ISSUE 04 July 2013

QUARTERLY JOURNAL OF THE JEFFERSON SOCIETY, INC.

Monticello

Upcoming Events

- **July 4, 2013: Thomas Jefferson Anniversary Dates**
  - 237 Years since adoption of the Declaration of Independence, at Philadelphia, Pa. (in 1776).
  - 187 Years since his death (in 1826) at Monticello in Charlottesville, Va. at age 83 on the 50th Anniversary of the Declaration of Independence.
- **Board of Directors Meeting**

  July 18, 2013 at 10:00 a.m. CDT (Conference Call)
  The agenda will be as follows:
  - Financial report.
  - Membership update.
  - Creation of a membership committee.
  - Suggestions for other committees.
  - Adoption of a mission statement.
  - Support for the AIA Large Firm Roundtable research.
  - Discussion of issues or initiatives proposed by board members prior to the meeting.

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.

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

AUTHORS WANTED

Interested in writing an article, a member profile, an opinion piece, or highlighting some new case or statute that is of interest. Please e-mail Bill Quatman to submit your idea for an upcoming issue of Monticello. Contact: bquatman@burnsmcd.com

JOIN US ON FACEBOOK & LINKEDIN

Want to connect with other members? Find us here.

WEBSITE:

www.thejeffersonsociety.org

In this issue

Our First Year and Looking Forward

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

The Jefferson Society, Inc. celebrates its first anniversary today, July 4, 2013. In the last year, past-president Bill Quatman, FAIA, Esq. expertly led The Society through formation, membership search, editorship of *The Monticello*, and set a standard for future leadership that will serve as a model. Many thanks should be given to Bill for a superior job well done. As I give thought to the future as a newly elected president, the first thing that comes to mind is that The Society is ready to start making a contribution to our professions of architecture and law.

We are not a club, are an organization with a purpose. This begs the question, what is that purpose? Generally, The Society was created to organize and use the dual professional specialties of the members to educate, and be a resource for, architects and attorneys as to legal issues arising from the practice of architecture, to promote activities and learning programs that support that purpose, to support with intellectual capital other organizations, schools, universities, and similar organizations who have interest, and provide a resource for architects in order to assist them in their professional and business development. In the future, The Society may conduct or participate in educational programs and seminars, interface with organizations such as the American Bar Association, The American Institute of Architects, The American Council of Engineering Companies, The Associated General Contractors of America, the Construction Users Roundtable, the Design Build Institute of America, and other organizations with interest in the design and construction industry.

The Society now has seventy members who live in twenty-four states, including the District of Columbia, and the membership will grow. Our members should be open to communicating with each other to share and exchange information that may enable our purpose to be effected when opportunities arise. The Society has been asked to have three members speak at the Design Build of America conference to be held in Las Vegas in November. Look for opportunities to engage The Society with architects in your area, with state and local governments, state and local chapters of trade organizations, schools and universities, and others where we can contribute; and, communicate with each other about issues that you confront as you deal with the challenges arising from the practices of law and architecture.

First Annual Meeting A Success

The First Annual Meeting of the Members of The Jefferson Society, Inc. was held in the Hill Country Dining Room at the Barton Creek Resort & Spa, 8212 Barton Club Dr., Austin, Texas, on May 8, 2013, at 8:00 p.m. The 15 Society members present included Timothy Burrow, Yvonne Castillo, Philip Croessmann, Julia Donoho, Ted Ewing, Mehrdad Farivar, Donna Hunt, Ashley Inabnet, Steve Kennedy, Jon Masini, Bill Quatman, Gilson Riecken, Jose Rodriguez, Craig Williams, and Sue Yoakum. Interim President Bill Quatman opened the meeting, determined that a quorum was present, and called the meeting to order as the annual meeting of the Members. Mr. Quatman began the Meeting with a brief history of The Society, how the idea and name had originated, and the purpose of forming an organization for architect-lawyers. He also reported on the previous actions since The Society was incorporated on July 4, 2012 in Virginia. Specifically, as of May 8, 2013, there were 62 Members from 21 States plus the District of Columbia; this includes 12 Founders and 50 Members, with another 4 potential members who had promised to join. Texas had the most Members (8), and there was a 4-way tie for second most: California, Illinois, Massachusetts and Missouri (6 each). Most members are in private law practice (35), followed by in-house counsel (8), insurance/surety (8) and just 4 practicing architects. Seven others have alternate careers ranging from AIA staff, mediation, risk management, non-profit and state representative. (See Member Profile of Rep. Elmer on page 12).

Bill announced that this first year we produced three newsletters and had developed a website, plus an online directory of the Members. The website will be updated with information over time. Mr. Quatman thanked Chuck Heuer for his help in incorporating The Society on July 4, 2012 and for his assistance in governance this first year.

Craig Williams, Treasurer, reported on the finances of The Society, including the number of $2 bills he had from Member initiation fees. He also reported on the bank account balance. Rimkus Consulting made a generous donation of $2,500 to underwrite the dinner portion of the meeting. Mr. Williams mentioned that he is in the process of applying for 501(c)(3) status for The Society.

Mr. Quatman thanked Craig for his work as Treasurer and announced that the next item of business was the adoption of By Laws. A draft set of By Laws of The Society had been distributed for review and comment, acknowledged by the Members attending. After discussion, upon a Motion made by Mr. Farivar, seconded by Mr. Kennedy, the By Laws were adopted as presented, a copy of which will be posted to The Society's website.

It was announced that the following candidates had been nominated as officers of The Society for the coming year:

President:
R. Craig Williams, AIA, Esq.;
Treasurer:
Wilkes Alexander, AIA, Esq.;
President-Elect/Secretary:
Charles R. Heuer, FAIA, Esq.

Mr. Quatman asked for any other nominations from the floor. There being none, it was moved by Mr. Croessmann and seconded by Ms. Yoakum, that the slate of officers be adopted as presented. The slate was adopted by unanimous vote of the Members attending. The newly elected officers were congratulated.

Mr. Quatman then announced that the By Laws just adopted provide for eleven (11) positions on the Board of Directors. The first slate of candidates has a staggered set of term limits to provide for overlap; in future years, the terms will all be 2-years. The names of the candidates were read as having been nominated as directors of The Society. Mr. Quatman asked for any other nominations from the floor. There being none, it was moved by Mr. Masini and seconded by Mr. Williams, that the slate of directors be adopted as presented. The slate was adopted by unanimous vote of the Members attending. The newly elected directors were congratulated.

Outgoing president Bill Quatman then presented newly-elected President Craig Williams with his president's gavel, and Mr. Williams then led a discussion of the Members on their ideas and goals for The Society. Mr. Williams thanked Mr. Quatman for his work as interim-president and announced that Bill will remain editor of *Monticello*, our Society newsletter, at his request. President Williams stated that the dates for future Board meetings would be established, as would the date and location of the 2014 Annual Meeting of Members. There being no further business, on motion made the meeting adjourned at 9:30 p.m.

Newly-elected president, R. Craig Williams, AIA, Esq., led a lively discussion of potential activities of The Jefferson Society at the conclusion of the May 8, 2013 Annual Meeting in Austin, Texas.

2012-13 Jefferson Society's Officers and Directors

Officers (1-year term, 2013-14)
President: R. Craig Williams, AIA, Esq. (HKS Architects)
Treasurer: D. Wilkes Alexander, AIA, Esq. (Fisk, Fielder, et al.)
President-Elect/Secretary: Charles R. Heuer, FAIA, Esq. (Heuer Law Group)

Directors
(2-year term, 2013-15)

1. D. Wilkes Alexander, AIA, Esq. (Fisk, Fielder, et al.)
2. Timothy W. Burrow, Esq. (Burrow & Cravens, P.C.)
3. Gary L. Cole AIA, Esq. (Law Office of Gary L. Cole)
4. Julia A. Donoho, AIA, Esq. (County of Sonoma)
5. Mehrdad Farivar, FAIA, Esq. (Morris, Povich & Purdy, LLP)
6. Donna Hunt, AIA, Esq. (Lexington Insurance Co.)
7. J. Ashley Inabnet, AIA, Esq. (Inabnet & Jones, LLP)

(3-year term. 2013-16)

8. Charles R. Heuer, FAIA, Esq. (The Heuer Law Group)
9. G. William Quatman, FAIA, Esq. (Burns & McDonnell Engineering Co.)
10. Timothy R. Twomey, FAIA, Esq. (RTKL Associates, Inc.)
11. R. Craig Williams, AIA, Esq. (HKS Architects)

Crawford v. Weather Shield: The Risks Beyond California's Boarders

By Gilson Riecken, AIA, Esq.
San Francisco, CA

> Citing to its own version of the Field Code statute on indemnification, the North Dakota Supreme Court noted: "Like the California statute, N.D.C.C. § 22-02-07(4) provides for a statutory duty to defend in an indemnity contract, unless a contrary intention appears in the agreement, and the duty to defend requires the indemnitor to defend the indemnitee, upon request, against actions or proceedings in respect to the matters embraced by the indemnity."

In *Crawford v. Weather Shield Manufacturing, Inc.*, 187 P.3d 424 (Cal. 2008) the California Supreme Court considered a subcontractor's duty to provide the legal defense for a developer under an indemnification and defense agreement. The *Crawford* court unanimously held that, unless parties expressly provide otherwise, every contract to indemnify a person includes the duty to defend that person in any lawsuit potentially embraced by the indemnity. This defense duty arises "before the litigation to be defended has determined whether indemnity is actually owed . . . [and], therefore *cannot depend on the outcome* of that litigation." The decision affirmed that a subcontractor had to pay a developer's defense costs, notwithstanding a jury verdict exonerating the subcontractor of all fault. A subsequent California Court of Appeals decision clarified that this defense obligation applies in contracts involving design professionals. The *Crawford* court summarized the statutory basis for its holding as follows: "[Civil Code] section 2778, unchanged since 1872, sets forth general rules for the interpretation of indemnity contracts, "unless a contrary intention appears." If not forbidden by other, more specific statutes, the obligations set forth in section 2778 thus are deemed included in every indemnity agreement unless the parties indicate otherwise." This creates a difficult situation for California design professionals. But it may not remain confined to California.

Crawford-Like Risks In Other States.

The California statute at issue in the *Crawford* decision is Ca. Civil Code Section 2778, which provides:

Rules of Interpretation.

"In the interpretation of a contract of indemnity, the following rules are to be applied, *unless a contrary intention appears*: * * *

3. An indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, *embraces the costs of defense* against such claims, demands, or liability incurred in good faith, and in the exercise of a reasonable discretion;

4. The person indemnifying is *bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity*, but the person indemnified has the right to conduct such defenses, if he chooses to do so; *** "

This specific language comes directly from the "Field Code," David Dudley Field's codification of New York State's laws. Although never adopted by New York, the Field Code influenced the laws of many other states during the mid-nineteenth century, and provided the basis for California's 1872 Civil, Criminal, and Political Codes, and a revised Code of Civil Procedure. The four other states mentioned above were among those that adopted portions of the Field Code, and those four retain the exact same language found in the California's Civil Code Section 2778.

Furthermore, case law from other states suggests that courts in other jurisdictions could find a similar, independent defense obligation lurking within every indemnity agreement.

Among those states with the identical statutory language, only North Dakota's has directly examined the defense duty issue. In December 2012, North Dakota's Supreme Court decided *Specialized Contracting v. St. Paul Fire,* 825 N.W.2d 872 (N.D. 2012), a case that concerned claims by a city against its engineer for defense costs incurred in defending against a contractor's claims that had included allegations of engineer negligence. The decision contains an extensive discussion of the *Crawford* opinion.

After echoing the California court's analysis, the North Dakota court distinguished the case before it by finding that the contract at issue expressed an intent that the indemnification and defense duties only apply to the extent that the city plaintiff incurred liability as a result of the actual negligence on the part of the contractor (indemnitor). In particular, the court focused on the last sentence of the indemnity provision, which obligated the engineer "only in an amount proportionate to [the engineer's] culpability." Unlike the *Crawford* court, the *Specialized* court was able to find that statutory duty to defend inapplicable "to the parties' indemnity agreement because it expressed a contrary intent."

Thus, an architect working in any of the five states (and in Guam) that have the Field Code language in their statutes should make certain that any indemnity provision includes language sufficient to meet the "contrary intent" requirement of the jurisdiction.

Other Jurisdictions?

A Checkerboard of Risk.

The Field Code language is not the only threat that architects face regarding broad defense duties under indemnity provisions. A number of states have case law that suggests possible imposition of an insurance-like defense duty on indemnitors. While none of these cases establish a defense duty as clearly as in *Crawford*, a number suggest that such a duty may exist in jurisdictions beyond those that contain the Field Code language in their statutes. My 2010 Santa Clara Law Review article on the *Crawford* decision included an appendix that surveyed statutes and/or case law in the fifty states and the District of Columbia for indications of whether they might find a defense duty similar to what California found in *Crawford*.

Different states have taken different approaches to the defense duties owed under indemnity agreements.

Some courts have imposed an insurance-like duty on indemnitors for any matter potentially embraced by the indemnification. For example, Hawaii's Court of Appeals imposed a defense duty independent of indemnification liability where a contract included an express defense pro-vision. The court expressly applied the rules for insurance agreements to interpret the indemnity contract. The court held that the standard for determining a contractual indemnitor's defense duty to its indemnitee is the same as that for finding an insurer's duty to defend an insured. Other states appear to similarly lean to-ward a defense duty similar to that found in *Crawford*, including Mississippi, Missouri, New Hampshire, Oregon, Texas, Vermont, and Wisconsin.

Courts in other states have expressly differentiated their approach from *Crawford*. The Arizona Court of Appeals expressly acknowledged *Crawford*, but and declined to impose a defense duty independent of indemnification liability where the contract included a provision limiting indemnity "to the extent" of indemnitor's negligence and was silent regarding any defense obligations. Other states that have declined to impose broad defense duties include Alaska, Ark., Del., Ga., Illinois, Ind., Kansas, Kentucky, Nevada, and N. Carolina. One state has gone further and expressly limits defense duties to apply only in proportion to an indemnitor's actual obligation to indemnify. A Colorado statute bars indemnification or defense in any construction contract beyond the extent of the indemnitor's fault. The remaining states either have no statutes or case law on whether an indemnitor's defense duties are broader than the scope owed under the indemnification itself (Alabama, Conn., Dist. of Columbia, Idaho, Iowa, Maine, Maryland, Nebr., N. Mex., Ohio, Penn., Rhode Island, S. Carolina, Tenn., Utah, Va., Wash., W. Va., and Wyo.); or have conflicting authority (Fla., La., Mass., Minn., N.J., and N.Y.).

Summary

Thus, *Crawford* may reach beyond California's border, especially when there is a choice-of-law clause. Four other states, plus Guam, have the same language as in *Crawford*, and several more have authority suggesting that they might find similar defense duties.

LEED Online Version 3

By Timothy R. Twomey, FAIA, Esq.
Baltimore, MD

In its 2011 publication of its sustainable guide document, AIA Document D503-2011, the American Institute of Architects included a link to the power point presentation that accompanied my PLI presentation and the concerns raised therein, noted the presentation was based on the April 2009 agreements, and indicated that the January 2011 supplements and updates to the April 2009 documents were not addressed.

In the ABA Forum on the Construction Industry's Spring 2013 edition of *The Construction Lawyer* there is an article entitled "Through the Green Looking Glass, Part II: Contractual Solutions to Avoid Falling into the Rabbit Hole," which references the AIA's D503 link to my PLI presentation, mentions that the presentation identifies some concerns with the provisions of LOL3, but does not mention that it was based on the April 2009 documents or that newer versions of the documents published by GBCI have superseded the 2009 versions.

In 2009, as now, there were typically three agreements in connection with the LEED registration process. They are, in the order in which they are entered into:

- Terms and Conditions for the Use of LEED Online Version 3 ("T&C's");
- Project Registration Agreement; and
- Project Certification Agreement.

Some of the concerns raised in the PLI presentation regarding the various LOL3 agreements included the following:

- Whether the Owner has sufficient rights in the relevant design documents submitted as part of the LOL3 registration process to grant the required LOL3license to GBCI (the registration arm of the USGBC) for the various uses therein indicated, since standard form design professional agreements, such as those published by the AIA, typically only grant a license to the Owner in connection with the design, construction, operation and maintenance of the project;
- The T&C's of the documents purported to be binding upon not just the user of the LOL3 registration process, but also personally upon that user's agents and employees, and that each user and its employees and agents agree to indemnify the USGBC and GBCI against third party claims related to use of LOL3;
- If confidentiality is desired, since most design professional agreements, including those published by the AIA, require the parties to maintain the confidentiality of the information exchanged between them, then it was imperative to check the "confidentiality option" box on the LOL3 registration forms and for parties to make sure they had sufficient rights of disclosure to include confidential information in their LOL3 submissions;
- The Project Registration Agreement supersedes "any and all prior agreements" between the parties, thus superseding the T&C's for the Use of LEED Online Version3. (Note that the subsequent Project Certification Agreement incorporates the Project Registration Agreement, but since the Registration Agreement doesn't incorporate the T&C's, the latter are likewise not part of the Certification Agreement);
- The inclusion in the Registration Agreement of various representations regarding the design and construction of the project, and the intentions of the Owner, to pursue and achieve LEED certification;
- An obligation on the registrant (who often is not the Owner) to keep all LEED related documentation on site for seven years after award of certification, which could be anywhere from eight to ten years after substantial completion of the project;
- Indemnification of GBCI and USGBC for all third party claims arising from or in any way related to registration or the LEED certification process not caused by GBCI's or USGBC's negligence or willful misconduct;
- Owner confirmation that each Licensed Professional who has registered as such with GBCI meets each of the Licensed Professional Exemption requirements and that Owner shall immediately notify GBCI of any change in status.

Since the date of the PLI presentation, GBCI has revised the various agreements a number of times in response to questions and concerns raised not only by my PLI presentation but also by other folks involved in a legal working group that USBGC's General Counsel put together to vet and improve upon the documents. As a result of that process, Version 4 of the T&C's was released on September 13, 2011; version 5 of the Registration Agreement on January 11, 2011; and Version 4 of the Certification Agreement also on January 11, 2011. Most significantly, from my point of view, USGBC also released in January 2011 a new document entitled "Confirmation of Agent's Authority," the most current version of which is simply indicated as "Revised – December 19, 2011."

Together, these four documents do a much better job of sensibly addressing the issues, including those mentioned, above, raised by my PLI presentation,

In particular, the Confirmation of Agent's Authority ("CAA") agreement clarified, from my point of view, several key concerns regarding the relationship between the Owner of the project and those who most often execute, or are deemed to have executed, the various LEED agreements in connection with the certification process, and the personal liability they were deemed to have assumed by doing so.

The CAA, which requires that the Owner appoint an organization as its Agent and at least one individual within that organization who may accept the various agreements on the Owner's behalf, states that by signing this document, the Owner confirms, among other things, that the Agent has been expressly granted the authority to accept the terms of the LEED Project Registration Agreement and the Project Certification Agreement, and that the Owner is bound to GBCI by such actions taken by the Agent as if the same were taken by the Owner.

The Owner also acknowledges in the CAA that the definition of the term "you" in these agreements, if entered into by the Agent, applies only to the Owner and not to the Agent. And, significantly, the CAA states that "GBCI shall not pursue any rights or remedies against Agent in relation to Agent's authorized acceptance: of the several LEED agreements and that "Owner, and not the Agent, shall be solely and fully responsible for any error, omission, misrepresentation, breach of contractual obligations or other wrong or damage arising from the actions of Agent on Owner's behalf."

The CAA is, therefore, a significant and, in my view, proper clarification from the earlier versions of the Registration and Certification Agreements before the CAA was introduced. Thus, as far as the Registration and Certification Agreements are concerned, it would appear that responsibility and liability properly lie with the Owner and not the Agent for authorized actions taken by the Agent on behalf of the Owner in connection with the registration and certification process.

There remains one nagging problem, however, and that is the agreement, deemed made by the "user" of LEED Online Version 3 to initiate the LEED certification process and still contained in Section 13 of the current T&C's, to indemnify USGBC and GBCI from claims by third parties due to or arising out of any content or information the user may "submit, post, transmit, modify or otherwise make available through LEED Online."

While the Registration Agreement by its terms supersedes all prior agreements between the user and GBCI, and while the Certification Agreement expressly incorporates the Registration Agreement, the Registration Agreement states that the "Terms and Conditions . . . are not superseded by this Agreement." And since the CAA creates an agency relationship between Owner and Agent only with respect to the Registration Agreement and Certification Agreement and not with respect to the T&C's, the Agent, assuming the Agent is also the user who is deemed to have accepted the T&C's when initiating the LEED certification process, is still obligated under the Section 13 indemnification clause of the T&C's.

It would appear that the definition of the documents referred to in the Section 13 indemnification clause of the T&C's is more than broad enough to encompass any document submittals made by the Agent under the Registration and Certifications Agreements. It would appear, therefore, that the CAA does not remove the personal liability the Agent or its representative may have assumed if it was the party who signed the T&C's. This apparent and possibly inconsistent treatment between the CAA and the T&C's on this issue is unfortunate. Otherwise, the current version of the LEED Online Version 3 documents is pretty decent.

Membership Hits 70!

Welcome Our Newest Members!

The following have joined since our last Newsletter:

Wendy R. Bennett, Esq.
Cohen Seglias Pallas, et al.
Philadelphia, PA

Kevin M. Bothwell, Esq.
Thompson Becker & Bothwell
Cherry Hill, NJ

Joelle D. Jefcoat, AIA, Esq.
Perkins and Will
Charlotte, NC

Roger W. Kipp, AIA, Esq.
Cuningham Group Architecture
Minneapolis, MN

Peggy Landry, AIA, Esq.
Landry Architecture, LLC
New Orleans, LA

Frank Musica, Assoc.AIA, Esq.
Victor O. Schinnerer & Co.
Chevy Chase, MD

Jacqueline Pons-Bunney, Esq.
Weil & Drage, APC
Laguna Hills, CA

Caleb M. Riser, Esq.
Richardson Plowden & Robinson
Columbia, SC

Alan B. Stover, AIA, Esq.
Bethesda, MD

SURVEY CREWS MUST BE PAID AS LABORERS AND MECHANICS SAYS DEPT. OF LABOR

(Washington, DC) On May 30th, the National Society of Professional Surveyors protested the Department of Labor's March 22, 2013 Memorandum declaring that Davis-Bacon wages apply to member of survey crews. The DOL Memo (AAM 212) stated that survey crews who perform physical work on a jobsite "while employed by contractors and subcontractors immediately prior or during actual construction, in direct support of construction crews" will be considered laborers or mechanics entitled to prevailing wages. NSPS objected, stating: "AAM 212 reverses more than 50 years of established and accepted federal policy [which is] an affront to the surveying profession." Being classified as "laborers and mechanics" is detrimental to the surveying profession, NSPS wrote, protesting that they were never consulted during the 19 months that the DOL evaluated this "back-room deal" with the Operating Engineers' union. It appears that the intent of the DOL's memo is limited to construction surveying, e.g. setting construction stakes, grades and elevations.

MINNESOTA LAW CLOSES THE DOOR ON CONTRIBUTION AND INDEMNITY CLAIMS

(St. Paul, MN) April 24, 2013 marked the date that Minnesota's Governor Mark Dayton signed into law HF 450, which cuts off construction related claims for contribution and indemnity 14 years after substantial completion. Minnesota, which has a 10-year statute of repose, allowed an action for contribution or indemnity to be filed within 2-years after it accrues, "regardless of whether it accrued before or after the ten-year period." The 2013 revisions now put an end date to the filing of such actions. The statute also bars contribution or indemnity claims based on statutory or express warranties 14 years after the effective warranty date. See Mn. Stat. § 541.051.

FLORIDA A/E'S PASS NEW LAW TO UPHOLD LIMITATIONS OF LIABILITY

(Tallahassee, FL) Florida design professionals succeeded in passing significant legislation this year to uphold limitation of liability clauses in design contracts. SB 286 was introduced largely in response to a controversial 2010 court decision, *Witt v. La Gorce Country Club, Inc.,* 35 So. 3d 1033 (Fla. 3d DCA 2010), where the court decided that the limitation of liability clause only applied to the design firm and not the employees of that firm, thus allowing a direct suit to proceed against the individual without the benefit of the negotiated limitation. The new Florida statute passed overwhelmingly, with final votes of 37-1 in the Senate and 103-13 in the House. SB 286 was signed by Governor Rick Scott and went into effect on July 1, 2013. Under new Florida Statute 558.0035, an individual design professional is protected from personal liability for negligence when: 1) the contract is made between the business entity and a claimant or with another entity for the provision of professional services to the claimant; 2) the contract does not name as a party to the contract the individual employee or agent who will perform the professional services; 3) the contract includes a prominent statement, in uppercase font that is at least five point sizes larger than the rest of the text, that, pursuant to this section, an individual employee or agent may not be held individually liable for negligence; 4) the business entity maintains any professional liability insurance required under the contract; and 5) any damages are solely economic in nature and the damages do not extend to personal injuries or property not subject to the contract.

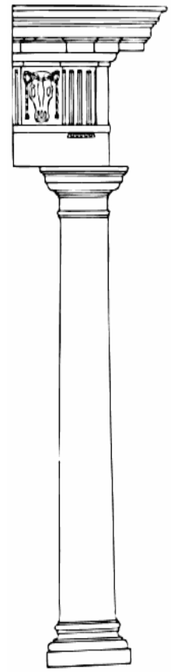
ARIZONA PASSES ANTI-INDEMNITY AMENDMENTS

(Phoenix, AZ) On June 20, 2013, Governor Brewer signed SB 1231 which made changes to the Arizona anti-indemnity statutes. A.R.S. 34-226 and 41-2586 were completely re-written and now provide clarity that the statute pre-empts any regulation enacted by a county, city, town or other political subdivision. The public entity may still require a design professional to indemnify and hold harmless the public agency, "but only to the extent caused by the negligence, recklessness or intentional wrongful conduct" of the design professional or "other persons employed or used" by the professional. The statutes flow this same limitation down to sub-contracts as well. The new law goes into effect on September 13, 2013.

Editor's Comments:
While this is a good clarification, it is still needs tweeking for at least two reasons: 1) It requires the design professional to indemnify the public body against "liabilities" (which is akin to mere "claims"); 2) It requires indemnity for the intentional torts of "other persons" employed "or used" by the design firm, and there would be no insurance for such acts of subconsultants.

COLORADO REVISES ITS LICENSING LAW

(Denver, CO) AIA Colorado helped shepherd through SB 13-161, which makes major changes in the A/E licensing statutes. Among the new provisions are: 1) majority of the officers and directors must be licensed architects to use the term "architects" in firm name; 2) architects need not report to the Board a malpractice claim that is dismissed by a court; 3) the term "architectural intern" is now a protected term; 4) the NCARB definition of the practice of architecture was adopted, with minor edits; 5) those practicing without a license must forfeit fees they receive; 6) electronic seals are now legal; and 7) the term "architect" cannot be used in its derivative form if you are not licensed.



There is no mistaking this California license plate for anyone but an Architect-Lawyer. This tag belongs to Jefferson Society board member Julia Donoho, AIA, Esq. of Windsor, CA. Julia notes that, "Somebody else in CA has the AIA + ESQ license plate." So what we want to know is: *Who has the other tag?* Have a similar license plate to share? Send it to Bill Quatman, editor of the Monticello newsletter: bquatman@burnsmcd.com

TEAMING AGREEMENT DECLARED INVALID IN VIRGINIA

The U.S. District Court for the Eastern District of Virginia recently issued its decision holding that a teaming agreement was unenforceable as a mere "agreement to agree." Two parties entered into a teaming agreement in 2008 to pursue a prime contract with the Federal government. The scope of work was an exhibit to the agreement as was the proposed form of subcontract the teammates would sign, if awarded. The team was successful and was awarded the prime contract. That same day they executed the subcontract. Shortly thereafter, the government advertised for bids for a similar contract and the same teammates entered into a second teaming agreement. Unlike the first one, however, no form of subcontract was attached, only a statement that they would "negotiate a subcontract" if awarded the job and if not, then the second teaming agreement would be terminated. When the second job was awarded to the team, negotiations began for a month on the subcontract but broke down. The Sub sued for breach of contract, unjust enrichment and fraud. The trial court held, however, that "mere agreements to agree in the future are too vague and too indefinite to be enforceable." The court noted that in Virginia, "agreements to negotiate at some point in the future are unenforceable." There being no mutual assent to the subcontract terms, there was no breach. Summary judgment was granted to the prime contractor teammate. See *Cyberlock Consulting, Inc. v. Information Experts, Inc*., 2012 WL 1395742 (E.D. Va. 2013).

Editor's Comment: Letters of intent have often run the same risk of enforceability as "agreements to agree." With the wide-spread use of teaming agreements, particularly in design-build ventures, the Virginia case causes some concern. Often teammates do not want to go through the process of negotiating the subcontract terms until they know if they have the job. DBIA's new Teaming Agreement (Form No. 580) requires the parties to decide upon the form of subcontract up front, called the "Subsequent Agreement." The official comments to the DBIA Teaming Agreement state:

"This provision requires the Parties to negotiate the terms and conditions of the Subsequent Agreement that they will enter into if the Design-Build Team is chosen for the Project. The parties should also negotiate and agree on the Teaming Party's anticipated Scope of Work for the Subsequent Agreement. It is not necessary for the Parties to negotiate compensation at the time that they negotiate the other terms and conditions of the Subsequent Agreement.

* * *

If one of the DBIA Standard Forms will be used, the Parties may simply check the appropriate box. If the Parties do not utilize one of the DBIA Standard Forms or if the parties modify one of the Standard Forms, then the Agreement must be attached as Exhibit A."

Based on the April 2013 decision in *Cyberlock Consulting,* this is good advice.

A choice of law clause might be a good consideration too: Not Virginia!

NULLUM TEMPUS: OHIO COURT SAYS STATUTE OF REPOSE IS NO BAR TO CLAIMS AGAINST THE KING

In a January 15, 2013 ruling involving the University of Cincinnati, a trial court followed Connecticut's lead in ruling that the State is not subject to a statute of repose. "*Nullum tempus occurrit regi*" or "time does not run against the king," was the basis for the holding. In this case, of course, the "king" is the State of Ohio. The University argued that under this doctrine, its claims related to a campus construction project were not barred by Ohio's Statute of Repose, Section 2305.131 of the Ohio Revised Code. The statute bars claims relating to the design and construction of improvements of property ten years after "substantial completion" of the improvement. The defendants argued that the University's 2011 suit was time-barred by the statute of repose on a project that was substantially completed in 1999. The University contended, however, under the *Nullum Tempus* doctrine, generally worded statutes of limitations and repose do not apply to it. The trial court agreed that under Ohio law, the state "absent express statutory provision to the contrary, is exempt from the operation of a generally worded statute of limitations." "[T]he sovereign, acting through its agents who are 'continually busied for the public good' can on occasion be somewhat less than imbued with alacrity in preserving the rights of the public. This is as true today as it was in monarchial times," said the court, citing to an Ohio Supreme Court case (*Sullivan*, 38 Ohio St.3d at 140). The trial court noted that its decision was contrary to Virginia law, but consistent with case law from Connecticut, and Illinois.

The case is *University of Cincinnati v. Walsh Higgins & Company, et al*. (Hamilton County, Ohio, Common Pleas No. A1105831).

Editor's Comment: For a more detailed discussion of the *Nullum Tempus* doctrine, see Theresa Ringle's excellent article on page 2 of the January 2013 issue of *Monticello*.

Drafting the Declaration of Independence became the defining event in Thomas Jefferson's life. His first draft in June 1776 included 86 changes made by John Adams, Benjamin Franklin and other members of the 5-man committee appointed to draft the document. The final text was adopted the morning of July 4, 1776.

TEXAS COURT SAYS ARCHITECT OWED NO DUTY TO INJURED THIRD PARTY

In a case followed by many Texas A/E firms, the Texas Supreme Court declined to review an appellate ruling that a design firm owed no duty to a third party who was not in contractual privity with the architect. The plaintiff injured when a residential balcony collapsed sued the architect and other parties. Evidence showed that a subcontractor made several critical errors. The suit alleged that the architect was negligent for failing to identify and report the mistakes. The architect admitted that progress photos it had taken showed defects that were open and obvious, in hindsight, and should have been reported to the homeowner. "It's obvious now," the architect testified, "We didn't notice." Based on this, a jury found the architect 10% at fault, the general contractor 70% and the subcontractor 20%. On the architect's appeal, the Austin Court of Appeals ruled that a third party who did not have a contract with the architect could not maintain an action against the architect, who had no independent duty to protect the homeowner's guests from the negligent acts of the contractors. "Had the [Owners] wanted the Architects to be guarantors or insurers, they could have contracted for such services and would likely have had to pay a higher fee. Instead, the [Owners] contracted for an intermediate level of services – obtaining from the Architects some oversight but not a guarantee." See, *Black + Vernooy Architects v. Smith*, 346 S.W.3d 877 (Tex. App.- Austin 2011, pet. denied).

A Member in Politics: Rep. Kevin Elmer, AIA, Esq.

Kevin Elmer, AIA, Esq. took Thomas Jefferson's career path to heart. A politician and architect, Kevin represents the 137th District in the Missouri House of Representatives. He began his political career as a City Alderman in his home town of Nixa, Missouri, where he and his wife Nancy raise their three sons, age 7 to 12. Kevin is a fiscal conservative, pro-life Republican, endorsed by the NRA. Born in Salem, Missouri, he was elected to his first two-year term in November 2010 and was voted Freshman State Representative of the Year by the Missouri Chamber of Commerce. Rep. Elmer currently serves as vice-chair of the House Judiciary Committee as well as the Professional Registration and Licensing Committee. He also chairs the Wetlands Management Issue Development Committee. Asked what first made him want to enter politics, Kevin said, "I believe that I have abilities, both natural and developed through my education, that I can give back in service to the people who elected me."

Kevin got his architectural degree from the University of Arkansas in 1994 and his J.D. from the University of Missouri - Kansas City in 2000, and is a licensed architect and attorney, with a private law practice (Elmer Law Firm, LLC) when he is not in the State Capitol. His law practice is split 50-50 between general civil litigation and construction law. He has been named to the prestigious SuperLawyer's listing where he was designated a "Rising Star" in 2010. Kevin's interest in architecture came from his father, a bricklayer. He attributes his fiscally conservative platform to his working-class Missouri roots. "People in my district understand what it takes to build a savings account or a farm or business brick-by-brick. And they're worried about the government taking that away. It's my passion to remember that each tax dollar was paid by a hardworking individual," Elmer adds. "I approach issues in our state government with the fresh enthusiasm of a political outsider."

Asked what was his most rewarding political experience, Kevin said, "There is not just one. It is comprised of opportunities when I am able to make a call or get involved in a constituent's situation with a governmental issue and see it resolved." When not practicing law or passing legislation, Kevin can be found on the ball diamond or soccer field watching his sons play sports.

Rep. Elmer was influential in getting Missouri to pass the first-in-the-nation "peer review" privilege law for design professionals in 2012. The law permits designers to act as peer reviewers for other firms without fear of being sued, and permits firms to engage in post-project completion "lessons learned" training without risk of such sessions being admitted into court. The innovative law was sponsored by Rep. Elmer to promote improvement in architectural and engineering designs and improve public safety. The bill was passed in 2011 but vetoed by Missouri's Governor Jay Nixon under pressure from the plaintiff's bar. Undeterred, Rep. Elmer took the bill back to the Legislature again the next year, where is passed again and convinced the governor that it was the right thing to do.

Editor's Comment: The new Missouri "peer review" statute is codified at RSMo. § 537.033. Kansas tried and failed to pass a similar law in 2013. They need Kevin Elmer!

Renewed Spotlight on Florida: A Closer Look at *Tiara*

By Jose B. Rodriguez, AIA, Esq.
Ft. Lauderdale, FL

In a recent decision which caused quite a stir in the legal community, the Florida Supreme Court in *Tiara Condo. Assoc., Inc. v. Marsh & McLennan Companies, Inc.*, WL 828003 (Fla. March 7, 2013), held that the application of the economic loss rule is limited to products liability cases. At first glance, the *Tiara* holding permits tort and contract claims even where such claims arise from the same events and contract, regardless of whether the claimant seeks identical economic damages. A closer analysis of *Tiara*, however, reveals that its impact is not as dramatic as it may seem. In *Tiara*, the Court analyzed the evolution of the economic loss rule and stated "Having reviewed the origin and original purpose of the economic loss rule, and what has been described as the unprincipled extension of the rule, we now take this final step and hold that the economic loss rule applies only in the products liability context." Thus, the Court receded from its prior rulings to the extent they "applied the economic loss rule to cases other than products liability."

The concern over *Tiara* is that it subjects architects, engineers and contractors to tort claims even where a contract exists. However, Justice Pariente's concurring opinion makes clear that even if the economic loss rule no longer bars an action in tort where a contract exists, *Tiara* is not intended to disturb long-standing Florida law requiring a claim in tort to be independent from a claim arising in contract.

Specifically, Justice Pariente addressed the concern that *Tiara* monumentally upsets Florida law or creates an expansion of tort law at the expense of contract principles. She wrote:

"The majority's conclusion that the economic loss rule is limited to the products liability context does not undermine Florida's contract law or provide for an expansion in viable tort claims. Basic common law principles already restrict the remedies available to parties who have specifically negotiated for those remedies, and, contrary to the assertions raised in dissent, our clarification of the economic loss rule's applicability does nothing to alter these common law concepts. For example, in order to bring a valid tort claim, a party still must demonstrate that all of the required elements for the cause of action are satisfied, including that the tort is independent of any breach of contract claim."

Thus, while *Tiara* seems to permit tort claims which are interconnected with contract claims, Justice Pariente clarifies and affirms the rule first outlined in the seminal case of *Fla. Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So.2d 899, 901–02 (Fla. 1987), which held that "contract principles [are] more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage."

In fact, Justice Pariente indicates that tort claims which are interconnected with claims in contract are subject to dismissal just as they were prior to *Tiara*; the only difference, Justice Pariente states, is that the dismissal does not result from the invocation of the economic loss rule but rather as a result of the application of common law principles of contract. In doing so, the concurring opinion in *Tiara* as it applies to professionals reminds that although the application of the economic loss rule has been curtailed, the bedrock principles of contract remain as relevant as ever: a tort claim which is not independent of a claim arising in contract cannot stand.

SUSTAINABLE DESIGN CEU'S WAIVED BY AIA BOARD.

The AIA Board has modified its continuing education requirements, particularly for Sustainable Design. Those of us who are AIA members are no longer required to accrue 4 hours of Sustainable Design per year. However, AIA members must now complete 12 total hours of health, safety, and welfare (HSW) education (previously only 8 hours were required). The total number of CEU hours remains at 18 hours/yr.