

# PROFESSIONAL LIABILITY UPDATE

A LOSS PREVENTION NEWSLETTER FOR THE DESIGN PROFESSION

MSP PL -01/2010 "What You Need to Understand about Indemnification Agreements"

January 2010

*Professional Liability Update* Newsletter © 2010 Cavnac & Associates — All Rights Reserved

## What You Need to Understand about Indemnification Agreements

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Cavnac & Associates provides contract review services for its design professional clients. We've reviewed over 1,000 contracts in the last 12 months alone. Our reviews are done from a risk management and insurance perspective. The objective is to quantify the risks for our clients so they can make the right decisions for their companies. While we typically review a number of different provisions, by far the most critical from a risk management and insurance perspective is the Indemnification Clause.

An indemnity agreement is a risk transfer mechanism in which one party is transferring risk to another party. In an indemnity agreement, one party, the "indemnitor," agrees to "indemnify" the other party, the "indemnitee," for things spelled out in the indemnity clause.

Unfortunately, it is common for design professionals to be asked to indemnify their clients not only for their own negligence, but for the clients' negligence as well. This is not only unfair, it is also uninsurable under a professional liability policy.

### Types of Indemnities

Client-drafted indemnities used in the design and construction industry can be separated into three general types: broad form, intermediate form, and limited form.



#### 1. Broad Form Indemnities

Of the three types of client-drafted indemnities, the broad form creates the most problems. It can make a design firm responsible for almost any problem that befalls its client during the project, whether or not the designer was negligent.

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A typical broad form indemnity reads as follows:

**Indemnification**

*"Consultant agrees to hold harmless and indemnify Client from any and all liability, including cost of defense, arising out of performance of the services described herein."*

Note that this clause does not limit the indemnification to liability that is a consequence of the design professional's negligent acts, errors, or omissions. Obviously, such an all-encompassing blanket indemnification creates enormous and largely uninsurable liabilities.

In some states (California for example), broad form indemnification has been made illegal by virtue of court decisions or anti-indemnification statutes. Even in states where such indemnities are illegal, a judge might still rule that a given clause will be enforced when the parties to the contract have enjoyed relatively equal bargaining strength and the clause is written so clearly that its intent is unmistakable. And, of course, even if a court rules in your favor, litigation always means you have lost valuable time, goodwill, peace of mind and dollars.

**2. Intermediate Form Indemnities**

An intermediate form indemnity is not much better than a broad form one, but it is legal in the majority of jurisdictions (including California). It provides that a design professional will cover the client's risk whenever the design professional shares some of the liability due to negligence. A typical intermediate form indemnity reads as follows:

**Indemnification**

*"Consultant agrees to defend, hold harmless and indemnify Client from any and all liability arising out of Consultant's performance except for the sole negligence or willful misconduct of Client."*

Given a clause such as this, the client could be 99% at fault, and as long as the designer is at least 1% at fault, the design professional would pick up 100% of the tab. In the event of a project problem, there is a very good likelihood that designer would be held partly at fault. In fact, only an incompetent attorney would be unable to convince most juries that a design professional had at least a minor role in a project problem.

Unfortunately, this contractual assumption of risk is not covered under a professional liability policy. Your professional liability policy covers you for your negligent acts, errors, and omissions. It does not



**2010 Risk Management Series**

- 2010 Cal/OSHA — New Laws and Rules  
Thursday, January 21, 2010  
Registration: 7:30 am  
Program: 8:00 am - 10:00 am
- Important SDI, PLF, and UI Information You Can Use in 2010  
Wednesday, February 10, 2010  
Registration: 11:30 am  
Program: Noon - 2:00 pm
- Workplace Investigations  
When and How to Investigate Issues of Misconduct, Harassment, Discrimination, and Retaliation  
Friday, February 19, 2010  
Registration: 7:30 am  
Program: 8:00 am - 10:00 am
- Employment Benefits  
Business Continuation and Exit Planning  
Tuesday, March 2, 2010  
Registration: 7:30 am  
Program: 8:00 - 10:00 am
- Sexual Harassment Prevention Training  
Satisfies AB1825 requirements  
Friday, March 5, 2010  
Registration: 7:30 am  
Program: 8:00 am - 10:00 am
- Strategic Human Resources for Part-Time HR  
Friday, March 19, 2010  
Registration: 7:30 am  
Program: 8:00 am - 10:00 am

All training sessions available to our clients  
\* Reserve early / seating is limited!

Register for upcoming seminars

Contact Darcee Nichols at [dnichols@cavnac.com](mailto:dnichols@cavnac.com) or call 619-744-0596

\* 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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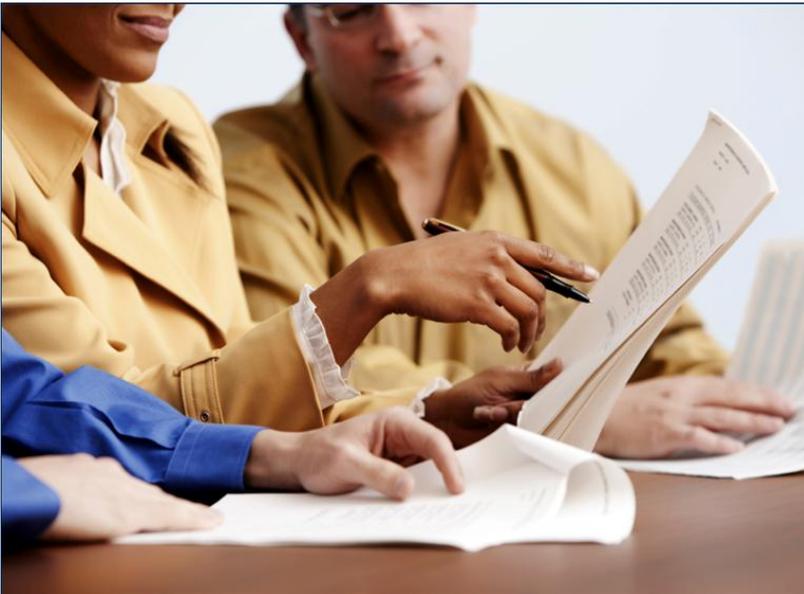
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- Client-drafted indemnities often require design professionals not only to indemnify the client, but also to defend the client. A design professional should avoid the obligation to defend at all costs.  
A Supreme Court case (the Crawford Case) made it clear that the obligation to defend was separate from the obligation to indemnify, and the indemnitor could be responsible for the indemnitee's defense costs – even if it were ultimately determined that the indemnitor was without fault!  
For additional information on the Crawford Case, see:  
<http://www.cavignac.com/pdfs/0209CML.pdf>.

## The Dilemma

What should a design professional do when faced with an indemnity that is unfair and uninsurable? The only real option is to negotiate the agreement.

- **Know the Law**

Find out whether your state has anti-indemnification statutes on the books. If so, what do they say? How have they been interpreted by the courts? Ask your attorney and insurance broker for assistance in this area.



Be aware that the law in your state may not apply in every instance. Client-drafted contracts frequently require that disputes be settled in the jurisdiction where the client is located and/or where the work is performed. This may be an out-of-state location where indemnities are enforceable.

Also, don't assume that, because your state has anti-indemnification statutes in place, you can accept a broad form indemnity because it would be struck down in court. Having to defend a claim is costly in any event – rarely does anyone come away from the experience a winner. Besides, as already noted, a court may decide that, for whatever reason, the indemnification is enforceable in your case.

- **Educate the Client**

The best tactic in getting rid of an unfair indemnity is to demonstrate to the owner the ineffectiveness of such a contractual stipulation. Point out any anti-indemnification statutes on the books in your state or the jurisdiction in which any dispute would be tried. Explain that any indemnification that expands your liabilities will be uninsurable. Point out that you are already liable for your errors and omissions without an indemnification clause, and therefore such a clause is unnecessary –



Indemnification (continued from page 2)

cover you for the negligence of others that you assume contractually.

### 3. Limited Form Indemnities

The limited form indemnity reflects what common law requires in any event – i.e., if you are 20% at fault, you will pay 20% of the damages.

A typical limited form indemnity reads as follows:

#### ***Indemnification***

*"Consultant agrees to hold harmless and indemnify Client from and against liability arising out of Consultant's negligent performance of services."*

This type of indemnity is covered under most professional liability policies.

## The Problem

Most client-drafted indemnities ask design professionals to be responsible for more than their own negligence.

- Client-drafted indemnities often require design professionals to indemnify the owner for everything except the owner's "sole" negligence; as mentioned above, this is not insurable.
- Client-drafted indemnities often are based on "intentional acts" or "performance" as opposed to "negligent acts, errors, or omissions."
- Client-drafted indemnities often require the design professional to indemnify not only the client, but also the client's agents, contractors, attorneys, and other unrelated parties that the design professional does not want to indemnify.

Indemnification (continued on page 4)

and may even cloud the issue of your legal responsibilities. Your insurance broker should be willing to help you address these issues with your client.

- **Negotiate for Fairness**

Finally, appeal to your client's sense of fairness. Explain that to hold you legally responsible for another's liability is simply unjust. Reaffirm your willingness to accept responsibility for your own errors and omissions, but your unwillingness to be held liable for the mistakes and oversights of others. Explain how it is unfair to hold a design firm responsible for liabilities that are completely out of its control.



- **Offer Alternatives**

- Propose a reciprocal indemnity in which each party agrees to hold harmless and indemnify the other for their respective negligence.
- Propose a unilateral, but insurable, indemnity that only obligates you to indemnify the owner from the consequences of your negligence.
- Propose a bifurcated or split indemnity that is broader for general liability claims (general liability policies provide broader contractual liability coverage) and narrower, but insurable, indemnity for professional services (the City of San Diego uses such a provision).



## Conclusion

Some clients will understand that the risk they are asking you to assume is unfair, and will change their agreements to make them acceptable (we call these good clients!). Others, however, will not. They will tell you that "everyone else signs it" and if you don't want the job, other qualified firms are waiting at the door.

At this point, you have a tough decision to make. Do you walk away from the job and forego a nice fee? Or do you close your eyes, sign the agreement, and hope the job goes off without a hitch? This is a decision only you can make. ✨

**Disclaimer:** This article is written from an insurance perspective and is meant to be used for informational purposes only. It is not the intent of this article to provide legal advice, or advice for any specific fact, situation or circumstance. Contact legal counsel for specific advice.



Article courtesy of Cavignac & Associates Employee Benefits Department

# LIVE WELL, WORK WELL

## Assistance with Assisted Living

Have you reached the point where you think you may have to place your parent(s) in a facility to help with dressing, bathing, eating and the like? Then assisted living is probably the best choice. This kind of residence helps older adults who should no longer live on their own, yet does not provide full-time nursing services.

Choosing a facility may seem daunting, but the U.S. Department of Health and Human Services (HHS) offers these suggestions to help you get started:



- **Think ahead.** What will your parent(s) need in the future? Will the residence meet those needs?
- Is the facility close to family and friends?
- Does the facility have limits on allowing residents to remain if their condition deteriorates (such as mental impairment)?
- Visit each facility more than once, sometimes unannounced.
- Visit at meal times and sample the food.
- Talk to residents – do they enjoy being there?
- Learn what types of training the staff receives and how frequent it is.
- Review state licensing reports. ✨



# WARNING!

## Over-the-Counter Medications Can Do You III

*By Stuart Nakutin, CSA, COA, CET, WCCP, CHMC, Director of Loss Control and Claims*  
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**C**old and flu season is here! Now is a good time for our annual warning about using over-the-counter cold and flu medications during work hours. Sometimes cold remedies and work are not a good mix.

The most common side effect of over-the-counter cold and flu medicine is drowsiness, which lowers one's alertness and reaction time. 10-25% of people taking these medications report daytime drowsiness. Approximately 200,000 vehicle accidents are attributed to sleepiness every year.

Fatigue is a factor in nearly one-third of truck accidents in which the driver is killed. Taking medications and going to work using machinery or sharp tools can be dangerous. When you are ill, what should you do?

In many cases, your employer may not want you to show up for work when you have a bad cold or the flu. Not only does your risk of injury increase if medication makes you drowsy, but your productivity is likely to be poor as well. In addition, you may pass a virus to co-workers so that they, too, become ill. Finally, your own recovery may be delayed if you are not getting enough rest to fight the ailment.

Sometimes you must go to work and you need to take medications. What can you do?

### Let Your Supervisor Know

It may be possible to change your work assignments or temporarily arrange for less hazardous work. You probably shouldn't do tasks that require the use of a respirator, or that are highly physically demanding.

Another reason for speaking to your supervisor is to acknowledge that your performance may not be quite up to par for a few days. Also, should you be injured, your supervisor and emergency responders will need to know what medications you are taking if you are unable to tell them.

### Use Recommended Dosages

Exceeding the recommended dosage will not help you get well faster or feel any better. In fact, side effects, such as drowsiness, usually become more pronounced.

### Do NOT Mix Medications

Remember that pills, capsules, or tonics are chemicals. They may be incompatible when mixed, causing more harm than good. A mixture of medicines – or medicine mixed with alcohol – may intensify a side effect, or even be dangerous.

### Read the Label

This is where you will find the information you need about dosage and side effects. If you can't read – or don't fully understand – the label, ask a pharmacist.

### Don't Try New Remedies During Work Hours

If you feel like experimenting with something new or different, do it over the weekend. Everyone reacts differently to cold and flu medications. Find one that works best and gives you the least troublesome side effects, and stay with it.

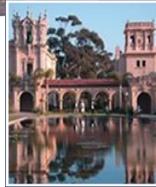


### Wash Your Hands Often

We give this advice to kids, but everyone should remember it during cold and flu season. More cold viruses are transmitted from hand to hand, from doorknob to hand, from hand to mouth, than in any other way. The best cold and flu solution is prevention! ✂

# Community Bulletin Board

*"Neighbors helping neighbors in San Diego"*



- ✦ Orchids & Onions 2009
- ✦ Web Site
- ✦ Questions? E-mail [info@SDArchitecture.org](mailto:info@SDArchitecture.org)



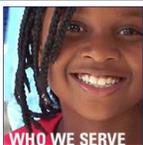
- ✦ Events Calendar
- ✦ Web Site



- ✦ Web Site
- ✦ Questions? Contact **Alicia Gettys** by phone at **619-232-7451** or e-mail [agettys@ymca.org](mailto:agettys@ymca.org)



## Monarch Schools



- ✦ Volunteers
- ✦ Web Site



### Mission:

The Society for Design Administration advances management and administrative professionals in the A/E/C industry through education, networking and resources.

- ✦ Become an SDA Member
- ✦ Web Site
- ✦ For more information, e-mail [vicepresident@sdasandiego.org](mailto:vicepresident@sdasandiego.org)



The San Diego Police Foundation supports the men and women who "protect and serve" by raising community awareness of important

unbudgeted or "discretionary" needs that will improve crime-prevention and law enforcement efficiency. The Foundation puts your tax-deductible contributions to measureable work in local communities.



- ✦ Web site
- ✦ SafetyNet (smartCYBERchoices)
- ✦ For more information, contact [info@sdpolicefoundation.org](mailto:info@sdpolicefoundation.org)



### Mission:

To provide quality and compassionate services for the survival, health and independence of seniors living in poverty

- ✦ Web Site