ISSUE 07 April 2014

QUARTERLY JOURNAL OF THE JEFFERSON SOCIETY

Monticello

Upcoming Events

- **Save the Date: Second Annual Meeting, June 25th!**

Join us for our second official membership meeting and election of officers and directors. See page 12 for details. RSVP to our event host, and TJS member Julia A. Donoho, AIA, Esq. at jdonoho@legalconstructs.com.

- **AIA Annual Convention, June 26-28, 2014, Chicago!**

The AIA National Convention, titled "Design With Purpose," is being held on June 26-28, 2014 in Chicago at McCormick Place. Join your fellow Jefferson Society members before, during or after the Convention at Chicago's great venues. This year's convention is very light on legal-related programs, with the following of interest:

New ADA Regulations, EL404 (June 27, 10:30-11:30 a.m.); Design-build: Contractual Relationships, Risks and Rewards, FR210 (June 27, 2-3:30 p.m.); Legal Issues Related to Sustainable Projects, FR306 (June 27, 4-5:30 p.m.); Project Delivery Trends: How State Legislatures Everywhere Are Shaping Your Future, SA206 (June 28, 8:30-10:00 a.m.).

Click below for the full Convention schedule:
http://convention.aia.org/event/schedule.aspx

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.

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

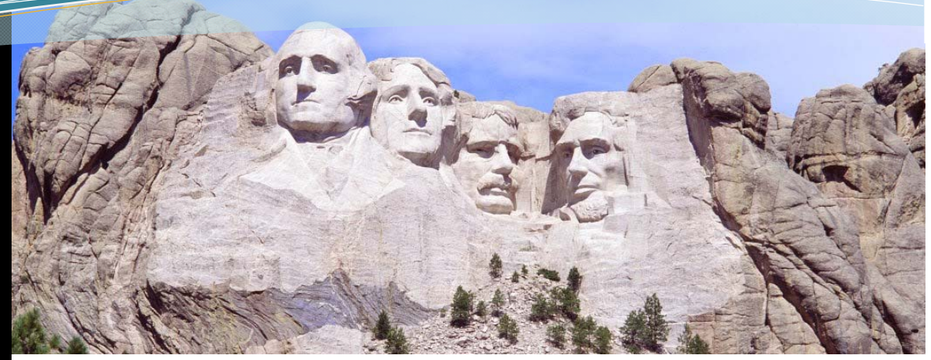
Send his or her name to President Craig Williams at cwilliams@hksinc.com and we will reach out to him or her. All candidates must have dual degrees in architecture and law.

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

JOIN US ON FACEBOOK & LINKEDIN

Want to connect with other members? Find us here.



After Dinner . . .

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

The second annual dinner and meeting of The Jefferson Society, Inc. will be held June 25 in Chicago at the Chicago Firehouse Restaurant. Those who attended the first annual dinner and meeting know what a unique gathering this will be. As we sat around a long dinner table, Past-president Bill Quatman asked each member to give a brief description of his or her journey through education in architecture and law, and architecture or law practice, or other career path; and, each member responded with individually unique and interesting tales of study, work, and personal relationships. It was obvious from the after-dinner conversations that developed that each member felt closely connected to architects, and the desire to promote better understandings by architects and lawyers of legal issues touching on the practice of architecture. Above all, each member was able to make personal contact with many others who have very unique, but uniquely similar, backgrounds and interests.

Thomas Jefferson was well known for his dinner parties and dinner conversations, one of his greatest pleasures being the "easy flow of after dinner conversation", as he once told his grandson. At his dinners, he abolished a the custom of drinking to the health of the dinner guests, called "healths" at the time. The reason for this is that this was a British custom, so it was considered offensive in post-revolution America.

Imagine yourself having dinner at Monticello. You may have witnessed a dinner such as the one described by British born architect Benjamin Latrobe, the second "Architect of the Capitol", who has been called the "Father of American Architecture". After his first dinner at Monticello, Latrobe wrote the following account to his wife: "Having employed my morning in my business I went to dine with the President. His two daughters, Mr. and Mrs. Madison, Mr. Lincoln (Attorney General), Dr. Thornton, a Mr. Carter from Virginia, and Captain (Meriwether) Lewis (the President's Secretary) were the party. The dinner was excellent, cooked rather in the French style (larded venison), the dessert was profuse and extremely elegant, and the knickknacks, after withdrawing the cloths, profuse and numberless. Wine in great variety, from sherry to champagne, and a few dec-

(continued on page 2)

Are Your Interns Exempt?

The U.S. Department of Labor (DOL) has identified the following six criteria for determining whether an internship program is exempt from paying wages:

1. **The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment;**
2. **The internship experience is for the benefit of the intern;**
3. **The intern does not displace regular employees, but works under close supervision of existing staff;**
4. **The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded;**
5. **The intern is not necessarily entitled to a job at the conclusion of the internship; and**
6. **The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.**

See, Dept. of Labor April 2010 Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act.

After Dinner . . .

(continued from page 1)

anters of rare Spanish wine, presents from Chevalier D'Yrujo. The conversation, of which Mr. Madison was the principal leader, was incomparably pleasant, and though Mr. Jefferson said little at dinner besides attending to the filling of plates, which he did with great ease and grace for a philosopher, he became very talkative as soon as the cloth was removed. The ladies stayed till five, and half an hour afterwards the gentlemen followed them to the tea table, where a most agreeable and spirited conversation was kept until seven, when everybody withdrew. It is a long time since I have been present at so elegant a mental treat. Literature, wit, and a little business, with a great deal of miscellaneous remarks on agriculture and building, filled every minute. There is a degree of ease in Mr. Jefferson's company that everyone seems to feel and to enjoy. At dinner Mrs. Martha Jefferson Randolph was asked by Mr. Carter to drink a glass of wine with him, and did so. Mr. Jefferson told her she was acting against the health law. She said she was not acquainted with it, that it must have passed during her absence. He replied that three laws governed his table - no healths, no politics, no restraint. I enjoyed the benefit of the law, and drank for the first time at such a party only one glass of wine, and, though I sat by the President, he did not invite me to drink another."

We are looking forward to again celebrating Mr. Jefferson's concept of dinner party, and intend to invoke two of his governing laws. I also expect more lively discussion regarding the future of The Society. If I were you, I would not miss dinner in Chicago.

Unpaid Interns & The "Black Swan" Case.

Each year, as summer approaches, college students begin applying for internships with architectural (and law) firms. Some of these students are willing to work for free just for the experience and the chance to show their skills to a potential employer. Many notable architects have had unpaid interns who work alongside the greats for "the privilege" of doing so. That line of thinking, however, is about to change based on some recent cases getting national attention.

The idea of exploiting willing students (or even graduates) seemed counter to ethical standards of the American Institute of Architects who, more than a decade ago, began requiring members who sought to become officers, directors, or Fellows of the Institute (or even to receive AIA awards or speak at AIA events) to confirm that they do not employ unpaid intern architects. Even after the economic downturn following the 2008 stock market crash, when employment opportunities for recent architecture grads plummeted, the AIA took a hard line on interns working for free.

Many grads who wanted to fulfill their Intern Development Program (IDP) training requirement in that market were willing to work for free, just to get the experience. Some architectural firms felt it was a "win—win" situation for the firm and intern, giving intern architects work experience in unpaid positions.

Generally speaking, however, the AIA warned that Federal employment laws prohibited that practice. See, G .Hancks, AIA, Esq., "Can Intern Architects Work for Free to Get IDP Experience?" *AIArchitect*, Vol. 16, July 10, 2009.

The topic made headlines last summer, when on June 11, 2013, the U.S. District Court for the Southern District of New York ruled that two unpaid production interns on the set of a motion picture should have been paid because they were essentially regular employees, not "interns" under the Fair Labor Standards Act ("FLSA"). The Court ruled that the employers had violated Federal and New York minimum wage laws by not paying the interns. The case sends a strong message, not only to the film industry, but to other businesses that rely heavily on unpaid internships, that the FLSA may require paid interns. The unpaid interns in the New York case worked on production of the film *Black Swan.* They filed a class action lawsuit against Fox Searchlight Pictures Inc. and Fox Entertainment Group, Inc. under the FLSA claiming that the employers violated federal and state labor laws by classifying them as "unpaid interns" instead of "paid employees." The parties filed cross-motions for summary judgment and the class representative moved for class certification of her claims. The District Court held that the interns were "employees" covered by the FLSA and New York law and allowed the class action to proceed. The case is *Glatt v. Fox Searchlight Pictures Inc.,* 293 F.R.D. 516 (S.D.N.Y. 2013).

One of the plaintiffs claimed that she and the members of her proposed class and collective action were "victims of a common policy of using unpaid interns to perform work that required them to be paid." Evidence showed that the interns performed routine tasks that would otherwise have been performed by regular employees. Even though the interns understood they would not be paid, the Court said, "[T]his factor adds little, because the FLSA does not allow employees to waive their entitlement to wages. The purposes of the Act require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act."

The ruling in "Black Swan" and other recent decisions serve as a wake-up call for architectural firms to re-evaluate unpaid internship programs to ensure compliance with the FLSA. While this type of litigation may have not yet hit architectural firms, it has affected other businesses.

In a 2013 New York case, unpaid interns at 20 different magazines sought class action status to assert claims under the FLSA and New York Labor Law. Evidence showed that since 2008, the publisher worked to reduce costs in response to the recession by hiring unpaid interns. Unlike the "Black Swan" case, however, the Court denied the class, finding that the plaintiffs failed to satisfy the "predominance" requirement for class certification, where there was no uniform policy among the magazines with respect to the contents of the internship, including the interns' duties, their training, and supervision. *Xuedan Wang v. Hearst Corp.,* 293 F.R.D. 489 (S.D..N.Y. 2013).

Television host Charlie Rose and his production company were sued by unpaid interns but settled the case by paying back wages of about $1,100 each to as many as 189 interns.

The U.S. Department of Labor (DOL) has identified six criteria for determining whether an internship program is exempt from paying wages. See the inset box on page 2. If your firm (or your clients) plan to have unpaid interns, be sure to review that list to limit a "Black Swan" action.

Editor's Note:

Are architectural firms the next targets for FLSA suits? We will have to wait and see.

Barko v. Halliburton: Lessons Learned to Preserve Attorney-Client and Work-Product Privilege.

By Susan McGreevy, Esq.
Stinson Leonard Street
Kansas City, Missouri

This article analyzes an opinion recently filed in the United States District Court for the District of Columbia, *Barko v. Halliburton*, 1:05-cv-01276 (D.D.C. Mar. 6, 2014) ("*Barko*"). In *Barko*, the District Court held that a government contractor's internal investigation reports were not privileged because the investigation was done pursuant to regulatory obligations under the Federal Acquisition Regulation ("FAR"), rather than for the primary purpose of seeking legal advice. *Barko* provides useful lessons relating to how best to conduct ethics investigations so that attorney-client and work-product privileges are more likely to be preserved.

The Barko Decision.

In this case, Kellogg Brown & Root Inc. ("KBR") was awarded a government contract to support reconstruction in Iraq, work that was subject to the FAR's ethics compliance requirements. Pursuant to these requirements, KBR's compliance program provided a process through which suspected wrongdoing could be reported to and evaluated by KBR's legal division. Accordingly, when KBR became aware of alleged misconduct in the award of subcontracts to a Kuwaiti company, an internal investigation was launched and reports were prepared. Following this investigation, a KBR employee ("Barko") filed a whistleblower lawsuit under the False Claims Act, asserting that KBR, among other entities, inflated construction costs through its subcontracts with the Kuwaiti company.

During discovery, Barko sought production of KBR's internal investigation reports regarding the alleged misconduct of the Kuwaiti subcontractor. KBR refused to produce the reports, relying upon the attorney-client and work-product privileges. Barko thereafter filed a motion to compel the production of the reports.

The District Court noted that "[i]n order to prevail on an assertion of the attorney-client privilege, the party invoking the privilege must show that the communication is 'for the purpose of securing primarily either (i) an opinion on law or (ii) assistance in some legal proceeding.'" In order to prevail on an assertion of the work-product privilege, the Court held that the document must be "prepared in anticipation of litigation." To meet this standard, "the lawyer must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable."

After reading the KBR investigation reports, the District Court held that the documents were not privileged. In so holding, the Court relied upon the following facts:

- The investigations were undertaken pursuant to a regulatory requirement (the FAR), rather than for the primary purpose of seeking legal advice under a threat of litigation;
- The investigation interviewers were non-lawyers;
- The witnesses were not informed that the purpose of the interviews was to assist KBR in obtaining legal advice or respond to litigation;
- The reports contained no mental impressions of lawyers in anticipation of litigation;
- The reports were created, in the ordinary course of business, as required by the FAR, and would have been created regardless of any litigation potential;
- The investigation was conducted several years before any litigation ensued; and
- The documents themselves were prepared by non-lawyers.

Also important to the Court's analysis was distinguishing the facts of the case from those of the Supreme Court case *Upjohn Co. v. U.S.*, 449 U.S. 383 (1991). Unlike in *Upjohn*, the investigation in *Barko* was routine, ongoing, and required by the FAR. In addition, the *Upjohn* investigation was conducted *only after* attorneys from the legal department had conferred with outside counsel on whether and how to conduct the investigation. In reading the District Court's opinion, one cannot help but suspect that the court was influenced in the vehemence of its language by the fact that it believed that counsel had not been forthright, such as in its discussion of the fact that a motion for summary judgment had been filed which represented that no evidence to support the complaint would be found in internal documents. The Court further made short shrift of the defendant's request that this memorandum be withheld from public view.

Lessons Learned.

The *Barko* opinion is fresh off the press and may or may not be affirmed on appeal. Nevertheless, a few lessons can be learned from *Barko* to make it less likely that a contractor will be required to disclose internal investigative reports under similar circumstances.

1. It may be advantageous to create guidelines that define those circumstances under which a referral for legal advice is needed during the claim-review process. For example, if an interview makes clear that an employee is considering litigation, outside counsel should be consulted to direct the remainder of the investigation;
2. Consider creating an optional process through which compliance investigations are conducted by internal staff attorneys or outside counsel. For example, claims could be pre-screened for litigation potential to determine whether attorney direction is needed to preserve privilege and obtain legal advice throughout the process;
3. To the extent certain investigations are considered a low litigation risk, the contractor should create guidelines limiting the documentation created, always keeping in mind that such documentation will not be privileged;
4. When legal advice is sought during a claim review, this fact should be clearly and prominently documented;
5. When conducting an investigation with a strong litigation risk, consider involving outside counsel. The *Barko* court determined that the investigation reports were not privileged, in part, because, unlike in *Upjohn*, outside counsel had not been involved prior to creating the reports.

Conclusion.

It is always important, when conducting internal investigations of misconduct, to keep in mind how created documentation may be beneficial or detrimental to future litigation. In the context of investigations required by the FAR, *Barko* reminds us that attorney-client and work-product privilege may not always be guaranteed. Nevertheless, some precautions can be taken to increase the likelihood of maintaining the confidentiality of investigative documentation. Specifically, setting up guidelines and procedures that clearly indicate when attorney advice should be obtained, and documented, helps to set apart documents of the privileged nature. Early attorney pre-screening of claims may also help to ensure privilege in the matters most likely to end up in court.

susan.mcgreevy@stinsonleonard.com

Jefferson Society Nears 90 Members !

As of publication date, there are a total of 88 Members. We welcome the following:

NEW MEMBERS:

Denis G. Ducran, AIA, Esq.
Satterfield & Pontikes Const.
Houston, TX

Joseph Di Monda, Esq.
Angelo & Di Monda
Manhattan Beach, CA

Bruce Ehrlich, AIA, Esq.
Ehrlich Group Law Office
Los Angeles, CA

William L. Erwin, AIA, Esq.
Andrews Myers, P.C.
Austin, TX

Calvin Lee, Assoc. AIA, Esq.
SOM
New York, NY

Richard M. Shapiro, Esq.
Farella Braun + Martel, LLP
San Francisco, CA

Scott Michael Shea, AIA, Esq.
Sherman & Howard
Denver, CO

Lloyd N. Shields, Esq.
Shields Mott Lund, LLP
New Orleans, LA

Carl T. Theil, AIA, Esq.
Jones Day
San Francisco, CA

NEW ASSOC. MEMBER:

Trevor O. Resurreccion, Esq.
Weil & Drage
Laguna Hills, CA

March 24, 2014: New OFCCP Regs Went Into Effect. Are You In Compliance?

For those of us working with or for firms that do Federal work, you should be aware of the new regulations initiated by the Office of Federal Contract Compliance Programs ("OFCCP") dealing with the hiring of veterans and of individuals with disabilities.

The new regulations affect Section 503 of the Rehabilitation Act and Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRA"). The Final Rules were published in the Federal Register on Sept. 24, 2013, starting a 180-day countdown until they became effective.

New VEVRA Regulations. Highlights of the VEVRA regulations include:

Hiring Benchmarks:

Contractors must establish annual hiring benchmarks for protected veterans, using one of two methods to establish their benchmarks: a) choose to establish a benchmark equal to the national percentage of veterans in the civilian labor force (currently 7.2%), updated annually by OFCCP; or, b) establish your own benchmarks, using data from the Bureau of Labor Statistics ("BLS") and Veterans' Employment and Training Service/Employment and Training Administration ("VETS/ETA"), as well other factors that reflect the contractor's unique hiring circumstances.

Data Collection:

Contractors must document and update annually several quantitative comparisons for the number of veterans who apply for jobs and the number of veterans they hire.

Invitation to Self-Identify:

Contractors must invite applicants to self-identify as protected veterans at both the pre-offer and post-offer phases of the application process. The new regulations include sample invitations to self-identify that contractors may use.

Equal Opportunity Clause:

When listing job openings, contractors must provide information in a manner and format permitted by the appropriate State or local job service, so that the service can access and use the information to make the job listings available to job seekers.

New 503 Regulations.

Section 503 of the Rehabilitation Act of 1973 prohibits Federal contractors and subcontractors from discriminating in employment against individuals with disabilities and requires these employers to take affirmative action to recruit, hire, promote, and retain these individuals. The new Section 503 regulations strengthen the affirmative action provisions. Federal contractors with a written affirmative action program ("AAP") already in place on the effective date (3/24/14) have additional time to come into compliance with the AAP requirements. Highlights include:

Utilization Goal:

Establish a nationwide 7% utilization goal for qualified disabled individuals. Contractors apply the goal to each of their job groups, or to their entire workforce if the contractor has 100 or fewer employees. Contractors must conduct an annual utilization analysis and assessment of problem areas, and establish specific action-oriented programs to address any identified problems.

Data Collection:

Contractors must document and update annually several quantitative comparisons for the number of disabled persons who apply for jobs and the number they hire.

Invitation to Self-Identify:

As with the VEVRA regulations, contractors must invite applicants to "self-identify" as Individuals with Disabilities ("IWD") at both the pre-offer and post-offer phases of the application process, using language prescribed by OFCCP. The new regulations also require that contractors invite their employees to self-identify as IWDs every 5 years, using the prescribed language.

The official regulations can be found at these links: www.dol.gov/ofccp/VEVRAARule and www.dol.gov/ofccp/503Rule

U.S. Supreme Court Clarifies Rules on Forum Selection Clauses in Construction Subcontracts.

It is rare for a construction contract case to make it to "The Supremes," but in a Dec. 3, 2013 ruling, the U.S. Supreme Court took up the enforceability of forum-selection clauses in subcontracts. The case involved a lawsuit filed by a Virginia subcontractor in Texas against a Texas contractor for non-payment on a project at a Texas Army base. Based on the subcontract clause which required all disputes to be litigated in Virginia, the contractor filed a motion to dismiss or, in the alternative, to transfer case to Virginia. The U.S. District Court for the Western District of Texas denied the contractor's motions on the basis that 28 U.S.C. § 1404(a) is the exclusive mechanism for enforcing a forum-selection clause that points to another federal forum; that the contractor bore the burden of establishing that a transfer would be appropriate under § 1404(a); and, that the Court would consider both public- and private-interest factors, only one of which was the forum-selection clause.

After weighing those factors, the trial court held that the contractor had not carried its burden. The contractor appealed to the 5th Circuit Court of Appeals, which upheld the lower court ruling. In a surprising move, the contractor appealed to the U.S. Supreme Court. Amicus briefs were filed by the American Subcontractors Association, the Chamber of the United States of America, and the Texas Civil Justice League, among others.

Justice Alito, writing for the majority in a rare unanimous decision, reversed the lower courts and remanded, holding that whether a venue is "wrong" or "improper" depends exclusively on whether the court in which case was brought satisfies requirements of Federal venue laws, irrespective of any forum-selection clause that may apply. The Court also held that the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of forum non conveniens.

The Supreme Court held that the Texas District Court had erred by improperly placing the burden on the contractor to prove that transfer to the contractually preselected forum was appropriate, instead of requiring the plaintiff-subcontractor (the party acting in violation of the forum-selection clause) to show that "public-interest factors overwhelmingly disfavored a transfer."

The Court also held that the trial court erred in its holding that public interests favored keeping the case in Texas "because Texas contract law is more familiar to Federal judges in Texas than to their Federal colleagues in Virginia." Judge Alito noted that Federal judges routinely apply the law of a State other than the State in which they sit, adding: "We are not aware of any exceptionally arcane features of Texas contract law that are likely to defy comprehension by a Federal judge sitting in Virginia." The case is *Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court*, 134 S.Ct. 568, 584 (2013).

Renew Your Dues Yet?

The Board of Directors has approved a modest renewal fee of $50.00 for each Member (both Founders and Regular Members) as an annual cost. You should have received an email from President R. Craig Williams, AIA, Esq., in late March about this. If you have not renewed yet, please forward your check (no $2 bills needed this time) payable to "The Jefferson Society, Inc." to:

D. Wilkes Alexander
2720 N. Stemmons Fwy
400 South Tower
Dallas, TX 75207

Thank you!!

MONTANA: Engineer Not Liable For Misrepresentation About Owner Paying.

On the first day of work, the contractor encountered differing subsurface conditions. The engineer's on-site representatives allegedly promised the contractor that it would be paid for the increased costs if the contractor could find offsetting savings. When the contractor submitted a written claim, however, the engineer denied it for failure to follow the contract notification procedures. Even though the contractor claimed that it had found offsetting savings, the county rejected the claim as well. The contractor sued the county and engineer for breach of contract, detrimental reliance, quantum meruit, and fraud. The Court held that the claim was barred for failure give written notice within 5 days of discovery (the contractor did not provide notice for 18 days). *JEM Contracting, Inc. v. Morrison-Maierle, Inc.,* 318 P.3d 678 (Mont. 2014).

Federal Rule 26 states, in part:

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

Discovery Disputes: "Clawback Provision" Upheld and Plaintiff Sanctioned!

Every lawyer worries that in producing records, whether in paper form or electronic, a privileged document might inadvertently get produced to the other side. As a result, parties often enter into agreed protective orders that require return of such documents. That was the situation in this case, which involves a trademark infringement action by a software company who claimed that its registered service mark of "RIPL" was violated when Google launched a new service under the name "RIPPLES." The parties had entered into a stipulated protective order which contained a "clawback provision" that any party may obtain the return of documents subject to attorney-client privilege by promptly notifying the recipient. Once notified, the recipient was to return all copies of the inadvertently produced privileged information to the producing party, or certify to the producing party that they have been destroyed or deleted. Google contended that documents subject to attorney client privilege were inadvertently produced in discovery and that plaintiff's counsel refused to destroy or return the documents. RIPL's lawyers argued that Google waived its right to assert attorney client privilege because its clawback request was not "prompt" as contemplated the protective order. The trial court cited to Fed.R.Civ.P. 26, which requires a party to "promptly return, sequester, or destroy the specified information and any copies it has." *(See inset, above).* The trial court rejected RIPL's claim of waiver of the privilege, citing to the protective order. As to whether Google acted "promptly," the court held that notice was provided one day after the disclosure was discovered and was therefore prompt. The court concluded that RIPL violated the protective order by failing to destroy or return the protected documents. Going a step further, the court granted Google's motion for sanctions for RIPL and its counsel's behavior in the form of attorney's fees and costs incurred to bring the motion to enforce the terms of the protective order. *See, RIPL Corp. v. Google Inc.,* WL 6632040 2013 (W.D.Wash. 2013).

LEGISLATION UPDATE:

"Peer Review" Law Pending in Kansas.

Kansas is about to become the second state to enact a special "peer review" privilege law for design professionals. H.B. 2246 passed the House 120-0 on February 21st, and passed in the Senate as amended by a vote of 39-1 on March 25th. The House and Senate are conferring over the changes, but the bill will likely be sent shortly to Governor Sam Brownback's desk for signature. You may recall that in 2012, Missouri became the first state to enact a peer review statute for design professionals. *(See Oct. 2012 issue of Monticello, p. 7).* The Missouri bill was first passed in 2011, but vetoed by Gov. Jay Nixon who felt the bill went too far. After several rounds of negotiations with the plaintiffs' bar, a revised bill was passed in Missouri and signed by Gov. Nixon in 2012. The Kansas law is broader than what Missouri passed and covers architects, landscape architects, land surveyors, geologists or engineers as "design professionals." It protects as privileged "lessons learned" – which includes "any internal meeting, class, publication in any medium, presentation, lecture, or other means of teaching and communicating after substantial completion of the project which are conducted solely and exclusively by and with the employees, partners, and coworkers of the design professional who prepared the project's design for the purpose of learning best practices and reducing errors and omissions in design documents and procedures." With limited exceptions, the reports, statements, memoranda, proceedings, findings and other records submitted to or generated by any peer review committee or peer reviewer "shall be privileged and shall not be subject to discovery, subpoena or other means of legal compulsion for their release to any person or entity or be admissible in evidence in any judicial or administrative proceeding."

The Kansas bill also protects peer reviewers from being sued, granting immunity from civil liability for such acts "so long as the acts are performed in good faith, without malice, and are reasonably related to the scope of inquiry of the peer review process." The immunity only applies to "outside peer reviews by a third-party design professional" who: a) is not an employee, coworker, or partner of the design professional whose design is being peer reviewed; and, b) has no other role in the project besides performing the peer review. Other states are watching what is going on in Kansas and Missouri. Does your state AIA or ACEC Chapter have plans to introduce a bill like this in 2015? Now is the time to start planning.

Patent Troll Legislation.

Senate Bill 1720 (S.1720), dubbed the Senate Patent Transparency and Improvements Act, was introduced in November 2013 by Sen. Patrick Leahy (D-VT) and was heard in the Committee on the Judiciary on Dec. 17, 2013. However, weeks of negotiation over a bipartisan bill meant to curb the negative impacts of "patent trolls" is nearing an end. Senator Leahy said the senators have "a broad bipartisan agreement in principle," but consideration of the bill has been delayed yet again until after the two-week Easter recess. The topic of legal fees has been the sticking point in negotiations, with Republicans looking to assess attorney's fees to the losing party, while Democrats fear that such a provision would chill the rights of those with legitimate cases from pursuing action.

The House passed its own anti-troll bill, H.R. 3309 (the Innovation Act) on Dec. 5, 2013 by a vote of 325 to 91. The House Bill requires courts to award prevailing parties reasonable fees and other expenses incurred in connection with such actions unless: 1) the position and conduct of the non-prevailing party was reasonably justified in law and fact; or 2) special circumstances (such as severe economic hardship to a named inventor) make an award unjust. The bill also directs, upon a motion of a party, to require another party to certify whether it will be able to pay any award of such fees and expenses in the event that such an award is made against it.

The United States Capitol, shown with Charles Bulfinch's original 140-foot high copper dome (circa 1846).

Have You Seen This Car? If you drive in the Madison, Wisconsin area you might see the unique tag of Marty Sell, AIA. Though not a lawyer, Marty has taught classes on design-build and is a past member of the AIA's Design-Build Knowledge Community Advisory Committee. TJS Member Bill Quatman took this photo when Marty passed through Kansas City earlier this month.

Colorado Court of Appeals Upholds Limitation of Liability Clause.

In this case, a subdivision developer/builder sued its geotechnical engineer (Terracon) and the grading contractor after homeowners complained about drywall cracks in homes. Terracon claimed that its contractual limitation of liability ("LOL") clause capped its liability at $550,000. The developer argued, however, that the Colorado Homeowner Protection Act, C.R.S. § 13–20–806(7) (the "Act") (enacted in 2007), voided all contractual limitations - even as against two commercial entities. Terracon moved for leave to deposit $550,000 into the court's registry, representing the maximum amount that the developer could recover from Terracon under the limitation of liability clause. In response to Terracon's assertion of the limitation of liability clause, the developer sought to amend its lawsuit to allege "willful and wanton conduct" for the sole purpose of attempting to overcome the limitation of liability clause. The court denied the motion to amend, but allowed Terracon to deposit the funds and then ruled that all of the developer's remaining claims against Terracon were moot and dismissed those claims with prejudice. The case then went to trial solely against the grading contractor who won a jury verdict. The developer then appealed the earlier ruling that let Terracon out of the case. An amicus brief was filed in support of the developer by Homeowners Against Deficient Dwellings ("HADD").

Despite the fact that there was no "homeowner" involvement in the lawsuit or contract, the developer took the position that the Act voided all LOLs, even between commercial entities. The Court of Appeals punted on that central question but in a January 30, 2014 decision ruled that, in any event, the retroactive application of the 2007 statute against a contract entered into years before was unconstitutional. The Court held that a contractual limitation of liability is a substantive right that cannot be changed retroactively.

The Act provides, in pertinent part that, "In order to preserve Colorado residential property owners' legal rights and remedies, in any civil action or arbitration proceeding described in section 13–20–802.5(1), any express waiver of, or limitation on, the legal rights, remedies, or damages provided by the Construction Defect Action Reform Act ... [is] void as against public policy." C.R.S. § 13–20–806(7)(a). In considering the impact of the Act on Terracon's contract, the Court said: "A statutory change is substantive when it creates, eliminates, or modifies vested rights or liabilities * * * Here, we see nothing in the record that would have put Terracon on notice that the limitation of liability clauses at issue could be invalidated."

Balancing the impairment of Terracon's vested rights against the public policy considerations behind the Act supported the Court's conclusion that applying the Act would be unconstitutionally retrospective.

The Court of Appeals remanded the case to the trial court for a determination of whether such evidence should have been allowed. If not, then the judgment in favor of Terracon shall stand affirmed, subject to the developer's limited right to appeal from that judgment.

Terracon's general counsel feels that it is almost a certainty that this decision will be appealed on to the Colorado Supreme Court. "But for now," says Michael Yost of Terracon, "it is binding authority in Colorado and good news for design professionals." See, *Taylor Morrison of Colorado, Inc. v. Bemas Const., Inc.,* 2014 WL 323490 (Colo.App.2014).

Survey Says: Contractors Make More Money Than Architects!

OK, so it's tax time and you just looked at your 2013 W2 from your law firm, construction or design firm, or insurance company. How'd you do? Are those three extra years of law school paying off, combined with your 5-6 years of architecture? Let's take a look at some recent salary surveys.

Engineering News Record reported in the March 24, 2014 issue that compensation packages for top executives at construction firms increased, on average, by 3.8% in 2013. By contrast, the AIA's 2013 Compensation Report reflects an increase of just 2.3% for senior design and project management staff at architectural firms, including base, bonus and incentive compensation. Citing to the 2014 Executive Compensation Survey for Contractors by Personal Administration Services, the *ENR* article showed the median base compensation for the President of a construction company to be $220,032, with median bonus of $133,500. For the Chairman of the Board, the total comp package topped $500,000 with median base pay of $316,500 and median bonus of $264,000. The AIA's 2013 Survey showed mean compensation for CEO/President of an architectural firm to be $131,800, with Managing Principals at $133,000. Not surprisingly, the contractors are making more money than the designers.

How About In-House Counsel?

General counsels did not fare badly either, with the 2014 Executive Compensation Survey for Contractors reflecting a median base pay of $192,550 and bonus of $86,000, for total comp of $278,500 for in-house attorneys working in construction firms. Not bad, but according to *Corporate Counsel,* the general counsel for General Electric Company took home $10.9 million in total cash compensation in 2012. *And he doesn't even have an architectural degree!*

Stepping outside of the construction industry, the *ABA Journal* reported in Sept. 2013 that general counsels and chief legal officers were paid average total cash compensation of $723,700 (men) and $575,200 (women), citing to a survey by ALM Legal Intelligence. Deputy chief legal officers earned $386,700 (men) and $316,400 (women) in the same survey.

Pick A Survey.

Inside Counsel quoted the HBR Consulting 2012 Law Department Survey as showing Chief Legal Officers and General Counsels earning average base salaries of $521,238 and $427,402, respectively, in 2011. The survey polled 260 companies across 21 industries. These numbers are for chief legal counsels, and may not reflect the typical in-house lawyer's take home pay, however.

The Robert Half Legal 2014 Salary Guide shows a salary range (from small- to large-sized companies) of $106,750 to $204,500 for in-house counsel with 4-9 years of experience, increasing to $121,500 to $245,750 for in-house lawyers with over 10 years of experience. These figures reflect an increase from 2013 figures ranging from a 3.7% increase for the most experienced lawyers at the largest companies to 2.5% for the least experienced attorneys at smaller companies.

The Chicago Firehouse Restaurant, on the corner of 14th Street and Michigan Ave., Chicago, site of the June 25, 2014 Annual Meeting

The Jefferson Society 2nd Annual Meeting and Dinner.

Planning to be in the Windy City for the AIA Convention? If so, then please join us for The Jefferson Society, Inc. 2nd **Annual Meeting of Members and Dinner** on Wednesday, June 25th, starting with a reception at 6:00 p.m., dinner at 7:00 p.m., and Annual Meeting to follow. The location is the West Room at **The Chicago Firehouse Restaurant,** 1401 South Michigan Ave., Chicago, IL 60605**.** The restaurant is in an attractive turn-of-the-century building that formerly housed the Chicago Fire Department and remodeled in 1999. The restaurant retained its charm with original tin ceilings, fire-glazed walls and brass poles. Located on the corner of 14th Street and Michigan Ave., the building was erected in 1905, designed by local architect Charles Harmann. The firehouse was built to serve the Prairie Avenue Community, whose residents consisted of many of the first families of Chicago, such as the Marshall Fields, the McCormicks, the Palmers and the Glessners. This unique firehouse, which is constructed of yellow brick and limestone stands in much the same condition today as when it was used as a firehouse. However, some interesting changes have occurred. The stables, which used to house the horses for the wagons, have now been replaced with a courtyard. The upstairs, which once had a large room to store the hay for the stables, later transformed to a handball court, has now been transformed to a banquet kitchen. The remaining part of the upstairs contained the living quarters for the firemen, where the movie "Backdraft" was filmed.

A special thanks to Jefferson Members Scott R. Fradin and Julia Donoho for planning of this event!

TJS MEMBER PROFILE: CARA SHIMKUS HALL, FAIA, Esq. Tulsa, OK

Architect-Lawyer Cara Shimkus Hall, FAIA, Esq. knew that she wanted to be an architect when she was in the 7the grade. "I was always interested in architecture and creating space," she said. So why law school? "Although I knew that I wanted to be an architect, I also knew that I wanted to do something with the law. After finishing architecture school and getting licensed, I still had a real attraction to the law. So after seven years of practicing architecture and *while* running an architecture practice, I went to law school at The University of Tulsa. It was a challenging three years but well worth the effort; I loved law school and found it fascinating!" Cara says that combining the two professions just came naturally to her. "They are both about solving or preventing problems, hopefully with elegant solutions."

That First Job. After graduating from The University of Oklahoma in 1989 with her B. Arch, Cara did what many architectural grads do . . . she immediately went backpacking in Europe for three months! "When I was offered a position upon my return," Cara said, "without having to do a resume or a portfolio, I took it! It was a terrific opportunity and I was allowed to learn and grow and challenge myself. I ended up staying with that firm for seven years."

After Law School. "When I started law school," Cara said, "I was a practicing architect with a firm to run. After law school, I was (and am) a practicing architect with a firm to run. Architecture is my first passion!" Cara's firm, GH2 Architects, is an award winning, international architecture and design firm located in Tulsa, with more than 40 years of experience in creating outstanding design. GH2 was named one of the hottest firms in the U.S. and Canada by The Zweig Letter "Hot Firm" List for 3 consecutive years and was included in the Inc. 5000.

AIA Activities. Cara keeps very active in local, state and national AIA events. In addition to her work as an architect and firm principal, she is the current Chair of the AIA Contract Documents Committee. Service on the Committee is a minimum of a ten-year commitment, and Cara will serve until the 2017 release of the Documents. Prior to her work on the Documents Committee, she served on and chaired the AIA Risk Management Committee. Cara has been active in the local AIA chapter, serving as Director, Treasurer, Vice President and President, as well as serving as Director on the Oklahoma state AIA component board.

The best part of your job? "My favorite part of what I do is working directly with clients to help them with their building programs." Perhaps the second best part of Cara's job is working with her husband of almost 22 years, who is also an architect as well as her business partner in GH2 Architects. "We have been working in the same firm, in the same office and within 10 feet of one another for most of the past 17 years!" Cara's favorite buildings are Pei's East Wing of the National Gallery of Art in Washington DC and Bernini's Baldacchino di San Pietro in Rome.

Her advice for a young architect considering law school? "Go. Go. Go. You will not regret it." Cara suggests that all young professionals get a good contact list application and keep it up to date. "Don't delete anyone or anything—ever. You will need it your entire life."

Cara Shimkus Hall, FAIA, Esq. is a partner in the Tulsa, Oklahoma architectural firm of GH2 Architects. She is a native Tulsan and she and her husband (her favorite architect) Michael R. Hall, AIA have two sons, Joseph and Alexander. Cara is the current Chair of the AIA Contract Documents Committee and is a Founding Member of the Jefferson Society, Inc.

What Really Drove YOU Into Architecture & Law? Your Myers-Briggs Profile

By Bill Quatman, FAIA, Esq.
Burns & McDonnell
Kansas City, Missouri

Like you, I wanted to be an architect, enjoyed art and sketching, but loved the intellectual challenge of design problems. I took an elective class in undergrad called "Business Law" and a light suddenly went on! What is this? I found each class fascinating, like nothing I'd ever heard in design studio or architectural history classes. Fast forward 35 years and I am now understanding why I, like 87 others of you, chose a career in architecture and law: I was born this way. Yep, stamped on my forehead at birth "Architect-Lawyer." OK, Bill, so just what the heck are you talking about? It's the Myers-Briggs personality profile, more commonly called the Myers-Briggs Type Indicator (or "MBTI"). If you've taken the test before, you know where I'm headed. It's in your DNA.

The MBTI.

The Myers-Briggs test is a "psychometric" questionnaire which measures psychological preferences in how people perceive the world and make decisions. Developed by Katharine Cook Briggs and her daughter, Isabel Briggs Myers, the personality profile test was first published in 1962. It breaks all personality types into 16 categories based on a number of factors. Are you an Extravert or an Introvert? Do you take in information more by Sensing, or by Intuition? Thinking or Feeling? See the box inset for the 8 factors, which combine for the 16 categories. No preference or total type is considered better or worse than another. As Popeye said, "I am what I am!" And we are what we are.

Architects – INTJs.

According to the book "MBTI Type Tables for Occupations," N. Schaubhut & R. Thompson (2008), and other studies I've read, most people who choose a career in architecture are introverts (53.6%). In his book "Looking at Type and Careers," Dr. Charles Martin, Ph.D. analyzed which personality types are drawn to various professions, as well as those professions least likely to attract certain personality types. Dr. Martin claimed that extroverts are rarely drawn to careers in architecture. They rank highest in "N" for Intuition (68.1%), "T" for Thinking (70.7%), and "J" for Judging (51.7%). Combine those traits and you have an INTJ, or an architect. Isabel Myers called the INTJ's "original, skeptical, independent, rational, detached." *OK, that's pretty much you, right?* INTJs find satisfaction in careers that use depth of concentration, logic and analysis, task orientation and ability to organize. These qualities often lead to executive and management positions. INTJs rank architecture as their top career choice, with careers in law a close second choice. The book "Do What You Are," P. Tieger & B. Barron (2007) says INTJs are "perfectionists," who are "logical, critical, and ingenious." They prefer to do things their own way. *Sound familiar?*

MBTI Dichotomies

Extraversion (**E**) – (**I**) Introversion

Sensing (**S**) – (**N**) Intuition

Thinking (**T**) – (**F**) Feeling

Judging (**J**) – (**P**) Perception

A close cousin to the INTJs are the INFJ personalities, who are drawn to careers in architecture and fine arts. They are attracted to professions which require deep concentration, creativity and organization. They are full of idealism and lofty goals, but are intensely individualistic and private persons. They need significant time alone in their work to focus on their ideas. According to Dr. Martin, "INFJs are found much less often in careers that are characterized by a great deal of technical work, attention to detail, work that requires realistic precision or production . . . They are also found much less often in careers that require more practical hands-on or mechanical work, or careers that may involve a significant amount of inter-personal conflict." Like INFJs, the INTJ needs quiet, even philosophical reflection prior to engaging in external tasks. According to Dr. Martin, "They pursue competence and mastering... whatever career they choose must have opportunities for learning."

Lawyers - ENTJs.

The MBTI Type Tables study found that unlike architects, more lawyers are extroverts "E" (55.8%) – *to no surprise*. But they share many traits of architects. In a sample of 3,258 attorneys, they were more often ranked highest in "N" for Intuition (56.6%), "T" for Thinking (69.7%) and "J" for Judging (55.1%). Isabel Myers called these ENTJ's "frank, logical, conceptual, assertive, innovative, direct." *OK, that's you too, right?* So, we have ENTJ's as the most common traits for lawyers . . . and INTJ's as the most common for architects. *Does anybody besides me see a link here?* Architects are just a chromosome away from being lawyers! The book "Do What You Are" says that, "ENTJs are great leaders and decision makers. They are ingenious thinkers and great long-range planners. Because ENTJs are so logical and analytical, they are usually good at anything that requires reasoning and intelligence." The book calls ENTJ's "natural leaders . . . who tend to live by a rather strict set of rules and expect others to do so as well."

Are You My Type?

Have you taken the MBTI? Got 15 minutes? Click here http://www.humanmetrics.com/cgi-win/jtypes2.asp

Let me know your results. It would be interesting to compile the scores (anonymously, of course) of Jefferson Society members to see if there are any patterns. Should be fun!

Email me your result at: bquatman@burnsmcd.com

TEXAS: Lack of Certificate of Merit Bars Two Claims.

In two 2014 Texas cases, the failure to file a certificate of merit resulted in dismissal of the lawsuit against a design professional. Tex. Civ. Prac. & Rem. Code Ann. § 150.002 requires that, "In any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party licensed [design professional]." In the first suit, the owner of rental property sued an engineering firm and its principals for fraud and civil conspiracy based on alleged false statements in engineering reports. The defendants moved to dismiss, which was denied by the trial court, but reversed on appeal. The Court of Appeals held that defendants' nearly 2-year delay in filing motion to dismiss, without more, did not constitute waiver of the certificate of merit.

In the second case, a pipeline service company sued an engineering firm for damages arising from a fire at a compressor station, claiming negligence in design and construction of station. The firm's motion to dismiss based on the failure of the plaintiff to file a certificate of merit was denied. The Court of Appeals reversed and the plaintiff petitioned the Texas Supreme Court for review. In upholding the dismissal of the lawsuit, the Supreme Court held that: 1) good cause did not exist for the trial court to grant an extension of time for the plaintiff to file the certificate of merit; and 2) the firm did not waive its right to seek dismissal of the suit even though its answer did not raise the issue of a certificate of merit as a defense, adding there is no waiver "where a per-son says or does nothing inconsistent with an intent to rely upon such right." The Court found that filing an answer and participating in discovery did not support waiver. See, *Foundation Assessment, Inc. v. O'Connor*, 2014 WL 880501 (Tex. App. - Fort Worth 2014); and *Crosstex Energy Services, L.P. v. Pro Plus, Inc.,* 2014 WL 1258307 (Tex. 2014).

Editor's Note: For more reading on Certificate of Merit statutes, see the new issue of *The Construction Lawyer,* ABA (Spring 2014), p. 34, for "A Survey of Certificate of Merit Statutes," which contains a 2-page chart listing COM statutes.

Even better, pull up the April 2013 issue of *Monticello*, page 10, for an more comprehensive listing of all Certificate of Merit and Screening Panel statutes in all 50 states.

http://thejeffersonsociety.org/monticello

TEXAS: Architect Not Liable For Misrepresentation About Flood Plain.

A property owner who purchased land in 100-year flood plain sued its architect and his firm for negligent misrepresentation, professional negligence, gross negligence, and fraud. The architect was granted summary judgment, which was upheld on appeal. The owner claimed that the architect failed to disclose that a large portion of the Property was located in the flood plain, and consequently, the property was not worth what it had appraised for. However, closing documents showed that the owner knew of the flood plain. The owner said: "You get a whole stack of documents," at closing, but the Court ruled: "A party who signs a document is presumed to know its contents." The Court also found that the architect did not provide any false information. *Collective Asset Partners LLC v. Schaumburg,* 2014 WL 1418109 (Tex.App.-Dallas 2014).

TEXAS: Architect Who Signed Certif. of Merit Need Not Be Expert In Type of Work at Issue.

After a man fell on stairs at an historic property, he sued the property owner, the contractor and the architect. As required by Texas law, a "Certificate of Merit" was attached to the lawsuit signed by another architect. The defendant filed a motion to dismiss, arguing that the expert lacked sufficient experience "pertaining to Historic Preservation." In his deposition, the expert admitted that he had never designed such a project, and was not familiar with the code provisions applicable to historic presservation. The trial court, denied the motion, affirmed on appeal. The Court of Appeals held that the certificate was sufficient, and that the architect supporting the certificate was not required to have knowledge of defendant architect's specialized area of practice. The Court found that the expert had been the architect of record on many commercial and residential buildings. *Gaertner v. Langhoff*, 2014 WL 1047028 (Tex. App. - Hous. (1 Dist.) 2014).

"Applicable Codes and Regulations" – Does This Clause Raise the Standard of Care? Yes! Says Florida Court.

There is a troubling new Florida case that will require AE's to rethink standard contract clauses to design "to applicable codes." The architect's contract in this 2014 case required (in three different clauses) that it would provide plans that complied with all applicable codes. A staircase had to be added after construction began due to a Codes Dept. official's disagreement with the architect's design. A peer reviewer had recommended the stair during preliminary design, but the Architect disagreed. The Owner (a school board) sued for the cost of the change order that added the stairs. The jury ruled for the architect based on the Florida standard of care, finding that architects do not guarantee a perfect result. The Court of Appeals reversed, however, holding: "Where an express provision within a professional services contract provides for a heightened standard of care, however, the professional must perform in accordance with the terms of the contract." The Court noted that, "If the professional contracts to perform duties beyond those required by ordinary standards of care, the quality of that performance must comport with the contractual terms. * * * In other words, an architect can contractually commit to perform under a standard of care higher than the common law standard." Judgment in favor of the architect on the staircase change order was reversed, and remanded for the trial court "to apply the standard of care agreed to in the contract, rather than the common law standard of care applicable to architects." The Court allowed the architect, however, to assert "betterment" as a defense to set off against damages. See, *School Bd. of Broward County v. Pierce Goodwin Alexander & Linville*, 2014 WL 1031461 (Fla.App. 4 Dist. 2014).

Editor's Note: It would seem that since building codes are adopted by local ordinance, compliance with codes would be part of the ordinary standard of care; therefore, a contract clause agreeing to comply with all applicable codes, laws and regulations would be no more than what is expected of any reasonable architect or engineer. The *Broward County* case, however, suggests that agreeing to such clauses can raise the standard of care. Does this call insurance coverage into question, in that professional liability coverage might be jeopardized by assuming (by contract) a higher standard of care?

Every professional liability insurance policy includes an exclusion something like this: *"This policy does not apply to any Claim or Claim Expenses based upon or arising out of any express warranty or guarantee."* The reason is simple: Underwriters for the insurance companies assess the risk of professional negligence, not perfection.

A warranty or a guarantee is an entirely different risk, defined by Webster as "an assurance for the fulfillment of a condition" or "an assurance of the quality." The margin of error for an express guarantee is zero. Courts do not expect perfection from design professionals, nor from doctors, lawyers or other professionals. But this does not prohibit someone from signing a contract that holds them to a higher standard.

In a 1982 case, for example, the Massachusetts Supreme Court stated, "An architect may provide <u>*an express warranty*</u> of a certain result. In that event, the plaintiff may maintain an action for breach of <u>*express warranty*</u>." *Klein v. Catalano*, 437 N.E.2d 514 (Mass. 1982). As the Florida Court of Appeals said in *Broward County*, in layman's terms, this means if you give someone an express warranty, you can be sued for that – whether you are insured or not.

As the Kansas Supreme Court stated: "Though professionals are liable for malpractice for breach of a legal duty, <u>*that does not preclude them from contracting*</u> to perform a duty higher than the one imposed by law." *Tamarac Dev. Co. v. Delamater Freund & Assoc.*, 675 P.2d 361 (Kan. 1984).

Question, however: Does agreeing to comply with applicable codes rise to the level of an express warranty? The jury did not think so, but they were instructed on the normal standard of care, not that the architect had warranted code compliance. *What do you think?*

NEBRASKA: Unlicensed Firms Held To Be "Professionals" Anyway.

A contractor was hired to build an ethanol plant located in Nebraska, subcontracting the engineering to PEI. A boiler exploded in Feb. 2007 and, later, the owner filed for bankruptcy in Nov. 2007. Three years later, the owner's claims were assigned by the bankruptcy judge to E3, who sued the contractor and PEI. Defendants argued that the claims were barred by the 2-year statute of limitations for professional negligence, while E3 claimed that the 4-year general statute applied as the defendants were not licensed engineers in Nebraska. The District Court granted summary judgment for both defendants, holding that, "[r]egardless of whether the Defendants held licenses at the time their services were rendered, the undisputed evidence demonstrates that they were providing services as engineers. Defendants, therefore, were professionals." Bankruptcy did not toll the statute. *E3 Biofuels, LLC v. Biothane, LLC*, 2014 WL 1096346 (D. Neb. 2014).

KENTUCKY: Claims Barred By 1-Year Statute of Limitations.

A property owner sued its contractor, architect, engineer and the developer over the design and construction of an oncology center that experience soil problems. A developer sold the property under the representation that the land consisted of "great lots" suitable for the construction. A geotechnical firm hired by the owner warned, however, that there was a risk of soil settlement which could result in damage. Another consultant recommended slope stabilization. After completion, there was settlement and cracking of the building. The owner first discovered cracks in 2008, but did not sue until Jan. 2010, claiming that some cracking was customary and no cause for alarm. The Court ruled, "Once the suspicion of harm arises, the aggrieved party must be diligent in disabusing himself of the unfounded concern, or confirming his sus-picion of wrongdoing," adding, "An aggrieved party cannot sit on his rights." Summary judg-ment was upheld in *Lore, LLC v. Moonbow Investments, LLC*, 2014 WL 507382 (Ky.App. 2014).