WELCOME TO
HALL & COMPANY
AE RESOURCES WEBINAR

Yours, Mine, and Ours... Who’s Responsible For That Design?

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Course Description

Allocated Design, Collaborative Design, Delegated Design, Integrated Design and Shared Design:

The sophistication of modern building envelopes and systems, and new project delivery systems, have increased the number of contributors to a project’s design and created a complex web of relationships among them. In this course, we will help you to identify and manage (by avoidance or control) the risks created by these developments of modern design.
Learning Objectives

Participants in this course will learn:

• Common Scenarios of Delegated and Shared Design Responsibility
• Concerns Raised by Delegated/Shared Design Responsibility
• Principal Factors Determining Responsibility (and Liability) for Design
• Alternative Sources of Project Design

Common Scenarios of Delegated and Shared Design Responsibility

- Prime Design Professional delegates responsibility for portions of project design to subconsultants.
- Design Professional delegates responsibility for design of project elements, systems or products to a contractor or vendor.
- Integrated Project Delivery (IPD) team shares responsibility for preparation of design through collaboration.
- Design/Builder delegates the design of project to an architectural or engineering firm.
- Multiple design professionals separately retained to provide design for project.

Concerns Raised by Delegated/Shared Design Responsibility

• Compliance with professional licensing laws
• Potential liability to client, other project participants and third parties
Principal Factors Determining Responsibility (and Liability) For Design

- The party that is the source of the design
- The provisions of licensure laws for design responsibility
- The contractual provisions establishing the duties and rights of the project participants and contributors to the design
- Case law interpreting each of the foregoing

Alternative Sources of Project Design

- **Sole Design:**
  - Design prepared by a single party who has sole contractual responsibility for the adequacy of the design

- **Allocated or Delegated Design:**
  - Design prepared by a single party to whom responsibility for preparation of design has been delegated, but another party has contractual responsibility for the adequacy of the design

- **Collaborative or Shared Design:**
  - Design prepared by the collaborative or shared efforts of a number of parties, but only one party may have contractual responsibility for the adequacy of the design

Fundamental Considerations

- When must you/may you sign and seal design documents?
- What are the implications of signing and sealing (or not signing and sealing) design documents?
- Can you avoid the implications of signing and sealing a design document, especially when it contains designs that were not prepared by you?
- Under what circumstances are you responsible for a design prepared by you in a design document signed and sealed by others?
THE BASICS

Pennsylvania’s Architects Licensure Law¹

1. Other states’ laws, while based on the need to protect the public’s health, safety and welfare, do so through rules and regulations that might significantly differ from one another. We recommend you consult local counsel to determine how the scenarios we discuss here would be handled in other states.

What Is the Practice of Architecture?

The “Practice of Architecture” is defined in Pennsylvania, in relevant part, as follows:

“The rendering or offering to render certain services hereinafter described, in connection with the design and construction of a structure or group of structures which have as their principal purpose human habitation or use, and the utilization of space within and surrounding such structures ...”

63 P.S. §34.3
Licensure Required To Practice Architecture

...no individual shall engage in the practice or offer to engage in the practice of architecture in this State, or use the title of architect or use any sign, card or device implying that such individual is an architect, or is competent to engage in the practice of architecture unless such individual holds a currently valid certificate issued pursuant to this Act.

63 P.S. §34.10

Proof of Licensure

THE CERTIFICATE
...upon payment of the fees required ... an individual who has complied with Section 8 or 9 [of the Act] shall be entitled to a certificate indicating that he is qualified to engage in the practice of architecture in this Commonwealth. Each certificate shall contain the name of the individual to whom it was issued and shall be valid for a period of two years.

63 P.S. §34.10

THE SEAL
Every architect shall obtain a seal approved by rules and regulations promulgated by the Board and shall impress that seal on drawings, specifications and other design documents prepared by the individual or under the architect's personal supervision for use in this State.

63 P.S. §34.11

Permitted Practices

Only a sole practitioner licensed to practice architecture or a firm authorized by the Commonwealth to engage in the practice of architecture may contract or provide architectural services

• Each Project undertaken by a firm engaged in the practice of architecture must be under the personal supervision of a:
  –Partner in the case of a partnership or LLP
  –Member of the Board Of Governors in the case of an Association
  –A Shareholder in the case of a Professional Corporation
  –A Director in the case of a Business Corporation
  –Member or Manager in the case of an LLC.

• That individual must hold a certificate to engage in the practice of architecture – and the seal of that individual must appear on all drawings, specifications and other design documents issued by the firm for such projects - 63 P.S. §34.14(i)

• The licensure law permits a firm not organized as an architectural entity to offer design-build services if it meets four requirements
Permitted Practices: Design-Build

The PA licensure law permits a firm not organized as an architectural entity to offer design-build services if it meets four requirements:

- The design-build entity independently selects or is selected by the client to provide design and supervision services.
- The design-build entity is responsible for all material aspects of the practice of architecture.
- The architect (or another person responsible for the design-build entity) will be engaged and contractually responsible to the design-build entity and, not the client.
- The contract between the design-build entity and the client is in writing, signed by the architect (or another person responsible for the design-build entity) for providing architectural services.

Architect Of Record

A well-used term:

- Not defined in the Act
- Not defined in the Chapter 9 Regulations issued by the Licensure Board to regulate the practice of architecture
- Not defined in any of the AIA Standard Forms of Agreement

Implications of the Use of the Seal

(Pennsylvania Architects)

- When architect issues final or complete documents for a client, or when an architect submits the final or complete documents to public or governmental agencies for final review, the seal and signature of the architect who prepared or personally supervised the preparation of the document shall be prominently displayed on the first page.
- Architect may not affix or permit a seal or signature to be affixed if the architect has transferred the translation of the seal or signature to another person.
- Architect may not affix or permit a seal or signature to be affixed if the architect has delegated, or to someone else another person to make a provision of the translation of the seal or signature.
Use of Seal: Multiple Architects
(Pennsylvania)

The Architects Licensure Law does not address the use of seals when multiple architects are involved in the preparation of design documents to identify the contribution of each architect.

In the absence of such authorization, it is not clear whether multiple seals can be impressed on a single design document to indicate each architect's particular contribution to the document. The Philadelphia Administrative Code seems to acknowledge that multiple architects could seal a permit set of design documents.

Use of Seal: Multiple Engineers
(Pennsylvania)

Pennsylvania’s Engineer Registration Law provides for the use of multiple seals when multiple engineers are involved in the preparation of design documents.

When multiple engineers prepare or direct and control the preparation of documents, each engineer's seal shall appear on the first page of the documents. 49 Pa. Code §37.59

In the alternative, the engineer's seal must appear on the identifiable portion or sections of the documents which were prepared or directed and controlled by the registrant. If the respective registrant's direction and control can be reasonably segregated 49 Pa. Code §37.59

“Responsible Charge” – Engineers (Pennsylvania)

- The phrase “responsible charge” is used in the Engineer Registration Law in respect to the signing and sealing of documents in the same way as the phrase “personal supervision” is used in the Architects Licensure Law.
- In contrast to the Architects Licensure Law, the Engineer Registration Law provides a definition for “responsible charge”:
  “Responsible Charge” means a position that requires initiative, skill and independent judgment, and implies such a degree of competence and accountability gained by technical education and experience of a grade and character as is sufficient to qualify an individual to personally and independently engage in and be entrusted with their work involved in the practice of engineering — This term does not include positions of routine performance of sub-professional work such as auxiliary survey personnel (unless acting chief of party) and drafting personnel.

63 P.S. §34.3
“Responsible Charge” – Engineers (New Jersey)

New Jersey’s licensure law for engineers also uses the term “responsible charge” in respect to enforcing that firm control or supervision of the work that goes beyond just the signature of an Engineer-In-Record. If not handled properly, the failure to maintain appropriate control over the design documents that do not qualify as the exercise of “responsible charge”

• The regular and continuous absence from principal office premises from which professional services are rendered
• The failure to personally inspect or review the work of subordinates where necessary and appropriate
• The rendering of a limited cursory or perfunctory review of plan or projects
• The failure to personally be available on a reasonable basis or with adequate advance notice of a consultation and inspection

Implications of the Use of the Seal (New Jersey)

New Jersey’s engineer licensing law defines the implications of signing and sealing documents more specifically than does Pennsylvania’s law:

The application of the signature and seal of the documents relating to the practice of professional engineering … shall indicate that the licensee has provided regular and effective supervision to those individuals performing services which directly and materially affect the quality and competence of the engineering …

The signature and/or seal signifies that the licensee takes professional responsibility for the document based upon the accepted standards of practice in place at the time the documents were sealed.


Responsibility When Sealing a Design Document

You are responsible for the design information contained therein.

You cannot represent that you prepared, or directed or supervised the design

The source of the design may also be liable for the information contained on that sealed document

You cannot prove that someone without violating the statute

You cannot assert the information contained under your personal supervision without violating the statute.
Responsibility When Sealing a Design Document

- The Architect can seek indemnification from its consultants, from a "design" architect, or from a contractor/vendor for liability caused by its designs.
- But can you transfer liability for your design services and the implications of your seal?
- The Pennsylvania Anti-Indemnification Statute provides, in part:

Every covenant, agreement or understanding in, or in connection with any contract or agreement made and entered into by owners, contractors, subcontractors and suppliers whereby an architect, engineer ... or his agents, servants, or employees shall be indemnified for damages, claims, losses or expenses including attorneys' fees arising out of: (1) the preparation or approval by an architect, engineer ... of maps, drawings, opinions, reports, surveys, change orders, designs or specifications or (2) the giving of or the failure to give directions or instructions by the architect, engineer ... provided such giving or failure to give is the primary cause of the damage, claim, loss or expense, shall be void as against public policy and wholly unenforceable.

Responsibility When Sealing a Design Document

- Does the activity constitute the practice of architecture/engineering?
- Was the party sealing the document properly a "responsible person" under the act?
- Is the seal required under the circumstances?
- Does the delegator/delegatee have proper proof of license?
- If so, is it a permitted practice under the applicable act?

Responsibility When You Do Not Seal a Design Document

Your responsibility (and perhaps liability) is determined by:
- Your agreement:
  - Provisions making you responsible for another party's (e.g., consultant's) design documents
  - Provisions obligating you to coordinate your design with another party's design
  - Provisions obligating you to provide design criteria, performance specifications, or other information for the guidance of those sealing documents (e.g., contractors, fabricators or manufacturers)
  - The licensing and local authorities having jurisdiction of the project and the regulations they enact (e.g., regulations governing delegated design)
Documents Sealed by Design Consultants

- In the absence of contract language indicating otherwise, the law will likely treat the relationship between architect and consultant as a principal-agent relationship.
- A principal may be vicariously liable to third parties for the torts of his agent to the extent carried out in the course of his agency.
- AIA form agreements directly address the relationship between architect and consultant and state that the consultant is an independent contractor, and not an agent, employee, or partner of the architect.
- An independent contractor is not, generally speaking, vicariously liable for the torts of his independent contractor.
- However, the AIA form agreements (and most other Owner/Architect agreements) obligate the architect to provide the structural, mechanical and electrical engineering services required for the project. As a result, although the Architect may not be vicariously liable for the negligence of its consultants to third parties, the Architect may be liable in contract to the client for those services — even if provided by a consultant who signs and seals his own documents.
- Therefore liability to client may be different than liability to a third-party.

Documents Sealed by a Contractor/Fabricator

- Examples include:
  - Building systems delivered on a design-build basis.
  - Building products generally specified
- Responsibility is largely determined by the contract:
  - AIA / ConsensusDOCS / EJCDC Standard Forms assign responsibility to the contractor/fabricator if certain conditions are met.
- The design services are specifically required by the construction documents or are required to carry out the means and methods of the work.
- Complete performance and design criteria are supplied by the Owner/Architect.
  - A properly credentialed design professional seals the documents on behalf of the owner.
- Party delegating may not abdicate responsibility for the overall design. The delegated design must conform to the overall project design.
- For examples of other states’ treatments of delegation, see NY State Rules of the Board of Regents (Section 29.36); which specifically authorizes such delegation; and N.J. Administrative Code §5:24-2.10(j)(1)(n).

Documents Sealed by a Contractor/Fabricator

AIA Document A201:

§3.12.10 The Contractor shall not be required to provide professional services that constitute the practice of architecture or engineering unless such services are specifically required by the Contract Documents. For a portion of the Work for which the Contractor shall not be required to carry out any services, the Contractor shall prepare such services in accordance with the requirements of this Contract Document. This section alone shall not be required to provide professional services in violation of applicable law. If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required by the Contractor by the Contract Documents, the Owner and the Architect shall specify all performance and design criteria that such services must satisfy. The Contractor shall cause such services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, and other submittals prepared by such professional. The Owner and the Architect shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications and approvals performed by such design professionals, provided the Owner and Architect have specified to the Contractor all performance and design criteria that such services must satisfy.
**Documents Sealed by a Contractor/Fabricator**

AIA Document B301:

33.4.3 If the Contract Documents specifically require the Contractor to provide professional design services or certifications by a design professional related to systems, materials or equipment, the Architect shall specify the appropriate performance and design criteria that such services must satisfy. The Architect shall review shop drawings and other submittals related to the Work designed or certified by the design professional retained by the Contractor that bear such professional’s seal and signature when submitted to the Architect. The Architect shall be entitled to rely upon the adequacy, ... of the services, ... provided by such design professionals.

**Documents Sealed by Joint Venturers**

Joint venturers are, in general, treated as general partners with respect to the specific enterprise being undertaken. As such, they are jointly and severally liable for one another’s acts or omissions within the scope of their undertaking.
Contractual Relationships In Integrated Project Delivery

Design responsibility for the Architect/Designer is contractually established in the applicable agreement and the statutory and common law and not by:

• the contractually required collaborative design development effort among the principal participants, or
• the use of BIM with contributions made to the model by the Contractor, Subcontractor and Vendor.

However, the private (i.e., contract) law of the contracting parties cannot override the public (i.e., state) licensure laws.

IPD Contractual Relationships

While the delivery method demands collaboration, the Architect or Designer remains responsible for the design documents ultimately produced (except design-build items). However, the standard form IPD contracts attempt to minimize or manage those risks by limiting the basis for disputes, or the amounts recoverable in disputes, among the project participants.

Design Documents Prepared In a Collaborative Design Effort

✓ Who prepared the documents?
✓ Who sealed the documents?
✓ What is your relationship to the party sealing, if you did not seal the documents?
• No direct contractual relationship (e.g., contractor/vendor providing design-build system or equipment/product according to the Contract Documents)
• Direct contractual relationship (e.g., Prime Designer-Consultant)
• Joint Venture relationship/general partnership
• IPD contractual relationship
✓ What coverage is provided by your professional liability insurer?
To report your attendance to AIA/CES use course #HCCES120

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Thank you for your time

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