Indemnification Clauses in Professional Services Agreements
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Winning the job or a new client means success to your firm. You’ve likely signed the professional services agreement without much scrutiny as to what your liabilities may be. Indemnification clauses are standard in these agreements, right? In reality, these provisions are often overlooked because most firms don’t think they can be changed.

In this webinar we’ll:

- Review Standard of Care
- Indemnification
- Identify Tactics to Limit Scope
- Analyze Clauses
- Assess Liabilities
Disclaimer

All provisions in this presentation are furnished solely for educational purposes.

Nothing herein is intended as legal advice, nor as a means of establishing an attorney-client relationship.

Laws and regulations may vary considerably by jurisdiction. Accordingly, you are advised to consult a knowledgeable attorney before making any contractual modifications.

— A Wise Lawyer
What is Unique about Professional Services Agreements?

Professionals with ‘common law’ duties to your client

You are generally insured for your failure to perform your services in accordance with the ‘common law standard of care’

If you agree to meet a higher standard or assume liability by contract you wouldn’t otherwise have had you may be uninsured!
Standard of Care

Ethical or legal duty of a professional to exercise the level of care, diligence, and skill prescribed in the code of practice of his or her profession, or as other professionals in the same discipline would in the same or similar circumstances.

--The Business Dictionary
What is an Indemnification Clause?

An **indemnification** is a contractual obligation by one party (**indemnitor**) to pay or compensate for the losses, damages or liabilities incurred by another party to the contract (**indemnitee**) or by a third party.
Three Types of Indemnifications

- Broad
- Intermediate
- Limited
Broad Form Indemnifications

Sample Broad Form Indemnification

“To the fullest extent of the law, Consultant shall indemnify, defend and hold harmless Client, its officers, employees, agents, representatives, consultants, and contractors from and against any and all loss, costs, penalties, fines, damages, claims, expenses (including attorney’s fees) or liabilities ... arising out of, resulting from, or in connection with the services contemplated by this Contract...”
Broad Form Indemnifications

Broad form indemnification provisions often include a “duty to defend” and a “duty to hold harmless.”
“Consultant agrees to hold harmless and indemnify Client from any and all liability, arising out of Consultant’s negligence, whether it be sole or in concert with others, in connection with performance of the services described herein.”
Limited Indemnifications

Sample Limited Indemnification

“Consultant agrees to indemnify Client from and against liability caused by Consultant’s negligent performance of services.”
As a general rule, “Red Flag” words are B.A.D.

- **Breadth**
  - “Arising from”
  - “Defend”
  - “in whole or in part”
  - “fees, costs, expenses”

- **Ambiguity**
  - “Agents”
  - “Representatives”
  - “Affiliates”
  - “Assigns”
  - “Insurers”

- **Degree**
  - “any”
  - “all”
  - “To the fullest extent”
  - “highest”
Indemnification Clauses

- Review it carefully
- Limit to the liability of the client for damages resulting from your firm’s negligence
- Should not obligate you to defend the client before any determination of liability

Indemnification
Consult an Attorney

Establish Time Limits

Include Monetary Caps

Establish when the duty to indemnify “kicks in”

Limit Number of Indemniteses

Include Reciprocal Terms
The Consultant shall indemnify and hold harmless the Client, its officers and employees from and against damages, liabilities, losses, costs, and expenses, but only to the extent caused by the negligent acts, errors or omissions of the Consultant, or of those for whom the Consultant is legally liable, which arise out of the Consultant’s performance of its professional services under this agreement.
“Consultant agrees to indemnify the Client against all damages... caused by the Consultant’s negligent performance of professional services...

Client agrees to indemnify the Consultant against all damages... caused by the Client's negligent acts.

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

- Attorneys
- Brokers
- Insurance Companies
Thank you for your time!

QUESTIONS??

This concludes the Professional Services Group Learning Event

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