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

- **Save the Date: First Annual Meeting, May 8, 2013!**

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! Watch for your invitation in February.

- **Topics for Schinnerer's May 9-10, 2013 Meeting:**
  - Annual legal case update
  - The Economic Loss Doctrine and Collaborative Design
  - Case Study – Risk Management for Innovative Design
  - Case Study – Enforcement of Limitation of Liability Clauses
  - Case study – Construction Site Safety for AE's
  - What AE's Need to Know About Sureties
  - Effective Arbitration
  - Social Medial in Litigation and Trial
  - Prepping your Presentation for Mediation and Trial

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

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QUARTERLY JOURNAL OF THE JEFFERSON SOCIETY

Monticello

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

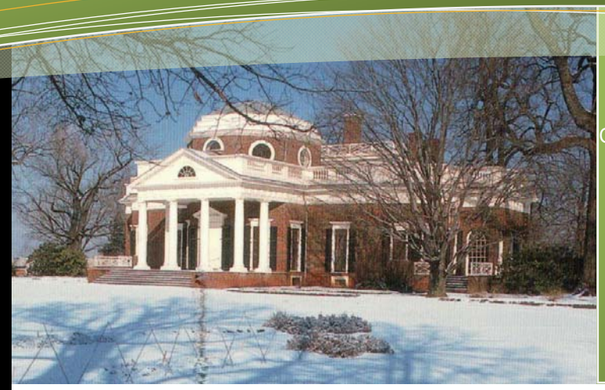
Send his or her name to interim president Bill Quatman at bquatman@burnsmcd.com or to Craig Williams at cwilliams@hksinc.com and we will reach out to them. Must have dual degrees in architecture and law.

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

JOIN US ON FACEBOOK & LINKEDIN

Want to connect with other members? Find us here.



In this issue

"Architecture is my delight and putting up and pulling down one of my favorite amusements."

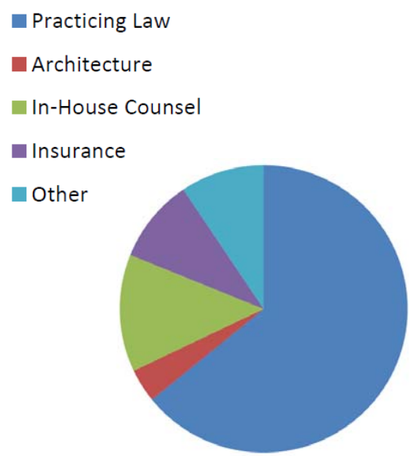
By G. William Quatman, FAIA, Esq.
Burns & McDonnell

Thomas Jefferson wrote this in 1824 at the ripe age of 81. Unlike most of us, Jefferson was able to pull off simultaneous professions of lawyer and architect. For the rest of us, however, we have had to choose one profession over the other. Of the current members of The Jefferson Society, nearly 2/3 make a living in private law practice. Money is an obvious driver in this decision. I recall my first job out of architecture school which paid $12,000 a year – the same most of my classmates made in 1980 no matter what size firm or location. My wife, a grade-school teacher, was also paid $12,000 a year to teach in public schools and she complained about how underpaid teachers were (she still complains today, and is correct). But when I told her she gets 3 months' vacation in the Summer, plus Spring Break and Christmas Holiday, while I worked 50-60 hours a week, she showed no sympathy. Three years later, I more than doubled my salary to $25,000 as a first year lawyer in a small construction law boutique.

OK, it was not merely money that drove me into the legal side. As Arthur Kornblut, FAIA, Esq. advised me: "Once you get your law degree, you'll be over-qualified to sit at a drafting table." And he was right. Once armed with a Juris Doctor, 64% of our members have chosen to practice law, where mean annual salaries today have risen to $130,490 as compared to $77,100 for architects. (Bureau of Labor Standards, National Occup. Employment and Wage Estimates, May 2011). Only 2 of our members are practicing architects.

When asked by former classmates if I liked being a lawyer more than being an architect, my smart response was always, "Only on pay day." Why did you choose one over the other? Send me a commentary for our next newsletter.

OUR MEMBERSHIP BY OCCUPATION:



Connecticut Supreme Court Says: State is King and Not Bound by Statutes of Limitations or Repose.

By Theresa Ringle, Esq.
Ringle Law Group, LLC

The Connecticut Supreme Court's recent unanimous decision in *State v. Lombardo Brothers Mason Contractors et. al*, 2012 Conn. LEXIS 443 (Conn. Nov. 1, 2012), concluded that the state of Connecticut was immune from statutes of limitation or repose defenses. This means that the state can proceed with its claims against the contractors, subcontractors, design professionals and construction management companies who allegedly were responsible for the defective design and construction of a law school library ***12 years*** after the project was occupied – i.e., after the limitation or repose period has expired for their work on a particular project.

The *Lombardo* case arises out of the design and construction of the library at the Univ. of Connecticut's School of Law. The project was completed in 1996. Soon thereafter, the state experienced problems with water intrusion. Over the years, water proved to be continuing and progressive. A forensic investigation uncovered defects which required corrective work. After the repairs began in 2007, additional defects were discovered, including the omission of re-bar. The repairs cost about $22 million even though the initial cost of the exterior walls was only $4.5 million. The state filed suit in 2008 to recover from the project's designers and contractors. According to a *New York Times* article, the state sought $15 to 23 million. In response, all of the defendants raised time based defenses. The state argued it was immune from statutes of limitation and repose by operation of the *nullem tempus occurrit regi doctrine* -- which means, no time runs against the king. The doctrine is closely related to the doctrine of sovereign immunity since both shield a state from the consequences of its own neglect or malfeasance.

***Lombardo* reflects a disturbing trend, on the heels of the Minnesota Supreme Court's decision in the Jacobs I-35 Bridge case, that A/E firms cannot rely on a statute of repose for claims made by the state.**

The doctrine is based upon public policy that prevents the imposition of fiscal burdens on states, but allows them to pursue wrongdoers in vindication of public rights - without regard to time limitations that might apply to other parties. In *Lombardo*, the defendants argued that the *Nullum Tempus* doctrine was not part of Connecticut's common law and thus did not shield the state. The trial court ruled in favor of the defendants, holding that the doctrine was incompatible with the legislative policies that underpin the statutes of limitation and repose. The trial court also ruled that one contractor (Gilbane) was entitled to summary judgment on the additional basis that the state's claims were time-barred by a provision of Gilbane's contract with the state, which provided that its services were specifically subject to the seven year limitation period applicable to architects, professional engineers and land surveyors. On appeal, however, the Connecticut Supreme Court concluded that the trial court ignored binding common law. Although there was no prior decision by an appellate court in Connecticut referencing the *Nullum Tempus* doctrine by name, the courts have recognized and applied the rule. The Supreme Court cited case law dating back more than a century providing that "[any] statutory provision limiting rights is not to be construed as applying to the state unless the statutory language expressly or by implication provides otherwise." The Court then held that *Nullum Tempus* was a fundamental and important feature of the state's sovereignty rights. Therefore, the trial court lacked the authority to ignore it. Only Connecticut's legislature could make that type of policy judgment, the high court said.

According to the Connecticut Supreme Court, there are only two situations where a time period could run against the state. The first is when a statute expressly identifies the state as a party against which the limitation or repose period runs or otherwise includes language reflecting the legislature's clear intent to waive state sovereign rights. The second is where the state's claim is based on a separate statute that includes its own time limitation period as inherent in the rights established by the statute. The Court concluded that these two situations did not apply. Most importantly, the Court held that the Connecticut statutes did not include express language reflecting a legislative intent to waive the *Nullum Tempus* doctrine rights.

The Court also rejected the argument that the state contractually waived its rights against Gilbane. The relevant paragraph of Gilbane's contract was entitled "Period of Repose" and provided that "[t]he services performed pursuant to this contract shall be considered professional work to which any statutory period of repose then otherwise applicable to design work under Connecticut law shall apply." The Court held that the commissioner for the Department of Public Works who signed the Gilbane contract lacked authority to waive the state's sovereign rights. Under Connecticut law, the Nullum Tempus doctrine could only be waived by the Legislature itself and; therefore, any contract provision that might intend to waive the state's Nullum Tempus rights was not binding on the state.

WHY *LOMBARDO* HAS POTENTIAL NATIONAL IMPLICATIONS:

The *Lombardo* decision casts further doubt on the efficacy of statutes of repose as a basis for contractors, construction managers, and design professionals to defend against actions arising out older projects. The purpose of statutes of repose is to establish a point in time beyond which a potential defendant should be immune from liability.

The Connecticut ruling in *Lombardo* and the Minnesota Supreme Court's 2011 ruling in *Jacobs Engineering Group, Inc. v. Minnesota*, 806 N.W.2d 820 (Minn. 2011) demonstrates that without statutes of limitation or statutes of repose, construction professionals could be exposed to liability for decades after a project has been completed.

HOW TO DEAL WITH PUBLIC BODIES:

Sovereign entities are likely to be immune from the statute of repose unless *Nullum Tempus* has been abolished by the state's legislature or courts. Here are 5 steps to take: 1) Determine if *Nullum Tempus* applies in the state where the project is located. 2) Do not presume that if the state's law has abolished the doctrine of Sovereign Immunity that the *Nullum Tempus* doctrine also no longer applies. According *Lombardo*, only four states have abrogated the doctrine. (S. Car., W. Va., Co. and N.J.). 3) Determine whether the client qualifies as a "sovereign entity" by law. Per *Lombardo*, some states extend the doctrine broader than others. 4) If the doctrine applies, determine if the doctrine can be waived by contract. 5) If so, *Lombardo* serves as a reminder to confirm that the person signing the contract has authority to bind the sovereign entity.

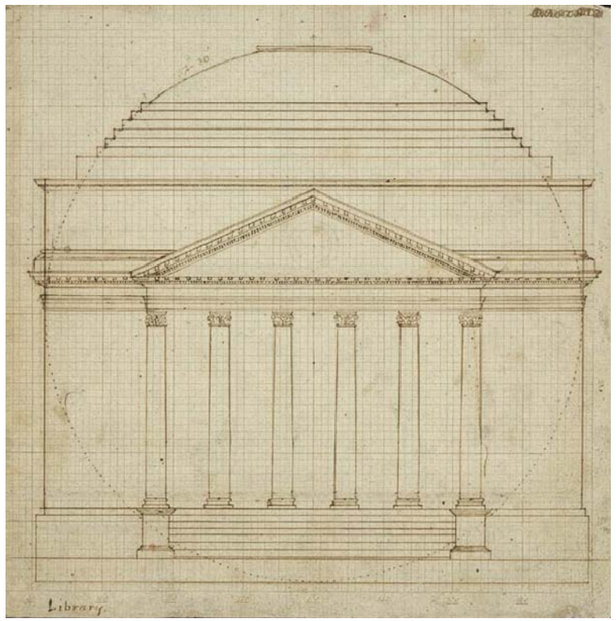
LEGAL BRIEFS

NEW YORK:
No Right To Common Law Indemnity From Architect.

When the owner of a YMCA sued its project manager for unjust enrichment in construction of an indoor swimming pool, the project manager sued the project's architect and contractor for contribution and common-law indemnification. The trial court denied the architect's motion for summary judgment and the architect appealed. The appeals court ruled that the owner's lawsuit was based on the project manager's own negligence, not upon anything the architect had done wrong. Therefore, since there was no allegation of vicarious liability, the project manager had no right to common-law indemnification from the architect. The case is *Genesee/ Wyoming YMCA v. Bovis Lend Lease,* 98 A.D.3d 1242, 951 N.Y.S.2d 768 (2012).

Primer: Copyright Protection For Architectural Works

By Adam T. Mow, AIA, Esq.
Jones Waldo Holbrook & McDonough



The original elevation for Jefferson's Rotunda at the University of Virginia in Charlottesville, Va., drawing attributed to Thomas Jefferson. (Public Domain).

U.S. copyright law protects "original works of authorship fixed in any tangible medium of expression." For individuals, copyrights are valid for the life of the author + 70 years. Entities are protected for 95 years. Before the 1990 Architectural Works Copyright Protection Act, only plans or drawings were copyrightable. As a result, construction of a building from copyrighted plans or drawings was not a violation. The 1990 Act specifically protects architectural works built on or after Dec. 1, 1990, and those works embodied in unpublished plans and drawings created before that date. An architectural work is "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as the arrangement and composition of spaces and elements in the design, but does not include individual standard features." Therefore, plans and drawings now are dually protected from both unauthorized reproduction in graphic form and by construction. Also buildings are protected from unauthorized reproduction by construction. Copyrights on built works are limited in two ways: 1) copyright owners may not prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place; and 2) the copyright owner's consent is not required before alteration or destruction of the protected work.

Obtaining a Copyright. A work fixed in a tangible form is automatically protected under copyright law at creation. Although not required by law, the author may place a copyright notice on the work, e.g. Copyright 2013 Adam T. Mow. Authors may also register their work with the U.S. Copyright Office in DC. Registration has 3 advantages if there is an infringement: 1) it provides proof of creation; 2) it is required for an award of statutory damages and fees; and 3) it permits the author to file suit. An author cannot claim copyright protection for a work which was created as part of the author's employment, i.e. an architect employed at a firm. This is known as a "work for hire." However, the author does not give up the copyright simply by contracting with another party to produce the work. By default, the architect retains the copyright, although it may be assigned by contract. To help protect the architect's rights, AIA's B101-2007, *Owner and Architect Agreement*, Par. 7.2, expressly provides that the architect retains the copyright in the "Instruments of Service" but grants the owner a license to use the Instruments for certain limited purposes.

Copyright Infringement. The test for infringement follow a 3-part analysis. A court first determines whether a valid copyright exists. Then, the court looks for both the defendant's access to the copyrighted material and whether the works are similar in their entirety. Access is defined broadly as the opportunity to view the copyrighted material. The court's final analysis, "substantial similarity," compares only the copyrightable elements of the original and allegedly infringing work. This analysis involves two steps: 1) determine what portions of the author's work are protected by copyright. Mere ideas, concepts, and functional or standard elements are not copyrightable components and are not part of the inquiry; 2) determine whether an allegedly infringing work is "substantially similar" to the protected elements of the original work. Constructed architectural works are judged not by isolated, individual elements, but by their "overall look and feel."

Remedies. Remedies for infringement can include statutory damages or actual damages, plus the infringer's profits. A court can impound and even order destruction of the infringing item, or issue injunctive relief. One of the largest recoveries under the Act was a $5.9 mil. award in 2005 to Hablinski+Manion when a $20 Mil. residential design was copied.

Jefferson Society Gains 50+ Members In Just 6 Months!

We welcome the following:

NEW FOUNDERS:

Frederick Butters, FAIA, Esq.
Frederick F. Butters, PLLC
Southfield, MI

Jay Wickersham, FAIA, Esq.
Noble & Wickersham LLP
Cambridge, MA

NEW MEMBERS:

Mark Brown, Esq.
Law Firm of Mark Brown LLC
Kansas City, MO

Philip R. Croessman, AIA, Esq.
MWH Constructors, Inc
Broomfield, CO

Julia A. Donoho, AIA, Esq.
County of Sonoma
Windsor, CA

Rep. Kevin Elmer, AIA, Esq.
Missouri House of Rep.
Jefferson City, MO

John B. Masini, Esq.
Vanek, Vickers & Masini, PC
Chicago, IL

Adam T. Mow, AIA, Esq.
Jones Waldo Holbrook, et al.
Salt Lake City, UT

Donovan P. Olliff, AIA, Esq.
HOK
Saint Louis, MO

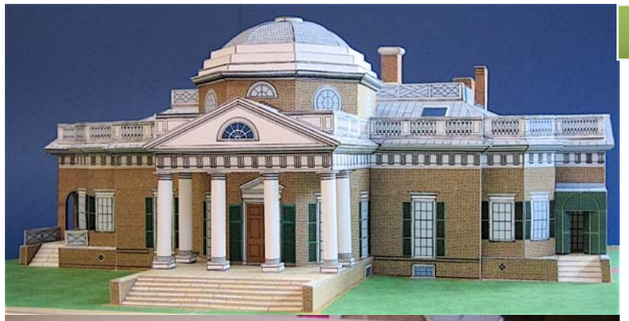
Jose B. Rodriguez, AIA, Esq.
Daniels, Kashtan, et al.
Ft. Lauderdale, FL

Susan M. Stern, AIA, Esq.
Irvington, NY

LEGAL BRIEFS

CONNECTICUT:
Suit Properly Stayed Against Architect Pending Arbitration.

The owner of a renovated tennis facility in filed a Demand for Arbitration against its architect on, alleging breach of contract and negligence. The architect responded with an answer and counter-claim. The plaintiff then tried to withdraw from arbitration and filed a lawsuit against the design architect personally, and against the firm, making similar allegations. In response, the architectural firm filed a motion to dismiss. The trial court denied the motion, but stayed the suit pending the outcome of arbitration. The owner appealed. The Court of Appeals held that, "Arbitration is a favored procedure in this state," and that a written agreement to arbitrate "shall be valid, irrevocable and enforceable." As a result, the Court stayed the suit against the architect until the completion of the pending arbitration. The case is *Danbury Sports, LLC v. Harry Pharr Architect &Planner, LLC*, 2012 WL 753753 (Conn. Super.).



Attention Former College Model-Makers:

Paper Model of Monticello Via Instant Download to Your Computer

It has come to our attention that for the mere sum of $9.50, you can download a color pdf of Jefferson's masterpiece, Monticello, in 1/8" scale size, which can be printed on card stock and made into a paper model. The vendor, Monticello Model, has prepared a set of plans and elevations, complete with directions. Impress your friends and family with the skills you learned in college, cutting chipboard late into the night. The website is www.monticellomodel.com

NEW YORK COURT SAYS ARCHITECT IS NOT LIABLE TO CONDO OWNERS FOR DEVELOPER MISREPS . . .

A condo association sued the developer and its architect for construction and design defects in a condo conversion of an old warehouse that leaked. As required by New York's *Martin Act*, an "Offering Plan" was presented to each purchaser, which included plans for the project and a "Certification of the Sponsor's Architect. The architect's contract disclaimed any third party beneficiaries, however, the developer's Offering stated that the architect's certification was "made for the benefit of all persons to whom this offer is made." The architect was sued by the condominium owners for breach of contract, negligence, malpractice and fraud. In New York, there is no common-law cause of action where the claim is predicated solely on a violation of the Martin Act. Plaintiffs claimed the architect knew, or should have known that its representations were false. In dismissing the claims against the architect, the Court held that, "Such alleged failure, however, cannot render the Architect defendants' actions fraudulent or negligent. A claim for fraud and negligent misrepresentation cannot be maintained where it is based on the failure to disclose facts in amendments which are required only because of the Martin Act." Therefore, those claims against the architect were dismissed. As to the breach of contract claim, the Court ruled that "a plaintiff who purchases a condominium unit is merely an incidental third-party beneficiary" to the developer's contract, who lacks standing and privity to sue the architect. The case is *Board of Managers v. 231 Norman Ave. Prop. Devel., LLC,* 2012 WL 3590767 (N.Y.Sup.).

. . . BUT IN CALIFORNIA, ARCHITECTS CAN BE LIABLE TO CONDO OWNERS DESPITE A DISCLAIMER!

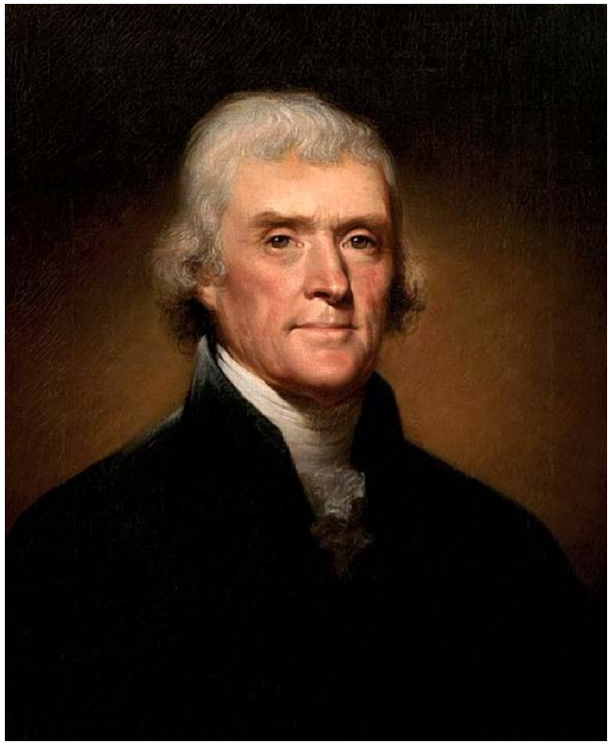
A condo association in San Francisco sued design firms SOM and HKS for negligent design, alleging various structural and HVAC issues. The A/E's filed motions for summary judgment, which were granted. but the Court of Appeals reversed holding that, "In considering liability of design professionals to third party purchasers of residential construction, we do not chart unexplored territory or view this case as truly a matter of first impression. The issue, as we view it, is not whether a design professional owes a duty of care to these purchasers, but the scope of that duty." The Court explained that in California, architects have a duty to "any person who foreseeably and with reasonable certainty may be injured" by negligent services, regardless of privity. The architect's contract disclaimed any third-party beneficiaries, but the Court held that the architects "were more than well aware that future homeowners would necessarily be affected by the work that they performed" and that, "a duty of care imposed by law cannot simply be disclaimed." Further, the Court found that under California's Senate Bill No. 800, a design professional who "as the result of a negligent act or omission" causes, in whole or in part, a violation of the standards . . . for residential housing may be liable to the ultimate purchasers for damages." *Beacon Residential Community Assn. v. SOM,* 2012 WL 6221728 (Cal.App. 1 Dist.).

ARCHITECT AND CONTRACTOR WITH COMMON OWNERSHIP, OFFICERS AND LOCATION ARE NOT "ALTER EGOS."

The owner of an apartment complex sued the contractor (TMT) and architect (TMTA) for negligence, fraud, and breach of contract, specifically alleging that the two were "alter egos" of each other, warranting piercing the corporate veil. The trial court granted the defendants summary judgment, upheld on appeal. Despite the fact that the architect and contractor had overlapping ownership, a common officer, and common office space and facilities, the plaintiff failed to prove "complete domination and control" and that such domination was used to commit a fraud upon her. Since TMT was not a party to the contract, there was no basis for a breach of contract action. Also, the court dismissed the negligence claim against TMTA since it was merely an allegation that the architect negligently performed its contractual duties. As to allegations of fraud, there was no evidence that the architect made any misrepresentation and the only harm alleged, defective workmanship, related to plaintiff's claim for breach of contract. *Sass v. TMT Restoration Consultants, Ltd.,* 100 A.D.3d 443, 953 N.Y.S.2d 574 (2012).

RICO: ARCHITECT FOUND NOT LIABLE UNDER RACKETEERING STATUTE FOR SINGLE ALLEGED KICK-BACK.

In yet another residential lawsuit, the owner of an apartment co-op sued its architect (personally) and his firm for negligently over-certifying payment to the contractor (57% when work was just 25-30%) and for defective work. Based on allegations that the contractor paid kick-backs to the architect on jobs where it was selected, the owner sued the architect for bribery-based racketeering under the Federal RICO statute. The architect then moved for dismissal of the claims of RICO, breach of contract, professional malpractice, misrepresentation, and on its counterclaims for copyright infringement. As to the RICO claim, the appeals court held that since there was only a single alleged kickback, there was no "scheme to defraud," as required by RICO, thus defeating the required "continuity element of the RICO test." The RICO claim was, therefore, dismissed. As to breach of contract and malpractice claims, the Court held that when the two causes of action are based on the same allegations, seeking the same damages, such claims cannot co-exist. The claim of malpractice against the architect was allowed to remain. The case is *Oppenheim v. Mojo-Stumer Assoc. Architects, P.C.*, 2012 WL 3064868 (N.Y.Sup.).



Draft Social Media Policies With Care

By Joseph H. Jones, Jr., AIA, Esq.
Victor O. Schinnerer

The proliferation of social media has transformed the way people communicate with each other by allowing anyone to post whatever strikes their fancy, share comments and pictures with their network and, by extension, inform the whole world instantaneously. Design firms are increasingly using social media platforms as part of their business practices: checking social media to screen new employees and using social media tools as an extension of their marketing efforts to "tell their story" to existing and new clients. Social media is a fact of life and firms need to develop thoughtful policies regarding social media for their staff that are clear and in compliance with the laws that are in place.

Social Media Provides Resources and Dangers in Hiring and Firing.

Employers are increasingly checking social media websites to run background checks on prospective employees. It is generally recognized that applicants have no expectation of privacy with respect to information in the public domain; however employers have to be careful that they do not use that information to make decisions that are against the law. It is therefore important that background checks use this information fairly and that protected class information is not used to make employment decisions. In response to reports of job applicants being asked to disclose usernames and passwords to social media sites so that the prospective employer can review a prospective employee's private pages, several state legislatures have banned these practices. Firms should make sure that their policies are in compliance with the laws of their particular state. The general societal expectation is that employers should not seek access to information that would not be available without the prospective employee granting access to their account passwords.

Marketing through Social Medial Needs Guidance.

Recognizing that social media is one way for firms to tell their story to existing and potential clients, firms have started to embrace social media platforms, often posting material or encouraging employees to do so. Employees who in their scope of their employment post content to social media platforms need to have clear guidelines on the tone and content of the materials they can post. Because of confidentiality obligations, it is prudent to check with the client and review the professional services agreement before posting project-specific information. Firms should proceed on the assumption that anything posted on a social media platform is available to the public.

Employees Can Harm Firms through Social Media

Generally, employees have no expectation of privacy with respect to information they publish on social media sites. But they also should understand that their firm and the firm's clients have an expectation of confidentiality. While posting information about a client's project with the client's permission is reasonable, discussing a project or posting photographs of designs or final projects by a firm's employees is not. Confidentiality and security concerns usually preclude the casual posting of project information.

In addition, firms that regularly monitor information about them on social media sites may come across information posted by employees about the firm that is less than flattering. The National Labor Relations Board (NLRB) has recently issued guidance stating that employer policies on the use of social media by employees should not be so sweeping that they prohibit the kinds of activity protected by federal laws, such as the discussion of wages or working conditions among employees. ***(See next articles).***

Another issue that firms may face is an employee using social media to harass another employee. Regardless of the media where it takes place, any reports of harassment by an employee towards another employee have to be dealt with in accordance with your policy on discrimination and harassment.

Firms Need To Update and Enforce Policies.

Disciplining employees who post negative comments about the firm or inappropriate information about the clients of the firm or others in the firm should be handled with extreme caution. It is likely that because of the explosion of social media in the last few years, you have not assessed how you are currently using social media in your business practices. Firms should take stock of their current practices in regard to use of social media platforms and develop guidelines that reflect both their business practices and legal obligations.

NLRB Issues Controversial Guidelines on Social Media.

In January and May, 2012 the NLRB issued two memoranda to provide guidance to employers, employees and unions regarding social media policies. The memos have caused a stir among most companies who have read them, as what would appear to be reasonable corporate policies to protect either the company's image and reputation, or client confidences, have been declared illegal by NLRB. As an example, the NLRB found unlawful a policy that "offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline" as well as a policy that said, "when in doubt about whether the information you are considering sharing falls into one of the prohibited categories, DO NOT POST. Check with Communications or Legal to see if it's a good idea." The NLRB also found it unlawful for a policy to state, "Don't comment on any legal matters, including pending litigation or disputes." Drafting a Social Media policy in light of these guidelines is no easy task these days.

NLRB Rulings Void Social Media Policies.

On Sept. 7, 2012 a 3-person NLRB panel invalidated Costco's employee policies covering the use of social media. The panel ruled 2-1 that the employee policies were "too broad." The Costco employee handbook advised that employees should, "be aware that statements posted electronically (such as to online message boards or discussion groups) that damage the company, defame any individual or damage any person's reputation or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment." While the policy might sound reasonable, the NLRB panel ruled that employees could interpret the Costco policy as prohibiting Section 7 activity under the Act.

In a similar case, on October 12, 2012, an NLRB panel ruled 2-1 that a BMW dealer's "Courtesy" rule was illegal. The rule said that: "*Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership"* The NLRB said that the rule was unlawful because employees would reasonably construe its broad prohibition against "disrespectful" conduct and "language which injures the image or reputation of the Dealership" as encompassing protected statements that object to their working conditions. "A reasonable employee who wishes to avoid discipline or discharge will surely pay careful attention and exercise caution when he is told what lines he may not safely cross at work," the majority said.

LICENSING LAW:

Is "Incidental Engineering" An Architect's Property Right?

In many states, an architect is allowed to engage in "incidental" engineering, and not be accused of practicing engineering without a license. What constitutes "incidental" is not well defined, and the overlap between architecture and engineering has led to some local and even national disputes between the two professions.

A case in point is this 2012 Utah suit in which an owner was denied a building permit because the architect's plans lacked certified structural calculations from an engineer. The owner then hired an engineer to certify the structural design but the architect was offended and sued the City for harm done to him based on the City's "unauthorized restrictions on the scope of his architect's license." The architect claimed he had been denied a property right without due process because Utah licensing law permits a licensed architect to perform "incidental" engineering. The trial court threw the suit out stating that the City's rejection of proposed plans did not demonstrate a policy of limiting the plaintiff's practice of architecture, incidental to which he may engage in engineering. The architect appealed and lost. The Court of Appeals bypassed the issue of whether the requirement of an engineer's calculations was an arbitrary restriction of the architect's license or property rights, because the architect failed to exhaust his administrative remedies by appealing to the City's board of appeals. As a result, the suit was properly dismissed. *Van Frank v. Salt Lake City Corp.,* 283 P. 3d 535 (Utah App. 2012).

Utah Rule R156-3a-102(6)
"Incidental practice" means "architecture work as is incidental to the practice of engineering" as used in Subsection 58-22-102(9) and "engineering work as is incidental to the practice of architecture" as used in Subsection 58-3a-102(6) which:
(a) can be safely and competently performed by the licensee without jeopardizing the life, health, property and welfare of the public;
(b) is secondary and substantially less in scope and magnitude when compared to the work performed or to be performed by the licensee in the licensed profession; * * *

Editor's Comments:

A nationwide debate has been raging for years over whether engineers should be able to design buildings. There have been several court cases and attorney general opinions reaching different conclusions on the topic. See generally, *Engineering Licensing Laws & The Design of Buildings*, NSPE (1994). Some of you will recall that in January 1995, The National Society of Professional Engineers (NSPE) made news when it filed an anti-trust complaint with the DOJ that the architectural profession was restraining trade by adopting policies that prevent engineers from practicing architecture. In Missouri, for example, R.S.Mo. § 327.181 defines the practice of engineering as including "such architectural work as is *incidental* to the practice of engineering." Architects are permitted to perform "incidental" engineering under a similar statute. R.S.Mo. § 327.191(4). What does this mean? You will find a range of opinion from professionals across the nation. A suit was filed in 1997 in St. Louis seeking to define the overlap when a local official permitted engineers to seal architectural plans for permitting. Passions run high on both sides of the argument. The Missouri licensing board has historically had less than 2% of its cases dealing with a violation of "incidental practice." This is a gray area of the law, and intentionally so, because specific definitions of "incidental practice" are difficult to develop with industry consensus. The current approach is to examine violations on a case-by-case basis.

The Acceptance Doctrine – An Old Defense May Still Have Some Life!

In a 2012 California case, the architect got summary judgment in its favor because the owner accepted the project with obvious defects. In *Nieman v. Leo A. Daly Co.*, 210 Cal.App.4th 962, 148 Cal.Rptr.3d 818 (2012) a theater patron who fell on stairs sued the Santa Monica Community College District and its architect for negligence. The trial court granted summary judgment for the architect. At issue was whether or not the "completed and accepted doctrine" precluded an action for negligence against the architect for lack of contrast marking stripes on stairs as required by Code. The architect argued that it did not owe a duty of care to a third party like plaintiff when it supervises construction work in its capacity as an agent of the owner (although it does owe such a duty when it prepares the plans and specifications in its capacity as an independent contractor). The architect also argued that it could not be held liable because the work had been completed and accepted in June 2006, long before the accident. The appeals court agreed that under the acceptance doctrine, a contractor who completes work that is accepted by the owner, is not liable to third parties injured as a result of the condition of the work, even if the contractor was negligent. The sole exception is if the defect was latent or concealed. The Court found that lack of a tread marking was not concealed, and that "a reasonable inspection should disclose the striping called for in the plans and specifications is missing." Therefore, the architect was not liable once the project was accepted by the owner. The Court held that the architect's "negligence in performing the contract is irrelevant in application of the completed and accepted doctrine."

Editor's Comments:

In a November 2012 Colorado case (which rejected the Doctrine) the Court noted three reasons behind the Acceptance Doctrine: 1) lack of privity between the contractor and the injured third person; 2) the contractor has no legal control over the work once the owner resumes possession of the site or project; 3) the owner is presumed to know of any patent defects and thereby takes responsibility for them upon acceptance of the work. *Collard v. Vista Paving Corp.,* 2012 WL 5871446 (Colo. App. 2012).

As late as the 1950's, the majority of jurisdictions applied the Acceptance Doctrine (aka the "Completed and Accepted" rule, but it has since been repudiated in most states in favor of a "foreseeability rule." According to a 2007 Washington case (which abandoned the Doctrine), 38 states have rejected the Acceptance Doctrine. It may be more today. *Davis v. Baugh Indus. Contractors, Inc.,* 150 P.3d 545 (Wash. 2007). This makes the 2012 California case all the more remarkable, given the trend nationally to abandon the Doctrine as outdated.

WHAT ARE THE EXCEPTIONS TO THE "ACCEPTANCE DOCTRINE"?

When Arkansas abandoned the Doctrine in 1999, the State Supreme Court said, "better-reasoned view is that the accepted-work doctrine is both outmoded and often unnecessarily unfair in its application." *Suneson v. Holloway Const. Co.,* 992 S.W.2d 79 (Ark. 1999). States that have ditched the Acceptance Doctrine have generally adopted in its place Restatement 2d of Torts § 385.

In those few states that still apply it, there are several exceptions, including:

1) the work is a nuisance per se;

2) the work is inherently or intrinsically dangerous;

3) the work is so negligently defective as to be imminently dangerous to third persons. See, e.g., *Hollis & Spann, Inc. v. Hopkins*, 686 S.E.2d 817 (Ga. App. 2009).

The latter is known as the "humanitarian" exception in Indiana. *See, Bush v. SECO Elec. Co.,* 118 F.3d 519 (7th Cir. 1997).

Better Angel

By Timothy R. Twomey, FAIA, Esq.
RTKL Assoc., Inc.

"… all men are created equal … endowed by their creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness …" With this declaration, the world changed. It changed profoundly and irreversibly. When Thomas Jefferson voiced this declaration, he changed the very trajectory of human history. He proclaimed the deepest of human aspirations and dared to propose a government of, by and for the people founded upon such principals.

A unique man, at a unique time, in a unique part of the world, with a unique opportunity. And given that opportunity, and with the support of like-minded individuals, and exhibiting tremendous courage, he gave voice to the dreams of the millions of desperate souls then living and yet to be born, and challenged the foundations of human intercourse which had existed until that 4th day in July almost 237 years ago. He cast freedom's pole star into the heavens for future generations across the world to follow. And those generations have followed it ever since.

Was it possible that a people could conceive of themselves in such a manner, to structure their relations to bring about such a state of affairs? Could a people actually live according to such an ideal? Could he? I think it is virtually impossible today to fully appreciate the revolutionary impact those sentiments, boldly and clearly expressed, had upon the times and the people who lived within those times. As today's beneficiaries we take them too much for granted, since we've known nothing else, certainly for those in this land. But then - then it was fresh and full of hope. The hope of not just dreaming but of having it within your control to create a better tomorrow, and a still better tomorrow after that, for oneself, one's family and for future generations. I find this declaration more meaningful and hopeful and fruitful today than when I first read it so many years ago as a child. I hope you do to.

Of course, I was aware that Jefferson owned slaves, and that he owned them throughout his life. I always assumed he treated them reasonably well and understood that, like George Washington, he permitted many to go free over the course of his life. The popular narrative of Jefferson's life said so, it still does, and I believed it. I was therefore quite shaken and saddened when I read the recent Smithsonian magazine article by Henry Wiencek (October 2012) entitled *The Dark Side of Thomas Jefferson: A New Portrait of the Founding Father Challenges the Long-held Perception of Thomas Jefferson as a Benevolent Slaveholder*. It detailed an increasingly cruel and malevolent individual entirely at odds with his historical image. From one who so clearly and elegantly voiced that elemental hope of the ages, to one who, as the years wore on, increasingly went from mere silence on the issue of slavery to one who fully supported its existence, so much so that he calculated the annual financial profit to be derived from its existence at *Monticello* and, indeed, to others in the surrounding countryside. And the cruel and abhorrent treatment of his slaves increased as the number of slaves he owned increased over time. The article describes and catalogues the misery he brought upon those he possessed, so I will not repeat it here.

I could hardly bear to read the article it so shocked me. How could this be? How could this be! But, better that I did read the article then not to have read it at all. For life is better lived in all of its disappointments so that we better appreciate all we are actually given to enjoy.

Shortly after reading this disturbing article on what I can only describe as the maddening of Thomas Jefferson, my spirits were lifted when I read, first, Doris Kearns Goodwin's *A Team of Rivals: The Political Genius of Abraham Lincoln,* and then David Von Drehle's *Rise to Greatness: Abraham Lincoln and America's Most Perilous Year,* and then watched director Stephen Spielberg's magisterial new movie Lincoln. Each chronicles, in varying degrees and from differing perspectives, the unimaginable horrors of a war that divided the nation in two, brutally killed 600,000 of its citizens and maimed countless others, a staggering percentage of the still relatively young nation's population, set members of families against each other, desolated the economy and culture of almost half the country, and upended whole ways of life for both victor and vanquished alike. But more importantly, for me, they describe and made me feel the depth of devotion and the almost inconceivable emotional attachment that both Abraham Lincoln and all those fighting to preserve the Union held for the proposition first enunciated in Jefferson's transcendent declaration. You come to understand, as this nation's history since that war has made it possible to more clearly see, that that proposition means something so fundamental that a nation was willing to go to war and to sacrifice so many lives to preserve what it represents. The sins of the nation's forefathers, Jefferson chief among them, in not pursuing that proposition eventually had to be expiated in the blood and treasure of their descendants. In a way, Jefferson's devolution from egalitarian idealist to denier to others of the very rights he claimed for himself presaged the country's own moral spiral from its early days of self-reliance and resilience to near utter dependence on the sweat and consequent misery of others.

This nation is still fighting, more than 147 years after that great war, on many fronts, in many forums, mostly peaceful, but not always so, to more fully realize that original proposition.

In the *Gettysburg Address*, what is perhaps the most famous and moving 272 words ever recorded, Lincoln reminded the country of that proposition enunciated by Jefferson 87 years previously and rededicated the nation to that proposition.

And so, I came to realize that as deeply flawed as Jefferson may have been, he nevertheless followed the better angel of his nature when it was most important for him to do so. And in so doing, set the course for this country and greater mankind, to guide its messy and contradictory and oftentimes shameful and certainly never-ending journey to more perfectly realize the ideal of that proposition. I also realized more certainly than ever that words do mean something, that they are important, that they are powerful, that they can be acts of immense courage as well as embodiments of universal truths. They can set both hearts and the world on fire. In spite of his flaws, I am forever grateful to Thomas Jefferson for this great gift he gave to me and to all.

MEMBER PROFILE TIMOTHY R. (TIM) TWOMEY, FAIA, Esq.

The author of "Better Angel," Tim Twomey, FAIA, Esq., is Deputy General Counsel at RTKL Associates Inc., in Baltimore, Maryland. Tim has over 30 years of in-house counsel experience at large national and international architectural firms. Tim graduated with a Bachelor of Science in Architecture degree from the University of Southern California, a Juris Doctor degree from the University of California at Los Angeles School of Law, and a Master in Architecture degree from Harvard University. Tim served for eleven years on the American Institute of Architect's Documents Committee, including two years as its Chair, and was a drafter of the AIA's current versions of its design-build, integrated project delivery and general conditions documents.

MICHIGAN PASSES A/E ANTI-INDEMNITY AND COMPARATIVE FAULT LAW

Governor Richard Snyder gave the A/E community an early Christmas gift when he signed into law H.B. 5466 on December 22nd. The new law voids any indemnity clause in a contract for the "design, construction, alteration, repair, or maintenance of a building, a structure, an appurtenance, an appliance, a highway, road, bridge, water line, sewer line, or other infrastructure, or any other improvement to real property" under which the indemnitor agrees to indemnify another person or entity for their "sole negligence." The same law also provides that in public contracts, the public entity cannot require an A/E to "defend the public entity or any other party from claims, or to assume any liability or indemnify the public entity or any other party for any amount greater than the degree of fault of the Michigan-licensed" A/E. Good work by our friends in Michigan!

The law becomes effective March 1, 2013.