

PROFESSIONAL LIABILITY UPDATE

A Loss Prevention Newsletter for the Design Profession

MSP PL 02/2006: "Beware of Unfair Client Contracts"

March, 2006

Beware of Unfair Client Contracts

Article courtesy of Professional Liability Agents Network (PLAN)
with special thanks to XL Design Professional (XLDP)

Of all contractual clauses between a design firm and its clients, indemnity agreements may have the most far-reaching implications. If a design firm agrees to an onerous client-written indemnity, that firm may find itself saddled with virtually all project risks – with many of them uninsured. That's why it's imperative for you to understand the issues surrounding indemnities and to work with your attorney to ensure that your client-drafted agreements contain reasonable contract clauses.

The concept of indemnification originated in the construction industry as a method to hold project owners harmless from liabilities that arise during construction. The basic concept makes a great deal of sense: since the contractor has 100% control of the jobsite, it should indemnify – or hold harmless – the project owner for any site-related liabilities that arise. If a worker is injured during construction, for example, the contractor is

generally held responsible since it controls jobsite safety.

Over time, unfortunately, the concept behind indemnification has been altered in ways that are unfair to design consultants. Architects and engineers now are often asked to sign indemnity agreements that make them assume a large portion of project risks. Indeed, it is not uncommon for design firms to find one or more clauses requiring them to



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indemnify the client from substantial liabilities, including those over which they exercise no control. The indemnification language may be short and seem innocuous, but it spells serious trouble nonetheless.

Many design professionals concede that they have unwittingly encouraged the use of onerous indemnifications by accepting them so readily. If they balk at an indemnity, the client may say, “Well, the design firm down the street doesn’t object to the language.” Fearing that it might lose the job, the design firm disregards better judgment and signs an indemnity-laden contract.

But before signing on that dotted line, consider:

1. Client-drafted indemnities typically ask you to assume liability for the client’s negligence. Ask yourself: without the indemnity, whose risk would it be? Almost invariably it would be the client’s risk.
2. Most client-drafted indemnities are uninsurable. If you sign an indemnity agreement that is not limited to your negligence, you are accepting liability beyond that required by law. Your professional liability policy likely includes a clause with language such as: “*This insurance does not apply to liability assumed by you under any contract unless you would have been liable in the absence of such contract.*”
3. Client-drafted indemnities frequently contain onerous, overreaching language. For instance, a client may ask for indemnity for your “intentional acts.” Unfortunately, a crafty attorney could interpret virtually any of your acts as “intentional.”
4. Client-drafted indemnities frequently ask you to defend the client. This provision could be interpreted as an obligation on your part to retain an attorney for your client and pay for this defense – even before liability for negligence has been established.
5. Client-drafted indemnities may include inappropriate parties as indemnitees (parties to be indemnified). You should never agree to indemnify a client’s agent, contractor, attorney, contract employee, lender, volunteer or anyone else who is not directly part of the client entity.

Why Indemnities Leave You Uninsured

Professional liability insurance specifically excludes liability you assume by contract; i.e., liability that would not be yours were it not for the fact that you specifically agreed to accept it.

The insurers’ position on this issue is understandable. The rates they charge are based on certain assumptions they make about known risks, given the types of services a design firm performs, types of clients, amount of fees earned and so forth. If insurers were to cover any and all additional risks a design firm agrees to assume by contract, the liability exposure could be made one thousand times greater than normal simply by the stroke of a designer’s pen.

On the other hand, commercial general liability (CGL) policies typically provide “broad form contractual liability” coverage. This allows the named insured to assume the tort liability or negligence of another.

Almost all general liability policies also contain professional services exclusions, and therefore would not provide coverage for actual or assumed liability arising out of professional services.

Whenever a design firm is considering acceptance of an indemnification clause, it should have the clause reviewed by a knowledgeable attorney to assess its legal ramifications, and also by an experienced insurance broker to determine the clause’s insurability. ✨

Types of Client-Drafted 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.

Broad-Form Indemnities

Of the three types of client-drafted indemnities, the broad-form type creates the greatest problems. Such an indemnity can make a design firm responsible for almost any problem that befalls its client

2006 Seminars

Cavignac & Associates' Training Room

Bank of America Plaza
450 B Street, 18th Floor, San Diego, CA

- **OSHA 10-Hour Course—Part 2**
Thursday, March 23, 2006—8:00 AM—1:00 PM
(Attendees receive Certificates of Completion for each part; OSHA will provide 10-Hour Card after ALL sessions have been completed)
- **Sexual Harassment (AB1825 Compliant)**
Friday, March 31, 2006—9:00—11:00 AM
- **Reduce Your Total Cost of Workers Compensation Insurance**
Friday, April 14, 2006 — 9:00 AM — 12:00 Noon
- **How to Set Up a Formal Hazard Communication Program (Per OSHA "Right to Know" Standards)**
Thursday, April 27, 2006 — 9:00 AM — 11 AM
- **Material Handling & Industrial Ergonomics**
Friday, May 12, 2006 — 9:00 AM — 11 AM
- **Sexual Harassment (AB1825 Compliant)**
Thursday, May 25, 2006—9:00—11:00 AM

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

For more information about upcoming seminars:

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- **RSVP to JASMIN ADRIANO** by e-mail jadriano@cavignac.com or by phone at **619-744-0596**. ☘

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during the project, whether or not the designer was negligent. 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 the result of the design professional's negligent acts, errors or omissions. Obviously, such an all-encompassing indemnification creates enormous and largely uninsurable liabilities.

In some states, broad-form indemnification has been made illegal by virtue of court decisions or anti-indemnification statutes. But 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 income.

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. 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 hold harmless and indemnify Client from any and all liability, including cost of defense, arising out of Consultant's negligence, whether it be sole or in concert with others, in connection with performance of the services described herein.

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 consultant could pick up 100% of the tab. And in the event of a project upset, there is a very good likelihood that a design consultant would be held partly at fault. In fact, virtually any attorney could convince a jury that a design professional had at least a minor role in a project upset.

Limited-Form Indemnities

The limited-form indemnity assigns liability to the parties involved in proportion to the degree of fault. For example, if you are found to be 20% at fault, you will pay 20% of the damages. A typical limited-form indemnification may read as follows:

Indemnification

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

While this limited-form indemnity is certainly more acceptable than the other two, it is best not to have it in a contract. First, it is unnecessary since you are already liable for your negligence. Second,

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it could muddy the waters regarding the insurability of your errors and omissions.

Making Your Stand

Regardless of how attractive a potential project may be, your guiding principle should be that you would not accept unlimited liability imposed by a client-written indemnity agreement. You must insist that liabilities remain with those parties who are in the best position to control them. You should do your best to persuade the client to remove any indemnity language that increases your liability beyond the liability you already have for your negligence, errors and omissions. Specifically, be sure you:

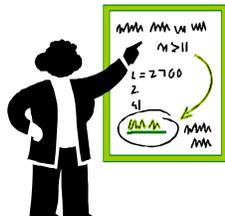
Know the Law

Working with your attorney, find out whether your state has anti-indemnification statutes on the books. If so, what do they say and how have the courts interpreted them? Be aware that the law in your state may not apply to your project disputes. 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.



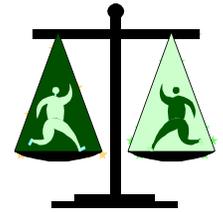
Educate Your Client

Perhaps the best tactic for 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 where any dispute would be tried. Explain that any indemnification that expands your liabilities will be uninsurable and could even jeopardize coverages that would apply without the indemnification.



As your insurance agent, we can help explain to your client that you are already liable for your errors and omissions and any resulting damages are covered within the available limits of your professional liability insurance policy. We'll explain that an indemnity is unnecessary and may cloud the issue of your insurance coverage and legal responsibilities.

Plead for Fairness



Explain that to hold you legally responsible for another's liability is simply unfair. Reaffirm your willingness to accept responsibility for your own errors and omissions but state your unwillingness to be liable for the mistakes and oversights of others. Explain that the theory of indemnities applies to contractors on the construction site since they assume control over the work site. Explain how it is unfair to hold a design firm responsible for liabilities that are completely out of its control.

Convincing an owner that an indemnification would be unenforceable and/or unfair can be difficult when the client has paid an attorney to draft the contract and the client has been told that another design firm will agree to the provision. What do you do when a plea for basic fairness does not work? There are still some options that while not ideal, are far better than accepting a client-drafted indemnity.

Indemnity agreements originated in the construction industry to hold owners harmless from liabilities that arose during construction. Since the contractor has 100% control of the job site, it's only fair that the contractor should indemnify (i.e., hold harmless) the owner for any site-related problems that arise. Over time, however, the fairness concept behind indemnification has been corrupted.

Today, architects and engineers are often forced to sign contracts that make them assume a large portion of the owners' 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, spelling double trouble.

We've examined the dangers of client-drafted indemnities, identified three types of such indemnities and demonstrated techniques to persuade a client to abandon the use of these onerous agreements.

But what if a client insists upon including an indemnity in your contract? There are alternative forms of client indemnities that have only limited drawbacks. In addition, there are situations in which you may want to ask for a reasonable indemnity from the client, the contractor, your subconsultants and other third parties.

The Mutual Indemnity

The limited-form indemnity discussed in Part I is definitely the least of the three evils examined previously. An even better alternative, however, is a mutual indemnity that calls upon each party to indemnify the other, but only for each party's negligent acts. If a client presents you with its own indemnity language, you can counter with a mutual indemnity such as the following example from The Contract Guide published by XL Design Professional (XLDP):

Indemnification

The Consultant agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Client, its officers, directors and employees (collectively, Client) against all damages, liabilities or costs, including reasonable attorneys' fees and defense costs, to the extent caused by the Consultants negligent performance of professional services under this Agreement and that of its subconsultants or anyone for whom the Consultant is legally liable.

The Client agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Consultant, its officers, directors, employees and subconsultants (collectively, Consultant) against all damages, liabilities or costs, including reasonable attorneys' fees and defense costs, to the extent caused by the Client's negligent acts in connection with the Project and the acts of its contractors, subcontractors or consultants or anyone for whom the Client is legally liable.

Neither the Client nor the Consultant shall be obligated to indemnify the other party in any manner whatsoever for the other party's negligence.

The Insurable Indemnity

As a decidedly less desirable alternative, you may consider giving an insistent client some type of unilateral indemnity that limits the indemnity to that which is insurable. Tie the indemnity to your negligence and purge any client-generated clause of onerous language. Include the concept of comparative negligence, which holds you liable for only the portion of the damages for which you are responsible (unless your state law has an even more protec-

tive provision). Finally, see that the indemnity is limited to the services called for under the agreement. These concepts are reflected in the following sample language from XLDP:

Indemnification

The Consultant agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Client against damages, liabilities and costs arising from the negligent acts of the Consultant in the performance of professional services under this Agreement, to the extent that the Consultant is responsible for such damages, liabilities and costs on a comparative basis of fault and responsibility between the Consultant and the Client. The Consultant shall not be obligated to indemnify the Client for the Client's own negligence.

When the Client Won't Budge

If the client refuses to accept any alteration of an onerous indemnification, you have a business decision to make. You can accept the clause and the risk, hoping that the client will not ever have to apply the indemnity. Realize, however, that you are opening yourself up to an unlimited financial exposure that virtually no professional liability insurance policy will cover. This option should only be considered with a very low-risk client and project type with which your firm is thoroughly familiar and has had a claim-free record of work.



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 project, but it may be the prudent choice to ensure your long-term survivability. And who knows: your willingness to hold 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 You Want an Indemnity from Your Client

As stated, the original concept of indemnity is based in fairness, and no consultant should be

overly reluctant to indemnify an owner from the design firm's own negligence, errors or omissions. Likewise, there are certain instances where a design firm should not accept work on a project unless the client is willing to indemnify the consultant from unusual risks. Such instances may involve hazardous waste, asbestos, condominiums, renovations or the possible unauthorized reuse of your design documents.

Indeed, there are times when an indemnity from your client is the only prudent approach. Your firm did not create the hazards and your role is to help the client overcome them. In high-risk projects, an indemnity from the owner should be a requirement for your services. Such a contractual clause might read like the following sample from XLDP:

Indemnification

The Client agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Consultant, its officers, directors, employees and subconsultants (collectively, Consultant) against all damages, liabilities or costs including reasonable attorneys' fees and defense costs, arising out of or in any way connected with this Project or the performance by any of the parties above named of the services under this Agreement, excepting only those damages, liabilities or costs attributable to the negligent acts or negligent failure to act by the Consultant.

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 indemnity separate so that if the waiver is ruled invalid the indemnity isn't thrown out with it. Here is a sample waiver from XLDP:

Waiver

In consideration of the substantial risks to the Consultant in rendering professional services in connection with this Project, the Client agrees to make no claim and hereby waives, to the fullest extent permitted by law, any claim or cause of ac-

tion of any nature against the Consultant, his or her officers, directors, employees, agents or subconsultants, which may arise out of or in connection with this Project or the performance by any of the parties above named of the services under this Agreement.

Third Party Indemnities

In the event of jobsite injuries to workers or others, architects and engineers are often included in the resulting claims. For protection against these and other third-party claims, add a clause to your client contract that requires the client to include provisions in the client-contractor contract requiring the contractor to 1) have adequate insurance and 2) indemnify you and the owner for claims by the contractor's employees. Here is sample language from XLDP:

Contractor Insurance and Indemnity Requirements

The Client agrees, in any construction contracts in connection with this Project, to require all contractors of any tier to carry statutory Workers Compensation, Employers Liability insurance and appropriate limits of Commercial General Liability insurance (CGL). The Client further agrees to require all contractors to have their CGL policies endorsed to name the Client, the Consultant and its subconsultants as Additional Insureds and to provide Contractual Liability coverage sufficient to insure the hold harmless and indemnity obligations assumed by the contractors.

The Client shall require all contractors to furnish to the Client and the Consultant 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 Client shall require that all contractors will, to the fullest extent permitted by law, indemnify and hold harmless the Client, the Consultant and its subconsultants from and against any damages, liabilities or costs, including reasonable attorney's fees and defense costs, arising out of or in any way connected with the Project, including all claims by employees of the contractors.

Indemnity From Subconsultants

Prime consultants may seek indemnities from their subconsultants to protect themselves from damages and costs arising from claims due to the actions of these subconsultants. Consider the following language from XLDP:

Indemnification

The Consultant and the Subconsultant mutually agree, to the fullest extent permitted by law, to indemnify and hold each other harmless against all damages, liabilities or costs, including reasonable attorneys' fees and defense costs, arising from their own negligent acts in the performance of their services under this Agreement, to the extent

that each party is responsible for such damages, liabilities and costs on a comparative basis.

Conclusion

Indemnities are complex and have enormous liability implications. Have your attorney draft or approve any indemnity language with respect to the laws of the governing jurisdiction to determine exactly what your rights and exposures may be. Work, too, with us, your professional liability insurance specialist, to determine the insurability of any indemnities you intend to sign. ✨

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.

Aggressive Drivers Cause Crashes

By Stuart Nakutin, CSM, AIC, PHR, WCCP, CPDM

According to the Bureau of Labor Statistics, highway crashes continued as the leading cause of on-the-job fatalities during 1999, accounting for one-fourth of the fatal work injury total. The Department of Transportation estimates that aggressive driving causes two-thirds of traffic accidents. Of the million drivers in the United States, 53% clearly expressed anger to another driver at least twice a year. If you have employees who spend time behind the wheel, they may be at risk of becoming an aggressive driver, or a victim of one.

Causes

Congestion is a leading cause of aggressive driving. Clogged highways, tight schedules, and no way out of a jam can turn mere irritation into physical violence. Some common behaviors of other drivers that may elicit anger in an aggressive driver include the following:

- Tailgating, cutting off, failing to yield, or driving too fast or too slow
- Eating, applying makeup, or using a cell phone while driving
- Stealing a good parking spot
- Riding in the passing lane at a slower speed than traffic

Some Solutions

You and your driving employees can avoid becoming a victim of an aggressive driver by following a few tips:

- Allow enough time for the trip – it'll ease the risk of stress
- Don't cut off another driver; use your turn signal to indicate your intentions
- Move over and let faster drivers pass you if you are in the left lane
- Do not tailgate – allow at least a two-second space between your car and the car ahead
- Do not make obscene gestures
- Give aggressive drivers room – steer clear of them
- Avoid eye contact with aggressive drivers
- Do not give in to the challenges of an aggressive driver, or allow yourself to become one

Some employers have driving policies for their employees whose job involves driving. Some may include provisions for aggressive driving.

The simple quiz on the next page may help those employees determine if they are aggressive drivers.



Are YOU an Aggressive Driver?

By Stuart Nakutin, CSM, AIC, PHR, WCCP, CPDM

Do you get angry:

- When other drivers go too slow or too fast?
- When you are cut off?
- In traffic jams?
- At tailgaters?

Never Sometimes Often Always

Do you get impatient:

- At stoplights?
- Waiting in lines (car wash, bank, etc.?)
- When the car ahead of you slows down?
- With pedestrians crossing the street?

Do you often:

- Compete with other drivers?
- Challenge other drivers?
- Compete to amuse yourself?
- Punish "bad" drivers?
- Curse at or make obscene gestures at other drivers?
- Block cars from trying to pass or change lanes?
- Tailgate the car in front of you?
- Seek a personal encounter with other drivers?

Have you and your employees experienced the ease and simplicity of



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