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Our Mission

The Jefferson Society, Inc. is a non-profit corporation, founded on July 4, 2012 for the advancement of its members' mutual interests in Architecture and Law. The Society intends to accomplish these purposes by enhancing collegiality among its members and by facilitating dialogue between architects and lawyers.

The Jefferson Society, Inc.

c/o 2170 Lonicera Way
Charlottesville, VA 22911

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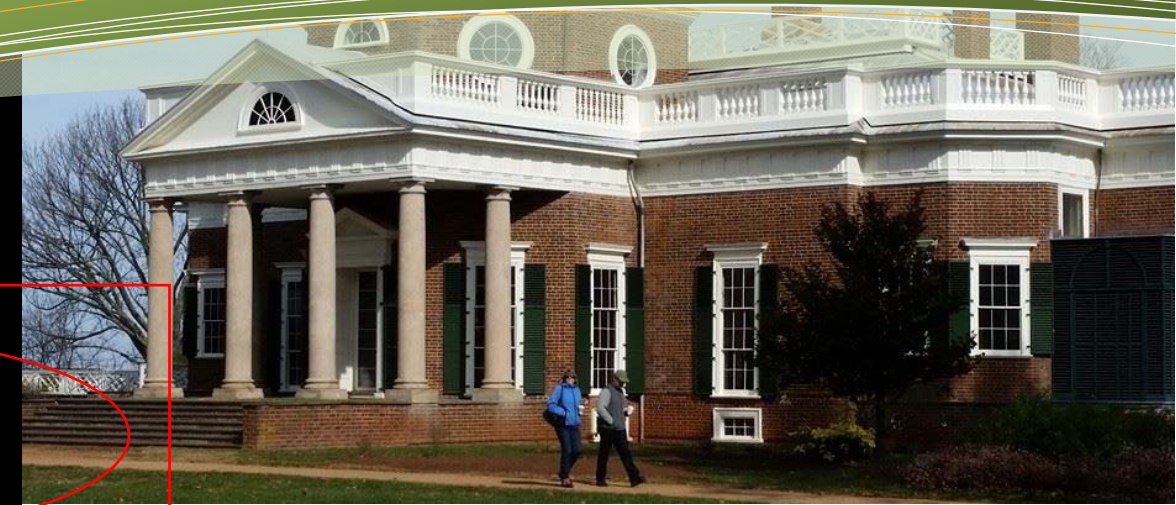
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Know of Another Architect-Lawyer Who Has Not Yet Joined?

Send his or her name to President Craig Williams at cwilliams@hksinc.com and we will reach out to him or her. All candidates must have dual degrees in architecture and law.

AUTHORS WANTED

Interested in writing an article, a member profile, an opinion piece, or highlighting some new case or statute that is of interest. Please e-mail Bill Quatman to submit your idea for an upcoming issue of Monticello. Contact: bquatman@burnsmcd.com

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Want to connect with other members? Find us here.



Milestone Reached!

By R. Craig Williams, AIA, Esq.
HKS Architects

Last month, the lead word of my President's Message was "Help!" This month, there are two words and they are a lot more positive: "Milestone Reached!" The Jefferson Society has now passed the 100 Member milestone. As one who has been involved in conceiving, incorporating and initiating operation of The Jefferson Society, I find this very satisfying. I don't expect further growth to be rapid, but I do expect it to be steady. So far, our accomplishments are modest, but we are off and running and we have a membership with figurative mass and literal energy. Good things will come from that combination.

I had previously sent an e-mail to all members transmitting a copy of the minutes of the Board Meeting conducted by conference call on the 22d of December, 2014. If you did not receive the e-mail, just let me know and I will resend. In summary:

- The Cuba Trip was cancelled for lack of the minimum required commitments.
- We have established a Membership Certificate which will be provided to

each Member. Soon, but the actual date is indefinite.

- Dues notices will be sent. More on this elsewhere in this issue of Monticello. Please see the information on payment options available to make this relatively painless.
- I continue to pursue some response from Architect magazine to our proposal to write a regular series of articles on legal/architectural topics. Two emails to the articles editor and one to the editor in chief have so far not even produced an acknowledgement. I will continue to pursue this.
- The third Annual Meeting is being planned under the leadership of Julia Donoho, AIA, Esq. The expected date is the 13th of May in Atlanta, GA, just ahead of the opening of the AIA Convention. Please consider attending the Convention and the Annual Meeting. If the other members of The Jefferson Society are not enough of an attraction for you, former President Bill Clinton will be the Keynote Speaker. Whatever your politics, I would expect him to make some kind of splash. Details will follow shortly.

Finally, I want to harken back to the plea of "Help" which I stated in the last issue

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Monticello. Thomas Jefferson's masterpiece, office and home. (photo by G. William Quatman, FAIA, Esq. during a pilgrimage many year ago, 1983)

Milestone Reached!
(continued from page 1)

of Monticello. Although I received ZERO comments or suggestions, I know that many share my frustrations with the nature of many owner-architect agreements and the trends that are evident. Please don't be bashful about sharing: cheuer@heuerlaw.com. Best wishes for a really wonderful year in 2015.



DRONE UPDATE!

The FAA has issued new guidance on how to apply for an exemption from the FAA's current "no fly" policy for drones, and has issued several recent exemptions, including some in the construction industry. Despite the drone landing on the White House lawn recently, the FAA continues efforts to develop a regulatory framework for safely integrating small Unmanned Aircraft Systems ("UAS") into the national air space. This will primarily be accomplished by the small UAS (sUAS) rule, which is scheduled to

be released for public comment later this year. While these efforts continue, the FAA is also working to leverage the authority granted under Section 333 of the *FAA Modernization and Reform Act of 2012* to establish an interim policy that bridges the gap between the current state and Federal operations as they will be once the small UAS rule is finalized. The FAA is currently considering exemptions under Section 333 from several different entities. Click here for the FAA UAS website: <http://www.faa.gov/uas/>

NEW JERSEY: CERTIFICATE OF MERIT BY AN ENGINEER HELD NOT SUFFICIENT IN ACTION AGAINST AN ARCHITECT.

Under New Jersey's Affidavit of Merit statute, N.J.S.A. 2A:53A-26 to -29, in a lawsuit for damages for personal injuries, wrongful death or property damage resulting from an alleged act of *malpractice or negligence by a licensed person in his profession or occupation*, the plaintiff must provide each defendant with "an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, *fell outside acceptable professional or occupational standards or treatment practices.*" In this case against an architect, an affidavit of merit was issued by a licensed engineer which criticized both the construction contract administration and the design services provided by a licensed New Jersey architect and his firm. The question on appeal was whether the engineer's affidavit qualifies as accept-

able from an "appropriate licensed person," for a claim against a licensed architect. The Court held that the affidavit was not proper since it was not "issued by an affiant who is licensed within the same profession as the defendant." The Court explained that the trial court erred in ruling that an affidavit issued by a licensed engineer sufficed to support claims that alleged deviations of the professional standards of care by the defendant architect and his architectural firm. However, since this was deemed a "novel" issue, and one that "might not have been readily predicted," the plaintiff was granted leave to submit, on remand, a substitute affidavit from a licensed architect, within a reasonable period of time to be specified by the trial court. See, *Hill Intern., Inc. v. Atlantic City Bd. of Educ.*, 2014 WL 7370085 (N.J. Super.A.D. 2014).

Editor's Note: For a table of all Certificate of Merit laws, go to the Monticello page on our website and look for the April 2013 issue, pp. 10-11. More cases are being dismissed lately on this basis.

Minutes of the Meeting of TJS' Board of Directors.

Pursuant to a notice send to all Board Members, a meeting of the Board of Directors was held by telephone conference call on Dec. 22, 2014 beginning at 2:00 pm EST. Directors present on the call were: Chuck Heuer, Tim Twomey, Bill Quatman, Craig Williams, Ashley Inabnet, Tim Burrow and Donna Hunt. President Heuer reported on the following matters:

1. The proposed trip to Cuba has been cancelled for lack of an adequate number of commitments. Chuck will send Joyce Raspa-Gore a "thank you" for all her efforts in planning the trip. In light of recent changes in U.S. policy toward Cuba, a future trip may garner more interest.
2. TJS has purchased a Directors and Officers insurance policy with limits of \$1M/\$1M. Thanks to Craig Williams who did most of the legwork to put this in place.
3. Chuck Heuer has sent two e-mails to the

appropriate editor at Architect magazine offering the efforts of TJS in preparing articles on a regular basis on topics related to architecture and law. No response (or even acknowledgement of receipt) has been returned. The next step will be to contact the Editor in Chief and then officers as the AIA, as appropriate.

4. Current membership stands at 98. There are four others "in the pipeline," so we will shortly pass the 100 mark as those applications are submitted.
5. Bill Quatman, Craig Williams and Chuck Heuer have established a Membership Certificate to be provided to each member. We have the template and are working on the logistics of inserting names, dates and signatures so the Certificates can be distributed.
6. Dues for 2015 will be due soon. Bill Quatman is going to provide information about options to pay electronically through the TJS web-site via Pay

Pal or otherwise. Details to follow, including the charges to TJS, if any, for making the option available.

7. Bill Quatman has suggested that it may be possible to offer members a chance, for a nominal charge, to place a link on the TJS web-site to a personal "bio" page. The discussion was to the effect that we don't want to commercialize the web-site and didn't want to have links to firm web-pages. However, that would not preclude a member from linking his or her firm to their personal bio page. Bill will supply further details on logistics and costs. Similarly, The AIA Trust has established a Legal Directory on its web-page and members may be interested in purchasing a listing there. This has no direct connection to TJS other than that the members may find a listing in the Legal Directory to be valuable.

(continued on page 4)

(Board Minutes, continued)

8. TJS had been asked by Member Yvonne Castillo at AIA HQ about our interest in commenting on and, possibly endorsing, the AIA's "PPP: Legislative Resource Guide." The sense of the Board was that we should tread lightly on this kind of review/endorsement and take action only after careful review and based on a consensus opinion. Donna Hunt will contact Yvonne to discuss and get more details on how TJS might participate and in what time frame.
9. We discussed the next Annual Meeting of TJS tentatively planned to be held in Atlanta in conjunction with the AIA Convention. The Convention will run from May 14-16, 2015. Presently there are no TJS members in Atlanta. Julia Donoho planned last year's meeting very successfully and had offered to work on it again this year. She was not on the call, but Chuck Heuer has contacted her to discuss her further involvement. The meeting was concluded at 12:40 pm EST.

CONNECTICUT: ARCHITECT-ENGINEER NOT LIABLE FOR PUBLIC NUISANCE.

Two people were injured in separate incidents when they each fell off of a block retaining wall, located within the highway limits in the Town of Redding. The retaining wall was part of a new streetscape project designed by BL Companies (an architect/engineer). The plaintiffs sued the town as well as the designer and contractor for their injuries. The design called for a wood wall consisting of railroad ties to be replaced by a brick retaining wall. A drawing of the wall, sealed by a licensed Connecticut engineer, was submitted by the contractor to the A/E firm for review. The A/E then submitted the proposal to the State of Connecticut Dept. of Transportation for its approval. The designer and contractor each moved for summary judgment in both lawsuits, claiming that no action in public nuisance may be maintained against them, as a matter of law. Under Connecticut law, a nuisance is created intentionally, if the creator of the condition intends the act that brings about the condition; and the defend-

ant must be a "user" of the property in question. Here, BL Companies served as project architect under an agreement with the Town and did not design the retaining wall in question (designed by the contractor). BL Companies did not own the highway, or the land on which the block retaining wall was constructed. Nor did BL Companies perform any actual construction work concerning the retaining wall. As a result, the Court held that BL Companies never assumed control of the real property on which the block retaining wall was constructed. The plaintiffs alleged, however, that BL Companies did not inform the Town that a fence was required for safety reasons, and argued that BL Companies "drew the wool over the town's eyes," by failing to follow a bridge design manual. Even if all of these allegations were true, however, the Court ruled that the plaintiffs could not establish that BL Companies was a "user" of the property in question, when the plaintiffs sustained their injuries. "Although free to assert claims of professional negligence against the architect, the Plaintiffs have fail-

ed to do so." As a result, summary judgment was granted to the design firm on the sole claim of nuisance. See, *Smith v. Town of Redding*, 2014 WL 7525641 (Conn. Super. 2014).

NEW YORK: ARCHITECT NOT LIABLE FOR CRACKED FAÇADE ON ALLEGED DESIGN-BUILD CONTRACT.

The developer of an office building renovation project sued its architect when the stucco facade of the building began to crack and fail after just three years, with delamination allegedly occurring over most of the building's exterior vertical surfaces. The lawsuit alleged strict liability, breach of implied warranty of fitness for a particular purpose, breach of implied warranty of merchantability, negligent design or review, breach of contract and negligent misrepresentation. In lieu of answering, the architect moved to dismiss all six claims on the basis that they either failed to state a cause of action or were time-barred under the 3-year statute of limitations applicable to claims of professional malpractice. The

In the *797 Broadway* case, the New York appellate court stated that in distinguishing between types of contracts:

"In 'turnkey' or 'design-build' construction projects, an owner contracts with one entity to both design and build the project and the turnkey builder is responsible for every phase of the construction from final design through subcontracting, construction, finishing and testing. The design-builder generally cannot shift liability and is the 'single point of responsibility' under a design-build contract, because it is the design-builder who has the responsibility of the preliminary and construction design, the responsibility of submitting a fixed sum for the construction of the project and the responsibility for holding the contracts with its trade contractors."

trial court granted that motion and the developer appealed claiming that the contract at issue was a "design-build agreement" pursuant to which the defendant was responsible for all aspects of designing and building the project, as opposed to only professional services. The Court held, however, that the parties had not entered into a true

design-build agreement, despite their mislabeling the agreement as such, "because the critical factor in a design-build arrangement — that the owner has only a single contract with the design — builder — is absent." The plaintiff had contracted with the architect solely for professional services relating to the design of the renovations to

be performed on plaintiff's building. As a result, the 3-year statute applied. With regard to the other claims, the Court held that, "it is settled that no action lies for breach of implied warranty, or what is now known as strict product liability, on behalf of an owner against the architect with whom he or she has a contract." Also, plaintiff's claim for negligent misrepresentation was properly dismissed because it "arises from the same facts as the architectural malpractice causes of action alleged in the complaint, and does not allege distinct damages." The dismissal was upheld. The case is *797 Broadway Group, LLC v. Stracher Roth Gilmore Architects*, 2014 WL 6978344, 3 (N.Y.A.D. 3 Dept. 2014).

JEFFERSON SOCIETY HITS A MAJOR MILESTONE! MEMBERSHIP TOPS THE CENTURY MARK: 100!

You could hear a "Yee-haw!" from Craig Williams, and an "Alright!" from Chuck Heuer, when member number 100 sent in his \$2 bill and signed application on Oct. 20, 2014. Paul E. Ridley, AIA, Esq. from Dallas, Texas is


officially our 100th Member since our founding on July 4, 2012. "This is a major accomplishment," said Mr. Heuer, "to identify over 100 men and women who share the same education and interests in law and architecture." But after we celebrate, let's focus on the 30 men and women with such dual degrees who have not yet joined!

**Jefferson Society
Tops 100 Members!**

We welcome the following:

NEW MEMBERS:

96. Jesse M. Guerra, Esq. JM Guerra Law Coconut Grove, FL
97. Kurt Ludwick, AIA, Esq. Eudora, KS
98. Kenneth Michael, AIA, Esq. Womble Carlyle Sandridge Winston Salem, N.C.
99. Prof. Casius Pealer, Esq. Tulane University New Orleans, LA
- 100. Paul E. Ridley, AIA, Esq. Ridley Law Firm Dallas, TX**
101. Scott Siekawitch, Esq. Perkins Coie, LLP Seattle, WA



MEMBER PROFILE: KELLI E. GOSS

Conner Gwyn Schenck
Raleigh, N.C.

Kelli E. Goss, Esq. attended architecture school at North Carolina State Univ. School of Design. "I chose the NC State because of its great reputation and its location on the east coast. I went to Dartmouth for my undergraduate studies and grew up in New England, so remaining somewhere on the east coast was important to me," Kelli said. She liked North Carolina so much that Kelli stayed there to study law, getting her Juris Doctor from the University of North Carolina at Chapel Hill School of Law. "I chose UNC Chapel Hill Law School because it has a good reputation and because I wanted to remain in Raleigh while going to law school. Chapel Hill is a commutable distance from Raleigh." Kelli practiced architecture and became a principal in a large firm in Raleigh for a number of years. "I always performed construction administration on all my projects," Kelli said. "I enjoyed working with contractors and one day I realized that I wanted



Kelli Goss lives in Raleigh, North Carolina just two blocks off of the University's main campus.

to do more than solve problems on the construction site, so I thought about combining architecture and law and now I represent contractors." Kelli's first job out of architecture was for NBBJ which had an office in the Research Triangle Park in North Carolina. "I worked on large-scale, complex structures, including sports facilities, hockey rinks, and swimming pool facilities," Kelli recalled fondly. After law school she went to work for the law firm of Nelson Mullins Riley and Scarborough in their Raleigh office. The firm has over ten offices up and down the east coast. "I worked in numerous areas

of law including construction and government contracts, but mainly I years of working in different practice areas, Kelli decided to focus her practice on construction law now works for Conner Gwyn Schenck, a law firm that concentrates on construction law and the construction industry. The best part of her job? "Working with twelve of the best construction lawyers in the state and being able to focus on one area of law," Kelli said. Ms. Goss has remained active in the AIA, currently serving as the AIA/Design Professional Liaison Committee Chair for the North Carolina Bar Association

Construction Section. "The committee brings together the AIA and various engineering associations acquired a lot of experience." Today, after six and licensing boards with construction attorneys to stay abreast of legislative changes and current trends in the market." As mentioned above, Kelli grew up in New England, where she enjoyed all kinds of outdoor sports activities. "My family still lives in New England," Kelli said, "but, I never liked the cold so I stayed in the south after graduate school!" When not practicing law or working with the AIA, Kelli is a runner. "Running is by far my greatest passion. I have participated in a few sprint triathlons and marathons when work allowed for the training required," she says. Kelli confessed to Monticello that she also enjoys kayaking and has been known to play hooky on a beautiful day and take her kayak out! Kelli is an appointed member of the Raleigh Appearance Commission in her hometown. "This has been a wonderful opportunity to be back in the world of architecture as the Commission reviews new projects that are submitted."



Kelli is an avid runner, which she says is "by far my greatest passion!" When not practicing construction law with the firm of Conner Gwyn Schenck in Raleigh, you'll find Kelli participating in triathlons, marathons, or paddling her kayak. Below, Kelli visits Frank Lloyd Wright's Taliesin West in Scottsdale, Arizona, architect Frank Lloyd Wright's winter home and school in the desert from 1937 until his death in 1959 at the age of 91.



She is passionate about her adopted city of Raleigh, where her home is just two blocks off NCSU's main campus and close to the downtown area, which makes it lively at times and full of opportunities within the city. Raleigh is a host city for numerous sporting events and music and design festivals. There is an extensive Greenway system in the city and surrounding area. For our runner-member Kelli Goss, the city has over 100 running races a year and has recently brought in the 70.3 Ironman event. Kelli is a fan of the designs of The Salk Institute and Kimbell Art Museum. "I was always inspired by Louis Kahn's work and his appreciation of clean lines and poetic sense of space," she said. But her favorite architect has always been Le Corbusier. Kelli says that she has no regrets about choosing a dual degree life as an architect/lawyer. "I believe that the more experience in architecture and construction that you obtain before turning to construction law, the more valuable your architecture practice will serve you in your practice of law."



**MEMBER
PROFILE:
Frederick F.
Butters, FAIA,
Esq.
Southfield, MI**

Fred Butters is a Member who wears many hats. Not only lawyer and architect, but Fred is also a referee, a woodcarver, chef and a musician! This varied career began when Fred attended Lawrence Technological University in Southfield, Michigan. "I studied architecture as a second interest," Fred said. "I had always contemplated law school but I didn't think an undergrad degree that had no independent use (like political science or pre-law) was a wise idea in the event law school was not a viable option." So, Fred enrolled in architectural

school, never dreaming he would one day become a member of the College of Fellows of the American Institute of Architects! His choice of law schools was Wayne State University in Detroit, Michigan. "I had completed my architectural degrees and considered starting law school each fall. Since it was something I had always wanted to do I knew I had to give it a try or always regret not doing it," Fred admitted. It was a busy time in his life, as Fred recalled. "I finished my internship, wrote my licensing exams, and started law school about 6 weeks later." He chose Wayne State because it had a good reputation, but also because it duplicated its entire day program in the evening which worked with Fred's employment schedule as a young architect. "For the next 3-1/2 years, I worked

full time in an architectural firm and carried a full credit load as a night student in the WSU evening program," a load that many of us can identify with.

Fred was intrigued about combining the two studies after working in an architectural firm for a few years. "It was apparent to me that while I loved great design, I wasn't talented in the sense that I could produce it. I gravitated to contracts, specifications, construction administration and general problem solving, at times working with legal counsel my employers had engaged." The transition from architecture to law proved to be an easy task for Fred. After graduation from architecture school, Fred worked for a large A/E firm that specialized in industrial work in Southfield Michigan. "CADD technology was new then and the Intergraph systems the firm invested in were capital intensive such that they operated three shifts a day. I was soon trained to on that system and began working the night shift detailing various industrial projects (along with a few other institutional project types)." While Fred claims that none of that work made a design statements worthy of an AIA

award, "I can say that if one can solve some of the problems that arise in that specialty, I think one can easily detail most anything that would arise in more typical architectural work." After graduating with his J.D. from Wayne State, Fred worked in a small boutique law firm in Bloomfield Hills, Michigan that specialized in design and construction issues. "My work was specifically A/E insurance defense. Because the firm was as small, I got a lot of courtroom and trial experience very quickly," Fred recalled. Today, Fred has my own firm in Southfield, Michigan specializing in A/E representation along with some general legal practice his client base requires. "I view my role as facilitating the preparation of great design by working to ease the business and legal issues that sometimes complicate it. I think the best part has been explaining to a client when it is time to make a business decision and end a dispute on favorable terms when possible, despite the fact that isn't the route they really wish to take," Fred says. "Generally, when I speak with clients to whom I rendered that advice some time later



There is hardly enough room on these two pages to list all of Fred Butters' accomplishments, awards and interests. One of his passions is refereeing local sports, as shown here. Quite a guy!

they all respond in a similar manner. When I gave them that advice they hated it - and they hated me - but with the perspective that some time they came to realize and appreciate that I gave them sound advice that truly was in their best interests." Having a client expresses that they are appreciative of the efforts he made on their behalf is satisfying and is "certainly the best part of the job," says Fred.

Fred has devoted substantial time to the local and national AIA, including a term on the AIA National Board of Directors and serving for a number of years on various committees. Most notably, Fred was the founding member of the AIA Michigan Government Affairs Committee, formed to lobby and direct

the future of legislation as it affects the architectural profession - the first of its kind anywhere in the country. "We have recorded a number of legislative victories over the years (the most notable of which I believe was setting the Statute of Limitations and the Statute of Repose for claims against Design Professionals to 2 years and 6 years respectively - among the shortest periods of that sort of which I am aware anywhere in the country," Fred boasts, appropriately. "I have been active in that effort for close to 30 years and I continue to chair that committee today."

Among his many talents, Fred is active with the Michigan Architectural Foundation, where he donates cooking classes and

dinner for sale through their fundraising programs to raise funds for the Evans Historical Preservation Grant and various scholarships. At last count, Fred says that there are 76 Chefs certified as Master Chefs by the American Culinary Federation, together with 13 Certified Master Pastry Chefs. "I have been fortunate in that I have studied under 4 Certified Master Chefs and one Certified Master Pastry Chef, together with a number of other renowned culinary masters from around the world." When not cooking up a meal or a piece of legislation, Fred Butters can be found on a local gridiron or court officiating high school and recreational league football and basketball games. As if that is not enough, Fred

Fred also umpires softball and baseball! This multi-talented lawyer is also a woodworker and builds furniture (along with a number of other things). In what free time he has left, Fred plays the Highland Bagpipes and occasionally enjoys some time away riding his Harley Davidson. Fred is a past recipient of the Lawrence Technological University College of Architecture Distinguished Alumni Award; the AIA Detroit Yong Architect of the Year; the AIA Detroit Gold Medal; and the AIA Michigan Hastings Award. With all of this free time (kidding, of course), Fred also serves on the Michigan Construction Code Commission, to which he was appointed by the governor. What an accomplished, and talented Member we have in Detroit!

AIA Convention 2015 in Atlanta. May 14-16.

This year's AIA Convention boasts nearly 300 sessions (seminars, workshops, expo credit, tours) and 40+ events. The keynote speaker, May 14th at 10:45 a.m. is former President Bill Clinton (whose middle name, by the way, is "Jefferson"). Regardless of your political leanings, it will be entertaining and provocative to hear President Clinton's talk to the nation's architects. Yes, his law license in Arkansas was suspended for giving false testimony in the Paula Jones lawsuit, but he is not speaking on legal issues (we hope). There are, however, several sessions on legal issues for architects. Among them are:

Wed., May 13:

8:00 AM - 12:00 PM (WE101) Risk Management Essentials: Part I (The Design Firm)
1:00 PM - 5:00 PM (WE301) Risk Management Essentials: Part II (The Construction Project)
1:00 PM - 5:00 PM (WE308) Disability, Accessibility, and Liability: What Every Architect Needs to Know

Thurs., May 14:

3:30 PM - 4:30 PM (TH301) Understanding the General Conditions of a Construction Contract

Fri., May 15:

7:00 AM - 8:00 AM (FR101) Owner/Consultant Agreements: Understanding Roles, Contractual Relationships, and Terms
3:30 PM - 4:30 PM (FR303) Alternative Contract Models for Small Projects

For the full schedule, click here

<http://convention.aia.org/event/schedule.aspx>

TJS's Annual Membership Meeting in Atlanta on May 13, 2015!

Mark your calendars and plan to join us in Atlanta on Wed., May 13th the day before the AIA Convention opens here. As we did last year, we will host a Member

-only reception, followed by dinner and then Annual Meeting. Julia Donoho, AIA, Esq. has graciously agreed to coordinate the dinner meeting again this year for us (Thank you!). We will have the election of officers for 2015-16, followed by an opportunity to discuss the future of TJS and anything on your mind.

Watch the April issue of *Monticello* for the list of candidates for officers and directors. If you have an interest in serving on the Board, or as an officer, contact Chuck Heuer at: cheuer@heuerlaw.com
To help plan the Annual Meeting, contact Julia at jdonoho@legalconstructs.com or (707) 849-4116.

TWO NEW 2014 FLORIDA CASES APPLY THE "SLAVIN" DOCTRINE (a/k/a THE "ACCEPTANCE" DOCTRINE TO A/E's:

DESIGNER OF GUARDRAIL FOUND NOT LIABLE FOR INJURIES AFTER FDOT ACCEPTED THE PROJECT.

In this 2014 case, a passenger in a car was killed in an accident when the driver lost control, left the roadway, and struck an uncushioned guardrail end. Her estate sued the Florida Department of Transportation ("FDOT"), the engineer who designed the guardrail, Transportation Engineering, Inc. ("TEI"), and the contractor, claiming that FDOT breached a duty of care to the passenger by failing to warn the public about or failing to remedy a dangerous condition, not readily apparent to the public. The estate also claimed that the designer and contractor breached their duties of care by negligently designing and constructing the guardrail ends. The trial granted summary judgment for the contractor, but denied the

Evidence showed that FDOT had specific "Design Standards," derived from national standards, governing the design and construction of guardrails, which required crash cushions on the guardrail end involved in this accident. In this case, however, FDOT accepted an unprotected "Type II" end anchorage, without crash cushions, on exposed guardrail ends (3 to 4 times cheaper than cushions). FDOT argued in the case that the alternative design in FDOT's guide drawing was only a "concept drawing" to be used as "guidance," and that TEI had the ultimate responsibility to ensure that its design plans met state and national standards. The plaintiff's own expert on standard of care testified that TEI was not negligent, however.

The contractor and TEI each filed motions for summary judgment based on the so-called *Slavin* doctrine, *Slavin v. Kay*, 108 So.2d 462 (Fla.1959). Under the *Slavin* doctrine, a contractor cannot be held liable for injuries sustained by third parties when the injuries occur after the contractor completed its work, the owner of the property accepted the con-

tractor's work, and the defects causing the injury were patent. An earlier 1988 Florida case had held that the doctrine applied equally to architects and engineers. *Easterday v. Masiello*, 518 So.2d 260 (Fla.1988). In upholding the ruling for TEI, the Court held that, "It was undisputed at summary judgment that DOT accepted the project with bare (uncushioned) guardrail ends within the clear zone, and that this was an open and obvious condition. Therefore, even if TEI violated its standard of care * * * we agree that summary judgment should have been granted in TEI's favor based upon *Slavin* and *Easterday*." See, *Transportation Engineering, Inc. v. Cruz*, 2014 WL 5782251 (Fla. App. 5 Dist. 2014).

ENGINEER NOT LIABLE FOR DEATH WHERE TRAFFIC SIGNAL DESIGN WAS ACCEPTED BY STATE.

In yet another case where a motorist was killed in Florida, the estate sued the traffic signal designer, FDOT, and the county for negligent design. The trial court entered a judgment for the design firm based on

the *Slavin* doctrine, upheld on appeal. TEI Engineers and Planners ("TEI") was hired as the engineer, who in turn, hired a subconsultant to design the traffic signals for the intersection. The design plans were required to be in accordance with the Manual on Uniform Traffic Control Devices. FDOT hired another firm to provide additional engineering review and to certify the plans. The plaintiff's expert testified the traffic signal design was the primary cause of the collision because the line of sight would give the driver the ability to focus on the second set of signals located farther out in the intersection, but not the first set of signals. Under *Slavin*, "the liability of a contractor is cut off after the owner has accepted the work performed, if the alleged defect is a patent defect which the owner could have discovered and remedied." The Court found that the design firm completed its duty under the contract before the construction was completed, and FDOT accepted the plans. "Our supreme court has acknowledged and reaffirmed *Slavin's* vitality. It has applied it to shield a design engineer and architects,"

the Court said. "[I]t would be unfair to continue to hold the contractor responsible for patent defects after the owner has accepted the improvement and undertaken its maintenance and repair," the Court held, in affirming the judgment for the designer. The case is *McIntosh v. Progressive Design and Engineering, Inc.*, 2015 WL 71931 (Fla. App. 4 Dist.).

ATTENTION ALL PHOTOGRAPHERS Call for Entries for the AIA National Photography Competition.

AIA St. Louis has announced the opening of the 2015 AIA National Photography Competition, with deadline of April 1, 2015. The rules and entry form for this juried competition can be found at:

www.aia-stlouis.org. An entry fee of just \$30 covers five images, so it is a very reasonable competition and they offer cash prizes of \$500 for first place; \$400 for second place; \$300 for third place and \$200 for the Fuller Award that captures architecture in the U.S. The winning images will be exhibited at the AIA National Convention in 2015.

RHODE ISLAND: ARCHITECT DENIED “TWO BITES AT THE APPLE”; ARBITRATION AWARD IS RES JUDICATA AS TO NEW EQUITABLE CLAIMS.

The plaintiff, Torrado Architects (“Torrado”) signed a contract with the Rhode Island Department of Human Services (“DHS”) to perform architectural, engineering, and design services for a not-to-exceed fee of \$61,500 to renovate a state - owned veterans’ home. The architect claimed that the administrator of the home assured its representatives that additional services, outside the scope of the contract, needed to be performed and that Torrado would be paid extra. The architect’s invoice was rejected, however, and appealed through an administrative process. After the claim was denied again, Torrado filed suit seeking to reverse the administrative decision and award a revised contract amount of \$156,000 (more than double the original contract). The parties then agreed to stay the lawsuit pending a statutory arbitration procedure. The

arbitrator issued an award stating that, although he sympathized with Torrado because he believed that the firm rendered additional services to the DHS, he concluded that the additional work was not authorized under the procurement regulations. Accordingly, the arbitrator concluded that Torrado was limited to its contract price. Torrado then filed a motion requesting that the arbitrator reconsider his decision, but then withdrew that motion and, by agreement, the arbitration award was confirmed. No appeal was taken on the award. Thereafter, the architect filed a petition in court to compel arbitration on certain “equitable claims” that the arbitrator declined to consider in the first arbitration. The trial court denied the petition based on the doctrine of *res judicata*. Torrado then appealed that decision. In upholding the ruling, the Rhode Island Supreme Court held that there was no dispute that both identity of parties and finality of judgment exist. Torrado challenged only the existence of a second element—identity of issues, claiming that its equitable claims could not have been raised

in the first complaint because they were not part of the administrative appeal that was referred to arbitration. Stating that, “The principle underlying the rule of *res judicata* is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so,” the Supreme Court ruled that Torrado had ample opportunity to bring its equitable claims, but simply failed to do so. Finding no exceptions to the *res judicata* doctrine in this case that would serve to negate the finality of the judgment confirming the arbitration award, the Court ruled against the architect. The rather complicated procedural case is *Torrado Architects v. Rhode Island Dept. of Human Services*, 102 A.3d 655 (R.I. 2014).

Moral of the Story: As happens too often to architectural firms, when your scope increases, get a contract amendment in writing before proceeding. It seems that architects rely too often on promises and oral agreements, in good faith, perhaps, but contrary to contract language that requires a written amendment. A lot of legal fees

appear to have been spent in this case, on administrative appeals, on arbitration, a trial court motion and Supreme Court appeal, that could have been saved if only a contract amendment had been proposed and signed. An expensive lesson learned!

NEW YORK: ARCHITECT HELD NOT LIABLE FOR COLLAPSE OF BUILDING ON ADJACENT PROPERTY.

In this 2014 New York case, the plaintiffs sued the architect (BKSK Architects) for the partial collapse of their building which was allegedly caused by excavation work being performed at an adjoining property, designed by BKSK. Claims were asserted based on an administrative code and in negligence. The general contractor filed a cross-claim against the architect for common-law indemnification and contribution. The trial court granted summary judgment to the architect on all claims and cross-claims, which was upheld on appeal. First, the plaintiff sued the architect for violation of an administrative code. In upholding

the dismissal, the Court said that the claim was improper since BKSK was not “the person who cause[d] an excavation or fill to be made” within the meaning of the code, since the architect was neither the owner nor the contractor who performed the excavation.

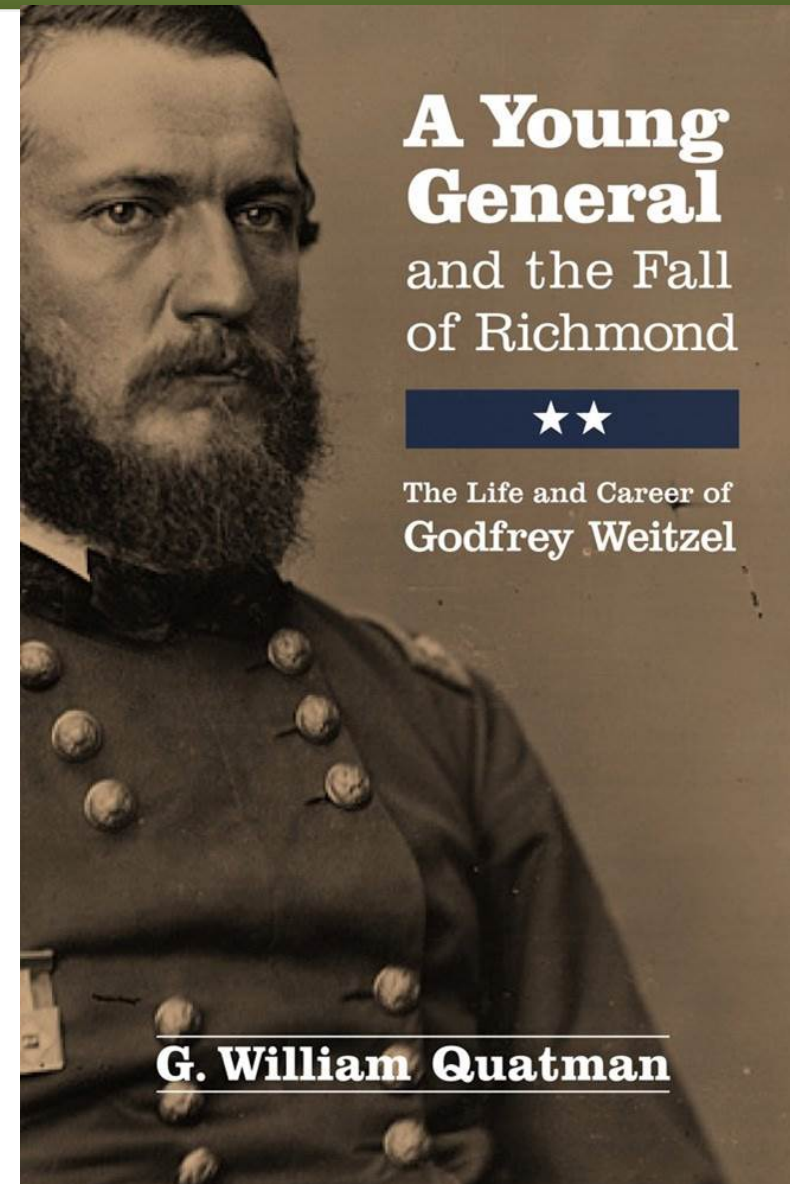
BKSK’s designs for the proposed building on the adjacent property included a cellar and subcellar. However, the Court held that the architect’s knowledge that some excavation would take place, did not raise an issue of fact as to whether it “cause[d] an excavation” within the meaning of the code. The negligence claim was also properly dismissed “because BKSK’s contractual obligations to the owner of the [adjacent] property do not give rise to tort liability in favor of plaintiffs. BKSK’s contract with its client did not specifically impose any duties with respect to the excavation phase of the project and expressly stated that BKSK did not have control over, and was not responsible for, the construction means and methods or the safety precautions taken in connection with the work. The Court held that the archi-

tect’s involvement in discussions related to the means and methods to be employed in the excavation, and its general responsibilities to visit the site during construction to monitor compliance with the contract, “do not raise an issue of fact as to whether it entirely displaced the owner’s duty to maintain the premises.” In dismissing the cross-claim by the contractor, the Court held that, “BKSK owed no duty to the other defendants or to plaintiffs.” BKSK was not actively at fault in bringing about the damage caused to plaintiffs’ building and it did not exercise actual supervision or control over the damage producing work.

The case is *87 Chambers, LLC v. 77 Reade, LLC*, 2014 WL 6636353 (N.Y.A.D. 1 Dept. 2014).

HAVANA, CUBA TRIP IS CANCELLED.

The deadline passed for registration and we did not have enough Members or friends sign up. Darn it. We want to thank Joyce Raspa-Gore, AIA, Esq. for her hard work in organizing what would have been a wonderful, and educational trip to Havana, Cuba. Thank you!



Bill Quatman, FAIA, Esq. is the author of a newly published Civil War biography titled “*A Young General and the Fall of Richmond*.” The book traces the career of Major-General Godfrey Weitzel. “Who?” You ask? Well, do you know which general captured Richmond at the close of the war? No, not Grant, but Weitzel! The book is the result of 12 years of research and writing, including trips to West Point, New Orleans, the bayous south of Baton Rouge, Cincinnati, Washington, D.C., and Richmond, Va. Bill says that Weitzel was the “Forrest Gump” of the Civil War, “always at the right place, and the right time. Appointed twice as military mayor of New Orleans, then brigadier general, then major general and given command of the only all-black Army corps, the 25th Corps . . . all while in his 20’s. The book is now available on amazon.com.



RTKL's general counsel, Tim Twomey, FAIA, Esq. is well known to most architect/lawyers. This photo was taken while on the River Li in China.

**MEMBER PROFILE:
TIMOTHY R.
TWOMEY, FAIA,
ESQ.**

RTKL
Baltimore, MD; Boston, MA

Founding Jefferson Society Member Timothy R. Twomey, FAIA, Esq. is the general counsel of RTKL Associates Inc., headquartered in Baltimore, Maryland. Tim studied architecture at the University of Southern California (USC), where he got his Bachelor of Science in Architecture in 1972, followed

up by a Masters of Architecture from Harvard Graduate School of Design in 1978. In between architecture degrees, Tim got his Juris Doctor from UCLA in 1975. "I wanted to go to law school following my undergraduate studies at USC because I was fascinated by how a society goes about organizing and running itself through a set of norms (i.e., a constitution and laws)." "Also," Tim admits, "there were no architecture jobs in the Southern California area at the time of my graduation

from USC, so I deferred my acceptance into UC Berkeley's School of Architecture's Masters program while I attended law school." Tim's plunge into the law was, what he calls, "more of an intellectual side adventure." He always intended to go back to get a Masters in architecture, and had been accepted into Berkeley's Masters program. "They were willing to defer my acceptance while I pursued my law degree." While that sounded great, things took a fortuitous and unexpected turn that landed Tim on the opposed coast! "In my last year of law school, Berkeley informed me that they were very sorry but they had changed their admittance requirements and would only be accepting their own undergraduates! So I panicked, and applied to Harvard's Master's program instead." Fortunately for Tim, Harvard accepted him, so he headed east after graduating from UCLA's law school. His first job out of undergraduate school (which was during law school) was not on his career path as an architect/lawyer. Tim worked as a law clerk for a small firm on the corner of Hollywood & Vine that represented high profile entertainment and sports personalities. After law school, his first job (which was during the Harvard Masters of Architecture program) was as a part time first year associate at a major Boston law firm. His second job (again while in the Harvard Masters program), was at The Architects Collaborative ("TAC") in Harvard Square, across the Yard from the Harvard architecture building, Gund Hall. What gets Tim excited about going to work? "The variety of issues with which I must deal; the global and multi-national nature of the firm's practice; and working with some really bright, creative and exciting individuals."

For eleven years (1999-2011), Tim was a member of the AIA's Documents Committee, including for several years as a member of its management committee, and for four years as co-chair and then chair of the management committee. Presently, he participates in several AIA-related and/or supported programs, such as the AIA Large Firm Roundtables' Cost of Imperfection Study (see Oct. 2014 issue of *Monticello*, pp. 8-9), an effort in which several Jefferson Members

participated. Tim is married to an architect, his wife of 42 years, Nancy. Her practice for the last 31 years as a solo practitioner has been largely in a residential design practice. The Twomeys have three sons; Ryan, an entrepreneur in the software development field; Colin, a PhD candidate at Princeton University's Ecology and Evolutionary Biology Department; and Kevin, a recent Masters graduate of the London School of Economics, and currently working for a start up in New Castle, England.

Tim enjoys travel and photography, and has recently become involved in the local Massachusetts chapter of Habitat for Humanity designing homes for Habitat's "families." Tim and Nancy's home is just north of Boston, and he commutes from there to Baltimore each week. He loves both cities, which are "wonderful, neighborhood-defined and oriented cities, great walking cities, each with fabulous historical architecture." Tim is particularly fascinated with Baltimore's row housing, its history and its many mani-



(above) Tim Twomey at his favorite coffee shop in Boston; and (left) "goofing" around at Disney World while on a trip with his wife Nancy, who is also an architect.



festations." He has always greatly admired Louis Kahn's Exeter Library and similarly, Richard Meier's Getty Museum. "I've spent many hours just 'being' in those buildings and the spaces they create. They are exquisite!" he said. Yet he has no single "favorite" architect. He explained that, "My tastes change over time. But I remain a great admirer of Frank Lloyd Wright's early and mid-car-