



Would You Use Another Person's Toothbrush? Managing the Risk of Taking Over for Another Design Professional By Paul E. Knupp III

When a developer calls up asking if you'd be willing to take over a project from a prior design professional, should you accept? The average design professional is likely to be approached with this proposition at least once in their career. Before agreeing to such a request, first ask yourself a more basic question—would you use another person's toothbrush? No one would willingly sign up to use another person's toothbrush. But you *might* if someone made you an offer you couldn't refuse.

Ethical Considerations Affecting Takeover Decision

Design professionals should refresh their knowledge of the rules of professional conduct in every state where they are licensed. State laws and ethics rules vary as to whether design professionals are permitted to "finish" another's design and what is required. The Commonwealth of Virginia for instance, imposes the following requirement on all design professionals, without exception:

a regulant shall not utilize the design, drawings, specifications, or work of another regulant to complete or to replicate any work without the *written consent of the person or organization that owns the design, drawings, specifications, or work.*

18VAC10-20-740(F). In neighboring Maryland, however, the licensing laws do not explicitly require obtaining written consent but do require that drawings be signed and sealed by the licensed professional who prepared them.

Another important consideration is whether state law applicable to the project requires you to maintain records of how you used the prior architect's work product. While Virginia and Maryland licensing laws are silent on recordkeeping altogether, the law in neighboring West Virginia requires a follow-on architect to keep and maintain records of their review and integration of another architect's drawings for at least five years. W. Va. Code § 30-12-1 *et seq.*, 2CSR1 § 9.5.5. A five-year (or longer) record retention policy may be wise to implement, even in the absence of an obligation imposed by law, simply to ensure crucial evidence is available to defend against a copyright infringement action—or enforce your own intellectual property rights—years after a project is completed; however, it is a necessary practice when in West Virginia to avoid running afoul of this regulatory requirement.

Design professionals must be attuned to the differences in licensing laws across various jurisdictions, since it is common for design professionals to be licensed in several jurisdictions. The ethical obligations imposed on a design professional in one jurisdiction may apply with equal force when that design professional is in another jurisdiction. Moreover, violating a requirement in one jurisdiction could subject you to reciprocal discipline in another jurisdiction.



Business Considerations Affecting Takeover Decision

While there are many ways taking over for another design professional exposes you to risks, the most common are copyright infringement and professional liability for another's work.

Your potential client's assurances that "everything will be fine" is no assurance at all. Owners often think they own the copyright to a design because the project was their "creative vision" and they simply hired an architect to draw it. Not so. Under copyright law, the author of the drawings is the copyright holder. An owner's belief that they can authorize a follow-on design professional's use of a prior design professional's drawings will be no defense to a valid copyright infringement claim by the prior design professional or to a disciplinary action by a licensing board.

There are business reasons to be leery about taking over a project from another architect, as well. A breakdown in the owner's relationship with the prior design professional may be a sign the owner is difficult to work with, perhaps seeking repeated redesign (at no cost) or being slow to pay. Depending on how far along the prior architect's design is at the time you would be taking over the project, the owner may have unrealistic expectations of the design effort remaining, or the cost associated with fulfilling your professional obligations prior to signing/sealing a set of plans. Your fees will need to account for not just completing the design but thoroughly reviewing the prior architect's work to the point you feel comfortable taking professional responsibility for it.

Assuming you do all of that, and are paid, will it still have been worth it if the prior architect has insisted on attribution rights as the "Design Architect" whenever the project is referenced in your marketing materials? Will your anticipated fee for the project adequately compensate you for the time you will inevitably spend complying with the licensing regulations, negotiating with the prior architect and owner, and ironing out copyright and contractual arrangements with the owner's or prior architect's consulting engineers?

Best Practices for Takeover of Another's Work

As a best practice, design professionals should always start by reviewing the rules governing professional conduct in every state in which they are licensed and do business. Next, you should insist on speaking with the prior design professional and obtaining their written consent to proceed with the current design. After obtaining consent, you should include adequate fee in your proposal to fully review the design and make all changes necessary so that you are prepared to assume full responsibility for the quality of the design.

Paul E. Knupp, III is a lawyer at Lee/Shoemaker PLLC, a law firm devoted to the representation of design professionals in DC, Maryland, and Virginia. The content of this article was prepared to educate related to potential risks but is not intended to be a substitute for professional legal advice.