Our Mission

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

Inside This Issue

The Jefferson Society, Inc.

c/o 2170 Lonicera Way
Charlottesville, VA 22911

ISSUE 08 July 2014

QUARTERLY JOURNAL OF THE JEFFERSON SOCIETY, INC.

Monticello

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

Send his or her name to President Chuck Heuer at cheuer@heuerlaw.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

The Third Time Is The Charm!

PRESIDENT'S MESSAGE:
By Charles R. Heuer, FAIA, Esq.
The Heuer Law Group

The Jefferson Society, Inc. has just passed through its second full year of existence and is poised for a charmed third year.

Craig Williams, AIA, Esq. did a superb job as President last year carrying on the high standard established by Bill Quatman, FAIA, Esq. as our first president. I hope to be able to do the same in the coming year.

Serving with me this year as officers are Tim Twomey, FAIA, Esq., as Secretary/President-elect, and Suzanne Harness, AIA, Esq. as Treasurer. I know we are all open to receiving ideas from all members if they can make membership more enjoyable and meaningful and the Society more productive or effective.

Just before leaving for the Annual Meeting, I received notice from the IRS that the Society has been approved as exempt from Federal taxation under section 501(c) (3) of the Internal Revenue Code. That also means that contributions to the Society are tax deductible under section 170 of the Revenue Code. Finally, we are classified as a Public Charity under section 509(a) (2). All of this is retroactive to our founding on July 4, 2012. Someone who knows should advise whether or not that makes our "dues" deductible. My eyes tend to glaze over on these topics, but I would appreciate ideas from those knowledgeable in this area as to how we can maximize the benefit of our new status.

Last year in his President's Message, Craig noted that our feet are now under us and we should be moving to promote and participate in activities that support architects and attorneys and the legal issues we deal with. There are many forms that can take. We now have more than 90 members. A "speaker's bureau" has been mentioned. At the Annual Meeting in Chicago we discussed offering to draft a monthly article for *Architectural Record* on legal / practice topics. By sharing the load, we could easily supply them with articles for years. Also, NCARB is now looking to push the licensing process further down into the schools with the hope of allowing for licensing upon, or shortly after, graduation. (See article on page 10). They will be soliciting proposals

(Continued on page 2)

President's Message
(cont'd from page 1)

from the schools on how this might work. I think we have a unique perspective on many aspects of this process and could participate in, or lead, development of curricula or courses to effectuate this goal. Please communicate and make use of the resource we all represent for each other and for our professions.

I spend most of my time in Charlottesville, Virginia – just designated the "happiest" city in America. I don't know about that, but this is certainly still Mr. Jefferson's town. It's pretty in central Virginia, the campus at UVA is great and I hereby offer to facilitate visits from one and all.

Members in Boston (Left to right): Wilkes Alexander, Trevor Resurreccion, Jacqueline Pons-Bunney, Hollye Fisk, Ashley Inabnet, Ted Ewing, Bill Quatman, Frank Musica, Joe Jones (not pictured David Garst & Jon Masini).

Eleven Jefferson Members Gather in Boston.

No, it wasn't a tea party, but the 53rd Annual Meeting of Invited Attorneys that attracted eleven Jefferson Society members on May 22-23, 2014 to that city on the lazy river Charles. The meeting is sponsored by Victor O. Schinnerer & Co., Inc. each year for their insureds and for attorneys handling defense work for CNA Insurance. The meeting is organized each year by Jefferson Society members Joe Jones and Frank Musica, both of whom work for Schinnerer.

Second Annual Meeting Draws Over 20 Members to Chicago.

The Second Annual Meeting of the Members of The Jefferson Society, Inc. was held at the historic Firehouse Restaurant at 14th Street and Michigan Avenue in Chicago on June 25, 2014, at 8:00 p.m. Members present included Robin Baker, Yvonne Castillo, Julia Donoho, Brian Erwin, Ted Ewing, Mehrdad Farivar, Scott Fradin, Tim Gibbons, Suzanne Harness, Chuck Heuer, Donna Hunt, Ashley Inabnet, Peggy Landry, Eric Pempus, Jacqueline Pons-Bunney, Bill Quatman, Kerri Ranney, Joyce Raspa-Gore, Jose Rodriguez, Gracia Schiffrin, Bryan Seifert, Ed Smith, Craig Williams, and Sue Yoakum. Also attending as guests were two representatives of Rimkus Consulting, who sponsored the dinner. President Craig Williams opened the meeting, determined that a quorum was present, and called the meeting to order as the annual meeting of the Members.

Mr. Williams asked past president Bill Quatman to give a brief history of the Society, how the idea and name had originated and the purpose of forming an organization for architect-lawyers.

President Williams reported on the previous actions since the last annual meeting in May 2013. Mr. Williams gave a report on the finances of the Society, including bank balance. He also reported that he has applied to the IRS for an official 501(c)(3) status as a tax-exempt entity. *(See note on page 4 of this newsletter).*

Mr. Williams thanked Wilkes Alexander for his work as Treasurer and Mr. Quatman for his work on the quarterly newsletter. Mr. Williams thanked Julia Donoho for her excellent work in planning the annual meeting and Ms. Donoho expressed interest in planning the 2015 meeting as well.

Mr. Williams then announced that the next item of business was the election of officers. It was announced that the following candidates listed below (see inset) had been nominated as officers of the Society for the coming year. Mr. Williams asked for any other nominations from the floor. There being none, it was moved by Mr. Quatman 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 in person except for Mr. Twomey, who was unable to attend due to a prior commitment.

Mr. Williams then announced that the By Laws provide for eleven (11) positions on the Board of Directors and that at last year's annual meeting, the first slate of candidates was elected with a staggered set of term limits to provide for overlap. Four directors were elected to serve 3-year terms, with seven directors elected for 2-year terms. Since all directors had one or more years remaining, there was no need to elect new directors. Mr. Williams clarified that in future years, the terms will all be 2-years. The following directors will remain on the

2014-15 Jefferson Society's Officers and Directors

Officers (1-year term, 2014-15)
President: Charles R. Heuer, FAIA, Esq. (Heuer Law Group)
Treasurer: Suzanne H. Harness, AIA, Esq. (Harness Law, LLC)
President-Elect/Secretary: Timothy R. Twomey, FAIA, Esq. (RTKL Associates, Inc.)

Directors
(Remaining 2-year terms, 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. (Legal Constructs)
5. Mehrdad Farivar, FAIA, Esq. (Morris, Povich & Purdy, LLP)
6. Donna Hunt, AIA, Esq. (Ironshore)
7. J. Ashley Inabnet, AIA, Esq. (Inabnet & Jones, LLP)

(Remaining 3-year terms. 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)

Annual Meeting (cont'd)

Board as follows:
(See inset on page 3 of this newsletter).
Outgoing president Craig Williams then presented newly-elected President Chuck Heuer with his president's gavel, and Mr. Heuer then led a discussion of the Members on their ideas and goals for the Society. In particular, there was discussion about writing a monthly column for Architectural Record, about scholarships for architectural students considering law school, and holding a legal seminar, perhaps in Charlottesville, Virginia, as well as other items. President Heuer stated that the dates for future Board meetings would be established, as would the date and location of the 2015 Annual Meeting of Members. There being no further business, on Motion duly made and seconded, the meeting was adjourned at 9:30 p.m.

IRS GRANTS TJS 501(C)(3) STATUS.

On June 30, 2014, just five days after our Second Annual Meeting, the Internal Revenue Service granted The Jefferson Society its Public Charity Status under Section 501(c)(3) of the Code, effective as of the date of organization on July 4, 2012.

The IRS has determined that the Society properly falls into the category of a Public Charity *(rather than a Private Foundation).* The Society can receive tax deductible bequests or donations. A copy of the tax exempt letter is available upon request from the President or Treasurer. Congratulations!

(above) Outgoing President R. Craig Williams, AIA, Esq. discussed the Society's activities during the past year while (below) TJS members listened intently.

(clockwise from above left) TJS member Julia Donoho gave awards of Thomas Jefferson Strawberry Soda which she brought all the way from Mount Rushmore National Memorial in South Dakota. During dinner, each member gave a short summary of where they went to college and law school, what they do now, and why they became both an architect and a lawyer, the highlight of the Second Annual Meeting. Craig Williams surprised newly elected President Charles R. (Chuck) Heuer, FAIA, Esq. with his president's gavel, after which Chuck led a lively discussion.

Membership Tops 90!

The Jefferson Society has 91 Members, which includes: 12 Founders, 77 Regular Members, and 2 Associate Members.

Please Welcome Our 3 Newest Members!

The following have joined since our last Newsletter:

MEMBERS:
Brendan J. Peters, AIA, Esq.
Perkins Coie, LLP
Seattle, WA

Steven C. Swanson, Esq.
Foran Glennon
Chicago, IL

ASSOCIATE MEMBERS:
Andrea S. McMurtry, Esq.
Horn Aylward & Bandy, LLC
Kansas City, MO

Do you know of someone we've overlooked? Please help us to recruit those potential members who hold dual degrees in both architecture and law. Send their names to:

Chuck Heuer, FAIA, Esq.
President
The Jefferson Society
cheuer@heuerlaw.com

Yahoo! A Big Win in Texas: State Supreme Court Unanimously Blocks Contractor's Economic Loss Tort Claims Against Designer Firm

John R. Hawkins, Esq. **
Porter Hedges, LLP
Houston, TX

Did you hear that cheering in Texas last month? In the Lone Star State, contractors have long tried to directly sue their owners' professional design firms -- rarely with success -- when faulty plans cause economic losses such as increased costs from delays and disruptions. A few cases in recent years brought contractors hope that there might be a viable path to professional designers' checkbooks through tort claims like negligent misrepresentation. The latter tort is the dissemination of business information, like that in contract documents ("CD's"), which is negligently wrong and damages another, like a contractor, who was entitled to rely on the information. The Texas Supreme Court just took away this hope in *LAN/STV v. Martin K. Eby Constr. Co.*, 2014 WL 2789097 (Tex.), much to the delight of A/E's in the state.

The Economic Loss Rule. The Court based its decision in *Eby* on the Economic Loss Rule, which we all know can be a legal barrier in some states to tort claims, like negligence or negligent misrepresentation, for the recovery of purely economic loss. When applied, the Rule prevents a general contractor from recovering increased performance and delay costs from errors in CD's directly against the owner's project designer. The contractor's remedy for this economic loss remains against the owner. Of course, when project stakeholders are limited to contract claims, owners cannot sue subcontractors or sub-consultants, contractors and subcontractors cannot sue designers, and *vice versa,* for economic loss because there is no contract between them.

The *Eby* Case. Dallas Area Rapid Transit Authority (DART) built a rail project. The contractor, Eby, claimed delay and disruption damages caused errors in the CD's. Eby sued DART for breach of contract. Eby also sued LAN/STV, DART's design team, for negligent misrepresentation trying to recover out-of-pocket expenditures and consequential losses Eby suffered by relying on the Contract Documents (CD's).

The trial court entered judgment against LAN/STV based upon the jury's finding of LAN/STV's negligent misrepresentation in the form of errors in its Contract Documents. The intermediate court of appeals in Dallas agreed with the trial court. In a big win for design professionals, the Texas Supreme Court applied the Economic Loss Rule, reversing that decision and entering judgment in favor of LAN/STV.

The Predictability of Risk in Contracts. The Court explored principal rationales for the Rule. Economic losses grow more easily than losses usually associated with torts, injury to the body or property of another. The physical forces that cause personal injury and property damage spend themselves in predictable ways, but economic harm is not self-limiting. If, for example, a roofing sub could sue a foundation sub for delays, the risk of liability for all stakeholders would be magnified and indeterminate. The indeterminate liability of economic loss may be out of proportion with the culpability. Also, risks of economic loss are especially well suited to allocation by contract. Contracting parties can assess the risks before signing a contract and agree to allocate the risk through insurance, indemnities and the like.

The *Eby* case will disappoint contractors and relieve design professionals, but all construction stakeholders can at least be sure that the contract they negotiate will be the final word for resolution of claims for economic loss. Carefully crafting risk shifting tools such as indemnity, release, insurance and dispute resolution provisions is now more important than ever.

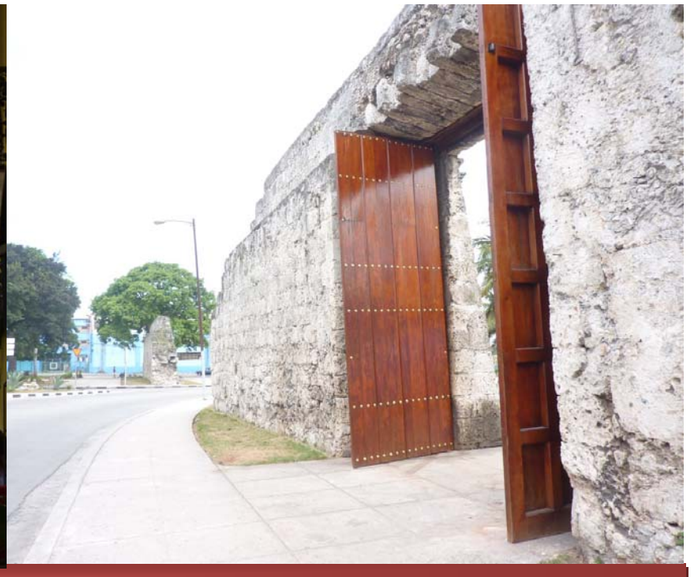
** Author John Hawkins received his B. Arch. from Louisiana State University and his J.D. from the University of Houston Law Center. He is a member of The Jefferson Society.

TRAVEL FEATURE: The Populated Urban Ruins of Havana

By Joyce Raspa-Gore, AIA, Esq.
Roselle Park, New Jersey

In May, I joined a group of fifteen AIA New Jersey members travelling from Miami on a State-approved Ambassador tour of Cuba with a Special License for educational purposes. My first image as we exited the Airport and entered the streets of Cuba was the ***cars!*** The epic fleet of classic American antiques cruising by reflected the character of the people: vibrant, proud, fun-loving, inviting, but frozen in that period of Cuban history of the 1950's and facing more than a half century of an embargo while simultaneously welcoming American visitors. The second image was of the ***architecture***, an abundance of magnificent buildings in extreme disrepair; from the Colonial Fortifications to Baroque Churches, Classical Civic Institutions, Art Deco structures, and a few Modernist buildings. Structures collapse regularly, needing immediate repair, some with balconies which had fallen off leaving only exposed rebar, others with significant deterioration from decay, neglect and the constant salt spray, especially along the Malecon – the waterfront boulevard. "*Que Casualidad*!" - What a Shame! I saw and felt the expression of mutual frustration written on the ruins of one of the "Unfinished Spaces" gold medal buildings of the Universidad de las Artes outside of Havana. Founded in 1550 by Spanish Conquistadores, the Bay of Havana became the largest port in the region. It developed from two basic necessities; first, the growing population's need for water which led to the development of the aqueduct; and second, the need for military defense which led to the construction of the Fort-

(continued on p. 10)



Travel Feature: Cuba *(cont'd from page 7)*

ress and walled city, the oldest and largest fortress in the Americas. Old Havana, a symphony of Baroque and Neo-classical architecture, is defined by the old city walls. The UNESCO World Heritage Site has maintained the early urban context with its five main plazas, each with its own character: *Plaza de Armas*, *Plaza Vieja*, *Plaza de San Francisco, Plaza del Cristo* and *Plaza de la Catedral*.

A railroad was built across Cuba to further the production and sale of their biggest crop, sugar, allowing Cuba to enter the 20th century with a bang. After WW I the astronomically high price of sugar funded the rapid development of Havana from the Art Deco buildings of the 1920-30's to the high rise construction of the 1950's. Havana with 1% of the land has 20% of the population, so in addition to overcrowding, and an inadequate transportation system, the housing has an average age of 75 years with little to no routine maintenance. This is because paint and materials are costly and hard to obtain especially given the average salary of twenty dollars a month. Everyone is provided with some form of housing. Nine out of ten families do not pay rent, and 94% own their own home. The government designates a value to the premises based on condition, location, size and age and gives each citizen a few

TJS Member Joyce Raspa-Gore in Havana

joint ventures with the Cuban government as a partner; yet the government maintains ultimate control.

Privatization is illegal, but every day we were excited by shining beacons of creative Cuban cultural spirit. Expressions through Music, from the street performers to the accompaniment at lunch, through Dance performances on the rooftops and nightclubs, through Art in the museums and in the boulevard parks, all were encouraged and rewarded. Indeed, due to the increasing lack of order in the enforcement of housing regulations, many homes - with beautiful interior courtyards, iron grillwork, marble winding stairways - were converted to restaurants and night clubs, others to elaborate art houses with a conglomeration of found objects, or colorful mosaics such as the complex by the artist, Furster, in an expression of their individual spirit.

Cuba's leading imports include oil from Venezuela, food from all over the world, and motor parts from China. Other industry includes cigar production, a major distillery, oil extraction fields, and a power plant. There are still many problems: electricity shuts off without warning, there is a great concern for availability of fresh water, sufficient food, and other basic necessities. A mother on the street asked me for "*jabon*" (soap), another for a pen for his child for school. It was heartbreaking to see the state of the people, the buildings, the country.

In October of 1960 the United States established an Embargo against exports - with the exception of food and medicine - and imports to and from Cuba, which must be paid in cash since credit is not available to Cuba. The Embargo is currently governed by the following six statutes which were established in response to certain hostile actions by the Cuban Government.

First, President Kennedy imposed an embargo on all trade with Cuba using his authority under the Trading with the Enemy Act, enacted in 1917 which restricts trade with countries hostile to the U.S. when not at war. Second, the Foreign Assistance Act enacted in 1961 "to promote the foreign policy, security, and general welfare of the United States by assisting peoples of the world in their efforts toward economic and social development and internal and external security, and for other purposes" and states that no assistance will be provided to a government which "engages in a consistent pattern of gross violations of internationally recognized human rights including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, causing the disappearance of persons by the abduction and clandestine detention of those persons, or other flagrant denial of the right to life, liberty, and the security of person, unless such assistance will directly benefit the needy people in such country."

Third, the Cuba Assets Control Regulations of 1963 which prohibits all travel-related transactions with Cuba. However, a State licensing authority may issue case-by-case licenses authorizing travel-related transactions with direct charter flights from Miami International Airport for close relatives, newsgathering, professional research or meetings, "humanitarian reasons" and for public performances, exhibitions, and similar activities.

Fourth, the Cuban Democracy Act of 1992 in "support for the Cuban people" which opens telecommunications with Cuba, and encourages assistance to non-governmental organizations and others in Cuba working to establish civil society. Fifth, the Helms–Burton Act of 1996 allowed the use of civil penalties in cases involving travel-related transactions while allowing further licenses, such as for certain amateur athletic competitions and for official government travel. And finally, the Trade Sanctions Reform and Export Enhancement Act of 2000, which again restricted certain travel-related transactions and discontinued several categories of licenses.

Most recently, President Obama has set forth the reforms Cuba is encouraged to make to end the Embargo including but not limited to releasing political prisoners, permitting American telecommunications companies to do business in Cuba, and ending the 10% charge on every dollar from the United States.

In conclusion, currently the Cuban Department of the Interior is tapping into the local 'Brain Power' to broaden their knowledge and develop strategies through a series of lectures by academicians, planners and other intellectuals in hope of advancing their country's development and further modify their Urban Reform laws. Let's hope there will be significant changes to improve the human condition and facilitate an exchange with one of the United States' logistically closest neighbors.

INTERESTED IN A TJS TRIP TO CUBA?

Anyone interested in travelling to Cuba on a group tour in 2015, please send an email to Joyce at: joyceraspagore@yahoo.com.

Details to follow. Yes, spouses can attend. Joyce is working on an itinerary already. Perhaps our Third Annual Meeting could be held there? Joyce is thinking of a trip around April 13th – Thomas Jefferson's birthday!

NCARB's Controversial New Path to Licensure: Architectural License Upon Graduation!!

On May 30, 2014, the National Council of Architectural Registration Boards (NCARB) Board of Directors announced its endorsement of the concept of an additional, structured path that leads to licensure in a U.S. jurisdiction. The controversial new path, *licensure upon graduation from an accredited program,* would integrate the rigorous internship and examination requirements that young architects must fulfill into the years spent completing a professional degree in architecture. The concept was designed by the Licensure Task Force, a group of volunteers convened by NCARB to recommend national registration standards. The group is headed by NCARB's Immediate Past President Ron Blitch of Louisiana, and includes former and current leaders of NCARB, the National Architectural Accrediting Board (NAAB), the American Institute of Architects (AIA), the Association of Colleges and Schools of Architecture (ACSA), and the American Institute of Architecture Students (AIAS), as well as interns, recently licensed architects, program deans and instructors, and jurisdictional licensing board representatives. Critics of the proposal wonder how an intern-architect can obtain the equivalent of the traditional 3-year work experience in a university classroom. The NCARB Board said: *"The Board of Directors endorses the concept of an additional, structured path to licensure that may lead to licensure upon graduation. This additional path will integrate current education, experience, and examination requirements and requires a collaborative partnership with institutions offering NAAB-accredited programs, our Member Boards, students, and firms."* The Licensure Task Force will start to identify schools interested in participating in the program. NCARB expects to issue schools Requests for Information later in the year, followed by a Request for Proposal process in 2015.

What Do You Think? Any concerns? Write an Op-Ed piece for the next issue of Monticello!

MEMBER PROFILE: YVONNE ROSELYN CASTILLO, ESQ.

TJS member Yvonne Roselyn Castillo, Esq. is a passionate advocate for architects in the legislatures across the nation in her role as the Director of State and Local Government Affairs for The American Institute of Architects in Washington, D.C. Her dual credentialed career began by studying architecture at the University of Texas at Austin. When asked why she chose that major, Yvonne said, "because I wanted to be like Frank Lloyd Wright and design places that complemented the natural landscape."

After completing her studies in architecture, Yvonne went on to law school at the University of Colorado Boulder. Her goal was to be an environmental lawyer and the UC-Boulder school had a very strong environmental law program. "Actually, I went to law school because I didn't think I was creative enough!" Yvonne said. "My peers in architecture school were so creative and artistic. Going to law school was my way of becoming a professional in something that didn't require that I draw." Yvonne did not escape drawing completely, as she found that law school required quite a bit of time diagramming and drawing out legal scenarios in order to process legal issues.

Although Yvonne never pursued licensure as an architect, she graduated from architecture school in Texas with a 4 year degree and then began working at the Texas Center for Policy Studies for environmental lawyers while studying for the LSAT. After finishing law school in Colorado, she clerked for a District Court Judge and then became a Deputy State Public Defender in Colorado. Now, Yvonne spends most of her time reading and writing legislation to promote the rights and interests of architects.

When asked what is the best part of her job at the AIA, Yvonne said, "Solving problems. I really enjoy learning about issues that architects face in their practice and the issue's impact on business. I enjoy dissecting the issue, researching and strategizing policy solutions and then developing an implementation plan." She finds satisfaction in analyzing an issue and then handing over the solution and hearing that the solution had a positive impact on architects. Though not an AIA member herself, Yvonne said, "Everything I do is an AIA activity, since I work full-time on the AIA staff here in Washington!"

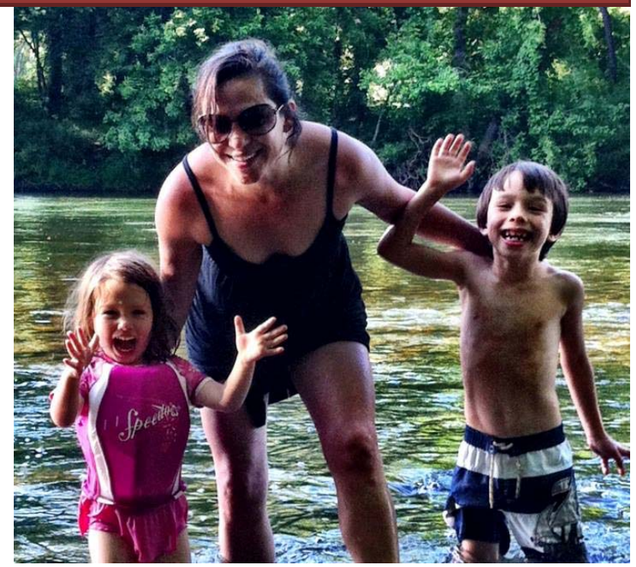
Yvonne is married to Alex Veltman, who is also an attorney and who speaks many different languages. The couple has two children, a son named Elan (age 7) and a daughter named Xochitl (pronounced and abbreviated as "So-chee") who is 4 yrs old. The family lives in Chevy Chase, Maryland where Yvonne says, "the schools are amazing and trails, shops, restaurants, grocery stores, bakery, hardware are all within a short walking distance. It's quite wonderful." She and Alex moved to the nation's capital after living in the Texas capital of Austin a couple of years ago. They miss their families but are quite pleased with their decision to relocate.

Yvonne is inspired most by organic architecture. "Anything with curves makes me happy," she said. Her favorite architect is Frank Lloyd Wright. When asked if she had any advice for a young architect thinking about law school, Yvonne answered: "There have been times when I questioned the value of law school but usually those moments are fleeting. Law school really turns students into critical thinkers, which is an important skill in the professional world no matter where you end up." We are fortunate to have a strong advocate for architects on the AIA staff like Yvonne Roselyn Castillo!

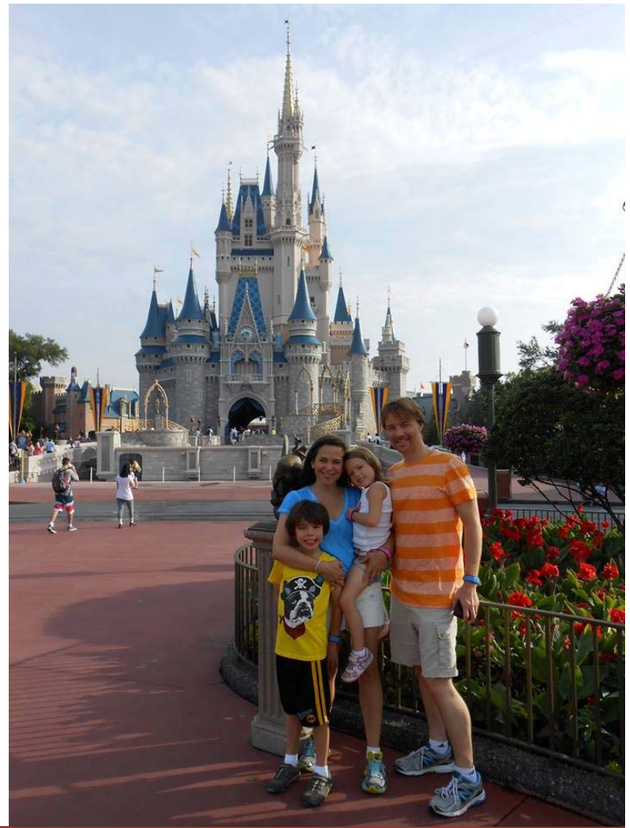
Some of the current issues on her desk at the AIA include the following:

- Public-Private-Partnerships (P3);
- Design-Build and CM at Risk Laws;
- Certificates of Merit;
- Good Samaritan Laws and Statutes of Repose;
- State Licensing and Exemptions to the Practice of Architecture;
- QBS Laws and Use of "Stock" Architectural Plans;
- Sustainability;
- Taxes on Professional Services; and,
- Codes and Standards.

Do you have an interest in state or federal legislation? If so, contact and she will be happy to help: yvonnecastillo@aia.org



(above) Yvonne and her darling children, Xochitl and Elan; (below) Doing the Disney thing with her Alex and kids.



TJS Members Craig Williams, Bill Quatman and Denis Ducran recently met up in Asheville, North Carolina where all three spoke at a conference held in the historic Grove Park Inn. Also attending the conference was TJS Member Brodie Stephens (not pictured). The panelists were all introduced as members of The Jefferson Society.

A Few 2014 State Laws You Might Have Missed!

Unless you are a legislation junkie, you might not have heard about a couple of laws that were passed this year that may have some people "jumping" for joy. For example, in Missouri, **HB 1603** makes "Jumping Jacks" the Official State Exercise for Missouri. The exercise was invented by Missouri-born General John Pershing as a drill exercise for West Point cadets in late 1800's. The general was from Laclede, Missouri. The law goes into effect on Aug. 28th and will have folks from the Show-Me State flapping their arms and legs daily.

In nearby Kansas, **HB 2595** acknowledged the official State Fossils. In a bill that passed the House 96-27 with some dissention, but flew past the Senate 40-0, Kansans now designate the *Tylosaurus* as the official state marine fossil and the *Pteranodon* as the official state flying fossil. Both monsters lived in great oceans that once covered the Kansas prairie.

In July, 2014, Massachusetts became the 9th state to regulate the trade of "shark fins" within their state borders. Under **HB 4088**, Whoever violates any provision of this law shall be punished by imprisonment for 60 days or by a fine of not less than $500 nor more than $1,000 dollars for every shark fin deemed in violation of the law, or by both such imprisonment and fine. The new law goes into effect on Sept. 1st and bars folks in Boston from making their fish chowda from shark fins!

On Jan. 1, 2014, California became the first state in the country to enact a law protecting the rights of transgender students. Under controversial **AB 1266**, such students can now choose which restroom to use, which locker room to use and whether to play on boys' or girls' sports teams.

The Georgia Legislature passed **HB 60**, a sweeping gun bill known officially as the "Safe Carry Protection Act," but called by some the "Guns Everywhere Act." The bill was signed into law on April 23, 2014 which allows firearms in bars, nightclubs, certain government buildings and churches, as well as certain parts of airports. In addition, certain persons authorized by school officials may also carry a loaded weapon into a school or onto a school bus. The bill passed 112-58 in the House and 37-18 in the Senate. Anyone bringing a gun into a church that prohibits them won't be arrested but could pay a fine up to $100.

By contrast, on July 18, 2014, California Gov. Jerry Brown signed into law the anti-gun **AB 1964** which removes existing exemptions for single-shot pistols from the state's roster of "not unsafe" handguns. The bill was strongly opposed by the NRA.

METCALF CONSTRUCTION CASE REVERSED: PRIOR HOLDING CAUSED CONCERN AMONG CONTRACTORS.

By G. William Quatman, FAIA, Esq.

In a widely followed case in which the DBIA filed an amicus brief, the U.S. Court of Appeals for the Federal Circuit ruled on Feb. 11, 2014 that a bidder could recover for differing site conditions despite a government disclaimer. The case dealt with the scope of the duty of good faith and fair dealing under a contract between the federal government and a private design-build firm hired to design and to build housing for the military. In 2002, the U.S. Navy awarded Metcalf a design-build contract for housing units at a Marine Corps base in Hawaii for $42.9 million. Problems arose almost immediately after the notice to proceed was issued related to expansive soils. A government-commissioned report found that the soil at the site had a "slight expansion potential" and the government warned bidders to conduct their own independent soil investigation, incorporating the standard FAR 52.236-2 (48 C.F.R. § 52.236-2), which concerns site conditions that differ materially from those disclosed in the contract. However, the government clarified, in writing that the contract would be amended if the contractor's post-award independent investigation turned up soil conditions significantly different from those described in the government's report. Metcalf hired its own geotech to investigate the soil, who reported that the soil's swelling potential was "moderate to high," not "slight" (as the pre-bid government study had said). The Navy denied that there was any material difference between the pre-bid and post-award soil assessments and thus concluded that no additional compensation was warranted (although the Navy approved contract modifications that paid Metcalf for additional soil tests and authorized Metcalf to build 2 prototype units in accordance with its geotech's recommendations. By that time, however, Metcalf was about 200 days behind schedule and incurring extra costs to the tune of over $4.8 million to use "post-tension" concrete.

Metcalf ultimately filed a claim for damages with the Navy's contracting officer that the Navy had materially breached the implied duty of good faith and fair dealing under the contract. The contracting officer denied the claim and so Metcalf sued under the Contract Disputes Act. The government counterclaimed for liquidated damages. The trial court rejected the bulk of Metcalf's claim, awarding only $272,191 on its claim, but granting the LD's for late completion of $2,637,507. Metcalf appealed, resulting in a ruling vacating the lower court outcome and remanding it for retrial.

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement," the Court said (citing to *Restatement (Second) of Contracts § 205*), including the federal government. The contract "Differing Site Conditions" clause (FAR 52.236-2) gave the contractor relief if it promptly reported subsurface or latent physical conditions at the site which differ materially from those indicated in this contract. A pre-bid question-and-answer stated in plain terms that material deviations from the government's report on swelling potential would be "dealt with by change order." The Court held that Metcalf was entitled to rely on the report "for bidding purposes," and the trial court erred in placing on Metcalf the risk and costs of dealing with newly discovered conditions different from those stated by the government before the contract became binding. FAR 52.236-2 "exists precisely in order to take at least some of the gamble on subsurface conditions out of bidding," the Court held. Language in the RFP that the expansive-soil report was "for preliminary information only" did not "shift that risk to Metcalf, especially when read together with the other government pronouncements."

See, *Metcalf Const. Co., Inc. v. U.S.,* 742 F.3d 984 (Fed.Cir. 2014).

PRESIDENT OBAMA PROHIBITS FEDERAL CONTRACTORS FROM DISCRIMINATING BECAUSE OF SEXUAL ORIENTATION OR GENDER IDENTITY

In a July 21, 2014 Executive Order, President Obama prohibited federal contractors from discriminating against individuals on the basis of sexual orientation or gender identity. The Executive Order leaves many unanswered questions which will most likely be addressed by proposed regulations, which the Department of Labor must publish within 90 days. The new Executive Order amends a 1965 order by President Lyndon Johnson by adding the following bold, underlined language to the existing provisions in all government contracts:

• The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, **sexual orientation, gender identity**, or national origin.

• The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, **sexual orientation, gender identity**, or national origin.

• The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, **sexual orientation, gender identity**, or national origin.

The new provisions will apply to federal contracts and subcontracts entered into on or after the effective date of the regulations to be issued by the Department of Labor.

President Obama's Order also prohibits the federal government from discriminating against applicants and employees on the basis of gender identity; sexual orientation was already a protected characteristic for federal public sector employees. The EO does not define "sexual orientation" and "gender identity." Nor does it state what "affirmative action" contractors will be required to take with respect to LGBT applicants. The EO also does not state if there will be any exemption for small contractors, or (in light of the recent *Hobby Lobby* decision) whether there is any special exemption for religious organizations – despite reported pressure on President Obama to do so. For those of us who do work for the federal government, this is one of a series of executive actions in which the President has used federal contractors as a way to achieve measures that he cannot get passed through Congress. *(See article below).* Many contractors are beginning to complain that the additional administrative burden placed on them puts their companies at a competitive disadvantage and is a disincentive to doing business with the federal government.

ANOTHER EXECUTIVE ORDER EXPANDS CLASS OF OVERTIME EMPLOYEES

On March 13, 2014, President Barack Obama signed another Executive Order directing the Secretary of Labor to reform regulations to expand the class of employees who are entitled to overtime, meaning private businesses will ultimately have to pay more overtime to employees. Currently, the majority of salaried workers are exempt from overtime because they: 1) earn more than $455 per week (approx.. $24,000 per year); 2) are considered "executive, administrative, or professional;" and, 3) are part of "management," meaning they direct the work of other employees, manage a business, and have the authority to hire and fire. This exemption allows employers to deny overtime pay to any employee who meets the pay threshold and spends any time supervising other workers. The president's Executive Order instructs the DOL Secretary to devise a plan that will expand the number of workers eligible for overtime pay. Some speculate that the new threshold will be raised to at least $955 per week (roughly $50,000 per year). It is also believed that the Obama Administration will push for the new rules to be wrapped up long before the 2016 presidential election.

NCARB Announces Exam Evolution.

In addition to the expedited licensure recommendation (See page 10, above), NCARB announced in May 2014 that a transition plan is underway to guide the implementation of major improvements and changes to the Architect Registration Examination® (ARE®), the test that all prospective architects must take to get their licenses. The new ARE 5.0 will launch in late 2016, while ARE 4.0 will remain available for at least 18 months after the launch.

WORD GAMES: Judge Rules That Apple May Not Call A Troll "A Troll!"

Honolulu-based GPNE Corp. has sued computer giant Apple for infringing some of the two dozen paging, packet radio and network patents it owns. The case has come before Lucy Koh, a U.S. district judge who knows the ways of Apple's lawyers, having supervised three *Apple v. Samsung* jury trials. In a pre-trial ruling issued on June 24, 2014, U.S. District Judge Lucy H. Koh laid down some guidelines for the use of the word "troll" in this patent litigation. Granting the plaintiff's motion in limine, in part, Judge Koh stated: "Apple may not refer to GPNE as a "patent troll," "pirate," "bounty hunter," "privateer," "bandit," "paper patent," "stick up," "shakedown," "playing the lawsuit lottery," "corporate shell game," or "a corporate shell." The judge clarified, however, that, "Apple may refer to GPNE as a "non-practicing entity," "licensing entity," "patent assertion entity," "a company that doesn't make anything," or "a company that doesn't sell anything."

The Court finds that this conclusion strikes the balance between allowing Apple to argue that GPNE's status as a non-practicing entity is relevant to the calculation of reasonable royalties and to secondary considerations of non-obviousness without unduly prejudicing GPNE or confusing the jury." The case is *GPNE Corp. v. Apple, Inc.,* Case No. 12-CV-02885-LHK, U.S. Dist. Ct. for the Northern Dist. of California.

There was no comment from the Brothers Grimm, nor from any trolls, who declined to be interviewed!

Ghostwritten Memo By In-House Lawyer Not Privileged.

In an employment race-discrimination case, a federal judge in the Northern District of California has ruled that the attorney–client privilege did not protect the employer's HR Manager's memo regarding his internal investigation of hotline complaints. The court issued this ruling even though the company's in-house lawyer "ghostwrote" the memo. In *Thompson v. C&H Sugar Co*., 2014 WL 595911 (N.D. Cal. Feb. 14, 2014) thirteen African–American employees sued their employer alleging that the company failed to properly train and promote them because of their race. The employees sought in discovery an internal investigation memo regarding the company's hotline complaints about alleged discriminatory acts. The memo, sent from the HR Manager to the HR VP, contained conclusions as to work-place dynamics and training recommendations. In an effort to buttress the privilege assertion, the company's in-house attorney submitted a declaration stating that he "essentially ghostwrote" the memo, particularly the investigation summary and conclusion. The Court was not persuaded by the in-house lawyer's ghostwriting assertion, stating that it found no support indicating that an attorney "essentially ghostwriting" a communication—whatever that means—renders that communication protected by the attorney–client privilege. As to claims of the Work Product Doctrine, that the in-house lawyer directed and supervised the HR Manager's investigation in anticipation of litigation, the Court held that the work-product doctrine covered the investigation memo. However, the Court also held that the plaintiffs demonstrated a substantial need for the memo because they could not otherwise obtain the hotline-info.

So Is There Anything GOOD to be Taken from *Beacon?*

Jacqueline Pons-Bunney, Esq.
Weil & Drage, APC

The Beacon condos are just a short distance from AT&T Park in San Francisco. A new California ruling has architects up in arms.

Another blow by the California Supreme Court on the design industry hit the wires with a vengeance when the Court issued its July 3, 2014 ruling. For those of you that may not have already heard, the State's high court in *Beacon Residential Community Association v. Skidmore, Owings & Merrill, LLP, et.al.,* (Supr. Ct. No. S208173), affirmed a finding by the Court of Appeals that imposed a duty on the principal architects of a condominium project to the homeowners' association, thereby allowing the association to sue the architects directly in tort.

SOM designed the condominium project for a developer client in San Francisco, California. Due to the mild Bay Area climate, the project did not include providing an air conditioning system for the individual condominium units in the design. The lawsuit alleged that the lack of installed air-conditioning resulted in an extremely high solar heat gain, rendering some of the condominium units uncomfortably warm during days of higher than normal temperatures. As a result of the original lawsuit in which the condo owners sued SOM, (even though they had no contract with SOM, and SOM prevailed at trial, but then lost on appeal in the appellate court), the case went before the California State Supreme Court. The issue was whether an architect can be held liable for claims from a third party with whom it did not have a contract. Simply stated, this case will determine: whether architects are accountable to third party purchasers of property for negligent design? Certainly, the impact on its face appears to be that the Court has managed to erode any contractual protections that prime design consultants work so hard to negotiate into their contracts. The Court seems to make a concerted effort to take excerpts from history and weave them into a suffocating tarp that leaves consultants with little room to breathe. But we should not necessarily accept the decision as a complete wash of any defenses design professionals may have when confronted with a claim by a project owner in the absence of a contract. Here are some notable points made by the Court:

- The decision is an appeal to a ruling on demurrer, an initial attack to a complaint that is confined to the allegations made in the opening pleading; the Court left open the possibility that it may have reached a different conclusion had this been a motion for summary judgment, which would have allowed the architects to bring in controverting evidence to dispute the alleged facts in the complaint;
- The decision relied heavily on the defendant architects being "principal architects" of the project, and focused on the broad scope of services provided, from conceptual design through construction administration (including weekly inspections at the construction site, monitoring contractor compliance with design plans, altering design requirements as issues arose, advising owner of non-comforming work that should be rejected), as well as their large fee of over $5 million;
- The Court declined to rule as to whether a duty is automatically imposed by the Right to Repair Act (Civ. Code Section 896 et seq.);
- The Court specifically distinguished the facts in *Beacon* with those in *Weseloh Family Ltd. Partnership v. K.L. Wessel Construction Col., Inc.* (2004) 125 Cal.App.4th 152 *(Weseloh)*, wherein the California Court of Appeals determined that there was no duty owed by second tier engineers to the project owner. Specifically, the Court noted that the engineers were retained by the prime consultant, and their services were for the intended benefit of the prime. Further, the Court took note that the engineers were not involved in the construction of the project, but simply provided an opinion for the intended use of the prime.

For most design professionals, this ruling may not have a significant impact at all. Those who typically provide services as a subconsultant, for example, might use the *Beacon* ruling to their advantage. The Court was very specific as to the facts directing this lawsuit. Despite the ruling in *Beacon*, design professionals should keep their focus on negotiating good contracts that offer significant protections because those provisions will still play an important role when a project becomes the subject of litigation.

Throughout the decision, the Court pointed to the very broad scope of services provided by the "principal architects", and the high fees charged. Most design professionals do not fit into this category. Indeed, most consultants would agree that the trend is for clients to limit services and skimp on fees, even to the project's detriment.

As to the Right to Repair Act, we have seen that the statute has gained momentum in the past year. While the statute creates a certain standard of construction and allows claims against design professionals, the Court left room for design professionals to assert defenses, contractual or otherwise, and did not take advantage of an opportunity to determine that a duty is automatically owed regardless of the consultant's role on a project. That defense is still alive and well under most conditions.

As to those who often find themselves in the role of "principal architects" similarly situated as the defendant in *Beacon*, well, the battlefield just became a little more dangerous. We like to believe that prime consultants who are entrusted with a vast scope of responsibilities and a healthy fee are also in a better position to negotiate their contracts at the start of the project, and have the ability to effectively document a project file through-

(continued on page 18)

Members David Garst and Ted Ewing met up at the Meeting of Invited Attorneys in Boston, two of the eleven Jefferson Society members who attended the annual meeting of defense counsel.

Beacon case analysis

(cont'd from p. 17)

throughout the course of design and construction. Some thoughts:

1. An iron-clad scope of services, clearly designating the roles of owner, contractor and design consultants, may prove helpful in educating a court on how broad a prime consultant's services really are. We are all very aware that lead consultants on a project can only do so much. The A/E's contract becomes the first line of defense in articulating how much control they really have.

2. An indemnity and/or limitation of liability provision that includes third party claims is generally enforceable. Firms can negotiate reasonable language with their clients that will protect both parties fairly, and require the client to protect the designer from third party claims or, in the alternative, to provide insurance to cover such claims. Even if that protection has its limits, it is worth fighting for. Better yet, insist that the indemnity obligations are with the parent company of the developer as opposed to the single-purpose LLC that only owns the one development property and has limited assets.

3. The lead consultant is often the scrivener of meeting minutes, responses to inquiries and change order requests, etc. Use these opportunities to include notations as to the parties involved in certain discussions and decision-making. These documents may become key in a summary judgment motion, as they will likely shed light on how much power a "principal architect" really has throughout the course of a project.

4. Propose contract provisions to the developer client requiring language in the Purchase and Sales Agreements and CC&Rs that require the HOA and individual unit owners, if they are to be considered legitimate third party beneficiaries, to be subject to any and all contract defenses that are contained within the designer's agreement with its client.

5. Insist upon additional, protective contract language that has the client agree to write into the Declaration, the Bylaws and Purchase & Sales Agreements a requirement that the recommended maintenance be the responsibility of the HOA, and that unit owners agree to undertake additional maintenance measures for their own residences.

To be sure, the Supreme Court did not do design professionals any favors in its most recent ruling impacting the design industry. We are left with the perhaps unwieldy task of using the ruling to improve the way we do business. While the initial analyses hitting the wire in the hours after the ruling was published generally took a dim view of our revered State Supreme Court, perhaps some deeper consideration will help architects refocus and strengthen their stance.

The Westlaw cite to the case is *Beacon Residential Community Association v. Skidmore, Owings & Merrill, LLP, et.al.,* 327 P.3d 850 (Cal. 2014).

[Editor's Note: Condo litigation has plagued design professionals for many years, driving insurance rates up and some firms out of the multi-family residential marketplace. The AIA Trust published a manual in 2006 titled "The Condo Crisis" and it is available on line for free at www.theaiatrust.com/condocrisis]

Some 2014 Legislative Highlights.

Minnesota Passes Anti-Indemnity Bill.

The 2014 legislative session has wrapped in most states with a mixed bag of results. On the brighter side, after a six year struggle, design professionals in Minnesota saw passage of ACEC/MN's anti-indemnification bill (HF2090, SF1757), which makes uninsurable clauses in design professional contracts void and unenforceable. The bill was signed into law by the Governor on May 16, 2014. The legislation covers both public and private client contracts for work in Minnesota and reflects the reality that professional liability insurance covers only the design professionals' errors and omissions and does not extend to others for actions outside of their control. The language states: *"A provision contained in, or executed in connection with, a design professional services contract is void and unenforceable to the extent it attempts to require an indemnitor to indemnify, to hold harmless, or to defend an indemnitee from or against liability for loss or damage resulting from the negligence or fault of anyone other than the indemnitor or others for whom the indemnitor is legally liable."* Congratulations to our friends in Minnesota!

Missouri A/E's Get Prompt Pay Relief.

For many years now, contractors and subcontractors have had a prompt pay law mandating payment on state and political subdivision projects, but the law was silent as to design professionals. With the passage of S.B. 529, however, architects and engineers are now protected with the right to prompt pay (within 30 days) and 1.5% interest per month on late payments. The same bill reduces punchlist holdback on contractors from 200% to 150% and reduces retainage on GC's and subs to 5% max. Missouri S.B. 809 also passed this year, making several minor changes to the A/E Licensing Law. Some of the key changes include:

1. Definitions of "incidental practice" and "responsible charge;"
2. Calls landscape architects "professionals;"
3. Modifies many of the "exemptions" to licensure;
4. Requires final "technical submissions" to be sealed

Kansas Overhauls Its Licensing Statutes and Passes Peer Review Privilege Law.

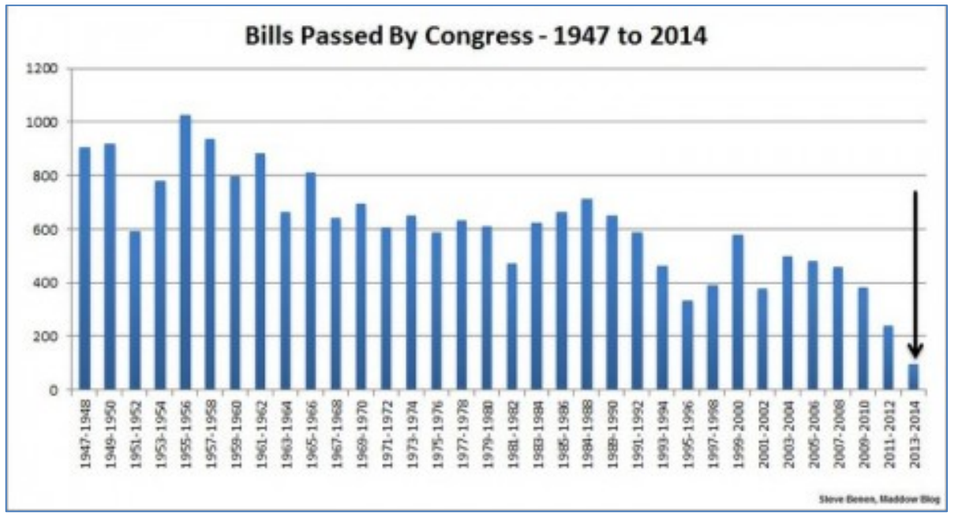
Like Missouri, Kansas S.B. 54 made sweeping changes to the licensing laws for design professionals in that state, including new definitions of "the practice of architecture" and "standard of care".

As mentioned in the April 2014 issue of *Monticello*, Kansas also became the second state to enact a "Peer Review" Privilege statute. Kansas H.B. 2246 breezed past the House 124-0 and the Senate 39-1, and was signed into law by former U.S. Senator (now Governor) Sam Brownback on May 12, 2014. The law went into effect on July 1, 2014. The Kansas law is much broader in its scope and protection than the bill passed by Missouri in 2012. Unlike the fierce negotiations and trade-offs that design professionals were forced to make after Missouri Governor Jay Nixon vetoed a 2011 bill under pressure from the plaintiffs' bar, the Kansas bill kept intact key concepts such as immunity for peer reviewers and inadmissibility of peer review comments and lessons learned.

There is considerable interest in spreading the passage of Peer Review Privilege laws nationwide now that two states have led the effort. Since this is a rule of evidence, applied in the court in which the matter is pending, it is important that other states enact similar laws to provide uniform protection for firms that have a nationwide practice.

Most Ineffective U.S. Congress in History!

The Jefferson Society is not a political body, but we cannot help but point out some shocking statistics. Did you know that the 113th Congressional (2013-15) will be the least productive Congress in history in terms of passing legislation? There are a total of 9,021 bills and resolutions currently pending, with only 121 bills passed in the last two years (just 56 this year). The net passage rate is a dismal 1.34%. With political parties becoming more hotly opposed in every issue, the trend may continue for the foreseeable future.



MEMBER PROFILE: Gracia Maria Shiffrin, AIA, Esq.

TJS Member Gracia Maria Shiffrin graduated from Louisiana State University School of Architecture with her B.Arch degree to fulfill a childhood dream. "Since I was a child," Gracia said, "I knew I wanted to be an architect. I have always loved the sights and smells of a construction site." Her father was the head of a governmental entity in her native country of El Salvador that provided the funding for social housing. "So I grew up visiting many construction sites with him and seeing the impact of his work," she said.

After finishing undergraduate studies in Baton Rouge, Louisiana, Gracia found that there were not many architectural jobs. "I bested a few of my classmates and landed a job at the Louisiana State Fire Marshall's Office reviewing architectural proposals for compliance with life safety codes. It took away my fear of codes and regulations." Armed with her knowledge of code and regs, Gracia then headed to California where she worked as an architect before moving north to Chicago. In the Windy City she enrolled in law school at DePaul University College of Law. "I had just gotten married and moved to Chicago and DePaul offered me a generous scholarship," Gracia said.

Gracia yearned to build upon her experiences as an architect in California and wanted to be involved in the activities that lead up to and surround the engagement of an architect. "In law school, I gravitated towards financial and real estate transactions courses and knew that I would enjoy that type of work."

After obtaining her Juris Doctor, Gracia's first legal job was as Assistant Corporation Counsel in the City of Chicago Office of the Corporation Counsel. The 270+ attorneys in that office provided legal services to over forty municipal departments. "I represented the Departments of Housing, Planning and Human Services. I worked in many financial transactions that included city funding and other types of assistance for economic development, large-scale public projects, and the creation and preservation of affordable housing." This passion for quality urban housing led her to Gracia's current job, where

she advises real estate developers seeking to create affordable housing for special populations such as homeless veterans, military families, and the elderly. "I help them find the funding and venture partners," she said.

"The best part of my job is the final product, when my work puts a roof over individuals who were living previously in deplorable conditions," Gracia admitted. She is truly helping to serve others with her dual degrees in architecture and law. Gracia is currently involved in an initiative called Working with an Architect/Ask an Architect. It's a public outreach effort that demystifies the use of architects and highlights the many benefits and services an architect can provide. Not surprisingly, the target audience is most often homeowners. "Chicago AIA has recently launched this effort in Spanish and we go out to Hispanic neighborhoods that have the highest rate of code violations," she said.

Gracia is married to "a recovering lawyer" and the couple lives in Chicago with their two daughters. "I have lived here (in Chicago) for 21 years. It has been a wonderful place to flourish professionally and to raise children." She feels that the city of Chicago is a "walking museum," with so much history as well as great new architecture. "The downtown is majestic and the neighborhoods have separate identities with thriving small commercial districts." With so much wonderful architecture to enjoy, Gracia says that, "As a collective, I find the historic high rise buildings in the Loop inspiring, especially as they are juxtaposed with contemporary architecture." She gives as an example the Spertus Museum, built as an infill in the Historic Michigan Boulevard district.

Who's her favorite architect? Santiago Calatrava, who she has met personally. "But I'm waiting for his first project in Chicago!" Gracia says.

Any advice for a young architect thinking about law school? "Do it! Talk to as many practitioners as you can, ask them about their day-to-day activities. Find a mentor in The Jefferson Society!" . . . What a great idea to explore!

GOOD NEWS FOR IN-HOUSE COUNSEL: D.C. Circuit Court Restores Attorney-Client Privilege for Internal Investigations.

In a follow up to the troubling case we profiled in the April 2014 issue of *Monticello*, the D.C. Circuit issued a June 27, 2014 ruling in *In Re Kellogg Brown & Root, Inc.* which should come as a welcome relief for companies that conduct internal investigations. *(See article on p. 4 of the April issue of Monticello).* The Court granted Kellogg Brown & Root Inc.'s (KBR's) petition for a writ of mandamus and vacated the lower court's production order that, as we reported, had compelled the production of materials prepared during the course of an internal investigation overseen by KBR's in-house counsel. The lawsuit involves a False Claims Act *qui tam* action brought by a former KBR employee named Harry Barko.

Mr. Barko alleged that KBR and certain subcontractors had defrauded the U.S. Government by inflating the costs of construction on military bases in Iraq. Prior to the lawsuit, KBR had conducted an internal investigation in accordance with its Code of Business Conduct to investigate potential violations of law and corporate policy. During discovery, plaintiff Barko sought documents prepared during the course of KBR's prior internal investigation. KBR responded that the documents were protected by the attorney-client and work product privileges. The trial judge reviewed the disputed documents *in camera* and then ruled that the documents were not covered by the attorney-client privilege because the KBR's investigation was not undertaken for the *primary purpose* of seeking legal advice. According to the Court, the investigation was a routine corporate compliance investigation required by regulatory law and corporate policy. The district court also rejected KBR's claim for work product privilege, ruling that documents were prepared in the ordinary course of business, not *because of* the prospect of litigation. Thus, as we reported in April, the district court effectively denied attorney-client privilege over internal investigations that arise for more than one purpose.

On appeal, the D.C. Circuit held that the district court's privilege ruling was clearly erroneous under *Upjohn v. United States,* 101 S.Ct. 677 (1981). As the appellate court explained, *"the District Court's novel approach would eradicate the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs, which is now the case in a significant swath of American industry."*

Going further, the D.C. Circuit clarified that the "primary purpose test" — which is used to resolve privilege disputes when attorney-client communications may have both legal and business purposes — does not require the court to identify the *one* primary purpose of the communication. The D.C. Circuit rejected the trial court's requirement that the communications at issue have the "sole purpose" of obtaining legal advice. Instead, the court should ask whether obtaining legal advice was *a primary purpose* of the communication. If one of the significant purposes of the internal investigation "was to obtain or provide legal advice, the privilege will apply." *In re KBR*, 2014 WL 2895939 (C.A.D.C.).