



DESIGN & CONSTRUCTION

Providing *Pro Bono* Services

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.

Instituting and Enforcing Clear Policies

It is very important for professional service firms to have clear policies on *pro bono* services and outside professional activity of its employees. A firm's exposure to the possibility of loss is decreased if clients for whom volunteer or *pro bono* services are being provided understand the risks faced by design professionals and agree to waive any claim and protect the design professional from any third-party claims. In addition, *pro bono* clients of individual employees should acknowledge that the services are being performed solely by the individual and not by the firm. A firm could protect itself and assist employees in understanding their responsibilities by having policies that address the two significant situations: those which involve individual services and those which employ a firm.

A firm may want to encourage *pro bono* activities both

from a good will perspective and to allow employees to gain experience in providing services directly to a client. The firm could develop a special provision for authorized services. The firm's professional liability insurance would cover such services regardless of whether or not they were for a fee if they are provided by the firm's employees with the recognition and permission of the firm. Claims from such projects, of course, would jeopardize professional liability coverage or rates as any other adverse experience.

Firms need to understand their risks and communicate with clients when contributing work without a fee. A client must acknowledge that in addition to providing services, the firm is risking its reputation and financial viability because of its exposure to meritless claims from the client or third parties. No services should be provided without a written agreement. In most cases, that agreement should acknowledge the client's understanding that it is waiving possible future claims against the firm. It is also both logical and fair to have the agreement contain language protecting the *pro bono* firm from third-party claims.

Some firms try to protect themselves through indemnification obligations running from their employees to the firm. A firm probably would not benefit in any meaningful way from an indemnification provision that protects the firm from any damage or expenses caused by a negligent employee. Most individuals providing any services outside the scope of their full-time employment

have few assets from which to indemnify their employer. It makes more sense to have such protections run from the client to the employee much in the same way that a client would protect the entire firm providing voluntary services.

Scope of Insurance Coverage for Individual Actions

Insurance coverage of any claim tracks with the law of agency. A firm's employees are covered for all activities performed within their scope of employment. If a problem occurs on a project for which employees are providing services, but for which their employer is not getting a fee, determination of coverage would be based on whether the firm or an agent of the firm is providing the services. It's possible that the firm could be held liable for the actions of employees even though the firm did not know specifically of such actions or have any factual authorization of those actions. Thus, the firm could have liability for its imputed professional negligence without insurance coverage for the harm caused by the employee's negligence.

It's clear that if the firm's name was not apparent on the documents, the likelihood of the initial claim being brought against the individual rather than the firm is much higher. The firm, however, could still be brought into the action. While the "invisibility" of the firm may have an immediate chilling effect on litigation, the firm cannot easily escape responsibility for the actions of its licensed design professionals. In most states, if a firm condones individual service, risk to the firm exists even if the employee is providing that service for no fee. The question is whether the action of the employee can be attributed to the firm. Specifics in determining that attribution are based on state rulings within the general framework of agency law.

Contractual Release and Indemnification Language

Contractual provisions can limit the risk of the design professional and firm. The negotiated consideration exchanged for a waiver of rights or an obligation to defend or pay on behalf of the firm is the firm's voluntary professional services. This bargaining of services for a

release and indemnification obligation should be part of the negotiation for services. A provision such as the one indicated below should be considered as an addition to the standard written contract used by the design firm. In addition to risk allocation provisions, written contracts should clearly spell out the scope of services and the limits of the ability of the firm based on time constraints and the conditions encountered. While design professionals are cautioned to seek specific recommendations from legal counsel as to the appropriate contract language to minimize risk, the following is a general provision that addresses the basic concerns of design firms:

Proposed Indemnification Language for Design Professionals Providing Voluntary Services

(NAME OF A/E FIRM) has agreed, at the specific request of (NAME OF CLIENT), to provide the above described professional services on a voluntary basis.

In exchange for (NAME OF A/E FIRM) providing services on a voluntary basis, (NAME OF CLIENT) agrees that neither (NAME OF A/E FIRM), nor its consultants, agents or employees shall be jointly, severally or individually liable to (NAME OF CLIENT). In addition, (NAME OF CLIENT) agrees to defend, indemnify and hold (NAME OF A/E FIRM), its consultants, agents or employees, harmless from and against any and all claims, defense costs, including attorneys' fees and dispute resolution costs, damages and other liabilities, actual or alleged, arising out of, or in any way be connected with, (NAME OF A/E FIRM)'s providing professional services, regardless of how or under what circumstances or by what cause such injuries or damages are sustained provided, however, that this indemnification shall not apply in the event of a willful act or omission by (NAME OF A/E FIRM) constituting gross negligence.

[**Note:** Some states may not allow a waiver of rights before a cause of action accrues. Some states may require separate consideration for indemnity agreements or require language to be specifically highlighted in contract text.]

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This document is for illustrative purposes only and is not a contract. It is intended to provide a general overview of the program described. Please remember only the insurance policy can give actual terms, coverage, amounts, conditions and exclusions. Program availability and coverage are subject to individual underwriting criteria.

Victor Insurance Managers Inc. (fka Victor O. Schinnerer & Company, Inc.) recently filed in all U.S. jurisdictions to re-brand and change its name. This name change has become effective in almost all states while still pending in several states, which we expect will complete their approval processes shortly.

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