# **Never Minimize the Significance of Client Driven Indemnity Provisions!**

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I recently took yet another call from a lawyer wanting to know my thoughts about a new business opportunity. It’s the call that starts out with so and so company wants the lawyer to be their exclusive local point person and the lawyer so wants to say yes to this wonderful new opportunity. This type of call is not infrequent and comes in many flavors. After talking about the issues as I see them, I always ask the one question these callers never seem to think about and the question is this. Is there an indemnification provision in the contract? I have yet to hear any lawyer tell me no.

Truth be told, a number of the lawyers who call about contracts they are considering signing seem to be surprised when I ask about the presence of any indemnification language. Apparently, they just gloss over certain sections of the contract; and trust me, that’s a misstep. Indemnification provisions are not something that can be ignored because they raise very real and serious malpractice coverage concerns.

Stop to consider how a malpractice insurer might view client driven indemnity provisions. When drafted very broadly, the language often used significantly expands what the lawyer may ultimately be liable for. Absent said language, the lawyer would be liable for any attorney negligence. However, depending upon the specific language at issue, by agreeing to an indemnity provision the lawyer can become liable for all kinds of client losses that are not the result of any attorney negligence. A malpractice insurance policy is designed to cover lawyers for their negligence. In addition, the insurer is not a party to the contract and has not agreed to the expanded exposure. As a result and in anticipation of such contract provisions, malpractice policies typically have a provision in them that excludes coverage for any obligation that arises under contract. This is what creates the coverage problem. In short, by voluntarily agreeing to contractually expand one’s exposure, a lawyer can create a serious coverage gap.

Unfortunately, this concern isn’t limited to contracts that a lawyer is thinking about entering into. Suppose a client inserts an indemnification clause into the boiler plate language of their guidelines and sends that to you. Might your continued representation after receiving the guidelines constitute an acceptance of that clause? I certainly wouldn’t want to be the one who has to pay to find out.

In this day and age when lawyers more and more are being treated like general service providers as opposed to trusted advisors, what is one to do? At the outset, read client guidelines and contract proposals front to back. Don’t continue with the representation or sign anything without understanding what your true exposure will be. If you are not comfortable with that exposure, see if the client will remove the problematic language. Other lawyers have suggested trying to insert language along the lines of “but only to the extent covered by my malpractice insurance policy” at the end of any indemnity clause and seeing if that will be acceptable. Hopefully some clients (your good clients) will understand that the risk they are asking you to assume is unfair and they will work to make the agreement acceptable. On the other hand, if any client responds by telling you everyone else signs this so if you want the work you will too, then I guess you have a tough decision to make. At least now you know it’s going to boil down to how comfortable you are in self-insuring the risk.

Mark Bassingthwaighte, Esq., ALPS Risk Manager, has conducted over 1,000 law firm risk assessments and presented 700+ legal education seminars across the U.S. He writes extensively on risk management and technology. Looking for more resources to support your solo firm? Check out Marks’ recent posts on the [ALPS Risk Management page](https://www.alpsinsurance.com/resources/risk-management?utm_campaign=Bar%20Program%20Asset%20Tracking&utm_source=Nevada_bar&utm_medium=referral&utm_term=handle_bar&utm_content=alps_rm_resources). You can reach Mark directly at mbass@alpsinsurance.com.