Monticello

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PRESIDENT'S MESSAGE

By Joshua Flowers, FAIA, Esq.
Gresham Smith

Happy New Year members of The Jefferson Society! I hope this year is off to a wonderful start for all of you.

Save the Date! As you plan your events and travel for the year, I hope you will mark your calendar for the TJS Annual Meeting in San Francisco on Weds., June 7. We will be meeting in person again this year during the AIA Conference on Architecture and look forward to seeing many of you there. Based on positive member feedback from last year's Annual Meeting in Chicago, we will continue holding the TJS Business Meeting virtually prior to our celebration in San Francisco. Details for the venue and registration will be announced soon, and TJS members and their guests are invited to attend for an evening of cocktails and dinner. We look forward to seeing you there!

What's new with TJS members? In this edition of *Monticello*, there are a number of member updates for career transitions, speaking engagements, appointments, and professional and civic leadership. It is inspiring to learn about the contributions of TJS members and the many applications for a dual background in architecture and law. I encourage you to read about the ways our members are advancing their professions and industries. Thank you to *Monticello* editor Bill Quatman for his commitment to documenting and sharing the stories of our members through this publication. **Do you have recent updates for yourself or a colleague?** Please share with us so we can include your accomplishments in future issues.

How are TJS members influencing law and policy? Recently, TJS member and former Director Rebecca McWilliams was reelected to her third term on the New Hampshire State Legislature. In her past campaigns, Rebecca emphasized her experience as an architect and project manager as considerations for holding elected office. It has long been a goal of the architecture profession to promote and support architects in all levels of civic engagement, yet there are few architects in civic life when compared to other professions. Congratulations to Rebecca on her continued service to her constituents and her representation of dual fields!

How is the delivery of design services changing in response to the need to consider broad societal factors that impact a project? The AIA recently published the Architect's Role in Creating Equitable Communities, an online resource that addresses advancement in

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Know of Another Architect-Lawyer Who Has Not Yet Joined The Jefferson Society, Inc.?

Send his or her name to TJS President Joshua Flowers, FAIA, Esq. at: josh.flowers@greshamsmith.com and we will reach out to them. Candidates must have dual degrees in architecture and law.

Inside This Issue:

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(President's Message, Cont'd from page 1)

equity within firms, a description of an expanded role of design professionals in considering new forms of community input on projects, and the role of architects as advocates for design in service to communities. This document summarizes an approach to design that considers factors outside the immediate project boundaries. **Have you been involved in projects that reflect this approach to design? What unique perspectives to TJS members bring to considering policy impacts of the design process?**

Finally, please be sure to pay your TJS membership dues using the online payment process.

Thank you to all of our members who have already renewed and to those who have taken advantage of the recurring membership option to ensure there is no interruption of TJS member benefits.

TJS Stuff

Changes in TJS Membership Committee.

The new TJS Membership Committee will consist of Jessyca Henderson, Laura Jo Lieffers and Donna Hunt. Thanks to Bill Quatman and Craig Williams, who are outgoing members of this committee.

Supreme Court Admissions.

Donna Hunt is contacting the Clerk of the U.S. Supreme Court to schedule another TJS Swearing-In Ceremony. Stay tuned for dates and details. Thanks, Donna for your leadership!

TJS 2023 Virtual Business Meeting.

The annual TJS Business Meeting will take place in May or June 2023, virtually. The date and time will be sent by email.

Nominations for TJS Officers and Directors.

The TJS Nominating Committee of Josh Flowers, Laura Jo Lieffers and Joyce Raspa will be making nominations for the following positions to be voted on at our 2023 Business Meeting: Director (3-year term); Secretary (1-year term). If you are interested, please contact one of the committee members.

Monticello Editors/Contributors Needed.

After 10 years, and over 40 issues of *Monticello*, Editor Bill Quatman has decided to pass on the reigns to a successor (or two). Michael Bell has agreed to take over the "social" writing starting in January 2024. We are looking for one or two members to write Case Summaries each quarter. If this interests you, please email Bill at: bill@quatmanadr.com.

FLORIDA. ARCHITECT CAN'T USE ONLINE ADVERTISMENT IMPLYING HE WAS LICENSED WHERE HE WAS NOT.

An architect licensed in Venezuela (for 35 years) was not licensed to practice architecture in the state of Florida, but he used the word "architect" in some commercial webpages (without a disclaimer that he was only licensed in Venezuela). The Florida Licensing Board imposed disciplinary action against him and he appealed. While he did not dispute that he used the title "architect" in websites, nor that he lacked a license to practice architecture in Florida – he claimed that he was entitled to provide architectural services — and thereby truthfully advertise that he was an "architect" — under Fla. Stat. § 481.229(1)(b), which states that: *"(1) No person shall be required to qualify as an architect in order to make plans and specifications for, or supervise the erection, enlargement, or alteration of: ... (b) Any one-family or two-family residence building, townhouse, or domestic outbuilding appurtenant to any one-family or two-family residence, regardless of cost[.]"*

The Board rejected this claim, however, and the appellate court affirmed that decision. That section of the licensing statutes states that the listed services in (a)-(c) of that subsection do not require the service provider to be qualified as an architect. "As such," the Court said, "anyone — whether an architect or non-architect — is permitted to 'make plans and specifications for, or supervise the erection, enlargement, or alteration' of the types of listed structures." While the Venezuela architect may "provide such services," that "doesn't transform him, as the service provider, into an architect [in Florida]," the Court said. Therefore, he could not use the unmodified title "architect."

The architect argued that he had a free speech right to include his licensure in Venezuela in his websites in Florida. The Court said, "It is factually true that he is a licensed Venezuelan architect, a feature of his extensive professional background that assuredly would be of value to Florida consumers of the types of services he is allowed to perform." And if he used "appropriate disclaimers," the Court said he "might well be within his constitutional right of commercial free speech." But, since he did not clarify that his license was valid only in Venezuela, the ad was misleading. The board's action was affirmed. *Feldman v. Fla. Dep't of Bus. & Pro. Regul.*, 2022 WL 17576861 (Fla. Dist. Ct. App.).

NEVADA. CONTRACTOR'S CLAIMS AGAINST DESIGN PROFESSIONALS ARE BARRED BY ECONOMIC LOSS DOCTRINE.

This suit arose out of the construction of a private residence in Nevada. The Contractor sued the Owner for nonpayment and the Owner counterclaimed for alleged construction defects. The Contractor then filed a third-party action against the Architect and its Geotechnical Subconsultant (the "Design Defendants") alleging that they "failed to perform their contracted work as required by contract, fell below the applicable standard of care in performing their work, failed to perform their work in a workmanlike manner, and acted negligently." The Contractor made claims of negligence, breach of implied warranties, contribution, and statutory liability under NRS Chapter 40, as well as implied indemnity. The Design Defendants moved to dismiss the third-party action.

As to the statutory claim, the Architect said that NRS Chapter 40 does not apply at all under the circumstances found in this matter because that chapter addresses only "constructional defects" in a new residence. The Court rejected the Architect's argument here. But the Court found that the Contractor's negligence claim against the Design Defendants was barred by the economic loss doctrine ("ELD") under Nevada. ("Under the economic loss doctrine 'there can be no recovery in tort for purely economic losses" "economic losses are not recoverable in negligence absent personal injury or damage to property other than the defective entity itself.") While the Nevada Supreme Court carved out "a homeowner exception" - holding that "a negligence claim can be alleged in a construction defects cause of action initiated under Chapter 40," that court left open the question of whether the ELD bars tort-based claims for purely economic losses against design professionals in *residential* constructional defect cases under NRS Chapter 40.

The federal court predicted that the Nevada Supreme Court would decide that the ELD also applies to design professionals in residential constructional defect cases under NRS Chapter 40. Therefore, the Court dismissed the Contractor's negligence claims as barred by the ELD.

Turning next to the claims of implied indemnity and contribution, the Court held that both "claims sound in tort and are based on [the Contractor's] negligence claim." Therefore, the two claims were barred by the ELD. As to the claim for breach of implied warranties claim the Design Defendants argued that while Nevada law is silent on the issue of whether design professionals can be held liable under claims of implied warranty - "the majority of jurisdictions hold [that] design professionals do not warrant their services and therefore cannot be held liable under claims of implied warranty." The federal court agreed again, holding that this "claim fails because the sparse case law that exists to support the recognition of an implied warranty of workmanship under Nevada law involves contractors and subcontractors and has not been extended to design professionals."

Lastly, the Contractor asserted a claim for relief under NRS Chapter 40. However, NRS §§ 40.600-40.695 does not create a new theory upon which liability may be based and, therefore, the claim for relief does not constitute a valid, separate cause of action. The two motions to dismiss were granted as to the Design Defendants. *Pulver v. Kane,* 2022 WL 17327182 (D. Nev.).

CALIFORNIA. HOTEL ARCHITECT CAN SUE FOR COPYRIGHT INFRINGEMENT.

It seems that most architectural copyright cases deal with residential designs, so this case is unusual in that it deals with a hotel property. Plaintiff, a licensed architectural firm, sued multiple defendants (including an architect) alleging copyright infringement, breach of contract, and unfair business practices. The plaintiff was hired to provide architectural design services for a new hotel in Los Angeles. The architect's contract indicated that it was the sole author, owner, and copyright holder of the architectural drawings and plans; and that once the Planning Department approved the drawings, the client would retain the plaintiff as the architect for the hotel's construction. The drawings were stamped with language providing that they could not be copied or transmitted without the plaintiff's express written permission.

However, after the drawings were approved, the plaintiff learned that the client was selling the hotel project to another party. In response, the plaintiff reached out to the new buyer to notify them that the Planning Department had approved the drawings and that the plaintiff could continue work on the project. The buyer then asked for a proposal for plaintiff's work. The plaintiff claims that it made it clear that it would only dis-

close the drawings in its proposal on the condition that the buyer could not use the drawings for the hotel unless it paid the plaintiff for them and hired plaintiff as the project architect. Plaintiff also stated that upon execution of a contract, it would grant the buyer a license to use the drawings in the hotel's construction. But the two parties never came to terms.

A few years later, the plaintiff-architect happened to see an advertisement for the sale of a hotel, which had since been constructed on the property, and recognized the design as its own. The plaintiff believed that the buyer had hired another designer and used the plaintiff's preliminary schematic design and drawings for the hotel's construction. The plaintiff registered the copyrights for the drawings and filed suit. The defendants moved to dismiss the lawsuit, claiming that the plaintiff's contract with the original client granted them an express, *or at least an implied,* license to use the drawings. While the defendants were not a party to that contract, they contended that the client transferred his license to a third-party, RSP, who in turn sold the land, drawings, and license to them. The federal court rejected this argument, however, noting that the Ninth Circuit has held that a licensee cannot transfer a copyright license without authorization. *Harris v. Emus Recs. Corp.,* 734 F.2d 1329, 1334 (9th Cir. 1984) Also, copyright owners can grant nonexclusive licenses by implication. *Foad Consulting Grp., Inc. v. Azzalino,* 270 F.3d 821, 826 (9th Cir. 2001). Consequently, courts generally resolve questions concerning implied licensing on a motion for summary judgment – and not on motions to dismiss – because they require factual inquiry and analysis. Since there were facts in dispute as to the terms of the contract and whether there was an implied license, the motion to dismiss was denied.

Next, the defendants argued that the suit was barred by the 3-year statute of limitations for copyright suits. 17 U.S.C. § 507(b). The Ninth Circuit has adopted "the discovery rule," which holds that a claim "accrues" when the copyright holder "has knowledge of a violation or is chargeable with such knowledge." *Roley v. New World Pictures, Ltd.,* 19 F.3d 479, 481 (9th Cir. 1994). "In other words, the three-year clock begins when a plaintiff discovers the infringement, so long as the plaintiff's prior unawareness of the infringement was reasonable under the circumstances." Here, defendants contended that the plaintiff "could have easily checked the records of the City of L.A." and learned that the buyer's new architects had submitted plans "from scratch" for the new 5-story hotel - by August of 2015.

While "constructive knowledge can trigger the statute of limitations," and "suspicion" of infringement "places upon the plaintiff a duty to investigate further into possible infringements of its copyrights," here, the Court ruled that "on a motion to dismiss, the Court should not impose a duty to investigate upon a plaintiff unless the complaint clearly evidences the plaintiff's suspicion or constructive knowledge of infringement." Under the Complaint in this case, the Court ruled that "a reasonable fact finder could believe that Plaintiff first discovered the alleged infringement on or about June 22, 2020, and that its prior unawareness was reasonable." The Court denied the Motion to Dismiss the copyright infringement claim.

As to the plaintiff's claim for breach of contract, the Court noted that the Copyright Act preempts a state law claim if the underlying work falls within the "subject matter" of the Act and the rights the plaintiff asserts under state law are equivalent to those protected by the Act. Here, no express contract existed, but plaintiff alleged that its correspondence with the defendants created a plausible *implied-in-fact contract*, which was allowed to proceed. (The Court noted that the California Supreme Court originally created the concept of implied-in-fact contracts to protect film writers from being deprived of the ideas they pitch to studio producers without just compensation. But courts have since applied the concept to various types of intellectual property disclosure, which should include architectural design disclosures). *nKlosures, Inc. v. Avalon Lodging LLC,* 2022 WL 17093927 (C.D. Cal.).

LOUISIANA. BY CLEVERLY STRIKING PLAINTIFFS' SOLE EXPERT, ARCHITECTS WERE ENTITLED TO SUMMARY JUDGMENT ON NEGLIGENCE CLAIMS.

This suit arose out of the design and construction of a multi-building apartment project. The first project owner (Owner-1) hired an architect (Architect-1) by written contract. That contract was later amended to reflect that Owner-2 was the owner of the project. Owner-2 and Architect-1 then entered into an Assignment Agreement, whereby a new architect (Architect-2) agreed to perform the remaining architectural services for the project. In a subsequent lawsuit, several plaintiffs, all claiming various ownership interests, sued ***both architects*** in state court alleging negligence and breach of contract relating to the architectural design services rendered for the project.

Defendants removed the suit to federal court where the two architects filed a Joint Motion for Summary Judgment after the federal court granted two motions in *limine* excluding expert reports and testimony of plaintiffs' sole expert (which were untimely filed and otherwise deficient under Federal Rules). Without an expert, the architects claimed that they were entitled to judgment as a matter of law because the plaintiffs could not establish the applicable standard of care, a breach thereof, or causation in the absence of expert testimony.

The federal court noted that under Louisiana law, liability only attaches for a professional if his or her conduct falls below an established standard of care; and that expert testimony is required to establish the appropriate standard of care, except in rare circumstances. Since the plaintiffs' had failed to present expert testimony as to the standard of care for architects in Louisiana, the architects prevailed and were entitled to summary judgment as a matter of law. *Stewart v. Gruber,* 2022 WL 16543412 and 2022 WL 16727814 (W.D. La.).

CALIFORNIA. LANDSCAPE ARCHITECT'S APPEAL OF HIS LICENSE REVOCATION IS DENIED FOR VARIOUS REASONS.

The California Architects Board revoked the license of a landscape architect due to his criminal conviction after he pled guilty in federal court to one count of distributing child pornography and was sentenced to prison. The licensee filed a petition for writ of administrative mandate to contest the Board's decision, but he did not name the Board as a respondent *(instead naming two staff members of the Board).* He later brought a motion to add the Board as a party, but the trial court ruled the statute of limitations had expired. The license appealed, claiming that the trial court denied him a fair hearing, erred by denying his motion to add the Board as a party, and erred by granting judgment on the pleadings. The appellate court affirmed the judgment against him.

The Court noted that the Architects Board is the state agency that regulates the practice of architecture in California, including landscape architect licenses. The Court found no violation of due process, finding that the licensee "had a fair hearing on the motion." The Court also found that the Board is protected by the statute of limitations from becoming a party. "Allowing plaintiff to defeat the statute of limitations because he did not timely name the Board as a party would defeat the Board's statutory right not to be named," the Court said, adding that "The statute of limitations is not merely a technical matter." Rather, "they mark the point where, in the judgment of the Legislature, the equities tip in favor of the defendant (who may be innocent of wrongdoing) and against the plaintiff (who failed to take prompt action)." Further, the licensee failed to establish grounds for "equitable tolling" of the statute of limitations. *Gustard v. McCauley*, 2022 WL 16560121 (Cal. Ct. App.) *(Note: an unpublished opinion)*

(Above) Architect, attorney, farmer, insurance claims expert, TJS member and State Representative Rebecca McWilliams of Concord, N.H. was re-elected on Nov. 8, 2022 for her third term in the State Legislature. She defeated her challenger by a vote of 5,308 to 2,451. Congratulations, Rebecca. We are proud of you!

VIRGINIA. PAY-IF-PAID NO LONGER ENFORCEABLE IN VA.

By Lawrence M. Prosen, Esq.
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Washington, D.C.

On January 1, 2023, "pay-if-paid" clauses in new contracts became void as against public policy and unenforceable as a result of Virginia Senate Bill 550 (SB 550) going into effect. *See* Va. Code §§ 2.2-4354 and 11-4.6. Moreover, pay-when-paid clauses in some public and private construction contracts were also limited. As outlined below, now only pay-when-paid clauses with a reasonable time period for payment are enforceable.

In *New Virginia Law Prohibits Pay-if-Paid Clauses in Construction Contracts*, we discussed the impacts of SB 550 and the implications for project owners and contractors re-

garding the prohibition of pay-if-paid clauses. Under most pay-if-paid provisions, contractors (of all tiers) were contractually permitted to wait to pay their subcontractors until they themselves first received payment for work. These pay-if-paid clauses shifted the risk of non-payment to the project's subcontractors as a result. In contrast, pay-when-paid clauses require a general contractor to make payment to its subcontractors within a reasonable time period, even if the general contractor does not first receive payment from the project owner. Pay-when-paid clauses have been viewed by courts as a timing mechanism as opposed to a contractual condition precedent.

Further, under the new law, project owners are required to pay their general contractors within sixty days of receipt of an invoice following the satisfactory completion of the work. Similarly, contractors are required to make downstream payments to their subcontractors within the earlier of seven days after receipt of amounts paid by the project owner or higher-tier contractor or sixty days of the satisfactory completion of work for which the subcontractor issued an invoice (whether or not payment is received from the owner).

The new law stops short of prohibiting retainage provisions, but if owners or contractors choose to withhold some or all of the invoiced amounts by a contractor or subcontractor, they are required to provide notice in writing of the withholding, including the amount being withheld and the reasoning or basis for the nonpayment. If a party fails to comply with these notice provisions, it may be liable for interest penalties.

It is important to note that the new law only applies to contracts entered into on January 1, 2023, or after—the law is not retroactive, and parties will not have to renegotiate previously executed contracts to be in compliance with the new law. That said, all parties should review the payment provisions in their existing construction contracts as well as those being negotiated and entered into after January 1, 2023, for compliance with the law's new requirements.

OHIO. COUNTY ENGINEER NOT ENTITLED TO SOVERIGN IMMUNITY.

The County Engineer, the County and the County Board of Commissioners were all sued in a class action by residents of the county who claimed to have suffered property damage due to negligence, reckless, willful and wanton actions of the County Engineer in his failure to properly operate, maintain and/or upkeep a storm drainage sewer system, roadways, and drainage from a swamp area. Several private parties (engineers, consultants and contractors) were dismissed. The County Defendants filed a Motion for Summary Judgment seeking sovereign immunity on certain tort claims (negligence, trespass and nuisance). The trial court denied that motion and certified the class. The County Defendants appealed.

The Court of Appeals began by stating: "Whether a party is entitled to immunity is a question of law properly determined by the court prior to trial pursuant to a motion for summary judgment." Under Ohio's Political Subdivision Tort Liability Act, "a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." R.C. 2744.02(A)(1). However, political subdivisions ***are liable*** for injury, death, or loss to person or property "caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions." The Court noted that the "provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system" is a ***governmental function***. But the "maintenance, destruction, operation, and upkeep of a sewer system" is ***a proprietary function***. The County defendants argued that this suit was essentially one for the County's failure to upgrade the sewer system, which is a claim for the construction or design of a system and, thus, is a governmental function. The Plaintiffs, however, claimed the suit is for "design, construction, and ***lack of maintenance*** issues," for which the County is not immune.

The Court of Appeals agreed with the County, in part, that "the majority of the causes identified by the plaintiffs clearly pertain to the provision or nonprovision, planning or design, construction, or reconstruction of the sewer system … a governmental function." But part of the suit alleged flooding due to ***a maintenance issue*** for which the County Defendants "do not have immunity." The Court explained that the performance of routine maintenance does not involve the exercise of judgment or discretion, so the County Defendants did not have immunity for the tort claims. The trial court order was affirmed in part and reversed in part. *State ex rel. Slacas v. KCI Technologies, Inc., et al.*, 2022 WL 17752264 (Ohio App. 11th Dist.)

TEXAS. SUIT BY THIRD-PARTY AGAINST ENGINEER AND HIS FIRM IS DISMISSED FOR FAILURE TO FILE A CERTIFICATE OF MERIT.

An engineering firm was hired by the seller of a home to conduct a structural inspection of the property. The buyers found defects in the foundation about one month after the sale. So, the buyers sued the seller, as well as the engineering firm and one of its employees (a P.E.), claiming that they relied upon the engineering report in closing the sale. Later, they found cracks on the wall, the flooring, and the foundation. A "foundation expert" was hired who recommended foundation repairs. The buyers alleged that the licensed P.E. who signed the report breached his fiduciary duty to them as members of the public who foreseeably could rely on his report, claiming the engineer owed not only a fiduciary duty to his clients, "but to members of the public who could foreseeably rely on the information provided in his reports." As for the firm, the buyers claimed that it was vicariously liable for its employee's negligence. The buyers sought compensatory damages in the amount of the cost to repair the foundation and house and exemplary damages.

Although the engineer's report noted a few cracks and downward deflection of the foundation, it concluded that the "damage has been very minor, the foundation is structurally intact, and the house is safe and livable."

The court noted that "central Texas area has clay soil, which shrinks and swells with variations in the moisture content. This phenomenon can cause foundations to move and cracks to occur. The homeowner must maintain a constant moisture content in the soil around the foundation in order to reduce foundation movement in the future." The engineer noted that he had only performed a visual inspection, and he disclaimed any express or implied "guarantee of specific future structural performance with the limited scope of this inspection."

The firm and the P.E. moved to dismiss the suit under Tex. Civ. Prac. & Rem. Code § 150.002 because the buyers did not file a certificate of merit with their original petition. The buyers argued, however, that no certificate of merit was required because the P.E. "was not engaged in the practice of engineering." They claimed that he was acting as a third-party inspector and that "merely inspecting a foundation does not involve an engineer's specialized education, training, or experience, and is therefore not the practice of engineering." The trial court denied the engineers' motion to dismiss, and the engineers appealed.

(Above) TJS Member Arlan D. Lewis passed his gavel as the outgoing Forum Chair of the ABA Forum on Construction Law to Cary Wright of Carlton Fields.

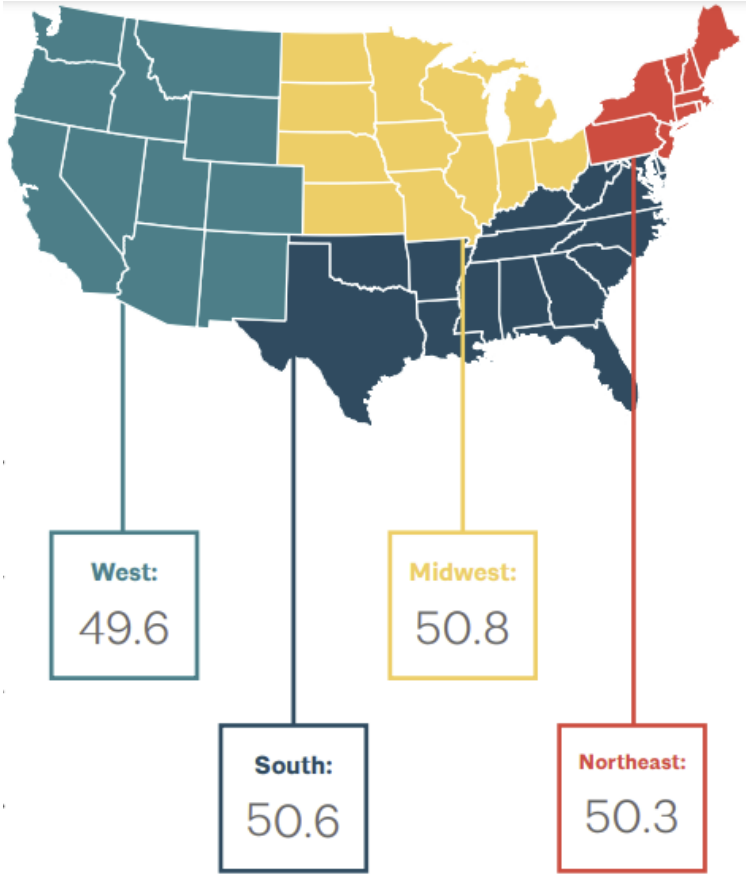
The Court of Appeals reversed, finding that the trial court abused its discretion by denying the motion. The Court said that by statute, a claimant's failure to file a certificate of merit when required under section 150.002 "***shall result*** in dismissal of the complaint against the defendant." Tex. Civ. Prac. & Rem. Code § 150.002(e). The only discretion the trial court had was whether to dismiss the lawsuit with or without prejudice. The allegations in the lawsuit were that the P.E. committed negligent errors or omissions in his capacity as a "licensed engineer." Even the claim for breach of fiduciary duty claim was based on the P.E.'s duty as "a licensed engineer" to members of the public who could foreseeably rely on the information provided in his reports. Likewise, the vicarious liability claims were linked to the P.E.'s acts as an engineer employed by the engineering firm, acting within the course and scope of his employment.

The Court of Appeals concluded that the P.E.'s inspection of the foundation — "even if the inspection itself would not be the provision of engineering services" — was done "as a component part of the necessary steps for preparing the structural inspection report, which was the provision of an engineering service." The trial court's order was reversed, and the case was remanded for the sole purpose of determining whether the lawsuit should be dismissed with or without prejudice. *Tucker Eng'g, Inc., v. Temperley & Burkhart,* 2022 WL 17684036 (Tex. App.).

COLORADO. EXPERT WITNESS HIRED ON A CONTINGENT FEE BASIS COULD NOT TESTIFY AS AN EXPERT (ONLY AS A FACT WITNESS).

A property owner submitted a claim to its insurer for property damage that occurred during a windstorm in Denver. The insurer denied the claim and the owner sued. The owner disclosed an individual as a "non-retained expert witness" pursuant to Fed. R. Civ. P. 26(a)(2)(C). The contract between the property owner and the firm that employed the expert was based on a contingency fee, that the firm would receive "10% of the total recovered amount of the claim" via the litigation. The insurer moved to exclude the testimony of the expert on the basis on a financial interest in the case, as well as on his qualifications.

The federal trial court cited to Fed. R. Evid. 702 which sets out the required qualifications for "expert witnesses." The court said that the rule makes clear, that "while required, it is not sufficient that an expert be qualified based upon knowledge, skill, experience, training, or education to give opinions in a particular subject area. Rather, the Court must perform a two-step analysis." After determining whether the expert is qualified, the proffered opinions must be assessed for reliability. The insurer argued that Colorado law prohibits expert witnesses from testifying if they have a contingent financial interest in the results of the litigation, citing *Murray v. Just In Case Bus. Lighthouse, LLC*, 374 P.3d 443, 450 (Colo. 2016). The plaintiff responded that the expert did not stand to personally earn the 10% contingent fee, only his employer would benefit. The federal court stated that, "A contingent fee in litigation is one that "is contingent on the ultimate outcome of the case." The expert's understanding of the contingency fee posed "a danger that his testimony will be inappropriately motivated," the court said, noting that the expert may "be improperly motivated to enhance his or her compensation and thus lose objectivity." As a result, his opinion testimony, "given his financial interest in the outcome of litigation, presents a danger of unfair prejudice to Owners that substantially outweighs its probative value, but the danger of this prejudice will be sufficiently limited by restricting [his] testimony to that of a fact witness." Therefore, the witness could testify as a fact witness to events that transpired during the claim process and his own observations, but he could not offer "expert opinions." *Midtown Invs., LP v. Auto-Owners Ins. Co.*, 2022 WL 17039225 (D. Colo.).



RECENT AIA STUDY SHOWS THAT ARCHITECTURE FIRM BILLINGS TOOK A SHARP DOWNWARD TURN IN OCTOBER & NOVEMBER 2022.

[Editor's Note: This article appeared online on the AIA website. The monthly Architecture Billings Index ("ABI") is a leading economic indicator for nonresidential construction activity. Per this article from the AIA, billings were down in both October and November 2022].

Billings at architecture firms softened considerably in October [2022] with an ABI score of 47.7, as firms reported the first decline in billings since January 2021. Economic headwinds have been mounting, and finally led to weakening demand for new projects. While one month of weak business conditions is not enough to indicate an emerging trend, it is worth keeping a close eye on firm billings in the coming months. In addition, while inquiries into new projects continued to grow at a modest pace in October, the value of new design contracts also declined in October as fewer new projects entered the pipeline. Since most firms currently have robust backlogs, there may be enough work in the pipeline to serve as a buffer against a downturn.

Business conditions were fairly consistent across the country in October, as firms in all four regions saw either slight growth or a slight downturn. *[See AIA graphic on p. 8, above]* (Due to the fact that regional and sector data are reported as three-month moving averages, they may show more variability, and may not average out to the national billings number exactly.) In addition, firms in the South may have been impacted by Hurricane Ian and may also see an impact from Hurricane Nicole as well. Conditions were more mixed by firm specialization this month [October], with firms with multifamily residential and commercial/industrial specializations seeing more significant declines in billings in October, following a gradual softening during the third quarter. Firms with an institutional specialization, on the other hand, saw fairly strong growth, which is typical for this point in the business cycle. Multifamily residential and commercial/industrial projects are usual first to rebound following a recession, and then as they start to slow, institutional projects pick up steam.

A Slowdown Across the Economy.

Conditions in the broader economy also moderated somewhat in October. Total nonfarm payroll employment added 261,000 new positions, well below the annual monthly average of 407,000 so far this year. Architecture services employment declined by 900 jobs in September, the most recent data available, marking the first decline in the sector since May. However, the torrid pace of inflation relaxed somewhat in October, as the Consumer Price Index (CPI) rose by just 0.4% compared to September levels and 7.7% compared to a year ago, the lowest annual growth rate seen since February. Core goods inflation declined by 0.4% due to higher retail inventories and lower transportation costs, while core services inflation rose by 0.5%, largely due to housing prices and despite a decline in airfares. Due to this modest deceleration in inflation, the Federal Reserve may make a smaller increase to interest rates at their December meeting than the 0.75 point increases they have made at their most recent meetings. However, with inflation still well above their target of 2%, they are likely to continue raising rates until at least mid-2023.

However, Firms Remain "Largely Optimistic" About 2023

After architecture firms experienced their first decline in billings in nearly two years in October, business conditions softened further in November, as the AIA's Architecture Billings Index (ABI) score fell to 46.6 (any score below 50 indicates a decline in firm billings). While inquiries into new projects continued to rise modestly, the value of new design contracts also declined further in November. This indicates that not only are firms seeing a decline in current work, but that less new work is entering the pipeline as well.

Business conditions also softened in nearly all regions of the country in November. Only firms located in the South, where firms have seen some of the strongest growth throughout the post-pandemic period, reported a small increase in billings. Firms in the Northeast have seen the largest decline in billings so far, and only experienced a few months of growth earlier this year before returning to negative territory. Firms of all specializations also saw weaker business conditions this month, including those with an institutional specialization, where conditions had been fairly robust recently.

Construction Rates Continue to Decline in a Flattening Economy

In the broader economy, there are signs of concern as well. In the most recent edition of the Federal Reserve's Beige Book report, released on November 30 and covering conditions in the previous six weeks, economic activity was reported as being largely flat across much of the country, or expanding with a slower pace of growth than in recent months. In addition, there was more pessimism about the overall economic outlook, given the ongoing impact of inflation and higher interest rates. In particular, interest rates had a large impact on home sales in areas like the Atlanta, St. Louis, Dallas, and San Francisco Districts. Both residential and nonresidential construction declined in most areas, although nonresidential construction declined at a slower pace. In addition, tightening credit standards have led to declines in bank lending, which may also have an impact on construction in the coming months.

However, companies are largely still hiring. Nonfarm payroll employment added an additional 263,000 new jobs in November, and construction employment grew by 20,000 employees, 8,000 of which were hired for nonresidential building construction.

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.

However, architecture services sector employment declined for the second month in a row in October (the most recent data available), shedding an additional 300 positions, for a total decline of 800 positions over the last two months.

Despite an Uneven Construction Industry, Firm Leaders "Remain Optimistic" [AIA Says]

This month [November 2022] we asked firm leaders about their expectations and concerns for the coming year. Despite the recent downturn in billings, firm leaders remained largely optimistic about 2023, with 63% expecting it to be a good to great year for their firm. Just 16% expect it to be a challenging or disastrous year, while 21% think that it will be a more mixed, or so-so year. However, some firms were more concerned. One quarter of firms located in the Northeast, and 25% of firms with annual billings of less than $1 million, expect 2023 to be challenging or disastrous. On the other hand, 68% of firms located in the Midwest, and 70% of firms with annual billings of $1 million or more, expect a good or great year next year.

The overall list of the top business concerns for the coming year for architecture firms is largely the same for 2023 as it was for 2022. Coping with volatile construction/building materials costs and availability and increasing firm profitability remained the top two issues, selected by 26% and 25% of responding firms, respectively. Increasing profitability is almost always one of the top concerns for firm leaders, regardless of what else is occurring in the economy at that time. Following those two concerns are ones about staffing: 20% indicated that finding candidates to fill key positions at their firm is one of their biggest concerns for 2023, while 17% selected filling open staff positions, and 10% selected retaining current staff. Issues related to running their firm were also high on the list, notably dealing with ownership transition issues, and managing the cost of running the firm/maintaining competitive salaries. And while 48% of responding firm leaders indicated that increasing the long-term commitment of younger staff to the profession is a major issue, just 6% selected it as one of their top concerns for 2023.

While there were some firms that indicated that issues like increasing firm work on existing buildings and implementing new project delivery methods are a major concern at their firm for the coming year, fewer than 1% of respondents selected those issues as one of their top concerns for the coming year.

In addition, more than 60% of respondents indicated that issues like managing possible merger and acquisition activity and managing a portion of the workforce that stays remote permanently are not a concern at all at their firms.

AIA SURVEY: MAJORITY OF FIRM LEADERS THINK RECENT GRADS ARE PREPARED FOR ARCHITECTURAL PRACTICE, BUT LACKING IN MANAGEMENT SKILLS AND HANDLING CLIENT RELATIONSHIPS.

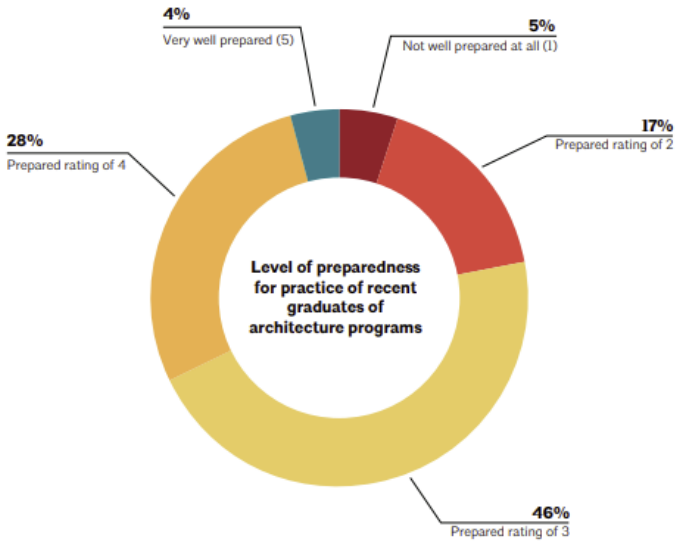
In October 2022, the AIA asked firm leaders about their experiences with recent graduates of architecture programs. Overall, two thirds of respondents indicated that they have hired recent graduates for architectural positions in the last few years. This share was even higher at firms located in the Midwest (74%) and at firms with an institutional specialization (79%). Conversely, just 53% of firms with a commercial/industrial specialization, and 57% of firms with a multifamily residential specialization, reported that they had hired recent graduates in the last few years.

AIA firm leaders said they find that recent graduates of architecture programs are likely to enter the profession ***not at all prepared*** for practice and project management, construction and evaluation, and client management/relationships.

At firms that have hired recent graduates of architecture programs in the last few years, nearly three quarters of responding firm leaders (74%) rated their level of preparation following graduation as a three (46%) or four (28%) on a scale of one to five. Just 5% rated them as a one, meaning not well prepared at all, while 4% rated them as a five, meaning very well prepared. In comparison to graduates from five to 10 years ago, most respondents who were able to make a comparison rated them as a three, or about the same level of preparedness now as then. However, 26% rated current graduates as better prepared now than in the past, while 21% rated recent graduates as less prepared now than five to ten years ago.

These firms also indicated that while they find that recent graduates of architecture programs tend to be very prepared in tech-

nology use/familiarity (e.g., CAD, Revit, Creative Suite), they are also likely to enter the profession not at all prepared for practice and project management, construction and evaluation, and client management/relationships. Of the skills that firms rated recent graduates as being not at all prepared in after graduation, 29% selected construction and evaluation as the one area with the most serious deficiency, while 20% selected project management, and 16% selected practice management. An additional 10% each indicated that "project development and technology" and "client management and relationships" were the areas in which recent graduates had the most serious deficiency.



NEW YORK. MEDIATION TERM SHEETS: ARE THEY ENFORCEABLE?

This case points out the need for clarity in term sheets signed at the close of every mediation. After his membership was suspended, a member sued an Association. During the mediation, the parties appeared to reach agreement, and they concluded the mediation. The Member's lawyer drafted a term sheet which the Member signed. That term sheet was then circulated to defense counsel, with a copy to the mediator. Later, the defense counsel emailed all counsel and the mediator, confirming that "we have an agreement in principle … We sent the term sheet to our client for signature." However, the next day, defense counsel added a new term that the Member would not return as a member, adding, that term was implicit in this deal. "He doesn't come back … No more applications … no demands … I want that to be clear. Please confirm that we're in agreement on this." The Member's lawyer responded, however, that the day before, during the mediation, the defense lawyer had emailed:

MARK YOUR CALENDAR!
FOR THE TJS ANNUAL MEETING

DATE: WEDS., JUNE 7, 2023
TIME: TBD
LOCATION: TBD, SAN FRANCISCO, CA

(Above) The 2023 AIA Conference on Architecture will be held in San Francisco, CA, Weds., June 7, 2023 – Sat., June 10, 2023. The Architecture Expo will be held at Moscone Center, June 8-9, 2023. As is our practice, the TJS Annual Meeting will be the night before the main AIA convention begins in the host city. Watch for more details in the April issue of *Monticello*.

(New York Mediation Term Sheets, cont'd)

"we have an agreement in principle," adding that constituted an acceptance of the terms. The Member's lawyer rejected the new terms. When the Association refused to sign the settlement agreement, the Member filed a motion to enforce the agreement and for attorney's fees incurred in preparing the motion.

The Court noted that, "A settlement agreement is a contract, and, to form a valid contract, there must be an objective meeting of the minds." The Court said that under New York law, there are two kinds of preliminary contracts, and a 4-factor test is applied to determine if the contract is enforceable. A "Type I" Agreement occurs when the parties have reached complete agreement (including the agreement to be bound) on all the issues perceived to require negotiation. This kind of agreement is "preliminary only in the sense that the parties desire a more elaborate formalization of the agreement which, although not necessary, is desirable." This is very common in mediations, where a term sheet is signed, to be followed by a more formal written agreement drafted by the lawyers. By contrast, a "Type II" Agreement expresses mutual commitment to a contract on agreed major terms, while recognizing the existence of open terms that remain to be negotiated. A party cannot demand performance under a Type II agreement under New York law.

The question here was whether the Mediation Agreement was a Type I (enforceable) or Type II (not enforceable). The Member argued that the Association's confirming email during the medi-

ation created an enforceable agreement that the Association would pay the Member a lump sum in exchange for a general release. There was no mention of his re-admission to the Association. The Association argued that, to the contrary, the parties never reached an enforceable agreement, because they had not agreed whether the Member could ever re-apply for admission. Taking this all in, the Court ruled that the parties had reached a binding and enforceable agreement when the Association's counsel confirmed by email that "we have an agreement in principle."

MEMBERS ON THE MOVE!

Mike Koger has a new email address at the AIA. You can now reach him at: MKoger@contractdocs.com

Jessyca Henderson also has a new email address: jessyca.henderson@gmail.com

Christopher Mills left private law practice in Aug. 2021. He is now Assistant General Counsel with Freddie Mac in McLean, VA. Congratulations, Christopher!

Jason Phillips has changed jobs. He is now with The Meridian Group in Bethesda, MD. His firm bio is here: https://tmgdc.com/staff/jason-p-phillips/

Ricardo Aparicio, Esq. can now be reached at:
Ricardo Aparicio, Esq.
1081 Inverness Drive
St Augustine FL 32092
RicardoAparicioLaw@gmail.com

(more Member Moves can be found on page 25)

While the terms of the general releases and confidentiality provisions had not been drafted, there was no indication, that those would be a problem. As to the sticky issue of re-applying for membership, however, the Court said it did not appear that topic was ever mentioned until the next day. "Because the plaintiff did not assent to that term, it is not part of the parties' agreement." Three of the four factors supported an enforceable agreement and "objective manifestations of a meeting of the minds." Therefore, the Member's motion to enforce the settlement agreement was granted, but his request for attorney's fees was denied. *Garmashov v. USPA*, 2022 WL 17342390 (S.D.N.Y.).

LOUISIANA. THE IMPORTANCE OF GETTING MEDIATION AGREEMENTS SIGNED BEFORE YOU LEAVE YOUR NEXT MEDIATION!

Another recent case dealt with unsigned mediation agreements. Here, a roofing company agreed to repair the roof on a motel. The motel Owner's Insurer gave an initial award of coverage, and the motel Owner hired the Roofer to perform an inspection and then make all needed repairs. *(The Roofer took an assignment of the Owner's insurance proceeds and proceeded with the work).* Due to a bust between the Insurer's initial award and the Roofer's assessment of the costs, the motel Owner and the Insurer agreed to mediate. An agreement was allegedly reached whereby the Insurer agreed to pay $1.5 million, but that agreement was never signed by the parties. The Roofer never got paid, so it sued the Owner and the Insurer. The Defendants moved to dismiss the lawsuit, claiming that the Mediation Agreement was unenforceable because it was unsigned; and because the Roofer's Proposal was subject to both "a suspensive condition" and an "integration clause" it could not claim detrimental reliance. As to the unsigned Mediation Agreement, under Louisiana law, to be enforceable, a compromise to settle "must either be reduced to writing and signed by the parties or their agents, or be recited in open court and be capable of transcription from the record of the proceeding." A compromise agreement must, therefore, be "unambiguous, perfect and complete in itself," in that state. The Roofer provided the Court with an email chain indicating that the parties did, in fact, intend for the Mediation Agreement to be the full compromise between them. Since this cast the defense in doubt, the motion to dismiss was denied. *(OK, but how much easier if the parties had just signed the document?)*

As to the defense of "suspensive condition" *(i.e. the Roofer's Proposal said it was "contingent upon insurance approval" – which the Insurer says it never did),* the Court found that facts were still in dispute here, and denied the motion to dismiss. Last, as to the defense that the Roofer's Proposal contained a "Complete Integration of Terms" clause, the Court agreed that this barred the Roofer's detrimental reliance claim, which was dismissed. This case points out the incredible expense that parties sometimes go through when they don't get a signed Mediation Agreement (even a signed Term Sheet) before they leave a mediation. *Stonewater Roofing Co., LCC v. Merryton, LLC*, 2022 WL 17324447 (W.D. La.).

TWO AIA-BACKED FEDERAL BILLS FAIL.

The 117th Congress (2021-22) adjourned on January 3, 2023, ending the two-year session and starting the new 118th Congressional session (2023-2025). The AIA pushed for passage of two federal bills in the last session, the *Democracy In Design Act* (H.R. 5291) and the *Yes In My Backyard Act* ("YIMBY") (H.R. 3198/S. 1614).

Let's take a look at each one and see how they fared:

Democracy In Design Act (H.R. 5291) was introduced by Rep. Dina Titus (D-NV) on September 17, 2021. The bill was referred to the Subcommittee on Economic Development, Public Buildings, and Emergency Management, where is sat idle and never got a hearing. Per the AIA, this bill "would ensure that communities across the country maintain a voice in the design of federal buildings consistent with their preferences, topographies, and design traditions." However, this bill died in committee.

The Yes In My Backyard ("YIMBY") Act (H.R. 3198/S. 1614), was actually two bills (one House and one Senate). The House bill was introduced by Rep. Derek Kilmer (D-WA) on May 13, 2021 and was referred to the House Committee on Financial Services, where it never got a hearing and died. The Senate bill was introduced that same day by Sen. Todd Young (R-IN) and was referred to the Senate - Banking, Housing, and Urban Affairs Committee.

Unlike its counterpart in the House, the Senate bill got a hearing on June 24, 2021, along with 11 other related bills, but then died in committee. Per the AIA, this legislation "addresses systemic inequities that continue to blight America's housing and zoning policies. The YIMBY Act is a common-sense approach to require more transparency from communities that receive federal funding through the Community Development Block Grant. By requiring regular and standardized reporting from local jurisdictions on their land use policies, we can promote inclusive zoning and increase affordable housing supply."

The official Senate summary of the YIMBY Act says "This bill requires certain Community Development Block Grant program recipients to submit to the Department of Housing and Urban Development information regarding their implementation of certain land-use policies, such as policies for expanding high-density single-family and multifamily zoning."

Of course, the House is now Republican-controlled in 2023, while the Democrats control the Senate. Whether either bill will see new life in the118th Congress remains to be seen.

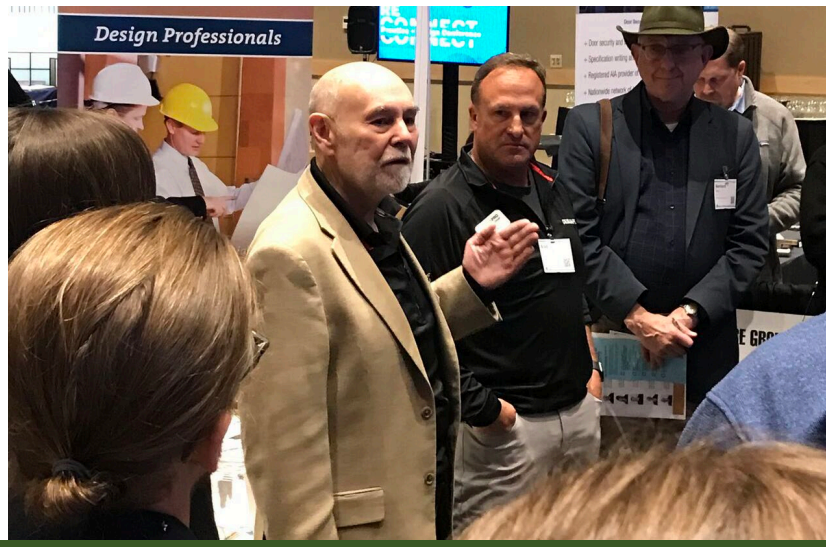
A TJS FOUNDER IS GIVEN LEADERSHIP AWARD BY LOCAL DBIA CHAPTER.

The MidAmerica Region (MAR) of the Design-Build Institute of America (DBIA) surprised one of our TJS Founders, Bill Quatman, FAIA, FDBIA, Esq., with its first-ever lifetime achievement award at its annual regional awards luncheon on Nov. 18, 2022. An even bigger surprise for Bill was that the award was named after him! The *"Bill Quatman Leadership Award"* will be presented in the future in Bill's name to regional DBIA members whose careers have impacted the design-build industry. "I had no idea that I was getting this award," Bill said. "The chapter executive director was sneaky – she invited my wife and me to attend the awards luncheon and to sit at the head table – which we were quite honored to do. But they kept the award a secret until the luncheon." Bill also received the DBIA National Lifetime Achievement Award in 2020, known as the Brunelleschi Award, named for Filippo Brunelleschi (1377-1446), the master-builder and designer of the famous Florence Cathedral in Italy.

Bill retired in 2021 as general counsel and senior vice-president of the international design-build firm, Burns & McDonnell. He is now a mediator and arbitrator with Quatman ADR, LLC in Kansas City, MO. He can be reached at bill@quatmanadr.com.

(Above and right) TJS Member Joseph H. Jones, Jr., AIA, Esq., Director of Risk Management/Professional Liability for Travelers Insurance did three podcasts in three days on the issue of the rising cost of construction and material availability. Joe's panel discussed what design professionals need to be aware of to manage their risk and increase the chances of a successful project. Nice backdrop, Joe!

(Right) Trevor O. Resurreccion of the Lynberg Watkins law firm traveled from Santa Ana, CA, to the campus of Catholic University of America in Washington, D.C. in Sept. 2022 to attend the raising of a full-scale 8,100 lb. replica of a Notre-Dame de Paris truss. A donor to the project, Trevor attended the university's architecture school as an undergraduate. The full-scale 45' x 35' replica of a Notre-Dame de Paris truss was raised above the lawn of the university. Produced using traditional, 800-year-old methods, the hand-hewn truss was created using blueprints of the original.



(Right) On Nov. 4, 2022, TJS Member Eric O. Pempus, FAIA, Esq. presented at the AIA Colorado 2022 Practice + Design Conference on "Dispute Resolution." Eric's article on "Scope Creep," from the Dec. 2022 issue of *Building Blocks* is reprinted in this issue on pages 15-16, with a sample form on page 24.

(Above) This wonderful photo of George Washington's home at Mount Vernon was submitted by TJS President, Josh Flowers, FAIA, Esq. Josh says that he took the photo on a recent trip to the historic home of America's first president.

SCOPE CREEP & HOW IT IMPACTS THE BOTTOM LINE IN AN A/E PRACTICE

By: Eric O. Pempus, FAIA, Esq., NCARB

DesignPro Insurance Group

(reprinted with permission)

Before we define "scope creep," let's first discuss what the "scope" of the design of a construction project entails. The scope of professional services in the context of the construction industry—in simple terms, is what architects and engineers (A/Es) prepare for the design and construction documents, tailored to what a design professional and its client agree, in terms what is and what is not involved in the project. The scope identifies all the individual tasks, activities and deliverables for their projects.

And most importantly, in the agreement between an A/E and their client, there must be a scope statement. A scope statement can be found in professional association model agreements, such as published by the American Institute of Architects (AIA) or the Engineers Joint Contract Documents Committee (EJCDC). However, the scope can also fashion a custom statement, negotiated between the A/E and their client. The scope of services may be very narrow, or very encompassing, or somewhere in between. For example, as a limited scope of services may be the design and construction of a single family residence. (Actually, some would say that the design of a home is quite complex—the inhabitants work there, play there, sleep there, eat there, etc., but for our purposes let's assume a home is a simple design).

On the other hand, a complex scope of services could involve the renovation of an existing k – 12 school involving phased construction, temporary administration and academic areas, hazardous material (asbestos and lead paint) abatement, adding new classrooms, swimming pool and gymnasium, parking lots and landscaping, new roof and windows. This complex project would involve architectural, landscape design and engineering design, including civil, geotechnical, structural, mechanical, electrical, and perhaps more specific acoustical and aquatic consulting services, and lastly construction administration.

A DIFFERENCE WITH DISTINCTION

And there is a difference between "scope of professional services," and "scope of work" for the construction industry. It is important to use the word "services" and not "work" for what design professionals do, because the word "work" is most commonly used for what construction contractors do. A/E's perform professional services. If there is a dispute on a project, it is critical to remove any doubt what design professionals do, compared to providing labor and materials to construct a project. People outside of the design and construction industry normally do not

understand the difference between services and work. Moreover, it is common in client driven agreements between design professionals and their clients that the word "work" is synonymous with "services."

SO, WHAT IS SCOPE CREEP?

Scope creep is what happens when changes are made to the project scope without any control procedure like change requests. Those changes also affect the project schedule, budget, costs, and resource allocation and might compromise the completion of milestones and goals. Scope creep is one of the most common project management risks. Generally, scope creep occurs when new project requirements are added by project clients or other stakeholders after the project execution has started. Often these changes are not properly reviewed. Therefore, the project team is expected to complete more tasks, deliverables and milestones with the same resources and in the same time as the original scope. On the other hand, you could end up with a project with lots of approved, considered changes that never ends because every time you think you have finished, a new project requirement such as a new product feature arrives in your inbox and you have to make more changes. To control your project scope and prevent scope creep, you'll need a scope change and risk management plan. Stephanie Ray, May 26, 2021.

TO CONTROL SCOPE CREEP

To develop a "scope change and risk management plan," consider the utilization of a simple short form agreement to track changes in professional services, such as follows:

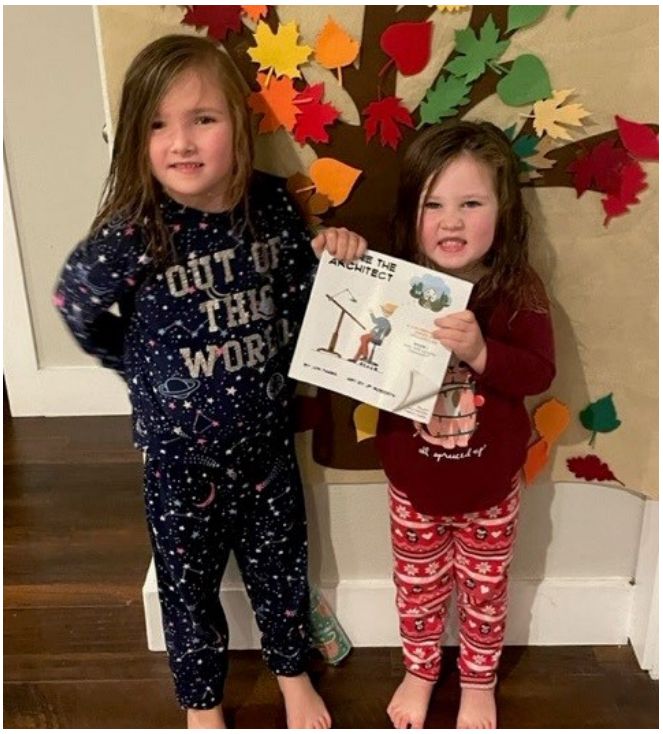
This is a sample agreement for your use and to modify as you see fit. Confer with your legal counsel that is knowledgeable in your state and other applicable state laws, to use in your design professional practice for risk management purposes, and this is not provided for legal advice. *(See page 24 for Eric's form)*

IN CONCLUSION

Not every change in scope need be an increase in the client's costs. In fact, it can be a deduction in the scope. While it is important to document every change in scope, perhaps an occasional "No Change in Cost" for something relatively minor would be good client relations. Nonetheless, the impact of scope creep can not only affect an A/E's profit and losses on the project, it can also increase project risks. The increased scope will bring with it additional exposures that were not anticipated at project interception.

TJS MEMBER'S FAMOUS DOG-VIDEO!

TJS member Ken Michael (see Member Profile on pp. 17-18) is best known to some for having a world-famous dog ("Sahara"). Ken's video of the dog was shown on *America's Funniest Home Videos* - winning a large cash prize plus a trip around the world to all the Disney theme parks, and a week-long Caribbean cruise! The video was the all-time favorite of the show's host, Tom Bergeron's (shown when he retired). Ken said: "The dog, a year-old mutt from an animal shelter, had a habit of thinking her back feet were trying to take bones she was chewing." In 2005, the video was ranked number five of the top funny videos posted on YouTube. "After being at my law firm for 10 years, I was known as the guy with the famous dog rather than as the architect/attorney construction lawyer!"



(Above) Attorney Catherine L. Deter of Wood Smith Henning & Berman, LLP (Aliso Viejo, CA) sent this photo to TJS Member and author Jon Masini showing her adorable nieces at bedtime after they read Jon's new book, *"Archie the Architect."* Catherine wrote: "The girls love all things construction! I'm so excited for them to learn and be curious about the design professional side of things!" Read more about Jon's new book on p. 21.

MEMBER PROFILE: KEN MICHAEL, ESQ.

Womble Bond Dickinson, LLP
Winston-Salem, NC

For architecture school, this Florida native chose the Univ. of Florida for its in-state tuition. "I was an undecided major for two years," he admits, "analysis paralysis - not wanting to rule anything out, until I drew some isometric drawings of a proposed dormitory loft and a friend said I should be an architect. It seemed obvious once she said it." Every undergraduate summer, Ken worked in architecture firms. "I also learned a lot working as a construction laborer on various residential and commercial projects." Such real-world experience was both humbling and invaluable, he said ("Nice detail, can it be built?"). Then, after undergraduate school, two of his classmates and Ken drove in his pea green Ford Pinto up the East Coast to visit 13 different architecture schools to decide which one would be best for a post-graduate degree. "Being heavily influenced by undergraduate professors from Virginia Tech, I was drawn there because of its design philosophy." Ken moved to Northern Virginia (working towards in-state residency) taking a year off to work in a couple of architect offices in Washington, D.C. and northern Virginia. Two years later, stacking major life events, Ken was one of a handful of fellow students who finished their thesis on time graduating from Virginia Tech. "Motivated by getting married the next week (to Susie) and then immediately setting off moving to a new city (Austin, TX), finding a new job and a new apartment," Ken got a job at a three-person (principal, secretary, and him) architecture firm in Austin, TX, in which "out of necessity," Ken had the opportunity to be involved in projects from proposals to final completion. "This was the beginning of the Intern-Architect system. My mentor/employer was very active in the AIA and at that time led my interest by example."

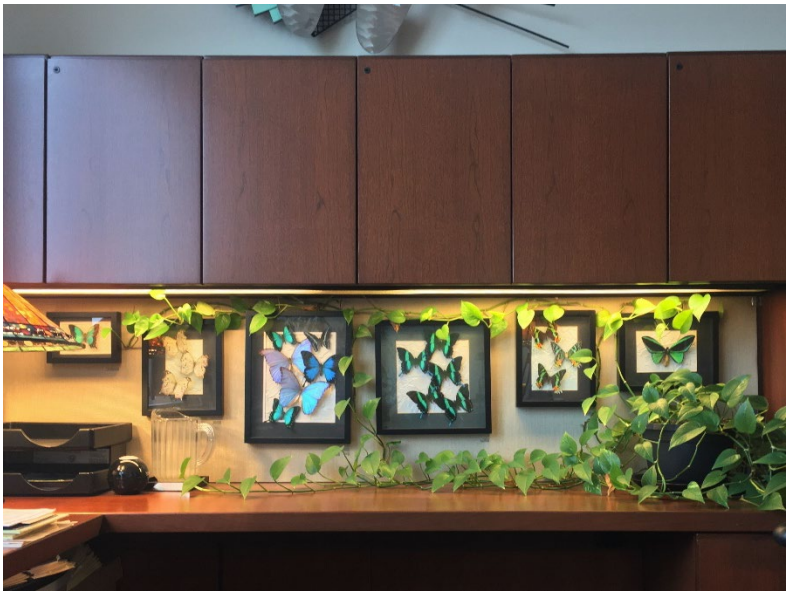
What intrigued Ken about combining architecture and law? He told us that: **"**A couple years before law school, I worked at an A/E firm in Florida using the right side of my brain as lead designer and entering designs in national competitions for the Astronauts Memorial (1987) and Korean War Memorial (1989). Then, the left side of my brain developed being a Certified Construction Specifier with CSI, getting involved with contracts, and some legal matters at the firm. At the same time, active in the 'no money down, get rich quick' era, I was in debt with rental properties owned in Texas that were casualties of the Reagan Tax Reform Act of 1986. In other words, I was pushed into the practice of law out of interest in the legal aspects of architecture and construction, and equally pulled in to make more money and solve my real estate debt problems." For law school, Ken returned to Gainesville (the Univ. of Florida) eleven years after getting his bachelor's degree there, only instead of living in a dorm or apartment with roommates, he was married with two young sons living in a house in a suburban neighborhood. "Same school, but completely different experience," he said.

Ken told us that "When I came home asking my wife Susie about quitting my full-time job with two young sons, no savings, and going into debt to go to law school full time, she agreed with one

(Below) Ken (front right) and his family a few years ago in Black Mountain, North Carolina.

with one stipulation – after law school we needed to move north escaping the Florida heat, humidity, and huge insects." Honoring his promise, after law school, Ken looked for jobs in N.C., Va., and D.C. "Since I did not know what state I would live in, I had the joy of taking the Florida Bar, and then after accepting a position with a Winston-Salem, N.C. law firm, I then learned that North Carolina would not grant reciprocity with Florida and I had to take the N.C. bar exam again that same year (Florida's fault for not wanting northerners moving down to practice and retire)." While many, the main reasons why he chose what is now the Womble Bond Dickinson law firm - the only law firm that Ken has ever worked for, is the culture and being able to practice "at the top of the food chain" representing primarily large institutional, governmental, and corporate owners (cross selling untapped existing clients) "who are generally happy to pay the bills," Ken says. Today, Womble Bond Dickinson has more than 1,000 attorneys in 26 U.S. and U.K. locations.

What does Ken do now? He explained that over the years "with little rhyme or reason, the pendulum swings between my construction law practice handling transactional and dispute related matters. For the latest picture in time, last year was probably two-thirds transactional and one-third dispute and real time project counseling matters." Ken told us that, "Years ago I had an expansive 'brag wall' of certificates and diplomas behind my office desk. Then one day I took them all down and replaced them with beautiful butterfly art (See photo, below).



(Above) Ken's "Butterfly Wall" in his office replaced his former "Brag Wall."

(Above) Ken and Susie with son, Steve, his wife, Joy, and two grandchildren.

"Nobody ever noticed or commented about my 'brag wall,' but I routinely get comments on my butterfly art. Over time I spend less and less energy trying to impress people. Not taking myself so seriously has been a gift of freedom."

Ken enjoys having the luxury of being able to do what he wants to do, when he wants to do it. "I use my architecture background in my law practice every single day, in which my clients appreciate the added-value – particularly my practical real-world work experience in the industry."

Ken told us that while his sons, Dan and Steve, were in high school, over a two-year period he and Susie adopted two daughters, Laura and Julia, in Ukraine and Russia. Ken's oldest son, Dan, is currently in the process of pursuing a path towards permanent residency in either New Zealand or Australia. Ken's youngest son, Steve, is married and lives in Sydney, Australia with Ken's two grandchildren (above). Steve's wife, Joy, is Thai which Ken said brought about an amazing trip to Bangkok for their wedding ceremony.

Ken enjoys collecting golf balls! There is a city golf course that he can see out of his home office. "No, I don't play golf," he said, "but rather my hobby is to find golf balls, selling them and donating the money to charity. And I'm pretty good at this – having once found over 100 golf balls in a single day." He is a fan of "Fallingwater," by Frank Lloyd Wright but also admires work by Santiago Calatrava and Zaha Hadid. "Odds are high that when I retire, we will spend most of our time in Australia. Life with my family has been an amazing ride!" he says.

MEMBER PROFILE: JUSTIN MONAHAN, ASSOC. AIA, ESQ.

Otak, Inc.
Portland, OR

Justin Monahan took the opposite route that most of us took: He got his law degree first! He explained that, "Back in the early 2000s, my wife and I were interested in living in the Pacific Northwest. I was in law school in Detroit, and clerking with a law firm with a strong land use and development practice. I then decided to study architecture. I sent out applications as a 3L and ended up having a blast earning my Master of Architecture!" Justin studied architecture at the Univ. of Oregon for one year at the main campus, in Eugene, Ore., and then two years at the school's urban satellite campus in Portland. "This was when Portland was building the hipster momentum that would later be portrayed in the TV show *Portlandia* and other media," he told us. "It was an exciting time to be part of the community." It was a great experience, Justin said. "I've returned to the school's studios as a reviewer in subsequent years and I continue to live and work in Portland today."

"I was born and raised in the metro Detroit area," he said. Not surprisingly, he got his J.D. at Wayne State Univ. in Detroit. "Wayne State has a diverse and robust program, well regarded in the metro Detroit area with a strong alumni network. When I started the program, I was still finding my professional footing coming out of an undergraduate degree in Philosophy, so it was also attractive that it was a tremendous value." Justin participated in Law Review at Wayne State and said that his law education there has provided a strong foundation for his current work as general counsel at Otak, Inc.

What intrigued Justin about combining the two areas of study? "In law school, I had the opportunity to clerk for a local firm in metro Detroit that had a strong construction, real estate, and land use practice," he said. "Although Wayne State Law had great instructors in other terrestrial concerns like water and environmental law, I decided that a more direct focus on the built environment was the place for me."

After getting his masters degree from the Univ. of Oregon, Justin hit the job market in the summer of 2009. "At the time, the biggest project in downtown Portland, the Park Avenue West Tower, was literally a stalled out giant hole in the ground. It was a challenging time to call up local architects and developers looking for work. Many of my classmates ended up leaving town for bigger markets in search of opportunities." Justin found work practicing as a lawyer with a law firm that had a strong construction practice. "With transactions and new projects slow right at the end of that decade, the first part of my practice had a strong litigation focus on construction projects."

(Above) Justin holding his son, Weston, at Halloween (yes, dressed as a slice of bacon!)

Today, you will find Justin as the general counsel for Otak, Inc., a multi-disciplinary design and program management firm headquartered in Portland. The company also has other sizable offices in Puget Sound and in the Denver area. "We have strong practices in architecture, landscape architecture, land use planning, civil engineering, water and natural resource engineering and planning, and in owner's representation and program management. We work in both public and private sectors." Justin also advises Otak's parent company, the Korean firm HanmiGlobal, on its independent operations in North America and the United Kingdom providing construction

management services for industrial projects.

When asked what's the best part of his job, Justin said: "The best part of my job is the diversity of our practices, the professionalism of my peers, and the wide range of efforts in the role. On a given day, I'll work with the architects on a local project where the construction may be struggling a bit and the client needs support; I'll coordinate with a school district about facility planning for an upcoming bond; someone in my survey practice will need help figuring out what they can and should not do in flying a mapping drone over different properties; we'll launch a stormwater planning effort for a multi-jurisdictional water district; we'll negotiate a lease for a new office; and we'll figure out how best to do business in Canada. It is all over the place!"

Justin was active with AIA Oregon's legislative committee, but recently he has been working more closely with the legislative committee of the Oregon chapter of the American Council of Engineering Companies (ACEC), which is pursuing "duty to defend" reform in Oregon this legislative session.

Justin is married to Kristin and says, "Every day I am astonished at how lucky I am to have such a lovely and loving wife who, over the past 20 years, through enormous effort and natural charisma has built a rewarding consulting practice advising nonprofit organizations on growing and delivering their missions and advising philanthropies and government agencies on working with them." He brags that Kristin has also found time "to be an inspiring mother to our two sons, of whom I could not be more proud." Their sons are Paxton, age 10, and Weston, age 2. Justin told us that, "One day after school recently, Paxton asked for help and brought me a Student Council Application Form. Nodding with approval, I said I'm happy to help." Was he thinking council president? "No, no," Paxton said, "not that, turn the paper over." On the back was a handwritten list of songs by Depeche Mode that Paxton's friend wanted Paxton to learn before their next jam (Pax plays piano and synths and his friend is a drummer). "We spent the night blasting Depeche Mode music videos. The future is in good hands," Justin said.

Outside of law and architecture, Justin enjoys bikes and music. "I am a dedicated bicycle commuter and promoter of multi-modal urban transportation," he says, "with the grizzle and gear attendant to 20+ years in the bike lanes in all four seasons." After work and school, Justin and his sons head downstairs to what they call "studio," where Justin has synthesizers, laptops with music software, drum kits, "all manner of large and small percussion instruments," guitars, bass, banjo, "you name it. We produce a joyful cacophony for as long as we can." (See photo). Justin finds inspiration in many buildings, but one of his favorites (a "magical experience") is the campus of the Cranbrook group of museums and schools in southeast Michigan.

(Above, left) "A joyful cacophony" - Weston plays drums while his brother, Paxton, plays the keyboard. (Above, right) Justin Monahan holds his two sons, Weston and Paxton.

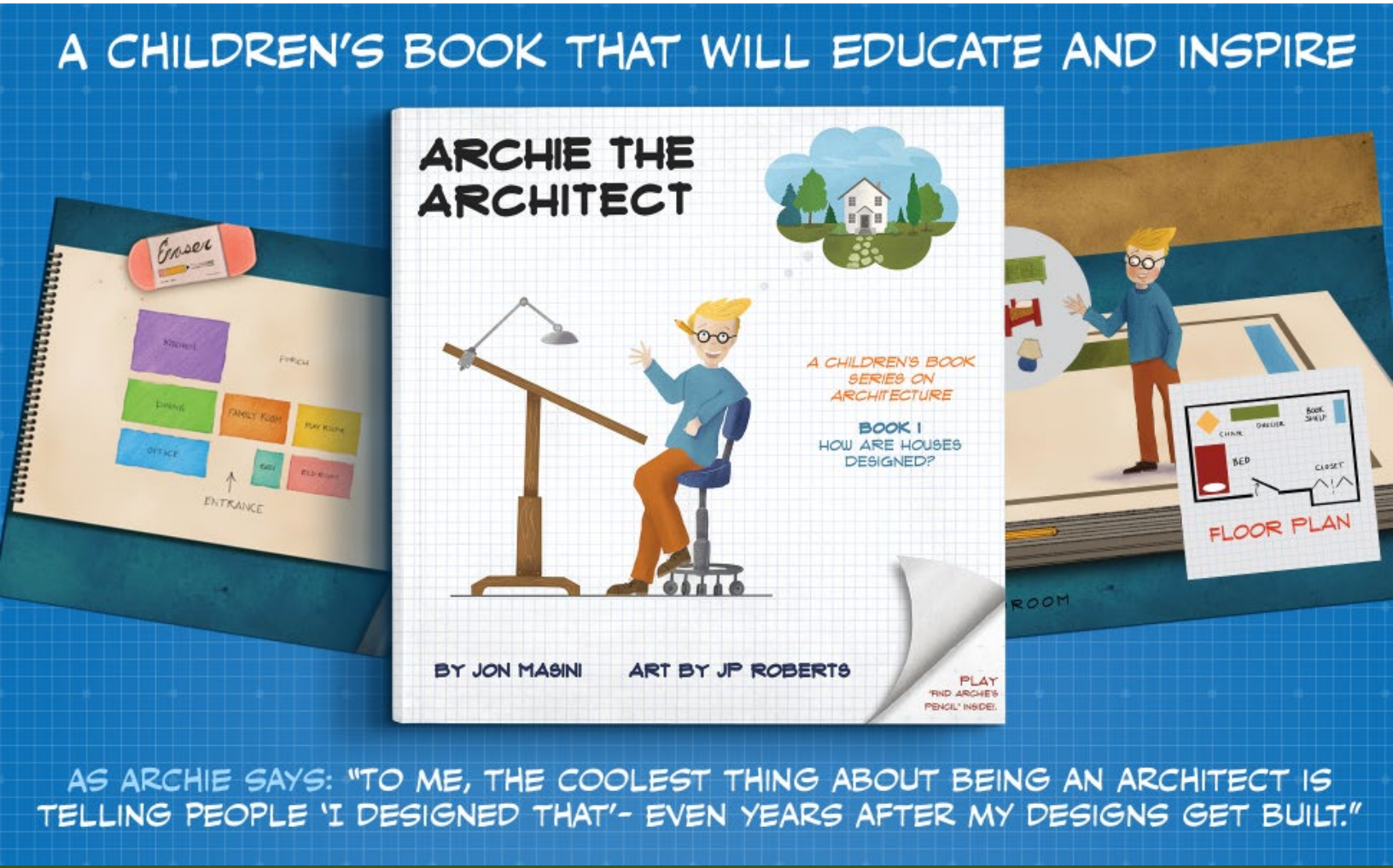
TJS MEMBER'S NEW BOOK A HIT!

TJS Member Jon B. Masini's new book *"Archie the Architect"* is getting great reviews! Amazon shows 96% of readers give the book 5 Stars, with 4% giving it 4 Stars! One Amazon reviewer wrote: *"Fantastic read for children (and parents) interested in construction and architecture! Such a breath of fresh air to see an informative and fun children's book focused on architecture! The pictures are cute and useful, and the story is easy for children to follow. Such a great addition to any children's library, as it will inspire creativity and different interests. My nieces love the 'hidden pencil' on each page, which keeps them engaged on every page. The book is a fun and educational introduction to how a house is built and how the architect fits into the equation on how the house is built. Highly recommend this book for creative children that have interests in art, construction, and design!"*

Another reviewer wrote:

"I wish this book was available when I was in grade school. Finally, there is a children's book on architecture that a child can relate to and learn from. The author explains in a simplistic way, the step-by-step process of designing a house. The illustrations in this book are wonderful and are a great help in making the process of designing a home visual and relatable. Finding the hidden pencil on every page helps to keep everyone engaged. If there is a budding architect in your child, this is a great way to spark their interest." Congratulations, Jon!

Author Jon Masini is a partner in the Chicago firm of Masini, Vickers & Hadsell, P.C. He got his J.D. from Loyola Univ. of Chicago and his architectural degree from Notre Dame.



MEMBERS IN THE NEWS!

After 13 years of service, **Michael J. Bell, FAIA, Esq.**, of Bell Architecture (New Orleans) completed his term on the AIA Contract Documents Committee in October 2022.

Clark Thiel, Esq., the Construction Counseling & Disputes Resolution Practice Leader at Pillsbury Winthrop Shaw Pittman LLP, has been recognized by *Best Lawyers* (published by BL Rankings LLC), for Construction Law (2021 – 2023).

Lawrence M. Prosen, Esq., of Cozen O'Connor, P.C., spoke on "Contracting Considerations for Large Projects" at the Practicing Law Institute (PLI) Construction and Infrastructure Conference. In 2022, Larry was also chosen to become a member of the Law360 2022 Construction Litigation Editorial Advisory Board.

Donovan P. Olliff, AIA, Esq. is now the General Counsel for HOK in St. Louis. Donovan was the Assistant General Counsel from 2007 to 2022. He was promoted in 2022 to the General Counsel role. Congratulations, Donovan!

Jacqueline Pons-Bunney, Esq. and her law partner, Peter Stacy, Esq., of W&D Law, LLP discussed "Ethical Inquiries & Red Flags in Contracts" at the 2022 AIA NE Mid-Year Symposium in Kearney, NE.

On Oct. 28, 2022, TJS Member **James R. Newland, Esq.,** of Seyferth Shaw, LLP, presented at the CSC Law Conference on "AIA Contract Provisions, What Really Matters When the Wheels Come Off."

Denis G. Ducran, AIA, Esq., with Peckar & Abramson, P.C. in Houston, has been recognized by *Best Lawyers* for his contributions in Construction Law from 2020 to 2023 and *Texas Super Lawyers* in 2022.

Jessyca L. Henderson, AIA, Esq. is an Adjunct Instructor at Morgan State Univ.'s School of Architecture + Planning. In Spring 2022, she taught Architectural Technology VI: "The Integrated Intelligent Detail" course instruction for the Master of Architecture (MArch) program (a required course).

Timothy M. Gibbons, Esq., of the Chambliss, Bahner & Stophel law firm in Chattanooga presented at the Tennessee Bar Association (TBA) Construction Law Section in Knoxville on Friday, Oct. 7. This program provided insight on the prompt pay act, contractor licensing, lien law, and construction contracts. Tim also presented at the Construction Specifications Institute (CSI) Chattanooga Chapter on Sept. 28 on "Current Issues in Tennessee Construction Law," which gave insight on supply chain issues, force majeure and mitigation.

Sheri L. Bonstelle, Esq., with the JMBM Zoning and Land Use Practice Group, presented a webinar on California's SB 9 and SB 10, which covered the latest land use, real estate and environmental issues impacting development in California.

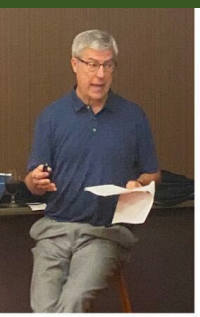
Donna Hunt, AIA, Esq., of Liberty Mutual Insurance, spoke at the 2022 CLM Construction Conference, where she and other panelists discussed best practices for the industry in a post-pandemic world.

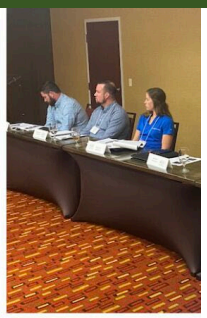
Joelle D. Jefcoat, FAIA, Esq., Deputy General Counsel for Perkins and Will, spoke in January 2022 at the ABA Forum on Construction Law, Division 1, on Litigating and Avoiding Delegated Design Disputes.

Laura B. LoBue, Esq., of the Pillsbury Winthrop Shaw Pittman law firm participated in 2022 Harvard's Women's Leadership Initiative.

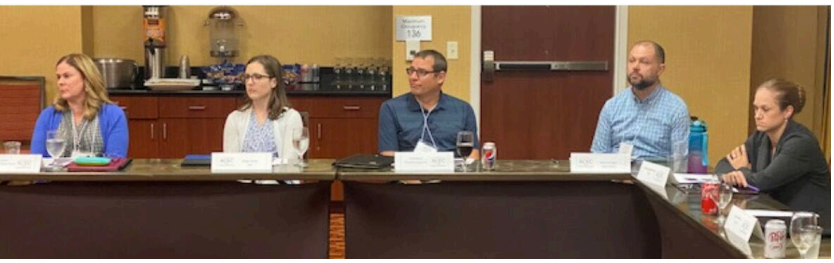
Bill Quatman, FAIA, Esq., and **Andrea S. (Ande) McMurtry, Assoc. AIA, Esq.,** co-presented to the Kansas City Metropolitan Bar Assn. (KCMBA) on 2022 Legislation and Case Law for the Construction Law Committee. This is an annual CLE presentation that covers recent state laws passed and cases published in both Kansas and Missouri.

(Below) Attorney/Architect/Contractor and TJS Member **Rick Salpietra, Esq., CCAL** was honored this year when his "Nihon-Inspired Contemporary project" earned a Best of Houzz Design 2022 Award, which celebrates the top 3% of home professionals whose work was most popular among the Houzz community.





ACEC
Emerging Leaders Program



(Above) Wyatt A. Hoch, Esq., with Foulston Siefkin LLP in Wichita, KS, lead the 2022 ACEC/Kansas Emerging Leaders Program, in which he addressed contract provisions, risk allocation and liability management.

APRIL 13, 2023 IS THOMAS JEFFERSON DAY!

Thomas Jefferson was born on April 13, 1743. His birthday has been celebrated since President Franklin D. Roosevelt issued a Proclamation 2276 on March 21, 1938. How can you celebrate?

1. **Read About Him.** Choose books and resources to read about Jefferson on Thomas Jefferson Day. This can give you all of the information that you need to know about the former president.
2. **Read Your Favorite Book.** Jefferson was an avid reader. His vast library contained more than 6,500 books. A great way to observe Thomas Jefferson Day is by spending some time reading.
3. **Watch a Documentary.** You can observe Thomas Jefferson Day by watching a documentary on the man himself or American history.

(Below) TJS Member Sara Miller, AIA, Esq. of Marks, Golia & Pinto, LLP was chosen for inclusion in the 2022 list of the 50 Women of Influence in the Construction Industry by the *San Diego Business Journal*.

Professional Change Services Amendment			
Design Professional:		Change Date:	
		Project Number:	
		Client:	
Date of Original Agreement:		Project Name:	
Project Description:			
Project Location:			
Scope and Reason for Change in Services:			
Fee Arrangement for Change in Services:			
Principals	$ /HR	Technicians	$ /HR
Architect/Engineer	$ /HR	Clerical	$ /HR
This Services Agreement is intended to use an attachment "Terms & Conditions" that define the duties and responsibilities of the Design Professional and Client.			
Special Notes:			
Offered by (Design Professional):		Accepted by (Client):	
Signature		Signature	
Date		Date	
Printed name / title		Printed name / title *Signature indicates the authority to bind the company to the terms herein*	

This sample form accompanies the article by Eric O. Pempus, FAIA, Esq., NCARB, on Scope Creep, found on pages 15-16, above.

MORE MEMBERS ON THE MOVE

Don Gray, Esq. can now be found at his new law firm:
Givens Pursley LLP
601 W Bannock St.
Boise, ID 83702
dongray@givenspursley.com

Jessica I. Hardy, Esq. moved to Clark Hill PLC, found at:
Clark Hill PLC
901 Main Street, Suite 6000
Dallas, TX 75202
jhardy@clarkhill.com

Travis B. Colburn, Esq. is now with Ahlers Cressman & Sleight:
Ahlers Cressman & Sleight PLLC
1325 4th Ave., Suite 1850
Seattle, WA 9810
travis.colburn@acslawyers.com

Hon. Kevin Elmer, AIA, Esq. is now an administrative law judge:
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1736 East Sunshine, Suite 610
Plaza Towers
Springfield, MO 65804-1333
kevinelmer1@gmail.com

William L. ("Bill") Erwin, AIA, Esq. is now with the law firm of Andrews Myers PC. He can be reached at:
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919 Congress Avenue
Suite 1050
Austin, Texas 78701
berwin@andrewsmyers.com

STILL MORE MEMBERS MOVED!

Francisco J. Matta, AIA, Esq. is the new Director of HKA's Miami office:
Francisco J. Matta
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78 SW 7th Street, Suite 500
Miami, FL 33130
FranciscoMatta@hka.com

Scott M. Vaughn, AIA, Esq. is now with Vaughn & Associates, Inc. He can be reached at:
Vaughn & Associates, Inc.
One Mifflin Place, Suite 400
Cambridge, MA 02138
smvaughn@verizon.net

Steven C. Swanson, Esq. has relocated to Denver. Find him at:
Foran Glennon
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Denver, CO 80202
sswanson@fgppr.com

Michael Bivens is now the Vice President & Counsel for Pedcor:
Vice President and Counsel
Pedcor Companies
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Have you recently changed firms or addresses? Let us know so that we can update the Directory Email your changes to the Editor of Monticello: bill@quatmanadr.com

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