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.

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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 him or her. All candidates must have dual degrees in architecture and law.

AUTHORS WANTED

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

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The Third President

By Charles R. Heuer, FAIA, Esq.
The Heuer Law Group

As we approach the date for the Third Annual Meeting of The Jefferson Society, Inc., my term as President is ending. For nearly 20 years I have been involved with the conception and eventual creation of the Society, culminating with its incorporation on July 4, 2012 here in Charlottesville, Virginia. I became *the third* President of the Society following after Bill Quatman, FAIA, Esq. and Craig Williams, AIA, Esq. Since I live here in Charlottesville, I am also particularly conscious of the fact that Thomas Jefferson was *the third* President of the United States, having previously been instrumental in laying the groundwork for the new nation and helping to get it started on the right foot. At that point, I promptly cease to think of myself in the same breath as Thomas Jefferson! That's a quick way to begin to feel pretty insubstantial!

Nevertheless, we have started something here with The Jefferson Society that I think will continue to grow (100+ members in the first three years) and prosper. It's hard to know what the Society will eventually accomplish in pursuit of its stated goals of enhancing collegiality among its members and facilitating dialogue between architects and lawyers. I know that I have made new friends and established collegial relationships with other members. I always learn something from the cases and other materials contained in the Monticello newsletter. The personal profiles in Monticello have been very interesting. Last year at the Annual Meeting, we had a brief roundtable exposition of the attendees' backgrounds and paths to dual careers, and I expect that we will to do so again this year. Opportunities for contact and collaboration are enhanced when there are personal connections.

I wonder what *the twentieth* President of The Jefferson Society will write at the end of his or her term. "From little oaks . . ." So, my message now is "Cheers! Carry on to bigger things in the future!"

- Chuck Heuer, President

Welcome Three New Jefferson Society Members!

We welcome the following:

NEW MEMBERS:

102. Joseph E. Flynn, AIA, Esq.
Jos. E. Flynn Architect, LLC
River Ridge, LA

103. Prof. Casius Pealer, Esq.
Professor of Practice
School of Architecture
Tulane University
New Orleans, LA

104. Joseph S. Sestay, AIA, Esq.
Peckar & Abramson, P.C.
Los Angeles, CA

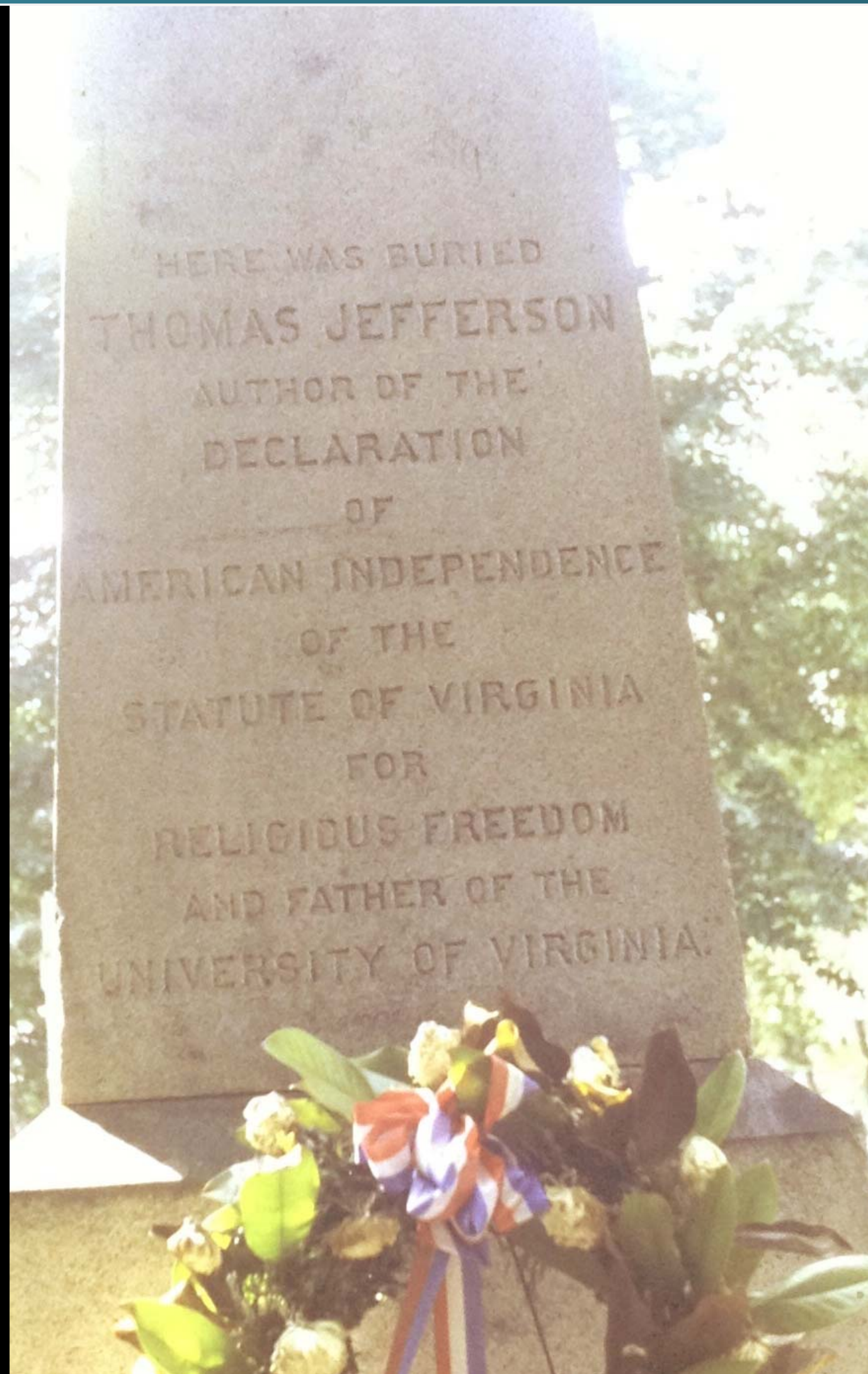
April 13: Happy 272nd Birthday to President Thomas Jefferson!

He was born on April 13, 1743 at the family home, in a one and a half story farmhouse not far from the Virginia wilderness. The third of ten children, his father, Peter Jefferson, was a planter and surveyor who died in 1757 when Thomas was age fourteen. The Jefferson estate was divided between Peter's two sons, Thomas and Randolph. Thomas inherited approximately 5,000 acres of land, including Monticello. He also inherited between 20 and 40 slaves. He took control of the property after he came of age at 21. As long as he lived, Jefferson expressed opposition to slavery, yet he owned hundreds of slaves and freed only a few of them.

IDAHO LAW:

Engineer's Lien Relates to Date It Began Services.

The date of the attachment of a lien, for priority purposes, is often the date the first physical work was performed on site. Known as the "first spade" rule in some states, this is the date of first visible improvement to property. But with design professionals, those services are performed miles away in an office, not on the jobsite. So, the question is: what date does the A/E's lien attach for purposes of priority over the lender? A 2014 Idaho case answered that question in favor of the A/E. The trial court held that an engineer's lien relates back only to the first date actual physical work was conducted on the property. On appeal, however, it was held that "an engineer under contract has a lien for professional services furnished with a priority date of when the engineer commenced to furnish any authorized, professional services under the contract regardless of where the services were rendered." See, *Hap Taylor & Sons, Inc. v. Summerwind Partners, LLC*, 338 P.3d 1204 (Idaho 2014).



He died on July 4th. Thomas Jefferson's tombstone. *(photo by TJS member G. William Quatman, FAIA, Esq. during a pilgrimage in 1983)*

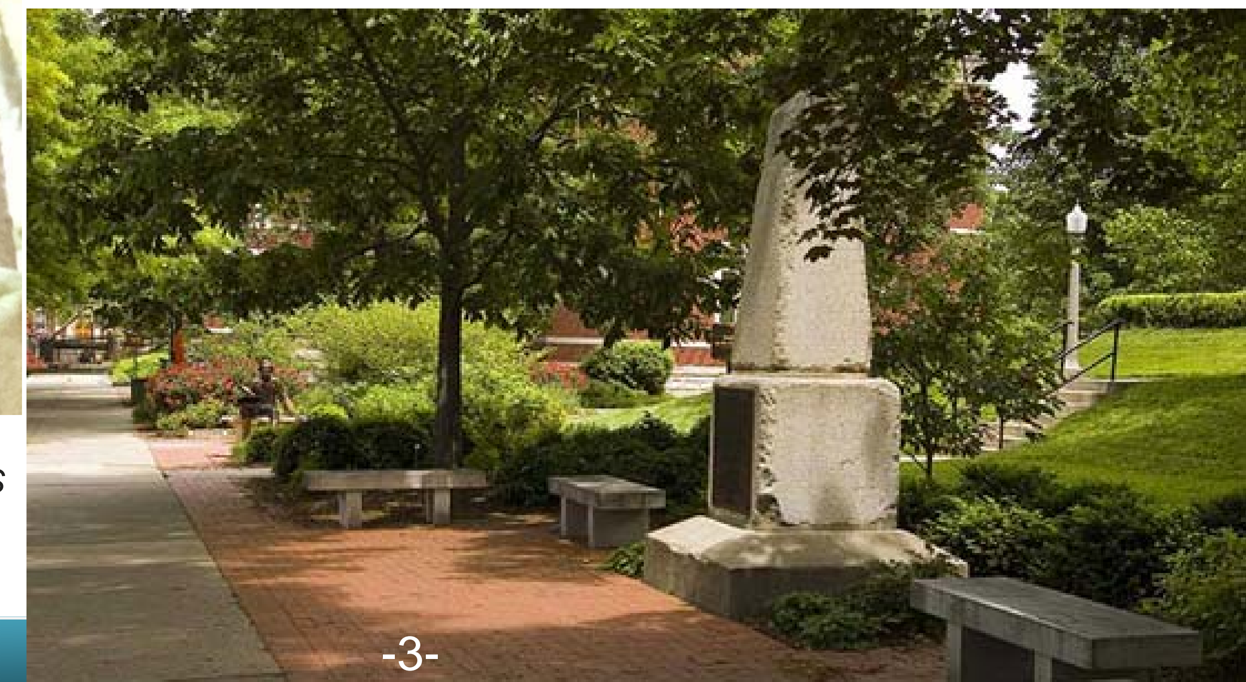
Jefferson's Tombstone.

Before his death, Thomas Jefferson left explicit instructions regarding the monument to be erected over his grave. In this document, Jefferson supplied a sketch of the shape of the marker, and the epitaph with which he wanted it to be inscribed: "...on the faces of the Obelisk the following inscription, & not a word more: Here was buried Thomas Jefferson, Author of the Declaration of American Independence, of the Statute of Virginia for religious freedom & Father of the University of Virginia." (see photo on page 2). He explained that, "Because by these, as testimonials that I have lived, I wish most to be remembered." Jefferson further instructed that the monument was to be made of "coarse stone...that no one might be tempted hereafter to destroy it for the value of the materials." (*Source:* Thomas Jefferson, undated memorandum on epitaph, Thomas Jefferson Papers, Library of Congress).

Jefferson's hope that the material of the grave monument might deter vandals turned out to be misguided. The first documented marker for Jefferson's grave was erected in the Jefferson family graveyard at Monticello in 1833. Beginning almost immediately, the granite obelisk suffered continual damage at the hands of visitors as they chipped off pieces of the stone - not for the value of the material, as Jefferson had feared, but as souvenirs. Uriah Phillips Levy, who purchased Monticello in 1836, moved the tombstone up to the house to protect it from further damage, and it was later taken by Thomas Jefferson Randolph to Edgehill for further safekeeping.

A joint resolution of Congress in 1882 provided funding for a new granite monument, which was eventually completed and erected at Monticello the next year. The decision was made by Jefferson's descendants to donate the original obelisk to the University of Missouri; it was unveiled at the university on July 4, 1885, and it now resides on the Francis Quadrangle.

(See photo below of the original obelisk on the campus of the University of Missouri).



Slate of Candidates for Annual Meeting.

The TJS Nominating Committee has come up with the following slate of candidates for Officers and for the seven (7) Director positions which will be vacated:

OFFICERS.

For President: Timothy R. Twomey, FAIA, Esq. (currently the President-elect)

For Treasurer: Suzanne H. Harness, AIA, Esq. (our current Treasurer, for a second term)

For Secretary/Pres.-Elect: Mehrdad Farivar, FAIA, Esq.

DIRECTORS. (Seven openings)

Donna M. Hunt, AIA, Esq.
J. Ashley Inabnet, AIA, Esq.
Timothy W. Burrow, AIA, Esq.
Julia A. Donoho, AIA, Esq.
Gary L. Cole, AIA, Esq.
D. Wilkes Alexander, AIA, Esq.
Eric O. Pempus, AIA, Esq.
Scott M. Vaughn, AIA, Esq.

In addition, there are four Directors whose terms continue and who are not up for re-election this year. Those are:

Charles R. Heuer, FAIA, Esq.
Timothy R. Twomey, FAIA, Esq.
G. William Quatman, FAIA, Esq.
R. Craig Williams, AIA, Esq.

From the By Laws. Art. IV. Sec. 1. "The Annual Meeting shall be held within 180 days following the close of the Society's fiscal year, at a time and place determined by the Board of Directors. The Members shall be given at least 30 days' written notice, including facsimile or other electronic methods of communication of the time and place of the Annual Meeting. If the Society shall publish a regular newsletter for distribution to its Members, such notice may be contained in that newsletter. The notice of the Annual Meeting need not state details of the Society's business to be transacted unless it is a matter, other than the election of Directors, for which a vote of the Members is expressly required by the provisions of Virginia law."

Mind your RFP's and RFQ's: Avoiding Common Mistakes in Public Design-Build Procurement

Patrick M. Miller, Esq.
Faegre Baker Daniels LLP
Chicago, IL

This article summarizes five recent cases as cautionary tales for state and local governments wishing to conduct design-build projects. In each case, the parties failed to understand simple fundamentals of public design-build procurement and experienced negative project outcomes as a result.

Cautionary Tale No. 1 – The Phantom "Lease-Back" Arrangement. *Alva Electric, et.al, v. Evansville-Vanderburgh School Corp., et. al.,* 7 N.E.3d 263 (Ind. 2014). Shortly after the economic downturn, the Evansville – Vanderburgh School Corporation was hit with a $6.5 million state funding cut. In response, the school decided to consolidate its administrative offices from several buildings into a warehouse. The school lacked sufficient funds to complete, or publicly bid, the warehouse renovations, and it could not sell bonds or increase taxes because it was already at its maximum tax rate. *Id.* at 265-66. So it devised the following plan: (1) the school would convey the warehouse to a private school foundation; (2) the foundation would negotiate a contract with a contractor to complete the renovations in exchange for partial payments over time; and (3) the foundation would sell the warehouse back to school in exchange for installment payments for the "sale" price in the precise amount and on the precise schedule that payments under the construction contract were due. *Id.*

A number of contractor-taxpayers (who did not receive the contract) filed a lawsuit to enjoin the project. The trial court entered summary judgment in favor of the school, and the contractors appealed. *Id.* at 267.

The Indiana Court of Appeals reversed, holding that the plan violated public bidding laws. The Indiana Supreme Court "summarily affirm[ed]" the Court of Appeals' reasoning that the plan failed to comply with Indiana's public bidding laws by, among other things, failing to follow sealed, low-bid, competitive bidding procedures. *Id.* at 286 (the Court of Appeals decision is at 984 N.E.2d 668).

Cautionary Tale No. 2 – The Phantom Design-Build "Tool-kit." *Brayman v. PennDOT,* 13 A.3d 925 (2011). In 2008, the Pennsylvania Department of Transportation decided to rebuild two perilously dilapidated bridges on 1-90 in Erie County. Without enabling legislation, PennDOT drafted an "Innovative Bidding Tool-kit" for the purpose of authorizing a typical best value design-build procurement process. *Id.* at 927-28. In the first phase of the process, PennDOT shortlisted three design-build teams to submit technical proposals for the second phase of the process. Brayman Construction did not make the short-list and filed suit to enjoin the remainder of the procurement. *Id.*

The trial court enjoined PennDOT from using the unauthorized "Tool - kit" design-build process, and an interlocutory appeal was filed with The Supreme Court of Pennsylvania. The court affirmed, reasoning that "the general rule for procurement under the [Pennsylvania] Code is that, '[u]nless otherwise authorized by law, all Commonwealth agency contracts shall be awarded by competitive sealed bidding under [the competitive bidding statutes].'" Obviously, the "Took-kit" best value design-build process allowed PennDOT to know the identity, and evaluate the qualifications, of the various design-build teams. This cannot happen during sealed bidding procurements, and therefore, PennDOT's process did not follow authorized procedures or fall within any exceptions. *Id.* at 938-40.

Cautionary Tale No. 3 – Beware of Licensing Statutes (or Don't Be?). *Drew County v. Joh Pas*, 2011 WL 1533434 (E.D.Ark). Drew County Hospital (Ark.) signed a design-build contract with developer /design-builder, Joh Pas, and incurred more than $100,000 in preliminary design and planning fees. *Id.* at 1-2. After incurring these fees, the hospital learned from its attorney that the design-build contract violated competitive bidding laws (similar grounds as seen in *Alva Electric* and *Brayman*). *Id.* at 5-6. The hospital refused to pay Joh Pas, arguing that Joh Pas was neither a licensed contractor nor a licensed design professional. Joh Pas filed suit in state court to collect its fees, and the hospital removed to the Easter District of Arkansas. The parties filed cross-motions for summary judgment.

The district court entered summary judgment in favor of Joh Pas. It reasoned that Joh Pas did not need a contractor's license because it had not bid on the construction phase of the work or engaged in any activities described in the licensing statute. *Id.* at 8. It further reasoned that Joh Pas violated the architectural and engineering licensing statutes by practicing these professions without a license; nevertheless, Joh Pas could recover payment for the improper services because the licensing statutes did not contain penalty provisions requiring forfeiture of payment. *Id.* at 10-11.

Cautionary Tale No. 4 – If You Approve It, Design-Build Will Come. *West Virginia v. Barr*, 716 S.E.2d 689 (W. Va. 2011). In the summer and fall of 2010, the West Virginia Parkway Authority, and the County Commissions of Mason and Putnam Counties, approved a plan for a 14-mile toll way to fund debt service and construction costs for improvements to U.S. Route 35. *Id.* at 692-93. Thereafter, a design-build contract was solicited and the lowest price proposal was $187.2 million. When the Authority published its toll rate schedule, based on the proposed contract price, the County Commission for Mason County reconvened and attempted to rescind its approval. *Id.*

The Authority filed a writ of mandamus in the Supreme Court of Virginia, requesting a writ compelling the Commission to comply with the enabling legislation and its prior approval of the project. The court entered the writ. It reasoned that the statute authorizing the project did not give the Commission the power to reconsider or rescind the initial approval. *Id.* at 694-95. The court was also concerned with the potential disarray caused by commissioners simply changing their minds after projects were underway.

Cautionary Tale No. 5 – Always Follow the RFP Instructions. *Pepco Energy v. Penn. Dept. of General Services*, 49 A.3d 488 (Commonwealth Pa. 2012). The Pennsylvania Department of General Services ("PaGSA") issued a design-build request

(continued on p. 6)

(continued from p. 5)

for proposals for a combined heating, cooling, and power plant servicing a state correctional facility. The RFP stated that the terms of the design-build contract were non-negotiable.

Pepco Energy's response was conditioned upon its ability to negotiate the following terms: collateralization for bonding requirements; consequential damage exclusions; and no cure default provisions. *Id.* at 490-91. Pepco Energy's response was rejected as non-responsive, and it filed a bid protest. The PaGSA denied the protest, and Pepco Energy appealed.

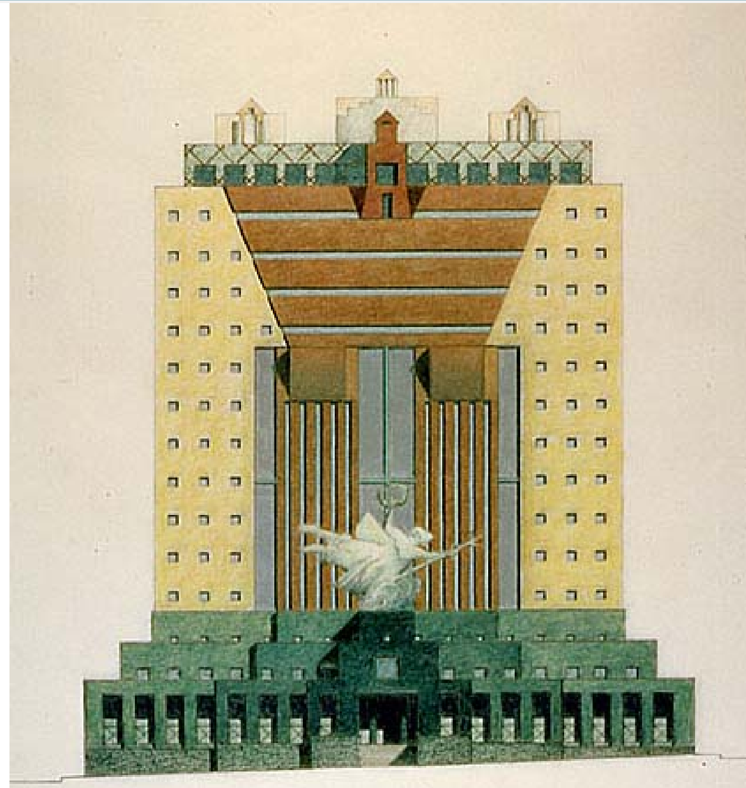
On appeal, the court held that the department had the right to reject the proposal. *Id.* at 493-94. The procurement statute allowed negotiations, but only if the RFP identified negotiation requirements. In this case, the RFP prohibited negotiation on the terms Pepco Energy wished to negotiate. Moreover, the negotiation procedures were for "responsible offerors," and Pepco Energy was not a "responsible offeror" because its response to the RFP included contingent negotiations on non-negotiable terms. *Id.*

OBITUARY: MICHAEL GRAVES DIES AT AGE 80

Many of us will recall the fresh voice that Michael Graves, FAIA gave to the post-modern movement in the 1980's. His playful designs, use of color, and those wonderful pastel sketches for the Portland Building in *Progressive Architecture* magazine captivated the architectural profession for years. The following comes from the obituary published online by *Architectural Record*:

"Over the course of 50 years, Graves grew his eponymous firm, Michael Graves Architecture & Design, to be one of the most recognized design practices in the world.

Inspired by Le Corbusier, Graves began his career as a modernist architect and as a member of a group dubbed the New York Five which had a penchant for white, planar, open-plan structures. In the mid-1970s, however, he left the fold for a post-modernist approach that valued traditional architecture and historical allusions. While he was celebrated for his



architecture, Graves and his design firm, Michael Graves Design Group, brought more than 2,500 products—from salad bowls to chairs—to market on the behalf of clients, which included Target, Disney, and JCPenney.

Graves was also known as an educator and taught at Princeton University School of Architecture for nearly four decades, beginning in 1962. In October, Kean University in New Jersey unveiled its newest division, the Michael Graves School of Architecture, for which Graves was developing the curriculum.

Among his firm's 200-plus awards, Graves has received the AIA Gold Medal, and Medal, and the National Medal of the Arts. In 2012, Graves won the Richard H. Driehaus Prize and the following year, was appointed by President Obama to the United States Access Board for his groundbreaking work in healthcare design. In celebration of his firm's 50th anniversary last year, Graves was the subject of numerous retrospectives, exhibitions, and lectures.

Said his firm in a statement, "As we go forward in our practice we will continue to honor Michael's humanistic design philosophy through our commitment to creating unique design solutions that transform people's lives." He died on March 12, 2015.

Architectural Firm Breached Contract By Providing CGL Insurance That Did Not Cover An Outbreak of Legionnaire's Disease.

NBBJ appealed a summary judgment ruling in favor of its client, Premier Health Partners ("PHP") and Miami Valley Hospital ("MVH") that it failed to provide insurance to cover a disease outbreak at a hospital. This dispute related to a contract for an inpatient facility on the existing hospital campus under which NBBJ was hired as the architect and to perform construction administration. In early 2011, an outbreak of Legionella occurred on the premises of the newly constructed Heart Patient Tower. (This is the disease made famous in 1976 by the outbreak first noticed among people attending a convention of the American Legion). By 2012, multiple lawsuits were filed against PHP, MVH, and other defendants (including NBBJ) alleging personal injury claims. Pursuant to Section 12.10.1 of the architect's contract with PHP, NBBJ was required to carry commercial general liability insurance for bodily injury and damage to property, naming MHV as an additional insured. The lawsuit alleged that NBBJ failed to include MVH as an additional insured under the CGL policy. In a separate contract clause, NBBJ was obligated to hold MVH and its officers, employees, and successors harmless from and against all damages, losses, and judgments, including reasonable attorney fees and expenses to the extent they arise from NBBJ's negligent acts or omissions in the performance of its services.

After lawsuits broke out over the disease, MVH tendered its defense to the various entities it hired to provide design, construction, and contract services, including the contractor (Skanska–Shook, JV), the plumbing subcontractor (TP Mechanical Contractors) and the architect (NBBJ). NBBJ refused to respond to the tender and effectively rejected the same. In addition, MHV's insurer (Zurich) tendered the defense of MVH to NBBJ, which NBBJ expressly rejected.

The hospital claimed that NBBH's failure to include it as an additional insured, its failure to provide a defense, and its failure to indemnify and hold harmless MVH, were breaches of contract. In response, NBBJ argued that its contract with PHP expressly carved out liability for the underlying Legionella causes, and that NBBJ never contracted with MVH. NBBJ further asserted that it was not liable to insure for the negligence of any of the contractors.

In sustaining plaintiffs' motion for summary judgment, the trial court held that PHP "dba MVH" was identified as "Owner" in the NBBJ contract. There was also evidence that NBBJ met its contractual requirement to name MVH as a named insured. However, the CGL policy contained an exclusion for bodily injury caused by "biological agents" or bacteria. Therefore, MVH claimed that NBBJ effectively breached the contract by not providing a comprehensive insurance policy. The trial court concluded that the "pollution" exclusion in the NBBJ contract did not permit the architect to procure an insurance policy covering its negligence with an exclusion for "Biological Agents." Only bodily injury resulting from "hazardous materials" or "toxic waste" were outside the scope of the NBBJ's insurance coverage requirements, and neither of those were at issue in the lawsuit. Therefore, the trial court found NBBJ in breach of contract for failing to provide comprehensive insurance coverage for claims of bodily injury occasioned by NBBJ's negligence.

In upholding summary judgment for MHV and PHP, the Court of Appeals ruled that, "The duty to defend arises purely as a contractual term, absent in this case. Nothing in [PHP's] agreement with NBBJ requires *defense* against claims as part of indemnification." However, while NBBJ may not have been required (itself) to defend PHP or MHV, it was required to provide insurance that would have provided that defense.

In short, the Court of Appeals ruled that NBBJ breached its contract when it provided a policy that contained a "Biological Agents" exclusion.

The case is *Premier Health Partners v. NBBJ*, 2015 WL 223863 (Ohio App. 2 Dist. 2015).

MEMBER PROFILE: ROBYN BAKER

RTKL
Los Angeles, CA

TJS member Robyn Baker is a Senior Associate Vice President and Associate General Counsel with the international design firm of RTKL Associates Inc. Her path to becoming an architect began as a child, when Robyn was fascinated by castles and houses, and the arrangement of spaces. "When I realized that I didn't have the stomach to become a veterinarian," she says, "I followed my interest in buildings, and set my mind on architecture." That interest took her to California State Polytechnic University, Pomona where she received her Bachelor of Architecture degree.

She worked her way through architecture school, first as a drafter ("before computers and CAD," she adds) in a small office that worked mostly on tenant improvement and residential projects.

As she did with undergraduate studies, Robyn worked her way through law school. "I was working for a large international architecture firm in a non-legal capacity, mostly spec writing, developing details and drawing sets, and construction administration, when I started law school." This young architect-law student caught the attention of another large international architecture firm, who promised her that if she worked on one last architecture project for them, she could then work in their legal department. The project was a large university building, and was planned to finish construction around the time of her graduation from law school. "I ended up working part-time architecturally, and part-time legally for a couple of years, which was the best of both worlds."

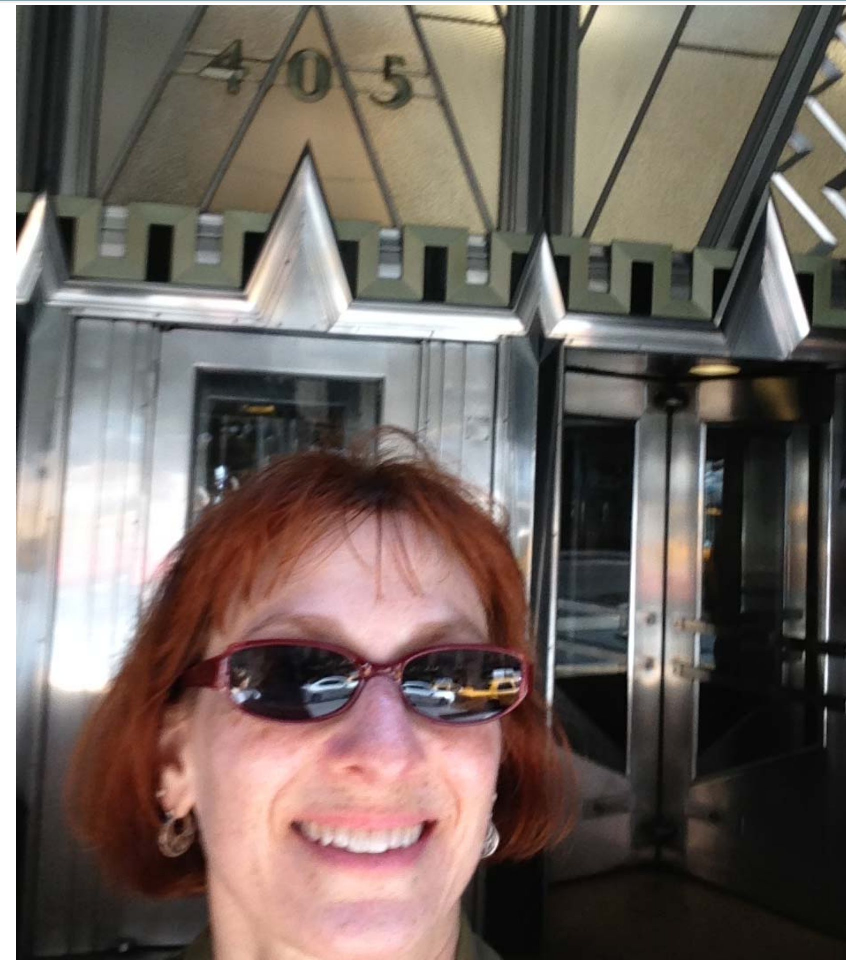
Robyn Baker and her paralegal, Lydia Lin, at the Great Wall of China, on their first trip there.

Robyn selected Southwestern University School of Law in Los Angeles for three reasons: its reputation, its part-time program, and because it is housed in a building listed on the Historic Register (the Bullock's Wilshire Building, designed by Parkinson & Parkinson). She found combining the two studies "a fascinating little niche." Robyn says that she enjoys her job because, "No two projects are ever the same, and there is so much variation on a daily basis. There are all kinds of interesting situations that arise constantly."

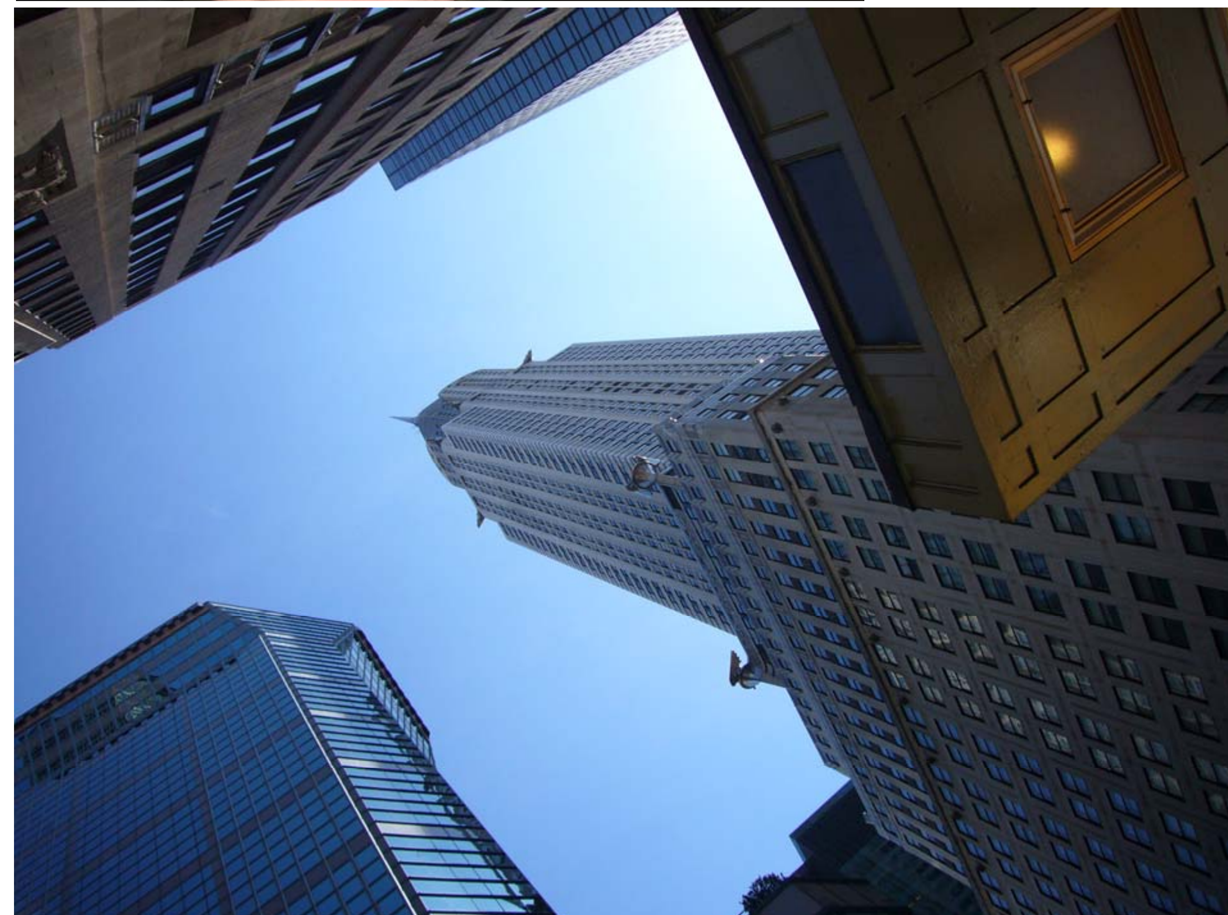
Like many of us, Robyn admits that law school was not her original plan, like many of us. "I realized in architecture school that I was more interested in the technical aspect of the profession, rather than the design side," Robyn says. "There were more creative designers than me." As she worked her way through architecture school, Robyn found that she enjoyed taking some-one else's design, figuring out how to detail it, and then carrying it through construction administration. "Performing construction administration primarily on publicly-bid projects, combined with spec writing and an innate ability to write, led me to the legal side."

Robyn finds reward in the variety of issues and the variety of projects she encounters at RTKL. "The creativity of our staff is wonderful, and even given the size of the firm, it is a family-type of atmosphere."

Robyn says that China has been her main area of focus for the last four years. "One of our market sector leaders volunteered me to speak on the topic of foreign firms working in China at the first AIA Shanghai chapter meeting, and then, again, at last year's AIA Convention."



Robyn pictured here with her favorite building (the iconic Chrysler Building in New York City) and her two dogs, named Hercules and Ruby. Not pictured are her two cats and a tortoise!



The Chrysler Building is her favorite building. "A couple of years ago I was in New York for a week," she recalls, "and visited the building at least three different times. I took numerous photos of the building from various angles." Not surprising, her favorite architects come from the Art Deco and Art Nouveau periods.

At home in Woodland Hills, Robyn enjoys the company of her large four-legged family, which consists of two large dogs, two house cats and a tortoise!

For a young architect thinking about attending law school, Robyn's advice is: "Do it ! Law school was one of the best decisions I ever made. It was hard working full time, but worth the time and sacrifice. There are many interesting issues and opportunities."

The Texas Two-Step

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

Many in the United States, if not most, view Texas as out of step with many norms in many ways. The Texas Supreme Court recently perpetuated this view with respect to implied warranties of the adequacy of construction documents ("CD's"). The Texas Court reached back 105 years and affirmed that Texas remains at odds with the "majority rule" *Spearin* Doctrine announced in *U.S. v. Spearin*, 248 U.S. 132 (1918). The Texas case in question, *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 811 (Tex. 2012), concerned the construction of a pipeline. After reviewing the contract the Texas Supreme Court concluded that the contractor contractually took on all risk for errors or inadequacy of information in pipeline crossing surveys provided by the owner. The *MasTec* opinion could well have ended there. Instead, the Texas Court took the (arguably unnecessary) second step of finding its holding consistent with *Lonergan v. San Antonio Loan & Trust Co.* 104 S.W. 1061 (Tex. 1907).

This second step is likely to be good news for design professionals in Texas. Under the *Spearin* Doctrine the owner has implied responsibility for the adequacy of the CD's, and the design professional's liability for this risk of errors retained by the owner will surely follow not far behind.

The *Lonergan* and *MasTec* cases, in contrast, place the risk of such loss on the contractor who, under the 2014 Texas Supreme Court case *LAN/STV v. Martin K. Eby Constr. Co.*, 435 S.W.3d 234 (Tex. 2014), generally has no recourse against the design professional.

The majority and minority rules start at the same place.

While at odds, the *Spearin* Doctrine and these Texas cases cannot be read as complete opposites. Both start with the premise that contractors that promise to build a completed building will not be excused for unforeseen difficulties in doing so. "Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation because unforeseen difficulties are encountered." *Spearin*, 248 U.S. 132, 135-36. Texas adheres to this "practically ... universal rule." *MasTec,* 389 S.W.3d 811. The next step beyond this principle, however, is where the *Spearin* Doctrine and the Texas' *Lonergan* rule diverge.

The rules diverge concerning an owner's implied warranty of CD adequacy.

Of course, courts in states following the *Spearin* Doctrine will not impose on the contractor responsibility for defective CD's when the contractor is bound to build according to the CD's. The Court stated: "[I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." *Spearin*, 248 U.S. at 136. The Owner makes in this circumstance an implied warranty of the adequacy of the prescriptive CD's that the contractor must follow. *Id.* at 137.

In *Lonergan*, as in *Spearin*, the contractor agreed to construct a building according CD's developed by an architect hired by the owner. *Lonergan,* 104 S.W. at 1061. When the construction was almost complete, the building collapsed. The contractor refused to replace the structure and abandoned the work. When the owner sued the contractor, the contractor defended on the ground that the building fell due to defects in the plans and specifications, the sufficiency of which the owner expressly or impliedly guaranteed. The Court accepted the truth of the allegation and held that notwithstanding the defects in the specifications, the contractor was liable to the owner as a result of the contractor's failure to comply with the agreement to construct and complete a building in accordance with the contract and specifications. *Id.* at 1065-66. In contrast to the *Spearin* case, the Texas Supreme Court dismissed the contention that the owner impliedly guaranteed the plans and specifications. "There is no more reason why the [owner] should be held responsible for the alleged defects in the specifications that it did not discover for want of skill and knowledge of the business of an architect, than there is for holding [the contractor] to be bound by their acceptance of the defective plans which they understood as well as the [owner] did, and in all probability much better. The fact that [the contractor] contracted to construct the building according to the specifications furnished implied that [the contractor] understood the plans. [If] there be any obligation resting upon the [owner], as guarantor of the sufficiency of the specifications, it must be found expressed in the language of the contract, or there must be found in that contract such language as would justify the court in concluding that the parties intended that the [owner] should guarantee the sufficiency of the specifications to [the contractor]." *Lonergan,* 104 S.W. at 1067. In other words, Texas law does not impose on the owner an implied guarantee of the sufficiency of the CD's to the contractor even when the contractor is expressly required to build according to the CD's. Since in *Lonergan* there was no implied (or express) warranty running from the owner to the contractor that the CD's were sufficient to construct the building, the contractor bore the risk of loss. The salient fact was that "[the contractor] contracted to construct the building according to the specifications furnished implied that [the contractor] understood the plans." *Id.*

Analysis of *Spearin* and *Lonergan* under A201-2007 provides answers and questions.

Analysis of AIA Document A201-2007 under the *Spearin* Doctrine provides clarity. Section § 3.1.2 requires that the "Contractor shall perform the Work in accordance with the Contract Documents," thus under *Spearin*, triggering an implied warranty by the Owner of the adequacy of the CD's. *Spearin*, 248 U.S. at 133. Provisions of A201-2007 further make clear that whoever is liable for insufficient CD's, it is not the contractor. "Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents, for differences between field measurements or conditions and the Contract Documents, or for nonconformities of the Contract Documents to applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities." A201-2007, § 3.2.4. In addition, the contractor is required to carefully study the CD's and report any errors found, but doing so is "not for the purpose of discovering errors, omissions, or inconsistencies in the [CD's]." A201-2007, § 3.2.2.

The responsibility for insufficient CD's analyzed through A201-2007 is less clear under Texas' *Lonergan* Rule. The owner has no implied responsibility under the *Lonergan* Rule for the sufficiency of CD's. There is no express language in A201-2007 that would justify the court under the *Lonergan* rule concluding that "the parties intended that the [owner] should guarantee the sufficiency of the CD's to [the contractor]" (except for surveys under § 2.2.3). However, the express terms of A201-2007 above make clear that the "[c]ontractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents."

Unanswered Questions

The genuflection of the Texas Supreme Court to the 1907 *Lonergan* case makes clear that Texas does not follow the majority rule *Spearin* Doctrine but also leaves important questions unanswered and seemingly in conflict with its other recent rulings. For example, as with the example above for A201-2007, if neither the owner nor the contractor is responsible for insufficient CD's under the minority *Lonergan* rule, who is?

The 2014 *Eby* case from the Texas Supreme Court determined that a contractor has no negligence claim against a design professional for the increased cost of construction associated with design errors. The rationale of the 2014 *Eby* decision is difficult, if not

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OFFICIAL NOTICE

Thomas Jefferson Society Annual Meeting

Wednesday, May 13, 2015

Where: Nickolai's Roof (30th floor of the Hilton Atlanta)
255 Courtland Street NE
Atlanta, GA 30303

Time: Cocktails at 6:00 p.m.; Dinner at 7:00 p.m.

Cost: No final word on the costs yet.

RSVP to: Julia Donoho, AIA, Esq.
jdonoho@legalconstructs.com

Deadline: April 29, 2015

Questions? Call Julia at (707) 849-4116

The Texas Two-Step
(continued from p. 11)

impossible, to reconcile with the 2012 *MasTec* decision. "But we think the contractor's principal reliance must be on the presentation of the plans by the owner, with whom the contractor is to reach an agreement, not the architect, a contractual stranger. The contractor does not choose the architect, or instruct it, or pay it." *Eby Constr. Co*, 435 S.W.3d at 247. The *Eby* case closed the door for most negligence claims by a contractor against a design professional. The *MasTec* case breathed new life into the *Lonergan* Rule that owners do not impliedly warranty the sufficiency of CD's. What recourse will a contractor have for flawed CD's when the issue is not addressed by the contract? The Texas contractors' bar is distressed and looking for answers.

Questions? Email me at: JHawkins@porterhedges.com

MEMBER PROFILE:
Jay Wickersham, FAIA, Esq.

Noble & Wickersham LLP
Cambridge, MA

B.A. from Yale University, an M.Arch. from Harvard Graduate School of Design, and a J.D. from Harvard Law School. A pretty impressive resume from TJS Founding member Jay Wickersham, FAIA, Esq. Jay tells us that as an undergraduate at Yale, he was inspired by the lectures of the great architectural historian Vincent Scully. "I started taking design studios and ultimately got a joint major in architecture and history. Then after working for two years in different offices, I moved to Cambridge (where I still live) to go to the Harvard Graduate School of Design. I received my Masters degree in 1983."

Jay's progression from architecture to law was, as he describes it, "slow and halting." After working for several small Boston-area firms until he obtained his architectural license, Jay then made a switch and worked for three years for a small urban design firm run by David Dixon (who's now with Stantech). "I liked how urban design blended design, politics, and law," Jay says, "and it got me thinking about applying to law school." He entered Harvard Law School at age 35, and graduated in 1994.

When asked what intrigued him about combining the two studies, Jay admits, "To be honest, I wasn't sure I would combine them in any way. When I started law school, it felt like a complete break with the past; I put all my architecture books and magazines in the basement and concentrated solely on this new way of seeing the world to which law school was introducing me."

For two summers while an undergraduate, and then between college and architecture school, Jay worked for Warren Platner, who had been the head of interior design for Eero Saarinen and had his own practice in New Haven. "My own tasks were pretty dull – as a junior drafter I spent months drawing toilet details – but the office did a fascinating range of work, from immense models of interiors at 1 ½" scale that stretched for 30 or 40 feet through the middle of the studio, to full-scale mockups of light fixtures and furniture."

After law school, Jay joined the Boston firm Hill & Barlow, where he started to work with Carl Sapers (long-time outside counsel for NCARB) and Chris Noble. "I hit it off with both of them, and found myself intrigued by the legal side of architecture." Then Jay had the chance to go into state government. From 1998 to 2002, he served as Assistant Environment Secretary for Massachusetts and head of the statewide environmental impact review program (the MEPA Office). "That was very exciting," Jay recalls. "The projects we reviewed included the creation of surface parks over the Central Artery in downtown Boston, the expansion of Logan Airport, and the early stages of the Cape Wind project in Nantucket Sound."

In late 2002, just as Jay was thinking about leaving government, Chris Noble approached him with the idea of starting their own firm, one that would concentrate in two areas: representing architects and and environmental law. And that's just how it has turned out. Bennet Heart joined the firm as a partner in 2009. Noble, Wickersham & Heart LLP now has five lawyers in its office in Harvard Square. "About two-thirds of our practice is transactional work for architects and other designers, much of it on international projects. The other one-third is environmental, mostly involving smart growth, brownfields, and renewable energy."

Founding Member Jay Wickersham advises anyone considering a dual degree should be prepared for how different the two systems of education will seem. "But as you progress, you will find the joint training gives you a powerful set of skills."

Shortly before Jay and Chris opened their practice, Jay started teaching at the Harvard Graduate School of Design, where he is now an associate professor in practice in the Architecture Department. History still fascinates Jay, who says, "I've published articles on how Charles Bulfinch, H.H. Richardson, and Daniel Burnham ran their projects and offices, and the ways in which they made (or lost) money." Jay's firm serves as outside counsel for the Boston Society of Architects (BSA). Jay also serves on the advisory board for *Architecture Boston*, the BSA's magazine.

When asked about his favorite building and architect, Jay recalls that as a teenager, he was a student at the Phillips Exeter Academy, at the time when Louis Kahn's library was under construction. When the building was finished, all the students formed a human chain, passing boxes of books from the old library to the new one. "That was the first time I'd entered that transcendent space, and it showed me what architecture could be." His favorite architects? H.H. Richardson and, no surprise here: Louis Kahn!

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Affidavit of Merit by an Engineer Found Insufficient in Lawsuit Against Architect.

In a case decided on Dec. 30, 2014, the New Jersey Court of Appeals dealt with whether an affidavit of merit ("AOM") issued by a **licensed engineer,** which criticizes both the construction contract administration and design services provided by a licensed New Jersey architect and his licensed architectural firm, qualifies as an acceptable supporting AOM from an "appropriate licensed person" even even though the affiant is not also **a licensed architect**. More broadly, the appeal concerned whether the statute should be construed to require a supporting AOM from a "like-licensed" professional in all malpractice or negligence cases within the scope of the statute. The Court concluded that to support claims of malpractice or negligence liability, the AOM must be issued by an affiant "who is licensed within the same profession as the defendant." Going even further, the Court held that, "That like - licensed requirement applies even where, as is the case here in matters involving architects and engineers, the relevant professional licensure laws overlap to some degree." The Court granted only a limited exception, stating that, "An affidavit from such a like-licensed expert is not, however, required in circumstances where the plaintiff's claims are confined to theories of vicarious liability or agency and do not assert or implicate deviations from the defendant's professional standards of care."

In this case, SOSH Architects ("SOSH") and the Board of Education entered into a contract. Mr. Gallagher was an architect employed by SOSH who participated in the project. Problems allegedly arose during the course of construction which were blamed on SOSH and Gallagher, in part. The contractor sued the owner and architects for damages. A week after the architects filed their answers, the contractor filed a two-page Affidavit of Merit from an engineer who held degrees in engineering, but none in architecture, and was not a licensed architect in New Jersey or in any other state. The architects moved to dismiss the case, claiming the AOM was inadequate. The contractor argued that engineers and architects in New Jersey have overlapping areas of expertise and training, and, in some instances, are authorized to perform the same tasks. The trial court denied the architects' dismissal motion, which was reversed on appeal. An amicus curiae brief was filed by AIA New Jersey, and The New Jersey NSPE. See, *Hill International, Inc. v. Atlantic City Bd. of Education*, 2014 N.J. Super. LEXIS 177 (N.J.App.Div. 2014).

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Council of American Structural Engineers
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Do You Know the Standard of Care?

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CASE Publishes White Paper on the Standard of Care.

In early, 2015, the Council of American Structural Engineers released its report titled "Do You Know the Standard of Care?" The paper is written for the layman and defines what a "tort" is, as well as the hornbook definition of "negligence." The paper warns of clients who include terms like "best," "highest," "expert" and the like, which could raise the standard of care beyond ordinary insurable professional negligence. CASE advises: "One should not be afraid to put a well-written standard of care definition in contracts, as this helps define the relationship between client and engineer and is helpful in educating clients as to what their expectations ought to be. The Engineers Joint Contract Document Committee (EJCDC) has a good definition in EJCDC E-500 (2014), as does the Council of American Structural Engineers (CASE) in CASE Contract #2 (2008), as well as the American Institute of Architects (AIA) in AIA B101 (2007)."

The Appendix is a 3-page summary of the Standard of Care in three states, taken from licensing laws, jury instructions and case law.

The paper is published at www.acec.org/case