CAVIGNAC & ASSOCIATES
INSURANCE BROKERS

JULY 2019

A Dozen Steps to Avoid Third-Party Liabilities

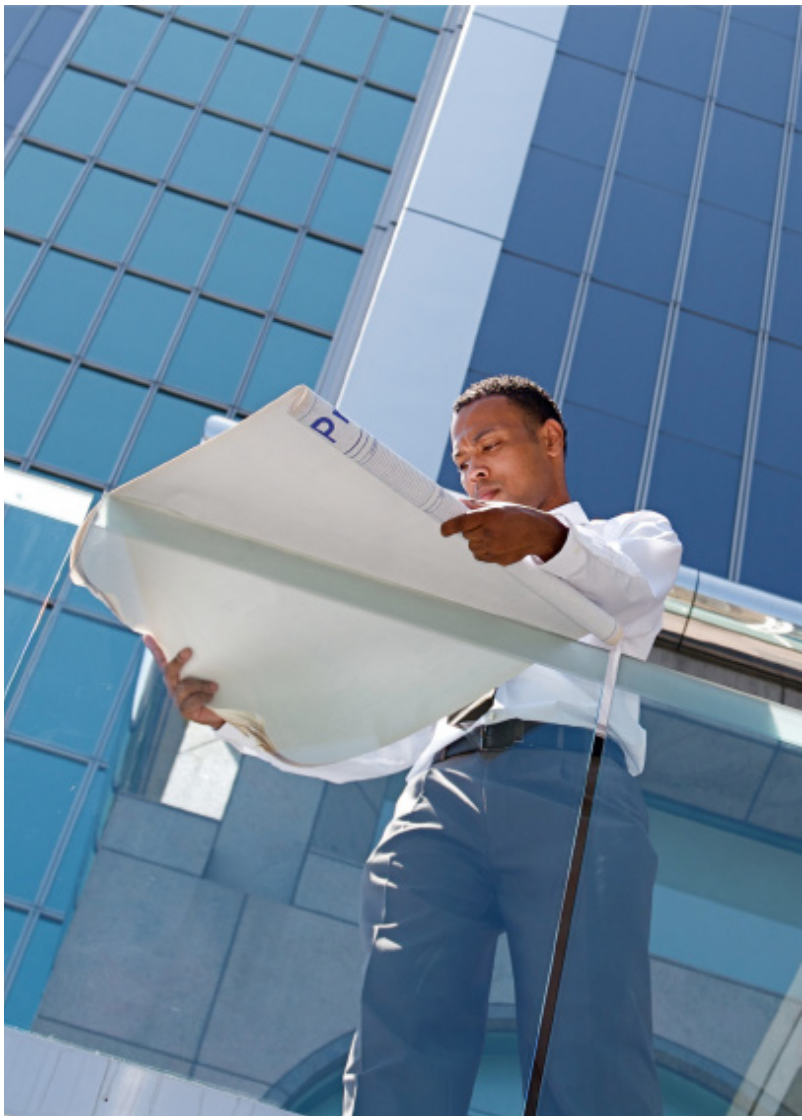
Article courtesy of Professional Liability Agents Network

Architects, engineers and other design professionals have long enjoyed the legal concept of "privity of contract." Put simply, privity of contract is a common law principle that prevents any person from seeking the enforcement of a contract or suing on its terms unless they are a party to that contract. Each party owes a duty of care only to those with whom it has a contract. Generally, a contract cannot confer rights or impose obligations upon anyone who is not a party to the contract.

Not surprisingly, privity of contract is not absolute. Over the years, this legal principle has been gradually eroded by the courts. Judges and juries have ruled that third parties can indeed successfully sue a design professional (or other service provider) for damages even though they are not parties to a contract. Contractors, subcontractors, vendors and building occupants are among those third parties who have successfully claimed damages against design firms.

Here are some example court cases upholding privity of contract:

- A U.S. District Court in Pennsylvania ruled that an engineer did not have a duty to warn the public or government agencies when it discovered toxic beryllium during tests on a jobsite. The court found it sufficient that the engineer warned its client per their contractual agreement.



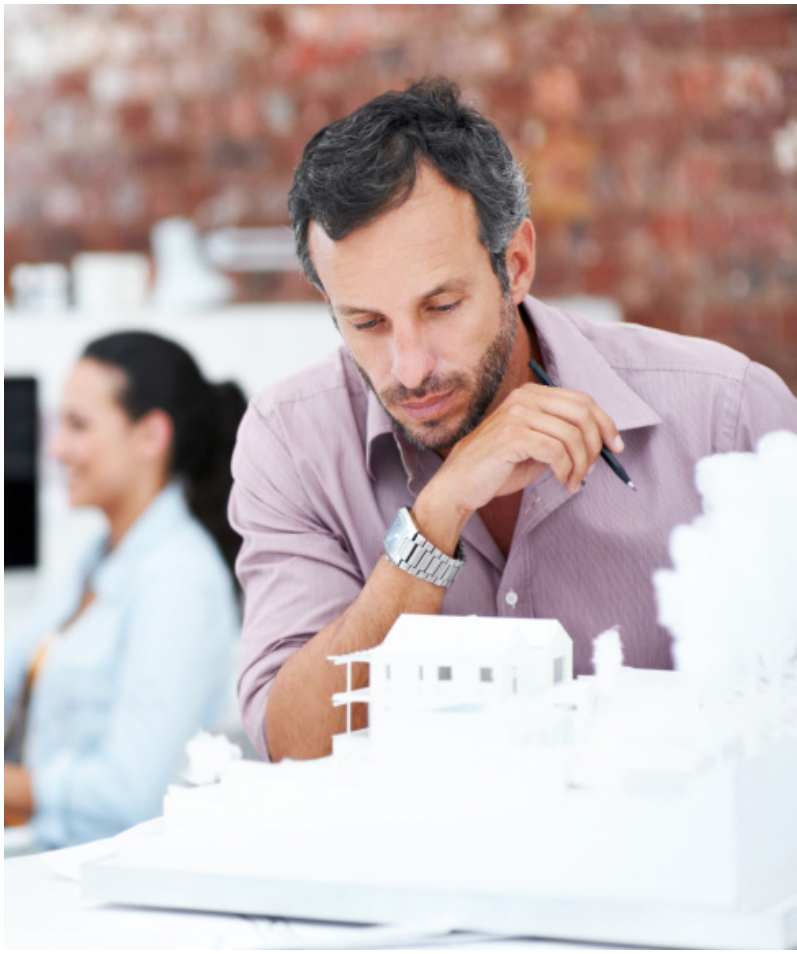
- A Court of Appeals in Texas ruled that an architect was not liable when a person was permanently injured when a residential balcony designed by the architect collapsed due to faulty construction. The court noted that the architect 1) did not have control of nor guaranteed or was responsible for construction, 2) did not notice the defect and 3) was only responsible to report known deviations to the client.
- The Supreme Court of Utah ruled that a subcontractor could not seek damages against

an architect because of alleged design errors that resulted in the subcontractor having to file numerous requests for information and change orders, and incurring significant delays and cost overruns. The court said that the general rule in the jurisdiction prohibiting the recovery of pure economic loss due to negligence applies to a contractor's or subcontractor's claim against a design professional.

And here are two cases, where privity of contract was not upheld:

- The Massachusetts Supreme Court ruled that an architect was subject to a third-party claim when an airport hotel worker was electrocuted while attempting to repair an electric transformer. The Court noted that the architect failed to ensure that the contractor applied warning signs and wiring diagrams it had specified in the design documents, and, due to the seriousness of the risk, could be sued by decedents of the electrocuted worker.
- In one of the most far-reaching and recent rulings regarding third-party liabilities, the California Supreme Court upheld a Court of Appeals decision that a lead architect owed a duty of care to members of a homeowners' association of a condominium complex it designed. The Supreme Court confirmed that the third-party liability applied to purely economic damages even where there is no contractual relationship between the residents and the designer. The Court reached this decision even though the architect's contract with the client expressly disclaimed the existence of any third-party beneficiary of the obligations contained in the agreement.

If these court cases demonstrate anything it's that court decisions are all over the board regarding third-party liabilities for design firms. However, decisions made within individual states and provinces tend to fairly consistent. For instance, the states of Missouri, Virginia, Utah and Texas tend to support privity of contract, whereas California and Massachusetts do not. It's important to investigate



the history of court cases in the jurisdictions within which you conduct business and do what you can to enhance your chances of avoiding third-party liabilities.

Avoiding Third-Party Liabilities

Regardless of the jurisdictions in which you operate, there are common sense steps you can take in your attempt to limit third-party liabilities. While there are no guarantees these steps will eliminate these liabilities, they are all worth discussing with your attorney and addressing in your client contracts.

1. **Include a third-party or "intended beneficiary"**

clause in your client contracts. Set expectations by having a clause stating that you and your client agree that your firm has no contractual relationship with contractors, subcontractors, vendors and other appropriate third parties. Also state that your services are intended for the sole use and benefit of your client and are not intended to create any third-party rights or benefits for any other person or entity. Such a clause may not be enforceable in all jurisdictions, so check your prevailing laws.

2. **Include a carefully defined and "closed" scope of services clause in your client contract.** It is important to list all of the services you agree to perform for your client's sole benefit and then note that your services are limited to those set forth in the agreement. State that you shall have no other obligations or responsibilities beyond those listed.

3. **Consider offering construction observation services as part of your scope.** Performing these services gives you the opportunity to address the contractors questions and concerns, spot potential problems early in the construction process and document your observations and recommendations for your client. If your client refuses your offer to provide construction observation services, document that fact, including your client's signed acknowledgement that such services were offered but turned down. Seek an indemnity when providing design without contract administration/construction observation services.

4. **Emphasize to the client the importance of contractor selection and offer to take part in the process.** Contractor prequalification helps ensure that the selected contractor has the experience needed to performed the required services on the project. It can also help identify whether the contractor has a history of being litigious against project owners or lead designers. A pre-

Risk Management Seminar Series

Cal-OSHA Permits: Simple Steps to Successfully Obtaining Required Permits *(Project, Annual, Scaffold, etc.)*
Wednesday, July 10th - DOWNTOWN
7:30am Registration
8:00am - 10:00am Program

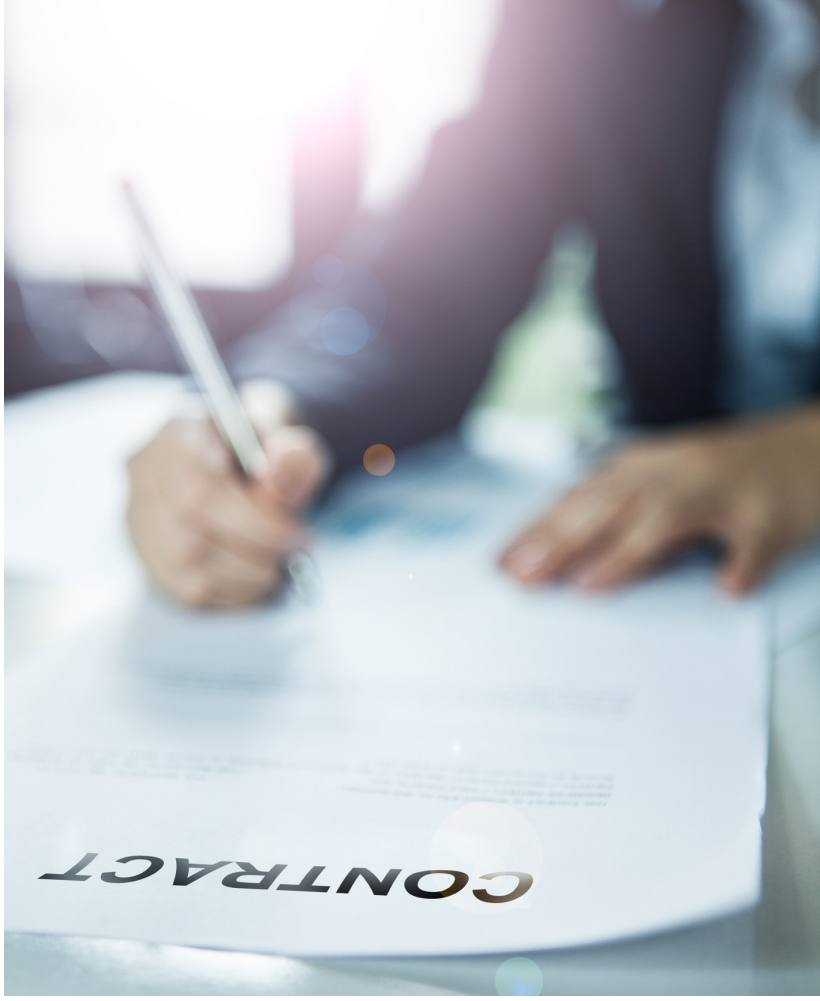
Sexual Harassment Prevention Training
Wednesday, July 31 - DOWNTOWN
7:30am Registration
8:00am - 10:00am Program

Human Resources Tools for Supervisors
Wednesday, Aug. 28th - DOWNTOWN
7:30am Registration
8:00am - 10:00am Program

To register, click on the 'register now' button in the announcement email, or contact Bethany Mongold at Mongold@cavignac.com or call 619-234-6848.

bid meeting among the owner, contractor and lead designer gives you the chance to answer any design questions a contractor may have and help eliminate potential misunderstandings and mistakes.

5. **Make it clear in your contract that you are not responsible for construction means and methods nor jobsite safety, and that these are the sole responsibility of the contractor.** Put it in writing that the contractor has all responsibility for construction means, methods, scheduling, sequencing, jobsite safety and compliance with construction documents and directions from the project owner. Suggest that your client include a similar clause in its contract with the contractor confirming its responsibilities. Make sure your actions on the jobsite support the fact that you are not responsible for construction.



6. **Include a modification clause in your client contract.** Specify that you are not responsible for any damages, including those to third parties, resulting from modifications made to your design or specified materials by a construction manager, value engineer or other party to the project selected or approved by the owner.

7. **Require all subconsultants you and your client have selected and approved for the project to be appropriately qualified and to have adequate professional liability insurance.** Speak with your attorney about requiring subconsultants to indemnify you and the client. Similarly, encourage your client to require the contractor and subcontractors to have adequate liability insurance. If you are the only "deep pockets" on the design and construction team, you become a primary target for a claim and dramatically increased your third-party liabilities.

8. **Manage and limit shop drawing reviews.** Some contractors have been known to inundate lead designers with shop drawing reviews, resulting in a slowdown in construction and eventual claims for delays from contractors, subcontractors, vendors and other third parties. As much as you can, put limits on your shop drawing responsibilities. Set guidelines on what type of shop drawings you agree to review and have the contractor comply with an approved submittal processes per a reasonable schedule.

9. **Beware of diminution of value when providing conditions surveys.** When providing conditions surveys for a client seeking to purchase a piece of property, you may face a claim from the property's current owner if your survey uncovers a condition that reduces the value of the property. To avoid this liability, have your client seek protection for the both of you by having the property owner agree to waive any claim regarding a loss of property value due to the discovery of conditions.

10. **Avoid certifications and guarantees to third parties.**

Third parties to a project, such as a bank or other lender, may ask the lead designer to certify that certain conditions are met regarding the project -- e.g., that an existing structure meets current codes. Whenever possible, avoid giving such certifications, which can be interpreted as guarantees. Instead, only give an "opinion" that such conditions have been met. Qualify your opinion to make it clear that you are not guaranteeing or warranting that a condition exists.

11. **Avoid condominium projects.** Perhaps nowhere is third-party liability more of a threat than with condominiums and other multi-unit residential complexes. Consider: A design team provides its services to a condo developer. Months or years later, often after the developer has been dissolved, a homeowners' association and its team of attorneys goes after the design team when alleged shoddy materials and workmanship come to light. Those designers with the biggest assets often become the prime targets in a claim.

Third Party Reliance Letters

Our twelfth tip for avoiding third-party liability deserves special attention because it represents a growing concern for today's design firms. We are seeing more and more requests for design firms to provide reliance letters to third parties.

What is a reliance letter? It's a document that gives a third party the right to rely upon the accuracy of a survey or report originally prepared for someone else. For instance, a developer may hire an environmental consultant to conduct a Phase 1 site assessment on a piece of property it is considering purchasing for a project. A lender who is potentially providing the developer a loan to fund the purchase of the property may request a reliance letter from the consultant. The letter would give the lender the right to rely on the accuracy of the site assessment report in making its decision to provide funding.

The increase in liability is obvious. Suddenly you have a written document that is essentially a contract with the lender. You no longer have the protection provided by privity of contract. What was traditionally a third party is now a client.

The obvious solution to preserve the privity of contract theory would be to refuse to provide reliance letters. In some situations, you can refuse such requests and the project goes on uninterrupted. In other situations, however, you may find it preferable to help your client and provide them the assistance they request to secure financing or otherwise move the project forward.

If you do decide to provide reliance letters, it is crucial that you and your legal representative take control of the process and establish the content of the letter according to your terms and conditions. You need to identify the exact surveys or reports the reliance letter applies to and establish limitations regarding who can use the report, how the report can be used and for how long.

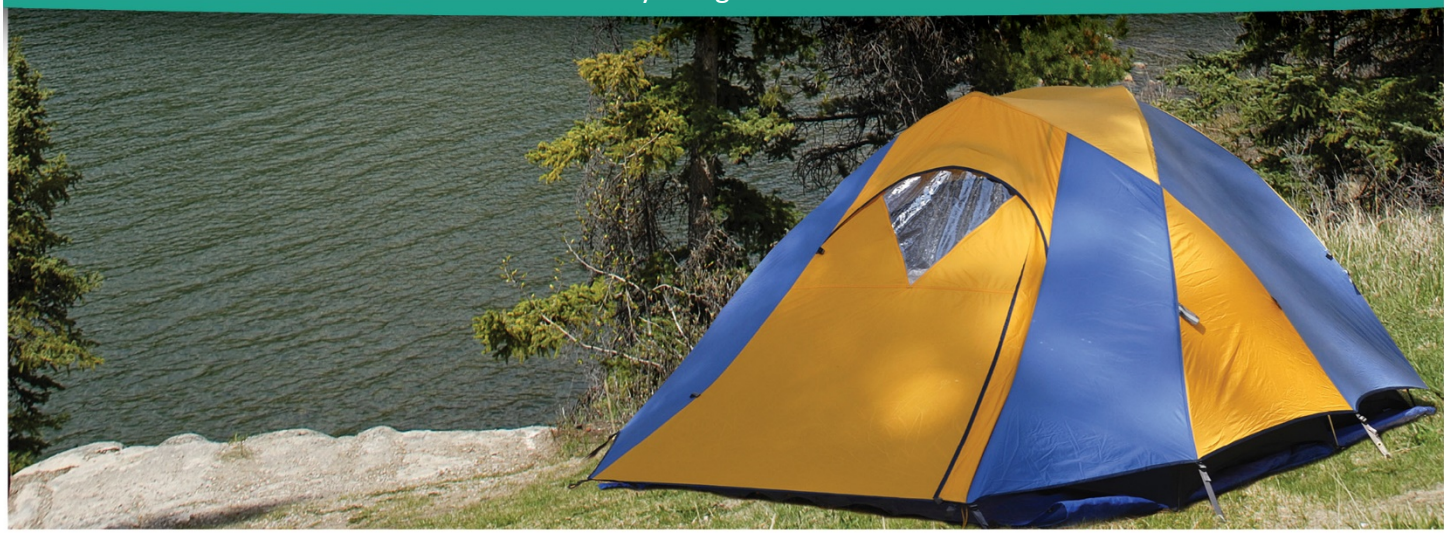
In the reliance letter you should establish that you exercised reasonable skill and strove to meet the prevailing standard of care in executing the survey or report. You need to maintain all of the protections that you set forth in your original contract with your primary client, including specific statements that you do not warrant nor guarantee that your report is 100% accurate and is only an opinion based upon limited information and testing.

Also, speak with your insurance agent or broker to verify that the reliance letter does not create any uninsurable liabilities. Finally, if you do decide to issue a reliance letter, charge an equitable fee that reflects your time invested and a potential increase in liabilities.

Live Well, Work Well

July 2019

Health and Wellness Tips for Your Work and Life
Provided by Cavignac & Associates



Going Camping? Here's the Rundown of What You Need to Know

As the temperatures rise and the days become longer, many Americans will head out on camping adventures. Whether you're a seasoned camping pro or new to the activity, it's always a good idea to review camping safety tips.

Don't Forget to Pack the Essentials
Before setting out, it is important that you remember to pack things like fresh water, food, a first-aid kit, matches, insect repellent, extra clothing and a waterproof tent.

Think Twice Before Pitching Your Tent
It's important to carefully consider where you're setting up camp. Avoid low-lying areas that could flood during a heavy rain. Also, in windy conditions, avoid setting up your tent under a tree, as possible falling limbs could present a danger.

Campfire Safety
If you're not careful, a campfire can quickly become dangerous. Keep the following tips in mind to stay safe:

- If possible, surround the fire pit with rocks, and keep a bucket of water nearby.
- Do not build the fire near the tent(s) or anything else flammable.
- Never leave a fire unattended, and ensure it is completely out before going to bed.
- Collect firewood from the ground only, never cut into living trees.

Prioritize Safety Over Fun
To keep the experience fun and safe there are some basic precautions that every camper should take. What's discussed here is just the beginning of camping safety. For more information on how you can remain safe on your trip, click here.

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Cucumber Blueberry Salad

Vinaigrette:
1 ½ Tbsp. extra virgin olive oil
2 Tbsp. white balsamic vinegar
1 Tbsp. lime juice
1 tsp. sugar
¼ tsp. salt
⅛ tsp. pepper

Salad:
1 cup fresh blueberries
1 medium cucumber (chopped)
4 cups fresh arugula
¼ medium red onion (thinly sliced)
¼ cup crumbled reduced-fat Feta cheese
2 Tbsp. walnuts (coarsely chopped)
4 slices whole-grain bread

Preparations

1. In a small bowl, whisk together vinaigrette ingredients.
2. In a large bowl, mix together all salad ingredients, except bread.
3. When ready to serve, add vinaigrette to salad and toss.
4. Toast bread and then cut into four pieces.

Makes: 4 servings

Nutritional Information (per serving)

Total Calories	212
Total Fat	10 g
Protein	7 g
Carbohydrates	24 g
Dietary Fiber	4 g
Saturated Fat	3 g
Sodium	368 mg
Total Sugars	10 g

Source: USDA

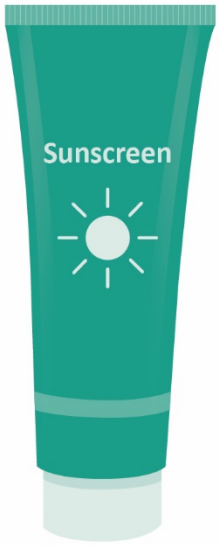
Sunscreen and You

To avoid the damaging effects of the sun's ultraviolet rays, we're often advised to wear sunscreen whenever we go outside. And, with skin cancer being the most common type of cancer in the United States, wearing sunscreen is of the utmost importance.

Recent changes mandated by the Food and Drug Administration have made sunscreen selection a lot easier. Under the new rules, sunscreen can only claim to reduce the risk of skin cancer and early skin aging if it is both broad-spectrum and has an SPF of 15 or higher.

Sunscreen that is not broad-spectrum or has an SPF of less than 15 can only claim to prevent sunburn and must include a warning stating it cannot prevent skin cancer or early aging. Sunscreen products also can no longer claim to be waterproof, only water-resistant, and labels must note a time limit of either 40 or 80 minutes before the sunscreen is ineffective.

For more information on sunscreen, visit the American Academy of Dermatology's website.



Did You Know?

The average adult needs to use **1 ounce of sunscreen** every time they apply it to adequately cover their body.

This is roughly equivalent to the amount needed to fill a standard shot glass.

Wearable Tech and Your Health in 2019

In the past few years, wearable fitness technology has become increasingly popular and advanced. Some models are now even capable of generating an electrocardiogram that can detect irregular heart rhythms. With their widespread popularity, you may be wondering if they do any good for you and your health.

Wearing these trackers can be beneficial for your overall health. And, a fitness tracker can be especially useful for monitoring progress with a new exercise routine or weight loss program. They can count steps, monitor heart rate, add up calories and even track sleep. A number of options are available to accommodate a wide variety of budgets and fitness goals.

Whether you're just starting out on a healthy living journey or are well on your way, using one of these widely available fitness trackers may be beneficial for you.

Cavignac & Community

Cavignac & Associates is proud to support local and non-profit civic organizations, including the Monarch School:

monarch school

education. opportunity. transformation.

Monarch has served San Diego for over three decades, beginning as a one-room education center and expanding into a K-12 comprehensive school designed to educate homeless youth.

There are more than 1.2 million homeless students across the country and 23,000 in San Diego County alone.

Sandra McBrayer founded the school in 1987 recognizing the need to get homeless youth off the streets and in school. She was later named Teacher of the Year by President Bill Clinton for her work.

For more information, go to www.onarchschools.org