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QUARTERLY JOURNAL OF THE JEFFERSON SOCIETY

Monticello

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.

Upcoming Events

• First Annual Meeting, May 8, 2013 in Austin!

Join us for our first official membership meeting and election of officers and directors. The meeting will be held at the **Barton Creek Resort & Spa,** 8212 Barton Club Drive, Austin, Texas. The Meeting is being timed to coincide with Victor O. Schinnerer's 52nd Annual Meeting of Invited Attorneys, which is May 8-10. We will host a dinner the evening of May 8th at the Resort. You will want to be present at this historic event!

• AIA Annual Convention, June 20-22, 2013 in Denver.

Can't make it to Austin in May? Join your fellow Architect-Lawyers at the AIA's Convention and Design Expo a month later at the Colorado Convention Center. Choose from nearly 200 education sessions.

• Know of an Architect-Lawyer Who Has Not Joined?

Send his or her name to Bill Quatman at bquatman@burnsmcd.com or to Craig Williams at cwilliams@hksinc.com and we will reach out to them. Must have dual degrees in architecture and law.

The Jefferson Society, Inc.
c/o 2170 Lonicera Way
Charlottesville, VA 22911

AIA's Continuing Education Rules Change

Note that as of January 1, 2012, AIA members will be required to complete 12 hours of health, safety, and welfare (HSW) education; previously 8 HSW hours were required. The total number of continuing education hours remains unchanged at 18 total hours, which includes 4 hours of sustainable design.

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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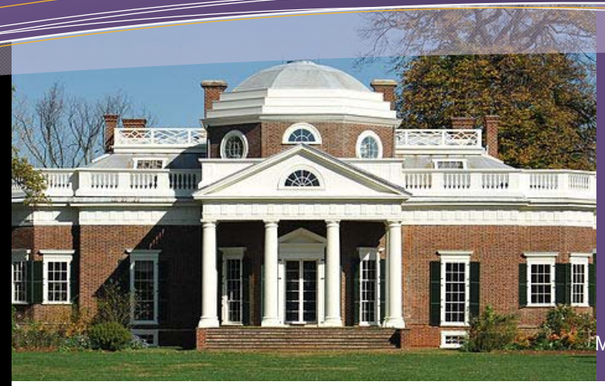
Want to connect with other members? Find us here.



In this issue

"Architect-Lawyers: An Important New Breed"

By G. William Quatman, FAIA, Esq.
Burns & McDonnell

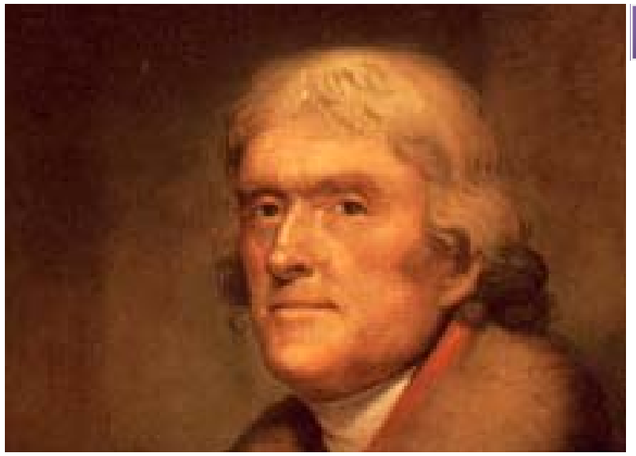
Many of us remember Arthur T. Kornblut, AIA, Esq., an architect-lawyer in Washington, D.C. who for years wrote a column in *Architectural Record* called "Legal Perspectives." It was a column I read in the late 1970's in which he talked about "Architect-lawyers: An important new breed." As an architecture student, the title caught my eye. "What is this? Architect-lawyers?" So I wrote to Mr. Kornblut asking him to tell me more.

We kept up a regular correspondence for several months, during which time I made the decision to apply to law school. I loved architecture, but found a business law class a fascinating elective, and Mr. Kornblut mentored me to think seriously about dual degrees. One piece of advice he gave that stuck: "Get your architect license before you graduate from law school. You'll be over-qualified to sit at a drafting table after that." And so I did. Finished architecture school, worked for a while, started law school and worked part-time all three years as an architect-intern, so that when I graduated with my J.D., I had enough years in to take the architect exam (and the bar exam). I've been proud to hold the dual credentials ever since.

That was nearly thirty years ago, and it has been life-changing for me, and my family. I have enjoyed my dual career more than I ever could have imagined, representing design professionals, working on high-level projects and contracts, trying lawsuits, and now serving as general counsel to one of the largest design firms in the U.S.

I owe a great debt to Art Kornblut, who died much too early at age 51 in May 1993. He would have been 70 years old this year, a Navy veteran, author, arbitrator, architecture graduate of Rensselaer Polytechnic with a J.D. from the University of Akron in Ohio. I have tried to return the favor any time a young architect or student asks me about dual careers in architecture and law. Pay it forward, as they say. I hope you do the same when asked.

The **Jefferson Society** is intended to be an informal, fraternal (not a "boys' club"), educational forum for all of us men and women who have made this unique career selection. I have made some wonderful friends over the years who share in this passion for law and design, and I hope to make many more through the meetings, social events, programs and e-exchanges we hope to have in the coming years. To those of you who have joined, Welcome. To those who have not, I hope you will reconsider. It is an honorable choice you've made and I hope you find this society a rewarding association of like-minded people.



Timeline of Jefferson's Life

1743. Born at Shadwell
1760-62. Attended the College of William & Mary
1762-67. Studied law with George Wythe
1767. Admitted to practice law (age 24)
1768. Began leveling mountain top for his new home at Monticello
1772. Married Martha
1774. Retired from law practice, inherited 11,000 acres and 135 slaves from his father-in-law
1775. Elected to the Continental Congress
1776. Writes Declaration of Independence; signed on July 4th
1779-81. Served as Governor of Virginia
1783. Elected to Congress
1790-93. First U.S. Secretary of State
1797-1801. Vice President
1801-09. U.S. President
1819: Designs UVA plan
1826. Died on July 4th at Monticello, Virginia

Why Choose Thomas Jefferson for Our Society's Name?

By R. Craig Williams, AIA, Esq. HKS

Architect-Lawyer Thomas Jefferson, was born April 13, 1743 in what is now Albemarle County, Virginia. He entered school at the College of William and Mary in Williamsburg at age 16, and completed his studies by 1762. His course work included a variety of subjects, including philosophy, mathematics, French, and music; and, it was at this time that he purchased his first book on architecture, probably the Giacomo Leoni translation of Andrea Palladio's *Four Books of Architecture*. Although he read law while working as a clerk for America's first law professor George Wythe, he had a passion for design.

> "An association of men who will not quarrel with one another is a thing which has never yet existed, from the greatest confederacy of nations down to a town meeting or a vestry."
> - Thomas Jefferson (1743-1826)

At this time there were no schools of architecture in America and it was through books that he discovered architecture. Without formal training, Jefferson began designing a home for himself around the time he was admitted to the Virginia bar in 1767.

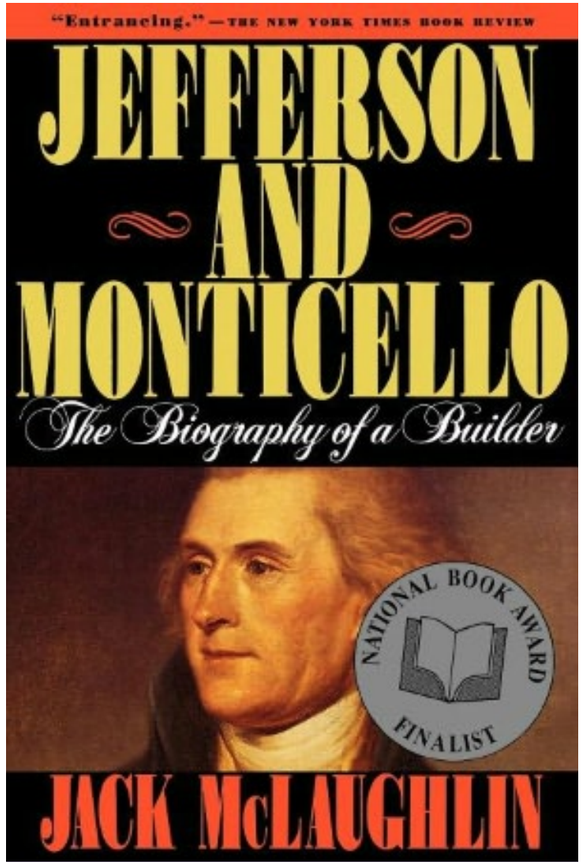
Neoclassicism was the architectural style in America in the period between the middle of the 18th and 19th Centuries, based upon the architecture of ancient, or classical, Greece. Neoclassicism in America was in many ways an extension of Neo-classicism in Europe. The phase of Neoclassicism for structures built between 1780 and 1820 is known as the Federal Style, reflected by the architectural designs of Charles Bulfinch, and was the creation of an affluent mercantile aristocracy with strong cultural and economic ties to Great Britain. The architecture of Thomas Jefferson was a divergence from the British influenced Neoclassicism. Thoroughly anti-British in his attitude toward architecture, he sought a design vocabulary symbolic of the new republic he helped create. He developed what he considered an appropriate idiom from two non-English sources, the Neoclassicism of France, and the architecture of ancient Rome. [Pierson, William H. Jr., American Buildings and Their Architects, New York: Oxford University Press, 1976. Vol. 1, pp. 205-213.]

Thomas Jefferson was perhaps the first American architect-lawyer, and the only one to be a U.S. President, thus far.

In 1766 while traveling with John Adams through Anapolis, Jefferson wrote that he was impressed by the "extremely beautiful houses" of Annapolis, but the public buildings were "not worth mentioning." Of course, he later became the designer of public buildings in Virginia. Jefferson's design of his home at Monticello reflects his keen sensibilities of style, form, and function. It is his personality and philosophy reflected in brick and mortar. As a lawyer, Jefferson was involved in hundreds of cases. He practiced law from 1767 to 1774 when the courts were closed due to the Revolution.

Of course, Monticello was only the beginning of what is recognized as a historical career as an architect. He took advantage of his years living in Paris, from 1785 to 1789 as United States Minister to France, to learn of France's architectural history. In his own work, he adopted those elements of design he learned. He designed the Virginia State Capitol (1785-1789), his second home at Poplar Forest (1805-1809), and founded and designed the first buildings at the Univ- of Virginia (1819-1826).

Thomas Jefferson somehow found time to do things other than practice law and architecture. He designed his own burial monument, an obelisk, and wrote his own epitaph for the monument: "On the faces of the Obelisk the following inscription and not a word more. Here was buried Thomas Jefferson; Author of the Declaration of American Independence; of the Statute of Virginia for religious freedom & Father of the University of Virginia. Because by these, as testimonials that I have lived, I wish most to be remembered."



A great book about Jefferson's life as an architect and, yes, a builder, is Jack McLaughlin's *Jefferson and Monticello*, Henry Holt & Co., New York (1988). Available through Amazon and others for $14.95.

JEFFERSON, A DESIGN-BUILD CONTRACTOR?

In Jack McLaughlin's book, *Jefferson and Monticello*, he writes: "Although there were no architects in the modern sense of the word – those who professionally designed buildings – in colonial Virginia, the more substantial plantation homes were constructed by professionals. It was usually a master bricklayer or carpenter who took on the functions of what today would be a building contractor. * * * Thomas Jefferson, on the other hand, from his earliest decision to build a house, made a commitment to design and supervise construction of it himself. * * * His decision to become his own architect and general contractor was not surprising, given what we know of this unusual young man." (pp. 36-37). The author later attributes this to Jefferson's concerns with the "minutest detail" and the fact that no work got done unless he was on site!

The Jefferson Society Welcomes 40 Members!

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Wright, Robinson, et al
Washington, D.C.
(died May 8, 1993)

George M. White, FAIA, Esq.
Architect of the Capitol
Washington, D.C.
(died June 11, 2011)

Performance Guarantees--Coming Soon to a Project Near You?

By Suzanne H. Harness, AIA, Esq.
Harnes Law, PLLC

An *Engineering News-Record* article published May 14, 2012, "GSA Brainchild: Full Fees After Building Hits Energy-Use Targets," had architects buzzing at the AIA National Convention held in Washington DC a few days later. It was hard for them to believe that not only the design-builder, but also the architect and MEP consultant on a U.S. General Services Administration (GSA) project being constructed in Seattle had agreed to accept the risk that actual energy usage during the building's first year of operation would be 30% less than ASHRAE's 90.1-2007 standard. The team agreed that the GSA could withhold 0.5% of the original contract amount, or $330,000, pending the achievement of the energy goal. A design team member was quoted as calling the GSA's process, a "step in the right direction for the industry" that he predicted would become more commonplace. Others may question whether putting one's fee on the line to guarantee a performance goal is a direction they want to follow.

The article did not address whether the retention of compensation was the GSA's sole remedy for the building's failure to meet the energy goal. If not, damages could potentially include recovery from the design-build team of additional energy costs the GSA incurs to operate the building, and costs to remediate the design defects.

The business model of a design firm depends upon sharing the risks of the firm's professional negligence with a professional liability (PL) insurance carrier, but PL carriers specifically exclude coverage for liability assumed solely through a performance guarantee. The liability incurred from assuming a performance guarantee can be substantial. In *Arkansas Rice Growers v. Alchemy Industries, Inc.,* 797 F.2d 565 (1986), the 8th Circuit found the designer's failure to provide a design that would achieve the performance criteria required by contract for the operation of a process plant to be a material breach of contract that discharged the owner from all further obligations under the contract. The court then permitted the owner to recover from the designer and the contractor the construction costs of the plant, less a few amounts attributed to other causes.

A few recent changes in the industry suggest that the GSA's way of doing things may be emulated, even outside the design-build arena. First, more and more measurable evidence exists that design truly does matter. In addition to energy cost reductions, evidence now shows that the design of a store does, in fact, affect sales; and the design of the hospital room does indeed influence healing.

Second, design professionals themselves are seizing upon the evidence now available to explore value-added design fees, on the logical assumption that a business-savvy owner would be willing to pay more for a design that drives sales.

The GSA chose not to execute an agreement with an incentive fee paid for the achievement of goals, as the Department of Energy did at its Golden, Colorado National Renewable Energy Laboratory, but instead imposed a penalty. A design team working under that threat would be wise to over-design the building systems to increase the likelihood that the operating building would meet the required performance. Such "over design" would benefit the owner, but at a price that not every owner would be willing to pay. The GSA's Seattle building is loaded with energy saving systems, some of which were included in a $1.3 million change order.

Everyone benefits from designs that reduce energy use, but consider whether a performance guarantee is the best way to achieve this, given the uninsurable risks and increased cost.

LEGAL BRIEFS
Recent A/E Court Decisions

NEBRASKA: Engineer Found Negligent Without Expert Testimony on Standard of Care

Developer had a fee dispute with its project Engineer, who sued for $10,238 in fees owed. The Owner counter-claimed for $25,000 with allegations of: breach of contract, ordinary negligence, and professional negligence. At the end of the trial, the Engineer moved for a directed verdict that all claims are essentially of professional negligence, requiring proof by expert testimony on the standard of care for professional engineers; and the Owner failed to present any expert at trial. Therefore, the Engineer claimed, the Court erred in submitting these claims to the jury. On appeal, the verdict was upheld and no error found because the trial judge did not submit "design error" allegations of professional negligence to the jury. The trial court instructed the jury that Owner claimed that the Engineer "breached the contract by failing to properly supervise the project to ensure that the construction was completed according to the project specifications."

The appellate court concluded that such claims were not of professional negligence requiring expert testimony.

The jury awarded the Engineer $10,238 on its claim and awarded the Developer $25,000 on its claim. The net result was a judgment in favor of the Developer for $14,762.

The case is *Associated Eng'g, Inc. v. Arbor Heights, LLC*, 2011 WL 6090238 (Neb. Ct. App. Dec. 6, 2011).

It is interesting that the Court found a way to avoid expert testimony, but perhaps even more amazing that the two parties went to trial and appeal over just $25,000!

LEGAL BRIEFS

MISSOURI: Federal Judge Allows Owner to Directly Sue Architect Who Was A Sub to the Design-Build Contractor.

An Owner contracted with a Design-Builder for three parking garages. The Owner later sued the Design-Builder for breach of contract, but also sued the project Architect (who was not in privity with the Owner) for negligent design. The Architect filed a Motion to Dismiss on two grounds: 1) The Missouri "Acceptance Doctrine" (not in privity) after the Owner accepts work, but there are exceptions; and, 2) The "Economic Loss Doctrine." which bars third party tort claims where the damages are purely economic. The Court denied the Motion, finding the Architect had a duty and fell into the exceptions to both Doctrines! As to the Acceptance Doctrine, there is a "latent defect" exception; and as to the Economic Loss Doctrine, the Federal judge said the doctrine did not apply in cases of negligent rendition of professional services. In upholding the Owner's right to bypass the Design-Builder and sue the Architect, the Court held: "Architects … owe a duty to exercise care … to persons…when injury to those third parties is foreseeable." The Court said the allegations fell within the latent defect exception and the "defects should have been foreseeable" by the Architect as likely result of its negligence. The Architect also lost out on its argument that the claims were barred by Missouri's 5-year statute of limitations since the Owner had alleged that the defects were "latent," thus avoiding dismissal at the early pleading stage.

The Federal Judge allowed an exception to the Economic Loss Doctrine for negligent rendition of professional services!

The case is *Westfield, LLC v. West County Center, LLC,* 816 F.Supp 2d 745 (E.D. Mo. 2011).

LEGISLATIVE UPDATE: H.B.1280 is one of the most significant tort reform laws to be passed in years. It will result in safer designs and fewer suits.

Missouri Passes First-In-The-Nation Peer Review Law for Design Professionals

To encourage open and candid discussions, the law prevents some communications from being revealed in court. Examples are those between a lawyer and client; a member of the clergy and a member of his or her church; a physician or psychologist and patient; and an accountant and client. Even communications between two physicians can be protected when in the context of a "peer review." Peer review is the name given to the evaluation, critique and commentary by one professional of a peer's work. In the medical field, most hospitals have committees that perform peer reviews of their doctors to improve quality of patient care.

The Health Care Quality Improvement Act of 1986 (HCQIA) was enacted after Congress determined that healthcare could be improved "through effective professional peer review," but that "the threat of private money damage liability . . . unreasonably discourages physicians from participating in effective professional peer review." Under the HCQIA, those participating in the peer review process are not liable for damages under any federal or state law for their role in the peer review process. Persons providing information to the peer review body are likewise immune from liability, with the exception of false testimony. Most states have adopted their own peer review laws modeled on the federal act.

Like doctors, design professionals are licensed to protect public safety but the same fears about liability and admissibility hold many A/E's back from engaging in peer reviews and from teaching "lessons learned." Taking a cue from the medical profession, in 2011 the Missouri legislature introduced and passed a "peer review privilege" law for architects, engineers and land surveyors. It was the nation's first.

With support from AIA and ACEC, S.B. 220 passed in the House 111-31, and passed overwhelmingly in the Senate 33-1. However, the bill was vetoed by Governor Jay Nixon who felt it was too broad. The design community worked with the Governor's office to introduce a revised bill in 2012, H.B. 1280, which passed in the last week of the 2012 session by votes of 33-1 in the Senate and 95-57 in the House. Governor Nixon signed the bill in July and it became effective August 28, 2012.

The new law provides immunity to outside peer reviewers who are engaged to provide only that service, but are otherwise not involved in the project. It also grants a privilege to internal "lessons learned" that are taught post-completion, in-house to the design firm's employees and partners. Such sessions are immune from discovery. The law expires in January 2023,

Many other states plan to copy the Missouri bill and introduce it in 2013. Efforts are underway in Colorado, Kansas and Oregon, to name a few.

LEGAL BRIEFS

ILLINOIS: Engineer's Scope of Work Upheld.

Two engineering firms were hired by a Developer to provide services for a new shopping mall. Due to increased traffic from the shopping mall, the Developer was required to replace a bridge deck over I–94. After construction, a driver was killed in an accident and his widow sued both engineers. An expert claimed the engineers should have designed a "Jersey barrier" on the road, including the bridge deck. The Engineers defended, saying their contract scope did not require a median barrier analysis. The case went to the Illinois Supreme Court, at which ACEC, AIA, and NPSE all filed amicus briefs. The Court concluded that the word "replacement" in the Scope did not require the Engineers to improve the bridge deck, nor to consider or add a Jersey barrier.

Thompson v. Gordon, 948 N.E.2d 39 (Ill. 2011).

A Failure to Communicate

By D. Wilkes Alexander, AIA, Esq.
Fisk Fielder Alexander, PC

I was once asked during a presentation for the primary source of claims against the design profession. As seconds passed, and approximately 500 audience members stared at me in anticipation of some wonderfully well thought out breakdown having to do with flashing, or pier depth, I realized that the primary cause of each and every claim that I had ever been associated with could be described in that simple phrase, made memorable in *Cool Hand Luke*: “A failure to communicate.”

The first line of communication between architect and client has to do with their initial meeting and the following contract negotiations. Duties, obligations, exclusions, scope of work, basic and additional services, payment, legal liabilities and responsibilities all have to be agreed upon, hopefully in writing. Too often the stage is set for disaster in a failure of this initial effort to clearly communicate expectations to one another. After clearing this first hurdle, the next round of communications relates to schematic design, when rough outlines of the client's needs are described and reduced to a drawing.

Communication with various consulting engineers begins with subcontract negotiations and coordinating with owner-retained consultants, like geotechnical or civil engineers. Communications between architect and client then proceed to a more hard line format in the design development phase. The architect takes the client's abstract thoughts and spacial needs and reduces them into a graphic format, supported by technical specifications. These are the initial strokes of what will become a set of construction documents.

Next is the form of communication that creates the largest hurdle for any design professional . . . the construction documents

> “It is the trade of lawyers to question everything, yield nothing, and talk by the hour." - Thomas Jefferson

phase. Here the architect begins communicating with contractors, vendors and, perhaps trade subs. These construction documents may later undergo intense scrutiny by a retained expert witness that the same contractor (now turned plaintiff) has hired to pick the construction documents apart. A dark black line in a base flashing detail that is only a tiny fraction of an inch away from location considered the "industry standard" can result in millions of dollars of potential liability to an architect when an expert witness convinces a jury that the entire brick veneer must be removed so as to repair this errant detail and kill the mold!

Communication between architect and contractor escalates in the construction phase. Contract administration communication takes the form of site visits, oral conversations, e-mails, RFI's, change orders and a vast array of documents that may later become exhibits in legal proceedings. A frustrated, late night e-mail, hurling insults at the ancestry of the site superintendent, may later be projected on a large screen for the jury and judge to read in disgust. "Oh, if only I had not pushed send on that one!" the architect laments. Then follows pay applications, punch lists and more communications as the project wraps up. Now is when payments are withheld, sureties and lawyers are contacted, tempers flare, foundations crack and water infiltrates. Mother Nature with her forces of gravity, wind, rain, temperature induced expansion and contraction, now takes part in the communication. Also joining the discussion may be expert witnesses retained by all parties.

As lawyers, we should strive to assist our clients in the improving their communication skills, especially in the early phases of the project and in contract drafting. A clear understanding of the duties and obligations of all parties will best serve our clients.

MEMBER PROFILE:

Charles R. (Chuck) Heuer, FAIA, Esq.
Principal, The Heuer Law Group

My professional education began at Carnegie-Mellon University in Pittsburgh in 1967. We had a small class of just 40 people. The group that made it through included the most talented people I have ever known, in one place and time. I graduated with a B.Arch. in 1971. That timing coincided with one of the many recessions in the industry, and I accepted a position as a Graduate Teaching Associate at Ohio State. I helped with one section of the first year design studio and graduated with an M.Arch. degree in 1972.

My first job was with an architectural firm in Palm Beach, Fla. where I learned a lot. I took and passed the ARE and became licensed in 1974. Later, I moved back to Ohio, near where I grew up, and worked for a firm there. By then another recession had rolled in and work slowed down. I decided that it would be a good thing to know more about legal and management matters. So I went to law school at night at Cleveland State Univ., while continuing to work as an architect. By that time I had my own architectural practice, doing small residential and commercial work. A mentor who happened to be on the AIA Board of Directors alerted me that the Institute was looking for a staff director for the AIA Documents Program. I got the job and moved to DC. That entailed transferring to law school at The American University, where I got my JD in 1978. I originally took and passed the Bar in Virginia. After working at the AIA as Assistant Director, and then Director of the Documents program, I consulted on construction claims for Hill International, Inc.

A member of the Documents Committee then offered me a job as in-house counsel at The Architects Collaborative, Inc. (TAC) in Cambridge. That was a great environment and the firm had work all over the world, with much of it in Iraq and the Middle-East. Ultimately, I left TAC to start my own law practice. I had never worked for a law firm and had no ready clients. That was 1986 and the rest, as they say, is history.

On the architecture side, I keep up my NCARB Certificate and some state licenses, though I don’t actively practice architecture now. I was elevated to the AIA College of Fellows in 1992.

I now have a small boutique law practice dedicated to the design and construction industry. We do mostly transactional work and some arbitration and litigation, but that is not the focus. We represent well over 200 firms, mostly small practices. I also often serve as a mediator or arbitrator for the AAA and I run the LegaLine service for the AIA Trust. I like what I do. I feel that if you can’t solve something and be a help in a few hours, or a couple of days at most, you probably aren’t helping. We pride ourselves on quick response times and personal service, like a Doctor in the ER – dealing with emergency situations to stabilize the patient.

LEGAL BRIEFS
Recent A/E Court Decisions

OKLAHOMA:
Engineer’s Specs Failed to Warn Contractor About Licensing Law

A Contractor won its bid for a project until the Owner learned that the Contractor was not licensed in Arkansas, and terminated the contracts, withholding $7.5 Million. The Contractor sued, claiming Owner and its Engineer had a duty to inform it of the license requirement. Ark. Stat. § 17-25-313, requires engineers preparing plans for work to be contracted in Arkansas to include in their specifications a warning that the bidder must be licensed before bidding. The Ark. S. Ct. upheld summary judgment for the Owner on the basis that the Contractor required a license and did not obtain one; and that the Owner’s staff and outside engineers had no personal tort duty to warn the Contractor. See, *Cent. Okla. Pipeline. v. Hawk Field Servs.,* 2012 WL 1222196 (Ark.)

MASSACHUSETTS:

Architect Not Liable for Indemnity, But Could Be Liable for Contribution.

In an Aug. 30, 2012 decision, the Massachusetts Supreme Court reversed an appellate court ruling against Cambridge Seven Associates, Inc. in a wrongful death case. The Owner (Hilton) had hired the Architect for a hotel project, including the electrical engineering, electrical systems materials and preliminary layout of switch-gear, transformer and generator placement. During construction the Architect was to conduct site visits "to determine, in general, if Work is being performed in accordance with the Construction Documents," and to submit written field reports each two weeks noting "any deficiencies in Work and/or deviations from the requirements of the Construction Contract which come to Architect's attention." The contract contained standard AIA disclaimers about construction means, methods, techniques, sequences or procedures, or safety precautions and programs, as well as the Contractor's failure to carry out Work in accordance with the Construction Contract. Added to the contract was an express indemnity clause, under which the Architect was to indemnify the Owner from and against all claims "arising out of and to the extent caused by the negligent acts, errors or omissions during the performance of professional services" under the agreement by it or its consultants provided that the claims did not "result from the negligent acts or omissions of the Indemnitees or other parties for whom Architect is not responsible." An electrician was killed by electrocution in 2004 when he opened an electrical cabinet and touched the gear some four years after the project was completed. The cabinet did not have a stenciled warning required by the Architect's specifications.

During construction, the Architect's consultant had noted in a field report that the switchgear had been activated but made no mention of the presence or absence of warning signs. The electrician's widow sued Hilton and the Architect among others, and the Hilton filed a cross-claim against the Architect for indemnity and contribution.

The trial court granted the Architect summary judgment based on the contract disclaimers, but the Court of Appeals reversed, finding that there were other duties in the contract that had been breached. The Supreme Court held that viewing the evidence in the record in the light most favorable to the Owner (Hilton), there was sufficient evidence that the Architect breached its contract by failing to report to Hilton that the Contractor had failed to comply with the specifications.

> "Architects, like other professionals, do not have a duty to be perfect in their work, but rather are expected to exercise that skill and judgment which can be reasonably expected from similarly situated professionals."
> - Mass. Supreme Court (Aug. 2012)

However, the Supreme Court rejected Hilton's claim for contractual indemnity, since the clause did not cover losses that "result from the negligent acts or omissions of ... other parties for which Architect is not responsible." Since the Architect was not responsible for the Contractor's "failure to carry out Work in accordance with the Construction Contract," and had no control over its acts or omissions, there could be no indemnity for the Contractor's failure to apply the warning signage. As to the claim for contribution, there was no expert testimony that the failure to report the defect constituted a breach of the professional standard of care of architects. The Appeals Court concluded that no expert opinion was needed and a layperson could find negligence. The Supreme Court agreed given that the Architect knew of the deficiencies which posed an obvious a risk to the safety of any person who would operate the switchgear but failed to report them. Nonetheless, the Supreme Court disagreed on the matter of causation, since

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the Architect could not in any event compel the Contractor to comply with the specifications. Thus, an issue of fact remained on Hilton's contribution claim. The case was remanded.

See, *LeBlanc v. Logan Hilton Jt. Venture*, 2012 WL 3711318 (Mass. 2012).

Minnesota Shocker! Supreme Court Upholds Exception to 15-Yr. Statute of Repose in I-35W Bridge Collapse

In 1962 Sverdrup and MnDOT executed the I-35W bridge design contract for a bridge that was completed in 1967. The Statute of Repose ran 15 years later in 1982, supposedly barring claims against the designer, Sverdrup. Then, in 1999, Jacobs acquired Sverdrup.

Eight years later, on Aug. 1, 2007, the I-35W bridge collapsed killing 13, injuring another 145 persons with substantial property damage. In response, in May, 2008 the Minnesota Legislature created the $37 Million "I-35 Victim Compensation Fund" Statute, which read, in part: "*Notwithstanding any statutory or common law to the contrary*, the state is entitled to recover from any third party, including an agent, contractor, or vendor retained by the state, any payments made from the emergency relief fund … to the extent the third party caused or contributed to the catastrophe."

Experts opined the probable cause of collapse was "inadequate load capacity, due to a design error by the original designer for the gusset plates."

After victims sued the State, the State asserted claims against Jacobs under the 2008 statute, alleging design errors and contractual indemnification. Jacobs lost its Motion to Dismiss, and again on two appeals.

The Minn. Supreme Court said: "We acknowledge that it may be economically unfair to allow a cause of action previously extinguished by a statute of repose to be revived by subsequent legislation, but we find nothing in the Due Process Clause to preclude this result." The U.S. Supreme Court refused to grant further review.

In re Individual 35 W Bridge Litigation, 806 N.W2d 820 (Minn. 2011).

LEGAL BRIEFS
Recent A/E Court Decisions

DELAWARE:

Engineer's Release of Liability Upheld Despite Owner's Claim It Was Forced To Sign It!

Residential developer hired Engineering Firm to provide civil and environmental engineering. Construction began after Engineer said no wetlands were impacted and no permits were needed. A fee dispute arose and Engineer refused to give up the drawings without a signed Release of Liability. The Developer signed a general release of any and all liability in connection with the engineering services on the Project. Then, the Developer got a cease and desist letter that unauthorized work had been performed on regulated wetlands. The Developer sued the Engineer for negligence and breach of contract. The Engineer filed a Motion for Summary Judgment based upon the "Economic Loss Doctrine" and the signed Release of Liability. The Court agreed on both points.

The Economic Loss doctrine "prohibits recovery in tort for losses unaccompanied by a bodily harm or a property damage" and requires a party who suffers only "economic losses" to sue on contract. As to the Release, the Developer said it had no choice because Engineer was wrongfully withholding its work product. The Court upheld the release, noting, "While Defendants may have driven a hard bargain in refusing to release work product unless Plaintiffs executed the Release, aggressive negotiation is insufficient to constitute duress." Engineer wins!

The case is *Riverbend Community, LLC v. Green Stone Engineer-ing, LLC*, 2012 WL 1409013 (Del.Super.)

What Do You Think? Should an A/E be able to demand a release of all liability as a condition of turning over final documents to a Client? Does it make a difference if the A/E was not paid in full? What if the Services were not fully performed at termination?