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# Double Indemnity: Indemnification Provisions in Engagement Agreements

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Lawyers deal with indemnification in a broad range of circumstances for their clients. Increasingly, however, lawyers are wrestling with indemnification provisions in a location closer to home: their own engagement agreements. Indemnification provisions in engagement agreements typically come in two flavors: indemnification of the lawyer or firm by clients against claims by third parties; and indemnification of the client by the lawyer or firm for risks beyond professional negligence. Each involves distinct considerations.

***Indemnification of the Law Firm***

In some situations, a law firm may wish to ask a client to indemnify the firm against claims by third parties. Oregon State Bar Formal Opinion 2005-165 addresses a common scenario: a firm is approached by a corporate client about investigating an employee for possible wrongdoing that, if confirmed, will likely lead to the employee's termination. In that situation, the firm may be concerned that it will be named as a defendant in subsequent litigation surrounding the termination.

Opinion 2005-165 notes that RPC 1.8(h) generally prohibits lawyers from prospectively limiting their liability to their own clients (absent the client being independently represented, which effectively means that such provisions are

exceedingly rare). Opinion 2005-165 reasons, however, that nothing in RPC 1.8(h) prohibits a lawyer or firm from seeking indemnification from third party claims as a part of an engagement agreement with a client. Opinion 2005-165 cautions that an indemnification provision would still be subject to the reasonableness standard that governs all fee agreements under the "fee rule"—RPC 1.5. It also "express[es] no opinion on whether such a provision must also meet Oregon RPC 1.8(a) regarding lawyers who engage in business transactions with clients." Although lawyer-client business transactions are not prohibited outright by RPC 1.8(a), the requirements for the client's informed consent are very exacting.

Client indemnification of a lawyer or law firm against third party claims is not a routine discussion that most firms have with their clients. In a circumstance like the one raised by Opinion 2005-165, however, indemnification is at least an option available for consideration.

***Indemnification by the Law Firm***

From the perspective of law firm risk management, a more problematic trend that has emerged in recent years is corporate clients asking law firms to indemnify them in engagement agreements or equivalent outside counsel "guidelines" prepared by the client. The specific terms vary, but many

indemnification provisions are quite broad, relatively open-ended and extend well beyond traditional legal malpractice liability. For example, this kind of provision might obligate the law firm contractually to indemnify the client for damages and legal expenses arising from a data breach at a litigation support vendor that was retained directly by the corporate client. Still others attempt to contractually obligate the law firm to hold the client harmless from negative consequences arising from otherwise flawless legal work.

The problems with broad indemnity provisions are threefold.

First, they may trigger obligations that are not covered by the law firm's malpractice insurance. Malpractice insurance—whether from the PLF or an excess policy from a private carrier—is designed to provide coverage for asserted negligence in delivering legal services. By contrast, malpractice policies typically exclude purely contractual obligations from coverage. Exclusion 18 in the 2017 PLF Plan, for example, generally excludes coverage for a law firm's contractual obligations—including "any assumed obligation to indemnify another[.]" In short, just as you would not look to your malpractice carrier to pay your monthly office rent, you shouldn't count on malpractice coverage to make good on your contractual assumption of an indemnity obligation.

Second, many indemnity provisions go well beyond professional negligence. Oregon lawyers in private practice have long been required by ORS 9.080 and accompanying Oregon State Bar bylaws to carry malpractice insurance and many firms also have excess coverage through the PLF or private carriers. As noted earlier, however, many indemnity provisions extend to areas that do not directly relate to the professional services rendered and instead obligate the firms involved to, in essence, become "insurers" in their own right for risks that they do not control—such as our earlier example of a data breach at a litigation support vendor retained directly by a corporate client.

Third, some indemnity provisions are so open-ended that they—at least in theory—expose the firm to contractual risks even if the legal services provided are flawless. A law firm, for example, might provide sage advice on a difficult issue for a client in any area that—through no fault of the law firm—involves inherent risk to the client. Depending on the breadth of the indemnity, the law firm may have effectively agreed contractually to hold the client harmless from any negative consequences notwithstanding the firm's capable legal work.

Proposed indemnity provisions requiring a law firm to indemnify a client are most often found in agreements that are prepared by sophisticated corporate legal departments. Lawyers need to carefully read "boilerplate" provisions that

may include broad indemnity obligations that run beyond professional negligence. If confronted with such a provision, lawyers—and their firms—then need to assess the risks involved and decide whether to "push back" against the provision or, if the economic risks involved outweigh the benefits, consider passing on the work altogether if the client will not remove the indemnity obligation.

**ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB Ethical Oregon Lawyer, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.