Our Mission

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

INSIDE THIS ISSUE:

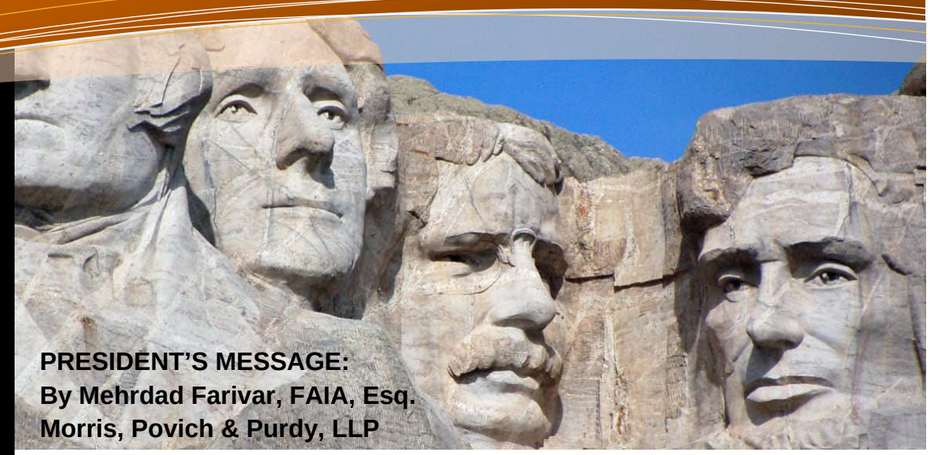
The Jefferson Society, Inc.

c/o 2170 Lonicera Way
Charlottesville, VA 22911

ISSUE 17 October 2016

QUARTERLY JOURNAL OF THE JEFFERSON SOCIETY, INC.

Monticello



PRESIDENT'S MESSAGE:
By Mehrdad Farivar, FAIA, Esq.
Morris, Povich & Purdy, LLP

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

"Robbing Peter to Pay Paul" – The Owner's New Motto?

A rather disturbing trend I have noticed in my practice recently, is owners (both public and private) settling dubious claims with contractors (often with inadequate analysis and without involving their lead design professional) and, thereafter, seeking to recoup some or all of that settlement payment from design professionals. There are, no doubt, many causes for this phenomenon. I would like to examine some of them here and seek your thoughts and ideas on this topic.

In one of the matters I am currently dealing with, the owner - a sophisticated and experienced real estate fund manager, embarked on a multi-phase major renovation/addition project with an extremely aggressive schedule and multiple architects. The owner chose not to involve the design professionals in the administration of the construction and interfaced with the general contractor directly, through its staff stationed at the site.

The schedule was extremely aggressive and failure to meet it would have had major adverse financial consequences for the owner. In the course of construction, the contractor made numerous claims for extras, many of which were readily approved by the owner and for some of which the owner authorized the use of the contingency fund. The design team was not consulted in the resolution of the claims.

Once the construction was substantially completed, the owner made a huge claim against the design team in an attempt to recoup some or all of the extras it had paid the contractor, including some of the items that had been paid for with contingency funds. The owner also withheld a significant sum from the design professionals, pending the resolution of the claim. The claim was extremely difficult to evaluate after the fact, due to the large number of items involved and the difficulty of identifying and assembling clear documentation to

(Continued on page 2)

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

track the cause or causes of the claim. An in-depth analysis of the claim (after the fact) would have been extremely expensive and would have consumed a big part of the lead architect's professional liability insurance coverage. So the claim had to be dealt with on a macro level to achieve a global settlement. In this case the owner allied itself with the contractor and against the design team, presumably because the owner did not want to jeopardize timely completion of the project by alienating the contractor, and perhaps also because the owner viewed the design team as a weaker opponent than the contractor.

In another matter I am currently working on, the owner, a public entity, managed the construction of a large hospital complex using bond funds. The contractor, on whom the owner heavily depended for shepherding the project in its many phases and components, bid the project in a competitive public bidding process. The completion deadline for one of the buildings slipped by over a year and the contractor made a large claim against the owner, blaming the delay on the design team and other factors beyond contractor's control. It is, at this stage, unclear to the design team whether there really was a delay, as opposed to an inadequate or underestimated initial schedule, and to the extent there was a delay, what the true cause of it was. Again, the owner already has settled with the contractor and now the design professionals face the daunting task of analyzing the entire claim in its many facets, after the fact, in order to defend themselves against the owner's pass-through claim.

In both of these cases it appears the owners chose not to get into a risky battle with the contractor and instead make the best deal they could with the contractor, and attempt, after the fact, to recover some of the extras claimed by the contractor from the design professionals and in the process deflect potential criticism against themselves for mismanaging the project.

It appears the following factors, in varying combinations, can cause these types of owner - claims against design professionals: (1) aggressive and inflexible construction completion deadlines or projects of unusual novelty or complexity, (2) ever diminishing role of architects and other design professionals in facilitating the resolution of claims between owners and contractors during construction, (3) ever increasing sophistication of contractors in creating and justifying claims, and (4) the inability of most owners to adequately analyze and respond to claims as they arise.

Of these 4 factors, none is really within the control of architects and other design professionals. Even the role of architects and design professionals in claim resolution between owners and contractors during construction is not something architects and other design professionals can ultimately determine, but perhaps can influence to some degree. They can only fulfill such a role however, if they are provided with the resources they need, to perform that function. The ever increasing presence of construction managers and project managers during construction, and the fees they charge, leaves little room (or resources) for architects and other design professionals to play a significant role in the claim resolution process. But, ironically, these design professionals can play a key role in assisting owners and other in analyzing and evaluating contractor claims as they arise. By not including them, owners often deprive themselves of a very valuable resource in properly analyzing and evaluating contractor claims.

Architects and other design professionals can at least attempt to address the risk of after the fact owner claims through contract drafting and negotiation. For example, they can include contract clauses providing that owners waive the right to seek indemnity or contribution against design professionals for contractor extras, unless such claims are brought contemporaneously with claims asserted by contractors against owners, so that at least they can be more easily evaluated, on a one-on-one basis, while events are still new and fresh. Design professionals and their insurance carriers are often at a significant disadvantage, when faced with complex claims resolved without their input.

If any other TJS members have noticed this trend, contact me at (213) 417-5108 or mfarivar@mpplaw.com.

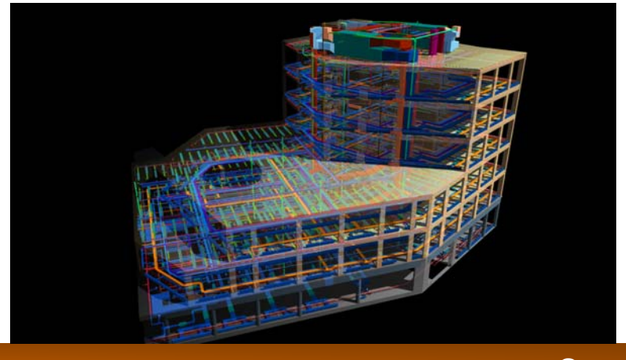
Thank you.

Sealing of BIM Models

By R. Craig Williams, FAIA, Esq.
HKS
Dallas, Texas

Licensed architects create numerous documents in connection with an architectural design project, including drawings, models, databases, and informational documents. With respect to drawing documents, these used to be hand - drawn, but with the availability of drafting software they are typically done using computer software. Similarly, text documents and databases are typically created electronically. Each finalized electronic document is "issued" by the architect by being printed, the print - out stamped with the architect's seal and signed by him or her to authenticate the document as a final drawing or other document approved for issuance by the architect.

Electronic versions are easily modifiable by recipients (other than the architect or users authorized by the architect) having access to them, resulting in changes that may be implemented during construction that have not been approved by the architect.



There has not previously been any way to authenticate that the electronic versions are the documents that have been approved by the architect because they lack the architect's seal and signature. Because of authentication issues, permitting agencies and state architectural registration boards have previously required issuance and submission of printed paper documents, including the architect's seal and signature, rather than electronic documents, in order for permits to be issued. In recent years, two dimensional, electronically sealed documents have been allowed by some state architectural boards, where the seal and signature are not removable from the electronic documents.

Current technology allows, and many clients of architects require, project documents to be created three-dimensionally in an electronic model, commonly called building information modeling, or "BIM". Since these architectural documents are created electronically, it would be beneficial to be able to "issue" them electronically with *a digital seal and signature* to indicate approval by the architect, thereby ensuring that the documents are genuine. There are known systems and methods for electronically sending and/or electronically signing documents and verifying the authenticity of the received document and/or electronic signature; however, these systems and methods have not been applied to architectural documents requiring an architect's seal and signature to be valid and obtain permits.

In an effort led by HKS, and this author in particular, we have created a methodology for electronically sealing and signing building information models that has been accepted by the California Board of Architects as satisfying its seal rule. Simply stated, the process involves performance of a hash function to create a file with the digital seal and signature and a cryptographic hash. The document is issued electronically, distributed to a recipient, extracted to a local drive, and subsequently accessed for use in an architectural project. The cryptographic hash of the extracted file is compared to that of the accessed filed to determine if they are the same. If the same, the accessed document is validated and the digital seal and signature remain visible in the accessed document. If not, the accessed document is not validated and the digital seal and signature are removed from or hidden, indicating the document should not be used. HKS, Inc. has applied for a patent for this this process; however, HKS intends to freely share the technology with anyone interested in using it. Currently, no states besides California have recognized this process as acceptable for sealing and signing models; however, "Google" this: "so goes California, so goes the nation", and see what pops up!

A Voice From the Past.

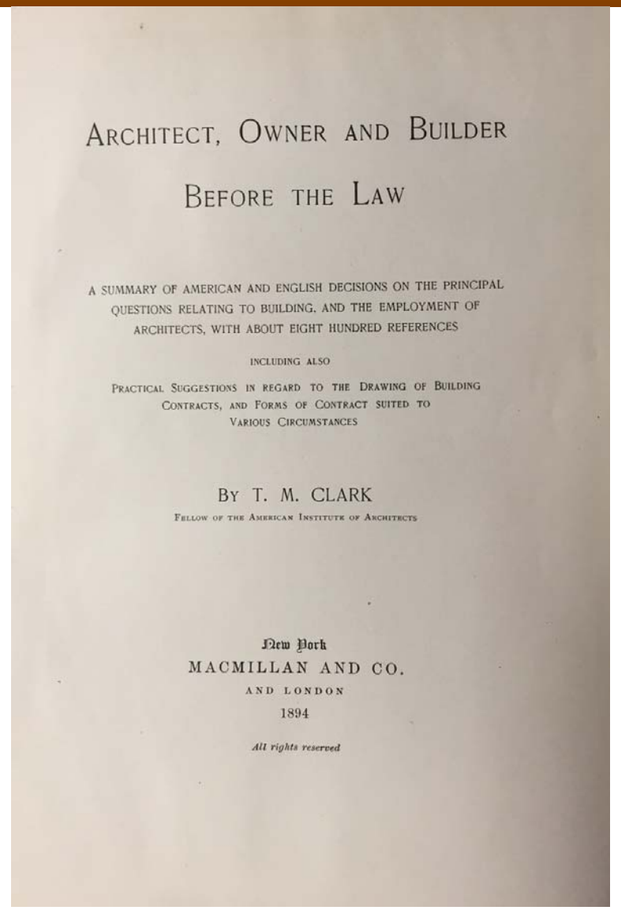
In the book "*Architect, Owner and Builder Before the Law*", written in 1894 by Theodore M. Clark, FAIA (1845-1909) he commented on how the architect's former lead role in Europe had changed. One hundred and twenty-two years ago, Mr. Clark wrote this:

"It is well known, both from the evidence of contemporary writers on architecture and building . . . that in the early part of the present century [i.e. the 1800's], and for many years before, the architect was commonly the principal contractor for the building. At that time, the trade guilds still flourished, and one of the rules of the guilds was that no member of any guild should contract for or do work belonging to any other guild; so that the only way to include a whole building in one contract was to make an agreement with some one outside the trades, and let him make sub-contracts for the different portions of the work. The person with whom the principal contract was usually made would naturally be the architect * * * Even at that time, however, there were certain architects, particularly those employed by the Government, who held aloof from contracting, and prided themselves on their strictly advisory, or, as we should say, professional character; and this attitude of architects toward their clients came by degrees to be recognized and the usual one." (at. pp. 57-58).

What an interesting insight, over a century ago, that the role of architect in Europe (France in particular) as prime contractor had changed due to "aloof" architects who felt that as "professionals" they were above contracting . . . and over time this became the recognized and predominant attitude of architects.

Many architects lament today that they have lost their leadership role to design-build contractors, program managers and construction managers. The AIA has even announced a new training program entitled, *"Building Team Cohesion: Positioning Architects as Leaders in Project Collaboration."* https://aiau.aia.org/courses/building-team-cohesion-positioning-architects-leaders-project-collaboration

What do you think? Are architects too aloof to act as prime contractor? Or are they too risk adverse?


ARCHITECT, OWNER AND BUILDER

BEFORE THE LAW

A SUMMARY OF AMERICAN AND ENGLISH DECISIONS ON THE PRINCIPAL QUESTIONS RELATING TO BUILDING, AND THE EMPLOYMENT OF ARCHITECTS, WITH ABOUT EIGHT HUNDRED REFERENCES

INCLUDING ALSO

PRACTICAL SUGGESTIONS IN REGARD TO THE DRAWING OF BUILDING CONTRACTS, AND FORMS OF CONTRACT SUITED TO VARIOUS CIRCUMSTANCES

BY T. M. CLARK

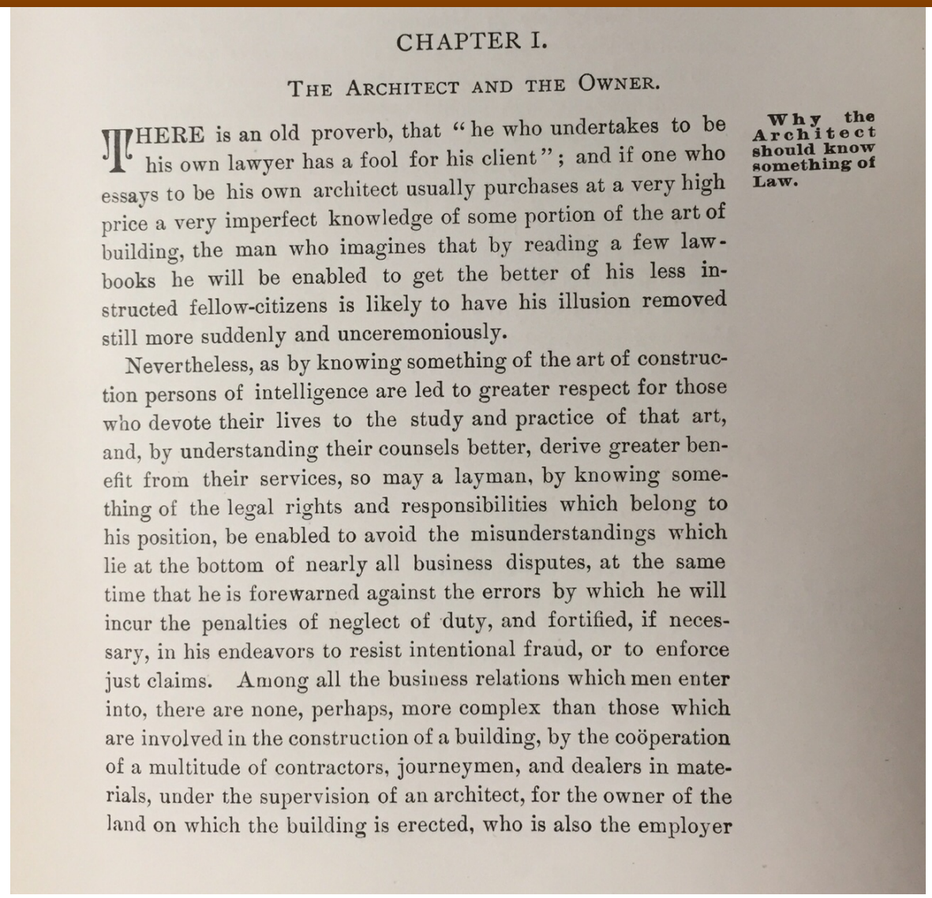
FELLOW OF THE AMERICAN INSTITUTE OF ARCHITECTS

New York
MACMILLAN AND CO.
AND LONDON
1894

All rights reserved

See T.M. Clark's opening comments (p. 5) on "Why the Architect should know something of Law." He'd have been an excellent contributor to *Monticello*!

T.M. Clark, FAIA, was a Boston architect who graduated from Harvard at age 20, and worked in the office of Henry Hobson ("H.H.") Richardson. He had his own architectural practice until 1880, when he became a professor of architecture at M.I.T., where he remained on the faculty for 8 years. He wrote several books and was the editor of American Architect and Building News from 1888 until 1909. He was active in the Boston Society of Architects and the AIA. Though not a lawyer, he wrote an excellent book on architectural law (see photo above), much of which is as relevant today as it was in 1894. Will anyone read our newsletter in 120 years?


CHAPTER I.

THE ARCHITECT AND THE OWNER.

Why the Architect should know something of Law.

WHERE is an old proverb, that "he who undertakes to be his own lawyer has a fool for his client"; and if one who essays to be his own architect usually purchases at a very high price a very imperfect knowledge of some portion of the art of building, the man who imagines that by reading a few law-books he will be enabled to get the better of his less instructed fellow-citizens is likely to have his illusion removed still more suddenly and unceremoniously.

Nevertheless, as by knowing something of the art of construction persons of intelligence are led to greater respect for those who devote their lives to the study and practice of that art, and, by understanding their counsels better, derive greater benefit from their services, so may a layman, by knowing something of the legal rights and responsibilities which belong to his position, be enabled to avoid the misunderstandings which lie at the bottom of nearly all business disputes, at the same time that he is forewarned against the errors by which he will incur the penalties of neglect of duty, and fortified, if necessary, in his endeavors to resist intentional fraud, or to enforce just claims. Among all the business relations which men enter into, there are none, perhaps, more complex than those which are involved in the construction of a building, by the coöperation of a multitude of contractors, journeymen, and dealers in materials, under the supervision of an architect, for the owner of the land on which the building is erected, who is also the employer

Your Chance To Be Admitted To The U.S. Supreme Court Awaits!

In a little more than one year, a group from The Jefferson Society will appear to be admitted to the Supreme Court of the United States. Donna Hunt is organizing the event for the Society. If you are interested in Admissions Day, please send Donna an email at: donna.hunt@ironshore.com and she will add you to the list. The cost of admission is a one-time payment of $200, and the breakfast is about $35-$40 per person. As we get closer to the date, Donna will send all the information you will need to prepare your application. The deadline for submitting the completed group packet to the court for admission will be Weds., Sept. 20, 2017. Once the packet is submitted, however, she will not be able to add additional members.

Note: if there is another TJS member in the Boston area that may have a little time to help be sort through all the applications to make sure they are completely filled, please contact Donna. She would really appreciate it!

Here is the current list of the 22 TJS members signed up for Admission on November 13, 2017:

1. D. Wilkes Alexander
2. Wendy R. Bennett
3. Kevin Elmer
4. Mehrdad Farivar
5. Jesse M. Guerra
6. Cara Shimkus Hall
7. Jeffrey M. Hamlett
8. Charles R. Heuer
9. Margaret Landry
10. Jon B. Masini
11. Andrea S. McMurtry
12. Eric O. Pempus
13. Jacqueline Pons-Bunney
14. Joyce Raspa-Gore
15. Trevor O. Resurreccion
16. Jose B. Rodriguez
17. Mark A. Ryan
18. Joe Sestay
19. Gracia M. Shiffrin
20. Alan B. Stover
21. Steven C. Swanson
22. Scott M. Vaughn

Our Question: Who will be the Justices in Nov. 2017?

Here are the current eight Justices (ranked by age):

1. Ruth Bader Ginsburg (83)
2. Anthony Kennedy (80)
3. Stephen Breyer (78)
4. Clarence Thomas (68)
5. Samuel A. Alito, Jr. (66)
6. Sonia Sotomayor (62)
7. John G. Roberts (61)
8. Elena Kagan (56)
9. Vacant (Antonin Scalia) Died Feb. 13, 2016 (79)

TJS Membership Continues To Grow!

The following new members have joined since our last Newsletter. We now have 114 members:

NEW MEMBERS:

113. Ricardo Aparicio, Esq.
General Electric
Cincinnati, OH

114. Raymond L. Deluca, Esq.
Pepper Hamilton LLP
Philadelphia, PA

Attention Delinquent Dues Payers!
Yes, you know who you are.
And so do we!

If you have not paid your 2016 dues, please write your check for $50 to "The Jefferson Society, Inc." and mail it to our Treasurer, Donna Hunt, AIA, Esq. at:

Ironshore
75 Federal Street
Boston, MA 02110

If you send a firm or company check, be sure your name is written on the memo line so that you get proper credit! If you have already paid your dues, "Thank You"!

Leadership: A History of AIA Positions on the Architect's Role as Leader and Design-Build

G. William Quatman, FAIA, Esq.
Burns & McDonnell
Kansas City, MO

In 2007, I chaired the AIA's Design - Build Knowledge Community which, at that time, was the second largest KC in the Institute, just behind the "Design" knowledge community. We did a series of seminars across the nation promoting architect-led design-build, with great reception from the membership. The concept of architects leading a design-build project was controversial, and was not warmly embraced by AIA leadership or staff. It was about that time that AIA began to promote IPD as the alternative to design-build, where the architect would sign a 3-party agreement with the owner and contractor, rather than be a sub to a design-builder. The Design-Build Knowledge Community was eventually disbanded. But in the process of our training seminars, our committee did extensive research on the Institute's historical positions on leadership and design-build. That research has never been published before now. Here is what we found on the AIA's "Changing Policies on Design-Build and Leadership Over the Years."

A. The Initial Prohibition of Design-Build. The AIA's original Code of Ethics (1909-1976) stated: *"Members may not engage in building contracting where compensation, direct or indirect, is derived from profit on labor and materials furnished in the building process except as participating owners."* In the early years, the AIA was protesting against "package builders" who gave design for free. That was, in fact, part of the reason for the formation of the AIA in 1857, per its founding papers. That prohibition against AIA members participating in construction later gave way to a new movement in the 1970's.

B. The Move to Construction Manager-Agent. The AIA's Code of Ethics in 1977 altered the former prohibition, with a push for involvement as construction managers. It stated: ***"****Members may not engage in building contracting where compensation, direct or indirect, is derived from profit on labor and materials furnished in the building process except as participating owners.* ***Members may engage in construction management as professionals for professional compensation only****."* At this time, the Institute was actively engaged in promoting a CM-agent role for architects.

C. Concerns About Risk and Conflicts of Interest Remain. After adopting the 1977 Code, the AIA was sued for antitrust law violations by a member whose membership was suspended by the AIA over ethical violations under the 1977 Code. See, *Mardirosian v. American Institute of Architects*, 474 F. Supp. 628 (D.C.D.C. 1979). The ethical issue in that case had nothing directly to do with design-build, but it caused the AIA to repeal its entire 1977 Code and replace it with a "voluntary" code in 1980. Members voted in 1984 to reinstate a mandatory code of ethics for AIA membership and in 1986 the AIA adopted a new Code of Ethics.

The AIA's Board of Directors had already begun to examine its position on design-build in the 1970's due to member interest in participating in

> *"Members may not engage in building contracting where compensation, direct or indirect, is derived from profit on labor and materials furnished in the building process except as participating owners."*
> - AIA Code of Ethics (1909-1976)

design-build. In a Policy Statement on Design-Build-Bid adopted by the AIA Board of Directors in March 1975, the AIA stated that the ethical conflict was in the architect's incentive to profit from construction, which might not be resolved even with a disclosure to the client. The 1975 Board Policy stated that, "When the architect is employed directly as a professional consultant to the design/construct entity . . . [t]he architect, in order to avoid any possibility of a claimed conflict of interest … should see that his role and extent of services with respect to the project are disclosed to the owner." However, the AIA Board warned that, "If the participation of the architect is not such that he has only one client (the design/construct entity) to which he can give full professional loyalty, several ethical concerns come to the forefront … Competition of the architect's financial interest with that of his client arising from the architect's ability to make profit and-loss decisions during the construction process or from the architect's ability to derive compensation, directly or indirectly, out of labor and materials, points plainly to a relationship which cannot qualify under [of the AIA's Standards of Ethical Practice, 1974]. In rare instances, it might be conceivable that an extremely knowledgeable owner, after full disclosure, could 'waive' his protection, but even if there is an informed 'waiver' the architect still must be certain that he has resolved any potential conflict 'in the best interest of the client' as required by [the Standards of Ethical Practice]."

The AIA's Policy Statement even inferred that clients (i.e. the design-builders) were the unethical ones in design-build, shifting risks to others, when it said that, "Design-Build-Bid . . . does not contemplate that there ever will arise a traditional Architect-Client relationship. The owner is not the client. The client is in fact a composite design/construct entity which is furnishing single-point responsibility for the project to an owner who has chosen not to act as a client has traditionally acted, in order to shift the burden for price and time on the project to the design / construct team."

The AIA's 1975 Policy Statement on Design-Build-Bid noted that design-build constituted a "fundamental departure from traditional methods of practicing as a professional" and advised that, "A professional architect is one who gives advice to clients . . .; that professional architect will have no interest in any project which might influence his judgment and decisions to the detriment of his client." Obviously trying to dissuade architects from engaging in design-build, the Policy Statement concluded that, "a. When an architect commits himself contractually to produce an end product, he invites the courts and other governmental agencies to treat him as a commercially motivated businessman and not as a professional; he may be subjected to strict liability and other disadvantages; b. Such advantages may be dealt with as involving warranties and consequently may not be covered by professional liability insurance; c. Such activities may require the architect to furnish surety bonds; d. Such activities may require compliance with controls affecting businesses, from which professionals are relatively free."

The several versions of AIA's Code of Ethics from 1987 through 1993 suggested that architects engaging in design-build disclose the nature of their relationship with the design-builder to the owner. *See, Commentary, AIA Rule 3.202, Conflict of*

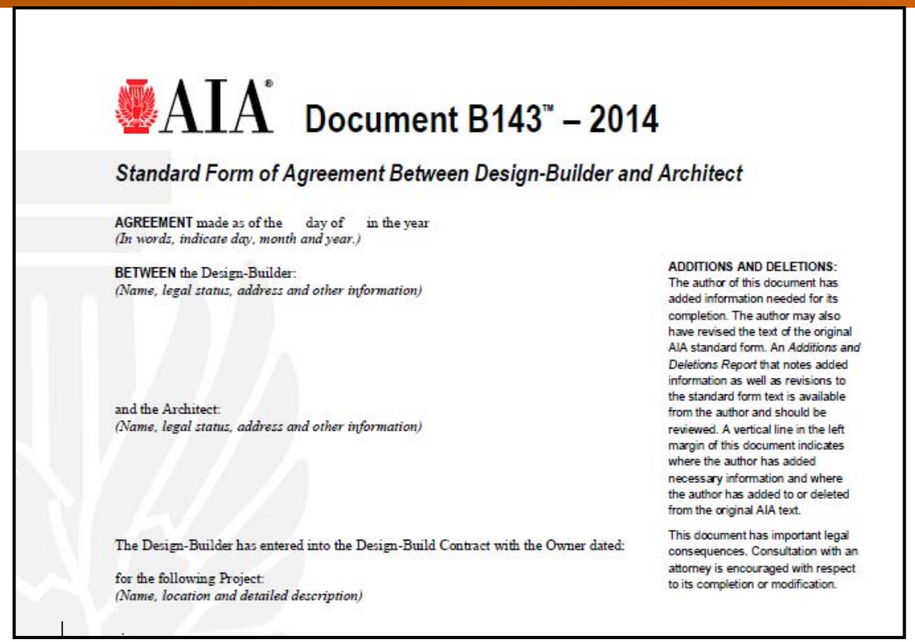
(continued on p. 8)

AIA History (cont'd)

Interest (1987, 1992 and 1993). The 1997 AIA Code removed this portion of the commentary and was silent on design-build, though it still required AIA members to avoid and disclose conflicts of interest.

It seems that during this time period, the AIA was discouraging its members, despite the repeal of the old Ethics Rule, from participating in design-build due to risk. This is about the same time of the "Liability Crisis" that faced the insurance industry in the early-mid 1980's, resulting in numerous AIA White Papers on liability and risk. As design-build grew, however, general contractors gladly accepted the lead role and became, legally and practically, the "Leader" of project delivery.

D. Push For Qualifications-Based-Selection. In 1983, the AIA's Board of Directors approved a Policy Statement affirming support for qualifications based selection (QBS) on public projects as a method of procuring A-E services on government jobs. The policy stated that competitive bidding for design services is not in the public's best interest, and that if a public owner chooses to contract with one entity for design and construction services, objective criteria should



AIA® Document B143™ – 2014

Standard Form of Agreement Between Design-Builder and Architect

AGREEMENT made as of the day of in the year
(In words, indicate day, month and year.)

BETWEEN the Design-Builder:
(Name, legal status, address and other information)

and the Architect:
(Name, legal status, address and other information)

The Design-Builder has entered into the Design-Build Contract with the Owner dated:

for the following Project:
(Name, location and detailed description)

ADDITIONS AND DELETIONS:
The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

be developed to evaluate the qualifications and competence of the design-build teams. The AIA was pushing QBS at this time nationally, about the same time many states passed QBS (or mini-Brooks) laws.

E. AIA Recommends New Entities, "Design – Builders," and New Contracts. In 1984 the AIA released drafts of its proposed new design-build contracts. The contracts drew objections from AIA Chapters in New York and in Wisconsin due to the creation of a new entity - - the "Design-builder" - - where that entity was not required to be a design professional. The New York State Association of Architects ("NYSAA") urged that either the architect or a joint association between an architect and contractor should be in the position of prime design-build contractor, fearing that allowing non - professionals to broker design and construction services may erode support for architectural licensing among legislators. Wisconsin's objections were that use of design-build in the public sector would provide a way for the state to avoid qualifications based selection. After Board debate, the AIA published its first series of design-build contract forms in 1985, with a "Design-builder" as prime, and the Contractor and Architect *as subcontractors* to that entity. The new documents came with advisory instructions that due to insurance, management and licensing laws, "it is expected that in most situations an architect will wish to establish a separate design-build firm. *This firm may then subcontract the design work to the parent architectural firm* through the use of AIA Document B901 [the subcontract between Design - *builder* (1985 edition)." Although this was the premise on which AIA's contracts were based, the market never followed that direction. Instead, contractors took the lead in most design-build projects and merely subcontracted to architectural firms. In most cases there is no separate design-build firm that is formed by the architect. Nonetheless, the AIA design-build contracts continued to be based on this model.

F. Concern Over Architect Being Cut Out of Contract Administration Role. At the request of NCARB's board of directors, its Committee on Procedures and Documents held hearings in Chicago in 1985 on the subject of the impact of the design-build process on the public health, safety and welfare. The committee identified two concerns. First, when the design-build contractor fails to clarify with the owner that the architect is employed by the contractor, not by the owner. The committee felt that the architect's role must be appropriately described. Second, the architect is frequently not asked to perform any construction phase services to see that the intent of the plans and specifications is carried out in the field. The committee recommended changes to the NCARB Model Registration Statute that, "In particular, a person (other than a registered architect) offering design-build services may offer to render architectural services as part of the design-build services, provided he has engaged an architect to furnish those architectural services." To address the lack of construction administration, the committee recommended that the Model Statute require that a registered architect be hired by the contractor "for the purpose of providing periodic on-site observation of the construction" and that this architect certify completion of the project in accordance with the plans and specifications.

G. Move Toward Public Sector Design-Build. The AIA's 1983 Policy Statement was sunset in 1988. In 1988, the Policy was remanded to the AIA's Government Affairs Advisory Committee. In 1989, the AIA formed a national task force in response to increased use of design-build in the public sector. That task force produced an interim report in Aug. 1990. On May 15, 1991, the AIA Board adopted a new Policy Statement on public sector design-build, which again emphasized the use of QBS criteria in selecting the design-build entity. That Policy recognized, for perhaps the first time that, "The design-build method of project delivery is being used by the public sector, and many AIA members are involved in this work." The AIA's 1991 Policy recommended pre-selection of a "short list" of firms, based on qualifications, then competition based on qualifications and other criteria, with payment of a "stipend" to compensate the finalists. The biggest boosts to Federal design-build came in 1994 and 1996 with the passage of two laws that permit award of construction contracts by the Federal government on the basis of "best value." The Federal Acquisition Streamlining Act of 1994 (FASA) and the National Defense Authorization Act of 1996, permitted the Federal government to procure design-build services using a two-phase selection process. (The portion of the 1996 Act that adopted the two-phase selection process has been re-named the "Clinger-Cohen Act"). Under the 1996 Act, Federal agencies are to determine if design-build is appropriate for the public project. If so, then the first phase of the process involves evaluation of specialized experience and technical competence of the proposers. Cost-related evaluation factors are not permitted in this phase. Then, proposers submit bids for the project. The contract is awarded to the design-build team with the highest overall ranking, based on qualifications and price. See, 10 U.S.C. § 2305a and 41 U.S.C.§ 253m.

H. AIA Reacts to Federal Legislation. In Dec. 1997, the AIA Board adopted a new Position Statement on Design-Build which recommended that on public projects, the agency preselect a short list of design-build entities based on competence, plus comprehendsive scope of work documents "prepared by licensed architects and other qualified professionals who are retained for the duration of the project", including soil information, outline specifications, budget parameters and project schedule. The 1997 AIA Position Statement defined design-build as, "the selection of the qualified design-build entity through a competitive process which may require evaluation of the concept design and project cost, along with other criteria." Keeping with AIA's strong position on qualifications-based selection, the AIA Statement recommended that selection of the design-build entity should be based on qualifications-based selection procedures, "which require consideration of competence, capability, and a negotiated price that is fair and reasonable to the public." AIA's Board went further into the specific selection criteria, suggesting all projects should specify certain recommended criteria to meet the public's desire for the architect to design building facilities that are safe, functional, attractive, and cost effective.

(continued on p. 10)

AIA History (cont'd)

AIA recommended that the public owner provide the pre-qualified design-build entities with a comprehensive request for proposal (RFP) that includes the project scope of work documents described above as well as the objective evaluation criteria that will be used as the basis for selection, the amount of the stipend to compensate the finalists (commensurate with the level of information required by the RFP), and contract forms of agreement for the project. AIA's 1997 Statement went on to address evaluation of proposals, payment of stipends, and use of a consultant during project execution. AIA also recommended that the proposals are evaluated by "a jury of qualified professionals (including those licensed professionals who prepared the scope of work documents)."

It was about this same time that the Federal government was passing legislation and using the "bridging" method of design-build, where a schematic design was prepared and given to competing teams to bid on. In reaction, AIA wanted to be sure that a licensed architect prepared the bridging documents and participated in the selection process, and acted on the Owner's behalf during the construction phase.

I. The Push For Leadership Role. Seeing contractors take over the lead in design-build, in Sept. 2005 the AIA Board adopted a new policy that stressed the architect's role in leadership. The policy stated:

"No. 26. Project Delivery: Alternative Delivery Methods.

The AIA maintains that projects can be effectively designed and constructed by a variety of delivery methods including but not limited to Design/Bid/Build, Design-build, and Negotiated Select Team. The AIA also believes that ***an architect is most qualified to lead alternative project delivery teams****, and advocates that* ***architects should be retained in that role regardless of which delivery method is used****."*

This was a very strong statement by the Institute, urging the architect *to lead* design-build efforts. Based on this endorsement, the AIA's Design-Build Knowledge Community led a series of seminars for several years, coast-to-coast, and internationally, including programs in San Juan and London. The programs were packed at each venue with AIA members who reacted positively to the Institute's suggestion that architects could take the lead role in design-build, with many members and seminar attendees reporting that their firms had made this move with great financial success. The AIA's endorsement of this method gave encouragement to its membership to "be a leader."

J. The Push for Sustainability and Integrated Project Delivery. In Dec. 2007, the AIA Board overhauled its Position Statements, emphasizing sustainability and Integrated Project Delivery (IPD) in many of the revisions. Not surprisingly, here is what the policy on alternative delivery said, promoting its two top agenda items and weaving them into design-build (a term no longer even used in 2007's edition of Policy No. 26):

"26. Project Delivery.

The AIA believes that every project delivery process must address the quality, cost-effectiveness, and ***sustainability*** *of our built environment. This can best be affected through* ***industry-wide adoption of an integrated approach*** *to project delivery methodologies characterized by early involvement of owners, designers, constructors, fabricators and end user/operators in an environment of effective collaboration and open information sharing. The* ***AIA also believes that an architect is well qualified to serve as a leader on integrated project delivery teams****. The AIA further believes that evolving project delivery processes require integration of education and practice in design and construction, both within and across disciplines."*

The draft that almost passed, until the AIA Design-Build Advisory Group got wind of the revised policy, in late Nov. 2007 - at the 11th hour- had no reference at all to the architect as a leader (removed from the 2005 Policy).

Despite urging from the AIA's Design-Build Advisory Group to restore the 2005 wording on leadership, the AIA Board only included a token suggestion that, ***"an architect is well qualified to serve as a leader*** on integrated project delivery teams." Contrast this to the 2005 wording, ***"an architect is most qualified to lead*** alternative project delivery teams."

Now, the architect is "a leader" – not "the leader," no longer the "most qualified." The push now was clearly for an "integrated team" effort, a preview of what eventually became known as "IPD," with the architect as part of a 3-entity consortium.

K. AIA Does a 180: Removal of Architect-As-Leader. In 2010, the AIA's Board proposed a substantial revision to the Policy Statement that removed any mention of the architect as leader. It would have read:

"26. Project Delivery

The AIA believes that every project delivery process must ***enhance*** ~~*address*~~ *the quality, cost-effectiveness, and sustainability of our built environment. This can best be affected through industry-wide adoption of* ~~*an*~~ *integrated approach****es*** *to project delivery* ~~*methodologies*~~ *characterized by early* ***and regular*** *involvement of owners,* ~~*designers,*~~ ***architects,*** *constructors, fabricators and end user / operators in an environment of effective collaboration****, mutually defined goals*** *and open information sharing.* ~~*The AIA also believes that an architect is well qualified to serve as a leader on integrated project delivery teams. The AIA further believes that evolving project delivery processes require integration of education and practice in design and construction, both within and across disciplines.*~~*"*

AIA's proposed change deleted any mention of architect as "the leader" or even as "a leader," whether in IPD or design-build, or any other method of project delivery. This proposal resulted in a strong letter from several Institute members protesting the dilution of the architect's leadership role. It was their view that the architect's role as leader has been whittled away slowly, at a time when the profession needs to establish itself as leader. The letter urged the AIA's Board to reject this proposed change and return to its statement from 2005, with the architect as "most qualified to lead."

L. Leader of "Design". The end result of the 2010 debate was the AIA's 2011 Position Statement on Project Delivery, which focused more on IPD and sustainability than on design-build. As to who should lead, the statement emphasized "design," stating that the "architect is most qualified to lead design of a project," but added that the architect, "***can lead a project team*** throughout the project delivery process."

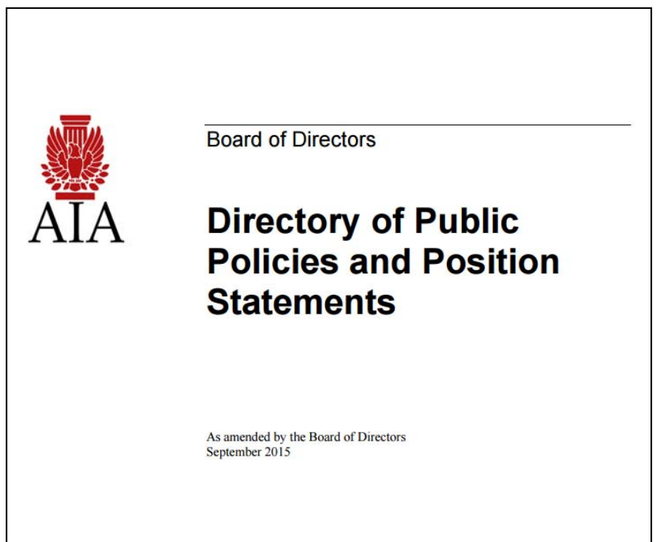
Position Statement No. 26 (2011) read:

"The AIA believes that project delivery processes must enhance the quality, cost-effectiveness, and sustainability of our built environment. This can best be achieved through industry-wide adoption of approaches to project delivery characterized by early and regular involvement of owners, architects, constructors, fabricators and end user/operators in an environment of effective collaboration, mutually defined goals and open information sharing. ***The AIA also believes that the architect is most qualified to lead design of a project and can lead a project team throughout the project delivery process****."*

M. The Current AIA Position Statement: Architect to Lead Development. The current AIA Position Statement on Project Delivery was adopted by the Institute in Dec. 2013 and sunsets on Dec. 31, 2016. As to leadership, it states that, "The AIA believes ***architects are uniquely qualified and positioned to lead the development of the project*** and provide architectural services for all project delivery methods." This is an interesting change from leading "design" to leading "the development of the project." The full Statement reads:

"The AIA believes collaborative project delivery processes enhance the quality, cost-effectiveness, and sustainability of our built environment. This can best be achieved through industry-wide adoption of approaches to project delivery characterized by early involvement of owners, architects, engineers, constructors, fabricators and end users in an environment of trust, fair compensation, clearly defined goals and transparency. There are several viable project delivery models in the marketplace that promote such early collaboration. ***The***

(continued on p. 12)


AIA

Board of Directors

Directory of Public Policies and Position Statements

As amended by the Board of Directors
September 2015

AIA History (cont'd)

AIA believes architects are uniquely qualified and positioned to lead the development of the project and provide architectural services for all project delivery methods. *Architectural services may include pre-design services, project management, programming, design, construction documentation, and construction administration for building projects. Architects have a professional and ethical responsibility to protect the health, safety and welfare of the public in all Project Delivery methods. In addition The AIA believes that Architects have a professional and ethical responsibility to represent the client's interests, including the need to provide prudent design guidance to to the owner."*

With the 2013 Position Statement expiring at the end of this year, we can only wonder what will be adopted in December.

Just this month, October 2016, AIA announced a new training program for its members, entitled: *"Building Team Cohesion: Positioning Architects as Leaders in Project Collaboration."* One of the objectives of this program is to "Formulate strategies positioning the architect ***to lead the creation of a commitment-based project culture*** to improve outcomes for your client, and provide safer, more satisfying environments for the public." The focus is not on the "Architect-As-Leader," but on leading the "culture" of the project.

So, it is interesting to read from an 1894 book published by an architect who claimed that even then architects had lost their leadership role, when they gave up the prime contracting role to others as being too *"aloof from contracting, and prided themselves on their strictly advisory, or, as we should say, professional character."* (See p. 4 of this issue of Monticello).

Conclusion:

The real question for the AIA, and perhaps for The Jefferson Society, Inc., is: *When and how does the profession regain its lost leadership role?* AIA Position Statements have bobbed and weaved for over a century about the architect's role in design-build and who is most qualified to lead the project. In the meantime, others have stepped forward to claim this turf. Rather than wringing our hands over lost leadership, it is time for the architectural profession to ask itself the tough question: Do you really want to be the Project Leader?

(The opinions in this article are those of the author and do not reflect the opinions of The Jefferson Society, Inc. or its members. Bill Quatman is the 2016 Chairman of the Design-Build Institute of America, DBIA).

D.C.: Suit Against Architect Barred Under 3-Year Statute . . . And, Indemnity Clause Only Covered Third Party Claims!

In a Sept. 28, 2016 ruling, the trial court granted summary judgment on two important legal issues for design professionals. First, some background. The architectural firm (Cooper Carry) contracted with Marriott to design the $350 million Marriott Marquis Hotel, near the Washington Convention Center. Marriott then hired Hensel Phelps as the contractor, *but assigned the design contract* to Hensel Phelps. Hensel Phelps claimed that it relied on the architectural firm to prepare construction documents, later found to be defective after Hensel Phelps had priced the project and started on construction. After the hotel project was substantially complete, Hensel Phelps sued Cooper Carry for breach of contract by failing to design the hotel to proper standards, and under indemnification provision of *the same contract* for failing to indemnify the contractor for increased expenses incurred to fix design mistakes. The architect moved to dismiss, or alternatively, for summary judgment.

As to the timing of the lawsuit, Cooper Carry completed the Design Development Phase in 2008, on which Hensel Phelps relied to calculate its guaranteed maximum price. The final construction documents were due Aug. 1, 2011. After substantial completion of the project, Hensel Phelps initiated a private claims process in Jan. 2015, as required by the contract with Cooper Carry, but did not file suit until Nov. 2015.

Statute of Limitations. The first question was when does the three years began to run for the claim that Cooper Carry's designs breached its obligations under the design services contract: a) when it delivered those design documents that Hensel Phelps relied upon (as Cooper Carry argued)? or b) when Cooper Carry's design services for the hotel project were "substantially complete" (as Hensel Phelps argued)? Hensel Phelps argued that a "unitary construction contract" is governed not by the first - breach rule, but by a more lenient requirement under which the statute of limitations does not begin to run until the construction project is "substantially complete." The Court said, "Unfortunately for Hensel Phelps, this is *not* a unitary construction contract case. Here, Cooper Carry had delivered and Hensel Phelps accepted the designs about which Hensel Phelps complains; indeed it had begun to act on them. By Hensel Phelps's own allegations, it was this acceptance of these non-conforming designs that caused damages to begin racking up long before substantial completion of the hotel project as a whole. *Accordingly, it was when Cooper Carry delivered those designs, not when it substantially completed all its design duties, that the clock began to run*." As a result, Hensel Phelps was time-barred from bringing its suit for breach of contract.

Indemnity Clause. On the alternate theory of liability that the indemnification clause of Cooper Carry's design services contract made it liable for costs that Hensel Phelps incurred in rectifying design errors, the court said, "that, of course, is not the natural way to read an indemnification clause." The architect argued that the clause covered only to liabilities that Hensel Phelps would face from third parties, not to Hensel Phelps's own "damage" and "costs and expenses" from contract breaches. The court agreed, saying, "It is unlikely the parties intended the indemnification clause to create an additional opportunity for breach, arising from the same design errors, on the imagined possibility that Hensel Phelps could face litigation from third parties if it did not pay its own obligations." Summary judgment in favor of the architect was granted. *Hensel Phelps Constr. Co. v. Cooper Carry, Inc.,* No. CV 15-1961 (RJL), 2016 WL 5415621 (D.D.C. Sept. 28, 2016).

Design Firm Agrees to $12 Mil. Ethics Settlement for Bribe Scheme

Engineering News Record reported in late Aug. 2016 that in a settlement with the federal government to resolve criminal liability related to a bribe scheme involving a former executive, other employees and an ex-Dept. of Veterans' Affairs manager, architect-engineer CannonDesign agreed to pay $12 mil. in penalties and take additional compliance steps. Under the agreement, the A-E firm will expand its ethics compliance program and cease its involvement in a large VA hospital project in West Los Angeles, Calif., that was allegedly won through inside information illegally obtained. That work is now being handled by CannonDesign's former joint venture partner, Leo A Daly, which is not involved in the Justice complaint.

CannonDesign was suspended for three months last year as a federal contractor.

According to the DOJ, a former director of the VA Medical Center in Ohio, arranged payments with former a CannonDesign executive under a "consulting deal" to gain insider information on VA projects and bids. The VA director was sentenced in June 2016 to nearly 5 years in prison after being found guilty of 64 counts, including conspiracy, and mail and wire fraud, and violation of the Hobbs Act. In addition, a former 55-year old Cannon Design associate principal was sentenced in Feb. 2016 to nearly 3 years for making more than a dozen cash payments in exchange for exclusive information about VA projects, contracts and business, including VA records. He apparently also involved as many as a dozen other employees in the scheme, who were not prosecuted. In one instance, the A-E firm allegedly gave a $20,000 check to the VA official. Later that month, the Cannon Design employee sent an email to fellow workers saying that the official would "fill up the bucket by directing task orders toward our contract." The federal prosecutors issued a statement saying, "A $12 million penalty is a strong deterrent against defrauding [the] VA." It certainly is!

MEMBER PROFILE:

D. WILKES ALEXANDER, AIA, ESQ.

Fisk Alexander
Dallas, Texas

TJS Board Member Wilkes Alexander is a native Texan who attended the University of Texas School of Architecture in Austin, after having spent two wayward years at the University of the South in Sewanee, Tenn. While the Sewanee campus was beautiful, it did not have an architecture program, so Wilkes moved back to his home state of Texas and enrolled in the School of Architecture there. "Austin was a smaller town," he recalls, "but a very vibrant and growing community. The teachers were all fantastic and the program was vibrant and very design oriented. Austin was a lot of fun too! Looking back, I think I enjoyed studying architecture more than I actually enjoyed the practice." Many of us can relate to that. After graduating from architecture school, Wilkes worked in Dallas for the architecture firm of Beran & Shelmire. "Overton Shelmire was a true gentleman architect talented, eloquent and soft-spoken. He was a real class act," Wilkes says of his mentor. However, the economic collapse of the 1980's confirmed that Wilkes really did enjoy studying architecture more than he did the practice. It was about then that law came calling. "After watching my brother deliver closing arguments in a murder trial where he was a prosecutor I made the critical decision to study law."

Wilkes enrolled at The University of Houston Law Center, which provided an interesting cross-section of studies such as oil and gas, admiralty and maritime law, patent law, as well as construction law, especially areas dealing with heavy industrial engineering projects.

His wife, Monica, is not a Texan. She was born in Barcelona, Spain, where Wilkes proposed to her in 1985. "She is definitely my better half," he admits. Not surprisingly, his favorite building is also in Barcelona, the incredible Sagrada Famalia designed by Antonio Gaudi. "It is probably the structure that affected me the most. I have visited this cathedral several times in the past 30 years, and have watched it progress. There is something truly remarkable about Gaudi's use of concrete and stone and even unfinished, this is truly a remarkable structure," he said.

The lovely Monica Alexander is a Master Naturalist and when she is not volunteering for environmental awareness programs, she invites her husband to various presentations given by her organization. Now, empty nesters, Wilkes and Monica enjoy traveling and have explored various in Europe, as well as in southeast Asia. In his spare time, Wilkes has also become involved in the practice of Kendo, which is a form of Japanese sword fighting much like fencing. Wilkes is quite serious about his martial arts, training with the regional Kendo organizations, as well as serving to support competitions locally and nationally.

(above) Wilkes and Monica Alexander visiting the Palace in Sintra, Portugal.
(below, left) Wilkes enjoying the sights and streets of Lisbon, Portugal.

The couple has two sons. Steven is in his medical residency at Vanderbilt and was recently married to Monika, from the Czech Republic. The Alexander family celebrated Steven and Monika's wedding abroad two years ago and Wilkes says, "We are ready to move there right now ... my bags are packed!" Their youngest son, David, is in his second year at St. Mary's Law School and his dad would one day like to practice with his son, to "teach him everything I know."

The Alexander family is musical, with a small recording studio in their home. "Almost every weekend, my sons used to invite their friends over for afternoon and late night jam sessions. Now that they have moved away from home, I think that is one of the things that my wife and I miss the most." The family's music studio has almost every instrument imaginable from drums, keyboards, base, mandolin, banjo to a pedal steel guitar. "We once even had the neighbors call the police on us because we were going a little too late and we were a little too loud."

When asked why he chose to combine architecture and law, Wilkes said, "I felt that both of these studies involved the formulation of detailed concepts, opinions, solutions to problems and then convincing an audience of its validity. In architecture, we use drawings, models and other forms or programming to create spacial solutions to problems, while in the law we organize facts and combine them with the applicable law to create legal solutions to conflicts between various parties." Even as he was preparing to go to law school, Wilkes had heard of a gentlemen named Hollye Fisk, FAIA, Esq. who was beginning that specialization and he called Mr. Fisk to introduce himself. About ten years later, after finishing law school and working with a general practice law firm in South Texas, Wilkes returned to work with Hollye to develop this specialized area of practice. Wilkes is a name partner in the law firm of Fisk Alexander, a boutique firm which represents architects and engineers, as well as other design professionals are their only clientele. "I now work with Hollye Fisk who I have been a partner with for the last 15 years. We offer a full service to our clients from initial contract negotiations to ongoing project issues to claim handling and litigation."

Like many of us, Wilkes is active in the local AIA, giving lectures to the local Dallas Chapter of the AIA as well as attending the Texas State Architects Convention. His advice for a young architect thinking about law school is simple: "Go for it! I believe that if you are able to achieve an understanding of how the laws and statutes work both in terms of contractual relationships, as well as regarding the authorities that have jurisdiction over your project, you have really achieved a wonderful thing. To be able to practice architecture with a deeper knowledge of the applicable law would lend a certain freedom to the practice that many architects struggle with. To be an architect practicing law would also allow you to provide an invaluable service to the profession."

Our world-traveler, Ricardo Aparicio, is shown here in 2013 with his wife Aimee atop the 15th Century Incan village at Machu Picchu in Peru. Ricardo has visited many of the world's architectural wonders in his travels.

MEMBER PROFILE:

RICARDO APARICIO, Esq.

General Electric
Cincinnati, OH

Our newest TJS member, Ricardo Aparicio, comes from a long line of design professionals. His grandfather was a surveyor and his father was an architectural draftsman, who also taught technical drafting at a trade school in Havana, Cuba. So, Ricardo grew up around T-squares, triangles and drafting tables. It was genetic that he developed a great aptitude for geometry and an interest in how things are put together, though he claims that as a child, he mostly spent time taking things apart, to see how they worked!

Ricardo has been married to his wife, Aimee, for 35 wonderful years. The Aparicios have two "exceptional" daughters, Rebecca (an actress and playwright) and Vivian (a social worker). Both girls are married and Ricardo is a grandfather to two beautiful grand-daughters (Victoria – 20 months, and Elizabeth – 6 months).

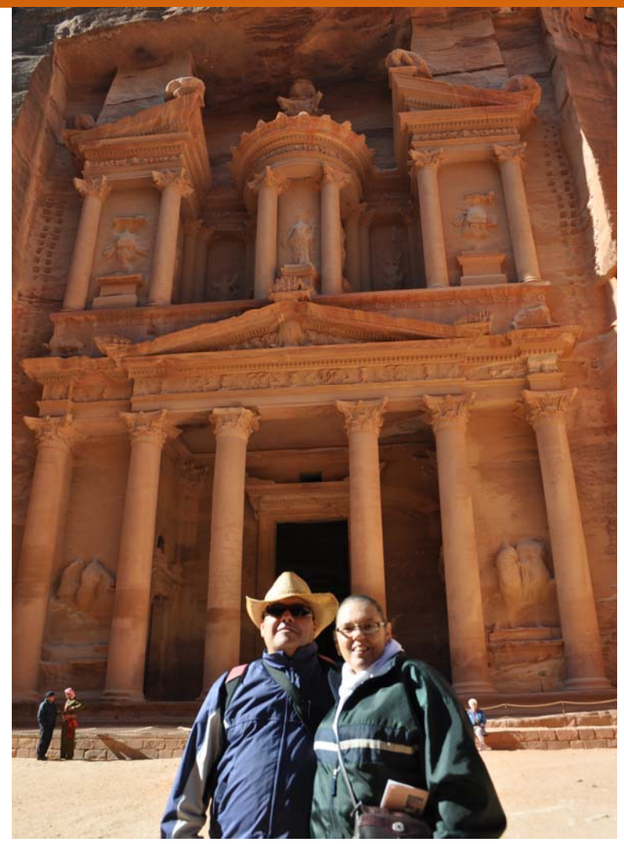
His dual career as an architect-lawyer began during his senior year of high school, when Ricardo worked as a draftsman for engineering firms. This led him to enroll in the University of Miami School of Architecture, where he graduated in 1981. At graduation, he was working for a small architectural firm in Miami but shortly thereafter he went to work as a Job Captain for HJ Ross Associates, a large A/E firm in Florida. His skills were noted and eventually Ricardo was promoted to Vice President of Architecture at the firm. So, what led him to leave architecture and study law? "I always had an interest in the law," he told us. "Having made a job change in the early 90's to work for a family - owned construction firm, I discovered how litigious the industry was in South Florida and decided that I could marry my technical knowledge with a law degree and pivot my career towards construction law." And so off he went to the University of Miami School of Law, which he attended nights and graduated Cum Laude, Order of the Coif, while working full time.

At graduation from law school, he was still working for that family-owned construction firm as Vice President of Operations. After passing the bar, he was named General Counsel. "A few months later, I was recruited by G.E. as Senior Counsel for Construction, where I was responsible for negotiating and executing design and construction contracts globally." In 2008, Ricardo started pivoting back to operations within G.E. After spending two years in Dubai in charge of construction activities in Europe, Middle East and Africa, he returned to the U.S. and currently runs the Properties Group in the Americas, in charge of real estate, construction and facility management for G.E.'s portfolio in Canada, U.S. and Latin America.

Ricardo and Aimee are shown here during their 2009 trip to the Taj Mahal palace on the south bank of the Yamuna River in the Indian city of Agra.

Outside of his legal career, Ricardo enjoys reading biographies, legal thrillers, Latin American literature and philately (or stamp collecting). He is active civically and is the past president of the Construction Users Round Table and a past board member of the Birmingham Urban League and Birmingham Hispanic Chamber of Commerce. The Aparicio family recently relocated to Cincinnati Ohio, which Ricardo calls, "a wonderful city with wonderful people, great sports teams and a vibrant and rejuvenated downtown area. It could use a bit of a warmer weather in the winter, but that's just me."

The thing he likes best about his job is touching all aspects of the building industry and in so doing he is able to capture the business needs of "one of the best companies in the world." He also enjoys developing workplace solutions that enables his colleagues to develop cutting edge technological solutions, services and products for the world. "When I see one of our aircraft engines mounted on a plane, or a G.E. MRI machine at a hospital, I am very proud that our team had an important part in making that possible."



Ricardo and Aimee Aparicio while visiting the rock-cut archaeological city Petra in southern Jordan in 2011.

When asked what building gives him inspiration, he gave credit to his former art history professor, Richard Smith, who Ricardo encountered during his first semester at Palm Beach Junior College. "Through him I had my first real in-depth look at the greatest architectural masterpieces of all times. I have been fortunate to travel the world as part of my work, or on vacation with my family, and in the process I have visited most of those works that inspired my early career, always grateful to Professor Smith for sharing and passing on his own passion and enthusiasm. Of these, the Acropolis always had a very special attraction for him. The Hagia Sophia in Istanbul also ranks right up there with the most fascinating buildings he has visited. "But if I have to select a single one, that would have to be St Paul's Cathedral in London. Having spent a lot of time in London during the execution of a project, I would often spend Sunday afternoons drinking expresso in the plaza at the entrance of the church, admiring its architecture and watching the people come and go. Invariably, if open, I would visit the crypt and pay my respects to Sir Christopher Wren." The epitaph in his tomb, written by his son, has to be the epitome of all epitaphs ever written for an architect. It reads: *"Visitor, if it is a monument that you seek, look around you!"*

Advice for a young architect pondering law school? "It is a fabulous combination but I would recommend taking a few years in between, growing the technical base about the industry and the multiple stakeholders that come together to deliver a project. It is a very complex industry and getting a grasp of the intricacies of the process will become invaluable, being able to cut to the very core of issues more quickly and clearly than anyone else."

Federal Contractors Get a Break: Judge Issues Preliminary Injunction on Obama's "Fair Pay & Safe Workplaces" Rule

On the day before its effective date, a federal judge granted a preliminary injunction, halting the implementation of the majority of the "Fair Pay & Safe Workplaces Rule." The 32-page ruling came in a suit filed by the Associated Builders and Contractors (ABC) of Southeast Texas which sought to prevent Executive Order 13673 and its implementing regulations from going into effect. The Rule (known by some as the "blacklisting rule") and the Dept. of Labor's Final Guidance required federal contractors to report 14 different labor law violations when bidding on contracts. The Order also barred federal contractors (and their subs) from requiring mandatory arbitration with their employees of any Title VII matters. The intent of the Rule was purportedly to ensure that the government is doing business only with responsible and ethical companies. On Oct. 24, 2016, U.S. District Judge Marcia A. Crone noted the fallacies behind this argument, and ruled that the ABC was likely to succeed on each argument against the disclosure requirements.

Judge Crone found that the Executive Order and regulations are pre-empted by other federal labor laws, stating that the Executive Branch appears to have departed from Congress' explicit instructions dictating how violations of the labor law statutes are to be addressed. She also ruled that the President's July 31, 2014 Executive Order, the Rule, and Guidance compel government contractors to "publicly condemn" themselves by stating that they have violated one or more labor or employment laws. The reports must be filed with regard to merely *alleged* violations, which the contractor may be vigorously contesting or has instead chosen to settle without an admission of guilt, and, therefore, without a hearing or final adjudication. The FAR Rule disregards government contractors' due process rights, the Judge ruled, by directing contracting officers to consider as potentially disqualifying any violations that have been found by an administrative agency (or court), including those determinations that have not yet been contested in a hearing or judicially reviewed.

Trouble in Pittsburgh! E&O Coverage Denied For Firm That Gave Notice of a Potential Claim on Last Day of Policy Period.

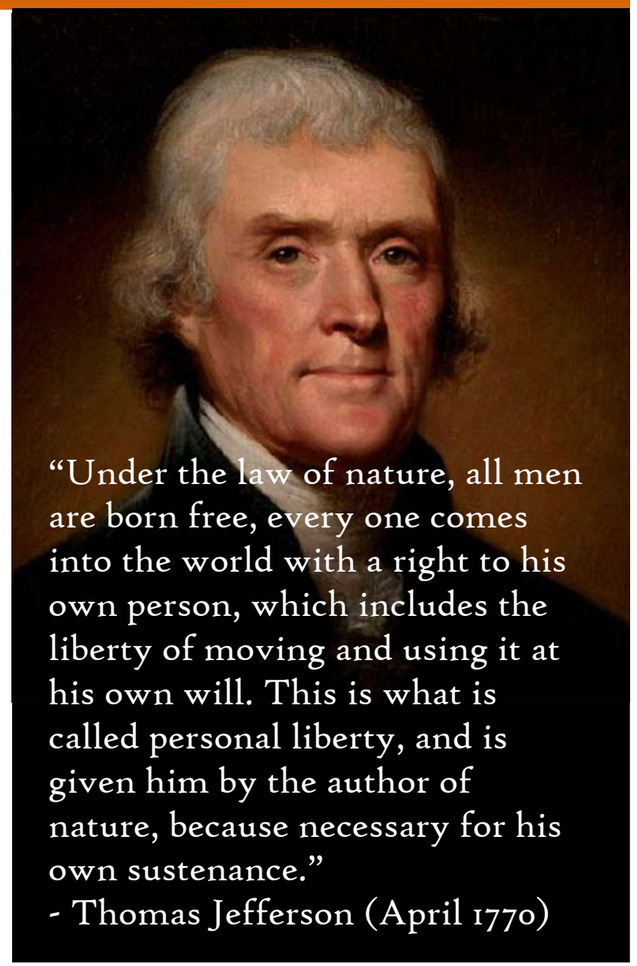
An architectural firm (Ballinger) was hired by the University of Pittsburgh for a project on campus. On the last day of the coverage period of the firm's professional liability policy (a claims-made policy), the firm reported an occurrence to its insurer, Lexington. The notice stated that senior management of the firm had been advised by the university that the project was experiencing problems and delays in its early stages. The insurer sought more information, but none was provided. As a result, Lexington issued a letter denying coverage, finding the notice was inadequate. Seven months later, the university made a formal claim against Ballinger, listing specific errors and omissions, and then filed a lawsuit against the firm. A separate lawsuit was filed by the university to determine if Lexington was obligated to provide coverage for the claim. In an earlier July ruling, the court stated that: "The nature of a claims-made policy is that it protects the insured for claims made against it and reported to the insurer within the policy period or, if applicable, the extended reporting period." The question was whether the firm provided adequate notice to its insurers.

The court brushed off the initial notice by Ballinger, saying, "This statement is entirely non-specific – it is merely a placeholder. It does not identify an alleged act, error, or omission by [Ballinger], or any professional services [Ballinger] provided to a potential claimant for a fee. It could mean just about anything." A vague notice of "trouble brewing at Pittsburgh" was plainly insufficient, the court held. The University argued that its architect "should not be penalized for submitting a notice of a potential claim on the last day of Lexington's policy period." But the court said, "That is not the rationale for the result. The timing of the notice—last day or not—is not the heart of the problem. The heart of the problem is its plain deficiency." In a statement that does not reflect the insurance market products available, the court said, "Ballinger could have insured itself in a more costly but less risky manner, for example, by purchasing occurrence coverage. It chose not to do so." Summary judgment was granted for the insurer, denying coverage. The troubling case is *Univ. of Pittsburgh v. Lexington Ins. Co.*, 2016 WL 4991622 (S.D.N.Y. Sept. 16, 2016).

[Editor's Note: This case is troubling on several fronts. First, prior to expiration of the policy period, most insureds are required to report any potential claims under the policy, or risk denial of coverage for failure to timely report. Second, Ballinger apparently did not have sufficient details on the eve of its policy expiring but, out of abundance of caution, reported a potential claim. This is common practice for design firms. The problem, it seems, is the firm's failure (or inability) to provide more details when asked by Lexington's claims rep. We do not know if the case will be taken up on appeal, but it may be one in which the industry (or The Jefferson Society) may wish to weigh in on. The court's suggestion that Ballinger should have bought an "occurrence-based professional liability policy" shows an ignorance of the insurance marketplace].

New York: Architect Not Liable To Adjacent Building Owner for Damage During Excavation

In a 2015 case, the owner of building which sustained damage during excavation performed as part of demolition project on adjacent building, and a commercial tenant, sued the owner of an adjacent building, its design architect, and contractor, seeking to recover damages for injury to property. The trial court granted plaintiffs' motion for summary judgment as to the architect's liability, and the architect appealed. The plaintiff was an attorney whose property adjoined property owned by a local church. The Church hired an architect for a new two-story building, including demolition of part of an existing building that belonged to the Church. The architect's plans included drawings for the underpinning that was to go beneath the building on the adjacent property. During site excavation the law firm's building next door sustained damage that rendered it unstable and at risk of collapse. The city issued an order directing the plaintiffs to vacate their property. The plaintiff's claim against the Church's architect was for violations of § 28–3309.4 of the city's Administrative Code, which imposes "absolute liability" upon the "person who causes" an excavation to be made.



The Court of Appeals reversed the ruling against the architect, saying that the architect "was neither the person who made the decision to excavate nor the contractor who carried out the physical excavation work." The Court also dismissed the negligence action against the architect, saying that the architect's "contractual obligations to the Church do not give rise to tort liability in favor of the plaintiffs, as his contract with the owner did not specifically impose any duties with respect to the excavation phase of the project and expressly stated that [the architect] did not have control over, and was not responsible for, the construction means and methods or the safety precautions taken in connection with the work." *Amer. Sec. Ins. Co. v. Church of God*, 131 A.D.3d 903, 16 N.Y.S.3d 247, 2015 N.Y. Slip Op. 06699 (2015).

Brunelleschi and Alberti: The Renaissance Master-Builders ("Capomaestro")

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

Most of us have visited the incredible cathedral in Florence, Italy, Santa Maria del Fiore, and stared in wonder at the huge dome (il duomo). But how many of us know, or recall, the history? Here are some interesting facts that every architect should know. This research comes from the book by author Ross King, *Brunelleschi's Dome*, Penguin Books (2000). It is essential reading for any architect who loves history.

The Designer of Record. The foundation stone for the Florence Cathedral was laid in 1296, based on the design by the original architect, a master mason named *Arnolfo di Cambio* – who died soon after construction began. For decades a 31-foot long model of the church with the world's largest dome sat in the aisle of the unfinished structure because no one in Italy knew how to construct it. The 143 foot diameter dome eclipsed even the Roman Parthenon, which for more than one thousand years had been the world's largest dome by far. The construction slowed in the mid-1300's when four-fifths of the population of Florence died from a plague known as the "Black Death." As the city recovered, work resumed. It was Filippo Brunelleschi who eventually solved the architectural puzzle. Not only was Brunelleschi the project designer, but he was appointed as the project superintendent (the *capomaestro* or "master builder") to oversee the construction and interpret the design for the masons. His responsibility, according to the owner, was to, "provide, arrange, compose or cause to have arranged and composed, all and everything necessary and desirable for building, continuing and completing the dome." Actually, there were two *capomaestri* appointed by the owner to oversee the construction of the duomo – Brunelleschi and his rival Lorenzo Ghiberti. The two had a bitter rivalry and it was Brunelleschi who ultimately proved the more knowledgeable engineer, rewarded with a salary nearly triple that of Ghiberti's.

As a clock-maker, Brunelleschi had knowledge of weights, wheels and gears. He designed not only the dome and its top lantern, but the machinery to hoist the 1,700 lb. beams from the ground to the cupola, a reversible geared device later studied by many architects and engineers, including Leonardo da Vinci. As superintendent of the dome's construction, Brunelleschi ordered a small kitchen built between the two shells of the cupola so that workers could enjoy a noon meal without having to come down from the structure. He traveled to the quarry to oversee the extraction of stone and even designed a special boat to transport marble from Pisa to Florence. He saw the project through to its completion and, upon his death in 1446, he was buried in the cathedral whose design and construction he had overseen. His tomb is marked with a marble slab engraved in Italian, "Here lies the body of the great ingenious man Filippo Brunelleschi of Florence."

The Capomaestro. During the Italian Renaissance period the *capomaestro* was in charge of not only designing the building and making models, but dealing with the masons and other craftsmen during construction. The *capomaestro* was often himself an experienced mason whose job it was to supervise the on-site construction and to translate the models and plans into reality by coordinating the efforts of the master masons and their crews. It is said that, "All building projects of the Middle Ages featured just such an individual, who was essential to their success. It was his task to describe the architect's plans to workmen unable to comprehend the complex architectural drawings." Filippo Brunelleschi was not a mason, but was granted an exemption by the Masons Guild to become the architect and *capomaestro* for the great dome.

The Separation Movement Begins. The movement toward separation of artist from craftsman ironically began during Brunelleschi's lifetime in his hometown of Florence by another architect named Leon Battista Alberti. Anthony Grafton's book ironically titled *Leon Battista Alberti: Master Builder of the Italian Renaissance*, Harvard Univ. Press (2000) is misleading in his characterization of Alberti as a "master-builder." Today, the term "master-builder" means one who both designs and builds or, at a minimum, has an active role in superintending the construction of his or her design. This hardly fits Alberti who, while a brilliant author, lawyer, playwright, artist, scholar and architect, never superintended the construction of his own architectural designs. Alberti was an architect and consultant on both renovation of existing buildings as well as new construction. But Grafton's book admits that, *"Alberti did not supervise the construction of his buildings on site. A builder always intervened between the design and its execution."* Grafton explained, *"But distance did not mean disinterest. As a member of the curia, Alberti normally could not make more than irregular visits to construction sites in Florence, Mantua, and Rimini. Accordingly, he supplied the builders who carried out his plans, not only with wooden models that laid out the buildings' general lines but also with designs for significant details."*

It was Alberti's book titled "On the Art of Building in Ten Books" *(*or *De Re Aedificatoria)*, written in 1450 that gave popularity to the notion that the architect was a scholar, an artist – who was separate and far apart from the mason and other craftsmen who actually carried out the architect's design. The treatise was first printed in 1486 (14 years after Alberti's death) and was later translated from Latin into Italian, French, Spanish and, eventually English and other languages. Alberti's theory on architect as a noble profession, separate from the builder, caught on. Alberti, who was also educated as a lawyer, explained that the architect played a basically intellectual role. He felt the architect's job was "conceptual, not practical". One of his biographers wrote that, "in fact, Alberti recommended that the architect avoid taking sole responsibility for the construction of his projects, lest he incur all the blame for errors and delays."

Risk Avoidance in the Middle Ages. This risk - avoidance mindset has remained with the architectural profession for over 550 years and it may have been Alberti who most influenced architects to separate themselves from the building process. Alberti described the architect as an almost God-like figure who could create whole cities out of nothing. He wrote:

"Before I go any farther, however, I should explain exactly whom I mean by an architect; for it is no carpenter that I would have you compare to the greatest exponents of other disciplines: the carpenter is but an instrument in the hands of the architect."

"A great matter is architecture, nor can everyone undertake it. He must be of the greatest ability, the keenest enthusiasm, the highest learning, the widest experience, and, above all, serious, of sound judgment and counsel, who would presume to call himself an architect." Leon Battista Alberti, *On the Art of Building in Ten Books*, The MIT Press (1988).

Alberti was good friends with Brunelleschi, even dedicating Alberti's book *On Painting* to Brunelleschi. He praised Brunelleschi for his cutting edge design for the dome ("a feat of engineering that people did not believe feasible these days, and it was probably equally unknown and unimaginable among the ancients").

Matthew's furry assistant, Otto, is asleep on the job, where he holds title of Director of Customer Outreach.

MEMBER PROFILE:

MATTHEW C. BOOMHOWER, ESQ.
Southern Cross Property Consultants
San Diego, CA

TJS member Matthew C. Boomhower's first job out of architecture school was as a project manager and estimator for Joseph Construction Company in Knoxville, Tenn., a family owned design-build firm. It was this experience that led him into law. "Once I started working on construction projects," he said, "I realized how difficult managing the legal aspects of the project could be. I eventually left that company and went to work for Nielsen Dillingham Builders at the time that they started building Petco Park."

Dillingham moved him to San Diego to help manage that project. "My intention was to stay in California just long enough to see the project through, but after being moved into the corporate headquarters and becoming involved with pre-construction management, I decided to open my own construction management firm."

The longer Matthew worked in the construction industry, and saw how much regulation existed and how often attorneys were required on even the simplest projects, he decided to go to law school so he could at least feel like he and his clients were in a fair fight. He attended law school at California Western School of Law in San Diego part time while juggling the demands of his new business and family obligations.

Matthew's construction management firm was then, and is still, known as Southern Cross Property Consultants. He is currently the president of that company, a professional services firm that provides preconstruction and project / construction management services for clients throughout southern California. "We serve infrequent purchasers of construction, including many volunteer - led organizations, as their advocate and expert consultant. I also have a (very) small legal practice, working mainly as outside counsel for small architecture and design firms, and dealing with the occasional construction or real estate law matter."

Prior to his 15 years of work in construction, Matthew obtained his architectural degree from the University of Tennessee at Knoxville.

What's the best part of his job? Matthew enjoys helping his clients navigate a seemingly mysterious and complicated process and helping them to see their project through to fruition. When not managing projects or practicing law, you'll find Matthew in the classroom at the Woodbury University School of Architecture, where is serves as an Adjunct Architecture Professor.

Matthew and his wife, Stephanie, will be celebrating their 19th wedding anniversary next year. She is the Assistant Director of Career Services for the Graduate School of Global Policy and Strategy at UCSD. The Boomhowers have one "child" Otto, a dog they adopted after San Bernardino Animal Control detained him for running the streets alone and without identification. Otto now assists in the family business. "After making a personal commitment to get his life back on track," Matthew said, "Otto was hired as the Director of Customer Outreach for Southern Cross Property Consultants. He has yet to meet anyone, person or dog, who cannot benefit from an enthusiastic greeting and kisses."

Otto Boomhower may look fierce, but he'd rather give you a kiss than a bite on the hand.

Matthew Boomhower enjoys music, teaching, sailing and bartending! In the photo below right, Matthew is the one in the day-glo yellow hood.

Matthew enjoys gardening, cooking, sailing, playing the banjo, and occasionally bartending. He also serves on the Infrastructure, Housing, and Landuse Committee of the San Diego Regional Chamber of Commerce, the Charitable Real Estate Committee of the San Diego Zoological Society Foundation, and the Code Monitoring Team for the City of San Diego's Development Services department, among other volunteer activities. He enjoys the architecture in San Diego, where he and Stephanie live in a 1930s Art Deco home, which they've been slowly restoring since 2012.

And yes, he adds, "the weather is beautiful all year."

Like many TJS members, he is a fan of "Falling Water" by Frank Lloyd Wright, who is his favorite architect. But he adds that in addition to Mr. Wright, he also greatly admires Louis Kahn, Phillip Johnson, Andres Duany and Elizabeth Plater-Zyberk.

What advice would he give a young architect thinking about law school? "Many of the problem-solving skills you learn in architecture school are directly applicable to legal research and analysis. Because the law impacts architecture in so many ways, they naturally complement each other."

So, if you ever need an architect/lawyer in San Diego, who can also tend bar, play a banjo and sail a boat, call Matthew!

California: Strict Products Liability for Contractors and Subs? Who's Next?

In 1963, California became one of the first states to recognize strict products liability, where a manufacturer could be held "strictly" liable for defects in its products even though the manufacturer did not sell the product directly to the injured consumer. The following year, the state's Supreme Court extended the strict liability doctrine to other parties involved in the distribution of products such as wholesalers and retailers. In the past five decades, strict products liability has been applied to developers of mass produced homes and manufacturers of construction components, but has not been applied to construction contractors or subs. That may be changing as a result of a 2016 case.

In *Hernandezcueva v. E.F. Brady Company, Inc.*, a janitor sued a subcontractor (E.F. Brady), which bought and installed asbestos-containing drywall in a commercial building where the janitor worked. The janitor sued for negligence and strict liability, alleging that asbestos released from products installed by subcontractor caused his mesothelioma. The trial court granted the sub's motion for nonsuit on strict products liability. Following a jury trial, the court then ruled against the plaintiff-janitor on the negligence claim. That decision was reversed, in part, on appeal. Amicus curiae briefs were filed by the American Subcontractors Association, The Association of the Wall and Ceiling Industry, and The Roofing Contractors Association of California.

The California Court of Appeals held that evidence was sufficient to show that the subcontractor was involved "in the stream of commerce" relating to products, and thus was subject to strict liability.

During the mid–1970's, Brady participated in the construction of a complex of buildings for the Fluor Corporation. In the 1990's, the plaintiff worked as a janitor in the Fluor complex. In 2011, he was diagnosed as suffering from mesothelioma. Evidence showed that in 1972 or 1973, Brady first became aware that asbestos in materials that its employees used was potentially hazardous. However, Brady never tested the materials it used to determine whether they contained asbestos.

Under Brady's $2 million subcontract on the Fluor complex, it selected the drywall and the related joint compound in accordance with the plans and specs, which called for asbestos-free fireproofing and insulation, but contained no analogous requirement regarding the drywall material and joint compound (the "taping mud"). Brady installed drywall made by Kaiser, and used joint compound made by Hamilton. An expert testified that both the Kaiser drywall and the Hamilton joint compound contained asbestos, even though neither product was labeled as containing asbestos. Brady's superintendent testified that he was unaware that the drywall and joint compounds used in the project contained asbestos.

The janitor worked in the Fluor complex in the 1990's during remodeling and repairs. Although Brady was not involved in that work, the janitor's duties included cleaning up drywall debris and other rubbish from areas where Brady had installed the original drywall and fireproofing. While performing those duties, he inhaled dust, which experts said caused his mesothelioma.

In reversing the trial court, the appellate court said that, "Under the stream – of - commerce approach to strict liability, no precise legal relationship to the member of the enterprise causing the defect to be manufactured or to the member most closely connected with the customer is required before the courts will impose strict liability. It is the defendant's participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise that created consumer demand for and reliance upon the product (and not the defendant's legal relationship (such as agency) with the manufacturer or other entities involved in the manufacturing - marketing system) which calls for imposition of strict liability."

Ordinarily, when Brady used a manufacturer's drywall, it also used that same manufacturer's joint compound in order to avoid issues regarding the applicable warranties. In this case, however, Brady opted to use Hamilton's joint compound, which was approved by the architect and general contractor. "Viewed in light of the policies underlying the doctrine of strict liability, the [plaintiffs'] evidence sufficed to show that E.F. Brady was involved in the stream of commerce relating to the defective products," the Court said. The case is *Hernandezcueva v. E.F. Brady Co., Inc.*, 243 Cal. App. 4th 249 (2015), as modified (Jan. 15, 2016), review denied (Mar. 9, 2016).

Florida: Does an Insurer Have to Defend a Statutory ADR Procedure?

In 2003, the Florida Legislature passed a law that established a notice and repair process to resolve construction disputes between property owners and contractors, subcontractors, suppliers, or design professionals. Fla. Stat. § 558.001. Altman Contractors was the general contractor for a high-rise condominium in Florida. Altman carried CGL insurance through Crum & Forster (C&F) which said the insurer would "defend the insured against any suit." The term "suit" was defined in the policy to include "any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent."

When the condo association served Altman with a notice of claim under Chapter 558, alleging various construction defects and deficiencies Altman notified its insurer and sought defense. The insurer denied a duty to defend, claiming that Altman was "not in suit." As a result, Altman sued the insurer for a declaration that C&F had a duty to defend and indemnify Altman and to cover the claims asserted by the condo association. The trial court entered summary judgment in favor of the insurer.

On appeal, amici curiae briefs were filed by several contractor and insurance advocacy groups, including the South Florida Associated General Contractors. The Court of Appeals noted that there are several decisions from courts out-side of Florida that address an insurer's duty to defend an insured pursuant to certain CGL policies during a statutory notice and repair process, but, no law in Florida. The Court reviewed the conflicting interpretations of the parties and the amicus briefs. Finding this to be a question of first impression, the court felt that certification to the Florida Supreme Court was appropriate, saying, "we believe that we would greatly benefit from the guidance of the Florida Supreme Court on the meaning of the policy language at issue here and its relationship to Chapter 558."

The case is *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 832 F.3d 1318 (11th Cir. 2016).

Texas: Economic Loss Doctrine Bars Negligence Claims By Design-Builder Against Its Architect-Subcontractor

In a May 2016 appellate decision, the Texas Court of Appeals reversed a jury verdict against an architectural firm based on the economic loss doctrine. This case dealt with a design-build project for a new administration building for the International Boundary and Water Commission. The Commission hired MOAB Construction Co. as the design-builder, who subcontracted the design to ALS 88 Design Build, LLC. MOAB terminated the architect prior to completion and some time later, the Commission fired MOAB. MOAB sued its architect in a single cause of action of negligence, claiming the firm failed to deliver the plans timely and in the format required, failed to communicate appropriately, and alleged that the design was flawed. The jury awarded MOAB $600,504 on its negligence claims, and the architect appealed. On appeal, the Court held that, "Texas courts have long adhered to the economic loss doctrine, which precludes the recovery of purely economic damages that are unaccompanied by injury to the plaintiff or its property in actions for negligence."

In Texas, however, there is not one economic loss rule, but several rules that govern recovery of economic losses, dependent upon various areas of the law implicated. In this case, the Court found that the subject matter of the contract between the design-builder and architect was the architectural design of a building to be constructed. As such, the architect's duties arose under the contract, not independent of the contract. In order to avoid the doctrine, MOAB would have to prove "a distinct tortious injury with actual damages." However, the only evidence on the issue of damages was the actual financial loss suffered by the architect's alleged deficient performance under the contract.

"The jury awarded no other damages based upon a tortious injury other this economic loss of the benefit of the bargain. MOAB alleged and recovered based upon a breach of duty created under the contract, not a breach of duty created by law. Accordingly, no exception to the economic loss doctrine applies, and the appropriate cause of action was breach of contract, only." A petition for review was filed with the Texas Supreme Court. The case is *ALS 88 Design Build LLC v. MOAB Constr. Co.*, No. 04-15-00096-CV, 2016 WL 2753915 (Tex. App. May 11, 2016).