

# BUILDING BLOCKS

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## PRO BONO SERVICES: RISK MANAGEMENT CONSIDERATIONS FOR ARCHITECTS & ENGINEERS

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The term "pro bono," which is short for pro bono publico, is a Latin term that means **"for the public good."** Although the term is used in a variety of different contexts to mean "the offering of free services," it has a very specific meaning to those in the legal profession.

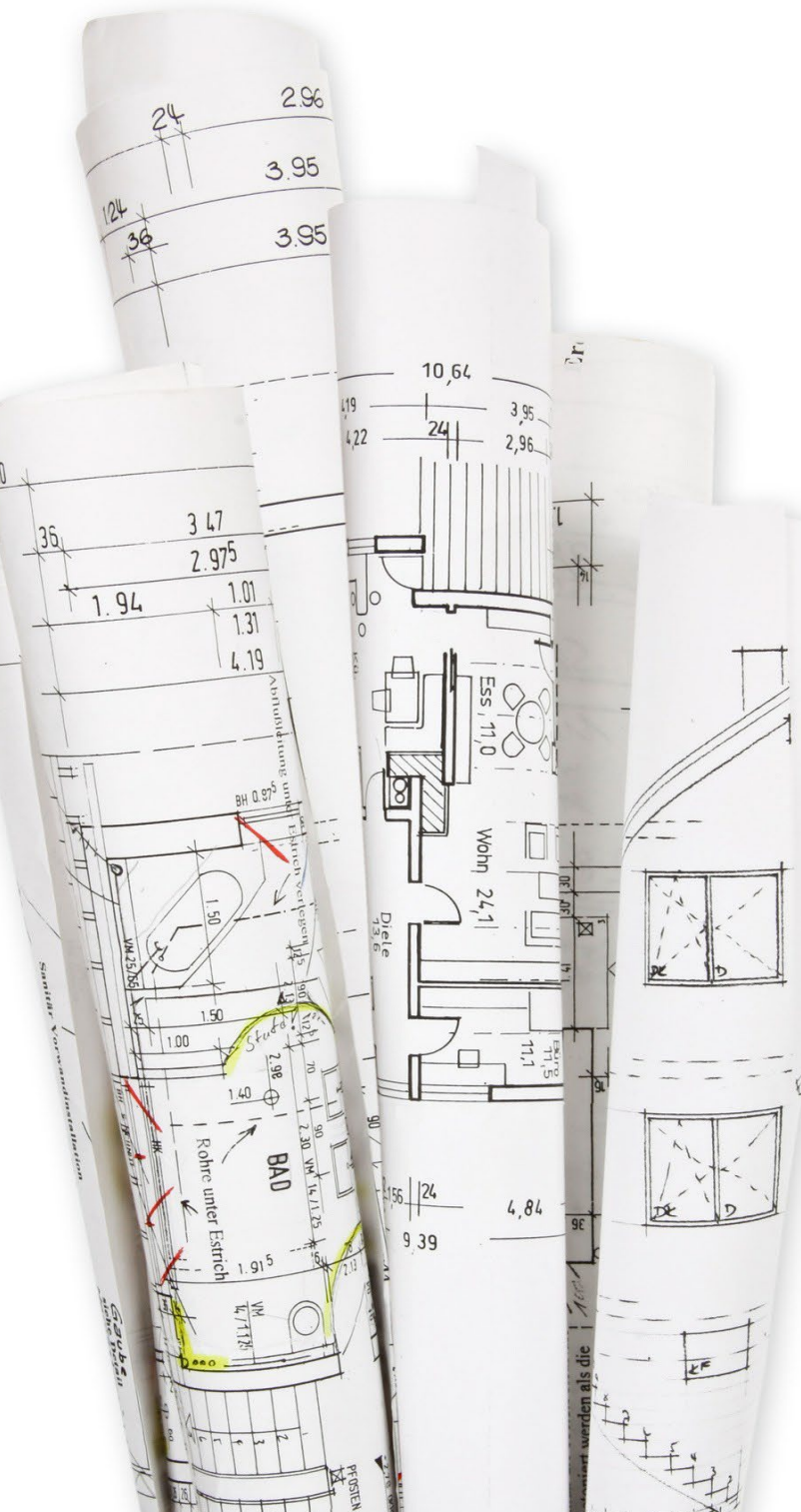
For lawyers, the benefits of providing pro bono services include gaining practical experience and a break from academics, the opportunity to narrow or expand career choices, developing legal references and creating work samples, and networking opportunities.

### FOR THE DESIGN PROFESSIONS

From the perspective of the design professions, the benefits of "the offering of free services" is analogous, but also somewhat different in one respect to the legal profession.

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Pertaining to architects and engineers (A/Es), design professionals have a paramount duty to protect the “health, safety and welfare (HSW) of the public.” In contrast, lawyers have a paramount fiduciary duty towards their clients, whereas there is no A/E fiduciary duty towards their clients.

Refer to DesignPro Insurance Group’s article titled “FIDUCIARY DUTY (OIL) & DESIGN PROFESSIONALS (WATER) DON’T MIX.” <https://www.designproins.com/blog/2022/01/fiduciary-duty-oil-design-professionals-water-dont-mix>



Some examples, by illustration, of pro bono services by design professionals include:

### **PLAYGROUND DESIGN & CONSTRUCTION ADMINISTRATION**

An architect’s child attends a local private grade school. The school is short of funds, but could use an outdoor playground for the students for recess times. An architect volunteers to design and manage the installation of the playground equipment, utilizing the school’s parents’ money from a fundraiser to purchase the equipment.

### **MECHANICAL ENGINEERING REPORT**

A mechanical engineer’s long-standing client’s renovated office complex was just completed. The engineer was not the engineer-of-record for the project. Some of the common areas in the facility are experiencing unacceptable temperature variations. The client requests the engineer to prepare an independent forensic report to diagnosis the problem. The engineer prepares a report as a “good-will” gesture, based on a trusted relationship from prior successful projects.

However, with the analogous benefits from providing pro bono services by the design professionals, plus the duty to protect the public’s HSW, comes with it some risk management considerations.

Whether or not professional services are provided for a fee or on a complimentary basis, the professional liability risks are the same. Professional liability insurance coverage is also the same, even though no premium is calculated on the value of the free services provided. The general rule is that a professional performing voluntary services must do so in accordance with the same care and diligence as other professionals providing similar services. The lack of a fee for services does not reduce the obligation to use due care.

### **Management Advisory**

**Victor O. Schinnerer & Company, Inc.**

**Providing Pro Bono Services as a Firm or as an Individual**

### **A WRITTEN AGREEMENT IS ALWAYS ESSENTIAL (Regardless whether services are compensated or not)**

It is tempting to provide design services with no fee or charge by a verbal and/or handshake arrangement, because the thought process may be that it is only for a worthy cause. However, the wisdom is that a design professional, when providing their good deeds, they may also incur liability.

Thus, probably the most important risk management consideration, is the relationship between the design professional and the project owner.

That relationship should be memorialized in a written contract and can limit the risks of the design professional, if there is any circumstance that could evolve into a claim. Terms and conditions relating to pro bono services should be considered as an addition to the standard written contract, used by the design firm. The following sample provision could be used.

The parties to this agreement acknowledge that the A/E, along with its consultants, agents and employees, are providing professional design services as defined in the "Scope of Services," without compensation. Therefore, the Owner shall indemnify, hold harmless and defend the A/E, along with its consultants, agents and employees, to the fullest extent permitted by law including but not limited to all damages, claims, liabilities, costs, including dispute resolution costs and reasonable attorney's fees and defense costs, incurred in any way by the A/E, along with its consultants, agents and employees, that arise from or result from the provision of the professional design services.

Furthermore, this indemnification and hold harmless is in addition to the Owner's waiver of any claims whatsoever against the A/E.

Beyond a contractual relationship, an A/E must always be mindful that their services, whether at no fee or not, are in accordance with their standard of care of their profession. Many claims against A/Es are based on breach of contract and negligence. In addition, lawyers working on behalf for a project owner may include also allegations, such as breach of warranties. Warranties are typically excluded from an A/E's professional liability insurance policy, either based on express contractual language or implied.

## **IN CONCLUSION:**

In agreeing to the above, the Owner must acknowledge that in addition to providing services without compensation, the firm is still always at risk, its reputation and financial viability because of its exposure to meritless claims from the Owner, and from third parties. And when providing pro bono services, A/E's are likely entering into a professional arrangement with a client that is under-funded, unfunded and/or inexperienced.

These clients may likely have unrealistic expectations that are misaligned when an A/E provides any type of professional services. Nonetheless, and unfortunately, our legal system does not provide protection from liability when providing professional service, even when doing so is for a worthy (and uncompensated) cause.

## **About the Author**

*Eric O. Pempus, FAIA, Esq., NCARB has been a risk manager for more than 17 years with experience in architecture, law and professional liability insurance, and a unique and well-rounded background in the construction industry. Prior to risk management, he has 25 years of experience in the practice of architecture, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 35 years. As a Fellow of the American Institute of Architects and AIA National Ethics Council 2021 Chair, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals and architectural students in various venues across the United States and Canada.*

*The above comments are based upon DesignPro Insurance Group's experience with Risk Management Loss Prevention activities, and should not be construed to represent a*

*determination of legal issues, but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.*

***Disclaimer:*** *The viewpoints expressed in this article are those of the author(s) and are not necessarily approved by, reflective of or edited by other individual, group, or institution. This article is an expression by the author(s) to generate discussion and interest in this topic.*

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UPCOMING



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### Speaking Engagements:



#### ***“Ohio Subdivision Law and Platting”***

August 31, 2022, all day program

Webinar

Times to be Determined



#### ***“Maximizing Compliance with Rules of Professional Conduct for Engineers”***

September 23, 2022, National Program

Webinar; 1:00 – 2:00 pm EST

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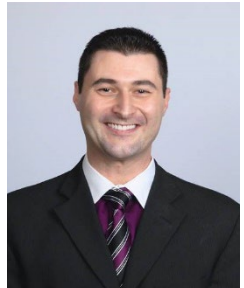
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