nonstructural interior elements of a building or structure.* Furthermore, two things may be mutually exclusive, but it does not follow that it is one or the other. Thus, black and white are mutually exclusive, but green is neither.

"Oh nooo!" I hear many say. "The Florida court's interpretation of interior design does not make sense, and certainly does not correctly characterize the interior design profession." This objection is most certainly correct. But, it was not the court's task or objective to assess the interior design profession, nor to determine whether or to what extent it should be regulated. The court was simply trying to find a con-

opinion: a random walk

struction of the legislative action that could pass muster under the United States Constitution. To do this, it found a circumstance in which the statutory language could be reasonably applied. It found it in the area of "preparing specifications of 'fixtures and their location within interior spaces.'"

To those who wished for more, to the greedy, we can only say, push further, and you will lose the whole ball game. We have previously written that the application of the Florida statutes was providing the Institute for Justice with exactly the evidence of anti-competitive effect that it needed to fight interior design right-to-practice legislation. The Florida Federal Court has saved the day. It is time for legislation advocates to rethink what they are doing.

Other considerations

The Florida Federal Court decision should put behind us most, perhaps all, of the unfortunate consequences of the FBAID's overreaching interpretation of the Florida interior design legislation and make available a new pathway to harmony for those who work for the interior environment in Florida and throughout the country. The unfortunate application of the Florida statutes over the past few years has caused unfortunate acrimony between those who should be – and in the past, have been – allied in the goal to provide better work interiors.

Thus, some Florida contract vendors and related persons have suffered business consequences, fines and business restructurings because of the tortured application of the statute. On the other side, some designers apparently have contacted manufacturers and told them that their products would not be specified as long as their Florida rep was against the then application of the Florida statute [clearly tortuous interference with advantageous business relationships]; other designers were reporting alleged violations of dealerships, etc.,. to the FBAID. Now natural allies can once again work together.

Here are some additional lessons to be learned from the tumultuous days of interior design legislation initiatives:

>As indicated above, it is one thing to fight for your right to practice, but be very careful about effects that may deny someone else their right to make a living. All affected persons should have a seat at the table in formulating appropriate legislation, regardless of whether they are design professionals.

>Something not to like, intellectually, but which did help preserve the Florida practice statute and is a concept that can provide an appealing approach for further legislative initiatives (but be cautious): The Florida Federal court cited with approval the contention of the State of Florida that:

this new category of licensed professional [interior designer] in the field of architecture and design is similar to the prior emergence of the physician's assistant and nurse practitioner in the medical field.

While this notion may be repugnant to those in the field of interior design – and, for the record, I state my opinion that, when it matures, the field of interior design will be seen as independent, and more complex, than the field of architecture – for the time being this schema probably more accurately reflects the state of affairs than other notions.

The Connecticut Federal Court decision – striking down the ban on using the title "interior designer" by unlicensed individuals – might seem only of historical interest, now that that issue is pretty well settled. But, no; the court made a number of observations that the interior design community should seriously consider, as a means to better understand how those who do not have design talent or a design background think about design. (Note:

The Connecticut interior design statute allowed anyone to perform interior design services, but prohibited anyone other than a limited class of people (architects, those holding a certificate of registration, certain grandfathered individuals) from using the title "interior designer" or advertising or describing their services as "interior design.") In striking down this legislation, the Connecticut Federal court said:

>The term "interior designer" is not a term of art and it is not inherently misleading [when used by a non-licensed or non-registered person]. It merely describes a person's trade or business. There has been no showing that the term "interior designer" is a well-established term of art in the design industry that connotes specialized skills or proficiency.

>"Interior designer" is a generic term that conveys no particular educational or experiential credentials on the part of an individual. This is especially true, said the court, given that one-quarter of registered interior designers in Connecticut fall under the grandfather provision in § 20-377l(3) and therefore may lack the education, experience, and certification held by the remaining percentage of "interior designers" registered with the state.

The Florida Federal Court had a similar finding: "A person who trains dogs is a dog trainer, even if she trains only poodles. A person who grows apples is an apple grower, even if

she grows only Granny Smiths. And a person who provides interior-design services is an interior designer, even if she works only on residences. There is nothing misleading about a Florida residential interior designer calling herself an "interior designer."

With the Florida victory, it's time for ASID – even though it was not a party – to take a bow for the work it has done in advancing the profession, for being willing to be the *man in the arena,* for helping designers everywhere obtain recognition for their skills and experience and the right to practice them.

It may be a bitter pill for interior design to accept that it won the Florida case on the basis that interior design is a subset of architecture. At the present time, however, and given the interwoven roots of interior design education with that of architecture, this is not an unfair assessment. The profession has yet to come to grips with its more complete affinity with human beings and their social and organizational behavior. When it does so, it will also have to take a public stand regarding the fact that most architects do not have the training and experience to practice interior design and have little knowledge about creating interior environments, other than that's what is left over after the building is created. If the profession does not come to grips with this, it will face a very hard road convincing anyone that interior design has anything of unique value to offer.

Alternatively, if the interior design field does not significantly pick up the pace, it will find that a number of very intelligent architects have lifted their heads from their drawing boards, set aside their pencils and prejudices, seen how the wind is blowing, and decided to incorporate interior design education as a specialty within the architecture curricula. ■

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