

Indemnities, Part II: Where Agreements May Make Sense

*Article provided by Professional Liability
Agents Network (PLAN)*

This material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, confer with a qualified professional who can provide guidance that considers your unique circumstances.

Indemnity agreements originated in the construction industry to hold project owners harmless from liabilities that arose during construction. Since the contractor has virtually 100% control of the jobsite, it's only fair that the contractor should indemnify (i.e., hold harmless) the owner for any site-related liabilities that arise from the construction work.

Over time, however, the fairness concept behind indemnification has been corrupted. Today, architects and engineers are often asked to sign contracts that make them assume a large portion of their client's risk -- even though they do not have control over those risks. Worse yet, this significant increase in liability assumed through a contractual indemnity is typically uninsurable.

Part 1 of this two-part report examined the dangers of client-drafted indemnities, identified the three major types of such indemnities and demonstrated techniques to persuade a client to abandon the use of these onerous agreements.

But what if a client is insistent upon including an indemnity in your contract? In Part 2, we'll examine alternative forms of client indemnities that have fewer drawbacks. We'll also address situations in which you may want to ask for a reasonable indemnity from the client, the contractor or your subconsultants.

The Mutual Indemnity

The proportionate-negligence indemnity discussed in Part 1 is definitely the least of the three evils examined in that issue. An even better alternative, however, is a mutual indemnity that calls upon the client and the design consultant to indemnify the other, but only for each party's negligent acts.

If a client presents you with one-sided indemnity language and refutes your efforts to remove the clause altogether, you and your attorney may counter with a mutual indemnity. Here, you agree, to the fullest extent permitted by law, to indemnify and hold harmless the client against all damages, liabilities and costs to the extent caused by your negligent performance of professional services under your contract with the client.



In return for your indemnity agreement, your client must also agree, to the fullest extent permitted by law, to indemnify you and hold you harmless against all damages, liabilities or costs to the extent caused by the client's negligent acts in connection with the project. Also, have the client agree to indemnify you against the acts of its contractors, subcontractors, consultants or anyone for whom the client is legally liable.

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At the end of the mutual indemnity, reiterate that neither your client nor you shall be obligated to indemnify the other party in any manner whatsoever other than for each party's own negligence. Also make it clear that the indemnity agreement does not include a duty to defend. A fair-minded client who asks you to hold them harmless for your negligent acts should be willing to provide you the same protection.

The “Final Offer” Unilateral Indemnity

If your client refuses a mutual indemnity, you and your attorney may consider offering one final unilateral agreement that limits the indemnity to your negligent insurable acts. Work with your legal counsel to draft an acceptable indemnity that includes all of the following elements:

- The indemnity must be negligence based. Make it clear you are only indemnifying your client against your negligent acts, errors or omissions.
- The indemnity must be proportionate. You should only be responsible proportionately for damages caused by your negligence, not for damages caused by others.
- The damages must be real. The indemnity should not apply to “alleged” liability.
- The indemnity should not include a duty to defend. This duty would be considered a contractual obligation and therefore uninsurable under most professional liability policies.

- The indemnity must not apply to third parties. It should apply only to the client and not to its agents and representatives, the contractor or others.
- The indemnity should be limited. See that the indemnity only applies to the services called for under your client-consultant agreement.

Under such an indemnity, then, you could agree, to the fullest extent permitted by law, to indemnify and hold harmless your client against damages, liabilities and costs arising from your insured negligent acts in the performance of professional services under the client agreement, to the extent that you are responsible for such damages, liabilities and costs on a comparative basis of fault and responsibility between you and the client. Specify that you shall not be obligated to indemnify the client for the client's own negligence.

When Your Client Says Take It or Leave it

If your client refuses to accept any alteration to an onerous indemnification, you have an important business decision to make. You can accept the clause and take on the risk, hoping that the client will not ever apply the indemnity. Realize, however, that you are opening yourself up to an unlimited financial exposure that your professional liability insurance policy will likely not cover. This option should only be considered with a very low-risk client and a project type with which your firm is thoroughly familiar and has had a claim-free record of work.

If you chose to go forward with an insistent client with a less-than-friendly indemnification, provide them with two options. Agree to perform your services at one fee without the indemnity and at a higher fee with the indemnity in place. Explain that it is only prudent that you offset your increased uninsurable risk with an increased fee. Sometimes, clients may agree to eliminate or revise an indemnity in exchange for a lower fee.

The foolproof approach, of course, is to decline any engagement that includes an onerous indemnity provision. This is a decision that may lose you an otherwise attractive client or badly needed project, but it may be the prudent choice to ensure your long-term survivability. And who knows: your willingness to hold



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your ground and walk away from the work because of the indemnity clause may just earn you the client's respect and perhaps result in an eleventh hour change of heart in demanding an unfair and uninsurable contractual agreement.

When to Ask Your Client for an Indemnity

As stated, the original concept of indemnity is based in fairness, and no consultant should be overly reluctant to indemnify a client from the design firm's own negligence, errors or omissions if the agreement is otherwise fair. On the other hand, there may be certain situations where a design firm should not accept work on a project unless the client is willing to indemnify the consultant from unusual project risks. Such instances may include projects involving hazardous waste, asbestos, condominiums or renovations, or the possible unauthorized reuse of your design documents. Fast-track projects with a highly accelerated schedule are another candidate for an indemnity.

Indeed, there are times when an indemnity from your client is the only prudent approach. With high-risk projects, your firm did not create the hazards and your role is to help the client overcome them. An indemnity from the owner should be a requirement for your services.

Work with your attorney to draft an indemnity agreement in which your client agrees, to the fullest extent permitted by law, to indemnify you and hold you harmless against all damages, liabilities or costs arising out of or in any way connected with the project or your performance of services under the client agreement, except those damages, liabilities or costs attributable to your negligent acts or negligent failure to act.

Should You Consider a Waiver?

For additional protection on very risky projects, particularly those involving hazardous conditions that you can't control or properly insure, talk to your attorney about the viability of asking your client for a waiver – an agreement from the client not to sue you. A waiver is one of the most difficult provisions to obtain and to enforce, and some states have strict statutes applying to waivers. Therefore, keep the waiver and any indemnity agreement separate so that if the waiver is ruled invalid the indemnity isn't thrown out with it.

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NOTE: Due to the popularity of our seminars and limited space available, we regret we cannot provide refunds or credits with less than 72 hours advance notice of cancellation.

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A simple waiver drafted by your attorney may stipulate that in consideration of the substantial risks to you in rendering professional services in connection with a risky project, the client agrees to make no claim and waives, to the fullest extent permitted by law, any claim or cause of action of any nature against you or your subconsultants, which may arise out of or in connection with the project or the performance of services under the client agreement.

Third-Party Indemnities

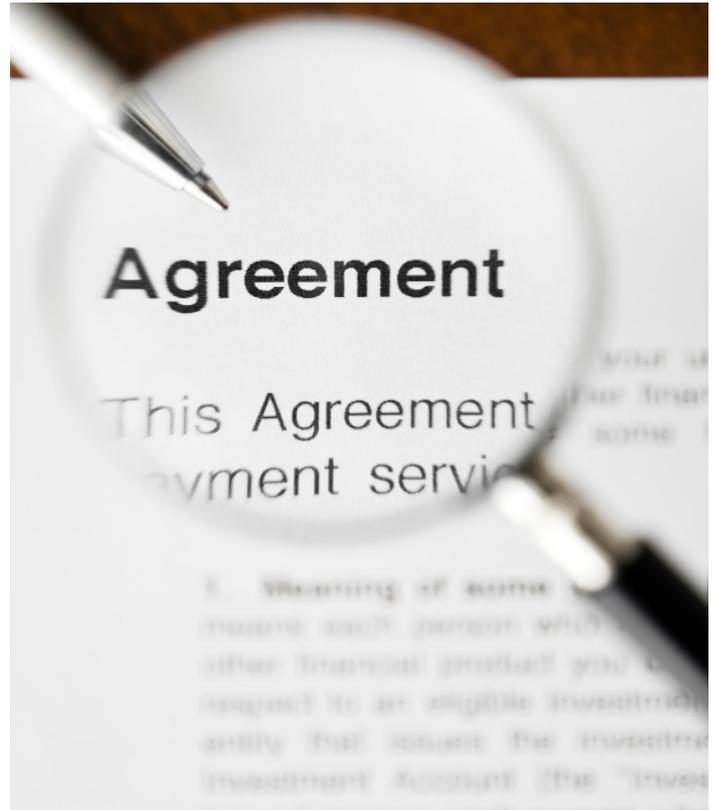
In the event of jobsite injuries to construction workers or others, architects and engineers are often named in the resulting claims. For protection against these and other third-party claims, discuss with your attorney adding a clause to your client contract that requires the client to include provisions in its client-contractor contract requiring the contractor to 1) have adequate insurance and 2) indemnify you and the owner for any claims by the contractor's employees.

With a third-party indemnity, the client would agree to require all contractors to carry statutory workers compensation, employers liability insurance and appropriate limits of commercial general liability insurance (CGL). The client would further agree to require all contractors to have their CGL policies endorsed to name the client, you and your subconsultants as "additional insureds" and to provide contractual liability coverage sufficient to insure the hold harmless and indemnity obligations assumed by the contractors. The contractor would be required to furnish the client and you certificates of insurance as evidence of the required insurance prior to commencing work and upon renewal of each policy during the entire period of construction. In addition, the contractor would, to the fullest extent permitted by law, indemnify and hold harmless the client, you and your subconsultants from all claims by employees of the contractors.

Subconsultant Indemnities

Finally, when serving as a prime consultant you and your attorney may consider seeking mutual indemnities with your subconsultants to protect each party from damages and costs arising from claims due to the negligent actions of the other. In such an agreement, you and your subconsultants would mutually agree, to the fullest extent permitted by law, to indemnify and hold each other harmless against all damages, liabilities or costs arising from each of your

negligent acts in the performance of your services under the agreement, to the extent that each party is responsible for such damages, liabilities and costs on a comparative basis.



Conclusion

It is critical to discuss the language of any client-written indemnities with your legal counsel and try to remove the indemnity or, at the least, strike out onerous and unfair language. As professional liability specialists, we can help you determine the insurability of such indemnities and help you build a case with your client as to why an indemnity may be unenforceable, uninsurable and undesirable.

Likewise, before you consider asking a client, contractor or subconsultant for an indemnity, make sure any such agreement is within the laws of your state or project jurisdiction. While there are certainly instances where indemnities can help reduce your liabilities in high-risk projects, you should avoid trying to pass on liabilities that rightly belong to you. ■

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.



Planning a Road Trip

Now that summer is here, many people are planning road trips for their vacations. Going on a road trip during the summer can be fun and liberating, but it can also be a source of stress and danger if you don't take the proper precautions. If you plan on traveling by car this summer, follow these tips to ensure your trip is safe and carefree.

Car Maintenance:

- Perform basic maintenance on your vehicle. Replace oil, wipers, fluids or the air filter if necessary.
- Have your brake pads inspected.
- Check your battery's charge and terminals.
- Check tires for tears and for bulges on the side wall. Also check your treads. If you don't have a gauge, insert a quarter upside down into the tread. If the

quarter stops while Washington's head is visible, your tires are too worn to be driven on safely.

Trip Planning

- Try to pack as lightly as possible to save on gas and stress, and to make your car more maneuverable. Most new cars have the total weight you can carry printed on the driver's side door.
- If you're driving with kids, make sure you pack enough snacks, water, games, videos and music to keep them occupied and comfortable during your journey.
- Bring GPS navigation to avoid getting lost, or to receive notification on traffic conditions ahead. Be aware that these can drain your phone's battery or may not be available where there is no Internet connection, so make sure you have a contingency plan (such as a map).

- Make sure your car has up-to-date tags and insurance. Among the worst things that can happen during a road trip are having your car ticketed or impounded for letting those things lapse.

Safety

- Pack an emergency kit. Include a flashlight, blanket, first-aid kit, tools, water and nonperishable food items.
- Wear your seat belt. Not only is this a life-saving precaution, but in most states it's also the law.
- Keep your eyes on the road. Pull over to adjust any GPS settings and make phone calls. Never text while you are driving.
- Stay alert. Take breaks to recover from the strain of long-distance driving. Always stop for a break when tired.
- Use your turn signals when changing lanes or making a turn, and turn on your headlights when it's raining or dark out so other drivers can see you.

Not all babies exposed to group B strep become infected, but for those who do, the results can be devastating.

Group B Strep Awareness

Group B streptococcus (strep) is a bacterium often carried in the intestines or lower genital tract. While usually harmless in adults, group B strep can cause serious illness in newborns.

Not all babies exposed to group B strep become infected, but for those who do, the results can be devastating. According to the Centers for Disease Control and Prevention, group B strep is the leading cause of sepsis and meningitis in newborns.

Group B strep is present in approximately 1 in 4 pregnant women. It can cause miscarriages or stillborn or premature births. If you're pregnant, get a group B strep screening during your third trimester. If you have group B strep, antibiotic treatment during labor can protect your baby.

Group B strep can also cause dangerous infections in adults who have certain chronic medical conditions, such as diabetes or liver disease. Left untreated, group B strep in adults can lead to infections in the blood, bones, joints, skin and lungs. While rare, the rate of serious group B strep infections increases with age. However, it is usually easily treated with antibiotics.

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Strength vs. Endurance Training

While building muscles is a common fitness goal, it's not what every person needs or wants. Many people find that endurance training is more up their alley. Both strength and endurance training boast health benefits, but concentrating on one type may be more beneficial for you based on your needs or goals.

Endurance training, or aerobic exercise, is any physical activity that works large muscle groups and uses more oxygen than while resting. The goal of aerobic exercise is to increase cardiovascular endurance. Examples of aerobic exercise include aerobics, cycling, swimming, running, walking, hiking and fast-paced sports like tennis and soccer.

Strength training is designed to firm, strengthen and tone your muscles, as well as to improve balance, coordination and bone strength. Strength training is also called resistance training or anaerobic exercise, and includes body weight exercises (pushups, pullups, crunches), free weights, weight machines and resistance tubing.

Depending on your fitness goals, you may want to focus more heavily on one type of training. However, a balance of the different styles is recommended for optimal health benefits and fitness level.



Waldorf Salad

The Waldorf salad was created in the 1890s by Oscar Tschirky, who named it after the Waldorf Hotel (later Waldorf-Astoria), where he worked as the maître d'hôtel. This version of the salad, made with a variety of healthy ingredients, retains the charm and simplicity of the original and can be served as an appetizer, side dish or light main dish. This salad is traditionally served over a bed of leafy green lettuce.

- ¼ cup walnuts, chopped
- 2 apples, cored and diced
- 1 cup celery, diced
- ½ cup raisins
- ¼ cup plain non-fat yogurt
- ½ tsp. sugar
- 1 tsp. lemon juice

Preheat oven to 350° F. Place chopped walnuts on an oiled or foil-lined baking sheet and bake for 12 to 15 minutes. Stir occasionally until they are evenly toasted. In a mixing bowl, combine apples, celery, nuts and raisins. In a separate bowl, stir together yogurt, sugar and lemon juice. Pour over apple mixture and toss lightly. Refrigerate leftovers within two hours.

Yield: 6 servings. Each serving provides 110 calories, 3.5g of fat, 0mg of cholesterol, 25mg of sodium, 2g of fiber and 15g of sugar.

Source: USDA

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Debt Management



You may not think you have many options when it comes to debt repayment, but there are several tools and strategies you can use to help pay off debt on time or ahead of schedule, or even to decrease your overall debt burden.

First, list your debts in a spreadsheet or budget program. Include outstanding balances, interest rates and minimum payments. Then use a debt repayment calculator to determine how long it will take to pay off existing debts.

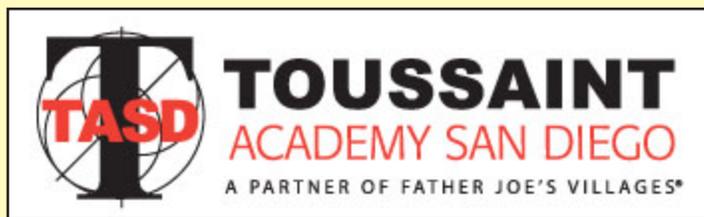
Next, write up a budget listing your monthly income and expenses. This is a great way to help you stay on top of payments, identify high areas of spending and locate extra money to put toward your debt. Ideally, budgeting will also prevent you from accruing any further debt. When making payments, always pay off higher-interest loans first to save money over time.

Depending on how much and the type of debt you have, refinancing, consolidating or even filing bankruptcy may be beneficial options for you. Consult a financial professional to learn more.

SPOTLIGHT ON



Cavnac & Associates is proud to support local and non-profit civic organizations, including Toussaint Academy.



Toussaint Academy San Diego is a group home serving homeless youth in San Diego County ages 14-18. Toussaint Academy provides support and opportunities to at-risk youth who have faced unimaginable challenges. Since 1992, the academy has delivered an array of services to help residents with the life skills necessary to become independent, contributing members of society. By connecting youth with caring adults, the Academy emphasizes each individual's strengths while providing them with opportunities to learn healthy behaviors.

As a partner agency of Father Joe's Villages, they share the mission to help their neighbors in need break the cycle of homelessness and poverty. By promoting self-sufficiency through their innovative continuum of care model, their multi-disciplinary programs, and the partnerships that come together in

the spirit of their CREED, they teach, learn from, and challenge their neighbors to support themselves and one another.

For more than a decade, Toussaint Academy has served hundreds of teens who have no place else to call home. Located in downtown San Diego, just a few blocks north of the Gaslamp Quarter, Toussaint Academy continues to thrive as a haven where kids can learn the skills they need to lead healthy, safe, and fulfilling lives.

Toussaint Academy also provides aftercare services to alumni ages 18-24 to help them maintain stability and success following graduation. Aftercare services include scholarships, housing assistance, job placement, and case management.

For more information about Toussaint Academy, go to www.toussaintacademy.org.