

THE PERILS OF DESIGN/BUILD

Contractors who make the leap into design/build face an array of legal obstacles in many states

The move from builder or remodeler to a design/build company is a natural progression. Most contractors don't hesitate to add a finished basement or a deck to a customer's prepared plans. Similarly, few hesitate to design a remodeled bath or small kitchen. From there, the next step may be designing a major addition or even a whole house from scratch. Such growth may proceed smoothly and seem natural, but there are many pitfalls that a contractor would be wise to consider.

When does a builder or remodeler who does a little design work become a "designer"? Can a builder/designer legally advertise design services? Can a designer who is not an architect get insurance against "errors and omissions" in design? Can a design/builder charge separately for design services?

While these questions are central to the livelihood of the design/builder, few have clear answers. For one thing, the laws governing design vary greatly from state to state. In some states, builders who advertise and perform design services are on solid ground; in others they are technically breaking the law and are subject to criminal penalties. But even in those states, the laws are generally unenforced. More typically, the issue is raised in civil cases over insurance payments or contract disputes, and here the guidelines are equally ambiguous.

So those who venture into design/build may face considerable risks, and those who don't may be losing out competitively. What's a reasonable course of action for the small contractor to follow?

State Laws on the Practice of Architecture

Every state has its own laws defining the practice of architecture, which spell out who may do what. These laws are summarized in the booklet, *National Summary of State Architectural Licensing Laws*, available for \$20 from the Remodelers Council of the National Association of Home Builders (800/368-5242), and the American Institute of Building Design (800/366-2423). Some of these laws are actively enforced and others are not, so it's important to

determine if your area enforces them. Your state builders association can be a good source of information.

Most states define "architecture" quite broadly, including everything from structural design through supervision of construction contracts, as well as the design of additions and other remodeling. Some include "aesthetic" design, environmental analysis, or "utilization of space." Literally interpreted, many of these laws would apply to interior decorating, siding on a garage, or installing a closet rod.

like everyone else in the business, that he need not pay attention to the strict language of the law.

If you're thinking of getting a friendly architect to put his seal on your plans, the lawmakers have thought of that, too — it's specifically banned by many state laws, and in most states architects are subject to disciplinary action or penalties if their seal is used on any plan not prepared by them or under their direct supervision.

While legislative activity and legal

everybody ignores the law regulating design services, so the contract wasn't really illegal. Such cases can go either way depending on the specific state laws, contract language, and judge's interpretation.

Another way the law could come back to haunt you is if your building were to suffer a structural failure resulting in personal injury or property damage. If that happened, your first phone call would likely be to your insurance agent, not your lawyer.

Design Insurance

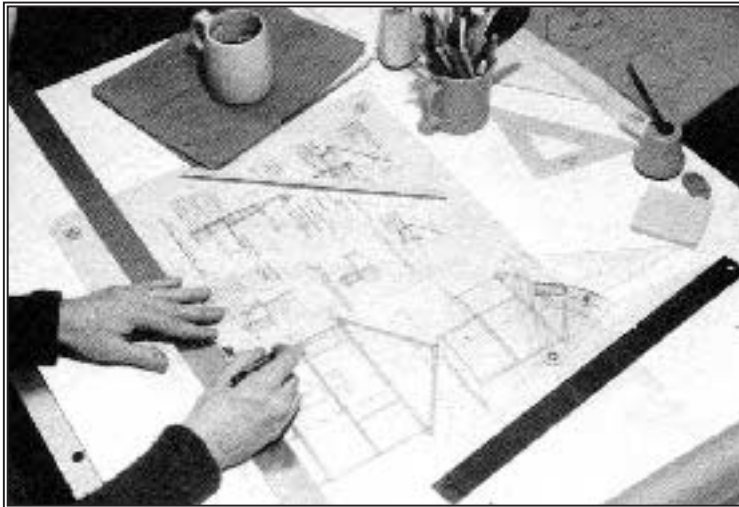
Does your insurance cover your design services, and does it make any difference whether the services were technically illegal (because you're not a licensed architect)? None of the insurance agents we contacted in researching this article were able to answer this one definitively.

In some cases, they said, the insurance company would simply pay; in the rest, the answer would come only from a court after a lawsuit was brought against the insurance company. At issue is whether the "general liability" coverage most builders carry will cover the "professional liability" incurred by a design error. Most builders' policies do not specifically *exclude* such professional liability. But they don't specifically include it either.

For example, let's suppose a structural failure was caused purely by the design, not by any error in construction — for instance, a main beam was undersized and caused damage. Your first resort is your general liability insurance, which protects you against ordinary "negligence." This covers any mistakes you make in your construction of a building (or any *claims* in a lawsuit that you made mistakes, even if you say you didn't).

But most insurance companies will tell you that your policy was not intended to cover "professional liability" or "malpractice" — such as design errors. They didn't add in that risk when they figured up your premium, since few insurance companies recognize that most builders and remodelers do design work.

When such cases have been litigated, courts have generally ruled against the insurance company, unless professional liability was specifically excluded.



Typically, the laws read that only licensed architects are allowed to provide these services, and that builders who violate these laws are subject to criminal penalties. In Pennsylvania, for example, if you prepare preliminary sketches or floor plans, you're subject to a maximum sentence of up to 30 days in prison and a \$500 fine.

Fortunately, many of the laws are limited in scope. For example, 32 states exempt design of single-family residences from the architectural licensing requirement. Some of the laws are limited to larger structures, or ones intended for public use.

But many design laws are not so limited and would severely restrict the rights of non-architects to design. To a large extent, these broad-based statutes are ignored by builders, architects, and law enforcement officials. This puts the burden on the builder to decide whether he wants to take a chance by assuming,

challenges have heated up a bit in the current building slump, generally speaking, there is little interest in "policing" the architectural state laws. This is certainly true here in Pennsylvania, which has some of the nation's strictest architectural statutes. So if the laws are largely ignored by those who are charged with enforcing them, what difference do they make?

The main way these laws come into play is in civil suits, most commonly in contract disputes. For example, let's say you're having trouble getting the last check, and sue your client for the contract price. If he hires an aggressive lawyer, he might claim your contract is unenforceable because it is illegal. In fact, agreements to violate the law, such as practicing "architecture" without a license, are usually not considered valid in court.

You, in turn, might argue that

Associations for Designers

The American Institute of Building Design is a nationally recognized association of building designers. It was formed in California in 1950, is active in 46 states, and has over 900 members. Most of the membership specialize in custom residential and small commercial projects, and the association states in its literature that it is its "responsibility to encourage members to comply with state statutes and to design their projects within the guidelines as set forth by prevailing building codes and engineering practices."

AIBD accepts members based on field experience and the ability to produce professional plans. It offers its members many services, includ-

ing access to professional liability insurance, and an exam to qualify members as Certified Professional Building Designers. For more information, contact AIBD at 800/366-2423.

Other organizations that offer training and certification for designers include the American Society of Interior Designers (ASID), 1430 Broadway, New York, NY 10018; 212/944-9220; and the National Kitchen & Bath Assn. (NKBA), 687 Willow Grove St., Hackettstown, N.J. 07840; 908/852-0033. ASID's program focuses on building interiors and NKBA's on kitchen and bath design.

—C.H. & T.A.

ed from coverage. The courts have argued that an insurance company should know enough to clearly state what its policy does and doesn't cover.

A few policies do clearly state in an "exclusion" that professional liability is not covered. But many policy forms don't mention it at all. If you write your agent a letter asking about this, his answer will probably be that you are not covered for design liability, since it is not the insurance company's intent to provide that. At best, the agent might admit that a court would probably rule in your favor since there is no exclusion in the policy for design services.

If you want to buy insurance that will definitely cover your design services, your insurer might sell you an "errors and omissions" policy similar to the one an architect has. More

likely, you'd need to shop around for a company willing to underwrite such a policy. Your premiums may be higher and your limits lower than for a licensed engineer or architect, who often pay well in excess of \$10,000 per year. The best strategy may be to purchase insurance through a trade association such as the American Institute of Building Designers (see "Associations for Designers").

Minimize Your Risk

Depending on your state laws, the design/build picture may appear pretty grim. Despite the lack of clear answers, however, there are ways to minimize your risk if you live in a state with restrictive laws.

The first and easiest strategy is to avoid the appearance of practicing architecture. If you advertise design

services, don't use the word "architectural" or anything like it. Many state laws specifically bar use of the terms "architect" or "architectural" by non-licensed persons describing their services. In fact, the state architectural board in New Jersey is attempting to ban the use of the word "design" by a remodeling contractor, who is contesting the order.

Second, it is best to state clearly that your design services are offered only in conjunction with your building services — that is, you are not offering to design unless it is understood to be part of a job you will build. Some lawsuits have decided that the licensing regulations don't apply to a designer who also builds the projects. Also, your design activities are less likely to come under legal challenge if you're the builder on the job.

When you're pricing the project, don't charge separately for "design." Instead, you could charge an hourly rate for "preconstruction services," or find some other way to get paid for

that many professional engineers, who are not licensed architects, are performing work that falls within the definition of "architecture."

Safety Not the Issue

Arguments against builders having the right to offer design/build services often contend that the state architectural laws are in place to ensure public safety.

When cases involving builders' design errors have been litigated, courts have generally ruled against the insurance company, unless professional liability was specifically excluded from coverage

In most locales, however, plans are reviewed for code compliance before the building department issues a building permit. Many municipalities retain engineers to perform this review, and it's the building inspector's job to see that buildings are built to comply with a code that was written with the public safety in mind. For most single-family residences, it would seem that this procedure is adequate with regard to safety. For a structurally complex custom home, review by an engineer for structural soundness would certainly do the job.

Furthermore, virtually every state, with the possible exceptions of Hawaii and Tennessee, allows an individual to design his own home, which could later be offered for sale. If public safety were really at issue, would the law permit this?

Look Before You Leap

As your building or remodeling business grows and you take on more design work, keep in mind the problems you may face. If you perform only enough design work to avoid misunderstandings with your customer, you may have little to worry about. If, on the other hand, you're considering an active design/build operation, you may be headed for some surprises.

While the intent of this article is to help alert builders to the risks of offering design services, it's important to note that it is not meant to be a legal guide. Contact an attorney before you make any final decisions.

Do your homework and know where you stand before you decide on a new venture. At least you'll know where the pitfalls are, and that can be a big help in keeping you out of them. ■

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your time. If the client is willing to sign a contract for the job before the detailed plans are drawn up, you could schedule periodic payments based on percentages of completion — which would include the "preconstruction" phase.

Sometimes your plans may find their way into the hands of another builder, exposing you to potential liability. Let's say a couple, who signed a contract and proceeded through the "preconstruction" phase with your company, decided to spend their money on divorce lawyers instead of building a house. They later resolved their differences, and decided to build the house after all — in another state. You can't keep them from taking the plans; after all, they've paid you and the plans belong to them. For this situation, you could put a rubber stamp on the plans stating that they are intended only for your use as builder. This won't necessarily protect you from all risk, but it will help and the cost is low.

If the project is large enough, consider bringing in a licensed engineer or architect to "supervise" your design work, and put his seal on the plans. This may comply with your state licensing law, and would also give you a stronger position if an unhappy client sues you for problems with the design. It's interesting to note that many state laws don't address the fact

Rating the States

In this chart, each state has been listed in one of three categories according to how restrictive the state's statutes are regarding the design of single-family residences. The chart is intended only as a general guideline for builders and designers. For more detailed information, contact the NAHB Remodelers Council or the American Institute of Building Design for a copy of the *National Summary of State Architectural Licensing Laws*.

Very Few Restrictions

Alabama
Alaska
Arizona
Arkansas
Colorado
Florida
Georgia
Illinois
Iowa
Kansas
Kentucky
Louisiana
Maryland
Massachusetts
Missouri
Minnesota
Mississippi
Montana

Nebraska
New Hampshire
North Carolina
Oklahoma
Oregon
Rhode Island
South Carolina
South Dakota
Texas
Vermont
Virginia
Washington
West Virginia
Wisconsin
Wyoming

Some Restrictions

California
Connecticut
Delaware
Idaho
Indiana
Michigan
New Mexico
Ohio
Utah

Very Restrictive

Hawaii
Maine
Nevada
New Jersey
New York
North Dakota
Pennsylvania
Tennessee