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Monticello

Our Mission

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

Inside This Issue

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

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

Send his or her name to President Mehrdad Farivar at mfarivar@mpplaw.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

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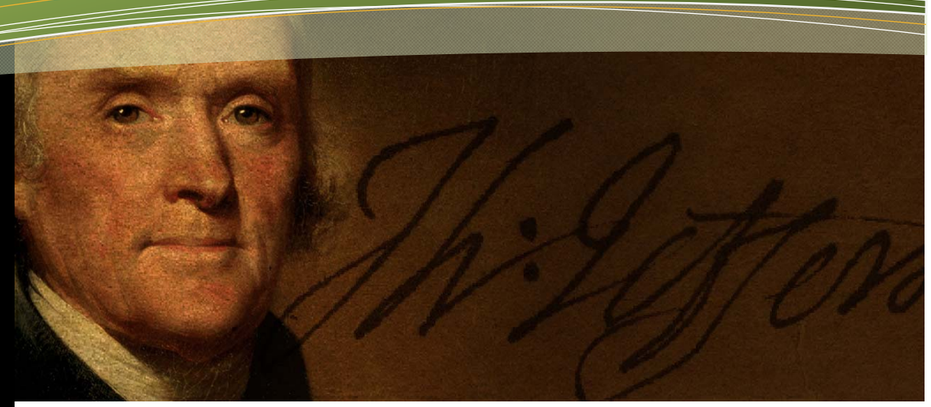

A Call for Advocacy!

By Mehrdad Farivar, FAIA, Esq.
Morris, Povich & Purdy, LLP

Energy and the environment are universal topics that architects have been professionally involved with for decades - perhaps years ahead of the general population. The impact, and sometimes entanglement, of policies and regulations in these areas are among the toughest challenges for legislators, policy makers, governments and, sometimes, courts and lawyers worldwide. In my travels this holiday season I witnessed an interesting example of how something as desirable and politically correct as renewable energy can have unwanted and unintended impacts that can unite entire towns and villages to oppose them.

The setting for the story is rural France, less than two hours from Paris, where I was visiting my sister, who is a longtime resident, over the Christmas holidays. This is the Isle de France Region, one of 60 or so autonomous local government subdivisions in France of which Paris, the national capital, is also the official regional capital. Each Region consists of a number of "Departments" and each Department, in turn, consists of a number of towns and villages. The area in question is a collection of 10 or so villages with populations ranging from a few hundred to about a thousand people each, that are all within a single "Department" in the Isle de France Region. These villages are peppered among large, expansive and generally flat and widely open farms, where wheat, corn and other similar staples are grown, as well as much smaller family owned dairy and cheese farms. This is the area that produces some of the finest "brie" cheese in all of France. The countryside is serene, pure and largely unspoiled by commercial and industrial buildings.

Like the U.S. federal government, the European Union has policies and financial subsidies aimed at creating and expanding renewable energy production facilities such as solar and wind farms. As a country that produces abundant electric power, mainly from nuclear power plants, France has a surplus of electric power which it exports. Perhaps as a result of not facing a power shortage, France is behind in meeting the quotas

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A Call for Advocacy
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that European policy makers have established for the construction of renewable energy plants, such as wind farms. The financial incentives for building these types of facilities are significant enough to motivate numerous companies to search for suitable sites to build them on, throughout France, including the Isle de France Region.

The owners of a farm in one of the 10 villages were approached by one such company for permission to conduct a study to determine if their farm was a feasible location for a wind farm consisting of just four turbines. Given the prospect of a potential steady monthly rental income, the farmers agreed to allow the study to proceed. The flatness of the topography in the area requires extra tall wind turbines of 120 meters in height (roughly 360 feet) in order to be effective - with the radius of the blades being approximately 30 meters (90 feet) long. The height of the wind turbines requires that they be spread over a large area, and an expansive concrete foundation for each wind turbine, that together cause a disruption in the continuity of the farm land.

The promoters of the wind farm conducted their study and concluded that the site was feasible. They applied for approvals from the regional government to proceed with the construction. That is when the residents of the ten villages became aware of what was about to happen and began mobilizing to evaluate the impact of, and eventually oppose, the project. Under the French local government laws, the regional government established a three person panel to undertake a "public inquiry"' - meaning hold public hearings and register the arguments for and against the project. The panel would visit the affected area and hold hearings there to allow the residents to testify and would report its findings to the regional governor, who would make the final determination on the application. That determination cannot be appealed, and can only be challenged through legal action.

The residents organized and divided the labor of investigating the potential adverse impacts of the project, which range from visual blight in the pristine countryside, to sickness in farm animals induced by the infrasonic waves created by winds hitting the blades. These waves are inaudible by human ear but audible, and extremely disturbing, to animals. Residents in a nearby village - not in the zone of the project - reported impacts such as significant reduction of milk in their milk cows as a result of the construction of a similar project.

On a very cold day, January 6, 2017, I took part in a caravan of approximately twenty cars driving at low speed through the ten villages with placards and visuals attached to them, and with the lead car inviting the residents through a handheld loudspeaker to attend a public hearing that evening before the "public inquiry" panel to register their opposition to the project. Most of the cars had bumper stickers showing a big "X" over the image of a wind turbine and saying: ***"Not in our village."*** The entire affair was beautiful. Seeing the residents, many of them elderly, organize to oppose what they view as a potential environmental blight supposedly built in the name of helping the environment, was seeing democracy in action at the very basic grass roots level. Several members of the group expressed pessimism that their effort could defeat the well-funded companies they were opposing, and said they wished they had the financial ability to challenge the project in court, if their effort at the public hearing failed to sway the decision in their favor.

After participating in the proceeding for most of the day, I came away thinking about the complexity of decisions impacting energy and the environment and the regulatory processes that are in place throughout the world to facilitate the making decisions that are in the best interest of the public and the environment.

Architect-lawyers are well equipped to be effective players in this arena, by virtue of their awareness of these topics, their skills as advocates, and their desire to have a positive impact on the environment and public life. Most land use and environmental decisions in the U.S. go through this type of process. The TJS has relatively few members involved in the land use /environmental arena. I know of only one in the Los Angeles area. This however is one of the most significant areas of law practice in which a practitioner with training and experience in architecture will have significant advantages, such as the ability to read plans, evaluate planning and architectural issues, interface with planners, developers, traffic engineers and public officials, and apply their advocacy skills as lawyers.

I would like to encourage more of our members, particularly those in the early stages of their career, to get involved in land use and environmental law. In fact it would be good for TJS to survey and document the areas of law practice in which our members are involved and the numbers engaged in each. This is how we can discover the practice areas in which we are underrepresented. I propose we undertake such a study and report the results to the membership in our next annual meeting.

The Making of Mount Rushmore

Abridged from *Smithsonian* (Oct. 30, 2011)

Finding a Sculptor

In the 1920s, despite the area's atrocious roads, a fair number of adventurous travelers were visiting South Dakota's Black Hills. But Doane Robinson, the official historian for the state had an idea to lure more tourists to the pine-covered mountain range that rises from the plains, taking to its rather atrocious roads. But Robinson wanted to entice more visitors to So. Dakota, which had been named a state just 30 years prior. "Tourists soon get fed up on scenery unless it has something of special interest connected with it to make it impressive," he said. He envisioned heroes of the American West — Red Cloud, Lewis and Clark, Buffalo Bill Cody, among others — carved into the granite "needles," named for their pointy appearance, near Harney Peak, the state's tallest mountain.

In Aug. 1924, Robinson wrote to Gutzon Borglum, an ambitious sculptor who was already carving on a granite cliff face in Georgia. "He knew that Borglum would have the skills and knowledge to get something like this done," says Amy Bracewell, park historian at Mount Rushmore.

Borglum, a son of Danish immigrants, was born in Idaho, spent his childhood in Nebraska and later studied art in California, Paris (with Auguste Rodin) and London. After returning to the U.S., Borglum entered a gold–medal-winning sculpture into the St. Louis World's Fair in 1904. He sculpted figures inside the Cathedral of St. John the Divine in New York City and a head of Lincoln that was prominently displayed by Theodore Roosevelt in the White House and, for many years, in the Capitol Rotunda. But when Robinson wrote to Borglum he was working on his largest project yet—a bas-relief of Confederate leaders on Stone Mountain in Georgia.

Borglum had managed to work out the technical difficulties of working on a sheer face of a mountain, in a massive scale, and was well into carving a figure of Robert E. Lee, when Robinson approached him about the assignment out West. At the time, tension was rising between Borglum and the Stone Mountain Monumental Association because while the sculptor sought to carve a whole army into the cliff, the association only had the funds for the frieze's centerpiece of Lee, Stonewall Jackson, Jefferson Davis and possibly a few other mounted generals. In Sept. 1924, just five months before the association fired him, Borglum made his first trip to South Dakota. He

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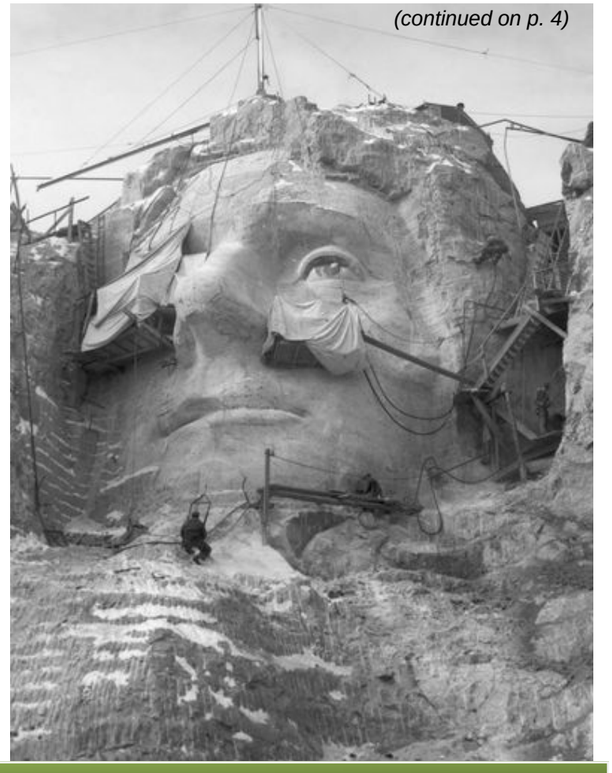


Making of Mt. Rushmore
(continued from p. 3)

was eager to start anew in the Black Hills. “I want the vindication it would give me,” he told Robinson.

When Borglum was in South Dakota, Robinson took him to see the “needles.” But the sculptor felt that the granite spires were too spindly to carve. Even if he could feasibly do it, Borglum told Robinson, “Figures on those granite spikes would only look like misplaced totem poles. We will have to look farther.”

A year later, in 1925, Borglum scouted the area surrounding Harney Peak for a mountain or piece of granite that was solid enough to hold a figure. “As an artist, he was very interested in light and making sure that the morning sunrise hit the face of the granite,” says Bracewell. A state forester led Borglum on horseback to three mountains he thought would be appropriate — Old Baldy, Sugarloaf and finally Mount Rushmore.

From all accounts, it seems that Borglum fell for Mount Rushmore at first sight. Its 400-foot high and 500-foot wide east-facing wall would serve as the perfect carving block, according to the sculptor. Hours after he laid eyes on it, Borglum told the *Rapid City Journal* that there was “no piece of granite comparable to it in the United States.”

The following day, Borglum and a few others climbed Mount Rushmore, Some members of the press and officials in Rapid City, the nearest population center about 25 miles northeast, were disappointed with Borglum’s selection, since it was in such a remote, roadless area of the state. But geologists approved. “They assured the sculptor that the ancient granite was extremely hard, and incredibly durable, and that the fissures were probably only skin deep,” wrote Gutzon’s son Lincoln Borglum.

Sculptor Gutzon Borglum died at age 73 and his son Lincoln took over in leading the project. (left) Each day, workers climbed 700 stairs to the top, then 3/8 inch thick steel cables lowered them over the front of the 500 foot face of the mountain in a “bosun chair” (above and right).

The Carving Process

Mount Rushmore was part of federal land, and with the help of Robinson and other heavyweight supporters, Borglum was able to get the mountain set aside for his project. The actual carving, funded at first by individuals and community organizations, began in 1927.

At Congressman Williamson’s urging, President Coolidge spent the summer of 1927 in the Black Hills. Impressed by Borglum’s vision, he invited the sculptor back to Washington, D.C., to discuss federal funding. By 1929, the Mount Rushmore bill was passed, ensuring that the government would provide up to $250,000, or half of the estimated cost of the memorial, by matching private donations. Over the 14 years spent constructing the memorial, funding was always an issue. In the end, the project cost nearly $1 million, about 85 percent of which came, according to Bracewell, from federal funds.

About 30 men at any given time, and 400 in total, worked on the monument, in a variety of capacities. Blacksmiths forged tools and drill bits. Tramway operators oversaw the shuttling of equipment from the base of the mountain to the work zone. There were drillers and carvers strapped into bosun chairs, and men who, by hand, worked the winches that lowered them. Call boys, positioned to see both the skilled laborers and the winch houses barked instructions to the winch operators. And, powder men cut sticks of dynamite to certain lengths and placed them in holes to blast out sections of the granite.

90% of the mountain was carved using dynamite. Borglum had used a massive projector at night to cast his image of Confederate leaders onto Stone Mountain; his assistant traced the shape with white paint. But at Mount Rushmore, Borglum mounted a flat-panel protractor on each of the presidents’ heads with a large boom and a plumb bomb dangling from the boom. He had a similar device on a model. “His crew took thousands of measurements on the model and then went up to the mountain and translated it times 12 to recreate those measurements on the mountain,” says Bracewell. In red paint, they marked off certain facial features, what needed to be carved and how deep. To remove the remaining three to five inches of granite, the carvers used a honeycomb method. They pounded small holes into the stone using jackhammers and with a hammer and chisel broke off the honeycomb pieces. “They would just kind of pop off because the holes were close together,” says Bracewell.

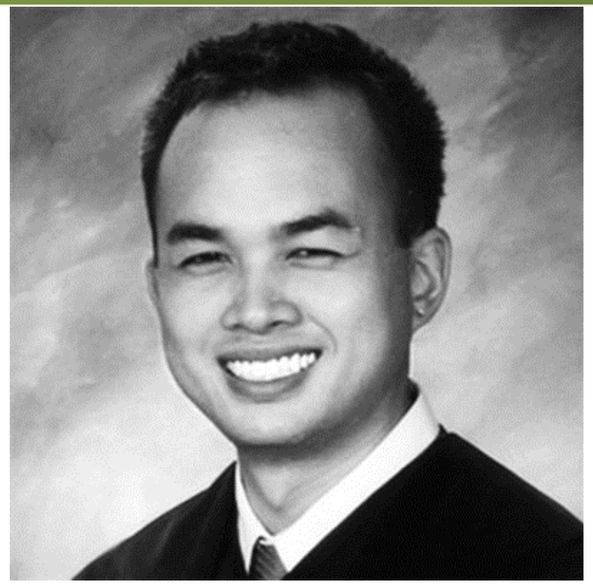
When all was said and done, 800 million pounds of rock had been removed. Incredibly, no one died in the making of the monument.

Over 2 million tourists visit Mount Rushmore every year, but, with new tools, such as holographic images for use in classrooms, the experience of the memorial with can now be shared with many more.

Jefferson was meant to be to the left of Washington, but when the crew started carving there, they realized the rock on that side was not well suited. They blasted him off and put him to the right of Washington instead. The shift ended up moving Lincoln’s head into the area intended for the entablature, which was never added.

MEMBER PROFILE: Calvin Lee, Esq.

WeWork
New York, NY



TJS Member Calvin Lee's parents both emigrated to the United States from Asia, his dad, Edward, from Hong Kong and his mom, Doris, from Burma (Myanmar). The family grew up in Brooklyn, New York, where his parents owned a restaurant in the Brighton Beach area for over 15 years. They now own their own business in the wholesale jewelry industry operating out of the Diamond District in Manhattan.

As a native New Yorker, Calvin thinks it is "the best city in the world." Not surprising, his favorite building is The Seagram Building on Park Avenue designed by one of his favorite architects, Mies van der Rohe. He is also a fan of Zaha Hadid's work.

Prior to his pursuits in law, Calvin studied architecture at the Bernard and Anne Spitzer School of Architecture at the City University of New York CUNY. At the same time, Calvin interned at the world renowned architectural design firm of Kohn Pederson Fox, more commonly known as "KPF."

Calvin was exposed to architecture early at Brooklyn Technical High School and realized it would provide one of the best and most well rounded educations. "The study and successful practice of architecture involves not only a keen sense of aesthetics and design," Calvin told us, "but also many socio-economic factors that influence the execution of a vision and project. He studied architecture at The Spitzer School as a member of the William E. Macaulay Honors College at CUNY, which provided Calvin with a full scholarship. He now sits on the Board of Directors of the CCNY Architectural Alumni Association.

After his graduation, Calvin continued his internship at KPF, where he had worked as an intern since his senior year in high school and through-out college. "I stayed on with KPF as a junior designer for approx.-imately a year and a half full time before going to law school." His work as KPF included various super-tall high end luxury buildings in Asia. Then, it was on to law school at Brooklyn Law School, where he graduated in 2010.

Why law? "To be honest, I originally decided to go to law school because I was feeling burned out from architecture and wanted to get into politics!"

The economic downturn starting in the mid-late 2000's forced him to capitalize on whatever specialty and background he had, so Calvin went into construction law and never looked back - nor had any regrets.

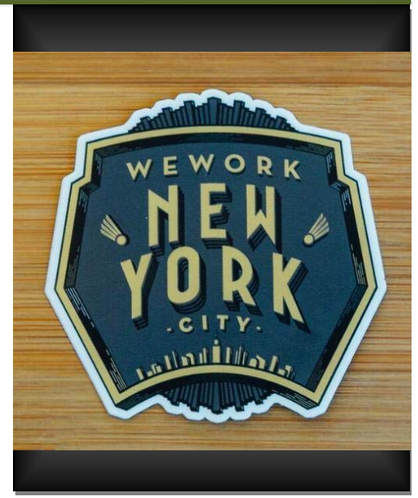
In addition to his J.D., Calvin earned an additional certificate in real estate law. During law school he interned at Zetlin & De Chiara LLP, a top construction litigation law firm. After finishing school Calvin practiced as a litigator at Z&D, primarily defending design professionals in complex construction claims. He then moved in-house, taking a position at Skidmore, Owings & Merrill in 2013, where he directly interacted with and advised the firm's partnership on various business and legal matters as well as negotiated all forms of agreements with clients and sub-consultants. More recently, Calvin left SOM to join WeWork as a corporate construction attorney.

When asked what's the best part of his job, Calvin said, "The opportunity to continue to work with design and construction professionals on a daily basis and to provide some training and guidance on the legal aspects of the profession."

As for hobbies, Calvin has a secret passion for food! He is a graduate of the Institute of Culinary Education in New York City (2007). In his free time, he continues to pursue his interest in the culinary arts. *(See photo to the left).* His love of food is, perhaps, surpassed by his love of architecture, which he says, "will always be one of my passions." He is also a sports fan, and plays golf and football, but adds, "I will play almost anything where you keep score."

Calvin is also a founding member and former vice president of Reading Empowers, Inc., a non-profit in New York.

When asked if he had any advice for a young architect thinking about law school, Calvin said, "The analytical problem solving skills and attention to detail that you learn in architecture school will be helpful in law school. However, be ready to read and write more than you ever have in your life. And when given the opportunity, write as much as you can in law school as it will become one of the most valuable skills you learn. Also, get some hobbies outside of law school and learn to maintain a work life balance because it can be just as bad architecture school / practicing architecture."



(Above) Calvin shows of his culinary skills in the kitchen with his mom, Doris, and brother, Lawrence; (Below) Calvin with two fellow CCNY Architecture Alumni Members at the CCNY Annual Alumni Dinner (from left Franklin Chuqui, Calvin Lee, & Jorge Plazas).

MEMBER PROFILE: Kesang Stefan Chin, R.A., Esq.

Miami, FL

TJS Member K. Stefan Chin is married to an architect, and the couple met in college, where they both attended architecture school at the University of Miami, Florida (which he calls "The U"). It was a technical drawing class in high school that led him into architecture and, eventually, to meeting his wife. "I enjoyed the work and I was intrigued by the creative aspect of building design," he said. Stefan selected "The U" because he has family who attended that school and because it offered a 5-year accredited B. Arch. Program that fulfilled the educational requirements for professional registration without the necessity of 2 years of graduate study. "And," he added, "because I enjoy the South Florida weather!"

It was in Miami that Stefan met Rita, who was also studying architecture at "The U." She is now a forensic architect. His first job out of architecture (and he adds, "my only architecture job after graduating") was at the firm of Bermello Ajamil & Partners, which at the time was one of Miami's largest architectural firms.

"I later decided to study law because I felt my thought process, work ethic, and personality lent well to that type of profession." In addition, since Stefan and Rita were both practicing architects, it was their consensus based on the market in 2004-2005 was that the young couple had too many eggs in one professional basket! "I chose Emory University in Atlanta because it is a highly regarded law school and because I thought it would be good to experience living and working in a different city and state." Apparently, Rita agreed.

Stefan says he was intrigued about combining the two studies because the practice of law encompasses a number of specialties. "I have been able to utilize my undergraduate education and experience in the profession of architecture to supplement my legal training and practice in the dynamic and challenging specialty field of construction law."

After getting his Juris Doctor, Stefan went to work for Peckar & Abramson's Miami office. He is a Florida Bar Board Certified construction lawyer with that firm, which is headquartered in New York and New Jersey, with offices in Florida, California, Washington, D.C., Illinois, Texas and Pennsylvania. He is also an NCARB - certified Florida Registered Architect.

As to the "best part" of his job, Stefan said: "No two of my cases are exactly alike; also, I get to use my architecture background almost daily while practicing law."

Stefan and Rita have a 4-month old baby girl (whose Godparents are both architects from his class at "The U"). They also have a 7-year old female Doberman Pinscher named "Mila." (photo, upper left).

When not practicing law, Stefan enjoys playing guitar, which he has done for more than 21 years, as well as writing music in his spare time. "I was in a band in my last year of law school," he added, "and we played a set for the incoming 1Ls."

Stefan and Rita love Miami, a vibrant city which he says is "a melting pot of cultures including from South America, the Caribbean, Europe, and elsewhere. It's a great city to live in if you understand the ins and outs and have good friends and family nearby. You can work hard and, if you wish, play hard as well. It's also as crazy as you have heard and seen in the news!"

As for any favorite building that inspires him, Stefan cited to Wright's masterpiece "Fallingwater," in Mill Run, Pennsylvania, and, more recently, the contemporary Kloof Road House by Werner van der Meulen, in Johannesburg. "I could see a guitar in every space of that house," Stefan added.

(Above, left) Stefan Chin and his wife, Rita, enjoying some shave ice in Haleiwa, Hawaii. Stefan and Rita are both architects, who met in college at The University of Miami (the "U"). The couple has a 4-month old baby daughter; (Right) Stefan playing guitar at a friend's wedding.

As for advice for a young architect thinking about law school, Stefan said: "Do your homework and really give it some thought, since it's almost like learning a new language. Speak to some lawyers and perhaps some law students to get an idea of what to expect, especially if you have been out of school for some time. Consider whether you would be interested in practicing construction law; if so, once you have the chance to select your law school courses, try to take as many as you can which relate to or may be transferable to construction law practice (*e.g.*, real estate law; ADR; commercial contract drafting)."

While in law school, Stefan served as Assistant Director of the Emory Mock Trial Society and represented Emory in national trial advocacy competitions. While a law student, he also served as a judicial intern for the Honorable Brenda H. Cole at the State Court of Fulton County, Georgia. Today, he remains active in the AGC, ABC and the Contractors Association of South Florida.

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ORLAIANDO!

AIA Convention 2017 in Orlando, April 27-29 Orange County Convention Center

This year's AIA Convention boasts over 50 unique educational tours throughout Central Florida. According to the Convention website, "A provocative lineup of celebrity speakers, an awe-inspiring array of tours, parties, exhibitors, seminars, and more." All happening in Orlando, nicknamed "The City Beautiful" and one of the world's most popular vacation destinations.

See more information at: https://convention.aia.org/Attendee/ShowInfo

TJS's Annual Membership Meeting in Orlando on April 26, 2017!

Mark your calendars and plan to join us in Orlando on Wed., April 26th, the day before the AIA Convention opens there. As we did last year, we will host a Member-only reception at a great venue, followed by dinner and then our Annual Meeting. We will have the election of officers for 2017-18, followed by an opportunity to discuss the future of TJS and anything on your mind.

Orlando has its famous theme parks, but is also home to must-see architecture by Frank Lloyd Wright, Bauhaus, and Calatrava.

Watch for the April issue of *Monticello* for the list of candidates for officers and directors. If you have an interest in serving on the Board, or as an officer, contact Mehrdad Farivar at: mfarivar@mpplaw.com

To help plan the Annual Meeting, contact TJS member Robert Alfert at: ralfert@broadandcassel.com.

See you in Orlando!

Architect and Mechanical Sub Shared a "Special Relationship"

In this 2016 case, a subcontractor (Penn Air Control) sued the general contractor (Bilbro) and its surety for payment on the subcontract and under the Miller Act for work performed on a $7.3 million design - build Navy project in Monterey, Calif. Bilbro filed a counterclaim against Penn Air and Alpha Mechanical, Inc. (Alpha) for the alleged failure to achieve noise levels that complied with those required for the project. Alpha then sued Bilbro and several design consultants, including the architectural firm (FPBA), alleging negligence. The architect, who was a subcontractor to Bilbro, filed a motion to dismiss.

Alpha alleged that under the design quality control plan, Alpha was required to submit its design - build plans to FPBA, the designer of record, and Bilbro, the prime contractor, for review and approvals; subsequently, Bilbro would submit the final proposal to the Navy for approval.

It was also alleged that even though Alpha had no contract with the architect, Alpha regularly received communications from the architect, either directly or as a forward by Bilbro.

After completion, the Navy noted that 23 of the rooms in the facility exceeded Navy's noise level requirements, although none of these 23 rooms were noted as a potential problem by Bilbro or FPBA during their review, revision and subsequent approvals of Alpha's proposed designs and equipment. Alpha alleged that FPBA was negligent by, "among other things, failing to meet the applicable standard of care due in performing their professional services, failing to properly inspect the designs on the Project prior to their approvals, failing to detect problems with the designs prior to the completion of the work, failing to retain properly-trained professionals, failing to effectively manage the job site and various subcontractors, failing to provide proper and effective solutions to address the elevated noise levels, and negligently performing services as described above."

Alpha sought damages in the amount of approximately $1.1 million for costs incurred due to additional labor performed and materials supplied for the project. The trial court noted that, "The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion," adding that "A duty of care may arise through statute, contract, the general character of the activity in which the defendant engaged, or the relationship between the parties." While acknowledging the economic loss doctrine, the court noted that even without privity of contract, the existence of a "special relationship" can give rise to a legal duty of care. To assess whether there is a "special relationship" in the absence of privity of contract, California courts balance six factors: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm.

In denying FBPA's motion to dismiss, the court concluded that Alpha had alleged facts sufficient to find that there was a "special relationship" between Alpha and FBPA because Alpha was contractually obligated by Bilbro to use FPBA's plans and there was no allegation that Alpha deviated from the FPBA-approved plans.

The case is *U.S. f/u/b/o Penn Air Control, Inc. v. Bilbro Constr. Co., Inc.*, 2016 U.S. Dist. Lexis 115809 (S.D. Cal.)

> "The people cannot be all, and always, well informed. The part which is wrong will be discontented, in proportion to the importance of the facts they misconceive. If they remain quiet under such misconceptions, it is lethargy, the forerunner of death to the public liberty.
> What country before ever existed a century and half without a rebellion? And what country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms. The remedy is to set them right as to facts, pardon and pacify them. What signify a few lives lost in a century or two?
> The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is the natural manure."
>
> - Thomas Jefferson to William Stephens Smith Paris, Nov. 13, 1787

MEMBER PROFILE: Ross C. Eberlein, R.A., Esq.

Thompson Hine LLP
Cleveland, OH

Ross Eberlein is an avid outdoorsman, who enjoys skiing, hiking, hunting, fishing and training his dog, “Atlas.” He is also a private pilot who enjoys flying and being a part of the great aviation community in Ohio (home of the Wright Brothers). He is also a registered architect and licensed attorney who works in his law firm’s Construction and Real Estate practice groups, both on the transactional side and in litigation. His formal education began with a five-year architectural degree from Iowa State University, the only five-year bachelor of architecture program in the Upper Midwest, which offered Ross a scholarship. ISU is also his mother’s alma matter, so there was a family connection.

Ross was on the college ski team (yes, Iowa State had a ski team). “During my college summers I also worked as a carpenter, which gave me skills and a love for construction,” Ross said, adding “that interest has led to many hours designing and building home improvement projects.” (See photo to right)

After graduation from ISU’s architecture school, his first job was in 2009, during the Recession, a tough year for the design and construction industries. Ross took a job as an intern with U.P. Engineers & Architects, Inc., a diversified firm in Michigan that offers full service engineering, architecture, planning, interior design and surveying. “I had good mentors there who helped me learn and navigate the intern development program,” Ross recalled. He got his architect’s license in 2011 and, today, he is licensed in three states: Iowa, Michigan and Wisconsin.

Ross decided to leave for Madison, Wisconsin, where he obtained his J.D. from the University of Wisconsin Law School, a school he selected due to its reputation for producing quality lawyers, its “law-in-action” philosophy that combines traditional legal curriculum with practical skills, and its affordable tuition. Wisconsin also had a family connection, as it trained both his grandfather and great - grandfather as lawyers.

Ross’s wife, Julie, who he met on the ski team at Iowa State University, with their dog “Atlas,” and one of the couple’s design-build projects.

It was his interest in real estate development that drew Ross into the law. “As an architect, I had the opportunity to work on projects with a budding developer and I soon realized that while my architectural skills could help design a great project and engage the community, there was a whole other set of skills necessary to make the project work that I didn’t have. I learned that navigating complex zoning requirements, tax incentives, financing and contracts (to name only some) required a lawyer’s expertise. I wanted those skills.” So he took a chance and packed up for three years of legal studies in Wisconsin.

During law school, Ross served as an intern to Hon. Presiding Judge Brian W. Blanchard of the Wisconsin District IV Court of Appeals. Ross was also a member of the Economic Justice Institute’s Neighborhood Law Clinic, a student litigation clinic engaged in landlord-tenant, public benefits and wage and hour disputes.

After graduating from law school, Ross began working for Thompson Hine LLP in Cleveland, Ohio, a firm with both vibrant real estate and construction practices, which was attractive to him. “Unlike many firms, these two practices are separate groups at Thompson Hine and we offer a full suite of transactional and dispute resolution services.” The firm is unique, in that it also has a wholly-owned subsidiary, “Project Management Consultants LLC,” which employs architects, engineers, and financial professionals, offering owner representative services and other complimentary management and planning tools to clients.

His practice at Thompson Hine includes both construction and real estate law. “I focus most of my time on transactional matters, but also work on disputes. In my short time with the firm thus far, I have worked on large and small domestic and international projects, including some of Cleveland’s own remarkable redevelopment,” he told us.

What’s the best part of his job? Ross said, “There are opportunities in many of my projects to share ideas and give advice that incorporate my expertise as both an architect and a lawyer. In addition to those moments, which are truly satisfying, I use the creative problem solving skills I learned as an architect in my legal work every single day.”

Ross is married to Julie, who he met while skiing competitively for ISU. “Both Julie and I went to school in the College of Design – where she was a fine arts major focused on metalsmithing and fiber work,” he said. Julie went on to earn her Master’s degree from the University of Wisconsin - La Crosse in occupational therapy while Ross attended law school. Julie is a lead therapist practicing at a skilled nursing facility in Cleveland. The couple has a German Wirehair, “Atlas,” with whom they enjoy spending time in the outdoors.

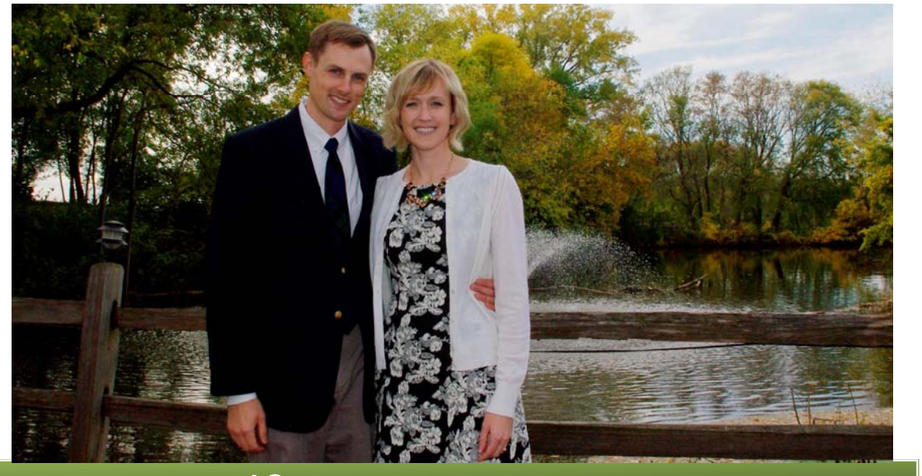
As a still - new resident of Cleveland, Ross says that he is continuing to become familiar with local community service opportunities for which he can be of use. “In the past, I have enjoyed working with Habitat for Humanity and I plan to do so again here in Cleveland. I also anticipate serving on the board of directors of a newly-created community land bank focused on delivering quality housing to low income families.”

Cleveland is a different place than it was 35 years ago, Ross told us. “There is a focus on redeveloping the urban core and continuing to attract the ‘eds and meds’ who drive the new economy in vibrant cities across the U.S. today.”

His favorite building is not in Cleveland, however. It is the iconic Flatiron (Fuller) Building on Fifth Avenue in New York City, a picture of which hangs in his office and is his favorite project by architect Daniel Burnham.

His favorite architect, however, is not Burnham, but Frank Lloyd Wright. “I appreciate the scale and details of well-designed and crafted residential construction. I am tall, however, and I don’t appreciate Wright’s insistence on designing door frames and ceiling heights for his own short stature!”

When asked for any advice for a young architect thinking about law school, Ross said: “Set goals early, and don’t wait to begin developing a strategy to reach them. These two areas of study - law and architecture - are terrific and can be extremely complimentary.” Ross adds that, “having both of these skills will make you unique, so determining how to translate your interests into a career that is fulfilling, will take some effort. It is worth it!”



Design-Build: Engineer Not Liable for Negligence, But Could Be Liable For Breach of Contract

The Minnesota Dept. of Transportation (MnDOT) issued a request for bids on a design-build highway-improvement project. Valley Paving contacted Stanley Consultants, an engineering firm, to help develop a bid by calculating the quantities of work necessary to complete the project. Although the two parties had no contract, Stanley provided quantity estimates for paving, milling, excavation, grading, fill, pipe-and-culvert work, pavement markings, and traffic signage. Stanley was not compensated for its work during the bid phase of the project. Shortly before the bid was due, Stanley's lead engineer on the project informed Valley Paving that he was 95% sure that Stanley's work - quantity estimates were accurate. ***[Spoiler Alert: They were not].***

Valley Paving used the Stanley estimates in calculating its low bid to MnDOT. After award, Valley Paving and Stanley entered into a formal subcontract to provide final design engineering services. That contract contained a warranty provision requiring Stanley to "conform to current professional engineering principles generally accepted as standards of the industry." The contract also included two notice provisions that required Stanley to inform Valley Paving of any errors in the MnDOT information or other contract documents, and of any event that might allow Valley Paving to seek a price increase on its contract with MnDOT. One of these provisions required Stanley to "notify" Valley Paving "[i]n the event of any conflict between or ambiguities in any documents which are part of this Agreement." The other required Stanley to give Valley Paving written notice of "the happening of any event which [Stanley] believes may give rise to a claim by [Stanley] for an increase in the Contract Price or in the scheduled time for performance, and for which [Valley Paving] may make a corresponding claim against [MnDOT] under the Prime Agreement."

After work began, an excavating sub (New Look) notified Valley Paving that its work quantities were far above what Stanley had originally estimated. This resulted in Valley Paving paying New Look significantly more as compared to Stanley's initial estimates. Valley Paving asked Stanley for an explanation and ceased paying Stanley, pending a resolution of the issues.

Valley Paving eventually sued Stanley for professional negligence during the bid phase of the contract, which resulted in the cost overruns. Valley Paving also claimed that, after it entered into the contract with Stanley, Stanley was negligent and breached the warranty and notice provisions of the contract by failing to notify Valley Paving of the cost overruns in a timely manner. Stanley counterclaimed for the fees owed under the contract. The trial court granted Stanley's motion for summary judgment, dismissing Valley Paving's claims and entering judgment in favor of Stanley on its counterclaim for fees. The Court of Appeals affirmed summary judgment on the professional negligence and breach of warranty claims, but not on the breach of contract claim. The Court of Appeals also reversed the trial court on granting summary judgment on Stanley's counterclaim.

Friendship Is Like Fine Wine:

"I find friendship to be like wine, raw when new, ripened with age, the true old man's milk and restorative cordial."

Thos. Jefferson to Benj. Rush
Aug. 17, 1811

The Court noted that under Minnesota law, "Architects, doctors, engineers, attorneys and others deal in somewhat inexact sciences and ... Because of the inescapable possibility of error which inheres in these services, the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals." As to the warranty claim, the Court held that: "The provisions of the contract that refer to warranty and quality of services, however, simply hold Stanley to the same standard of care applied by the common law in professional-negligence cases." The contract explicitly stated that the warranty "shall not be construed to elevate [Stanley's] standard of care ... concerning the quality of [Stanley's] services." However, unlike the negligence related claims, the breach-of-contract claim does not require the contractor to meet the professional-negligence causation standard. The contractor provided a precise calculation of the total amount of cost overruns. The case was affirmed in part, reversed in part, and remanded. *Valley Paving, Inc. v. Stanley Consultants, Inc.,* 2016 WL 2615956 (Minn. Ct. App. May 9, 2016).

(above) A "virtual" Thomas Jefferson appeared on the Daily Show to explain the purpose of the Electoral College to host Trevor Noah. Jefferson said: "we devised electors to ensure America would never elect a dangerous, charismatic lunatic."

Thomas Jefferson "Appears" on The Comedy Channel

On Dec. 7, 2016, the third president appeared on the Comedy Channel's "Daily Show" with host Trevor Noah to shed light on why the founding fathers chose to use electors instead of the popular vote. "In my day," Jefferson said, "we believed the common people were ill-informed and couldn't be relied on to reject a populist demagogue. So we devised electors to ensure America would never elect a dangerous, charismatic lunatic." Comedy host Trevor Noah then explained that the Electoral College was responsible for "a racist white guy" beating out "a more popular, more qualified woman." Host Noah conjured the "spirit" of Mr. Jefferson for answers. Jefferson's reply: *"Sounds like it's working perfectly. What's the problem?"*

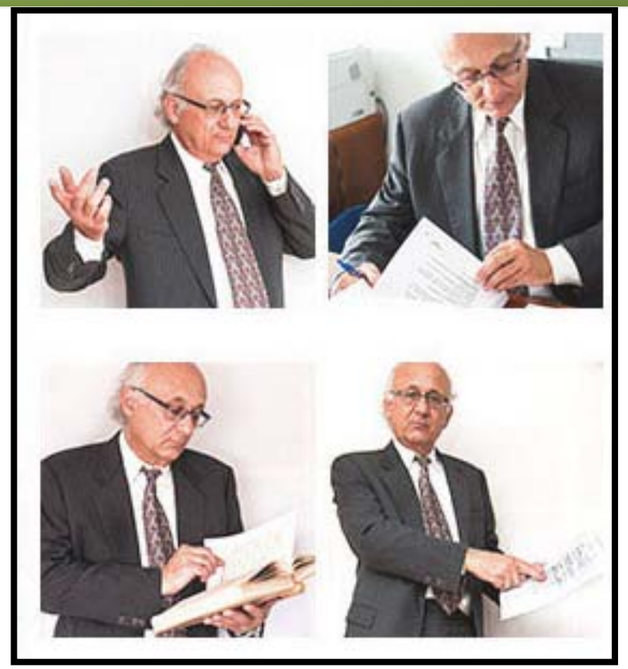
[Editor's note: Some claim that the founding fathers chose the Electoral College over a popular vote in order to balance the interests of high-population and low-population states. Others say the Electoral College stemmed from the fact that ordinary citizens across a vast continent would lack sufficient information to choose intelligently among presidential candidates. Whatever the reason, it is part of the U.S. Constitution, amended only once in 1804 (the 12th Amendment)].

MEMBER PROFILE: Joseph Di Monda, Esq.

Manhattan Beach, CA

New York native Joseph (Joe) Di Monda attended architecture school at City College of the City University of New York. He had graduated from Brooklyn Technical High School, which had a two year program in architecture which he took. "My High School diploma was both a regular HS diploma but also had a major in architecture," Joe told us. He grew up in an Italian neighborhood in the Big Apple, surrounded by lots of Italian immigrant craftsmen, stone cutters, masons, wood workers, etc., which triggered an interest within Joe in building at an early age. "I also had an uncle who was a comercial artist on Madison Avenue during the heydays of advertising in the 1950's," he told us. "Both influenced me."

Fresh out of architectural school, Joe worked as a young design architect for I.M. Pei and Partners in New York City. So why did this young architect decide to leave Pei and Partners to enroll in law school?



"I was the chair of the City of Hermosa Beach Planning Commission during the re-codification of the City's zoning ordinance," Joe recalled, "and the re-writing of its adult use ordinance after the U.S Supreme Court struck down most adult use ordinances as unconstitutionally vague. That caused me to work with the outside City lawyers and I found myself having to explain many zoning issues to them. My architectural practice at the time was mostly residential and when the dot-com bubble burst, so did the work."

While you might expect that Joe went to law school in NYC, you'd be 2,500 miles off. "I attended law school at Southwestern University School of Law in Los Angeles," he told us. "I found out that Southwestern University School of Law had a two year full time program, and I figured I could get a law degree while the economy worked itself out and then use it to help architects and the building industry."

When asked what had intrigued him about combining the two studies, Joe replied that he thought it would be an interesting specialty since Building Codes and Zoning Ordinances never get easier to understand." After his graduation from Southwestern University School of Law, Joe started his own law practice and has never worked for anyone other than himself since then!

Unlike many of the TJS members, whose practice involves construction disputes, Joe's practice focuses on catastrophic personal injury, paralysis, wrongful death etc., as well as insurance bad faith cases. His favorite part of the practice of law is handling his own appeals. "I enjoy arguing at the appellate level and have two published opinions, one of which involves constitutional issues related to land use."

Joe remains active in the AIA, and formerly served on the Board of Directors for the South Bay/Long Beach Chapter and is a Past-President.

He has two daughters, one still in college at Oberlin in Ohio, and the other working for an architectural firm in Los Angeles doing marketing.

When asked about his hobbies, Joe told us, candidly: "I love to drive fast, so I take my car to the various road course race tracks in Southern California. I also golf, ride my bike on the weekends and still use my home as a workshop. Seems like I'm always ripping something out and redesigning it."

(Above) TJS Member Joe DiMonda has a rather unique law practice, that focuses on personal injury, wrongful death and insurance bad faith; (Below) Joe found time to visit I.M. Pei's iconic pyramid at the Louvre with daughters Alessandra and Brianna.

Joe is a member of the Consumers Attorneys of Los Angeles as well as the Million Dollar and Multi-Million Advocates Forum. This native of New York now lives and works in another Manhattan: Manhattan Beach, California. "It's a small quiet beach community in the Los Angeles area, just south of Los Angeles International Airport (LAX). It's a big surfing spot, very different from New York City where I grew up."

Joe formerly owned a Sushi bar in Hermosa Beach for over 25 years, called "Sushi Sei." "It was basically a hobby that I went to after work," he said, "a very different experience than what I was used to while working in professional offices." The sushi bar caused Joe to become quite familiar with Japanese food and drink and he often attended the food/sake fairs put on by Japanese food companies and breweries. "I now have many friends in the Japanese / American community in Southern California and I travel to Japan often with my sushi chefs." Joe has done this so often that he is considering hosting an architecture/food tour of Japan, going to some out-of-the-way spots that Americans don't usually venture to. *Who's interested in going with him?*

When asked about a favorite building that inspires him Joe said, "Anything by Wright!" (referring to his favorite architect, Frank Lloyd Wright). When asked for any advice he might give to a young architect thinking about law school, he said, "As Nike says, Just do it! USC has a 4 year dual degree program combining different areas, one is law and planning."

Not My AIA! AIA's CEO Robert Ivy, FAIA Under Fire for Post-Election Comments

On Wed., Nov. 9th, shortly after the Democratic Party's nominee for president, Hillary Clinton, gave her concession speech in New York following the surprising Nov. 8, 2017 election of Republican Party nominee Donald Trump, the American Institute of Architects (AIA) released the following statement from AIA CEO Robert Ivy, FAIA:

"The AIA and its 89,000 members are committed to working with President-elect Trump to address the issues our country faces, particularly strengthening the nation's aging infrastructure. During the campaign, President-elect Trump called for committing at least $500 billion to infrastructure spending over five years. We stand ready to work with him and with the incoming 115th Congress to ensure that investments in schools, hospitals and other public infrastructure continue to be a major priority."

Mr. Ivy added: *"We also congratulate members of the new 115th Congress on their election. We urge both the incoming Trump Administration and the new Congress to work toward enhancing the design and construction sector's role as a major catalyst for job creation throughout the American economy."* He closed with the seemingly conciliatory note that: *"This has been a hard-fought, contentious election process. It is now time for all of us to work together to advance policies that help our country move forward."*

Ivy, the executive vice president and CEO of the AIA, came under immediate fire from outraged AIA members, forcing Mr. Ivy and Russ Davidson, FAIA, the AIA 2016 National president, to issue a joint video apology. The apology came after days of criticism directed at CEO Ivy from scores AIA members and academics who saw his memo as "tone-deaf" and complacent with the President-Elect's allegedly hateful and racist campaign tactics, as well as the incoming administration's refusal to acknowledge of climate change.

The recorded statement also follows an earlier, fumbled apology that was similarly-panned by the architectural community. Criticism of Ivy's support for Trump generated

strong condemnation from across the profession, with architecturally - focused advocacy organizations like QSAPP, Architecture Lobby, and even from local AIA chapters and affiliated groups writing letters in opposition to Ivy's statement. Prominent architecture firms and their principals also voiced strong outcry against the AIA's memo. In their apology video, Ivy and Davidson pledge to prioritize issues of diversity, equity, inclusion, and climate change moving forward and to embark on a listening tour to hear members' concerns more closely. One member of the College of Fellows posted a comment on-line stating: "Our collective voice is necessary irrespective of who is president or in any level of power but it is perhaps more critical now. * * * We have heard many things that would marginalize our stated Institute values. ***I refuse to be marginalized. Thomas Jefferson would have it no other way."*** Some AIA members have threatened to quit the Institute in protest.

[Editor's Note: the president and CEO of ACEC wrote a similar congratulatory letter to President - Elect Trump offering "hearty congratulations on your election." There was no similar blow-back from ACEC members!]

Michigan: Mechanical Contractor Had No Special Relationship with Architect

This 2016 federal court ruling arose out of disputes over work on a new cardio-vascular center hospital at the University of Michigan. The university hired the project architect, which hired a consulting firm to provide design services related to the mechanical, electrical, plumbing, and fire protection systems. The university also hired a construction manager who, in turn, subcontracted with O'Neil to serve as the mechanical contractor.

The prime contract between the CM and the university allowed the CM to pass through claims against it arising out of delays by the design professional. The subcontract incorporated a "flow-through" provision which incorporated the provisions of the prime contract into the subcontract. The architect's contract with the university contained similar dispute resolution and indemnity provisions.

The mechanical sub (O'Neil) filed suit against the CM and architect in 2006. However, the CM filed a motion to dismiss in favor of arbitration, which the trial court granted, staying the claims against the architect pending arbitration. In 2007, the sub filed for arbitration against the CM, and the CM filed for arbitration against the university for alleged design errors by the design team. While the arbitration was pending, in April 2009, trial court sub dismissed the claims against the architect without prejudice and ruled that the statute of limitations was tolled during the pendency of the litigation.

The arbitrations were consolidated and concluded in August 2010. O'Neil never pursued arbitration claims against the architect, but instead asserted a $19 million breach of contract claim against the CM for the implied warranty of accuracy and adequacy of the plans and specifications. Ultimately, the arbitrators issued an Interim Award in favor of O'Neil in the amount of $2.4 million. The arbitrators also found that the CM had failed to establish its claims against the university and that, therefore, the indemnity claims flowing through the university to the architect were also denied.

With that background, the mechanical sub (O'Neil) filed suit in federal court in May 2011 against the architect, asserting tort claims for professional negligence, tortious interference, and innocent misrepresentation. The trial court granted the architect summary judgment on res judicata grounds, which was reversed on appeal by the Sixth Circuit. On remand, the architect filed a motion to dismiss arguing that the claims are precluded by collateral estoppel, by the economic loss doctrine, and on their merits.

The court ruled in favor of the architect, finding that O'Neil failed to specify how the damages it now seeks differ materially from those considered and rejected by the arbitrators. "Only if the law recognizes a duty to act with due care arising from the relationship of the parties does it subject the defendant to liability for negligent conduct." The mechanical sub argued that the architect had a "special relationship" with it as a result of the critical importance of the design of the mechanical systems for a hospital, without regard for the consequences to O'Neil and future patients. The court rejected this theory. Under Michigan law, the heightened duties of a special relationship accrue only when "one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself." The trial court ruled that: "The Court has never held that the design professional - contractor relationship is one that triggers heightened duties, nor has it indicated that doing so would be appropriate."

The court also rejected claims of negligence per se, tortious interference, and innocent misrepresentation. As to the economic loss doctrine, the federal court declined to rule, stating: "This is a novel question of state law unresolved by the Michigan Supreme Court. Having already concluded that Plaintiff's claims are barred by collateral estoppel and that Defendants are entitled to summary dismissal on the merits, the court declines the invitation to wade into this complicated area of state law. Either of the other two grounds would alone warrant dismissal." The case is *W.J. O'Neil Co. v. Bulfinch*, 2016 WL 4158380 (E.D. Mich. Aug. 5, 2016).

[See pp. 10-11 this issue]

Copyright Case: Two Designs Can Have Same Footprint, But Not Be The Same Design

The Huangs intended to build a house and discussed this potential project with a principal of YS Built, LLC ("YSB"). The principal showed the Huangs a plan created by an architect but the parties failed to reach agreement on price. The Huangs later approached another builder ("Stanbrooke") about building their home. When YSB learned of this, it registered the copyright in their design to prevent the Huangs from using the plan to build with Stanbrooke. Working from the Huangs' specifications, Stanbrooke's designer drafted an alternative plan and the Huangs hired Stanbrooke to build their new house. YSB then sued for an injunction, claiming that the Stanbrooke Plan was an infringing copy of the copyrighted YSB Plan. The court noted that, "Not all copying ... is copyright infringement," but illicit copying may be established by showing "that defendant had access to plaintiff's work and that the two works are substantially similar in idea and expression."

Here, there was no question the Huangs had access to the YSB plan, so the sole issue was whether there was "substantial similarity" between the two plans. The Ninth Circuit applies a two-part test to determine whether a copy is substantially similar to an original work. First, the Court applies the "extrinsic test," an objective comparison of the two works that "often requires analytical dissection of a work and expert testimony." After engaging in this objective comparison of the original work and its alleged copy, the Court then applies the "intrinsic test," a "subjective comparison that focuses on whether the ordinary, reasonable audience would find the works substantially similar in the total concept and feel of the works." As applied here, the court found that the two plans shared some objective similarities in that they utilize some of the same individual architectural features. The parties presented the court with numerous drawings, as well as three-dimensional model, of each plan to aid in side-by-side comparison.

The court noted significant differences and, although there were similarities, in the court's opinion, "these changes substantially outweigh the similarities between the two plans." However, the court said that what is determinative for the court's decision is not only the differences between the individual characteristics of each plan, "but also the fact that the total concept and feel of each is not substantially similar." The court held that, "most, if not all, of the elements shared by the plans cannot be said to have originated with the architect, and are, therefore, not entitled to copyright protection. "The sharp lines and angular quality of both the [two] plans are attributable to their architectural style — contemporary. Elements taken from recognized styles from which architects draw are not protected by copyright. Likewise, design features used by architects because of consumer demand — such as a butterfly roof — are not entitled to copyright protection." Although the two plans shared a common "footprint," the court said "this copying does not denote infringement. The court finds that the footprint drawn into the [YSB] Plan is not a design element, but rather a functional one informed by building codes and the unusual topography of the lot. Injunctive relief was denied and the court said the Huangs were "free to construct their residence on the land purchased by them." See, *YS Built, LLC v. Huang*, 2016 WL 7375279 (W.D. Wash. Dec. 20, 2016).

Trouble in Pittsburgh: Part 2

In the October 2016 issue of *Monticello*, pp. 18-19, we reported on an insurance-coverage lawsuit between the Univ. of Pittsburgh and two insurance carriers, Lexington Insurance Co. and AXIS Insurance Co. The dispute arose from problems encountered during a construction project, for which the university had engaged Ballinger as its architect. When these problems resulted in a claim against Ballinger by the university, Ballinger reported a potential claim to its professional liability insurance carrier under policies it held with Lexington and AXIS, both of whom denied coverage. Litigation ensued when Ballinger sought a declaratory judgment that the insurers were required to defend and indemnify it against the claims. As reported in October, the trial court found for Lexington on summary judgment, holding that the notice of claim Ballinger submitted to Lexington was insufficient to trigger coverage under the Lexington policy's contractual terms. AXIS then moved for summary judgement on whether or not AXIS is required to defend and indemnify Ballinger. In a Dec. 8, 2016 ruling, the court held that AXIS was likewise not required to defend and indemnify.

Both the Lexington and AXIS policies are claims-made policies. In its "Coverage" section, the AXIS Policy provided that "[t]his insurance policy applies only when prior to the effective date of the first policy issued to you and continuously renewed by us, no principal, partner, director, executive officer, or any person whose signature appears on any application of yours had knowledge of any act, error, omission, situation or event that could reasonably be expected to result in a Claim." Ballinger became aware of problems with the project soon after construction began, and knew that they were reasonably likely to result in a claim being filed against it. On Jan. 31, 2012, Ballinger submitted a Notice of Occurrence/Claim to Lexington stating that there were "circumstances arising from its Professional Services at the Salk Hall Project that were reasonably likely to result in a claim being filed against [Ballinger]."

On March 5, 2012, Lexington refused to defend and indemnify Ballinger for any claims arising from the project due to insufficient information in Ballinger's notice of claim. Ballinger then notified AXIS on March 27, 2012, that "the insured feels strongly that a claim will be filed against it in this instance. As you will note, this matter has been previously been reported to Lexington, and they denied for the reasons set forth in the March 5, 2012 letter." AXIS argued that Ballinger's coverage claim fails in two ways: Either Ballinger's Jan. 31, 2012, submission to Lexington was sufficient to trigger AXIS's prior-notice exclusion (even if insufficient to comply strictly with Lexington's formal notice requirements) and therefore to bar coverage under the AXIS Policy; or a principal of Ballinger had knowledge sufficient to create a reasonable expectation of a claim prior to the beginning of the AXIS Policy period, such that coverage is precluded for that claim. The court agreed on the second point (avoiding what it called the "thornier issue" of the first point). The court said, "on the facts here, any reasonable juror would have to conclude that a principal of Ballinger had a reasonable expectation of liability prior to Feb. 1, 2012. This determination is sufficient to deny coverage under the AXIS Policy." An architect with Ballinger testified that prior to Feb. 1, 2012, he believed that a claim arising from delays in the project was "inevitable" and that there was a "possibility" that this inevitable claim would be against Ballinger because, inter alia, "there was likely to be a claim either asserted by the contractor against the owner or the owner against the contractor. And my experience is, you know, that if that were to happen, it's quite possible that the architect could get dragged into that." AXIS's motion for summary judgment was granted. See *Univ. of Pittsburgh v. Lexington Ins. Co.,* 2016 WL 7174667 (S.D.N.Y. Dec. 8, 2016).

This may not be the end of this saga. Stay tuned for more.

TJS Board members Bill Quatman and Donna Hunt ran into each other at the DBIA National Convention at Caesar's Palace in Las Vegas.

Maryland: Owner Sues Its Law Firm For Failure to Join Architect into Suit by Contractor

This unusual attorney malpractice case initially arose out a contract dispute between the owner (Al Jazeera International) and its contractor (Winmar, Inc.) who was hired to build a television studio and offices in Washington, D.C. The architect reviewed and approved pay applications on behalf of Al Jazeera during the project, including four applications totaling $1.8 million. However, Al Jazeera only paid one invoice due to questions about completion of the work. Winmar sent a notice of default, which triggered Al Jazeera's hiring an independent construction manager to review the status of the project. The CM concluded that Winmar had overbilled for work performed. As a result, the architect sent a letter to Winmar rescinding its certification for the three unpaid invoices.

To complicate matters, the construction lender made an erroneous payment to Winmar, which the contractor presumed was partial payment. The bank then sued Winmar to recover the erroneous payment. Winmar then sued the owner, who retained a law firm to file a counterclaim and defend against Winmar's claims. The law firm never called the architect to testify on behalf of Al Jazeera.

The trial court in the underlying case ruled in favor of Winmar for $1.47 million, plus attorney's fees and interest, finding that "Al Jazeera offered no evidence at trial showing how the Architect arrived at the decision to certify the Payment Applications ... In the absence of any evidence from Al Jazeera *that the Architect neglected its duties* under the Contract in making the certification decisions, the certified Payment Applications are the most reliable evidence of the services performed by Winmar in the periods covered."

Al Jazeera settled with Winmar for $2 million ***and then sued its lawyer***, claiming that the law firm failed to properly investigate the architect's role, including whether the architect breached its duty of care, thereby waiving factual defense to Winmar's principal claim: *i.e.*, that the certifications were *prima facie* evidence of the amount owed Winmar. The law firm filed a motion for summary judgment.

In the legal malpractice case, Al Jazeera took the deposition of the architect which the lawyers argued "would have cemented" the findings in favor of Winmar, thus justifying their decision not to call the architect as a witness. The court agreed on that point, finding that the law firm's decision not to depose the architect and not to call the architect as a witness, even if negligent, did not cause Al Jazeera's losses. However, as to the "case-within-the-case," i.e. whether the architect was negligent, Al Jazeera produced expert testimony from another architect who stated that Winmar did not complete the work it claimed to have completed at the time that it issued the payment applications, and that the architect's certification under these circumstances breached the duty of care the architect owed to Al Jazeera. The judge in the Winmar suit had accepted the certification by the architect "as the best evidence" that Winmar was owed payment and Al Jazeera's expert testified that but for the certifycations, Winmar would have owed Al Jazeera money – rather than vice versa!

The court agreed that Al Jazeera had a valid point here, and that the Winmar litigation, and the costs accompanying it, were an injury caused by the architect "no matter its outcome." Therefore, the law firm had not shown that they were entitled to summary judgment.

The law firm also claimed that Al Jazeera told them not to sue the architect because of their ongoing working relationship on numerous projects together worldwide at the time. Al Jazeera denied that allegation. However, the court ruled that a reasonable jury could find that the law firm had a duty to advise Al Jazeera that a suit against the architect was in its best interest, and had failed to do so. As a result, the law firm's motion for summary judgment was granted in part and denied in part.

The case is *Al Jazeera Int'l v. Dow Lohnes PLLC, et al.,* 2016 WL 7383874 (D. Md. Dec. 21, 2016).

Mississippi: A/E's Held Not Liable To Injured Workers

Four employees of a subcontractor were injured when scaffolding collapsed at a construction site. They sued the project architect, engineer, and property owner for negligence. The trial court granted summary judgment to all three defendants and the employees appealed. The Court of Appeals affirmed (see July 2016 issue of *Monticello*, pp. 14-15) and the employees sought a writ of certiorari from the Mississippi Supreme Court, which affirmed as well.

The Court of Appeals' decision to affirm the trial court adopted the seven-factor test used in a 1983 Kansas case (*Hanna v. Huer, et al.*, 662 P.2d 243 (Kan. 1983)), to determine whether an architect's supervisory powers go beyond the provisions of the contract. One of the issues in this case was scaffolding design work by Yates Engineering. It was undisputed that those plans were fundamentally flawed in that they contemplated using 24-foot posts, although wooden 4″x4″ posts are not available in that length. The scaffolding was not built per the plans (which was impossible) and collapsed during a concrete pour. As to whether an designers had a supervisory duty outside the provisions of the contract, the Court of Appeals had relied on the seven-factor test used in *Hanna*. The state Supreme Court held, "These *Hanna* factors are to be used as guidance and are not exhaustive. We also reaffirm our previous holding that for an architect to have an affirmative duty to warn of dangerous conditions, the architect must 'by contract or conduct' take on the responsibility to maintain the safety of the construction project." *McKean v. Yates Eng'g Corp.,* 200 So. 3d 431 (Miss. 2016).

Your Dues are Due, Dude!

It is that time of year again . . . TJS membership renewal. Our Treasurer, Donna M. Hunt, AIA, Esq., wrote to all the members in December to inform us that she was working to get PayPal set up to make everyone's life easier for dues payment. For now, however, we would appreciate if everyone submit their membership dues the old fashioned way, **by check via mail**.

The 2017 yearly membership dues fee is a mere Fifty Dollars ($50.00).

Please forward your check payable to "The Jefferson Society" to:

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There are a number of our members who have still not yet paid their 2016 or their 2015 *and* 2016 dues. If you are one of those members, please include an additional $50 for each unpaid year. If you are unsure whether you paid, please drop Donna Hunt a note at:
Donna.Hunt@ironshore.com
She will respond with any outstanding balance amounts. Thank you for your cooperation.

New York: Architect Liable For Failure To Get Amended Plans Approved

In this New York case, the owners of a landmark building sued their architect to recover damages for breach of contract and professional malpractice. The owners entered into an oral agreement with the architect to provide design services for construction. The architect failed to submit the amended plans to the planning commission. When construction was near completion, the commission determined that the construction did not comply with the plans that it had approved. Ultimately, the owners were required to demolish aspects of the construction. The trial court granted the building owners' motion for summary judgment and the architect appealed. The Supreme Court, Appellate Division, affirmed, stating that the plaintiffs established, prima facie, that the architect breached its contract and committed professional malpractice. "A claim of professional negligence requires proof that there was a departure from the accepted standards of practice and that the departure was a proximate cause of the injury," the Court said. Here, in support of this branch of their motion for summary judgment, the plaintiffs established that the defendant departed from accepted standards of practice in the architectural profession, which proximately caused injury to them. The case is *143 Bergen St., LLC v. Ruderman*, 144 A.D.3d 1002 (N.Y. App. Div. 2016).

The Day Thomas Jefferson's Daughter Told Him She Wanted to Become A Nun!

Thomas Jefferson was a Protestant, raised in the Church of England before the revolution. We can only guess at what Mr. Jefferson thought about having a daughter who wanted to become a Catholic nun! But, according to an article in *The National Catholic Register* (Dec. 10, 2016), that is exactly what happened. While Thomas Jefferson lived in Paris as a commerce commissioner, whose task it was to arrange an import/export trade deal with the French, his two daughters Patsy and Polly needed a proper education. Martha Washington Jefferson (1772-1836), nicknamed "Patsy," was in her early teens when she arrived in Paris, so one of Jefferson's first tasks was to find a suitable school in Catholic France for his daughters. All of his new French acquaintances recommended an elite convent school, l'Abbaye Royal de Panthemont in the Faubourg Saint-Germain. There the girls studied mathematics, history, geography, and they learned other languages.

Martha ("Patsy") Washington Jefferson served during 1801-1809 as "first lady" in the President's House, later known as the White House. She inherited Monticello from her father in 1826.

It was a splendid education, of a kind that very few girls received back in America. Jefferson's daughters also learned to play the harpsichord from Claude Balbastre, the organist at the Cathedral of Notre Dame.

In addition to operating a school, the nuns also offered rooms to aristocratic ladies who sought a quiet retreat from their troubles — the lack of a husband, the death of a husband, or the separation from a husband. Over time, the life of the nuns made an impression on Patsy Jefferson.

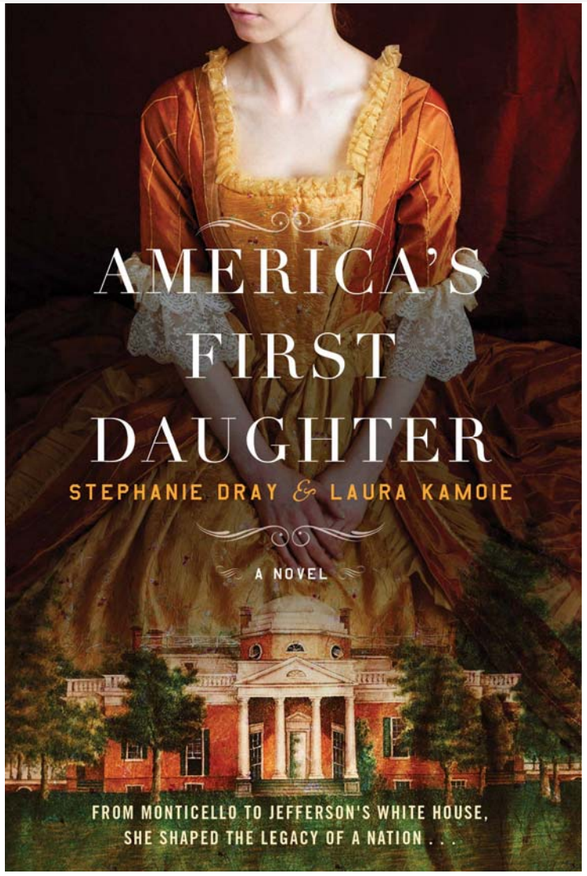
On April 18, 1788, Jefferson received a brief note from his daughter: Patsy formally requested her father's permission to join the nuns at the abbey. Jefferson sent no reply. Instead, he took Patsy shopping, spending more than one thousand francs on new clothes and shoes for her, and 48 francs for a ring. He also permitted her to attend balls and other entertainments. If his aim had been to make his daughter give up her dream of a religious vocation by enticing her with the pleasures of the world, it worked.

Patsy abandoned any thought of changing her religion and becoming a nun. Once the problem had resolved, Jefferson had himself driven to the Panthemont, and after a brief conversation with the abbess, withdrew Patsy and Polly from the school!

New Novel Profiles the Life of "Patsy" Jefferson

A new book released in March 2016 profiles the life of Thomas Jefferson's eldest daughter, Martha Washington Jefferson. The New York Times bestseller is a novel by authors Stephanie Dray and Laura Kamoie, that is described as a "compelling, richly researched novel that draws from thousands of letters and original sources." The authors tell the fascinating, untold story of "Patsy" Jefferson Randolph - a woman who kept the secrets of our most enigmatic founding father and shaped an American legacy.

The book's promotional materials state that, "From her earliest days, Patsy knows that though her father loves his family dearly, his devotion to his country runs deeper still. As Thomas Jefferson's oldest daughter, she becomes his



helpmate, protector, and constant companion in the wake of her mother's death, traveling with him when he becomes American minister to France."

The book is set in Paris, at the glittering court and among the first tumultuous days of revolution, where 15-year-old Patsy learns about her father's troubling liaison with Sally Hemings, a slave girl her own age. Meanwhile, Patsy has fallen in love - with her father's protégé William Short, an abolitionist and ambitious diplomat. "Torn between love, principles, and the bonds of family, Patsy questions whether she can choose a life as William's wife and still be a devoted daughter."

Her choice follows her in the years to come, to Monticello, and even the White House. "And as scandal, tragedy, and poverty threaten her family, Patsy must decide how much she will sacrifice to protect her father's reputation."

New California Laws in 2017!

Of the 1,059 bills passed in 2016, Gov. Brown signed just 898, resulting in a veto rate of about 15%. Here are a few of the new laws that go into effect in 2017:

Forum Selection Clauses and Choice of Law Provisions in Employment Contracts Voidable. SB 1241 prohibits employers from requiring employees who primarily reside and work in California to sign forum selection or choice of law provisions as a condition of employment. The law applies to claims that arise primarily in California and to agreements entered into, modified, or extended on or after Jan. 1, 2017. Any provision that violates the new law is voidable by the employee.

Fair Pay Act Protections. The Act prohibits an employer from paying any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work. SB 1063 amends the law to expand protections to employees who are paid less than other employees of another race or ethnicity.

Criminal History While a Juvenile. Two bills limit an employer's ability to inquire about an applicant's criminal history while the applicant was a juvenile. AB 1843 bars all such inquiries, meaning that even crimes of murder, rape, or mayhem may not be disclosed to an employer if those crimes were adjudicated by a juvenile court of law.

All-Gender Bathrooms Required. Effective March 1st, businesses are prohibited from labeling any "single - user toilet facility" as either "male" or "female," which covers any "toilet facility with no more than one water closet and one urinal with a locking mechanism controlled by the user."

Tougher Cell Phone Restrictions While Driving. AB 1785 prohibits operating a cell phone while driving unless used in voice-operated and hands-free mode, mounted on a windshield, dashboard, or center console and can be activated or deactivated with the motion of a single swipe or tap of the driver's finger.

Welcome to Our Newest Jefferson Society Member!

We welcome the following:

NEW MEMBER:

115. Lawrence M. Prosen
Kilpatrick Townsend
Washington, D.C.

Immunity for Design Professionals as Volunteers

By G. William Quatman, FAIA, Esq.

It seems with increasing frequency our nation suffers from natural disasters that leave victims without food or shelter. Good-natured volunteers rush in to assist, including architects and engineers who evaluate structures or help with temporary housing and utilities. But, being risk adverse by nature, design professionals have sought legislation to cloak themselves with "statutory immunity" in their role as a volunteers. As one court said: "Just as a charity might be reluctant to provide certain services and benefits if it knows it will be sued if it provides them negligently, prospective volunteers of the charity will be just as reluctant to volunteer their services if they know that they will be personally liable if they perform those volunteer services negligently." *Moore v. Warren,* WL 1031345 (Va.Cir.Ct. 1994).

In the past two years, bills have been introduced in New York, New Hampshire, Mississippi and Ohio with varying results. These new state laws and our new U.S. Congress suggest that we revisit this topic to see what developments have occurred in the states, and what might be accomplished at the federal level.

What Is a Good Samaritan Law? The name Good Samaritan comes from the biblical parable told by Jesus shortly after saying, "Love your neighbor as yourself." In Luke 10:30-37, the parable tells of a man who was attacked by robbers, stripped of his clothes, beaten and left half dead. A Samaritan stopped and took pity on the man, bandaged his wounds, placed him on a donkey, and brought him to an inn and took care of him. Jesus said at the end of the story, "Go and do likewise."

The first Good Samaritan statute was passed in 1959 in California. Since then, every state has enacted some form of legislation to protect various types of volunteers from liability for negligent acts committed while voluntarily providing emergency care. As one California court put it, "The enactment of Good Samaritan legislation represents the resolution of competing interests. On the one hand, there is an interest in the vindication of the rights of the malpractice victim. On the other hand, there is the need to encourage physicians to render emergency medical care when they otherwise might not. Where applicable, the legislation favors the latter over the former." *Colby v. Schwartz*, 144 Cal. Rptr. 624, 628–29 (Ct. App. 1978).

There are wide variances in these state laws, with some providing protection to a narrow class of individuals, such as licensed or certified medical professionals, while others protect a broader class of people. In at least 25 states, laws have been passed to protect design professionals who act as volunteers following an emergency or disaster. Those laws are summarized on the charts posted here at pp. 27-29.

Recent and Current Efforts. The state of New York has been trying for at least three years to pass a Good Samaritan law for design professionals. The current 2017 bill is N.Y. Senate Bill No. 2243 which protects engineers, architects, landscape architects and land surveyors from liability for personal injury, wrongful death, property damage or other loss when such professionals render voluntary services, without compensation (other than reimbursement of expenses) at the scene of a natural disaster or catastrophe. The bill covers only "a declared national, state or local disaster or emergency, whether natural or man-caused," when the professional is working at the request of, or with the consent from, a public official. The only conditions to qualify for immunity are that the professional was acting reasonably and in good faith within 90 days from termination of the declared emergency. The immunity does not apply, however, if the conduct involved "wanton, willful or intentional misconduct, or gross negligence." A similar Senate Bill 2160 passed the New York Senate 60-1 in 2016 but failed to get a vote in the House.

Last year, the Mississippi legislature considered House Bill No. 1317, titled, "the Good Samaritan Law for Architects and Engineers." The bill would have granted immunity to design professionals volunteering in an emergency, however the time within which the immunity applied was shorter than proposed in New York, and was limited to just 30 days after declaration of the specific emergency. Unfortunately,

State	Statute	Who's covered?	Exemptions
AL	§ 6-5-332(f)	licensed engineer, licensed architect, licensed surveyor, licensed contractor, licensed subcontractor, or other individual working under the direct supervision of the licensed individual	must act as a reasonably prudent person would have acted under the same or similar circumstances
			within 90 days after declaration of the emergency
AR	§ 17-15-106	registered architect or professional engineer	only applies to actions taken in good faith within the scope of their authority
AZ	§ 32-110	registrants volunteering professional services to emergency services personnel at the scene of a disaster as part of an authorized board program	only during the emergency or within 90 days following its end
			wanton, willful, or intentional misconduct
CA	§ 5536.27	licensed architects	must be acting in good faith; only excludes claims for negligence
			within 30 days of the declared emergency
CO	§ 13-21-108.3	licensed architects, professional engineers, land surveyors	gross negligence or willful misconduct
			during the time in which a state of disaster emergency exists
FL	§ 768.1345	any licensed professional	must act as a reasonably prudent person would have acted under the same or similar circumstances
			during the period of a declared emergency only
KS	§ 60-4201	licensed architects, professional engineers	must be acting in good faith; only excludes claims for negligence
			within 90 days of the disaster
			gross negligence or willful misconduct
IL	745 Ill. Stat. 49/72	professional engineers, architects, land surveyors, and structural engineers	willful and wanton misconduct
			during or within 60 days following the end of a disaster or catastrophic event
LA	§ 37:1736	architects, a professional engineers, or professional land surveyors	gross negligence, wanton, willful, or intentional misconduct
			only applies to services that occur during the emergency
MA	ch. 112, § 60Q	professional engineer, architect, environmental professional, landscape architect, planner, land surveyor or contractor, subcontractors and suppliers	wanton, willful or intentional misconduct or gross negligence
			during the natural disaster or catastrophe or within 90 days of its end
MD	§ 5-426	licensed architects	wanton, willful, intentionally tortious, or grossly negligent

(Volunteers, cont'd)

the bill never got to a floor vote in the House and died in committee. A similar state Senate Bill 2369 also died in committee.

Design professionals in two other states had better luck in 2015 in getting Good Samaritan laws enacted. The Ohio legislature passed House Bill No. 17 almost unanimously (96-1 in the House, and 31-1 in the Senate). The bill is broad and provides immunity not only to architects, engineers and surveyors, but to contractors and trades-persons who volunteer their services during a declared emergency. New Hampshire's legislature passed House Bill No. 292 in 2015, which granted civil immunity to licensed engineers and architects rendering assistance in an emergency in the absence of gross negligence or willful misconduct. The bill is limited to services that relate to "the structural integrity of the entire building or system or any portion thereof, or to a nonstructural element of the structure or system, affecting public safety." Like the proposed New York law, the immunity does not apply to gross negligence, or wanton or willful misconduct.

			only applies to services while a declared state of emergency is in effect
MO	§ 44.023	licensed architects, licensed engineers, building officials and building inspectors, construction contractors, equipment dealers and other owners and operators of construction equipment and the companies with which they are employed	willful misconduct or gross negligence
			must be part of an emergency volunteer program of the State
NC	§ 83A-13.1	architects	gross negligence, wanton conduct, or intentional wrongdoing; or operation of a motor vehicle
			services within 45 days after the declaration of the emergency or disaster
ND	§ 32-03-47	architects, professional engineers	wanton, willful, or intentional misconduct
			services within 90 days of the emergency, disaster, or catastrophic event
NH	§ 508:12-d	licensed engineers or engineering firms, licensed architects, or architectural firms	gross negligence, or wanton or willful misconduct
			services during the time in which the emergency exists
OH	§ 2305.2310	licensed architects, contractors, licensed engineers, registered surveyors, or tradespersons	wanton, willful, or intentional misconduct
			during a declared emergency and not more than 90 days after its end
OK	§ 76-5.8	licensed architects, professional engineers	gross negligence or willful or wanton misconduct
			during a declared emergency and not more than 90 days after its end
OR	§ 30.788	licensed architects, professional engineers	gross negligence or intentional torts
			within 60 days after the Governor declares a state of emergency
PA	42 Pa. Stat. and Cons. Stat. § 8332.4	design professionals, meaning licensed architects, geologists, land surveyors, landscape architects or professional engineers	conduct that falls substantially below the standards generally practiced and accepted in like circumstances by similar persons rendering such professional services
			related to a declared national, State or local emergency
RI	§ 5-1-16	licensed architects or architectural firms	gross negligence or willful misconduct
			during the time in which a state of disaster emergency exists
SC	§§ 40-3-325 and 40-22-295	licensed architects, professional engineers	gross negligence or recklessness
			during an emergency and 30 days after the event
TN	§ 62-2-109	licensed architects, professional engineers	must be acting in good faith; only excludes claims for negligence
			within 90 days of the declared national, state or local natural or man-made emergency
			gross negligence or willful misconduct
TX	Civ. Prac. & Rem. Code § 150.003	licensed architects, professional engineers	gross negligence or wanton, willful, or intentional misconduct
			during the duration of a proclaimed state of emergency
UT	§ 78-27-60	licensed architects, professional engineers	gross negligence or willful misconduct
			within 30 days of the earthquake
VA	§ 8.01-226.2	licensed architects, professional engineers	gross negligence or willful misconduct

State Laws Vary Greatly. The states that have passed Good Samaritan laws for design professionals are not uniform in who is covered, nor for what acts. As the table above shows, the statutes vary greatly in terms of the duration after a disaster that immunity applies, whether contractors are also covered, and exemptions for gross negligence, wanton, willful, or intentional misconduct.

Need for a Federal Law. As can be seen from the statutes summarized above, the variance calls for a federal law that will provide blanket coverage nationwide, without so many differences. There have been efforts since 2007 to pass just such a federal law, but those efforts have failed thus far. In 2011, Congress considered H.R.1145, the "Good Samaritan Protection for Construction, Architectural, and Engineering Volunteers Act," which would have provided "qualified immunity" for volunteers from the construction, architectural, and engineering industries who provide service in times of disasters and emergencies. The bill died but was reintroduced in 2014 as H.R. 4246, but died again. Prior 2007 and 2010 versions of the Act (H.R. 2067 and H.R. 5576, respectively) also died in committee without a House vote.

In 1997 President Clinton signed into law the Volunteer Protection Act (VPA), which gives limited immunity to volunteers serving non-profit organizations or government entities, as long as the volunteer was: 1) acting within the scope of his/her responsibilities at the time of the incident; and 2) appropriately licensed or certified to perform the type of service involved. 42 U.S.C. §§ 14501-05. The VPA does not protect volunteers from their "willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety." There are holes in the VPA that permit states to opt out of the Act, or to place additional constraints on eligibility for immunity.

With a Republican Congress and president, now is the time to pass "tort reform," such as a federal law that preempts state law on this subject for construction industry volunteers. Perhaps a renewed effort, with support from the AIA, NSPE, ACEC and AGC, will result in passing this federal law. The new 115th U.S. Congress has until January 3, 2019 to get the job done.