

# Design Professional Newsletter



## **HELPFUL TIPS FOR ASSESSING AND NAVIGATING THE RISKS INHERENT IN BEING THE SUCCESSOR DESIGN PROFESSIONAL ON A PROJECT**

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It is likely that at some point in your career, you will be asked to replace another design professional on a project. While the thrill of new opportunities and donning your superhero cape to save a project in distress provide significant motivations, this role is messy and carries with it substantial risk. The intention of this article is to provide guidance to best protect you - the successor design professional.

Before signing on, it is critical that you take a thorough look “under the hood” to understand the project and the issues precipitating replacement. The most efficient path is to seek the Client’s permission to speak with your potential predecessor. This interaction will likely provide key insight into the specific complexities of the project, any impediments to completion and also any payment issues. Rejection by the Client of this proposition should be seen as a red flag. In either event, you will need to perform sufficient due diligence so that you are comfortable that you understand the requirements of, and any issues with, the project and can complete it within the time period required. If so, you will likely be required to rely on information and documentation prepared by your predecessor. This inherently raises serious liability and intellectual property issues which need to be addressed.

Parachuting into a partially completed project places the design professional at an informational disadvantage. Since you were not onboard from inception, you did not have the opportunity to investigate and confirm specific details. Consequently, you will be required to make, and act on, a number of assumptions, each of which carry varying levels of risk. These are risks that should not be borne by you. The following two contractual provisions seek to address and correctly apportion this risk. First, the contract should contain an “Information Provided by Others” provision expressing that the design professional is entitled to rely upon the accuracy and completeness of documents or information provided by the by the owner, including the information provided by the predecessor design professional and their agents, without any obligation for the design

professional to perform an independent investigation. Owners typically push back on that provision, but even if that provision is accepted, it would be prudent/important for the successor design professional to include some verification in its budget, although that verification work need not be specifically identified in the scope of work. Second, there should be contractual language requiring that the Client indemnify, defend and hold harmless the design professional for any claims arising from errors or omissions in the predecessor design professional's services. If the Client will not agree to these provisions, then it is only fair that you should be paid to start from the beginning in re-performing this work or at the very least to evaluate the partially completed work in detail. After all, the successor design professional can be held liable for the work of others under some circumstances.

Utilizing the predecessor design professional's Instruments of Service without appropriate authorization violates federal copyright laws (which carry significant penalties) and could have serious repercussions for your professional licensing. It is not sufficient to take the Client at its word that they either own the Instruments of Service or are permitted to use them to advance the project. Rather, you need to obtain written acknowledgements from the Client and predecessor design professional(s) authorizing your use, modification and advancement of any such intellectual property. Many design firms have standard releases for this purpose. In addition, your contract with the Client should require that the Client indemnify, defend and hold you harmless from any claims for unauthorized use of the intellectual property.

While all projects carry some risk, serving as a successor design professional significantly elevates that risk. It is imperative that the successor design professional be aware of the increased risk and diligently evaluate the situation and negotiate the provisions of the contract to mitigate these risks.

Should you have any questions regarding termination, please feel free to contact Sean Ryan, Esq. at [sryan@bardsleylawfirm.com](mailto:sryan@bardsleylawfirm.com) or Dean Seman, Esq. at [dseman@bardsleylawfirm.com](mailto:dseman@bardsleylawfirm.com).

**About the Authors:** Sean Ryan is a partner at Bardsley Law. Sean primarily focuses his practice on the defense of design, construction, and real estate professionals. In the construction sphere, he works closely with his architect, engineer, and contractor clients to negotiate complex contracts, seek to mitigate potential risk, and provide guidance throughout the entire project life cycle. Sean additionally represents these professionals against design and construction defect, delay, and professional liability claims and in the prosecution of fee collection cases.

Dean Seman, a civil litigator for 20 years, is passionate about his representation of the companies and professionals who work hard to improve the communities and neighborhoods in which we work and live in the face of risk and today's litigious society. Dean leverages the knowledge and technical skills that he gained through his education and former experience as an environmental/civil engineer to defend his clients in state and federal courts as well as dispute resolution forums, in areas including environmental matters, design and construction defects, product liability and toxic tort.