



BACKGROUND

Of all the contract clauses in professional services agreements, indemnification clauses have the most significant liability implications. Indemnity is an agreement to assume liability in the event of a loss, and the assumption of liability involves the shifting of risk from one party to another. When a design consultant agrees to indemnify his client, he may be assuming some or all of the client's potential or actual legal liabilities. Unfortunately, these assumed liabilities may not be covered by insurance.

Indemnity clauses sometimes obligate the design professional to also provide a defense of certain claims made against the client. Providing a defense can sometimes mean actually retaining attorneys and experts and paying all defense costs incurred by the client as they come due. Alternatively, it can mean reimbursing the client for its attorneys' fees and defense costs incurred, with the method and timing of the payment according to terms negotiated by the parties.

Most professional liability insurance policies do not provide coverage for the defense of another party, which is unlike contractors' general liability insurance which will cover defense costs for claims for bodily injury, death or property damage. As such, the financial risks that are inherent in the "duty to defend" clause far exceed the risks that are assumed under an indemnity-only provision that does not include a defense obligation. It is therefore critically important for the design professional to disclaim any such an obligation, particularly given recent California court decisions¹ holding that an obligation to pay for a client's defense costs is implied in any agreement to indemnify *unless it is specifically stated otherwise*. The sample provided is intended to mitigate this concern, and we strongly recommend that design consultants work with their legal counsel to address these issues.

SAMPLE CONTRACT CLAUSE

Consultant agrees, to the extent permitted by law, to indemnify and hold harmless but shall have no obligation to defend the Client and its officers, directors and employees (collectively "Client") from and against liability for damages to the extent actually caused by the negligent acts, errors or omissions of Consultant and its subconsultants, or anyone for whom the Consultant is legally liable, in the performance of professional services under this Agreement.

Client agrees, to the extent permitted by law, to indemnify and hold harmless but shall have no obligation to defend the Consultant and its officers, directors, employees and subconsultants (collectively "Consultant") from and against liability for damages to the actually extent caused by the negligent acts, errors or omissions of Client and its contractors, subcontractors, consultants, or anyone for whom Client is legally liable, in connection with this Agreement.

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

¹ (Crawford v. Weather Shield Mfg., Inc., 44 Cal.4th 541 (2008) and Universal Development, L.P. (UDC) v. CH2M Hill (2010) 181 Cal.App.4th 10.)



WHEN YOUR CLIENT WILL NOT REMOVE THE DUTY TO “DEFEND”

The following two samples are provided as a possible compromise to significantly reduce, although not eliminate, the possibility of you assuming uninsurable liability to pay your clients’ costs of defense. In this scenario, you are not required to defend the client up-front but only to reimburse the client for its reasonable attorneys’ fees and costs of defense to the extent of your established negligence. Keep in mind that these reduced defense obligations may not be insurable, depending on your professional liability carrier.

OPTION #1

Consultant has no obligation to pay for any of the indemnitees’ defense related cost prior to a final determination of liability or to pay any amount that exceeds Consultant’s finally determined percentage of liability based upon the comparative fault of Consultant.

OPTION #2

Notwithstanding any contrary provision herein, it is hereby agreed that the Consultant’s obligation to defend or to pay the defense costs of the indemnitees shall only apply if and when and to the extent that a court or other forum of competent jurisdiction has determined the percentage of Consultant’s fault for the liability alleged, in which case Consultant shall be obligated to pay the amount equal to the percentage of its fault that has been actually determined.

At your request and as a courtesy to you, Dealey, Renton & Associates (DRA) provides the above to assist you in reviewing and negotiating proposed contractual provisions specific to the insurance issues in design contracts. It is not to be regarded as opinion or advice for any specific contracts. If legal advice or expert assistance is required, the services of a competent professional should be sought. You should develop your own language based on your firm’s procedures and experience in reviewing and approving contracts written by other parties.