ISSUE 21 October 2017

QUARTERLY JOURNAL OF THE JEFFERSON SOCIETY, INC.

Monticello

INSIDE THIS ISSUE:

Our Mission

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

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

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

Send his or her name to TJS President Suzanne Harness sharness@harnessprojects.com and we will reach out to them. Candidates must have dual degrees in architecture and law.

AUTHORS WANTED

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

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WEBSITE:

www.thejeffersonsociety.org

PRESIDENT'S MESSAGE:
By Suzanne Harness, AIA, Esq.
Harness Law, PLLC

Nov. 13, 2017 will be a very big day for The Jefferson Society. At 10:00 a.m., twenty-four of our members, along with three of their family and friends, will be sworn in as members of the Bar of the United States Supreme Court. Our Treasurer, Donna Hunt, has devoted multiple hours over the past year to soliciting and submitting the 27 applications and communicating with the Court, and she will have the honor to move the members for admission. I will attend as a guest, and we hope to have a dignitary from the American Institute of Architects joining us as well. At Donna's suggestion, we sent our beautiful new TJS lapel pins to the Justices, and wrote to Chief Justice Roberts requesting an opportunity to meet and take photos with the Justices after the ceremony—what a thrill that would be! The day will begin with a group breakfast at the Supreme Court Dining Room that Joyce Raspa - Gore is arranging. All the papers are in, the fees are paid, and now we wait in anticipation. We all owe Donna and Joyce our most sincere thanks for volunteering their time to make this day a success.

This is the second time that The Jefferson Society has presented members for admission to the U.S. Supreme Court. The first admission was on Dec. 5, 2015, an event that our current Secretary, Julia Donoho, organized. Take a look at *Monticello* January 2016 issue for a photo and first-hand account by then-President Tim Twomey, who moved for admission five TJS members, including myself, Craig Williams, Julia Donoho, Josh Flowers, and Jason Phillips. It was so much fun for us, and such an honor. There is about a two-year lead time for these admissions. If you missed the first two, and would like to spearhead our third admissions effort in 2019, then contact Donna Hunt (donna.hunt@ironshore.com) for information and advice about how to make

(Continued on page 2)

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

the arrangements with the Court. I'm sure you won't regret it!

In other great news, our education workshop proposal to the American Institute of Architects advanced to the second round of competition! Our education committee, Julia Donoho, Sue Yoakum, and Eric Pempus, provided the second submission in September for a half-day preconvention workshop they developed entitled "Legal Bootcamp for Practicing Architects." We should find out by the end of October whether the AIA accepted the program or not. If so, Julia, Sue, and Eric will present it on June 20, 2018 at the Annual Conference on Architecture in New York City. The workshop will cover 10 key contract provisions to keep architects out of trouble, practice issues that can work for and against the architect's interests, and an update of recent cases, including what they mean for the architecture profession. It's an ambitious program, well-tailored to the AIA annual convention audience, and uniquely suited for delivery by TJS members. I cannot wait to see it!

Are you speaking at an event? Were you recently published? If so, send a note to our editor Bill Quatman at the following address: bquatman@burnsmcd.com with details for publication in *Monticello* so that your fellow TJS members can find out all about it, come on down to support you, buy your book, or read your paper. For example, TJS members Kelli Goss, Sue Yoakum, and I are speaking in three different plenary sessions at the ABA Forum on Construction Law Fall Meeting in Boston on Oct. 5-6. This meeting is devoted to the 2017 changes to AIA Contract Documents. (See Mike Koger's article on pp. 13-17 of this issue). Sue's session will cover the 2017 changes that matter the most, Kelli is taking on digital data, BIM and design responsibilities, and I'll be talking about tried-and-true AIA clauses that the owner, architect, and contractor change most often. Kelli, Sue, and I also submitted papers on our respective topics, and our papers will be available to all Forum members after the meeting. If you will be attending the meeting in Boston, please be sure to look for us.

TJS Member Jay Wickersham Elected VP and President-Elect of the Boston Society of Architects

Jay Wickersham, FAIA, Esq., an architect and lawyer with the law firm of Noble, Wickersham & Heart LLP, has recently been elected Vice President and President-elect of the Boston Society of Architects/AIA (BSA). Jay specializes in design, construction, environmental and land use law. He has worked in all aspects of design and development as a lawyer, an architect, an urban planner, and an environmental regulator.

A member of the BSA since 1986, Jay looks forward to helping the BSA expand its leadership role on the urgent challenges of climate change, using design to envision the buildings and public spaces of a truly sustainable city. Jay will also use his experience advising architectural firms across the country and internationally to help the BSA and its members explore, research, and celebrate new models of practice.

Congratulations, Jay!

Jay Wickersham New Vice Pres. and Pres.-Elect of BSA

TJS Admissions to the U.S. Supreme Court.

As Suzanne Harness wrote in her President's Message (p. 1), the following 24 members of The Jefferson Society will all be sworn in before the Justices of the U.S. Supreme Court on Monday, Nov. 13, 2017:

1. Wendy Bennett
2. Jacqueline Pons-Bunney
3. Tim Burrow
4. Kevin Elmer
5. Kelli Goss
6. Cara Shimkus Hall
7. Jeffrey Hamlett
8. Charles Heuer
9. Joelle Jefcoat
10. Margaret Landry
11. Calvin Lee
12. Laura Jo Lieffers
13. Jon Masini
14. Andrea McMurtry
15. Rebecca McWilliams
16. Joyce Raspa-Gore
17. Trevor Resurreccion
18. Jose Rodriguez
19. Mark Ryan
20. Gracia María Shiffrin
21. Alan Stover
22. Steven Swanson
23. Alexander van Gaalen
24. Scott Vaughn

The swearing-in ceremony has been organized by TJS member Donna Hunt, who is already a member of the Court. On Sept. 15, 2017, TJS President Suzanne Harness sent this introductory letter to The Chief Justice of the United States: "Dear Chief Justice Roberts and Associate Justices of the Supreme Court of the United States:

I write to you on behalf of a group of attorney-architect members of The Jefferson Society who are scheduled to be sworn in to the United States Supreme Court Bar on Monday, November 13, 2017. The Jefferson Society, Inc. was incorporated as a not-for-profit entity on July 4, 2012 in Virginia, the home state of President Thomas Jefferson. Like Jefferson, our members are trained in the law and in architecture. The Jefferson Society's mission is to organize and utilize the dual professional education and experience of our members to be a resource for architects, attorneys and the public on legal aspects of the practice of architecture; to promote activities and educational programs that further that purpose; to support with intellectual capital other organizations, schools, universities, and similar organizations that have shared interests; and to provide a resource for architects in their professional and business development. We are extremely honored to participate in this ceremony, and our experience would be greatly enhanced if we could have the opportunity to meet with you and the Associate Justices as time and schedule permits. We understand that you and the Associate Justices have a very busy schedule, but if time allows for photos and handshakes in the Lawyers' Lounge, either before or after the ceremony, we would be most grateful. Thank you very much for your consideration.

Sincerely,

Suzanne H. Harness AIA, Esq.

President, The Jefferson Society"

Can you idenitfy all 9 of the current U.S. Supreme Court Justices?

Match these names with the faces below:

1. John G. Roberts, Jr., Chief Justice
2. Anthony M. Kennedy, Associate Justice
3. Clarence Thomas, Associate Justice
4. Ruth Bader Ginsburg, Associate Justice
5. Stephen G. Breyer, Associate Justice
6. Samuel A. Alito, Jr., Associate Justice
7. Sonia Sotomayor, Associate Justice
8. Elena Kagan, Associate Justice
9. Neil M. Gorsuch, Associate Justice

If your name is on the list of 24 Members on pp. 2-3, you'd better bone up!

The Chief Justice of the United States
One First Street, N.E.
Washington D.C. 20543

September 15, 2017

Dear Chief Justice Roberts and Associate Justices of the Supreme Court of the United States:

I write to you on behalf of a group of attorney-architect members of The Jefferson Society who are scheduled to be sworn in to the United States Supreme Court Bar on Monday, November 13, 2017.

The Jefferson Society, Inc. was incorporated as a not-for-profit entity on July 4, 2012 in Virginia, the home state of President Thomas Jefferson. Like Jefferson, our members are trained in the law and in architecture. The Jefferson Society's mission is to organize and utilize the dual professional education and experience of our members to be a resource for architects, attorneys and the public on legal aspects of the practice of architecture; to promote activities and educational programs that further that purpose; to support with intellectual capital other organizations, schools, universities, and similar organizations that have shared interests; and to provide a resource for architects in their professional and business development.

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Thank you very much for your consideration.

Sincerely,

Suzanne H. Harness, AIA, Esq.
President, The Jefferson Society, Inc.

c/o 2170 Lonicera Way Charlottesville, VA 22911 U.S.A. http://thejeffersonsociety.org/

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE RUTH BADER GINSBURG

October 2, 2017

Suzanne H. Harness
Donna M. Hunt
The Jefferson Society, Inc.
c/o 2170 Lonicera Way
Charlottesville, VA 22911

Dear Ms. Harness and Ms. Hunt:

I have marked the November 13, 2017 date on my calendar and would be glad to greet new members of the Court's Bar from The Jefferson Society at the post-admissions reception.

Every good wish,

Ruth Bader Ginsburg

(left) On Sept. 15, 2017, TJS President Suzanne H. Harness wrote to Chief Justice John G. Roberts, Jr. to request an opportunity to meet with the justices following the ceremony on Nov. 13, 2017. Suzanne was surprised to receive the personal note (above) from Associate Justice Ruth Bader Ginsburg expressing her desire to "greet new members of the Court's Bar from The Jefferson Society at the post-admission reception."

About Associate Justice Ruth Bader Ginsburg.

Justice Ginsburg was born in Brooklyn, New York, March 15, 1933. She married Martin D. Ginsburg in 1954, and has a daughter, Jane, and a son, James. She received her B.A. from Cornell University, attended Harvard Law School, and received her LL.B. from Columbia Law School. She served as a law clerk to Hon. Edmund L. Palmieri, U.S. Dist. Court for the Southern District of New York, from 1959–1961. From 1961–1963, she was a research associate and then associate director of the Columbia Law School Project on International Procedure. She was a Professor of Law at Rutgers University School of Law from 1963–1972, and Columbia Law School from 1972–1980, and a fellow at the Center for Advanced Study in the Behavioral Sciences in Stanford, California from 1977–1978.

In 1971, she was instrumental in launching the Women's Rights Project of the American Civil Liberties Union, and served as the ACLU's General Counsel from 1973–1980, and on the National Board of Directors from 1974–1980.

She was appointed a Judge of the United States Court of Appeals for the District of Columbia Circuit in 1980. President Clinton nominated her as an Associate Justice of the Supreme Court, and she took her seat August 10, 1993.

She is the second female justice to be confirmed to the Supreme Court (after Sandra Day O'Connor), and one of four female justices to be confirmed (with Sonia Sotomayor and Elena Kagan, who are still serving). Following Justice O'Connor's retirement, and prior to Justice Sotomayor joining the Court, Justice Ginsburg was the only female justice on the Supreme Court.

Legal scholars and advocates credit Justice Ginsburg's body of work with making significant legal advances for women under the Equal Protection Clause of the Constitution

Louisiana: Contractor Not Liable for Design Flaws When It Met Performance Spec Requirements

The owner and operator of a shipbuilding operation in Houma, La. ("LaShip") sued its contractor, Hayward Baker, Inc. ("HBI"), which performed soil stabilization work for a large shipbuilding facility after the stabilization work began to fail. Disputes and finger-pointing over performance specs resulted in a lawsuit against HBI for breach of contract and negligent failure to warn. After a ten-day bench trial, the trial court entered judgment for HBI and this appeal followed. The owner had retained an engineering firm to design the foundation system for the facility. Based on the results of soil borings, the engineer concluded that soil-mixed columns were an appropriate option to support the foundation. HBI submitted a bid and was awarded the contract for the soil mixing and drilled shaft work on the project. Under the owner's performance specifications, HBI was to obtain "wet grab" samples from two of the columns made each day to ascertain the columns' strength. Samples tested at between 100 and 125 psi. Some of the six-foot diameter columns that were installed met the strength requirements, but nonetheless exhibited unwelcome spiraling, indicative of the presence of both mixed and unmixed soil. In addition, HBI experienced several cave-ins during its installation of the drill shafts on some of the columns. As a result, LaShip decided to abandon the six-foot columns, move the footprint, and switch to eight-foot columns. After more unwanted settlement of the columns occurred, however, the owner sued HBI, who filed a counterclaim for breach of contract due to non-payment. The trial court held that LaShip failed to prove by a preponderance of the evidence its defect claims against HBI. The court ruled in favor of HBI on its counterclaim against La-Ship. On appeal, the 5th Circuit Court of Appeals found it was undisputed that HBI fulfilled the performance specifications, namely that the required percent of samples all met the minimum compressive strength requirements. LaShip also asserted a negligent failure to warn claim on appeal, arguing that the trial court had erred in finding that HBI owed no duty to warn La-Ship about alleged defects in the design of the columns. However, the Court ruled that HBI was statutorily immune from this claim under La. Stat. 9:2771, which provides: "No contractor ... shall be liable for destruction or deterioration of or defects in any work constructed, or under construction, by him if he constructed, or is constructing, the work according to plans or specifications furnished to him which he did not make or cause to be made and if the destruction, deterioration, or defect was due to any fault or insufficiency of the plans or specifications." The Court said, "Generally, a contractor may rely on LSA-R.S. 9:2771 to shield it from liability for any defects that may arise as a result of the contractor's adherence to plans and specifications that were provided to it. Such a contractor cannot escape liability, however, "if he has a justifiable reason to believe that adherence to plans and specifications would create a hazardous condition."

The case is *LaShip, L.L.C. v. Hayward Baker, Inc.*, 680 F. App'x 317 (5th Cir. 2017).

Colorado: Limitation of Liability Clause Upheld; Recovery Reduced to $550,000 on $9.5 Mil. Jury Verdict

In this case, a subdivision developer brought a construction defect action against a geotechnical engineering firm, based on many homeowners' complaints about drywall cracks in their homes. The developer sued the geotech firm as well as certain contractors and, ultimately, recovered $592,500 through a settlement with the contractors. After dismissal of the geotech firm from the suit based on a contractual limitation of liability, the Court of Appeals remanded the case for determination as to whether the developer should have been permitted to introduce evidence that the engineer's conduct was willful and wanton, as is required to overcome a contractual liability limitation. The trial court held a new trial on the plaintiff's breach of contract claim against the geotech firm. Although the trial court allowed evidence of willful and wanton conduct, it excluded testimony from plaintiff's experts that characterized the geotechnical

"May it please the Court?" The Bench of the U.S. Supreme Court, Washington, D.C. The Justices sit in order of seniority on the Bench with the Chief Justice in the center. Twenty-four TJS members will appear here on Nov. 3, 2017.

firm's conduct as "willful and wanton." The jury awarded $9,586,056 but found that the firm's conduct was not willful and wanton. After extensive post-trial briefing, the trial court entered judgment of zero dollars. It arrived at this figure by first applying the $550,000 limitation of liability (LOL) clause to reduce the jury's verdict to $550,000. Then, the court deducted $592,500 in settlements (received from others) from the $550,000 to arrive at a net zero award. On appeal, the developer argued that the trial court erroneously deducted the $592,500 setoff from the geotech firm's contractual $550,000 limit on liability, instead of deducting it from the $9,586,056 jury damages verdict (a credit, not a limitation). The Court said that the trial court applied the $550,000 contractual limitation on damages before deducting the $592,500 set of for the amounts received from other parties, resulting in a final judgment of zero dollars. "This result effectively rendered the jury's damages finding meaningless." The Court then went on, however, to state that, "Had the trial court first applied the setoff against the jury verdict and then applied the contractual limitation, the court would have applied the $592,500 setoff against the $9,586,056 jury damages verdict, resulting in new total of $8,993,556. The trial court then would have capped [geotech firm's] liability according to the Limitation, and reached a final judgment of $550,000." The net effect is the same: to uphold the LOL clause and to reduce the verdict to $550,000. The opinion is a bit confusing, but the result is correct. *Taylor Morrison of Colo., Inc. v. Terracon Consultants, Inc*., 2017 WL 2180518 (Colo. App. 2017).

TJS Membership Drops Below 100 !

This issue marks the first time since we were formed that TJS had no new members this quarter. In fact, membership has shrunk due to 12 members who have not paid their dues since 2014. Those memberships have been revoked. In addition, we have 3 members who owe dues for 2016 and 2017, and 2 others who owe dues for 2017 only. **Total current membership is 99 in good standing.**

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

If you have not paid your 2016 or 2017 dues, please write your check for $50 for each year 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"!

2017 Legislative Changes

The legislative sessions for most states have closed for the year. Here is a recap of some of the 2017 changes that affect the design and construction industry:

ARKANSAS. H.B. 1645 permits municipalities to use design-build to procure a municipal sewage system for projects over $2 million, and may use construction management at risk on such projects.

CALIF. S.B. 496 revises the anti-indemnity statute, Section 2782.8 of the Civil Code. For contracts entered into after Jan. 1, 2018 for design professional services which contain a requirement to "defend" the indemnitee, such clauses are unenforceable EXCEPT to the extent the claim against the indemnitee arises out of, pertains to, or relates to the negligence, recklessness, or willful misconduct of the design professional. The amendment clarifies that in no event shall the cost to defend charged to the design professional exceed the design professional's "proportionate percentage of fault" (unless a co-defendant is not able to pay its/their share of defense costs due to bankruptcy or dissolution, in which case the design professional is merely required to "meet and confer" with the other parties about the unpaid defense costs. The statute has two exceptions.

FLORIDA. C.S.C.S.H.B. 377 amends the 4-year statute of limitations for actions founded on the design, planning, or construction of an improvement to real property. The current statute states that it begins to run from the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or "the date of completion" or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest (other than latent defects). The new law clarifies that "completion of the contract" means the later of the date of final performance of all the contracted services or the date that final payment for such services becomes due (without regard to the date payment is actually made). This law applies only to causes of action that accrue on or after July 1, 2017.

IDAHO. H.B. 86 revises the public works procurement statutes by requiring construction managers bidding on public works to hold a "certificate of authority" to provide or "hold itself out as providing" construction manager services. This law was effective as of July 1, 2017.

MINN. H.F. 1538 amends several statutes dealing with construction defect claims on condo projects by adding a definition of a "construction defect claim." New is a requirement that before a condo association may institute litigation or arbitration against a developer, it must give written notice to each unit owner specifying the nature of the claim, the relief sought, and how the matter will be funded; and obtain approval of a majority of the unit owners to proceed. The condo association board is also required to prepare and approve a "written preventative maintenance plan," schedule and budget for common elements. Finally, prior to any construction defect claim, the parties are required to submit to mediation, during which time the statute of limitations and statute of repose is tolled. The new law was effective Aug. 1, 2017.

NEVADA. S.B. 338 amends the notice for mechanic's liens under NRS 108.245. The statute also amends NRS 608.150 to provide that in any action to recover an indebtedness for construction labor, the court "shall award costs and reasonable attorney's fees to the prevailing party." This act became effective on July 1, 2017.

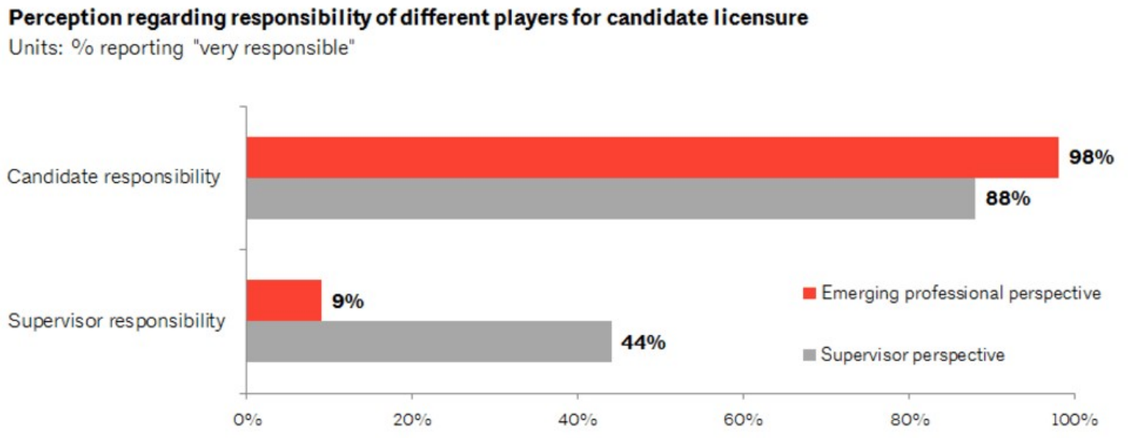
NEW HAMPSHIRE. S.B. 21 adds new exemptions to the architectural licensing laws for any new or reconstructed structure that is not a concrete or structure steel frame; more than two and one-half stories tall; is over 4,000 s.f.; of in occupancy classifications A, E, H, I, or R-4. The changes were effective on Aug. 15, 2017.

N. DAKOTA. H.B. 1189 increases the dollar threshhold for state agencies to hire an architect, engineer, construction manager, or land surveyor by direct negotiation from $25,000 to $35,000.

TEXAS. H.B. 3021 amends the anti-indemnity laws by revising Tx Govt Code § 2254.0031 to add that a state governmental entity may not require a contractor to indemnify, hold harmless, "or defend" the state for claims or liabilities resulting from the negligent acts or omissions of the state governmental entity or its employees. H.B. 3021 also amends the Tx Local Govt Code by removing the requirement in the standard of care that the professional exercise skill and care ordinarily provided by competent A/E's practicing "in the same or similar locality." The bill passed unanimously in the House (143-0) and Senate (31-0) and was effective Sept. 1, 2017. Also passed in Texas was S. B. 807, which made changes to § 272.0001 of the Tx Bus & Com Code. The new amendments void contract provisions in a design or construction contract (or subcontract) on public or private real property located in Texas if such contract requires that conflicts are subject to another state's law, or litigation in the courts of another state, or arbitration in another state. The changes apply only to a contract, or an agreement collateral to or affecting a contract, entered into on or after Sept. 1, 2017. A contract, or an agreement collateral to or affecting a contract, entered into before the effective date is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose. The provisions of S.B. 807 were overwhelmingly passed in the House 135-8 and 29-2 in the Senate.

VIRGINIA. H.B. 2366 amends public procurement laws for use of construction management and design-build contracts and was approved March 24, 2017. The new law clarifies that "Goods, services other than professional services, and insurance may be procured by competitive sealed bidding or competitive negotiation." A new Chapter 43.1 was added dealing with procurement of construction management and design-build contracts. VA ST §§ 2.2–4378, et seq.

DID WE MISS ANY? If you are aware of an important state law that passed in 2017, not mentioned here, let us know. Better yet, submit an article telling us why it is important, what motivated its passage, who was behind the new law, and your role (if any) in drafting, testifying, or lobbying for the new law.



Setting up Emerging Professionals for Licensure and Success

This article appeared in the AIA Architect (online edition)
By Korey White, AIA
June 30, 2017

Is getting an architecture license worth it? Are emerging professionals even encouraged to pursue licensure? Chances are you're going to get a very different opinion depending on who you ask. According to AIA and NCARB's 2017 joint survey, there are drastically different ways architectural associates and supervisors view their contributions to career advancement and licensure.

But where does the gap come from, and how can we overcome it? By bringing together various approaches of practitioners, including firm leaders and emerging professionals, we can move towards a more unified profession that can support itself for generations to come.

Perception versus reality

As detailed in the survey findings, only 27% of emerging professionals believe it is "very important" to their supervisors for them to obtain a license, while 88% of supervisors indicated that it was "very important" for the emerging professionals they supervised to get licensed. Essentially, those on the path towards licensure don't feel like their supervisors care whether they get licensed or not, and that's a problem.

This discrepancy seems to come down to a communication issue between firm leadership and emerging professionals. Jason Takeuchi, Assoc. AIA, of Ferraro Choi in Hawaii believes that the current generation of leaders has "viewed licensure as valued and necessary," whereas the newer generation of emerging professionals doesn't always see it as a critical step in their careers. Like many, Choi's firm has encouraged licensure as a means to get to work on desirable projects, and as a tool to become exposed to the business of architecture.

Peter Kuttner, FAIA, of Cambridge Seven Associates believes the discrepancy is a product of supervisors not understanding that it is also incumbent upon them to serve as a mentor. Previously, the NCARB Architectural Experience Program, or AXP (formerly the Intern Development Program, or IDP) called for a "supervisor" and a "mentor," with the mentor serving a more discretionary role to the emerging professional.

Now that architectural associates are required only to have a supervisor, the concept of mentoring may have gotten lost in the process. Supervisors may be able to mitigate potential problems with the perceived value of licensure by stepping back into that dual role. Kuttner, who supervises two young designers, goes beyond encouraging licensure.

"I have been able to get emerging professionals involved with local and regional AIA activities and positions," he says. "I believe being a part of the bigger professional community early is an important factor in getting excited about licensure and the profession."

Realizing the benefits of licensure

While there are many benefits to licensure, some of the most notable are those which directly affect the individual and the firm. Obvious benefits include increased salary and responsibilities, and respect within the industry. Janice Suchan, AIA, principal and managing leader at Stantec in their Berkley, Michigan office, stressed the benefit of a license not only for the firm but for the individual employee. "For the employee, it provides the validation necessary for them to take complete accountability and control of their work in the future," Suchan says.

Licensure is often seen as a very personal endeavor. Studying for the ARE is left to the discretion of the individual practitioner. Some firms support this through providing resources, such as time off for exams—in addition to PTO and sick leave—and reimbursement for exams passed.

Tania Salgado, AIA, principal at Handprint Architecture, identifies incentives to get licensed as one of the reasons why there is a discrepancy between emerging professionals' perspective and their supervisors. As a small firm owner, she provides paid time off for exams and a study day prior to the exam. Her firm also supports licensed professionals by paying for their licensing dues and their AIA memberships.

"For the employee, [a license] provides the validation necessary for them to take complete accountability and control of their work in the future." - Janice Suchan, AIA.

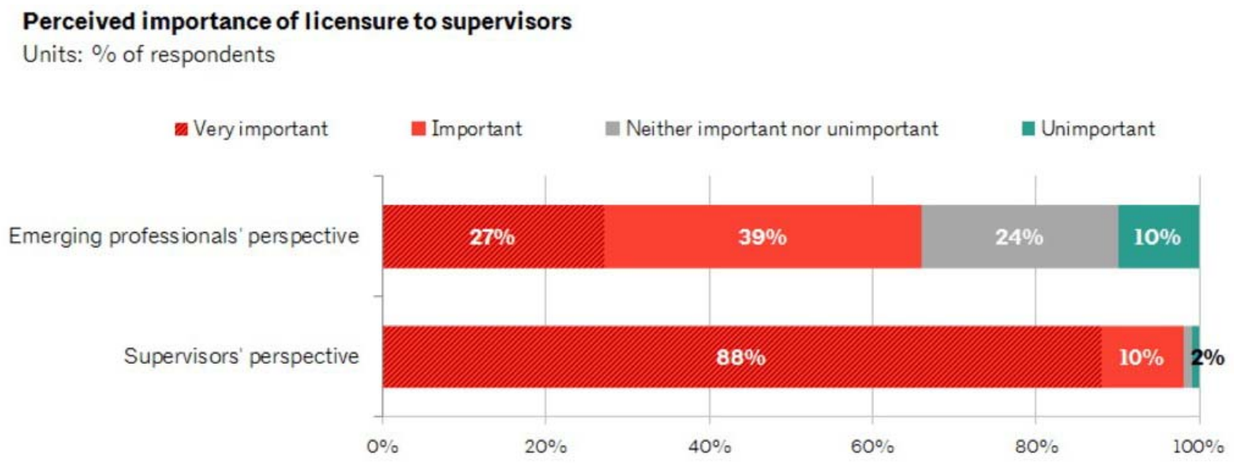
Annual and semi-annual reviews are one of the greatest tools to encourage and support employees on the path to licensure. Suchan describes the process at Stantec: Each employee has a semiannual formal review where future goals are discussed and detailed plans are established collaboratively, which are monitored and developed over time.

While automatic raises and promotion are not associated with licensure at Cambridge Seven, it is a factor in overall evaluation and there is still support throughout the licensure process. Exams which are successfully passed are paid for, as well as the increase in AIA membership dues when changing from an Associate to an Architect membership level.

In practice, reducing liability is at the forefront of running a successful business. Ken Anderson, AIA, managing principal of RNL Design in Arlington, Virginia, believes that when more employees are licensed, they are less of a liability to firms and to projects. Because architects are required to meet certain continuing education requirements per state licensing laws, they are staying informed of the best practices and newest technologies throughout their career. Inherently, this reduces the risk of mistakes on the job, decreasing liability.

As any firm owner, leader or architect knows, winning business is paramount to the success and livelihood of a firm. More and more, business development has become a key factor in encouraging licensure. Suchan identifies business development as a key benefit to licensure. RFPs and RFQs are requiring certain licensure requirements for key roles on projects. This can be prohibitive to a person's professional development if they cannot be a project manager on a new project because of licensure requirements by the client.

(continued on p. 12)



Emerging Professionals (cont'd)

Increasing success on the path towards licensure

Architectural professionals are always looking to enhance the perceived value of the architect in society. The value and importance of licensure should be stressed both in architecture school and in the professional environment, Suchan explains.

Supervisors can ensure a clear path and increase transparency, but individuals need to take licensure seriously by fulfilling AXP and establishing an ARE test schedule. Communicating the value that a firm places on a license will increase the value of the license to the individual and the community in which the architect is working.

"Within the firm, we can do a better job of integrating test schedules and AXP experience needs into our project management concerns," Kuttner states. "It is too easy now to put off an exam or two to accommodate a project schedule or last minute charrette." If test schedules and AXP are discussed regularly, emerging professionals will feel like they truly have a partner in their path to licensure. Salgado notes that increasing the value of architecture starts early on in one's career: "Professional advancement includes improving individual worth. In addition to integrity, this consists of developing determined skills sets, building strong client relationships, championing good design, and validating with licensure."

[Editor's note: Author Korey D. White, AIA is a registered architect and passionate advocate of the built environment. She currently serves as the AIA National Associates Committee Chair and is a project architect with RNL Design in Washington D.C. This article reflects the perspective and opinion of the author and does not necessarily represent a policy or position of the AIA or The Jefferson Society].

About the Emerging Professional and Supervisor Survey

The data referenced in the preceding article is from a survey of emerging professionals and supervisors that gathered information on the current relationship between the two groups, including insights into how their respective opinions compared. The survey was conducted by The Rickinson Group, an independent third-party market research company, on behalf of the AIA and NCARB in Oct. 2016. The survey was in the field for 10 days, and received responses from 580 emerging professionals and 800 supervisors for a total of 1,380 usable survey responses. For the purposes of this survey, supervisors were defined as those who currently, or in the past, have supervised an emerging professional on the path to licensure, while emerging professionals were defined as those actively on the path to licensure.

Per the survey, just 66% of emerging professionals believed that their supervisor thinks it is important for them to become licensed. While 44% of supervisors believe they are "very responsible" for preparing the candidate(s) they supervise for licensure, just 9% of emerging professionals perceive their supervisor to be "very responsible" for their licensure. In addition, 26% of emerging professionals indicated that they believe that their supervisor is "not very" or "not at all responsible" for preparing them for licensure.

The largest gap between the emerging professional and supervisor perception is related to reviewing experience progression. 86% of supervisors believe they are providing that assistance, while just 38% of emerging professionals believe they are receiving it.

For types of assistance like "mentor candidates on career goals" and "help candidates gain experience across all AXP areas," less than half of emerging professionals believe they are receiving that assistance from their supervisor, while a significant majority of supervisors believe they are providing that assistance.

Reprints of Key Founding Docs

In 2005, the Declaration of Independence and the four pages of the Constitution were printed in exact size and in color. Color matching was done by the National Archives preservation staff. The resulting reproductions are said to be the finest ever made of these Founding Documents. In 2006, the Bill of Rights was also printed in exact size in color. The publisher for this undertaking was Historical Document Reproduction, Inc. Two sets were sent to George Washington's Mount Vernon and to the Lincoln Presidential Library Foundation. A limited number of these historic prints is now available for $476 each, shipped at no charge. Go to www.freedomdocuments.com or call 409-381-8555.

7 Changes Architects Should Know About the AIA's 2017 Documents

By Mike Koger, AIA, Esq.
American Institute of Architects

This spring, the American Institute of Architects (AIA) updated its design-bid-build family of documents. This once-in-a-decade update includes revised versions of some of the AIA's most popular documents, including *A201™-2017, General Conditions of the Contract for Construction* and *B101™-2017, Standard Form of Agreement Between Owner and Architect*. The AIA has already posted samples of these documents on www.aiacontracts.org, along with comparisons to prior versions. Read through these "2017" documents and you will notice changes everywhere. These changes range from the relatively innocent insert of a comma, to the introduction of an entirely new insurance exhibit. Yet, if you are an architect, you probably care most about the changes that impact you and your practice. Here then, are seven of the most important changes impacting architects in the AIA's new 2017 documents.

(1) Architect's Obligation to Revise the Contract Documents.

For an architect, designing a new project can be pretty fun. Redesigning a project, on the other hand, is far less enjoyable. And if you are not getting paid for that redesign effort, it can be downright miserable.

One of the more well-known provisions of B101™-2007 required the architect to provide free redesign services if the lowest bona fide bid or negotiated proposal exceeded the owner's budget for the cost of the work. This obligation remains in B101–2017, however, an exception has been added that the architect will be entitled to additional compensation if the lowest bona fide bid or negotiated proposal exceeds the Owner's budget due to market conditions the architect could not reasonably anticipate. Here is the operative language from B101-2017, with this new caveat underlined: "**§ 6.6** If the Owner's budget for the Cost of the Work at the conclusion of the Construction Documents Phase Services is exceeded by the lowest bona fide bid or negotiated proposal, the Owner shall **…**

.4 in consultation with the Architect, revise the Project program, scope, or quality as required to reduce the Cost of the Work; or, **…**

§ 6.7 If the Owner chooses to proceed under Section 6.6.4, the Architect shall modify the Construction Documents as necessary to comply with the Owner's budget for the Cost of the Work at the conclusion of the Construction Documents Phase Services, or the budget as adjusted under Section 6.6.1. If the Owner requires the Architect to modify the Construction Documents because the lowest bona fide bid or negotiated proposal exceeds the Owner's budget for the Cost of the Work due to market conditions the Architect could not reasonably anticipate, the Owner shall compensate the Architect for the modifications as an Additional Service pursuant to Section 11.3; otherwise the Architect's services for modifying the Construction Documents shall be without

(continued on p. 14)

2017 AIA Docs (cont'd)

additional compensation. In any event, the Architect's modification of the Construction Documents shall be the limit of the Architect's responsibility under this Article 6." B101-2017 §§ 6.6, 6.7.

The AIA Documents Committee received input from numerous architects and owners while debating whether, and how, to revise this provision. Ultimately, the AIA concluded the B101-2007 language could result in an unfair scenario for architects who could fall victim to fluctuating market conditions they could not anticipate. Additionally, the AIA looked to the Federal Acquisition Regulations (FARs), which call for an architect's redesign efforts to be compensated if the unfavorable bids or proposals are the result of conditions beyond the architect's reasonable control.

(2) The Architect's Role in Communications During Construction. An architect plays an important role during construction. A201-2017, and its predecessor versions, have long reflected this by requiring the architect to be a representative of the owner during the construction phase of a project. As the owner's advisor during construction, the architect should be involved in discussions between the owner and contractor, particularly those that pertain to changes in the project. Such changes can have unintended impacts on the project's design, the function of systems and components, and code compliance. A201-2007 included the following language regarding the architect's role in owner/contractor communications: "Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized, the Owner and Contractor shall endeavor to communicate with each other through the Architect about matters arising out of or relating to the Contract." A201-2007 § 4.2.4.

A201-2017 continues to recognize the importance of the architect's role in communications between the owner and contractor. At the same time, the AIA Documents Committee acknowledged that, in some circumstances, it can be appropriate for the owner and contractor to communicate without waiting for the architect's participation. Accordingly, A201-2017 includes the following modified language: "The Owner and Contractor shall include the Architect in all communications that relate to or affect the Architect's services or professional responsibilities. The Owner shall promptly notify the Architect of the substance of any direct communications between the Owner and the Contractor otherwise relating to the Project." A201-2017 § 4.2.4.

Notice that the owner and contractor are still required to include the architect on communications that affect the architect's services or professional responsibilities. Otherwise, the owner and contractor are free to communicate directly as long as the owner promptly notifies the architect about such communications.

(3) Computing an Architect's Compensation on a Percentage Basis. Many architects prefer to set their compensation as a percentage of the project's cost of construction. After all, the cost to build a project is a rough approximation of its complexity, and a rough estimation of the services the architect is expected to perform. B101-2007 largely left the architect's method of compensation to be determined by the parties. B101-2007's instructions noted that there were at least ten methods of computing an architect's compensation that could be inserted into the agreement. As to using a percentage of the project's cost, the instructions suggested the following language: "Percentage of the Cost of the Work, in which compensation is calculated by applying an assumed percentage to the estimated or actual Cost of the Work, whichever is more certain at the time the calculation is made." B101-2007 Instructions. Even with this guidance, architects struggled to adequately define how they were to be paid in a "percentage of the cost of the work" scenario. If they simply inserted something like: "7 percent of the Cost of the Work", did that mean the architect was to be paid based on actual or estimated costs throughout the project? If the parties agreed upon estimated cost, would the architect's compensation be reconciled against actual costs once the project was complete? Also, what happened if an owner purchased materials and provided them to the contractor? Would those costs be used to calculate the architect's compensation?

B101-2017 includes several revisions to clarify the architect's compensation, particularly when it is computed on a percentage basis. Article 11 now includes prompts where compensation can be based on a stipulated sum, percentage basis, or another method determined by the parties. Importantly, the percentage based compensation is expressed as a "percentage of the Owner's budget for the Cost of the Work" rather than as a "Percentage of the Cost of the Work." Furthermore, language was added to clarify how this percentage basis will operate: "When compensation identified in Section 11.1 is on a percentage basis, progress payments for each phase of Basic Services shall be calculated by multiplying the percentages identified in this Article by the Owner's most recent budget for the Cost of the Work. Compensation paid in previous progress payments shall not be adjusted based on subsequent updates to the Owner's budget for the Cost of the Work." B101-2017 § 11.6.

So, what does this accomplish? First, it makes sure that all project costs will be used to calculate the architect's compensation. B101-2017 § 5.2 requires the owner's budget to include the owner's "other costs" and "reasonable contingencies" in addition to the budget for the cost of the work. Thus, if an owner opts to buy materials or equipment directly, those costs will still be used to calculate the architect's compensation. Second, B101-2017 § 5.2 requires the owner to update its budget until final completion. In other words, the owner's budget is not an estimated number that remains static as actual costs far exceed it during construction. Rather, by the time the project is completed, the owner's budget should mirror actual costs. Lastly, B101-2017 § 11.6 clarifies that once a progress payment is made, it shall not retroactively be adjusted based on subsequent increases or decreases to the owner's budget for the cost of the work. As such, an architect can rest easy with the knowledge that an owner cannot seek a refund for fees already paid if the budget changes, and an owner knows it will not be asked for additional payment relating to prior invoices.

(4) Sustainable Projects Exhibit. One of the more recognizable features of the AIA's 2017 documents is the introduction of *E204™-2017, Sustainable Projects Exhibit*. In a single document, E204-2017 sets forth the roles and responsibilities for each of the project participants regarding sustainable elements of the project. E204-2017 represents the culmination of a decade of work by the AIA Documents Committee to understand and evaluate the responsibilities and risks inherent in projects with sustainable features. The AIA's 2007 design-bid-build documents included, for the first time, basic references and requirements related to sustainability. In 2011, the AIA produced a comprehensive guide to sustainable projects with model language that parties could use to edit the core 2007 documents to accommodate a project with significant sustainable design and construction elements. In 2013, the AIA produced fully coordinated sustainable projects "SP" versions of each of their key contracts. The following year, the AIA embraced the convenience of using a single exhibit to include sustainability requirements by including such an exhibit in the 2014 design-build agreements.

This brings us to 2017 and the introduction of E204-2017 to the AIA's design-bid-build family of documents. E204-2017 establishes a process for identifying, developing, and assigning responsibility for the sustainable design and construction elements for a project. It requires the owner and architect to meet and discuss sustainable design features during a sustainability workshop. The architect then creates a sustainability plan that outlines sustainability measures necessary to achieve the owner's sustainability objective. Importantly, the plan assigns responsibility for each sustainability measure to the project participant in the best position to perform it. E204 - 2017 also addresses several issues unique to sus-

(continued on p. 16)

2017 AIA Docs (cont'd)

tainable design and construction. For example, it includes requirements for proposed materials or equipment substitutions, construction waste management, and registration and certification with a certifying authority.

E204-2017 should be attached as an exhibit to the owner/architect agreement, the owner /contractor agreement, and to other project related agreements as appropriate. Contractors should note that the sustainability plan is specifically identified as a contract document, and they will be responsible for performing sustainable measures assigned to them.

(5) Architects Can Do More Than Architecture. An architect's role on a project is well understood as both the leader of the design team, and the lead designer. Architects are also the owner's representative during construction, as they review submittals, evaluate payment applications, and certify substantial completion. Yet, many owners do not realize that architects can often provide services that go well beyond the traditional practice of architecture. While the AIA's 2017 spring publication includes traditional owner/ architect and owner/contractor agreements, the fall publication includes updated "scope" documents that can be added to any owner/ architect agreement. For example, the AIA is publishing updated scope documents that can be used to describe services an architect might provide (1) to help select a site and determine the feasibility of a project (*AIA B203™-2017*), (2) to address issues unique to a project involving a historic building or property (*AIA B205 ™-2017*), (3) as an on-site representative (*AIA B207 ™-2017*), (4) to perform commissioning services (*AIA C203 ™ -2017)*, or (5) to help manage space planning and maintenance activities for a facility (*AIA B210™-2017)*.

(6) When is an Additional Service no Longer an Additional Service? In 2017, the AIA answered the paradox of whether additional services could truly be "additional" if they were known at the time of contracting. The AIA concluded they cannot, and services that are known at the time of contracting, yet not a part of the architect's basic services, are now called "supplemental services" in B101-2017. The 2007 version of B101 included two types of additional services. The first were additional services that are known at the time of contracting, but fall outside of an architect's basic services as defined in Article 3. These additional services, found in B101-2007 § 4.1, include anything from programming, to site evaluation, to the preparation of record drawings. The second variety of additional services were those that arose after the owner and architect entered into their contract. Amongst others, these included services to avoid delay in the construction phase of the project, services resulting from a material change in the project, and attendance at public presentations or meetings. B101-2017 now uses the term "supplemental services" to describe the services described in § 4.1, thus drawing a clearer distinction between services that are known to the parties at the time of contracting, and those that arise later. Is this a meaningful change? In many ways, this change does not have a substantive effect on how B101-2017 operates. B101-2017 still contains a familiar looking table with supplemental services that are recognizable from prior versions. It still requires the parties to identify who is responsible for these services in Section 4.1.1, and the parties still must craft their own description of those supplemental services in Section 4.1.2. Yet, this change does bring clarity in Article 4. There is a meaningful distinction between services that are known at the time of contracting, and those that arise during the project. Giving that distinction a name – supplemental vs. additional services – will help owners and architects negotiate their contracts with more clarity.

(7) Enhanced Initial Information. B101-2007 included an optional exhibit where the owner and architect could memorialize initial information about the project. This exhibit contained prompts where the parties could insert information such as details about the owner's program, the project's physical characteristics, the owner's budget, and the intended delivery method for the project. This exhibit also allowed the parties to identify members of the project team.

In the past decade, this initial information has evolved to become a critical part of the owner/architect agreement. B101-2017 does away with the optional exhibit approach and includes initial information as an integrated part of the agreement. Thus, Article 1 of B101-2017 includes many of the initial information prompts that were once included in Exhibit A to B101-2007. It also includes a new prompt for the parties to identify a sustainable objective for the project, if any exists.

Architects should pay close attention to the project's initial information prompts and fill them out as completely as possible. If an owner later changes direction, and requires services that were not anticipated based on the initial information, the architect may be entitled to additional compensation. B101-2017 § 4.2.1.1 identifies the following as additional services that entitles the Architect to additional compensation: "Services necessitated by a change in the Initial Information, previous instructions or approvals given by the Owner, or a material change in the Project including size, quality, complexity, the Owner's schedule or budget for Cost of the Work, or procurement or delivery method;" B101-2017 § 4.2.1.1.

Article 4 of B101-2017 can be an architect's best friend when it comes to warding off, or getting paid for, scope creep. Diligently completing the initial information in Article 1 helps to establish the parties' expectations on the project, and gives an architect a basis for seeking additional compensation if those expectations change.

To learn more about the AIA's 2017 contract documents, visit www.aiacontracts.org.

Georgia: Economic Loss Doctrine No Bar to Negligent Misrepresentation Claim

A developer sued a consultant that had been hired to conduct a Phase 1 Environmental Assessment of certain land that the developer planned to purchase, alleging professional negligence based on the consultant's incorrect report that a portion of the land was a "soil/ stone storage area," when, in fact, it was a landfill. The trial court granted summary judgment for the consultant and the developer appealed. On appeal, the Georgia Court of Appeals affirmed in part, and reversed in part. The consultant issued a written report indicating that an adjacent landowner had encroached on, and was using, a small portion of the property as a "soil/stone storage yard." The consultant also wrote that it did not recommend an additional environmental investigation.

Relying in part on this environmental study, the developer bought the property and began pre-development work on it. The adjacent landowner, however, referred to the encroachment as a "landfill." The developer's principals determined that, due to the landfill, the property could not be developed as planned because it was not economically viable. The lender instituted foreclosure proceedings and the developer filed bankruptcy. The plaintiff's theory of damages was that late discovery of the landfill doomed the project. The developer presented evidence of what it would have received had the project proceeded as intended, as well as pre-development costs. In reversing, in part, the Court of Appeals held that there was a genuine issue of material fact as to whether the consultant's alleged negligent misrepresentation proximately caused loss to the developer. As to the consultant's reliance on the economic loss rule, the Court clarified that the rule "generally provides that a contracting party who suffers purely economic losses must seek [its] remedy in contract and not in tort. But this case concerns an alleged negligent misrepresentation, albeit a misrepresentation made by a professional in the alleged breach of its professional responsibilities." Therefore, under Georgia law, there is an exception under Restatement (Second) of Torts § 552 for negligent misrepresentation. The case is *Atlantic Geoscience, Inc. v. Phoenix Devel. and Land Inv., LLC*, 799 S.E.2d 242 (Ga. App. 2017).

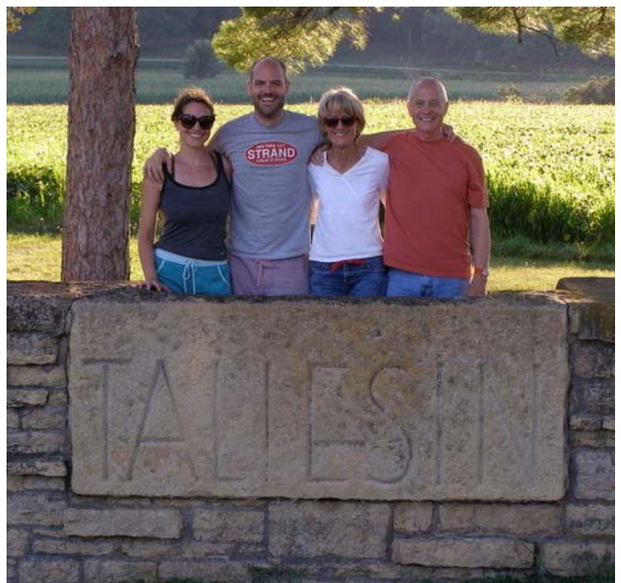
MEMBER PROFILE:

BRUCE WAUGH, ESQ.
Waugh Mediations
Kansas City

TJS Member Bruce Waugh, Esq. has had a lifelong interest in architecture that intensified while attending boarding school in England. "Weekend trips in the U.K. and holidays on the Continent exposed me to great works, including a spring break in Greece. Pomona College permitted me to create a pre-architecture major before transferring to Kansas Univ. School of Architecture." Both Bruce's parents and his grandparents attended KU. "My maternal grandfather was an engineer and contractor and my father's side has generations of lawyers," Bruce said, so the combination of design and law was in his genetics. It was during his final year of architecture school that he decided to become an urban planner. The University of Missouri - Kansas City Law School had developed a national reputation in urban planning, led by Prof. Robert Freilich, who also headed the *Urban Lawyer*, a law review dedicated to that discipline. So, Bruce enrolled at UMKC to study law. There, he worked on the *Urban Lawyer* and took classes from Prof. Freilich.

"My hopes to become an urban planner conflicted with the need for gainful employment," Bruce confessed, "so upon graduation I began working at Gage & Tucker, a Kansas City firm." The idea of learning real estate law seemed like a logical step toward becoming an urban planner. However, the law firm had other ideas and Bruce was assigned to the construction litigation department. "My litigation cases were varied," he told us, "but eventually consisted primarily of representing sureties on performance bond matters." That led to a successful surety law practice and, eventually, he opened a boutique surety defense firm in Kansas City as part of a law firm based in Hutchinson, KS. Around that same time, a colleague asked if Bruce would mediate a construction case he was handling. "Having participated in a few mediations I naturally thought I could do it. (*See one, do one, teach one*.) By pure luck it was successful, and the next year I did three or four. After a few years, I decided to do the mediation training to get some idea how it was supposed to be done. Each year I did more and more mediations, almost exclusively construction disputes, until mediating began to take over my litigation practice."

A couple of years ago, Bruce ceased his traditional law practice to focus solely on mediations, which he loves.



(above left) Bruce and Nancy Waugh at their place in the Kansas Flint Hills, which they call "the Little," after the family who originally lived there. (lower left) Jackie Zammuto, Kyle Waugh, Bruce and Nancy Waugh at Taliesin (Wisconsin). (Above), of course, is architect-lawyer Bruce Waugh and his lovely wife Nancy at Frank Lloyd Wright's masterpiece, "Fallingwater," at Mill Run, Pa. Over 5 million people have visited since 1964.

"No longer do I wake up with dozens of lawyers plotting against me. I work with great lawyers and, for the most part, their enjoyable clients. Everyone laughs at my jokes! The beginning and end are three days apart in mediation, rather than three years. Achieving resolution is extremely satisfying," he says. Bruce is a Fellow of the American College of Civil Trial Mediators. He graduated with Distinction from UMKC Law School, where he was a member of the Bench and Robe Society, as well as serving on the board of editors of the UMKC Law Review. His loyalties run, however, to his architecture alma mater, the Kansas Jayhawks, especially during basketball season.

Bruce's wife, Nancy, is a retired teacher. The couple's honeymoon consisted of a series of mandatory architectural stops, from Stonehenge to Ronchamp to the Piazza San Marco, to see some of the world's wonders. Bruce and Nancy enjoy traveling, especially to see works of architecture, including remaining Frank Lloyd Wright buildings. This past summer the Waughs traveled to see the Frank Lloyd Wright exhibit at the MOMA, celebrating Mr. Wright's 150th birthday.

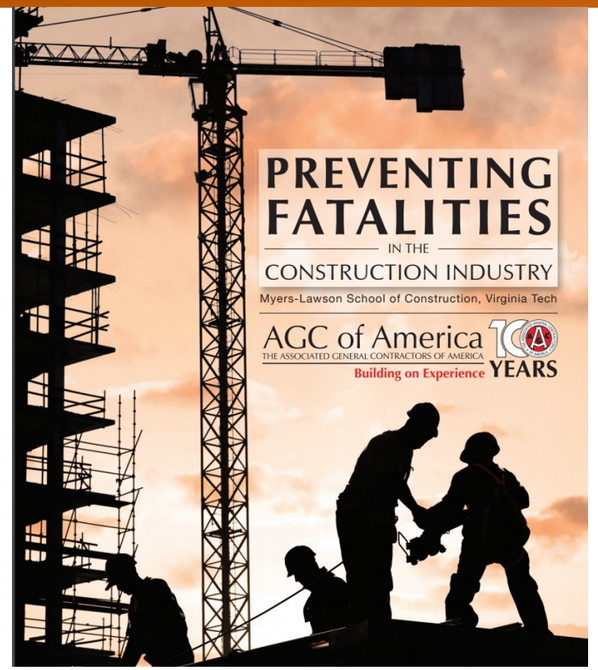
The Waughs live in Kansas City, but spend most weekends at their tiny stone Civil War-era house in the Kansas Flint Hills, in the area where Bruce grew up, near Topeka. (See photo top of p. 18). "We watch birds, Nancy draws wildflowers in the pasture, and … I get to fix stuff," he said.

Their son Kyle is an apple that did not fall far from the family tree . . . he is an instructor in the school of architecture at Pratt Institute in Brooklyn, New York, teaching writing to architecture students. "Working at Pratt, my son keeps me current on the field of architecture," Bruce said.

Bruce is also a member of the National Academy of Distinguished Neutrals, a former Vice Chair of the ABA TIPS Fidelity & Surety Law Committee, and a member of the Surety Claims Institute. He has authored several articles on design and construction law. He has been listed in the SuperLawyers roster each year since 2006 for Alternative Dispute Resolution. He practiced law with the firm of Gilliland Hayes for 26 years before going full-time into mediations in 2013.

If you have a dispute that needs the services of an experienced construction mediator, one who understands design, construction and surety law, Bruce is your guy!

AGC Releases New Study on Jobsite Fatalities



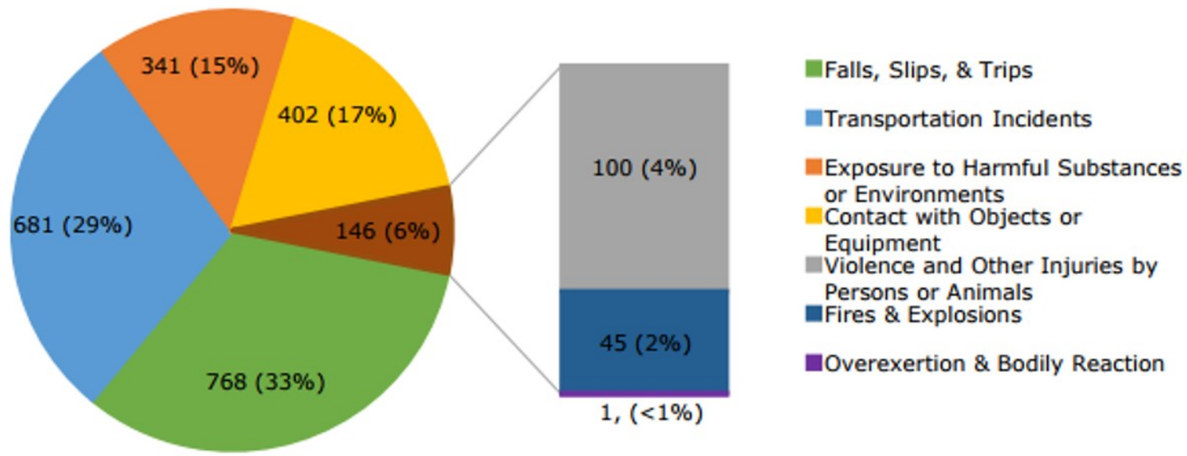
The Associated General Contractors (AGC) of America commissioned a new study with the goal of taking a deeper dive into existing information on fatalities, with the goal of learning new methods of preventing worker fatalities in the construction industry. The study was conducted by the Myers-Lawson School of Construction at Virginia Tech, and analyzed U.S. Bureau of Labor Statistics (BLS) fatality reports from 2010-2012. The AGC study is unique in many aspects. First, the data investigated is current and the findings reflect the most recent trends in injuries in the construction industry. Second, unlike previous studies of BLS data that only considered factors at a high level of categorized data, this study drilled down deeper to capture specifics and the analysis resulted in more detailed and actionable information. Third, advanced analytic techniques were adopted. Fourth, unlike previous studies, the analysis included an emphasis on work zone-related accidents.

Some of the report's most interesting findings are that:

- Most fatalities occurred between 10 a.m. and 3 p.m., with a peak at noon (previous studies found that occurrence of fatalities was most dominant between the hours of 9 a.m. and 1 p.m., and bottomed near noon).
- Fatalities due to transportation and violence and other injuries by persons or animals increased, while fatalities due to exposure to harmful substances and fire and explosions decreased.
- Small construction firms (1-9 employees) accounted for 47% of fatalities and the highest fatality rate at 26 fatalities per 100,000 workers annually.
- Most highway and road work zone fatalities involved vehicular operations.
- Hispanic workers made up 24% of the workforce and accounted for 20% of highway and road work zone fatalities in 2010-2012.
- Specialty trades had significantly more fatalities than any other sector, accounting for 56% of deaths. However, the Heavy & Civil sector had the highest annual fatality rate with 24 fatalities per 100,000 workers.
- Overall, most fatalities occurred in the South region (46%) with the highest annual fatality rate (17 deaths per 100,000 workers). This region is also largest in terms of the population of the employed.
- Fatalities increased in spring and summer, with a peak in August (12%), and decreased until reaching a minimum in winter (Feb. was just 5%).
- Almost 75% of all deaths occurred Mon. – Thurs., with similar totals on each of those days. Fatalities decreased on Friday and during the weekend (reaching a minimum on Sundays at just 4.7%).
- Industrial project locations experienced the highest number of fatalities at 35%. Residential and heavy project locations accounted for 25% and 29%, respectively. The remainder of fatalities occurred at commercial (5%) and other (6%) locations.
- Falls remain the leading cause (33%) of death in construction, accounting for one-third of all fatalities. Falls were commonly from buildings, other structural elements, and ladders. Transportation incidents accounted for 29% of fatalities. These typically involved trucks (36%) and multi-purpose highway vehicles (31%), e.g. pickup trucks.

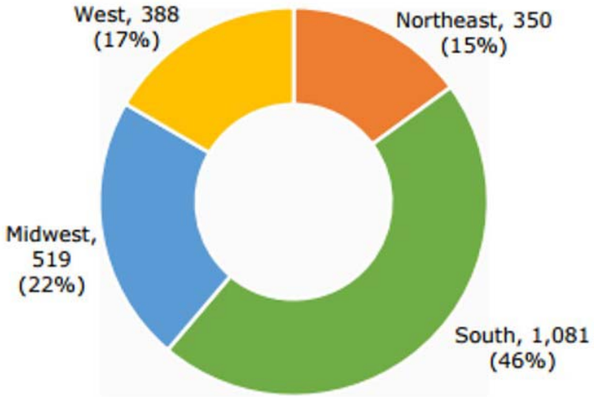
To read the full report, click on this link: https://www.agc-nm.org/sites/default/files/agc-vt_fatality_report_final.pdf

Figure 14. Number and Percentage of Fatalities, by Event or Exposure, 2010-2012

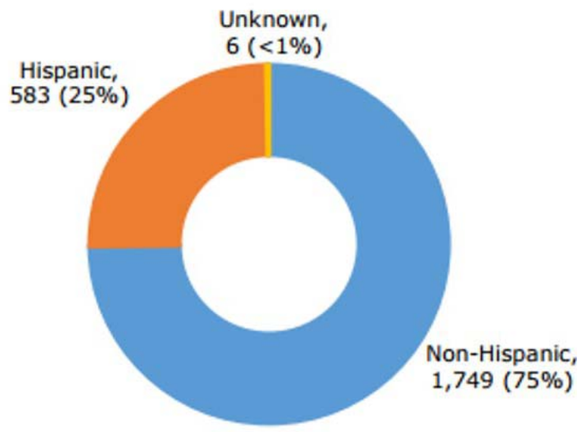


A total of 2,338 workers died from construction-related injuries between 2010 and 2012, out of an overall 14,011 fatalities across all industries. Although no significant trend was observed across the three years, the difference among census regions was significant. Southern states accounted for 1,081 fatalities, or nearly half of all construction industry fatalities (46%). A few factors could be the population of that region, and warm weather which results in a longer construction season than in the Northeast and Midwest (37% collectively). While falls, slips and trips led the list, accounting for 33% of the fatalities in the study, the second highest, vehicular and transportation operations, accounted for 29% of fatalities. Within the category, 78% of vehicle-related fatalities occurred in a location of heavy construction projects. Construction workers aged 35-54 accounted for 50% of fatalities. Younger and older workers, under 25 and 65 or over, represented relatively small proportions of fatalities, with 8% and 7%, respectively. When age was factored in, fatalities rates showed a steady increase by age. The 65+ age group had the highest fatality rate (19 fatalities per 100,000 workers), suggesting the older workers were more likely to die from jobsite injuries than younger construction workers.

Figure 4. Number and Percentage of Fatalities, by Region, 2010-2012



Number and Percentage of Fatalities, by Ethnicity



Supreme Court Trivia: Name The Only U.S. Supreme Court Justice *Imprisoned* After Office!

By Bill Quatman, FAIA, Esq.

Are you stumped? Well here is a bit of cocktail conversation trivia for you. Associate Justice John Archibald Campbell is not considered one of the great jurists of the U.S. Supreme Court. While an intelligent and skilled lawyer, his opinions are not recognized for literary style or legal content. In fact, very little is associated with his name today outside of his role in the Hampton Roads Peace Conference of Feb. 1865 and the John A. Campbell Federal Courthouse in Mobile, Alabama. But Campbell's story line weaves in and out of the American civil war, culminating with his arrest in May 1865. Here is what you should know.

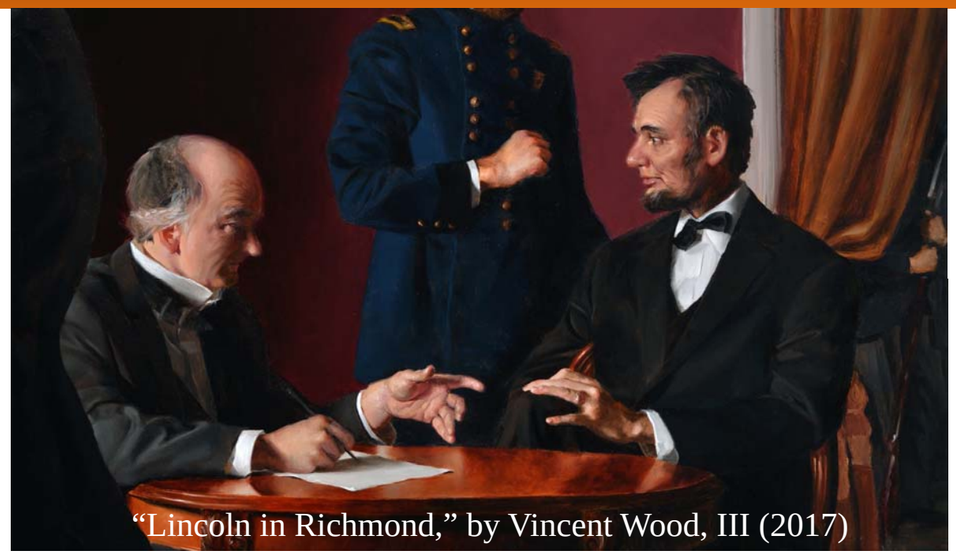
John A. Campbell was born in Georgia in 1811, and showed his intellect at a very young age, graduating with first honors of his class from Franklin College (as the Univ. of Georgia was then known), at the age of just 14. He was accepted into West Point Military Academy in 1925. He dropped out of the academy in his third year there after his father died in 1828, so as to help his mother with finances.

John Campbell took up his father's occupation and studied law for a year in his uncle's law office. A special act was passed by the Georgia state legislature waiving the age restriction and young Campbell was admitted to the Georgia bar at the age of just 18. He embarked on a successful law practice in Mobile which caught the attention of state officials. Campbell was twice offered a seat on the Alabama Supreme Court, the first such offer coming at age 24, but he declined both offers. The young lawyer rose to national attention when he argued six cases before the U.S. Supreme Court. When Justice John McKinley died in 1852, a vacancy was left to be filled by Pres. Franklin Pierce. McKinley was from Alabama, and so the search for a successor to McKinley's seat led to Alabama lawyer John Campbell. Despite his age and lack of experience as a judge, the Senate quickly and unanimously confirmed the 41-one year old Campbell's nomination. On April 11, 1853, John A. Campbell was sworn in as an Associate Justice of the U.S. Supreme Court. After seven years on the bench, Campbell's name was even considered by the Democrats for the 1860 presidential nomination.

During his tenure on the Taney Court, Justice Campbell addressed many weighty questions over property rights and human rights. While on assignment to preside over trials in the Fifth Circuit, he heard cases involving fugitive slave laws in the anti-slavery region of New England. He was a proponent of voluntary emancipation as well as slave education, and freed his own slaves around 1853. John Campbell sat on the Court during the *Dred Scott* case in 1857. The Court ruled against the slave, holding that since Scott's ancestors were imported from Africa and sold as slaves, he was not a "citizen" of Missouri under the Constitution and, therefore, was not entitled to file a lawsuit in the Federal circuit courts. Each of the nine jurists wrote separate opinions in a case that is seen as a key catalyst to the outbreak of civil war four years later.

After Abraham Lincoln's election in Nov. 1860, with talk of secession rampant, Justice Campbell urged Pres. Buchanan to send commissioners to a convention to determine if the sectional differences could be resolved. "I think that a constitutional settlement, at all events, is better – far better – than a sudden and violent disruption," he wrote. Campbell wrote to Alabama's political leaders arguing that Lincoln's election was not sufficient cause for secession. However, he pledged to resign his seat on the Court if Alabama seceded, which it did on Jan. 11, 1861.

The Supreme Court completed the work of its term on March 14, 1861 which freed up Justice Campbell to turn his focus to peace negotiations. The next day he acted as an intermediary to a Confederate commission of three representatives to meet with the new Lincoln administration. The negotiations failed, and when Pres. Lincoln issued orders for a blockade of Southern ports, 49-year old Campbell tendered his resignation, the only Southern justice to do so. To Justice Nathan Clifford, Campbell sent a farewell as he left Washington on April 29th lamenting, *"Oh for peace, peace."* He moved to New Orleans and established a law practice there for the next 18 months, as the war entered



"Lincoln in Richmond," by Vincent Wood, III (2017)

its early stages. After New Orleans fell in April 1862, "Judge" Campbell (as he was known) was summoned to Richmond, where Pres. Jefferson Davis appointed him the Assistant Secretary of War. Always hopeful for a peaceful resolution, however, Campbell was one of the three Confederate Peace Commissioners who met with Pres. Lincoln and Sec. Seward on Feb. 3, 1865 at the Hampton Roads, Va. Peace Conference in an unsuccessful attempt to negotiate an end to the Civil War.

After Richmond fell to the Yankees on April 3, 1865, Pres. Lincoln went to Richmond to see the former Confederate capital. There, he met over two days with Judge John A. Campbell inside the Confederate White House in an attempt to negotiate terms for surrender.

Judge Campbell had long since made up his mind that the cause of the South was hopeless. He had written to Jefferson Davis, immediately after the Hampton Roads Peace Conference, urging him and the Confederate Congress to take immediate steps to stop the war and restore the Union. Campbell remained in Richmond, Va. after Davis and the Rebel government evacuated so that he could assist in negotiations that would certainly follow with Union officials.

During the meetings with Pres. Lincoln at the former Davis home, Judge Campbell pitched a novel idea: If Mr. Lincoln would allow the Virginia Legislature to meet in Richmond, "it would at once repeal the ordinance of secession and that then General Robert E. Lee and every other Virginian would submit." After some thought, Lincoln agreed to Campbell's novel plan. But when Gen. Lee surrendered on April 9, 1865 at Appomattox, the peace plan became moot.

After Mr. Lincoln was assassinated in Washington just five days later, loyal Unionists began to suspect any Southern leader as a co-conspirator. Numerous arrests were made of Confederate civil officers who were held as prisoners of war. Judge Campbell said this paranoia "naturally aroused wild and improbable suspicions as to the extent of the conspiracy."

At 10 p.m. on May 22, 1865, as John and Anne Campbell relaxed at their Richmond home, armed Federal soldiers knocked on their door. The former Supreme Court Justice was arrested, placed in iron restraints on his hands and feet, and led from his home like a common criminal, with no explanation of his offense. His wife was terrified, fearing for her husband's fate and fully aware that Rebel officials were being rounded up and imprisoned.

Campbell was taken to the docks on the James River where he was transferred to a small room onboard the army gunboat *U.S.S. Mosswood*. He remained confined in his floating prison for the next week without being charged with any crime. He was later transferred to a prison cell at Fort Pulaski, an island just off the Georgia coast. Supreme Court Justice Benjamin Curtis and other friends petitioned the president and finally convinced Andrew Johnson to release Judge Campbell from Federal prison. The president issued the release order on Oct. 11, 1865, nearly 5 months after the judge had been seized from his home. At this point, however, Campbell was bankrupt, both financially and politically. His home, property and reputation had all been destroyed. He and Anne moved back to New Orleans, where he set up a law practice with his son, Duncan.

Campbell later pondered, "What the course of Mr. Lincoln would have been had his life been spared." He closed his law practice in 1886 and died three years later, on March 12, 1889 at the age of 77.

MEMBER PROFILE:

MIKE KOGER, AIA, ESQ.

The American Institute of Architects (AIA)
Washington, D.C.

TJS member Mike Koger has worked as a staff attorney at AIA National for the past 4 years. He worked with the AIA's Documents Committee to create and revise the 2017 edition of the AIA contract documents. (See Mike's article on pp. 13-17). "At the AIA, we often say that we draft our contract documents to be fair and balanced. I truly believe we live up to that standard," he says. "Yet, while we don't draft our documents to favor architects, we do pay attention to how our documents impact the architecture profession. I like that I play a small role in supporting the architectural profession in this way," Mike added. He enjoys his work with the Documents Committee, but also likes working with some of the other AIA departments to discover what they do. The AIA Conference is always one of the highlights of his year.

So, how did his career begin? Mike attended the College of Architecture and Planning at Ball State University in Muncie, Indiana. "I wish I could say that I always wanted to be an architect", Mike told us, "but that isn't true. My mother talked me into applying to the Ball State architecture program. I'm glad she did!" Mike quickly grew to love the unique combination of art, science, and history that is architecture.

After graduation from Ball State, Mike moved to San Diego with a couple of friends to find work. "I literally went door-to-door introducing myself to architects around town with the hopes of landing a job. I finally got hired by a small firm named DiDonato Associates. We did custom residential work and a fair amount of work permitting cell phone tower equipment. The cell phone equipment work wasn't glamorous, but I got to be quite good at navigating through local planning and building departments through this work."

Mike later enrolled in law school at Tulane University in New Orleans. "I had grown up a lot by the time I went back to school and realized that a career in law was a more natural fit for me than architecture," he said. He was attracted to Tulane's environmental law program and student clinic. Although he does not practice environmental law now, studying that topic in law school was probably his most rewarding formal education experience. "I also wanted to live in a new and interesting city, and New Orleans didn't let me down one bit. My wife and I still try to visit a few times each year."

Mike and his wife Marina have a beautiful 14-month old daughter named Mary, seen in all of the photos on these pages. "We spend our free time playing in our neighborhood pool, climbing the steps of the huge church in our neighborhood (the Basilica of the Immaculate Conception), and doing other toddler-friendly activities." Marina and Mike met while studying for the California Bar exam back in 2009. She is an attorney with the Nature Conservancy in Northern Virginia.

Marina Koger and Mary Koger are the women in Mike's life these days!

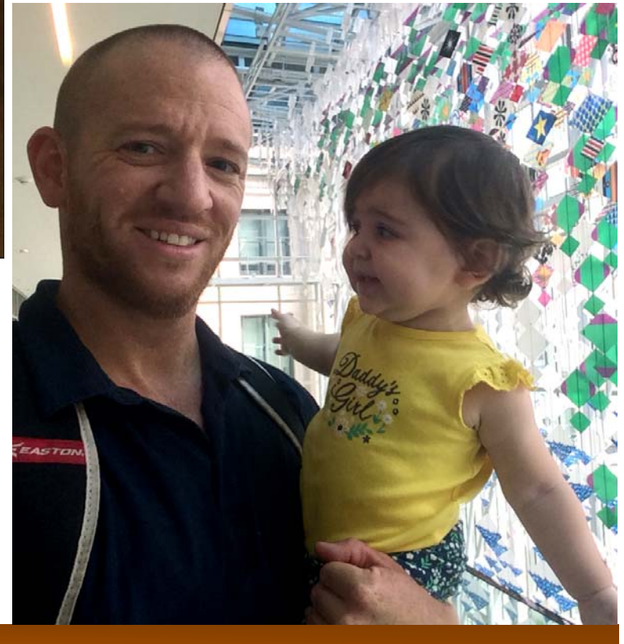
(below) 14-month old Mary Koger. What a beautiful little girl, and we love the pixie hair-do too! (lower right) Mike and his daughter wearing the shirt "Daddy's Girl."

As to buildings that inspire him, Mike named the Salk Institute by architect Louis Kahn in LaJolla, California. "It's still an active research facility, so it can be a bit elusive to tour it and spend much time there. I think because I have spent so much time trying to catch a glimpse of it from outside that it has taken on special meaning for me. It's location, right on the Pacific Ocean, couldn't be more perfect." In addition to Louis Kahn's work, Mike Koger says he has become fascinated with Le Corbusier recently, "but that may just be a phase." Otherwise, he favors the work of Irving Gill and, of course, Frank Lloyd Wright.

Mike grew up playing a lot of baseball but, today, he sticks to slow-pitch softball. "I can still claim that I have been to every home playoff game the Washington Nationals have hosted," he boasted. "I am an absolute nerd at baseball games – I keep an incredibly detailed book of every play that happens."

Over the years, Mike has been involved with several historic preservation organizations. Mike and Marina were married at the newly repaired World War I Memorial in Washington, D.C. and had their wedding reception at the old Civil War Hospital on Capitol Hill. Both of these buildings were neglected for years before the D.C. Preservation League urged their restoration.

When asked what advice he would give to a young architect thinking about law school, Mike said, "You need to fully understand the financial ramifications of going to law school before going that route. Law programs are big business for universities nowadays. It is entirely possible to get into a good school, graduate, pass the bar, and still have it not work out for you from a financial perspective. In other words, beware of debt. Also, have a realistic idea of what kind of legal job you want and start looking into it between your first and second year of school. Law school is not like architecture school and many of the best jobs are snatched up while you are still in school."



"Complying with All Laws" During Design and Construction

By Eric O. Pempus, FAIA, Esq.
DesignPro Insurance Group
Cuyahoga Falls, OH

Consider this situation: You have been awarded a commission to design a building for a new client. You propose using the AIA's Standard Form of Agreement B101 as your owner-architect contract, but the client insists you sign a version of the B101 "with just a few minor changes." You notice that one of those changes requires you to "comply with all laws, rules, and regulations," rather than, as the B101 states, to "review laws, codes, and regulations applicable to the Architect's services." That changed language should be setting off alarm bells for you.

One of the most overlooked yet dangerous pitfalls for an architect is a provision in a legal document requiring a design professional to "comply with all laws, rules, and regulations" or similar language. However, such a provision can create a trap for an unsuspecting architect.

The Problems with "Complying with all Codes."

A large number of laws apply to the design and construction of buildings. These laws govern such things as:

- Life safety (national model building codes as well as local variations);
- Fire protection;
- Accessibility (ADA as well as local requirements);
- Zoning;
- Occupant safety (e.g., OSHA);
- Sustainable design;
- Wetlands preservation;
- Public health;
- Historic preservation; and,
- Employment (federal, state, and local).

It may in fact be impossible to comply with *all* laws that apply to a particular project because those laws may have contradictory provisions. To illustrate this point, the Advisory Legal Opinion – AGO 93-40 from the Florida Office of the Attorney General, on the subject of "conflict between building code & firesafety code," states that: "*when the provisions of the applicable minimum building code and the applicable minimum firesafety code conflict … the local building code enforcement official and the local fire code enforcement official [shall] resolve the conflict by agreement in favor of the requirement of the code which provides the greatest degree of life-safety or alternatives which would provide an equivalent degree of life-safety and an equivalent method of construction.*"

Similarly, the General Services Administration's (GSA) Codes and Standards states that: "*[s]hould a conflict exist between GSA requirements and the GSA adopted nationally recognized codes, the GSA requirement shall prevail. All code conflicts shall be brought to the attention of the GSA project manager for resolution.*"

Likewise, the Dept. of Public Safety, Bureau of Building Codes & Standards, State of Maine, states that when conflicts between codes arise the Bureau will make changes. But until such changes are made, an architect may not be able to comply with all laws. Even national model codes can conflict with each other. As the Maine Dept. of Public Safety notes: "*Since the creation of the Technical Standards and Codes Board in 2009, the Board has reviewed several conflicts between the ICC Codes adopted and the NFPA Code. They have also made several amendments to the Code that was originally adopted. All of these changes should be reflected in the latest set of Chapters 1-6 that were done through Rule-making in the 126th Legislature …*"

Furthermore, when architects agree to "comply with all laws, rules, and regulations" in either a modified AIA B101 or a client's customized contract, they may be agreeing to perform services beyond their expertise and normal responsibility. If "all laws, rules, and regulations" is construed to mean, for example, job-site safety, then OSHA regulations could apply, making architects responsible for work that is not covered under their professional liability insurance.

And finally, what does "comply with" actually mean? To receive a building permit, it is commonplace for an architect's drawings and specifications to be reviewed by the agencies having jurisdiction over building code compliance. Normally, the plan review process generates corrections, with the agency citing code sections that were not met in the submitted plans, thus not "complying with all laws, rules and regulations." Especially for large or complex projects, rarely is a plan review returned with no corrections needing to be made. Is the architect in breach of contract if the initial plan review identifies areas of noncompliance?

Standard forms of agreement and the architect's standard of care.

The AIA Owner-Architect Standard Form of Agreement B101 (2017) recognizes that (1) there is a bewildering number of laws and codes related to design and construction, making it unreasonable to expect an architect to be an expert in all of them; (2) the codes themselves may contradict each other; and (3) not all the design- and construction-related laws and codes concern the architect. Thus, the B101 states, in Section 3.2.1, that: "*[t]he Architect shall review the program and other information furnished by the Owner, and shall review laws, codes, and regulations applicable to the Architect's services.*" This effectively establishes the standard of care for architects relative to code compliance (the standard of care for architects being how other architects under similar circumstances, in the same time frame, and in the same locale, would be expected to perform). Agreeing to a "comply with all"–type clause might be argued by some to raise an architect's professional standard of care beyond what is typically insurable, and should be replaced with words such as "take into account" or "review." There is considerable authority for this position.

The 2012 AIA Code of Ethics & Professional Conduct addresses this: "*3.101 In performing professional services, members shall take into account applicable laws and regulations. Members may rely on the advice of other qualified persons as to the intent and meaning of such regulations.*" NCARB's Rules of Conduct are recommended for Member Boards having the authority to promulgate and enforce rules of conduct. NCARB's Rules state that: "*[i]n designing a project, an architect shall take into account all applicable state and municipal building laws and regulations. While an architect may rely on the advice of other professionals (e.g., attorneys, engineers, and other qualified persons) as to the intent and meaning of such laws and regulations, once having obtained such advice, an architect shall not knowingly design a project in violation of such laws and regulations.*" Many states follow NCARB's view. For example, the Ohio Administrative Code (OAC) 4703-3-07 (A)(2) requires that architects "take into account" all laws when performing their services. It does not require an architect to be perfect and "comply with all laws." The lesson to be learned from NCARB and states like Ohio is that architects do not have to agree to such a clause, and that an architect who does could find it difficult or impossible to perform in accordance with the contract.

Certifications including compliance with all laws.

On some projects, the architect may be presented with the client's lending institution's Certificate of Consent for Assignment. This document may state that in order for the client's loan to be finalized for the project, the architect must certify that the project was designed and built in compliance with all laws, rules, and regulations, so that the architect's agreement can be assigned to the lender if the client defaults on the loan. Unfortunately, sometimes this certificate lists every conceivable law or rule, which may be well beyond the scope of the architect's services. If you find yourself in the situation where your client is requiring you as an architect to certify that something is true, complete, and correct, and that the design "complies with all laws," push back. Satisfying this requirement exceeds the standard of care for which you are insured, and signing such a document may risk your insurance coverage. Your better option is to advise your client to delete such onerous "comply with all laws" language if they also require you to carry professional liability insurance—they can't have both. If that doesn't work, then at least define what is meant by "certify."

Avoid the "Comply with all Laws" trap.

In summary, architects should explain to their clients why the "comply with all" language is problematic. First, there are so many laws, rules, and regulations affecting the building industry that they may at times conflict, and it simply is not possible for an architect to know them all. Second, laws are constantly evolving, sometimes even during the course of a project, making it impossible to comply with a moving target. And third, laws are subject to human interpretation. One code official's interpretation of a regulation may be different from another's, and code officials may change during the course of a project. Explain to your client the standard of care.