ISSUE 23 April 2018

QUARTERLY JOURNAL OF THE JEFFERSON SOCIETY

Monticello

Our Mission

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

Inside This Issue

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

TJS Elections and Annual Meeting

By Suzanne Harness, AIA, Esq.
Harness Law, PLLC

This is an active time of year for The Jefferson Society. Over the next few months we will place names in nomination for the election of a new Secretary and President-Elect, and also for three new members of our Board of Directors. If you are interested in serving in one of these roles, please let me know right away so that our nominating committee can contact you for more information.

Because The Jefferson Society meets in person only once per year at our annual meeting — coming up on June 20 — most of us do not know one another well. You may be the perfect candidate, but we may not know that. So, please, no hiding your light under a bushel basket! Announce yourself to me, or to another member of our Board (see left page for roster of our directors), so that we can get to know you better and place your name in consideration for an elected office. You can reach me at sharness@harnessprojects.com.

If you are planning to attend A'18, the AIA's annual Conference on Architecture, in New York City June 20-23, please arrange your schedule so that you can attend our Annual Dinner and Meeting on Wednesday evening, June 20th. ***(See p. 10 of this newsletter for details).*** Even if you are not planning to attend the AIA conference, but live in the NYC area, please put June 20 in your calendar and join us for dinner. TJS member Joyce Raspa, AIA, Esq. found the perfect location, just a short walk from the Javits Center, where we can enjoy cocktails, Italian food, conversation, and networking, and also hold our annual business meeting. The annual meeting is always fun, and a great venue for sharing your views about the synergy of architecture and the law. I hope to see you there.

And speaking of holding office, note that one of our very own TJS members,

(continued on page 2)

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

Send his or her name to President Suzanne Harness at sharness@harnessprojects.com and we will reach out to him or her. All candidates must have dual degrees in architecture and law.

AUTHORS WANTED

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

JOIN US ON FACEBOOK & LINKEDIN

Want to connect with other members? Find us here.

President's Message
(continued from page 1)

Rebecca McWilliams, AIA, Esq., is running for State Representative in her home state of New Hampshire. Go Becky! Many of us met Becky last fall, when she traveled to Washington to be sworn in to the U.S. Supreme Court with several other TJS members. Architect, lawyer, mother, and farmer, Becky is one of the many women who are making their voices heard across America by running for office this year. Whether you are blue or red, I'm sure that you will appreciate and support your TJS colleague for doing what she can to make a difference. Please read more about Becky and her motivation on page 3.

In case you were wondering, you can support The Jefferson Society in other ways as well. For example, if you missed the U.S. Supreme Court swearing ceremony last fall, please volunteer to lead another group forward to that rewarding goal. Our Treasurer, Donna Hunt, led the effort this last time, and she will be happy to coach you in the process. Feel free to reach out to her at: donna.hunt@ironshore.com

Also in this issue, don't miss the mini treatises by *Monticello*'s editor, G. William Quatman, FAIA, Esq., on two topics that are never far from our thoughts as architects and lawyers: the *Spearin* Doctrine, which celebrates its centennial in 2018 (pages 12-13), and the Work for Hire Doctrine (pages 20-21). If you have an article that is looking for a publisher, or you have a story to tell, like member Sheri Bonstelle, Esq., who climbed Mount Kilimanjaro (pages 24-25), don't hesitate to contact our editor Bill Quatman at bquatman@burnsmcd.com. We are always looking for fresh content and we love to hear your stories.

I'm looking forward to seeing you in New York City on June 20, and announcing the results of our election in the next issue of *Monticello* in July.

Last, this month marks the 275th birthday of our namesake, Thomas Jefferson. Mr. Jefferson continues to generate controversy nearly three centuries after his birth. (see articles on p. 23 of this issue). One city celebrates his birthday, while a university calls for removal of his statue. These are certainly interesting times we live in.

SO. DAKOTA: ARCHITECT MAY RECOVER ATTORNEY'S FEES FROM CONTRACTOR'S INSURER WHO DELAYED RESPONDING TO CLAIM

This suit arose out of a project to build four condominiums in Minnesota. TSP was the project architect and BHI was the contractor. BHI hired a consultant to do land surveying who made an error such that two of the condos were located too close to the property line and did not comply with county setback requirements. BHI and TSP agreed to provide the funds for the developer to purchase a buffer strip of land to compensate for the mistake and to share the expense. The architect paid the full $302,208 and BHI never paid its portion of the loss. As a result, TSP sued BHI for damages. BHI forwarded the suit to its CGL carrier (Western) for defense, which was denied. BHI and TSP later settled the lawsuit, agreeing that TSP could pursue any remedy against Western that BHI might have under the CGL policy. Western filed a suit for declaratory judgment against TSP, seeking a ruling that its CGL policy did not provide coverage for TSP's claims. The parties filed motions for summary judgment and the trial court granted judgment in favor of the architect, awarding a total of $299,009, including attorney's fees. The insurer appealed and the state supreme court reversed, holding that the professional services endorsement in the CGL policy excluded coverage for the contractor arising out of an error by its surveyor. However, the court found that despite lack of coverage, the architect had a right to bring a claim for statutory attorney's fees based on the insurer's failure to respond to insured contractor within 30 days on two separate occassions, as required by SDCL 58–33–67(1), the Unfair Claims Practices Act.

However, the case was remanded with directions that the trial court hold a hearing to determine what portion, if any, of the fees awarded to the architect (TSP) occurred as a result of Western's violations of SDCL 58–33–67(1), and to award the same.

See, *Western National Mutual Ins. Co. v. TSP, Inc.,* 904 N.W.2d 52 (S.D. 2017).

TJS Member Rebecca J. McWilliams, AIA, Esq. Runs for Public Office in New Hampshire

Taking Mr. Jefferson's dual interest in politics and architecture to heart, our own Rebecca (Becky) McWilliams has recently announced her candidacy for public office! One of her favorite quotes is: "You can't wait for inspiration, you have to go after it with a club," from Jack London. She is definitely not waiting for inspiration, as she has put her hat in the ring for State Representative from her home of Concord, N.H., Merrimack 27 District.

McWilliams says there will likely be a September primary, but the general election is November 6th. Commenting on her background, McWilliams told us, "I do think that the farmer and politician piece make me stand out as a bit more Jeffersonian." She and her husband, James, own a 130-acre farm in Concord, N.H. which they bought in 2016 to continue the farming operations there, and to offer events such as monthly farm-to-table dinners, a harvest festival, outdoor concerts and nature hikes. This is one very busy lady. "At this time I am barely keeping my head above water with 1 year old twins, a campaign for State Rep, and a growing law practice," she told us. "I'm running because reading the political news this past year has made me an activist. This is the year for women to get involved in politics, and I'm proud to be part of the blue wave sweeping New Hampshire. It's time for new voices to speak out and make a difference in New Hampshire politics." Ms. McWilliams is a graduate of Suffolk Univ. Law School and she obtained her architecture degree from Roger Williams Univ. During architecture school, she studied abroad at the Palazzo Rucellai in Florence, Italy. After graduation, Rebecca worked as the Director of BIM for a large Boston A/E firm, and then for as an Associate at Donovan Hatem, LLP in Boston before starting her own law firm, McWilliams Law.

Her political career got started when she served as Director of Policy for Massachusetts State Rep. Chris Walsh, where she helped draft legislation for proposed design-build alternative procurement for public projects and enabling legislation for greywater recycling.

What an inspiration to all of us, for one of our own members to run for public office, in the footsteps of Mr. Jefferson. If you are interested in learning more and supporting Rebecca's campaign, you can reach her by cell at (401) 451-4642, or email her at: rebeccamcwilliams@gmail.com.

Individual donors are capped at $1,000 and donations can be made online at: www.CrowdPAC.com. Search for "Rebecca McWilliams".

Future N.H. State Representative Rebecca J. (Becky) McWilliams, AIA, Esq.

Welcome New Members!

We welcome the following

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

Daniel B. Boatright, Esq.
Littler
Kansas City, MO

Sheri L. Bonstelle, Esq.
Jeffer Mangels Butler, et al.
Los Angeles, CA

Richard Elbert, AIA, Esq.
Bjarke Ingels Group Architects
Brooklyn, NY

Jessica I. Hardy, Esq.
Macdonald Devin, P.C.
Dallas, TX

James F. Latour, Esq.
James Latour Law
Champions Gate, FL

Laura B. LoBue, Esq.
Pillsbury Winthrop Shaw et al.
Washington, DC

Francisco J. Matta, AIA, Esq.
Navigant Consulting, Inc.
Phoenix**, AZ**

James Newland, Jr., AIA, Esq.
Seyfarth Shaw LLP
Washington, D.C.

Action Items for Annual Meeting.

OFFICERS:

For President-Elect: Nominations are open for the office of President-Elect. Per the 2016 Bylaws change, Suzanne H. Harness, AIA, Esq. will complete her two-year term at the 2019 Annual Meeting. At this coming meeting we will elect a President-Elect who will serve for one year and step into the two-year President's role at the 2019 Annual Meeting.

For Treasurer-Elect: No election this year. Per the 2016 Bylaws change, Donna M. Hunt, AIA, Esq. will complete her two-year term as Treasurer at this Annual Meeting. Treasurer-Elect Jose Rodriguez, AIA, Esq. will then take office as Treasurer for the two-year term 2018-2020. We will hold elections for Treasurer-Elect in 2019 at the 7th Annual Meeting.

For Secretary: Nominations are open for the position of Secretary. Each year we elect a Secretary, which is a one-year term.

DIRECTORS: Nominations are now open for three (3) openings on the Board of Directors. Directors "must be Members who have been admitted to practice law in at least one jurisdiction AND who have a license to practice architecture in at least one State or Commonwealth."

Please submit any nominations to Suzanne Harness.

Happy Birthday, Mr. Jefferson!

Did you know that Pres. Thomas Jefferson was born on **April 13, 1743** in Shadwell, Va., and this year marks his **275th birthday?**

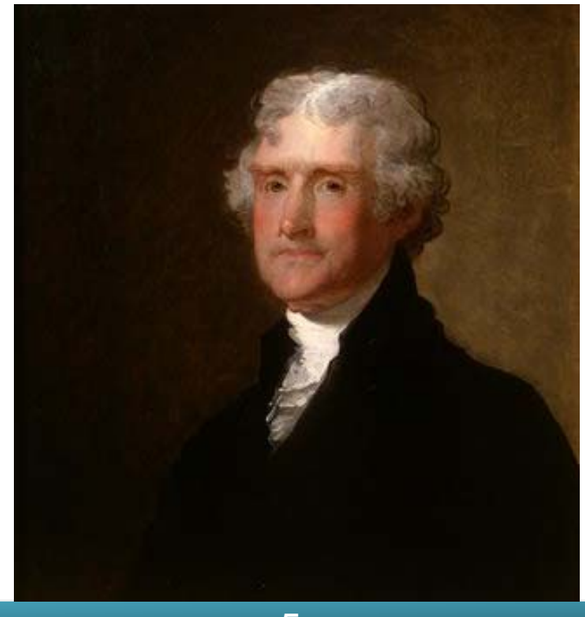
NEW YORK: OWNER CANNOT SUE ARCHITECT IN BOTH CONTRACT AND TORT FOR THE SAME DAMAGES

The City and Dormitory Authority of the State of New York (DASNY) sued its architect, alleging both breach of contract and negligence related to the design of a forensic biology laboratory in New York City. The architect moved for summary judgment, which the trial court granted in part. On appeal, the Supreme Court, Appellate Division, affirmed, and then certified the questions to New York's highest court, The Court of Appeals. The high court reversed, holding that the City of New York was not an intended third-party beneficiary of the architect's contract, and that DASNY"s negligence claim was duplicative of its breach of contract cause of action. The Court stated that summary judgment should have been granted in the architect's favor on both issues.

The architect's contract provided that it would "indemnify and hold harmless" DASNY and the "Client" (that is, OCME, and the NYC Police and Fire Departments) from claims arising out of the architect's negligent acts or omissions and that extra costs or expenses incurred by DASNY and the Client as a result of the firm's "design errors or omissions shall be recoverable from [the architect] and/or its Professional Liability Insurance carrier." During work on the building's foundation, the contractor's failure to properly install an excavation support system led to substantial damage and delays, including settlement of an adjacent building by as much as eight inches, damaging other adjacent structures (including sidewalks, sewers and water mains), which required emergency repairs. These issues caused the project to be delayed by more than 18 months at an additional cost of $37 million. DASNY sued the contractor in 2006, and the architect was added as a defendant in 2007 with claims of breach of contract and negligence. The architect moved for summary judgment on the grounds that the City was not an intended third-party beneficiary, and that DASNY's negligence claim was duplicative of its breach of contract claim.

As to the first issue, the Court of Appeals stated that "[A] third party may sue as a beneficiary on a contract made for [its] benefit. However, an intent to benefit the third party must be shown, and, absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular contracts." The Court noted that the contract did not expressly name the City as an intended third-party beneficiary nor authorize the City to enforce any obligations thereunder.

As to the duplicative negligence claim, the Court stated that, "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." The only damages alleged under either theory of recovery were the additional expenses required to complete the project, including the costs to repair the damage to adjacent structures. The Court added, "Clearly, there are circumstances where a professional architect may be subject to a tort claim for failure to exercise due care in the performance of contractual obligations. * * * We distinguished between the situation where the harm was an 'abrupt, cataclysmic occurrence' not contemplated by the contracting parties and one where the plaintiff was essentially seeking enforcement of contract rights." In ruling for the architect, the Court said, "Put another way, there was no injury alleged here that a separate negligence claim would include that is not already encompassed in DASNY's contract claim * * Thus, we hold that the negligence claim is duplicative of the breach of contract cause of action." Two judges dissented. The case is *Dormitory Authority v. Samson Construction Co.,* 2018 WL 889524 (N.Y. 2018). The dissenters would have allowed dual claims for both professional negligence and contract to be maintained by DASNY.



DELAWARE: ARCHITECT LOSES APPEAL OF $1,000 FINE FOR NOT MAINTAINING HIS CONTINUING ED CREDITS

In this case an architect appealed a disciplinary decision of the Delaware Board of Architects for failure to meet the biennial continuing education ("CE") requirements. He argued that he should not have been disciplined because he did not violate the regulation "willfully;" that the discipline would create an undue burden upon him; and that the Board's decision was arbitrary and capricious. The Court rejected all three defenses and sided with the Board. Under Delaware law, licensed architects must complete a minimum of 12 CE hours each calendar year. (Note: This requirement was modified in 2016). The architect was randomly selected for an audit and found to be deficient (he only completed 8.0 of the requisite 12.0 HSW CE's in 2014). At the disciplinary hearing, which the architect attended without legal counsel, the architect admitted that he "made a mistake" and "miscalculated" his CE's, adding that he "was shocked when he found out that he was deficient." Nonetheless, the Board gave him a Letter of Reprimand and a $1,000 fine. In upholding the Board's action, the Court stated that the Board's decision was supported by substantial evidence and was free from legal error. Even if not a "willful" violation, the Court said that the Board found that there was no evidence of intent to violate the CE requirement. However, the Court stated that, "The Board need not find that Appellant willfully disregarded or fraudulently misrepresented his CE's to discipline him." In affirming, the Court ruled that the Board's decision was supported by substantial evidence and was free from legal error. See, *Schultz v. Delaware Board of Architects,* 2018 WL 948624 (Del. Super. 2018).

MEMBER PROFILE: JAMES R. NEWLAND, AIA, ESQ.

Seyfarth Shaw LLP
Washington, D.C.

TJS Member James R. (Jim) Newland, Jr., Esq., AIA attended Virginia Tech (Virginia Polytechnic Institute & State University) in his home state of Virginia, a school known to be design-focused and which offered the five year, first professional degree program. After graduating in architecture, Jim worked for a firm known as Ward Hall Associates in Virginia, focusing on the design of public and educational facilities. He then chose The Univ. of Pittsburgh School of Law for his post-graduate studies because he thought he wanted to live in Pittsburgh. "I didn't set out to practice law," he told us, "rather, I had planned to return to architecture practice after law school. When I practiced architecture, I enjoyed the problem solving that occurs during the design and construction phases. Practicing law can present a similar type of opportunity, particularly if you are helping clients navigate so called 'troubled projects' during the construction phase pre-dispute phase." After law school, Jim decided to practice law full time. "Looking back, I think the combination of professions, and understanding both the design and construction side, is indispensable in helping clients sort through troubled projects, presenting the case in mediation or arbitration, dealing with experts and helping clients better understand the upside and downside risks they face in negotiating contracts or in the disputes process," he said.

After his first year of law school, Jim spent a year working for a construction /government contract firm located in northern Virginia, where he worked on transportation projects and claims arising therefrom. Today, his practice is dedicated exclusively to construction as a partner in Seyfarth Shaw LLP, working out of that firm's D.C. and Atlanta offices. He has been ranked by Chambers USA the last two years and Legal 500.

Jim says that the best part of his job is working with very smart colleagues, clients and experts to put a together a comprehensive narrative representing his client's case. "I enjoy preparing and presenting the case, particularly in mediation and arbitration. On the non-contentious side, I enjoy helping clients draft RFPs for design and construction services, drafting the contracts and negotiating them; particularly when I help them understand something they may not have thought through."

Jim and Sarah Newland's two sons, Bennett (left) and Jay (right). Both boys are competitive swimmers which keeps the Newlands busy between practices and travel meets. No, that is not Jim's car (we asked!)

Jim and Sarah Newland enjoy traveling and time spent outdoors. Jim competes in triathlons.

Jim and his lovely wife Sarah have been married for 18 years and they have two sons, Jay and Bennett. The family enjoys travel and has spent time together in Hawaii (Maui, Kauai, Oahu and Hawaii), London, Rome, Puerto Rico, Bermuda and the National Parks in the continental U.S. When not practicing law, Jim and his family enjoy time outdoors and Virginia offers many outdoor activities. Jim likes triathlon training, travel, photography, cooking and music. Jim is also a nationally-certified swim official with USA Swimming and officiates ten or so meets per year as a starter or stroke and turn official. He is also involved in Jubilee Support Alliance, which is a DC-based charity that buys and remodels apartments buildings to lease units to low-income families living and working in the Adams Morgan area of D.C.

The Newlands live on the Occoquan reservoir, located in Prince William County, Va., where they enjoy having a bit of land and water to enjoy in what is becoming a crowded residential environment. "It is about 25 miles south from my office in D.C.," Jim said, "and nearby is the quaint little town of Occoquan, which includes a good French restaurant and many boutique shops."

As a student, Jim admired the design work of Richard Meier, Botta and Tado Ando. Today, Jim is impressed with the work of Foster + Partners, as their projects are very complex from a programming and construction standpoint.

When asked if he had any advice for a young architect thinking about going to law school, Jim said, "I viewed law school as one of the most versatile post-graduate degrees. Even though it is technically a specialized program, it really offers the opportunity to learn to analyze complex problems and understand relationships in a way that is helpful in most business endeavors. In that regard, although it is a long time commitment, it leaves you with a skill set that is useful in architecture, and certainly in construction, development or in the practice of design and construction law."

The Newland family loves to travel. Here, Sarah is shown in Rome on the rooftop of Castel Sant'Angelo with the dome of the Vatican's St. Peter's Cathedral in the background, with sons Jay and Bennett.

MEMBER PROFILE: JON B. MASINI, AIA, Esq.

Vanek Vickers Masini
Chicago, IL

Jon is a "golden domer," who graduated from The University of Notre Dame with his Bachelor's Degree in Architecture in 1984. "Notre Dame was the only college I applied to, because I was brainwashed from birth. My father went there, my uncle went there, my older brother played football there, and both of my sisters went to St. Mary's across the street," Jon told us. He started off majoring in chemical engineering, but his roommate freshman year was enrolled in the architecture program, and Jon went with him to the Architecture Building a few times. "After that, I knew I wanted to be an architect (I also found out we would spend a year in Rome, Italy)! Therefore, I changed majors after one semester, and it was one of the best decisions I have ever made," he said.

After graduating from college, Jon went to work for the architectural firm of O'Donnell, Wicklund, Pigozzi & Petersen ("OWP&P"), where he worked as an architect until graduating from law school in 1989. "I started as a draftsman - on an actual drafting table which I still have," he said, "I then became a Project Architect, and began preparing technical specifications. After becoming a member of the Construction Specifications Institute (CSI), I worked primarily as a spec writer, and also participated in the contract review process, until I was hired by a law firm to work full time as an attorney."

Why law school? In the second semester of his last year at Notre Dame, Jon took a course entitled "Legal Aspects of Architecture and Engineering." He really enjoyed the class, which first made him consider the possibility of combining the two professions. "In addition, my older sister was an attorney at the time (she is now a judge) and, after graduating from college, we discussed combining my architectural degree with a law degree and specializing in construction law. The intrigue for me was, and still is, the juxtaposition between the 'black and white' world of architecture / engineering and the often 'gray' legal world, and utilizing my skills in both worlds to defend architects and engineers."

Jon at Wrigley Field with his wife, Julie, and his father at Game Four of the World Series.

Jon got his J.D. from Loyola University of Chicago Law School in 1989, choosing that school because it had a good night school program, and Jon wanted to continue working as an architect during the day in order to obtain his architectural license. The location of Loyola was also attractive to Jon, who was living in downtown Chicago when he decided to go to law school, and Loyola was not far from his apartment.

Jon says that his wife, Julie, chuckles and rolls her eyes whenever anyone asks her why Jon switched from being an architect to becoming an attorney, because she knows that he first typically jokes that: "I was such a lousy architect that I got sued all the time, so I had to become an attorney to defend myself." Ironically, many of Jon's architect friends and clients say he made the right move becoming a lawyer, while his fellow lawyers often ask: "Why would you change from being an architect, when you can design and have something wonderful and tangible built and say 'I did that', when as lawyers all we do is push paper and fight with one another?" As they say, the grass is always greener.

Upon graduation from law school, Jon was already working part time at the law firm of Clausen Miller, P.C. in Chicago, and he began working full time in their Construction Law Group. Today, Jon is still defending design professionals in all types of construction cases as part of his litigation practice. In addition, he serves as an arbitrator and mediator, primarily for construction disputes, but also handles some commercial matters as well. Currently, Jon's ADR practice makes up about 20% of his work, most of which is through the AAA.

Jon and his son, Jack, riding ATVs in Cabo, Mexico.

Jon's wife, Julie, is a flight attendant for American Airlines and the couple is celebrating their 25th anniversary this year! Their son, Jack, is 20 years old and is at college working on his degree to become a Radiologic Technician. When not engaged in law or ADR, Jon enjoys playing golf or platform tennis, fishing, working out, watching sports and traveling. He is a member of the ABA's Forum on Construction Law and serves on the Board of a charitable organization that raises money for pediatric cancer research.

Jon and Julie Masini at the Ryder Cup.

OFFICIAL NOTICE – MEMBERS ONLY

The Jefferson Society 6th Annual Meeting

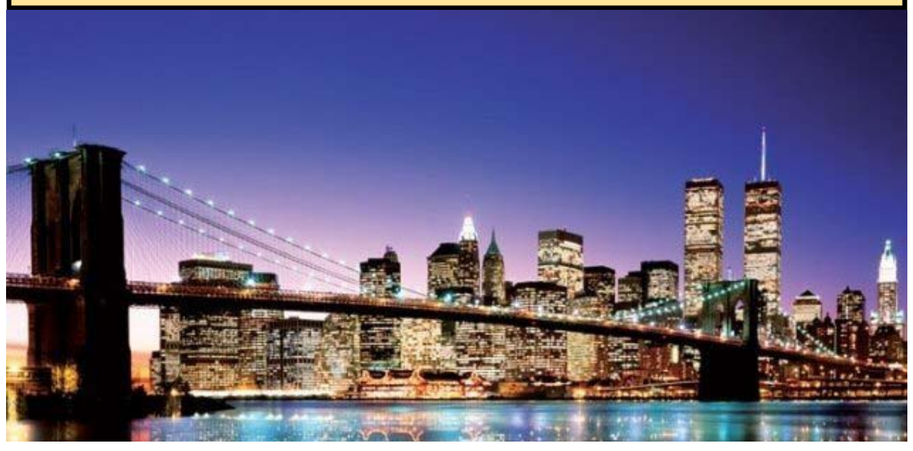
Date and Time: Wed. June 20, 6:30 – 9:00 p.m.

Location: Il Punto Ristorante, 507 9th Ave New York, NY 10018 (at 38th St), a short walk from the Javits Center (site of the 2018 AIA Conference)

Schedule: Cocktails 6:30-7:15 p.m. Dinner 7:15 p.m. Annual Meeting and Elections to follow

Cost: $75 per person (Members Only)
Check to "The Jefferson Society" and mail to Donna Hunt, 110 Payson Road, Brookline, MA 02467

RSVP: By June 10 to Donna M. Hunt, AIA, Esq. at donna.hunt@ironshore.com



TJS 6th Annual Meeting & Dinner Details

Join us for the 6th Annual Meeting and Dinner at Il Punto Ristorante in New York City. Il Punto is just a short walk from the Javits Center, the primary location for the AIA Conference on Architecture.

TJS member Joyce Raspa, AIA, Esq. has planned an evening of cocktails and appetizers followed by dinner in a private dining room. We will be joined by two representatives of RIMKUS Consulting Group, which has generously offered to provide sponsorship. After dinner will be the 6th Annual Meeting of the Members, which will be chaired by our current president, Suzanne Harness, AIA, Esq.

At this meeting we will elect three new members to our Board of Directors, a new Secretary, and a President-Elect.

Please join us for a lively dinner and to meet your fellow and sister members. You won't want to miss this!

As Suzanne stated in her President's Message, if you are interested in being nominated for an open officer or director position, please contact Suzanne Harness: sharness@harnessprojects.com

AIA Conference Sessions of Interest.

The AIA has announced the lineup of speakers for the 2018 Conference on Architecture and there are a few legal programs scheduled, which include:

WE104/WE308, Risk Management Essentials: Parts 1 & 2; WE307, Legal Bootcamp; TH111, The Architect's Guide to Managing Risk on Complex Residential Projects; TH312, Owner - Architect Agreements and Sustainable Design & Construction; TH404, Accessibility Design Mistakes & Settlement Agreements that Follow; EL801A, AIA Contract Documents 2017 Release General Overview; FR312, Understanding General Conditions of a Construction Contract; and, EL803B, Using Contracts to Manage Risks on Custom Residential Projects. Also, consider presenting at the 2019 AIA Conference on a legal topic of interest.

Stephen Ayers, FAIA, Wins 2018 Thomas Jefferson Award for Public Architecture

(reprinted from AIA online, www.aia.org)

The AIA's Thomas Jefferson Awards for Public Architecture recognize architects in the public and private sectors, public officials, or other individuals who design distinguished public facilities and / or who advocate for design excellence. This year's 2018 Thomas Jefferson Award recipient is Stephen Ayers, FAIA, The Architect of the Capitol.

As the 11th Architect of the Capitol, a position he was appointed to by President Barack Obama in 2010, Stephen Ayers, FAIA, cares for the nation's architectural treasures and uses his prominent voice to advance the profession. His leadership has seen him testify before Congress on more than 50 occasions, where his keen insight on matters of historic preservation, long-range master planning, and sustainability has elevated the discourse on good design to the national level.

"In so many ways, Stephen Ayers has used his national leadership role to go well beyond what would normally be expected of a public servant," wrote Carolyn Sponza, AIA, president of the AIA|DC Board of Directors, in a letter nominating Ayers for the AIA Thomas Jefferson Award for Public Architecture. "He has made himself a resource for the public, showing how public architects can help make a better world through design excellence."

A recognized leader in sustainability, Ayers guides more than 2,300 employees and a $600 million budget in the stewardship of some of America's most important buildings. He oversaw completion of the U.S. Capitol Visitor Center, a project that was well over budget and behind schedule when he was appointed. When he committed to a completion date and final budget — both of which proved to be accurate — Ayers demonstrated to Congress that the country's architects can lead and deliver. More recently, his restoration of the Capitol dome and rotunda repaired more than 1,000 cracks and deficiencies in the structure.

"Can you imagine an architectural position with heavier demands than the Architect of the Capitol? Yet, Stephen has not only shouldered this heavy load, he has enhanced the status and relevance of the office of the Architect of the Capitol by insisting on the highest standards of historic preservation and sustainable design," wrote 2018 AIA President Carl Elefante, FAIA, a principal at Quinn Evans Architects, in a letter supporting Ayers' nomination. "Stephen has gone to great lengths to tell the stories of architecture, consistently leveraging the inherent interest in the iconic buildings for which he is responsible."

Ayers has received several design awards from the AIA for his restorations of the Thomas Jefferson Building and the U.S. Botanic Garden Conservatory, among others, and initiated and oversaw a comprehensive master plan for the U.S. Capitol complex. The plan was developed concurrently with one for the National Mall, and encompassed the House of Representatives, Senate, Library of Congress, and Supreme Court. Congratulations, Mr. Ayers!

Spearin **Doctrine Turns 100 - Happy Birthday!**

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

Every government contract lawyer has heard the phrase *Spearin* Doctrine, but few know the back story on how this doctrine came about. The 100+ year old dispute involved a broken storm sewer line and the modest sum of just $3,875. Our story begins on Feb. 7, 1905, when Mr. George B. Spearin contracted with the U.S. government to build a dry dock at the Brooklyn Navy Yard for $757,800. Mr. Spearin was provided by the government with plans and specifications detailing the work. Prior to submitting his bid, Mr. Spearin, who was not a civil engineer, personally visited the site and made a superficial examination. He also sent a few representatives to the civil engineer's office at the Navy Yard to obtain what information they could concerning the site conditions and probable cost of the work.

The project site was intersected by a 6-foot brick sewer, making it necessary to divert and relocate a section of the sewer before construction the dry dock could begin. Mr. Spearin complied with all requirements of the plans and specs as to the dimensions, material and location of the section to be relocated, and the new 6-foot sewer section was accepted by the government as satisfactory. However, about a year after the relocation of the sewer, in August 1906, there was a rainstorm coincident with a high tide. This forced water into the sewer at a pressure that cracked the new sewer at several places, flooding the excavation of Mr. Spearin's new dry dock. Upon investigation, it was discovered that there had been an existing (and undisclosed) 5-foot tall dam on the site which caused the internal pressure that broke the sewer line. Government officials were unaware of the existence of the dam but did know that the site was low ground that flooded on occasion. That fact had not been communicated to Mr. Spearin by anyone.

Spearin's contract included detailed specifications related to the sewer line and also stated: "Control of work. The United States, by its civil engineer in charge of the work or other authorized representative, shall at all times have full control and direction of the work under the contract, and all questions, disputes, or differences as to any part or detail thereof shall be decided by such civil engineer or representative, subject only to appeal to the Chief of the Bureau of Yards and Docks."

Promptly after the sewer line break, Mr. Spearin notified the government that he considered the sewers under existing plans "a menace to the work" and he refused to resume work unless the government assumed responsibility for the damage that had occurred and either made such changes in the sewer system to remove the danger or to assume responsibility for any damage which might thereafter occur.

On Jan. 29, 1907, Mr. Spearin wrote to the Secretary of the Navy, stating: "You must recognize that the main point at issue is not as to who is responsible for what has occurred, but what is to be done for the future. Unquestionably a grave blunder has been made in the design of this sewer, and again in locating it where it is around the head of this dry-dock structure within the line of the natural slope of the excavation. Such conditions render it impossible for me to comply with your demand that I proceed with the work without modification of the sewer plan … We know now beyond a shadow of a doubt that this sewer is insufficient in size and strength for the work that it must do, and that it will be a constant menace to my plant, to the dry dock itself, and to the Government's surrounding property. I have no power to change the plan or location of the sewer, even if I would, nor can I bring myself to believe that it is the desire of your department to perpetuate this blunder by leaving this sewer as it is and where it is--a constant menace to the final success of this important work … I am therefore unwilling to resume work until this menace has been removed."

The estimated cost of restoring the sewer was just $3,875 (equivalent to $96,566 in 2018 dollars) but the government insisted that the responsibility for remedying existing conditions rested solely with the contractor. After 15 months of investigation "and fruitless correspondence," on Nov. 14, 1907 the Secretary of the Navy annulled Mr. Spearin's contract and took possession of the project and all materials on the site. Later the dry dock was completed by other contractors under "radically changed and enlarged plans," so as to remove all risk of the sewer line breaking again. Up to that time $210,939 had been spent by Spearin on the work, but he had only been paid $129,758.

Mr. Spearin filed suit against the government in the Court of Claims for $250,767, which included the unpaid contract balance of $144,839, plus lost profits under the contract of $105,928. The government, however, rejected the claim and argued that Spearin was only entitled to recover $7,908. In a 3 to 1 decision, the Court of Claims found in 1916 that if he had been allowed to complete the contract, Mr. Spearin would have earned a profit of $60,000 and the court awarded him a total of $141,181. One judge dissented and both parties appealed to the U.S. Supreme Court.

Mr. Spearin's contract contained the following clauses:

21. Contractor's Responsibility. The contractor shall be responsible for the entire work and every part thereof, until completion and final acceptance by the Chief of Bureau of Yards and Docks, and for all tools, appliances, and property of every description used in connection therewith.

25. Checking Plans and Dimensions; Lines and Levels. The contractor shall check all plans furnished him immediately upon their receipt and promptly notify the civil engineer in charge of any discrepancies discovered therein…The contractor will be held responsible for the lines and levels of his work, and he must combine all materials properly, so that the completed structure shall conform to the true intent and meaning of the plans and specifications.

271. Examination of Site. Intending bidders are expected to examine the site of the proposed dry dock and inform themselves thoroughly of the actual conditions and requirements before submitting proposals.

The Famous U.S. Supreme Court Ruling – and The Implied Warranty.

In its landmark decision, the U.S. Supreme Court held in Dec. 1918 (more than 12-years after the sewer line broke) that: "The general rules of law applicable to these facts are well settled. Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered." *U.S. v. Spearin*, 39 S.Ct. 59, 248 U.S. 132 (1918). Probably most important, however, was the following holding: "But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." Explaining that the government's actions constituted *an implied warranty*, the Court said: "But the insertion of the articles prescribing the character, dimensions and location of the sewer *imported a warranty that if the specifications were complied with, the sewer would be adequate*. This implied warranty is not overcome by the general clauses requiring the contractor to examine the site ***[See inset box],*** to check up the plans, and to assume responsibility for the work until completion and acceptance. The obligation to examine the site did not impose upon him the duty of making a diligent inquiry into the history of the locality with a view to determining, at his peril, whether the sewer specifically prescribed by the government would prove adequate. The duty to check plans did not impose the obligation to pass upon their adequacy to accomplish the purpose in view. And the provision concerning contractor's responsibility cannot be construed as abridging rights arising under specific provisions of the contract.

As of the date this paper was prepared, *Spearin* had been

(continued on p. 14)

Congratulations to Joshua Flowers, FAIA, Esq.!

Joshua ("Josh") Flowers, FAIA, Esq. will be received into the AIA College of Fellows at the National Convention in New York City in June. Josh is the General Counsel at HBG Design (Hnedak Bobo Group) in Memphis, a nationally-recognized leader in hospitality design. He currently serves as the 2018 President-Elect/2019 President of AIA Tennessee and a Past-President (2012) of AIA Memphis. Mr. Flowers was is a past recipient of the 2014 AIA National Young Architects Award as well as the Univ. of Tennessee Alumni Promise Award in recognition of his achievements and involvement in the community. He is the recipient of numerous other honors including the AIA Tennessee President's Award; Building Design and Construction Magazine's 2013 Top 40 Under 40; Engineering News Record Top 20 Under 40 and the Memphis Business Journal Top 40 Under 40 Award. He has been a leader at both the state and national levels designing and executing development initiatives for emerging industry professionals. As president of AIA/Memphis, his leadership helped create numerous programs that benefit the industry and the community. Mr. Flowers has also organized several programs that are helping to create groundbreaking social change and improved communities through design. As a graduate of both the College of Architecture and Design and the College of Law of The University of Tennessee, Josh Flowers, has had a unique and substantial impact on the practice of each discipline and on the citizens of Tennessee. He was involved in the design and construction of the Westin Beale Street, Metro 67 Apartments, Beale Street Landing and many other local and national projects for the firm. Josh Flowers, FAIA, Esq. was the 2015 Vice Chair of the AIA's

Joshua ("Josh") Flowers, FAIA, Esq.
Hnedak Bobo Group
Memphis, TN

National Young Architects Forum. As the 2013-2014 YAF Knowledge Director, Josh developed a career advancement educational track for the 2014 AIA convention focused on emerging professionals. Congratulations, Josh!

Spearin (cont'd from p. 13)

cited 2,934 times by other courts. Despite its age, the doctrine is still relevant today. In fact, the *Spearin* Doctrine was only accepted in Missouri last year, in 2017.

The Doctrine and Its Application.

At its core, a *Spearin* claim is a breach of contract action. In short, the *Spearin* Doctrine stands for the proposition that when a governmental entity includes detailed specifications in a contract, it impliedly warrants that: 1) if the contractor follows those specifications, the resultant product will not be defective or unsafe; and, 2) if the resultant product proves defective or unsafe, the contractor will not be liable for the consequences. The implied warranty is that the plans and specifications are "reasonably accurate," free from significant defects - though not perfect. Plans and specifications are considered "defective" if they are "so faulty as to prevent or unreasonably delay completion of the contract performance." In determining whether the government's plans and specifications are so defective as to provide relief to the contractor, the courts look at the cumulative effect of the alleged design errors. This is not simply a guarantee that a particular level of care and competency was used to create the plans, as in a lawsuit for negligence against a design professional. The *Spearin* warranty is much higher. "When the government provides a contractor with defective specifications, the government is deemed to have breached the implied warranty that satisfactory contract performance will result from adherence to the specifications, and the contractor is entitled to recover all of the costs proximately flowing from the breach."

However, the *Spearin* Doctrine is not merely a shield to protect the contractor from liability for building from defective designs. It can also be used to compensate a wronged contractor for damages. Compensable costs may include not only direct costs, but costs of delays that result from dealing with the defective design. Unlike some situations in which the government has a reasonable time to make changes before it becomes liable for delay, it has been that under *Spearin*, all delay due to defective or erroneous Government specifications are per se unreasonable and hence compensable." *Chaney & James Const. Co. v. U.S.*, 190 Ct.Cl. 699, 421 F.2d 728, 732 (1970); see also, *Daly Const., Inc. v. Garrett*, 5 F.3d 520, 522 (Fed.Cir.1993).

Performance Specifications.

Today, courts distinguish between design specifications and performance specifications. The distinction is important because the *Spearin* implied warranty does not extend to *performance specifications* which "merely set forth an objective without specifying the method of obtaining the objective." *Travelers Cas. and Sur. of America v. U.S.*, 74 Fed.Cl. 75, 89 (2006). If the defect is in *design specifications*, however, the contractor must fully comply with - and follow - the design specifications, although faulty, to receive the protections of the implied warranty, unless the departure from the specifications is "entirely irrelevant to the alleged defect." *Id.* In today's era of design-build, EPC and government projects where the public owner provides "bridging documents," consisting of preliminary outline specs and partial design, the *Spearin* warranty would still apply to the extent that the design-builder is required to use faulty information, even if only preliminary. For this reason, public owners need to understand that they do not completely shed all design risk by contracting for design-build if there are specified criteria or partial designs upon which the design-builder is entitled to rely. See the case below.

Spearin Doctrine Still Alive and Well

In a recent California case, two subcontractors sued a design-build contractor (Balfour Beatty) alleging breach of implied warranty under *Spearin*. One of the subs filed a motion for partial summary judgment seeking a declaratory judgment that the design-build contractor cannot shift legal responsibility for defective plans and specifications onto its subs. The project involved a $35 mil. design-build contract with NAVFAC to design and construct a hangar replacement. Balfour Beatty subcontracted with architects and engineers for the design work, and then provided those designs to the two subs for bidding, noting that they were incomplete. The subcontracts clarified that: "Subcontractor knowingly assumes the risk of further refinement of the plans and specifications associated with the design build process."

The sub argued that based on the *Spearin* Doctrine, a "contractor who, acting reasonably, is misled by incorrect plans and specifications issued by another contracting party as the basis for bids and who, as a result, submits a bid which is lower than he would otherwise have made may recover in a contract action for extra work necessitated by the incorrect plans and specifications." Balfour Beatty argued that *Spearin* does not apply here because in a design-build project, the plans and specs are expressly incomplete when the agreements are signed. The sub argued that it assumed the risk that the plans would be refined, not the risk that they would be defective. The court agreed that the *Spearin* Doctrine may apply to design-build projects, but the record was not sufficiently developed for the court to make that ruling. The motion was denied. *U.S. for the Use and Benefit of Bonita Pipeline, Inc. v. Balfour Beatty,* 2017 WL 2869721 (S.D.Cal. 2017).

MEMBER PROFILE: LAURA B. LoBUE, Esq.

Pillsbury Winthrop Shaw Pittman LLP
Washington, D.C.

Laura Bourgeois LoBue is one of our newest members. She is originally from Louisiana and attended college at the University of Louisiana at Lafayette. Laura started as an engineering major but, candidly admits, did not like the hours of her engineering classes so she transferred to architecture after her first year. "Little did I know the amount of time I put into my engineering work would pale in comparison to the hours I spent in the architecture studio!" she told us.

As to what led her into law, Laura said, "I think I was always destined to go to law school. As a child, I always saw myself as a lawyer when I grew up. Later, as I pursued my architecture degree, I think law school was always in the back of my mind. I recall a time in architecture school when a guest speaker gave a presentation on alternative careers for architects. 'Lawyer' was buried somewhere in the handout and I remember thinking I should file that away for later." After getting her architecture degree, Laura moved from her native Louisiana to Washington, D.C. to work for a large architecture / engineering firm there. After just a few months, she received a call from the principal of Page Southerland Page's D.C. office. "I had worked for Page's Houston office one summer while in architecture school, so I reached out to the principal of the local D.C. D.C. office in search of a job. He found a place for me on their team, so I made the move."

Lou and Laura, with daughter Paige (age four) and Lou IV (age one).

Following law school at The George Washington University Law School, Laura joined the D.C. office of Thelen Reid and Priest, where she had worked as a summer associate while in law school. "I realized very quickly that I had found an amazing group of attorneys in a premier construction litigation practice. A year later, Thelen declared bankruptcy. I moved with the entire group to another law firm, then a few years later, moved with a smaller group to Pillsbury, where I remain today."

Today, Laura is a partner in the construction litigation practice at Pillsbury Winthrop Shaw Pittman LLP, still working alongside some of the same attorneys who mentored her during summers in law school. "Hands down, the best part of my job is the people I work with. Not just my colleagues at the law firm, but clients and other people in the building industry that share the same appreciation for the design and building process," she told us.

In 2013, Laura married her high school boyfriend, Lou, after 20 years of friendship. The couple lives in Arlington, Va., just minutes away from Washington, D.C. by subway or car. They have a daughter, Paige, who turns four in August, and a son, Lou IV, who will turn one in August.

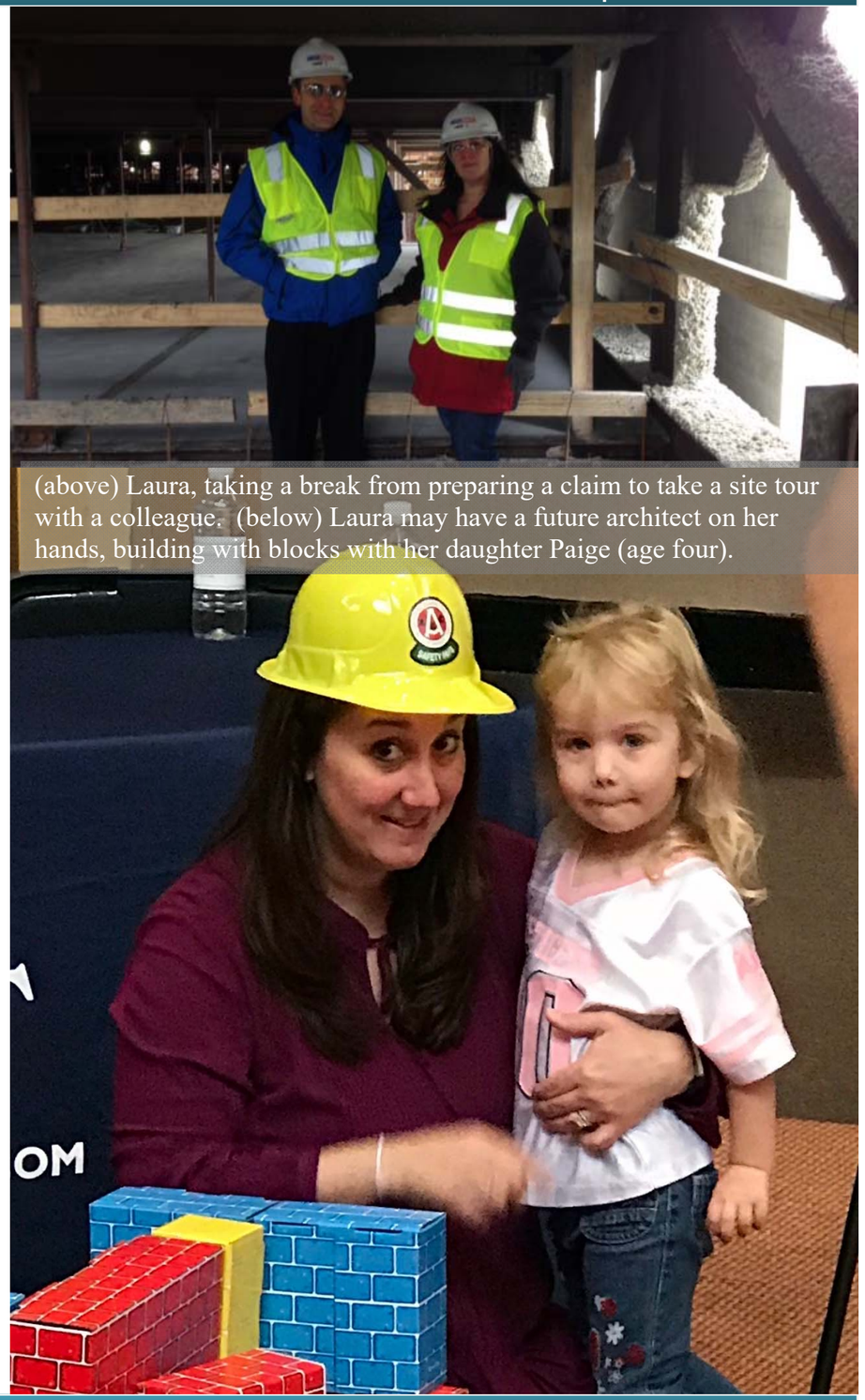
When not engaged in her busy law practice, Laura loves to travel, a bug she caught after graduating from law school, when she spent six wonderful weeks traveling around the world.

She is a member of Washington Building Congress, and involved with the Young Lawyers Alliance of the Legal Counsel for the Elderly. For the past three years (2014-17), Laura has been named a "Rising Star" by *Super Lawyers* for Washington, D.C. in the area of Construction Litigation.

Laura LoBue has represented clients in both jury and bench trials, as well as before U.S. government agencies, state and federal courts, and commercial arbitration panels.

Despite her Louisiana roots, Laura is hooked on the nation's capital. "I adore the National Building Museum. It's the first museum I became a member of when I moved to D.C. My family likes to visit for the exhibits, collections, and kid play areas. I am most inspired just sitting in the massive Great Hall."

What would she tell a young architect thinking about law school? "First, I say absolutely do it. Second, before you decide on any career path (walking away from one, starting another, combining the two), talk to people who have traveled that road before you. They may help you gain insight and perspective you didn't realize you needed."



(above) Laura, taking a break from preparing a claim to take a site tour with a colleague. (below) Laura may have a future architect on her hands, building with blocks with her daughter Paige (age four).

Oklahoma: Licensing Board Changes Cause Concerns.

The Oklahoma Board of Licensure for Professional Engineers and Land Surveyors (PELS) has issued proposed rules to implement recent statutory changes involving the engineering profession. Most significantly, at the instigation of the PELS board, design work for "significant structures" must now be completed by a licensed Structural Engineer (an "S.E."). A professional engineer ("P.E."), whether technically qualified or not, will not be able to seal a design of "significant structures" unless he/she also has an S.E. license.

The new regulations, Sec. 245:15-1-3, require that several categories of buildings will need structural design work to be performed by a Licensed Professional Structural Engineer as of Nov. 1, 2020. Oklahoma engineers have expressed concerns that the definition does not indicate what specific components or systems of "significant structures" must be designed by the licensed S.E.

Changes to Sec. 245:15-9-3, Responsibilities to the Public, has also caused concerns among local engineers because of a requirement in this section that places engineers in a position where they are effectively required to self-identify to a person that may have significant leverage over them, i.e. the Board, thereby discouraging necessary reporting of professional issues. The engineers argue that this is may inadvertently discourage necessary reporting of professional performance issues.

In addition to the S.E. issue, the Oklahoma board has added proposed Section 245: 15-17-2.c5(i), Use of Seal, which (among other changes) permits an Oklahoma engineer to seal design work prepared by an out-of-state engineer only if the unlicensed engineer "works in the same firm as the Oklahoma professional engineer" who seals the documents, after a full review. This practice is permitted in many states where a "successor licensee" is retained.

Finally, there is concern over statutory changes in Oklahoma, specifically Okla. Stat. 475.21, effective Nov. 1, 2017, which deals with engineering and land surveying by out-of-state firms. Under the revised statute, such firms can only offer or perform professional services in Oklahoma if "the firm has a professional engineer or professional land surveyor, respectively, designated as the managing agent in Oklahoma," and the engineer or land surveyor designated for this purpose "shall be required to spend a majority of normal business hours at one or more branch offices located in Oklahoma." The managing agent must also be an officer, principal, director or shareholder of the firm, with some exceptions.

Local engineers have expressed concerns that in recent years, many firms, specifically those with extensive field work and/or travel, have begun to move toward a "work from home" model for their licensed professional staff. Supervision for those subordinate engineers (P.E. at a minimum) is typically managed by a senior engineer who interacts with staff with routine in-person meetings and other forms of regular communication as well as regular technical and peer review of work performed. Under this growing business model, there is no specific "branch office" under which a designated "managing agent" would commonly be present. The local engineering association has urged the Board to develop language that provides greater flexibility in firm operations while requiring appropriate supervision to ensure compliance with statutes and Board rules to protect the safety, health, and welfare of the public.

As to the new "S.E." license, the Okla. Board is allowing "grandfathering" of P.E.'s who apply by Oct. 31, 2020. According to the Board website, all P.E.'s who have previously claimed their area of competence with this Board as "Structural with an S.E." must reapply to the Board in order to continue to use the "S.E." designation after Oct. 31, 2020. If not, the Board records will be revised to reflect "Structural without an S.E." and the engineer will no longer be allowed to perform structural engineering analysis and design services for so-called "significant structures."

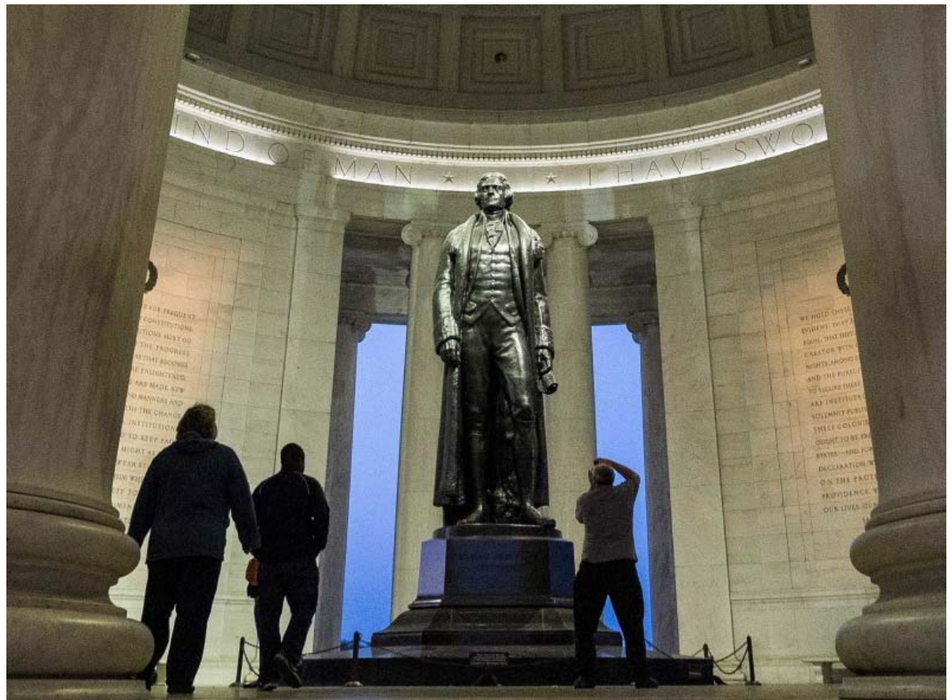
After soliciting comments, the Board was to hold a public hearing on March 29, 2018 at the Board offices to permit anyone to express views on the draft changes.

MISSISSIPPI: ENGINEER OWED NO DUTY TO CONTRACTOR

This lawsuit arose out of a project for a public water system in two counties in Mississippi. Triangle was the low bidder and Fouche was the public owner's project engineer. Although there was no direct contract between the contractor and the engineer, Triangle sued the owner and engineer for breach of contract, unjust enrichment or quantum meruit, breach of the covenant of good faith and fair dealing, and negligence, contending that the engineer was, in fact, a party to the construction contract. Upon project completion, the owner sent Triangle a check marked "Final Payment," but the check did not compensate Triangle for its alleged increased construction costs as a result of the delays or for alleged project expansion. Triangle conceded that it cashed the check, but argued that it repeatedly asserted to the owner (including in a letter sent to the engineer) that it did not consider the check to be final and that it would continue seeking the remainder of what it was owed. The defendants argued that the cashed check operated as an "accord and satisfaction" of the claims. The Court of Appeals agreed that under Mississippi law, "despite whatever contentions a party may make to the contrary, cashing a check marked 'final payment' constitutes an accord-and-satisfaction agreement, which precludes that party from bringing future claims for additional payment." Triangle argued that such a ruling cannot apply to the engineer, however, whose name was not on the check. The Court disagreed, stating that Triangle had argued repeatedly on appeal that the engineer had acted as the owner's representative or agent. "We refuse to allow Triangle to have it both ways. It cannot now argue that Fouche and [owner] are separate entities solely for the sake of its accord – and – satisfaction argument. Thus, we hold that Triangle's claims against Fouche are barred pursuant to the doctrine of accord and satisfaction."

On the direct contract claims against the engineer, the contractor argued that Fouche's company's seal was affixed to the contract's cover; and Fouche was designated as the project's engineer in the contract. However, the contract also stated clearly that the engineer's authority under the contract did not "create, impose, or give rise to any duty in contract, tort, or otherwise owed by [Fouche] to [Triangle]." The Court found that the engineer was not a party to the construction contract, even under the theory of "implied in fact." As to the tort claims against the engineer, the Court ruled that there was no evidence that Fouche owed any extracontractual duties to Triangle regarding the project. Summary judgment was affirmed.

See, *Triangle Const. Co., Inc. v. Fouche and Assoc., Inc.,* 218 So.3d 1180 (Miss. App. 2017).



The Work-For-Hire Doctrine

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What Is A "Work-For-Hire" Anyway?

For lawyers representing design professionals, it is important to have a basic understanding of copyright law. Design professionals are, traditionally, reluctant to give up ownership of their designs or drawings, including the copyrights. Several reasons exist for this. First, retaining ownership is a way to secure payment from a client, by preventing use or copying of the drawings until payment is made; second, there is expanded liability with each use of a design, so that restricting use of the drawings to a single project is a way to limit liability; and, third, a design that has market value (especially in the residential sector) can be sold over and over to new clients, such that the designer of a hot-selling plan might reap rewards for a clever plan layout or aesthetic design beyond the initial client for whom it was prepared.

The phrase "work for hire" (or the more cumbersome statutory phrase "work made for hire") refers to the doctrine in copyright cases dealing with ownership and authorship of the work in question when that work is created by an employee or an independent contractor. The doctrine dates to a 1903 U.S. Supreme Court case where the Court found that an employer owned the copyright to advertisements that had been created by an employee in the course of his employment. The concept is now codified in the U.S. Copyright Act.

Section 201(a) of the Act provides that copyright ownership "vests initially in the author or authors of the work." The "author" is generally deemed to be the person or party who actually created the work, i.e., the person who translates an idea into a fixed, tangible expression entitled to copyright protection. 17 U.S.C. § 102. The Act carves out an important exception, however, for "works made for hire."

If the work is created by an employee of a company (thus "for hire"), the Act states that "the employer or other person for whom the work was prepared is considered the author," and owns the copyright, unless there is a written agreement to the contrary. 17 U.S.C. § 201(b). This gives the architectural or engineering firm the rights to own designs prepared by their employees in the regular course of their employment. When we are dealing with commissioned architectural drawings, however, most often the architectural firm is an independent contractor (not an employee) of the client. As such, are the drawings subject to the work for hire doctrine? There has been considerable confusion on this topic. We can look to the Act, however, for clarity.

Limitations Under the Act.

Section 101 of the Copyright Act provides that a work is "for hire" under only two sets of circumstances:

1) a work prepared by an employee within the scope of his or her employment; or
2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, *if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire*. (emphasis added).

Reading that section carefully, there are only two situations when a work is "made for hire," i.e.: 1) when prepared by an "employee;" or, 2) when prepared by an independent contractor, "specially ordered or commissioned," but limited to specific types of works – and if there is a written contract specifically stating that the work is "made for hire." We will come back to this as it relates to architects and engineers.

The Standard AIA Forms.

As the U.S. Supreme Court has observed, "In a 'copyright marketplace,' the parties negotiate with an expectation that one of them will own the copyright in the completed work … With that expectation, the parties at the outset can settle on relevant contractual terms, such as the price for the work and the ownership of reproduction rights." *Community for Creative Non-Violence ("CCNV") v. Reid*, 109 S.Ct. 2166, 2178, 490 U.S. 730, 749 (1989). This can be seen in the standard AIA Owner - Architect Agreement, B101 (2017 ed.), which devotes an entire section (Article 7) to the topic of Copyrights and Licenses. Section 7.2 of the B101 states:

§ 7.2 The Architect and the Architect's consultants *shall be deemed the authors and owners of their respective Instruments of Service*, including the Drawings and Specifications, and shall retain all common law, statutory and other reserved rights, *including copyrights*. Submission or distribution of Instruments of Service to meet official regulatory requirements or for similar purposes in connection with the Project is not to be construed as publication in derogation of the reserved rights of the Architect and the Architect's consultants.

Clearly, the AIA (and all design professionals for that matter) want to protect the designer's work product, including the copyrights therein, for the reasons stated above. Par. 7.2 of the B101 form intentionally omits the phrase "work for hire," because for a work to be considered "made for hire", the Act expressly requires that the parties state, *in writing,* their intent that the work is "made for hire." If an architect agreed in writing that its drawings were "made for hire," the client/owner might attempt to assert ownership rights over the copyright just as if the architect were an employee. While not using the phrase "made for hire," the AIA forms are very specific, however, on who is the "author" and "owner" of the work, including copyrights – it is the architect.

Why Does It Matter?

In a 1989 U.S. Supreme Court case, it was noted that: "Classifying a work as "made for hire" determines not only the initial ownership of its copyright, but also the copyright's duration, § 302(c), and the owners' renewal rights, § 304(a), termination rights, § 203(a), and right to import certain goods bearing the copyright, § 601(b)(1). The contours of the work for hire doctrine therefore carry profound significance for freelance creators—including artists, writers, photographers, designers, composers, and computer programmers—and for the publishing, advertising, music, and other industries which commission their works." CCNV, 109 S.Ct. at p. 2171. Note that the Court did not mention either "architects" or "engineers" in this statement. The reason is quite simple. A work created by an independent contractor can constitute a "work for hire" only if it fits one of the nine narrowly drawn categories laid out in 17 U.S.C. § 101's definition of "works made for hire." Noticeably absent are "engineering" or "architectural" drawings. In a 2016 copyright case, the court stated simply: "Architectural drawings are not 'works for hire' under the Copyright Act," noting that it had been held by the Second Circuit Court of Appeals that, "drafting of architectural blueprints does not fit into any of the ... nine categories of 'specially ordered' work." *Nason Homes, LLC v. Singletary Const., LLC,* 2016 WL 6952257 (M.D. Tenn. 2016). In a 2008 copyright case, the project owner claimed to own the copyrights to the design prepared by an architect, under the work for hire doctrine. The court rejected this argument, however, noting that the AIA standard agreement does not make "even a veiled reference to works for hire, nor does [the] contract contain any language remotely suggesting an intention to establish a work for hire relationship." *Warren Freedenfeld Assoc., Inc. v. McTigue*, 531 F.3d 38, 48-49 (1st Cir. 2008).

In contract negotiations, lawyers representing A/E's should make clear that: 1) the designer retains the copyrights, and, 2) the A/E firm is an independent contractor. These two factors should negate any claim by the client that the design contract was a "work for hire," and that the client owns the copyrights.

Oddball Case Finds That Client Owned The Copyrights in an Architect's Work!

Contrary to what you just read on pp. 20-21 of this newsletter, courts do not always rule the way we think they should. A case in point is *Trek Leasing, Inc. v. U.S.,* 62 Fed.Cl. 673 (Fed.Cl. 2004). In that case, a developer (Trek Leasing) contracted with the U.S. Postal Service for the construction of a post office in Arizona and to lease it back to the government. The lease required Trek to "hire a licensed Architect/Engineer to adapt the design of the building to meet applicable local, state and national code requirements." Trek hired Mr. DeFilippis as its principal architect and project manager. The architect tendered an AIA B141 Owner-Architect contract to Trek, signed by both parties, which gave the architect ownership of the documents, including the copyrights. There was no mention of "work for hire" in the AIA contract. Litigation later ensued over ownership to the copyrights and whether Mr. DeFilippis was an "employee" or an "independent contractor."

In a rather bizarre holding, the court found that neither party considered the AIA form a binding, or even valid, agreement but only a formality. Therefore, the court ruled that the copyright clause was not binding. Further, the court found that the architect was, in fact, an "employee" of Trek (applying the 12-factor test in *CCNV*) who received a regular salary from Trek from which taxes were withheld. The result was that Trek owned the copyrights under the "work for hire" doctrine.

This case appears to be an aberration, however, based on the specific facts of the case and ordinarily we would expect a court to uphold an AIA-type copyright clause.

CONN.: CLAUSE IN ARCHITECT'S CONTRACT DID NOT BAR CLAIM

A city hired an architect for a school building project. The architect's scope included design of the mechanical systems, but also contained a clause that that the architect *"shall not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees."* The architect subcontracted the HVAC portion of its work to a subconsultant. When the HVAC system failed, the city sued the architect for breach of contract over the allegedly faulty HVAC design. Quoting from the contract, the architect moved to strike the breach of contract allegations, claiming they are really "negligence" claims and that the contract excluded liability for any subcontractor's work (i.e. the HVAC design defects). The court rejected this argument, stating that the contract "makes it clear that [the architect] is not responsible for the work the contract assigns to the contractor and its subcontractors." But it is possible that the term "subcontractors" referred only to the contractor's subcontractors, not the architect's own subcontractors. The contract required the architect to design an HVAC system and the court said, "It does not expressly assign the responsibility for HVAC to anyone else. * * * After all, if [the architect] was immune from liability for its own subcontractors it could escape all liability for work assigned to it under the contract merely by hiring subcontractors to do all of it." At this stage, the court had to construe the complaint in the light most favorable to the plaintiff and to resolve its doubts in favor of sustaining the complaint. Therefore, the court denied the motion to strike. The court said that its ruling "shouldn't startle any party to a contract: fulfilling a promise incompetently isn't fulfilling it at all. This complaint alleges a breach of contract, not merely negligence." See, *City of Bristol v. TSKP Studio, LLC,* 2018 WL 632291 (Conn. Super. 2018).

This statue of Mr. Jefferson at Hofstra Univ. has generated dualing petitions. See article on p. 23.

Jefferson City, Missouri Holds First "Jefferson Day" Event

Did you know the capital of Missouri is the only one in the nation named for President Thomas Jefferson? "Jefferson City" was so-named in 1821, when Mr. Jefferson was still living (he died in 1826). That name won out over the awkward runner-up "Missouriopolis." On April 30, 2018, the city will hold its first-ever Thomas Jefferson Day, hoping that the celebration will bring more attention to the president's accomplishments and the city's namesake. Organizers and sponsors of the first Thomas Jefferson Day said that they hoped local residents learned not only about Thomas Jefferson and his accomplishments, but also about the role he played locally. "I think it's to give respect and honor to the namesake of our city for his governing principles and impact on the country, this region and the state of Missouri," Ward 2 Councilman Rick Mihalevich said. "Jeff City" officials, businesses, organizations and schools hosted an essay and multimedia presentation contest to celebrate Mr. Jefferson's 275th birthday, in which students answered the question: *"Why Thomas Jefferson should matter today?"* The four winning essays and multimedia presentations — two from high school and two from middle school — were presented at the celebration, along with other entertainment that night, such as a Thomas Jefferson performer Patrick Lee. The winners took home a cash prize of $275 and a bust of Thomas Jefferson. "Anytime we have someone that has 275 years of history under their belt, I think there is something we can learn about from that person, whether it's Thomas Jefferson or someone else that had a significant role in the beginning of our country," said Jayne Dunkmann, of Jefferson Bank. "There's always something from our history that we can reflect on today that has made us the city we have become today."

Hofstra Univ. Students Split Over Removal of Jefferson Statue

While some in Missouri are honoring Thomas Jefferson, a rift is brewing in New York over the third U.S. president. Students at New York's Hofstra University have filed opposing petitions between those who want a Thomas Jefferson statue removed because Jefferson was a slave owner and those petitioning to keep the statue. The petition to remove the statue in front of Hofstra's Student Center had garnered 994 signatures as of our publication date. The bronze sculpture of a 71-year-old Jefferson was donated in 1999. A counter - petition seeks to protect the statue because of the many other things Jefferson did for the country despite his flaws. The petition to keep the statue had garnered 1,571 signatures as of the same date. Those in favor of removal argue that Jefferson wrote that "all men are created equal," but he reportedly owned more than 600 slaves over the course of his life. Hofstra administrators say that they "look forward to continuing a civil exchange of ideas and perspectives on the subject." According to a Hosftra University statement, the school will set up a meeting with the university president and other school officials to discuss the statue's future.

PEOPLE ON THE MOVE!

Jason Patrick Phillips, Esq., who was formerly with Hines, has changed firms. He is now with:
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Trevor O. Resurreccion, Esq. has left the law firm of Weil & Drage, APC, and is now with:
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Have you had a recent job change, or moved? Please let us know.

CLIMBING MOUNT KILIMANJARO!

My Trek to the Roof of Africa

By Sheri L. Bonstelle, Esq.
Jeffer Mangels
Los Angeles, CA

"It must be all attorneys on Kilimanjaro," the *Daily Journal* responded when we sent them an article on our trip. But, we did not see any other attorneys there. Known as the highest walkable mountain in the world, the journey draws people from every walk of life and every country on the planet.

We met a woman and her son from Israel, who were celebrating his bar mitzvah. We shared a rest stop with a group for 50 hikers from Belgium, who wore shorts and knee socks, while we were fully covered in our medium base layers and REI hiking pants. We took pictures with a group of students from China at the Lava Tower. We took selfies with Kristina Schou Madsen, a Danish trail racer, while she passed us each day on her altitude training runs. The day after we completed our 8-day hike to the peak, she set a female world record of 6 hours and 52 minutes.

At 19,341 feet, Uhuru Peak on Mt. Kilimanjaro is the highest point in Africa. It is also one of the most dangerous climbs, because of the altitude. According to our guide, 20 people died on the mountain last year and over 1,000 people had to be evacuated, primarily from acute mountain sickness (AMS). Above 15,000 feet, the dirt trail is lined with stretchers, which look like metal cages on a single large wheel without a breaking device – which our guides explained is the fastest way to get an ailing hiker down the mountain. With this ominous visual reminder, we carefully monitored our health status and watched out for each other.

Our nine-member group of friends from Los Angeles, who range in age from 27 to 68, had spent four months training together on local trails such as Mount Baldy and Inspiration Point. We included attorneys, staff and students in the legal profession from the firms of Jeffer Mangels, Garrett and Tully, and Munger. While we did share legal war stories on our 8-10 hours of hiking each day, we mostly talked about our families, our goals, and how we deal with adversity, and listened to each other's life experiences. We put the slowest hiker in the front as the pace setter, like a pack of wolves, so that we all stayed together. On Feb. 17, 2018, at around 5 p.m., we all reached the summit of Uhuru Peak. We were alone on the top, and spent an hour there looking out over the clouds below and watching the sun set.

Ask anyone who has been to Kilimanjaro, and they will say that the most important element of their team was their leader and the porters, who prefer the term "mountain crew." We had a 45-person mountain crew who travelled with us, and carried our tents, equipment, food, water and emergency oxygen. On the last two days, each hiker had an individual crew-member to guide us safely up the barranca wall, to carry our packs when we gasped for air, and to help us through the 5-foot deep snow on the way down to the crater. The crew shared stories about their lives, their children and their future dreams. Our leader, Maurice Oketch, who trained us on weekend hikes in Los Angeles, took care of our every need on the mountain.

(www.smsafaris.com). He coordinated all of the Tanzanian crew, including our local guide who employs more than 250 mountain crew on his treks, and fights for fair labor practices in the industry.

Mount Kilimanjaro has a barren beauty that often looked like we were on the moon. We took the long route from the Lemosho gate to help us acclimate slowly, as we hiked through the Montane forest, the Shira plateau, and the alpine desert on the way to the peak. But what I will treasure most are the people: our friends, the travelers we met, the local Tanzanians and our crew.

[Editor's Note: Mt. Kilimanjaro, is a dormant volcano in Tanzania, the highest mountain in Africa at about 16,100 ft. from its base to 19,341 ft. above sea level. The elevation at the Lemosho gate, where Sheri's team started their climb, was 7,800 ft. The first people known to have reached the summit of the mountain did so in 1889].

(Above) Sheri Bonstelle and the team climbing the barranco wall. (photo by Maurice Oketch); (Page 24) The team camp in the crater below Uhuru Peak. (photo by Sheri Bonstelle).

(Above) The team starting the hike on the second day with their first view of the peak of Kilimanjaro. (photo by Maurice Oketch);
(Below right) View of the receding glaciers on the way to the peak. (photo by Sheri Bonstelle).

(Above) The JMBM team at the summit on Uhuru peak (photo by Maurice Oketch).