



## Shifting the risk of professional negligence

BY PETER CHRISTENSEN

Contractual indemnification clauses are present in almost every contract relating to right of way services. Whether they are written for governmental entities or private companies, acquisition agents, appraisers and relocation agents in particular are often impacted and would benefit from a clear understanding of what indemnification is and how it works in typical right of way service agreements.

### Purpose of an Indemnification Clause

An indemnification clause is a contractual promise by one person or business to reimburse or pay for the monetary loss of another person or business. In commercial contracts, it is fairly common for one party to agree to indemnify (or reimburse) the other party for losses. For example, in a lease agreement, a tenant who operates a gymnastics school would agree to indemnify the landlord for all damages claimed against the landlord if an injured gymnast sued. After all, it is the tenant who controls safety in the gym and knows what the risks are, while the landlord has little or no control.

However, indemnification clauses often shift an unreasonable amount of risk to one party—risks that the party can't always control. Some even go so far as to require one party to indemnify the other party's own negligence.

### When The Indemnification Clause is Missing

When there is no indemnity clause in a service agreement, it doesn't mean that the right of way professional has no potential liability. They will still be responsible for damages stemming from breach of the contract. Obviously, right of way professionals also have potential responsibility for their own negligent or wrongful conduct, even when no indemnity clause is present. This is the common law of professional negligence, general negligence and other tort claims. If a right of way professional's work product falls below the applicable standard of care and that violation causes injury to the client, the professional may be sued for negligence.

For example, we recently saw a client sue a real estate appraiser over an unfavorable result in a condemnation suit. The judge had thrown out the valuation opinion because the appraiser had used the wrong date of valuation. The client alleged that this violated the appraiser's standard of care and that the appraiser should pay for the client's poor result and alleged financial loss.

The common law that has developed around professional negligence is applied every day in thousands of cases against all types of professionals. It is a very well conceived area of law, and it presents the legal risk that professional liability insurance policies are designed to cover.

### When Indemnification is Extreme

When creating contracts, legal counsel for users of substantial right of way services—such as local governments, transportation agencies or companies acquiring large scale land rights—often create very one-sided agreements. The lawyers throw in every possible provision they can dream up to protect their clients and shift risk to the right of way services firms.

For example, here's a lightly edited form agreement that a pipeline company gave to the right of way service firms they were seeking to engage:

"Consultant shall indemnify, defend, and hold harmless Company and Company's officers, directors, employees, contractors, agents and other representatives (collectively "Company Parties") from any and all losses, damages, costs, fines, suits, liabilities, claims, demands, actions and judgments of every kind and character, whether in law

or in equity (collectively "claims"), including those claims resulting solely or in part from the negligence or other acts or omissions of any Company Parties, arising out of or relating in any way, directly or indirectly, to Consultant's services under this Agreement. These obligations shall survive after termination of this Agreement in perpetuity. "

When I read something like this, I think about the risks that a firm may be blindly taking on. Under this clause, the right of way firm is promising to pay the pipeline company's losses or costs of any kind, including fines or penalties against the company, for anything related to any work done by the firm under the agreement. The right of way firm is even required to indemnify the company for losses resulting from the company's own negligence. While many state laws could make such extreme indemnity obligations difficult to enforce, no right of way professional has any interest in being hauled into court and forced to defend themselves based on such technical legal defenses. The provision also





requires the firm to indemnify them for the company's own financial losses. To top it off, the firm's indemnification promises will exist forever, even long after the project is over and the contract has ended.

### Three Key Considerations

The above example of extreme indemnification raises the kinds of issues that can arise in any services agreement. Before considering indemnification clauses, right of way firms should address these three major questions:

## 1 Does the clause require that your firm defend the client?

The example clause not only obligates the right of way firm to pay the client for damages or losses resulting from the firm's acts but also obligates the firm to defend the client against any claim relating to such acts. This is very common language in indemnity clauses, but it poses some major risks.

What it means is that you've promised to pay for lawyers to defend your client against a claim relating in some way to your work, regardless of whether you've actually been found to have been negligent or done anything wrong. For a right of way firm, there are two big risks to accepting such a defense obligation. First, the promise to defend your client against claims is almost certainly not covered by any professional liability insurance you may have. The reason is that this promise is purely contractual. You would not otherwise have a legal duty to pay for your client's defense if you had not agreed to the indemnification clause. And contractual obligations—as opposed to your professional duties—are not ordinarily covered by professional liability insurance. Second, it is too great a risk for your firm to pay out of its own pocket for attorneys to defend your client against a claim when you may not

actually have made any error or be found negligent.

## 2 Is the clause limited to indemnifying your client from third party claims—or does it also obligate you to indemnify and hold your client harmless for the client's own alleged losses relating to your work?

The example clause requires the right of way firm to indemnify and hold the client harmless for any damages or losses, whether they are the client's own internal costs or the result of legal claims brought by third parties. It is much safer to only agree to indemnify your client for losses and damages relating to claims and lawsuits filed by third parties. By agreeing to indemnify and hold your client harmless from its own "first party" losses or damages, you are likely stripping yourself of some important defenses that you would normally have against a claim for professional negligence. In particular, by agreeing to indemnify "first party" losses, you will likely lose out on the ability to defend a claim or decrease the amount of liability by pointing to negligence or mistakes on the part of your client.

## 3 Is your obligation to indemnify the client for wrongful conduct on your part—or are you obligated to indemnify the client without there being any wrongful or negligent acts on your part?

The fact is, you are much safer to tie your indemnification obligations to wrongful or negligent acts, rather than simply agreeing to indemnify more broadly for losses or damages related to your services. But many professionals and services firms sign agreements with problematic indemnity language under the assumption that the provisions can't be changed. In my experience, that's often not the case.

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I speak to many firms that are able to work with their clients to come up with acceptable compromises once they see the risks. Your client's contracts are sometimes attached to language that they themselves may see as unfair, particularly if they have been independent professionals in the past. The language may just have been adopted from a form without any real analysis.

“**Confirm your willingness to accept responsibility for your own negligence or misconduct, but make it clear that being liable for the mistakes of others is unreasonable.**”

When discussing your concerns, explain that holding you legally responsible for another's liability is simply unfair, as is requiring indemnification when you and your firm's representatives have not made any actual errors. Confirm your willingness to accept responsibility for your own negligence or misconduct, but make it clear that being liable for the mistakes of others is unreasonable.

### **A Fair Indemnification Clause in Comparison**

For comparison with the extreme example, here is a provision that could be considered fair:

“Consultant shall indemnify Client, and its officers, agents and employees, for losses, claims, liabilities or damages that may be asserted by any third party against Client arising out of or resulting from negligent acts or omissions or intentionally wrongful conduct by Consultant, or Consultant's employees, agents or contractors, in the performance of Consultant's services under this agreement. Consultant's liability shall exist to the extent such losses, claims, liabilities or damages are caused by the Consultant's negligent performance of professional services under this Agreement. Consultant's obligation to indemnify Client shall continue for a period of one year following termination of the Agreement.”

There are a few differences that should be apparent. This clause does not include a duty to “defend” the client. It also more narrowly tailors the situations for which the consultant will be obligated to

indemnify. Rather than obligating the consultant to indemnify for all claims relating to the work—regardless of who or what kind of conduct causes the claim—the clause only requires the consultant to indemnify for their “negligent acts or omissions or intentionally wrongful conduct.” This clause also more closely aligns with the professional liability insurance coverage that the consultant is likely to have. Finally, the indemnity obligation only exists for a year after termination of the service agreement.

### **Final Thoughts**

In the end, prudent right of way professionals are left with several choices when confronted with an unreasonable indemnification clause. They can try to negotiate a reasonable alternative, or if that does not work, they can choose not to do business with that particular client. Ultimately, the professional must decide whether the risk being assumed is worth the benefit of the client's potential business. 🍷



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