

# BUILDING BLOCKS

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## AFFIDAVIT OF MERIT— DEFENDING ARCHITECTS & ENGINEERS AGAINST FRIVOLOUS CLAIMS

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Also known as a “Certificate of Merit,” this legal document is designed to limit frivolous (and costly in money and time) lawsuits against design professionals, by assisting attorneys in assessing the technical merits of a potential case, prior to filing suit. Statutes in various statutes require that, before filing a lawsuit against a design professional, a plaintiff’s attorney must first consult with another competent design professional to determine if the suit has merit. Architects and engineers (A/Es) many times are sued on a project that went afoul. In any case, the A/E may be totally without fault. Known as “shotgun” litigation, everyone involved on the project gets sued, no matter how frivolous the claim against the A/E may be.

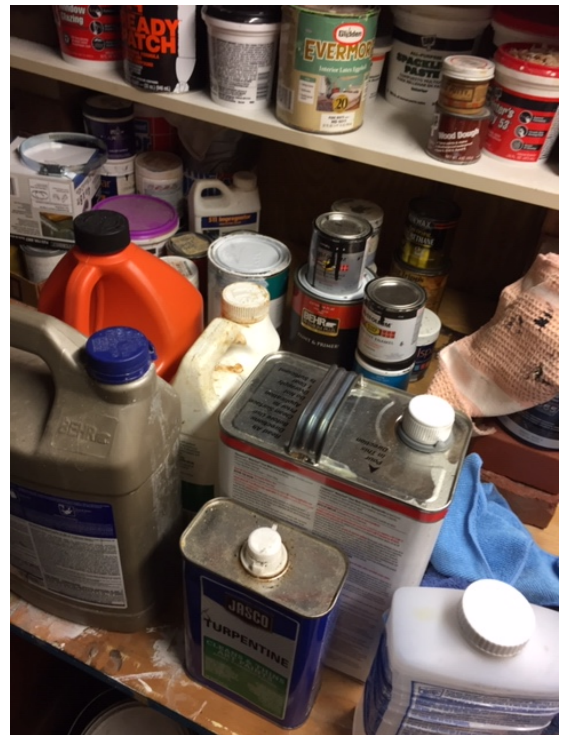
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## DISCOVERY LITIGATION & CASE STUDY

Without the benefit of an Affidavit of Merit or Certificate of Merit, design professionals and their insurers would be forced to undertake a defense against every frivolous claim coming their way. Being involved in litigation, from a design professional's perspective is no picnic. The early stage of litigation called "discovery" involves lawyers filing numerous pages of motions to the court, including requests for reviewing all documents in everyone's files (known as "production of documents"), requests for admissions, interrogatories, depositions where all the parties testify under oath about the facts of case, all with the hope that judge will dismiss the A/E after protracted litigated and expenses. A real case that I am familiar with:

*During the close-out of the construction of a building, the interior painting subcontractor had leftover solvents and materials that needed to be disposed of. The painter noticed through a window that a landscape subcontractor was operating a backhoe outside. The painter went outside and the two made a deal. The landscaper agreed to dig a hole, and the painter could pour of his solvents and unwanted materials in. In exchange, painter bought the landscaper a case of beer. Someone nearby saw the event, and blew the whistle. Litigation ensued, involving an environmental cleanup as damages to the building owner. Everyone got sued, including the architect, engineers and construction manager. The case settled in mediation, but basically everyone at the mediation table figuratively "threw some money into the hat at the center of the table," knowing that it was better to get back to their professions rather than staying into the case.*



*"Solvents & Unwanted Materials" Photo by Eric O. Pempus, DesignPro Insurance Group, 12.3.2021*

In the case above, the building owner's attorney figured that everyone would be become a defendant, and had either insurance or assets to cover the damages. The plaintiff's attorney may not have been familiar with the design and construction industry, nonetheless the claim was filed—and let the court figure out who was at fault. In that situation, early in the litigation, if the judge could have granted a motion of summary judgement, and dismiss the A/E out of the case—but did not. Judges do not like being reversed on an appeal of a granted motion for summary judgement (called a "dispositive motion"). On the other hand, the plaintiff's attorney may have been construction industry litigator. It did not matter. Everyone had to cut his or her losses and run.

Regardless, if the plaintiff had been required to file an Affidavit of Merit or Certificate of Merit against the architect, engineers and construction manager, and could not find a competent design professional to agree to sign the document, they would not have been in the case. The state where the project was located did not have a statute requiring an Affidavit of Merit or Certificate of Merit, so the architect, engineers and construction manager were joined into the claim.

## AFFIDAVIT OR CERTIFICATE OF MERIT STATE STATUTES

In order to deal with frivolous cases, some states have enacted a statute that requires a plaintiff's attorney to have an independent design professional review the facts of matter. If the facts have legal merit, the independent A/E can execute an affidavit, under oath, stating the "defendant(s) to be" are at fault, and the case may then move forward. The plaintiff's attorney would prepare such an affidavit or certificate. States that have a statute that requires an Affidavit of Merit or Certificate of Merit include California, Colorado, Pennsylvania, New Jersey, South Dakota, Oregon, Minnesota, South Carolina, Texas and Maryland. But beware, each states' technical requirements for filing an Affidavit or Certificate will vary state by state, so it wise for an A/E to confer with their legal counsel. That is an important point.

The filing of an Affidavit or Certificate would let an A/E know that another design professional felt that the case should move forward. On the other hand, the building owner (client of plaintiff's attorney) may be dissuaded from pursuing the case. Attorneys who take on a frivolous case, may end up being sued for malicious prosecution, and may be sanctioned by the court. Another consideration is that a one or two page affidavit may save the expense of an expert witness preparing a full-blown report, if there is no merit to the facts. Some expert witnesses ("**hired guns**") also provide the service of executing an Affidavit or Certificate.

<https://www.retrofestive.ca/ralphies-red-ryder-bb-gun-in-retro-box/>



## PROFESSIONAL JUDGMENT & STANDARD OF CARE

The independent A/E executing an Affidavit or Certificate (for that matter an expert witness) must be certain that they have exercised their professional judgment, within the standard care of their profession. Moreover, in accordance with their state licensing code of conduct, including a professional society that they are a member that has a code of ethics, may be sanctioned for manipulating or falsifying the facts in a design and construction project. Should a judge in a case determine that Affidavit or Certificate is insufficient and unmeritorious, the ruling could preclude the plaintiff's attorney for filing the case (called with prejudice).

## IN CONCLUSION

If your state has a statute relating to an Affidavit or Certificate of Merit, and you are faced with a claim, your legal counsel will have to work with you to mount your defense. If your state does not have a statute relating to an Affidavit or Certificate of Merit, an A/E may consider building into an agreement between themselves and their client language akin to an Affidavit or Certificate. However, many A/Es may be reluctant to start their relationship with their client with terms that may be pointing to a claim even before there is a dispute. Advocates for design professionals may approach their legislators with a proposed statute for an Affidavit or Certificate of Merit for their state.

## **About the Author**

*Eric O. Pempus, FAIA, Esq., NCARB has been a risk manager for more than 15 years with experience in architecture, law and professional liability insurance, and a unique and well-rounded background in the construction industry. He has 25 years of experience in the practice of architecture, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 34 years. As a Fellow of the American Institute of Architects and Chair/Hearing Officer of the AIA National Ethics Council, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals and architectural students in various venues across the United States and Canada.*

*The above comments are based upon DesignPro Insurance Group's experience with Risk Management Loss Prevention activities, and should not be construed to represent a determination of legal issues, but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.*

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12:00 – 1:00 pm EST



### ***“Ohio Land Use Law & Eminent Domain for Building Professionals”***

June 21, 2021 – 8:30 am – 4:30 pm

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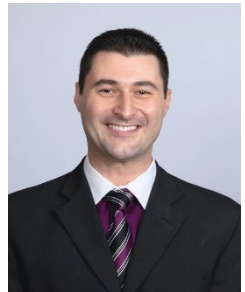
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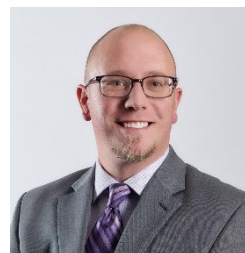
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