ISSUE 16 July 2016

QUARTERLY JOURNAL OF THE JEFFERSON SOCIETY, INC.

Monticello

Our Mission

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

Inside This Issue

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

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

Send his or her name to President Mehrdad Farivar at mfarivar@mpplaw.com and we will reach out to them. Must have dual degrees in architecture and law.

AUTHORS WANTED

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

JOIN US ON FACEBOOK & LINKEDIN

Want to connect with other members? Find us here.

WEBSITE:

www.thejeffersonsociety.org

PRESIDENT'S MESSAGE:

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

My name is Mehrdad Farivar and I am honored to be the 5th president of TJS. If you are new to the group, this is a unique assembly of professionals who have come together to advance the art of being dual professionals in architecture and law, with the goal of becoming a resource to both professions and beyond. While we are still in the process of figuring out how best to achieve the organization's goals, we have already come a long way since the society was founded on July 4, 2012, in Jefferson's home state of Virginia.

Under the capable leadership of my predecessors Bill Quatman, FAIA, Esq., Craig Williams, FAIA, Esq., Chuck Heuer, FAIA, Esq., and Tim Twomey, FAIA, Esq., and the support of our dedicated fellow members, we have grown from just a handful of founders to over 100 members who are in remarkably diverse endeavors. Our members are practicing lawyers, in-house counsel for some of the largest architecture and engineering firms in the country, insurance professionals, practicing architects, public officials, and teachers and professors.

We all share a passion for law and architecture and in being ambassadors of either profession in the other, or in an allied endeavor. In this day and age of specialization, by virtue of our dual training and qualification we are both specialists and generalists at the same time. As lawyers or members of allied professions such as insurance, we bring an insider's perspective when it comes to understanding how design professionals and design firms operate and what their needs are. That makes us specialists in serving the design professions. When we put our dual training and professional credentials to work in wider arenas as some of our members do, we bring a generalist's broader vision into play - just as Jefferson did in his time. The insights we have gained by virtue of our dual education and training can be very valuable to the people and causes we serve, professionally and socially.

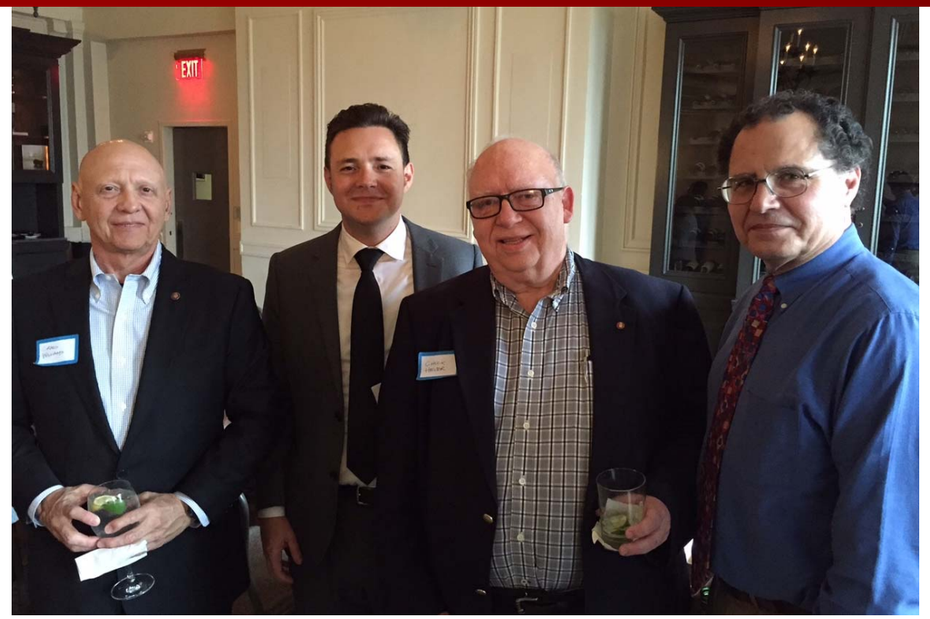
As your incoming president my goal is to exchange ideas with as many of you as possible, one on one or in groups, and with your help and guidance lay out a strategy for growing our membership and enhancing the visibility and presence of TJS in the worlds of

(Continued on page 2)

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

architecture, law and beyond. I invite each of you to contact me with your ideas and bring your energy into taking bold steps to move us forward.

In the course of last year we have discussed ideas about educational programs to be offered through the AIA and schools of architecture. What about similar programs for bar associations and group such as the ABA Forum on Construction Law, or the ABA Forum on Affordable Housing & Community Development? How about offering our collective knowledge and wisdom to organizations such as NCARB, DBIA, CMAA, ULI, and governmental agencies such as state legislatures and state licensing boards? How about using our LinkedIn site, or similar sites, for ongoing discussions and interaction among our members? These goals may seem a bit ambitious at first, and out of immediate reach for a small organization such as ours, but I am confident that over time they can be reached. I look forward to hearing from you on how TJS can be both a club, and an effective organization at the same time.



Reception in Philly (left to right): New "Fellow" Craig Williams, Alexander van Gaalaen, Chuck Heuer and Frank Musica all enjoy some fellowship prior to the Fourth Annual Meeting of The Jefferson Society. (More pics on pp. 4-5)

I thank all of you for your support, particularly our board members and volunteers that have supported TJS with their ideas, time and energy. Please keep it up!

Fourth Annual Meeting Minutes.

The Fourth Annual Meeting of the Members of The Jefferson Society, Inc., a Virginia non-profit corporation (the "Society"), was held at the Hyatt at Bellevue (XIX roof top restaurant) beginning at 7:00 pm on May 18, 2016. Donna Hunt served as Secretary of the Meeting. Fifteen members were in attendance, plus two guests from Rimkus Consulting, which agreed to underwrite part of the Meeting. President Tim Twomey called the Meeting to order as the Annual Meeting of the Members. He first thanked Julia Donoho for making arrangements for the dinner and Rimkus for sponsoring once again.

PRIOR MINUTES: The minutes of the May 13, 2015 Annual Meeting were approved by motion of Mr. Quatman, seconded by Mr. Williams, as printed in the Society's July 2015 newsletter.

PRESIDENT'S REPORT: Mr. Twomey reported on the previous actions since the last annual meeting in June 2015. Tim thanked Suzanne Harness for her work as Treasurer and Mr. Quatman for his work on the quarterly newsletter.

TREASURER'S REPORT: Ms. Harness reported on the finances of the Society, noting the bank account balance, and that membership dues are coming in slowly. She indicated that the 990 tax return would be filed with the IRS.

PROGRAM COMMITTEE REPORT: Eric Pempus reported that he is in the process of submitting a proposal for a workshop at the 2017 AIA National Convention. The proposal is for three 1-hour sessions with three Society members participating in each session. The proposed topics were: a) Contracts; b) Professional Practice; and, c) Construction Law. The deadline for submittal to the AIA is approaching and Eric hoped to get the submission in as soon as possible.

ELECTION OF OFFICERS AND DIRECTORS: Tim Twomey announced that the next item of business was the election of directors. It was announced that the following candidates had been nominated to fill four vacancies on the board, for a 3-year term 2016-2018:

Suzanne H. Harness, AIA, Esq.; Charles R. Heuer, FAIA, Esq.; Jose R. Rodriguez, FAIA, Esq.; and Rebecca McWilliams, AIA, Esq.

Mr. Twomey asked for any other nominations from the floor. There being none, it was moved by Mr. Williams, seconded by Ms. Hunt, that the four candidates should be elected as directors. The motion passed unanimously.

The next item of business was the election of officers. It was announced that the following candidates had been nominated as officers of the Society for the coming year 2016-2017:

President: Merhdad Farivar, FAIA, Esq.;

President-Elect/Secretary: Suzanne H. Harness, AIA, Esq.; and,

Treasurer: Donna Hunt, AIA, Esq.

Mr. Twomey asked if there were any other nominations from the floor. There being none, it was moved by Mr. Quatman, and seconded by Mr. Rodriguez, that the slate of officers be elected. The motion passed unanimously.

AMENDMENTS TO BYLAWS: Mr. Twomey brought up several proposed amendments to the Society bylaws, and he passed out copies of those proposals. The amendments were all

(continued on p. 4)

2016-17 Jefferson Society's Officers and Directors

Officers (1-year term, 2016-17)
President: Mehrdad Farivar, FAIA, Esq. (Morris, Povich & Purdy)
President-Elect/Secretary: Suzanne H. Harness, AIA, Esq. (Harness Law, LLC)
Treasurer: Donna M. Hunt, AIA, Esq. (Ironshore)

Directors
(Remaining 1-year terms, 2016-17)
1. D. Wilkes Alexander, AIA, Esq. (Fisk Alexander, P.C.)
2. Timothy W. Burrow, Esq. (Burrow & Cravens, P.C.)
3. Julia A. Donoho, AIA, Esq. (Legal Constructs)
4. Mehrdad Farivar, FAIA, Esq. (Morris, Povich & Purdy, LLP)
5. Donna Hunt, AIA, Esq. (Ironshore)
6. Eric O. Pempus, AIA, Esq. (Oswald Companies)
7. Scott M. Vaughn, AIA, Esq. (Vaughn Associates)

(Full 3-year terms, 2016-18)
8. Charles R. Heuer, FAIA, Esq. (The Heuer Law Group)
9. Suzanne H. Harness, AIA, Esq. (Harness Law, LLC)
10. Jose B. Rodriguez, FAIA, Esq. (Daniels Kashtan, et al.)
11. Rebecca McWilliams, AIA, Esq. (Independent Design, LLC)

Annual Meeting (cont'd)

published in the April 2016 issue of this newsletter, in advance of the Annual Meeting, and can be summarized as follows:

1. Reduce the Board from the current 11 Directors to 9, each serving 3-year staggered terms with three new members elected each year; and authorize the Board to adjust current term lengths to achieve the staggered 3-year terms as soon as practicable.
2. Create a new four-member "Founders Group," to serve as a non-voting advisory committee to the Board of Directors.
3. Increase the term of President to two (2) years to allow for more continuity.
4. Create a new one (1) year Vice President position for the Past President, so as to provide counsel to the current President.
5. Replace the current Secretary / President - Elect position with Vice President / President-Elect to allow one (1) year for the President-Elect to assist the current President and learn the role of President, without serving a dual role as Secretary.
6. Increase the term of Treasurer to two (2) years. Create a new one (1) year position as Treasurer - Elect, to learn the duties of Treasurer and to assist the current Treasurer.
7. Revise the Executive Committee to include the President, Vice-President / President - Elect, Vice President / Past President, Secretary, and Treasurer and to allow the Board to make other revisions to the Bylaws as needed to effectuate the changes above.

Upon motion by Donna Hunt, seconded by Eric Pempus, the Bylaw changes were all approved as submitted.

After adjourning the Fourth Annual Meeting of The Jefferson Society, the attendees posed for a group photo, with our hosts from Rimkus Consultants. The members elected new officers and directors and adopted seven changes to the Society's bylaws.

<u>FOUNDERS GROUP</u>:

The next item of business was to elect the members of the 4-member Founders Group. Nominations were taken from the floor, and the following members were nominated:

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

Upon motion by Mr. Bell, seconded by Ms. Bennett, the four nominees were unanimously elected.

<u>NEW BUSINESS</u>:

Mr. Twomey advised that the Society has an appointment for a swearing - in ceremony at the United States Supreme Court on Nov. 13, 2017. There are currently 29 Society members interested in attending and becoming admitted to the Court. Donna Hunt is organizing the event and she will be preparing a packet of information for all those who are interested.

<u>PASSING OF THE GAVEL</u>:

Mr. Farivar was unable to attend the meeting, but Mr. Twomey mentioned that he would pass the President's gavel to Mehrdad and looked forward to his leadership. Upon motion made and seconded, the meeting was adjourned.

Attendees at the Annual Meeting in Philadelphia.

The following fifteen members of the Society were in attendance at the Annual Meeting:

1. Michael Bell
2. Wendy Bennett
3. Josh Flowers
4. Suzanne Harness
5. Chuck Heuer
6. Donna Hunt
7. Alexander van Gaalaen
8. Mike Koger
9. Eric Pempus
10. Bill Quatman
11. Kerri Ranney
12. Joyce Raspa-Gore
13. Jose Rodriguez
14. Tim Twomey
15. Craig Williams

Also attending for the reception only was member Frank Musica, AIA, Esq., who had a prior commitment and was not able to stay for the full meeting. Be sure to make plans to attend the Fifth Annual Meeting of The Jefferson Society, which will be held on Wednesday, April 26, 2017 in Orlando, Florida, just prior to the opening of the AIA National Convention held at the Orange County Convention Center, April 27-29, 2017.

Interested in helping to plan the TJS reception and dinner in Orlando? If so, please contact TJS President Mehrdad Farivar at <u>mfarivar@mpplaw.com</u>

(Above) TJS Members Joyce Raspa-Gore and our new Treasurer, Donna Hunt, enjoy a laugh before dinner. (Below) Our new President-Elect, Suzanne Harness, with outgoing President Tim Twomey and TJS Member Wendy Bennett of Philadelphia.

Membership Update!

The Jefferson Society has 112 Members, which includes: 12 Founders, 98 Regular Members, and 2 Associate Members.

Please Welcome Our 2 Newest Members!

The following have joined since our last Newsletter:

MEMBERS:

111. Matthew Boomhower, Esq.
Boomhower Law, APC
San Diego, CA

112. K. Stefan Chin, Esq.
Peckar & Abramson, P.C.
Miami, FL

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:

Mehrdad Farivar, FAIA, Esq.
President
The Jefferson Society, Inc.
mfarivar@mpplaw.com

AIA's New Push on Materials Transparency: A Risk Worth Taking?

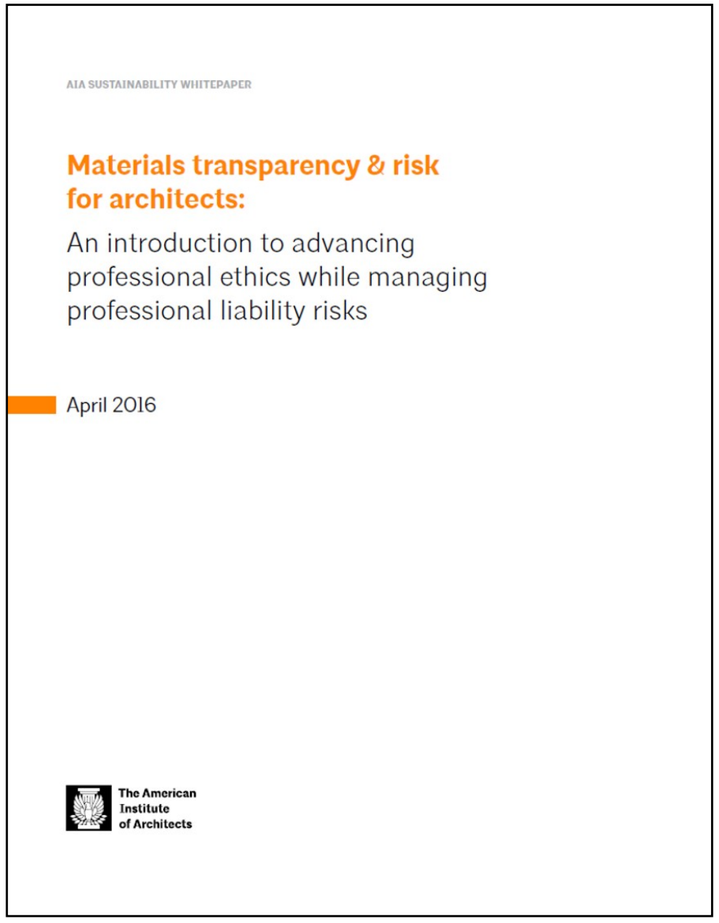
By G. William Quatman, FAIA, Esq.
Burns & McDonnell

Background. On April 8, 2016, The American Institute of Architects ("AIA") announced the release of its new white paper on "Materials Transparency and Risk," part of an AIA effort to equip the entire profession with what they call "consensus-driven guidance" on the issue of toxins and other health hazards in building materials. AIA calls this "an issue of critical importance" to the profession, its suppliers and clients. "Whether in politics or in building design, transparency is an increasingly necessary element of modern life," said AIA CEO Robert Ivy, FAIA. "And when it comes to materials - the very substances of our built environment - it's more important than ever for architects to be able to communicate openly about what they contain."

The white paper is the product of more than a year of effort by the AIA's Materials Knowledge Working Group ("MKWG"), pursuant to a Position Statement approved by the AIA Board of Directors in Dec. 2014. In that Statement, the AIA recognized that "building materials impact the environment and human health before, during and after their use," and it encouraged architects "to promote transparency in materials' contents and in their environmental and human health impacts." The white paper entitled: *"Materials transparency & risk for architects: An introduction to advancing professional ethics while managing professional liability risks,"* was created by materials specialists but is aimed at all architects. It provides a backdrop on the necessity for materials transparency and the steps architects should be taking to bring about change, promote openness, and increase collaboration between themselves, their suppliers and their clients. The paper is available at this link: http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aiab108448.pdf

HPD's. What this initiative has resulted in is a series of published Health Product Declarations (or "HPD"s), which are product data sheets listing all of the hazardous contents of the material. More information on HPD's is available at this site: http://hpd.smithgroupjjr.org/Pages/default.aspx The HPD's are a voluntary disclosure by the manufacturer, not required by law. Some feel that if architects require an HPD for any product they specify, then the building material manufacturers and sales reps will either have to disclose the contents or risk not being specified. If the HPD shows a toxic content, this disclosure will pressure manufacturers to change the contents, a voluntary way to get bad stuff out of building materials, even though not required by law. Some question whether this is a proper role for the AIA to take, and whether this should be driven instead by a governmental agency, like the EPA. But, the AIA is never shy about taking the lead on environmental initiatives. This time, however, many lawyers are wondering if the Institute has helped the planet but hurt their members.

The Risks. As for the risks, they are obvious. When an architect specifies a material that has volatile organic compounds ("VOC"s), say for a new elementary school or hospital or day care center, and there is a published HPD alerting of the contents, one of two theories might be argued in a lawsuit against the design firm. First, that the designer knowingly specified a hazardous material, thereby exposing (in theory) the building occupants to a health risk; or, Second, that the architect was negligent in not checking the product's HPD before specifying it. We can only imagine the cross-examination and deposition questioning of architects in either scenario, creating a troublesome situation. Perhaps "ignorance is bliss" in this case, that not knowing the content is better than having all of this information in the public domain. What is now in the public domain, however, is down-right scary. An example (shown on page 8) is the HPD for CertainTeed ceiling tile known as "Cashmere," which shows cancer-causing contents. The question posed to the architect under oath will be: "Let me understand, sir. You knew that this ceiling tile had cancer-causing components, and yet you specified its installation throughout my client's building, is that correct, sir?" Followed by "Have you stopped beating your wife?" These are no-win questions, to which a "Yes" or "No" answer creates potential liability.



Standard of Care. While the AIA has provided sample disclaimer language (not court-tested at this point), what about the 95% of contracts that do not have AIA wording in them? Will the standard of care now require an architect to review all materials specified for the HPD disclosures, and only specify those that don't have a "Cancer" box checked on the form? Only time will tell, but more than a few attorneys and insurers are concerned that the AIA's planet saving motives will result in increased claims and liability for their member.

The AIA white paper states: "While acknowledging the potential benefits of transparency, some architects and legal counselors have raised concerns about the possibility of increased exposure to legal liability coming from seeking and retaining information on product contents. One common concern is that a building occupant may claim to have been injured by a substance contained in a product, and may assert that the architect was aware of the presence of the allegedly injurious substance and had a duty to avoid specifying products containing that substance." The paper goes on to say, candidly, "With limited information about the risk of new forms of transparency information, and with legal precedent not yet established, there are legitimate concerns." The paper then goes on to discuss mitigation strategies and solutions.

Contract Disclaimers. The AIA Contract Documents Committee has prepared model contract language to limit the risk for architects who undertake materials transparency initiatives. The new

(continued on page 8)

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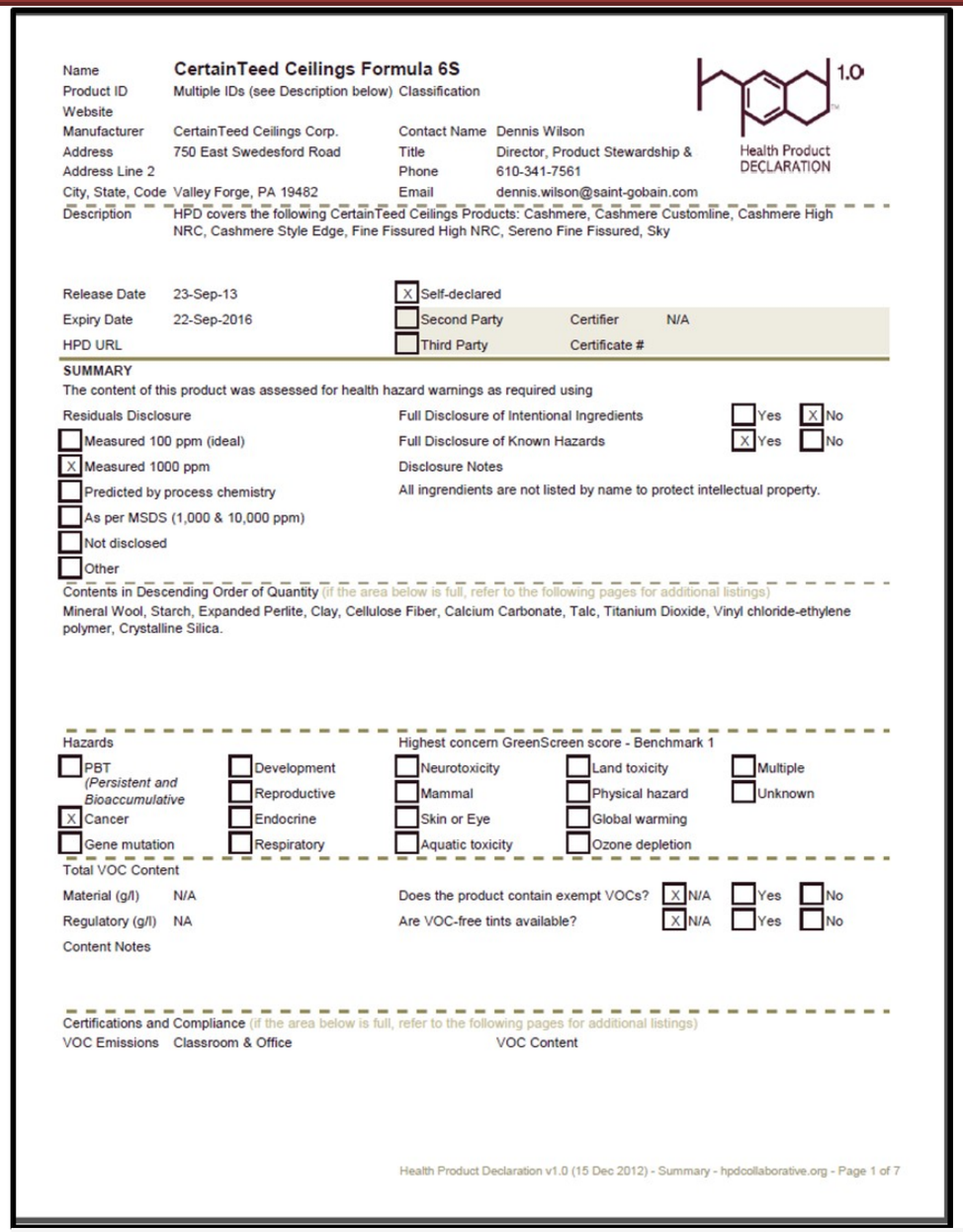
language is in Section 20 of the AIA Guide for Amendments to AIA Owner - Architect Agreements Document B503-2007. That language is reprinted on page 9 of this newsletter.

The question is whether architects will want to use this lengthy disclaimer as a red-lined revision to the AIA forms, and whether an owner will accept it. The answer is "No" or "Doubtful" to both questions.

The AIA Board's Position Statement "encourages architects to promote transparency in materials' contents and in their environmental and human health impacts." The white paper goes a step further than "encourage" and calls this an "ethical imperative," saying that this "strong urging" to AIA members is supported by the AIA Code of Ethics charge that "AIA Members should be environmentally responsible and advocate for sustainable building."

What Are Your Thoughts?

Is this an area that The Jefferson Society should weigh in on? Or is it too late to turn back the HPD tide? Weigh in on this timely topic with an opinion piece. The deadline for articles for the next issue of *Monticello* is October 1, 2016. Send your article to Bill Quatman, Editor at bquatman@burnsmcd.com



Name **CertainTeed Ceilings Formula 6S**
Product ID Multiple IDs (see Description below) Classification
Website
Manufacturer CertainTeed Ceilings Corp. Contact Name Dennis Wilson
Address 750 East Swedesford Road Title Director, Product Stewardship &
Address Line 2 Phone 610-341-7561
City, State, Code Valley Forge, PA 19482 Email dennis.wilson@saint-gobain.com

1.0 Health Product DECLARATION

Description HPD covers the following CertainTeed Ceilings Products: Cashmere, Cashmere Customline, Cashmere High NRC, Cashmere Style Edge, Fine Fissured High NRC, Sereno Fine Fissured, Sky

Release Date 23-Sep-13 [X] Self-declared
Expiry Date 22-Sep-2016 [ ] Second Party Certifier N/A
HPD URL [ ] Third Party Certificate #

SUMMARY
The content of this product was assessed for health hazard warnings as required using

Residuals Disclosure
[ ] Measured 100 ppm (ideal)
[X] Measured 1000 ppm
[ ] Predicted by process chemistry
[ ] As per MSDS (1,000 & 10,000 ppm)
[ ] Not disclosed
[ ] Other

Full Disclosure of Intentional Ingredients [ ] Yes [X] No
Full Disclosure of Known Hazards [X] Yes [ ] No
Disclosure Notes
All ingrendients are not listed by name to protect intellectual property.

Contents in Descending Order of Quantity (if the area below is full, refer to the following pages for additional listings)
Mineral Wool, Starch, Expanded Perlite, Clay, Cellulose Fiber, Calcium Carbonate, Talc, Titanium Dioxide, Vinyl chloride-ethylene polymer, Crystalline Silica.

Hazards
[ ] PBT (Persistent and Bioaccumulative
[X] Cancer
[ ] Gene mutation
[ ] Development
[ ] Reproductive
[ ] Endocrine
[ ] Respiratory

Highest concern GreenScreen score - Benchmark 1
[ ] Neurotoxicity [ ] Land toxicity [ ] Multiple
[ ] Mammal [ ] Physical hazard [ ] Unknown
[ ] Skin or Eye [ ] Global warming
[ ] Aquatic toxicity [ ] Ozone depletion

Total VOC Content
Material (g/l) N/A
Regulatory (g/l) NA
Content Notes

Does the product contain exempt VOCs? [X] N/A [ ] Yes [ ] No
Are VOC-free tints available? [X] N/A [ ] Yes [ ] No

Certifications and Compliance (if the area below is full, refer to the following pages for additional listings)
VOC Emissions Classroom & Office VOC Content

Health Product Declaration v1.0 (15 Dec 2012) - Summary - hpdcollaborative.org - Page 1 of 7

Above is a sample Health Product Declaration (or "HPD") from the Certain Teed website for a ceiling tile product. The contents include certain known cancer-causing materials, such as Crystalline Silica. According to OSHA, "Silica dust is hazardous when very small (respirable) particles are inhaled. These respirable dust particles can penetrate deep into the lungs and cause disabling and sometimes fatal lung diseases, including silicosis and lung cancer, as well as kidney disease." Would you specify this ceiling tile?

AIA Contract Disclaimers.

The AIA has published guidance on how to address materials transparency issues in its contract document B503-2007 Guide for Amendments to AIA Owner-Architect Agreements.
http://www.aia.org/groups/aia/documents/document/aias076859.pdf

Here are the proposed AIA clauses:

Clause 1.

"To the extent the Architect collects product manufacturer materials disclosing product contents, the Owner acknowledges that it is not relying on the Architect for any analysis of material composition or the human or environmental health impacts of specific material selections. Any assessments or evaluations of this kind should be conducted by a toxicologist or other trained professionals retained by the Owner."

Clause 2.

"By training and experience, the Architect does not possess the expertise to assess the environmental and human health impacts of varying types and quantities of substances contained in building products. To the extent the Architect collects product manufacturer materials disclosing product contents for purposes of pursuing LEED [or insert the name of any other third-party certifications such as Living Building Challenge or WELL Building being pursued on the Project], the Owner acknowledges that it is not relying upon the Architect for any analysis of material composition or the human or environmental health impacts of specific material selections. The Architect shall be entitled to rely exclusively on information furnished by manufacturers and material suppliers. The Owner acknowledges that the Architect does not possess the expertise to (1) evaluate the specific chemical composition of products or materials, (2) recognize that a product includes any particular chemicals or substances, or (3) evaluate the information furnished by the manufacturers or material suppliers, in order to determine the environmental and human health impacts of varying types and quantities of substances contained in building products. To the extent the Owner requires such analysis, any assessments or evaluations of this kind shall be conducted by a toxicologist or other trained professionals retained by the Owner."

Clause 3.

"The Owner has provided to the Architect specification criteria that identifies those chemicals or substances that the Owner desires the Architect to avoid when specifying products to be included in the improvements being designed for the Owner. The Architect shall endeavor to specify products from manufacturers that have made information disclosing product contents publically available, and shall further endeavor, based solely on a review of the information furnished by the manufacturers and material suppliers, to avoid specifying products that contain the substances identified by the Owner. The Architect shall be entitled to rely exclusively on information furnished by manufacturers and material suppliers. The Owner acknowledges that the Architect does not possess the expertise to (1) evaluate the specific chemical composition of products or materials, (2) recognize that a product includes one or more of the identified chemicals or substances, or (3) evaluate the information furnished by the manufacturers or material suppliers, in order to determine the environmental and human health impacts of varying types and quantities of substances contained in building products. Accordingly, the Owner warrants that it will retain a chemist, toxicologist, or other qualified professional to determine the environmental and human health impacts of varying types and quantities of substances contained in building products or to make other assessments required by the Owner:
(Insert, or attach as an exhibit, a list of substances that the Architect shall endeavor to avoid specifying or reference a published list of such substances.)"

TJS member Jacqueline Pons-Bunney sent us this photo of her son Zach's personal efforts to spread the Jefferson legacy. That's Zach in the funny hat. Thanks, Jacquie for submitting this. And thank you Zach!

Maryland: Economic Loss Doctrine Bars Contractors Suit Against Engineering Firm

The issue on appeal in this case was "whether the economic loss doctrine applies to shield an engineering firm from tort claims brought by a contractor seeking damages for economic losses suffered in consequence of relying on the firm's allegedly defective designs and projections." In this case, the engineering firm and the contractor each had separate contracts with the City of Baltimore for a wastewater treatment plant, and there was no contract between the parties. The contractor claimed that during construction it ran into costly delays and complications in reliance on the engineer's allegedly defective designs and negligent misrepresentations concerning project timeline projections. The contractor sued the engineer for: 1) professional negligence, 2) information negligently supplied for the guidance of others under Restatement (Second) of Torts § 552, and, 3) negligent misrepresentation. The trial court granted the engineer's motion to dismiss on the economic loss doctrine since there was no contractual privity. In upholding that ruling, The Court of Special Appeals stated: "The general rule is that a party cannot recover against another in tort where the resulting harm is purely economic loss and the parties have no contract between them," citing to a 1927 U.S. Supreme Court case, *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303 (1927). In Maryland, the Court held, "a construction contractor's ability to recover for economic losses against a design professional where there is no contractual privity is generally limited to situations involveing death, personal injury, property damage, or the risk of death or serious personal injury." The Court noted that in the construction industry, parties can limit their economic risk by defining their respective rights and liabilities contractually, adding "there is a beneficial effect to society when contractual agreements are enforced and expectancy interests are not frustrated .... The preservation of the contract represents the most efficient and fair manner in which to limit liability and govern economic expectations in the construction business." The Court declined to recognize an exception for an action based on negligent misrepresentation, stating, "For claims of economic loss based on negligent misrepresentation, the injured party must demonstrate it had an 'intimate nexus' relationship with the defendant in order to establish that the defendant owed a duty to the injured party." The Court said, "The parties, both sophisticated businesses with experience in construction projects and contracts, were free to allocate their duties and risks in their contracts with the City. [The contractor's] claims against [the engineer] for benefit-of-the-bargain economic damages under theories of professional negligence and negligent misrepresentation based on allegedly inaccurate timelines and flawed specifications that belonged to the City are barred by the economic loss doctrine." The case is *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*, 130 A.3d 1024 (Md. 2016).

Great Quotes: Cost Estimates

"There seems to be no reported case in which an architect is alleged to have overestimated the cost of a building project. Indeed, no case reveals that an architect has correctly estimated the cost of a project although tradition assures that this does occur."

Williams Eng'g, Inc. v. Goodyear, 496 So. 2d 1012, 1014 (La. 1986), citing to James Acret, *Architects and Engineers,* 84 (2d Ed.1983).

In this case, the engineer gave a preliminary estimate of $409,300, which included a 10% contingency fund. It repeatedly billed the owner on that sum. The final construction cost was $888,688, *more than double the estimate*! The owner stopped paying and the engineer sued. The contract had great language that, the "Opinion of the Net Construction Cost (Project Cost Estimate) is his best opinion of the probable lowest responsible Contractor's bid for the Work and is supplied as a guide only. Since [engineer] has no control over the labor and material market or over competitive bidding and contractor market conditions, he cannot and does not guarantee the accuracy of such cost opinions." Despite the contract, there was expert testimony that the engineer breached the contract *not* by giving an inaccurate initial estimate, but by failing to employ a professional estimator, failing to look at other similar projects, failing to advise the owners about other contractual possibilities, and failing to provide revised cost estimates. The court held that the engineer "lulled the owners into a false sense of financial security." The court denied the engineer any additional fee and awarded the owner $205,000 in damages.

The Annual Meeting and Dinner of The Jefferson Society was held on the 19th Floor of the Hyatt at the Bellevue in Philadelphia, in the roof top restaurant known at XIX.

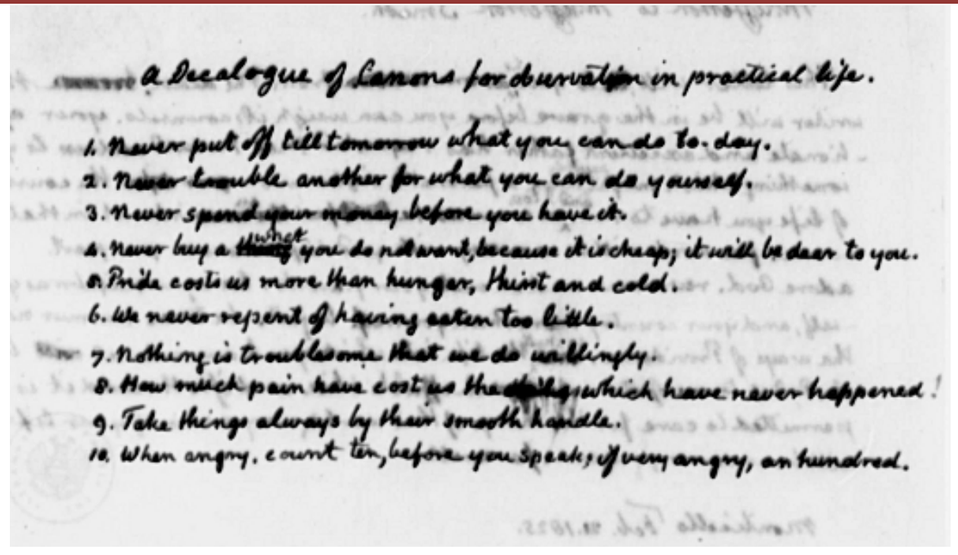
"A Decalogue of Canons for Observation in Practical Life"
by Thomas Jefferson

Jefferson wrote these ten tips to better living, many of which we've all heard (or said) before, but never knew their source. Well, now you know.

"1. Never put off till tomorrow what you can do today.
2. Never trouble another for what you can do yourself.
3. Never spend your money before you have it.
4. Never buy what you do not want, because it is cheap; it will be dear to you.
5. Pride costs us more than hunger, thirst, and cold.
6. We never repent of having eaten too little.
7. Nothing is troublesome that we do willingly.
8. How much pain have cost us the evils which have never happened.
9. Take things always by their smooth handle.
10. When angry, count ten, before you speak; if very angry, a hundred."

Wise words to live by.

(Source: Randall, Henry S., *The Life of Thomas Jefferson, Volume 3.* New York: Derby & Jackson (1858), p.525).


A Decalogue of Canons for observation in practical life.
1. Never put off till tomorrow what you can do to-day.
2. Never trouble another for what you can do yourself.
3. Never spend your money before you have it.
4. Never buy what you do not want, because it is cheap; it will be dear to you.
5. Pride costs us more than hunger, thirst and cold.
6. We never repent of having eaten too little.
7. Nothing is troublesome that we do willingly.
8. How much pain have cost us the evils which have never happened!
9. Take things always by their smooth handle.
10. When angry, count ten, before you speaks; if very angry, an hundred.

The original, handwritten "Decalogue" penned by Thomas Jefferson in 1825, at age 81, the year before his death. Apparently, right before Jefferson's death he was approached by a man seeking advice for his son, who was named after the former President. Jefferson obliged with a handwritten letter, adding at the end of that letter ten wise rules to always remember, titled it, "A Decalogue of Canons for observation in practical life."

The Disappearing "B. Arch." Degree

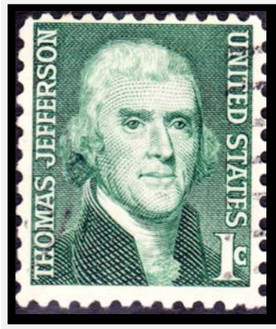
According to the National Architectural Accrediting Board (NAAB), there are 154 NAAB - accredited professional programs in architecture housed in 123 institutions. Of those, 95 (77%) offer a Master of Architecture while just 58 (47%) offer a Bachelor of Architecture degree. It seems that more schools are converting to 5 and 6 year Masters programs as the preferred degree. But one might ask: Is a new graduate more employable with a 5-year B.Arch. and 1-year of work experience, or a 6-year Masters degree and no experience? Both have a very structured curriculum of courses, with little space for electives. Thomas Jefferson might not approve of the trend. In 1823, he wrote: "I am not fully informed of the practices at Harvard, but there is one from which we shall certainly vary, although it has been copied, I believe, by nearly every college and academy in the United States. That is, the holding the students all to one prescribed course of reading, and disallowing exclusive application to those branches only which are to qualify them for the particular vocations to which they are destined. We shall, on the contrary, allow them uncontrolled choice in the lectures they shall choose to attend, and require elementary qualification only, and sufficient age." (Jefferson letter to George Ticknor, July 16, 1823; Thomas Jefferson: A Chronology of His Thoughts, Rowman & Littlefield Publishers, Inc., 2002, p. 294). Is your alma mater changing its program to a mandatory 6-year Masters in Architecture? Parents who can barely afford the extra year of college tuition for a B.Arch. may be less inclined to foot the bill for an M.Arch.

Rhode Island: Condo Owner Cannot Recover for Loss of Use of Units Due to Water Damage

A condo unit owner turned off the heat in unit 205, which allowed water in a pipe passing through their unit to freeze, causing the pipe to rupture. The ensuing flood resulted in extensive damage to units 203, 204, and 206, all of which were owned by the developer, resulting in $1.6 million of property damage. The units were unoccupied, and were listed and being marketed for sale. The owner's insurer paid for all the necessary repairs and the units were sold at full market value. Nonetheless, the owner sued the adjacent unit owner and the contractors, engineers, and architects for negligence, alleging damages as a result of not being able to use units it owned during repair of damage from the frozen water pipe. The trial court entered summary judgment in favor of the defendants. The Supreme Court upheld the ruling, finding that in the absence of any economic loss, the owner could not recover loss – of - use damages. The plaintiff acknowledged the absence of actual economic loss, but maintained that it was nonetheless entitled to damages from the defendants for their "tortious invasion and deprivation of its right to use its units during the repair period." In response, the defendants argued that the plaintiff failed to present any evidence to support a finding that plaintiff actually lost the use of the units, let alone that it sustained any injury related to the alleged loss of use. The plaintiff maintained that it could recover loss – of - use damages despite the fact that it conceded that it suffered no actual economic loss! The units had not been offered for rent, and later sold for full market value. Therefore, the Court concluded that where no actual damage could be shown, any award would be a windfall, not permitted by law. The case is *Newstone Dev., LLC v. E. Pac., LLC*, 2016 WL 3505709 (R.I. June 24, 2016).

Oregon: What Constitutes The "Practice of Architecture"?

In a recent Oregon case, an architectural firm and its principals appealed from an order of the Oregon licensing board imposing a $10,000 civil penalty against each for the unlawful practice of architecture. The Court of Appeals reversed after examining the allegations and held that: 1) preparation by architects of schemes for property development feasibility study did not constitute the practice of architecture; 2) the inclusion of the name of the firm, which included word "architecture," on schemes did not indicate that the firm was practicing architecture in Oregon; and, 3) an indication on the architects' website that they had Oregon licenses "pending" did not suggest that they were Oregon architects. The board's interpretation of the "practice of architecture" included *any* activity undertaken in contemplation of the erection of a building, no matter how removed that activity might be from the actual construction of the building. The Court held, however, that, "Such a broad reading of the statute would proscribe activities surely not contemplated by the legislature to be prohibited." Most surprising, however, is that the licensing board's ruling that the firm's logo included the words "architecture" and "design," indicating it was practicing architecture in the State of Oregon; however, the Court found "no substantial reason" for this finding, and overturned the civil penalty. The case is *Twist Architecture & Design, Inc. v. Oregon Bd. of Architect Examiners*, 369 P.3d 409 (Or. App. 2016).



"I tremble for my country when I reflect that God is just; that his justice cannot sleep forever."
Thomas Jefferson, *Notes on the State of Virginia*, inscribed on dome of the Jefferson Memorial, Washington, D.C.

13 Jefferson Society Members attended the Victor O. Schinnerer & Co. Annual Meeting of Invited Attorneys in Coral Gables, Fla. on May 26-27 at the Biltmore Hotel. Pictured here are: (left to right) Ashley Inabnet, David Garst, Bill Quatman, Jose Rodriguez, Mark Kalar, Wilkes Alexander and Roger Kipp. Not pictured (likely at the swimming pool with a cold drink) are TJS Members Hollye Fisk, Kevin Bothwell, Ted Ewing, Trevor Resurreccion, Yvonne Castillo and Frank Musica).

New York: "Continuous Representation Doctrine" Keeps Architect In The Case

In 2006, homeowners hired an architect (Cetera) to prepare and file plans for the construction of an extension to their residence. The filed plans were approved by the city and, thereafter, the architect notified the city that he was withdrawing responsibility for conducting controlled inspections for the project. The architect had no further role in the project until later, when the owners notified him that the city had audited the filed plans and had determined that certain errors had been made in the calculation of elevations and floor area. He rendered additional services in an effort to remedy the problems, concluding in November 2010. The owners sued the architect for malpractice in August 2013. The architect moved to dismiss the action as time-barred under the New York 3-year statute of limitations, which the trial court denied. On appeal, the Court affirmed, holding that accrual of a claim for professional malpractice "occurs upon the completion of performance and the resulting termination of the professional relationship." The plaintiffs had succeeded in raising a question of fact as to whether the "continuous representation doctrine" applied, so as to toll the running of the 3-year statute. The Court held that there were sufficient questions to deny a motion to dismiss. *Bronstein v. Omega Const. Grp., Inc.*, 30 N.Y.S.3d 653 (N.Y. App. Div. 2016).

Mississippi: Design Professionals Held Not Liable in Scaffolding Collapse

Several employees of a subcontractor, who were injured when scaffolding collapsed at a construction site, brought a negligence action against the architect, engineer, and property owner. The trial court granted summary judgment to all defendants, upheld on appeal. The Court of Appeals held that: 1) the engineer's design drawings for construction of the scaffolding were not the cause of the scaffolding's collapse; 2) the engineer had no duty to inspect the scaffolding; and, 3) the architect had no duty to ensure that the scaffolding design was adequate. The design called for 24-foot posts, but 4" x 4" wood posts did not come in that length, so the contractor spliced posts together. During pouring of concrete, the scaffolding collapsed injuring several workers who sued the engineer who designed the scaffolding and the architect, claiming they "were negligent in inspecting the scaffolding and failed and/or refused to correct known deficiencies and defects in the construction [that] made it dangerous to use prior to the subject incident." The Court of Appeals held that, "Mississippi law imposes on design professionals, including architects and engineers, the duty to exercise ordinary professional skill and diligence." The Court found that the engineer's scaffolding design was "fundamentally flawed" because it contemplated using 4″x4″ posts that were 24-feet tall, but the contractor acted on its own and "spliced" the posts by fastening a three-quarter-inch strip of plywood on opposite sides of the stacked posts above and below the point where the two posts met. An expert witness testified that "the cause of the failure did lie in the as-built scaffolding *and not in the design on paper that was not used.*" Stated differently, the Court ruled that "there is no evidence that [engineer's] design caused the plaintiffs' injuries," and summary judgment was proper. The plaintiffs cited no authority to support the conclusion that the engineer had an absolute duty to inspect the scaffolding and formwork to ensure that the contractor followed his design. "Unless [an engineer] has undertaken by conduct or contract to supervise a construction project, he is under no duty to notify or warn workers or employees of the contractor or subcontractor of hazardous conditions on the construction site," the Court held.

As to the architect, its AIA B141 contract stated that the architect was not be responsible for construction means, methods, techniques, sequences, or procedures, or safety precautions. The Court said that the "unambiguous language of the B141 Agreement" meant that the architect was not responsible for construction methods or safety precautions in connection with the work, and that the temporary scaffolding to support the formwork while the wet concrete within it hardened was "a means to build the project's second - story floor." There was also no evidence that the architect undertook to supervise any aspect of the scaffolding and had no duty to warn the plaintiffs that the scaffolding was inadequate. One judge dissented, stating that the architect was a regular visitor to the construction site and a participant in the onsite project meetings, who "was at liberty to reject work that did not conform to the contract documents."

The case is *McKean v. Yates Eng'g Corp.*, 2015 WL 5118062 (Miss. Ct. App. Sept. 1, 2015), reh'g denied (Mar. 1, 2016).

Illinois: Architects Not Liable for Breach of Implied Warranty in Condo Case

This was a consolidated appeal of three lawsuits in which claims of breach of implied warranty of habitability were filed against the project architects. In each of the cases, the trial court concluded that no such cause of action could be instituted against architects in Illinois. This was upheld on appeal. The Court of Appeals said that, "Traditionally, a cause of action for breach of implied warranty of habitability could only be properly asserted against developers or builder-vendors," however that theory had been expanded to subcontractors in one case. The plaintiffs argued that if the theory extends to subcontractors who use defective materials or deficient workmanship, it must also apply to architects who deficiently design. The architects argued that the theory has been consistently and uniformly limited to parties involved in the actual physical construction of residential buildings or in the sale of residential construction, and because none of the architects participated in the actual construction process, the implied warranty of habitability does not and cannot apply. The Court of Appeals noted that engineers and architects "provide a service and do not warrant the accuracy of their plans and specifications * * * The architect is not liable for mere errors of judgment, and liability attaches only when the architect's conduct falls below the standard of skill and care exercised by others engaged in the same profession, and in the same locality."

There was no allegation that the architect took part in the construction work or in the sale of real property. Therefore, the Court held that "this architect should not be subject to the implied warranty of habitability of construction."

The case is *Bd. of Managers of Film Exch. Lofts Condo. Ass'n v. Fitzgerald Associates Architects, P.C.*, 2016 IL App (1st) 113508-U.

Looking Back: Arthur T. Kornblut, FAIA, Esq.: Trailblazer, Mentor and Scholar

By Bill Quatman, FAIA, Esq.
Burns & McDonnell

Art Kornblut, FAIA, Esq. with his mother (Dorothy) and his two daughters, Anne (standing) and Emily (in grandma's lap). This photo was taken in 1980.

Arthur T. Kornblut, FAIA, Esq. was one of the first prominent architect-lawyers in the U.S. He was active in the AIA at the national level, lectured and wrote books and articles on legal liability for design professionals. He was a big influence on many of us, especially me. I read an article by Mr. Kornblut in Architectural Record when I was in my last year of architectural school in 1980, in which Arthur wrote that architect-lawyers were "An Important New Breed," and that the industry needed more attorneys who understood what architects did. *"What's this?"* I recall asking myself . . . *"Architect-Lawyers?Now that is intriguing."* That one paragraph changed my life. I wrote to Mr. Kornblut to ask more about this "important new breed," and was surprised to receive a letter back explaining the benefits of getting a law degree. We corresponded for several months by snail mail (no email at that time), and Arthur encouraged me to take the LSAT, which I did.

I remember him telling me that of the architect-lawyers he knew, the "better half" were licensed in both professions and, if possible, I should try to get my architect's license before completing law school. "You'll be overqualified to sit at a drafting table with a law degree," he said, "and likely never complete your required internship." With that advice, I worked all through law school and summers to get in my needed hours to sit for the architect's exam. If not for Arthur's encouragement, I am not sure I'd be where I am today, or editing the newsletter that you are reading.

Art Kornblut was an architecture graduate of Rensselaer Polytechnic Institute in Troy, N.Y., and received his law degree from the University of Akron in Ohio. He was a veteran, and served in the Navy from 1963 to 1965. He practiced law since 1974, specializing in cases involving architects, engineers and design professionals. He lived in McLean, Va. and was a founding partner in the law firm of Kornblut & Sokolov (later Kornblut, Sokolove & Farber) in Chevy Chase, Md., and a senior partner in the Washington offices of the Richmond - based Wright, Robinson, McCammon, Osthimer & Tatum law firm prior to his death. He was a founding fellow of the American College of Construction Lawyers, as well as a member of the AIA College of Fellows, perhaps the first attorney to receive his FAIA.

Before starting his law practice, Arthur spent five years (1969-1974) on the staff of the AIA in Washington, D.C., as the Administrator of the AIA's Commission on Professional Practice. He arrived at the AIA shortly after the publication of the controversial 1966 edition of A201, so all of the debate and discussions between the AIA and the engineering societies was quite fresh. Arthur would have been responsible for continuing the effort to reeducate architects to the newly limited role that was being prescribed for them, heavily involved in the continuing progression of protecting the architect against liability in the 1970 edition of A201 and creating the first "modern" editions of B141.

After leaving Institute, Arthur partnered with Gerald (Gerry) W. Farquhar, sharing the same street address as Victor O. Schinnerer & Co. Their principal business was as consulting attorneys (essentially the loss prevention department) for Schinnerer. This continued a consulting practice that Gerry Farquhar had started for Schinner in 1972.

TJS member Alan B. Stover, FAIA, Esq. is a former AIA Director of Documents and General Counsel for the Institute. Alan told me, "I knew Art during his post-AIA staff career at the Victor O. Schinnerer Company, where he was in a position in loss prevention comparable to that held by Frank Musica. Art was the one who wrote the Schinnerer Guidelines for Improving Practice articles and summaries of legal cases."

Alan recalled that: "Art had preceded me at the AIA (by one) in managing the Documents Committee (Documents Board, as it was then called). He was in charge of the Professional Practice Department in the late 1960's. At that time the Documents Board consisted of the Chairs of the various Professional Practice Committees. Later the department was expanded to create a director of Professional Practice Programs, originally filled by a non-lawyer, Steve Rosenthal, and the Documents Board members were appointed from the membership. In 1974, shortly after Art left, I succeeded Steve as Director of Professional Practice Programs."

For many years, Arthur wrote a monthly column in Architectural Record titled "Legal Perspectives," which are out of print, but would be as relevant today as when he wrote them in the 1970's and 80's. It was Kornblut's monthly articles in Record and Carl Sapers' articles in Progressive Architecture that brought about a whole new awareness within the architectural profession about professional liability and risk management. Arthur was the author of "Construction Documents & Services," (Kaplan AEC Education), a book that was updated after his death by TJS past president Chuck Heuer, FAIA, Esq., among others. He also wrote one of the earliest articles on limitation of liability clauses in 1974, titled: *"Limitation of Liability – Engineer's Panacea or Placebo."* In addition to his numerous articles and books, Arthur Kornblut wrote amicus curiae briefs to advocate on behalf of the Virginia Society of Architects, as in the case of Nelson v. Com., 368 S.E.2d 239 (Va. 1988).

Art was a strong advocate for the architect's role during construction administration. Kornblut once wrote: "The logic behind the architect being the initial decision-maker stems from the architect's intimate knowledge of the project and its design requirements, and from the architect's general involvement in construction - contract administration. If the architect were not available to decide the inevitable questions that arise during the construction process, the owner and contractor would be left to their own devices - with the potential for many more claims and disputes to blossom into full - blown legal proceedings." Arthur T. Kornblut, *"Legal perspectives: Should you decline to be the decision-maker in client-contractor disputes?"* Architectural Record, Oct. 1988, at p. 37.

Arthur did not shy away from taking controversial positions. Alan Stover noted, "He was very much committed to, and highly opinionated about, the protectionist view. Art was also very protective of CNA and highly critical of CNA's competitors. I remember an article he wrote about limitation of liability *('Panacea or Placebo')* that slammed DPIC's magic bullet." Alan added that: "Justin Sweet was a thorn in Arthur's side, as his early articles questioned AIA's /architects' motives in changing the contracts and at least for a time advocated that architects actually take more responsibility for construction site safety."

Not surprising, Arthur's oldest daughter, Anne Elise Kornblut, is not only a published author but a Pulitzer Prize - winning journalist, who now serves as Director of Strategic Communications for Facebook in Palo Alto, California. Like her late father, Anne Kornblut is also a published author, who wrote the book, "*Notes from the Cracked Ceiling: Hillary Clinton, Sarah Palin, and What It Will Take for a Woman to Win*," (Random House 2009). Arthur's youngest daughter, Emily Kornblut, is a filmmaker of documentaries with the production company Really Useful Media (Video with a Mission). Emily says that,

(continued on p. 18)

Kornblut (continued)

"Our father's work and work ethic influenced my sister and me greatly. I spent a lot of time as a kid hanging around his office, and am grateful for many things I gleaned from him, especially how important it is to love what you do."

Asked for a few memories of her dad, Anne said: "He always gave great advice. Two pieces of advice he gave me, sometime in the 1970s and 1980s, were: 1. If you want something done right, you'd better do it yourself; and, 2. You never want to depend on a man for money." Anne added, "He was right on both counts!"

Her sister Emily says, "He cultivated my ability to discover and question how things work, and always taught us *how* we think matters as much as *what* we think, often times more so."

Anne said that her father thought of himself as a good architect, and a good lawyer -- but he knew that together he could be a great architect-lawyer." This is true for many TJS members who, while competent in both professions, find the combined skills have elevated their careers and provided opportunities to serve the profession better than a single degree enables. Anne added, "My father helped me think about the practical implications of policy. I remember when new ADA laws went into compliance, he showed me the impact that something as simple as the direction that bathroom doors open can have on a bathroom design -- or what it means to include ramps at the front of buildings." Hopefully we are all passing along to our children the practical ways in which laws affect our communities and built environment.

Arthur Kornblut died much too young, of myelofibrosis, on May 8, 1993 at the young age of 51 at Georgetown University Hospital. A veteran, he is buried in Arlington National Cemetery. His daughter Anne thinks her father would have enjoyed membership in The Jefferson Society. "He loved Jefferson -- and history in general. We spent a lot of time, living in Washington, DC, going to look at historic buildings, the Capitol in particular," Anne told me. "Every July 4 we would go down to the National Mall to watch the fireworks. I know he would think it's perfect that your group is named for Jefferson, and the newsletter named for Monticello, which was one of his favorite places to visit," she said.

Art Kornblut's mentoring of a young architectural student changed my life, and helped steer me on a career path that I never imagined was possible. His memory lives on for me, and for many of us.

Who Are These Three Handsome Guys? TJS Members Bill Quatman, Jose Rodriguez and Josh Flowers chatted at the Fourth Annual Meeting in Philadelphia.

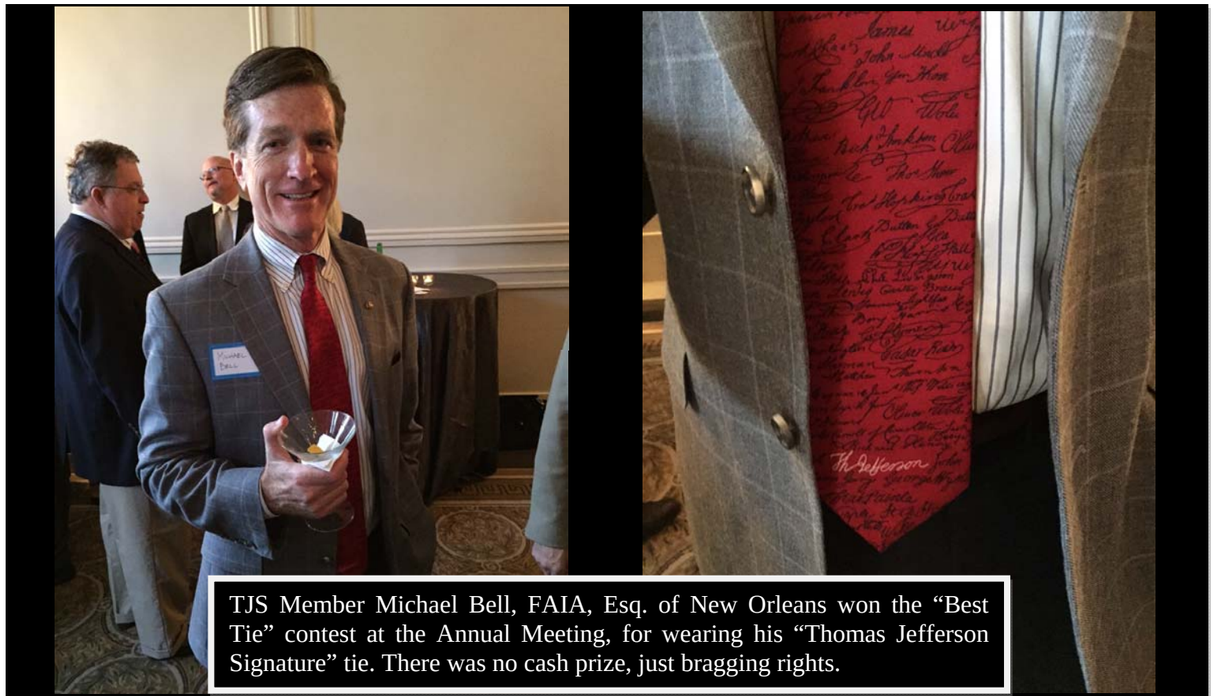
One of the trailblazers, architect-lawyer Arthur T. Kornblut, FAIA, Esq., at Big Sur, California in 1972.

Massachusetts: Contractor Liable For Violating Building Code Even Though the Owner Directed Him to Violate the Code

A contractor was hired to replace the roof and a roof deck on a townhouse in the Beacon Hill section of Boston. The local building code permitted no more than two layers of roofing on the building. The proposal submitted by the contractor included a line item for stripping off the existing roof system. However, the contractor did not strip off the roof, but instead installed a new roof membrane over the existing roof. A few years later, the owners had some HVAC work done and another contractor cut through the roof, discovering four layers of roofing materials. The owners hired yet another contractor to remove all the layers and install a new roof. They then sued the original roofing contractor for the costs. The trial judge instructed the jurors that they could proceed to determine damages only if they found that the building code was violated *and* that the violation was not done at the insistence of the owners. Based on this instruction, the jurors found in favor of the contractor.

On appeal, the Court of Appeals held that: "To permit a waiver by a homeowner of his or her right to compel a contractor to comply with the contractor's obligations under the building code would permit, even encourage, contractors, and perhaps consumers, to waive provisions of the building code on an ad hoc basis, in the hope of saving money in the short-run, but endangering future homeowners, first responders, and the public in general." Therefore, the Court ruled that: "a consumer's oral waiver of a building code requirement cannot defeat the contractor's liability for the violation" of the building code. The case was reversed and remanded. See *Downey v. Chutehall Const. Co.*, 42 N.E.3d 1194 (Mass. App. 2016).

[Note: In Gallo Builders, Inc. v. Travelodge, 268 Cal. Rptr. 79 (Cal. Ct. App. 1990), an unlicensed contractor said the owner promised to "waive" the California license requirement. The contractor was precluded by statute from enforcing the contract, but the court permitted an action for fraudulent misrepresentation against the owner.]

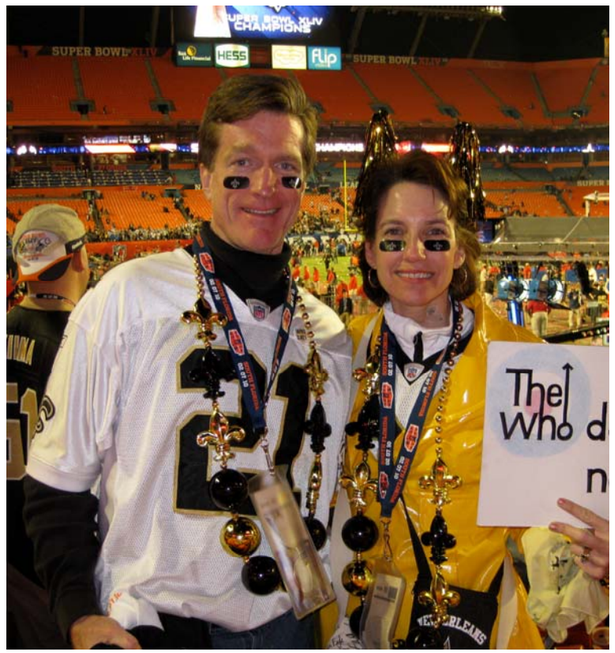


TJS Member Michael Bell, FAIA, Esq. of New Orleans won the "Best Tie" contest at the Annual Meeting, for wearing his "Thomas Jefferson Signature" tie. There was no cash prize, just bragging rights.

MEMBER PROFILE: MICHAEL BELL, FAIA, ESQ.

Michael Bell grew up in New Orleans surrounded by stimulating architecture and with a desire to draw and to build things. “I loved working with tools,” he told us. “My friends and I built treehouses and forts and I was always drawing and playing with Legos, Erector sets, plastic models, etc. I loved sneaking onto home construction sites and seeing how they were built.” When his parents hired an architect to design their home, young Michael was fascinated by the architect’s drawings. By high school he knew that he wanted to be an architect. “I could not imagine leaving the city I love so much so I enrolled in the Tulane School of Architecture,” he told us, where he obtained a 5-year masters degree.

Upon graduation from Tulane School of Architecture, Michael moved to Dallas and spent four years there as an intern architect. He worked with three Dallas firms on a variety of projects, the most significant probably being The Crescent in Dallas. When asked why he enrolled in law school, Michael said, “As the RTC bust put the hurt on Dallas architecture firms, I looked for career alternatives. I had never forgotten my ‘Legal Concerns of Professional Practice’ professor at Tulane, Victor Stilwell, who was an architect-turned-lawyer and who enjoyed a reputation as one of the toughest construction litigators in New Orleans. I had enjoyed Stilwell’s course and was fascinated by the idea of practicing law and specializing in construction cases.” Still in love with New Orleans, Michael returned home and enrolled at Tulane Law School. “I received notice that I had passed the architectural registration exam during my first month of law school.”



Michael Bell, FAIA, Esq. and his wife Aimée are passionate about New Orleans. Can you tell?

While in law school, Michael’s goal was to practice law with the aforementioned Victor Stilwell at Deutsch, Kerrigan and Stiles, New Orleans’ largest construction litigation firm, and that is what he did. “I took the bar exam and passed it prior to starting with DK&S, and I began to practice law. I primarily defended architects and learned a lot doing so, including the lessons that come with performing a post mortem on a construction project.”

After a couple of years of practicing law, Michael began to miss the creativity that comes with designing and building. “I began to dream about the type of architectural firm that I would create and how I might apply legal lessons learned to an architectural practice. So after three years as a lawyer, I set up my architectural shop in a spare bedroom of our home. As my practice matured I decided that I loved designing homes. I learned to say no to commercial work so that my firm could specialize and excel at residential work.” He wanted to differentiate his firm from those providing “house plans.” Today, Bell Architecture’s projects are exclusively residential, and predominantly single-family residential. “I’d like to think that we are now one of the leading custom home architectural firms in the New Orleans area. I am doing what I absolutely love to do,” he told us.

When asked what is the best part of his job, Michael said, “I love working with individuals and couples to design for them the home of their dreams. The process is its own reward, but there is no greater fulfillment than seeing the completed home and seeing the joy it brings our clients.”

Michael served as President of AIA New Orleans during that organization’s re-structuring to serve a more energized post-Katrina architectural profession. In 2009, he began service on AIA's Documents Committee and currently serves as Vice-Chair of that committee. In 2015, Michael was elevated to the AIA College of Fellows.

Michael and his wife Aimée have been married for 27 years and they have three children, ages 24 to 21 (Leighton, Bristol and Aggie). All three attended college in Tennessee and the first two just returned home to pursue their young careers in New Orleans.

When not designing houses, Michael avoids golf, but finds time to enjoy a little fishing, tennis, and stand-up paddle boarding. He also enjoys travel, photography, hunting and reading of history.

“Good things have happened to me, and giving back is the logical response,” Michael said. He has served on the Boards of the Louisiana Children’s Museum, Trinity Episcopal School, St. Charles Avenue Presbyterian Church, New Orleans Architecture Foundation, the Tulane Fund and Tulane’s School of Architecture. His firm has also donated the design for over 400 homes for New Orleans Area Habitat for Humanity. He is also very active in putting on the parades and balls that make up the Mardi Gras. “That is quite a bit of fun!”

It is obvious that Michael loves New Orleans. “I think Katrina made us more fully understand that New Orleans is incredibly unique and worth fighting for. In fact, I love the whole region. Aimée and I are increasingly dividing our time between New Orleans and our weekend home in Covington, La., on the Bogue Falaya River, which is one of the South’s most charming small towns.” He enjoys what he calls “Southern Coastal vernacular” architecture, which combines influences from the rural South, New Orleans, the arts & crafts style and contemporary architecture. He is a fan of the firm of Merrill Pastor, which has been a leader in the stylistic movement just mentioned and which designed the chapel at Seaside, Florida, where this movement began, in his opinion.

Any advice for a young architect thinking about law school? “It’s a great combination. As evidenced by the attorneys in the Jefferson Society, there is a real opportunity to specialize, which our economy increasingly demands. Or if you decide to practice architecture, a legal education will inform your practice in highly beneficial ways.”

The entire Bell family attending daughter Leighton’s graduation in Nashville (May 2014). From left to right: Bristol, Aggie, Leighton, Aimée and Michael. All but one now live in New Orleans, and love the Crescent City!

MEMBER PROFILE: TIMOTHY W. BURROW, AIA, ESQ.

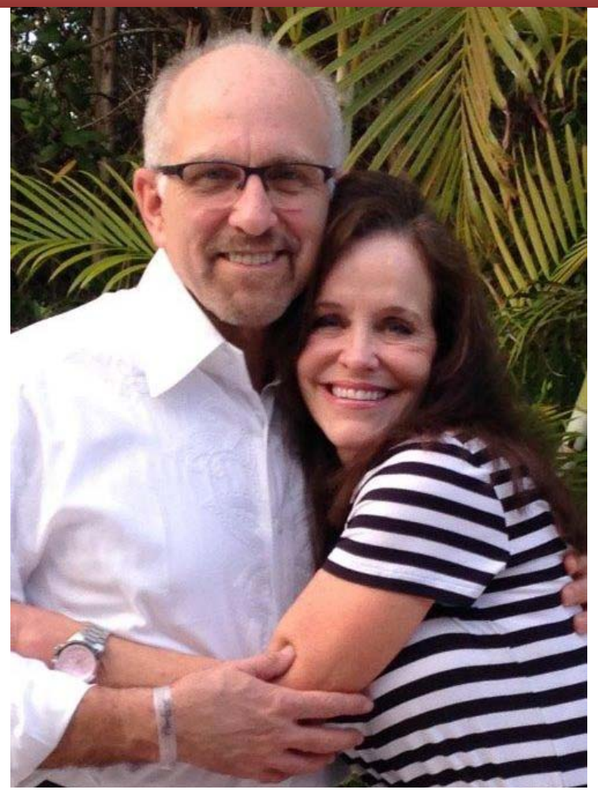
TJS Member Tim Burrow, AIA, Esq. is a bit unusual for the Jefferson Society in that he is not only a licensed architect and attorney, but he is a licensed contractor as well. This high achiever is also a published author and has also served as an expert witness and as an arbitrator on construction related cases. He is designated as an "Elite" architectural expert witness by IMS ExpertServices, a designation given to 3% of its database of expert witnesses, which is the largest database in the country.

This interesting career got its start when Tim got his architectural degree from the Univ. of Tennessee, Knoxville. "The reason I chose that school is simple. It was the closest architectural school to my home town of Nashville." He practiced as an architect for 12 years after graduation, first with the firm of Gresham, Smith & Partners in Nashville, then for Tim Burrow Architects, Gould Turner Group, P.C., and Yearwood, Johnson, Stanton & Smith. When asked why he desired to go to law school, Tim told us, "After 12 years of practicing architecture, I learned that there would always be a demand for construction lawyers with actual construction experience, I decided to take the plunge. I also wanted to make more money (I'm supposed to be honest, right?)." Not surprising, Tim chose Nashville School of Law for his legal education, where he could work during the day and go to school at night.

After law school, Tim went to work for the law firm of Lewis, Krieg, & Waldrop in Knoxville. Today, he is a name partner at the law firm of Burrow & Cravens, P.C., which he founded in 1997. His partner, Chris Cravens, is a former general counsel of the Tennessee Contractors Licensing Board and the Tennessee Surveyors Board. Tim got his license as a general contractor in 1985 and did construction work with his own company, The Burrow Company.

When asked "What's the best part of your job?" Tim said: "I love working puzzles, and that is the practice of law." Although Tim is not active in the AIA, he is a member of the ConsensusDocs Contract Content Advisory Council.

Tim lost his wife, Tamara, to cancer 10 years ago. He has a 25 - year old son,



(Above) Tim Burrow and his "angel" of a girlfriend, and athlete, Anne Campbell.

John-Michael Burrow, who works at Nolan Transportation Group in Nashville and the two are very close. "The lessons I tried to instill in him to love God, live by the golden rule, and work hard have taken hold," Tim says, "I am very blessed. I also have an angel of a girlfriend, named Anne." She is a heart transplant patient, and set two world records at the World Olympic Transplant Games.

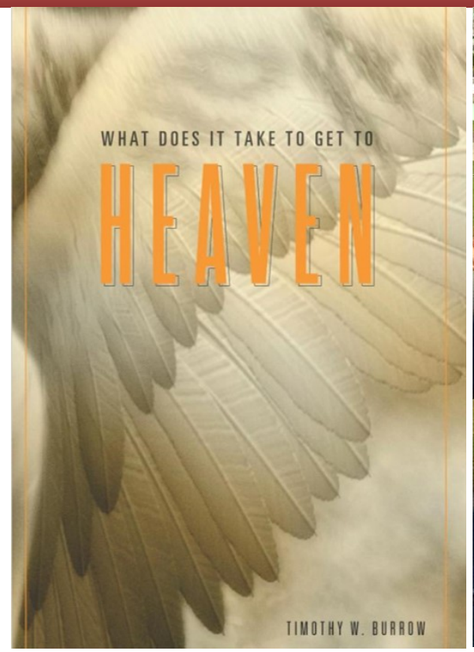
When not practicing law, writing a book or engaged in arbitration or expert witness work, Tim loves bike riding and analyzing Scripture. "After losing my wife, I was very distraught, and I told the Lord that I have to be with her in heaven some day. Reminding myself that I was not even sure how to get there, I said, 'How stupid is that, not knowing whether heaven or hell is where I will spend eternity.' So, I rolled up my sleeves, pulled down my Bible from the shelf and began looking for treasure — anything and everything on that subject." After deciding that Scripture on this topic was different than what most preachers taught ("most tell us what we want to hear," Tim says), this lawyer-architect decided to write a book. Tim's book entitled "*What Does It Take to Get to Heaven?*" can be purchased on Amazon. It is rated 5.0 out of 5.0 by readers. "It was a 1,700 hour project," Tim says. "Take your most difficult legal brief, and multiply it by 25 (the challenge was in finding the theory that has no conflict in Scripture) — that is the measure of the difficulty of my book." Tim is presently writing a second book.

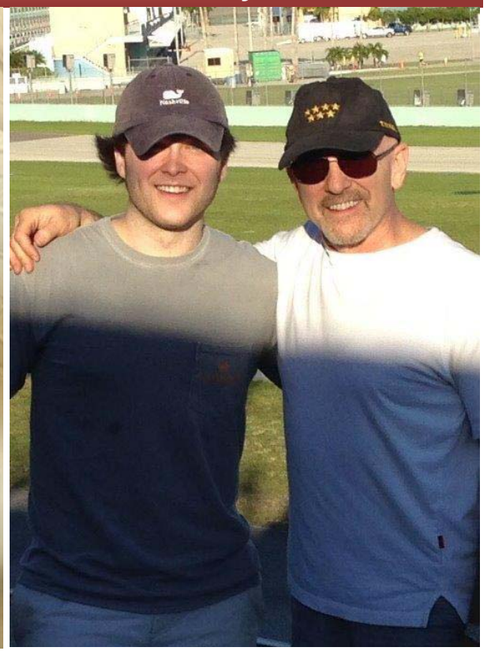
He loves Music City, and says, "Nashville is the best city, always has been, and is being discovered as that by people all over the world. We have close to 100 people moving here every day." Outside of Nashville, Tim likes the architecture of the Shanghai Tower in Shanghai, China, the second tallest building in the world. His favorite architect is Rob Jernigan at Gensler, Los Angeles, "in part because the 700-person division of his firm designed Shanghai Tower, as well as the most beautiful buildings I've seen (which are all over the world), and he was my best friend in college," Tim says. "He was the most fun person to be around, always getting everyone to laugh and and doing off-the-wall stunts. Five years out of architecture school, he wanted to start an architectural firm with me as his only partner. I thought, 'Nah, all we'd do is wrestle each other and get in trouble all day.' Great business decision!"

When asked for advice for a young architect who is thinking about law school, Tim says without hesitation: "Go for it! The best part is that you can bill the first hour and every hour after that, and there are no competitions for getting the job! More seriously though, it is a great opportunity to help many people, and if you truly have a heart for bringing about a just result, your clients will love you, even if you don't prevail." Tim says his greatest honor was being "Chaplin of the Day" on February 4, 2015 for the Tennessee Senate, providing the opening prayer for the legislative session. "I am the only non-preacher to be given that honor in the history of the State." Tim is the son of a Cumberland Presbyterian preacher, so this apple did not fall far from the tree.

Tim also has two stepdaughters, Hannah and Whitney-Lauren.

We certainly have a diverse membership in the Jefferson Society, but perhaps nobody with a more interesting story than Nashville member, Timothy W. Burrow.





(Right) Tim's son, John-Michael Burrow, with his dad; (Left) The first book by author Timothy W. Burrow, which is getting great reviews on Amazon.com. One of the reviews on Amazon of Tim's book says, *"Every now and then, someone writes a book that is really worth reading. Tim Burrow has done just that! This book is for everyone! I will be giving this book to friends and loved ones who know nothing about Salvation and what it takes to get to Heaven. This book is the perfect gift with a genuine, lasting meaning!"*

MEMBER PROFILE: DAVID GARST, ESQ.


David Garst atop the steel erection at the Memphis Pyramid (1991).

"Like father, like son," the saying goes. David Nelson Garst is the son of an engineer-lawyer, so it is no surprise he chose a dual degree for his education. "My father was a civil engineer and attorney who graduated from the Memphis State University College of Law in 1967. I thought it would be fun to follow in his footsteps," David told us. Why architecture instead of engineering, like his dad? "I was first drawn to architecture by my interest in modern architecture of the 1960s and 1970s," he said. "I wanted to find a creative occupation and so I also took a vocational aptitude test." The test results said he should consider architecture, so he did. David chose the University of Tennessee – Knoxville to study architecture. After graduation, David worked as an intern with McFarland Associates Architects in Memphis for about a year before beginning law school.

It was not just the family roots that led David to law school. His interest in law grew during professional practice classes and administration labs in architecture school. Like his father, David enrolled at the school of law at Memphis State University (now University of Memphis). "I understand we were the first father/son legacy graduates from Memphis Law," he says proudly. What intrigued him about combining the two studies was the realization that architectural practice involved complex legal relationships, contracts, and technical writing. "I did not anticipate becoming a practicing attorney when I began law school, but instead thought I might work in administration, risk management, or in-house counsel roles in a large architecture firm." After law school, he was recruited by Tennessee Valley Authority to work in its Office of General Counsel. "At the time, TVA was in the midst of a large building program and needed construction litigators. I was at TVA for about 3 years before moving to my current firm." Today, David Garst is the chair of the construction practice group at Lewis, Thomason, King, Krieg & Waldrop, P.C. He is also a shareholder and member of the Board of Directors, located in the firm's Nashville office.

David says that the best part of his job is combining his two main professional interests, architecture and law, in a stimulating and fulfilling manner. "After 30 years of practice, many of my architect, engineer, and contractor clients have become close friends. I am an integral part of their companies. It is nice to be able to help and work with people you like."

He has been active in the AIA for about 30 years. Although he never sought to become a registered architect, he has been an active Associate Member of AIA the entire time. "I also have assisted two AIA Chapters and the Tennessee AIA with general counsel services for about 25 years. In 1997, I received the Tennessee AIA Presidential Award of Merit for Distinguished Service." In addition, last year David received the Tennessee AIA Presidential Award of Excellence.

David and Kathryn Garst have been married for 30 years. The couple has 3 children, Hunter (23), Tory (21), and Julie (16). Hunter and Tory are in college in Knoxville and the youngest, Julie, intends to start college at Belmont University in Nashville in 2017.

Outside of his interests in law and architecture, David has collected World War II aviation memorabilia since he was a teenager, and has visited many World War II battle sites and museums. "I have owned many unusual cars, watercraft, and toys over the years. In particular, I have owned several hovercrafts, drones, a sea kayak, boats, and a NASCAR pace car. I also enjoy target shooting and am an active member of several ranges." Really? He owned a pace car? That is pretty cool!

In 2003, David founded Tennessee's construction bar association (aka TACC, the Tennessee Association of Construction Counsel). He served as President from 2003-2005 and since that time he has served as a permanent member of the Board of Directors. Directly, or through his law firm, he has been a member of many construction industry organizations, including the Tennessee Society of Professional Engineers, the Tennessee Associated General Contractors, the Tennessee Associated Builders and Contractors, Construction Specifications Institute, American Arbitration Association, and the Tennessee Plumbing, Heating, and Cooling Contractors. He also served a term on the Tennessee AGC Board of Directors and 3 terms on the Middle Tennessee AGC Board of Directors.

"My office is in Nashville, but I live one county to the South in a town called Franklin," David said. "It is the site of a major civil war battle and there is great interest in historic presservation throughout the county. Several blocks of historic downtown Franklin are on the National Register." There is a separate organization whose purpose is to preserve the battlefield there. "Although I rarely practice in Franklin, it is a good place to live and work. It has been voted one of the top small towns in America," he said.

David was inspired when he recently toured the 911 Memorial and the Freedom Tower in New York City. "The development of the 911 site is very impressive, and is my current favorite building." Like many of us, David is a fan of Frank Lloyd Wright's work. "If he was practicing today, I think he would still be a leading influence in the profession."

The Garst children: (from left) Hunter (age 23), his girlfriend Gabby, Julie (age 16), Tory (age 21)

Jefferson Society Members Bill Quatman, Craig Williams, and David Garst were all featured speakers at the ALFA International Conference at the Terranea Resort in Rancho Palos Verdes, California on July 28-29, 2016. Here they are, enjoying the sun!

NCARB Renames Intern Development Program as AXP

Effective June 29, 2016, the program we have all known as "IDP" or Intern Development Program will be renamed the Architectural Experience Program, or "AXP" for short. The rebranding of the program is part of an industry - wide push to retire the term "intern." Developed by the National Council of Architectural Registration Boards (NCARB), the AXP program is designed to guide aspiring architects through the early stages of their career so they can earn a license to practice architecture. This decision was enacted by NCARB's Board of Directors and is the result of over a year of research and outreach by various NCARB committees, as well as feedback from state licensing boards, industry leaders, and emerging professionals. Based on the recommendations of its Future Title Task Force, NCARB announced in May it would sunset the term "intern," while preserving the title "architect" for licensed practitioners. "Renaming the IDP is another step in realigning our programs to better reflect current practice and terminology," said NCARB President Dennis Ward, AIA, NCARB. "For example, one firm may refer to a non-licensed employee as a 'senior designer' while another uses the title 'project manager.' Yet, neither is likely to introduce that individual to clients as an 'intern." Since each state sets its own requirements for licensure, the program's new name will carry an important caveat: "Formerly known as the Intern Development Program, or IDP." This language will accommodate existing laws or rules that refer to the program's current name. Similarly, while NCARB will continue to refer to those working toward licensure as "aspiring architects" or "exam candidates," licensing boards have the authority to prescribe their own terminology for unlicensed professionals. The late June launch of the new name will accompany the program's realignment of experience areas. Over the next several months, NCARB will work with state licensing boards and the architectural community to implement these changes. For more information on NCARB's experience program, visit this website: www.ncarb.org/experience.

Serial Plaintiffs Filing "Waves" of Title III Disability Cases

by Ashley T. Kasarjian
Snell & Wilmer
Phoenix, Arizona

Hotels, restaurants and retail establishments have been flooded with new lawsuits filed by serial plaintiffs that allege that a property (a place of public accommodation) is in violation of Title III of the Americans with Disabilities Act (ADA) or the equivalent state law, such as the Arizonans with Disabilities Act (AzDA). Nearly identical allegations are filed against businesses throughout the state, and they usually allege that an individual with a disability either visited a business or attempted to visit a business, but was unable to do so due to a barrier on the property. In other words, the plaintiff is alleging that the company/defendant failed to comply with some aspect of the ADA Accessibility Guidelines (ADAAG). Examples of common barriers that are raised in these lawsuits are: (1) that a parking lot does not have a sufficient number of disabled or van accessible spaces or parking signs (or the signs are not high enough); (2) some part of the exterior of the property or the front door is inaccessible or improperly sloped; or (3) the restroom is not accessible — perhaps a stall is not wide enough or there is no disabled restroom at all. Typically, the plaintiff requests that the court provide it with injunctive relief (i.e., the defendant has to fix the property), compensatory damages (not available under federal law but, in limited circumstances, damages may be available under state law), and attorneys' fees and costs.

The premise of these lawsuits is simple enough, but the complexity becomes apparent as businesses realize there is no one-size-fits-all response.

Why are serial plaintiffs even bringing these lawsuits? There are a couple of answers here. The law provides a private cause of action to plaintiffs because there are simply too many buildings and places of public accommodation for the government to be able to efficiently monitor each and every one. Individual plaintiffs are able to bring multiple cases under the ADA to ensure that they and others are not harmed by businesses that fail to comply with the law. Even the idea of serial litigation is contemplated under the law. The Ninth Circuit explained that "[f]or the ADA to yield its promise of equal access for the disabled, it may indeed be necessary and desirable for committed individuals to bring serial litigation advancing the time when public accommodations will be compliant with the ADA." However, the Ninth Circuit includes this caution: "But as important as this goal is to disabled individuals and to the public, serial litigation can become vexatious when . . . a large number of nearly-identical complaints contain factual allegations that are contrived, exaggerated, and defy common sense."

Some people feel that these lawsuits are an attempt by plaintiffs' attorneys to cash in on the attorneys' fees provision under the ADA. Finding one area of non-compliance on a property can arguably permit a plaintiff to bring his or her expert and conduct a full-site inspection to uncover more issues. Unless the lawsuit is groundless or frivolous, plaintiffs know they likely will not be responsible for the defendants' fees and, in fact, they may have an opportunity to recover fees from defendants in certain circumstances. Because of this, these cases are often settled prior to trial and attorneys' fees may be a significant portion of that settlement.

There are many issues to consider when a lawsuit is filed. The threshold issue is whether the company can make the necessary changes to bring the subject property into compliance so that individuals with disabilities do not encounter any barriers to access. In addition, there are many other issues to consider. *When was the subject property built? When, if ever, was it altered? Is it a historic property? Does the plaintiff have standing? Are there non-parties at fault? Are plaintiff's requests structurally impracticable? Are there equivalent services offered?* While there are instances when companies must be in strict compliance with the ADA, there are also exceptions when strict compliance is not feasible or necessary. All these factors, and more, can help build a company's defense —that it is properly complying with the ADA.

Sometimes, landlords or tenants contractually agree that one party is responsible for actually making the changes and has to indemnify the other party if there are any lawsuits brought. However, the plaintiff can still sue both parties. It is then up to the landlord or tenant to collect on the indemnification. However, there are some states, such as Nevada, where indemnification is preempted and prohibited under the ADA because permitting an owner to circumvent responsibility would lessen the owner's incentive to ensure compliance with the ADA.

[The full article was published in the Snell & Wilmer July 13, 2016 newsletter, reprinted here with their permission].