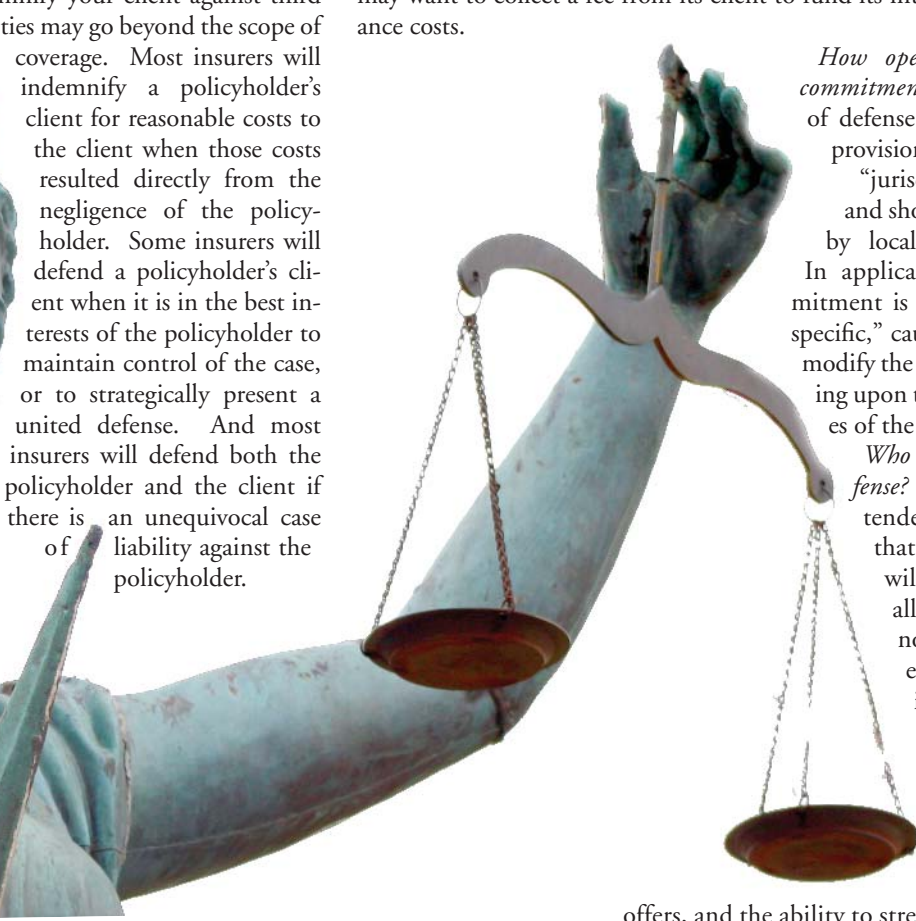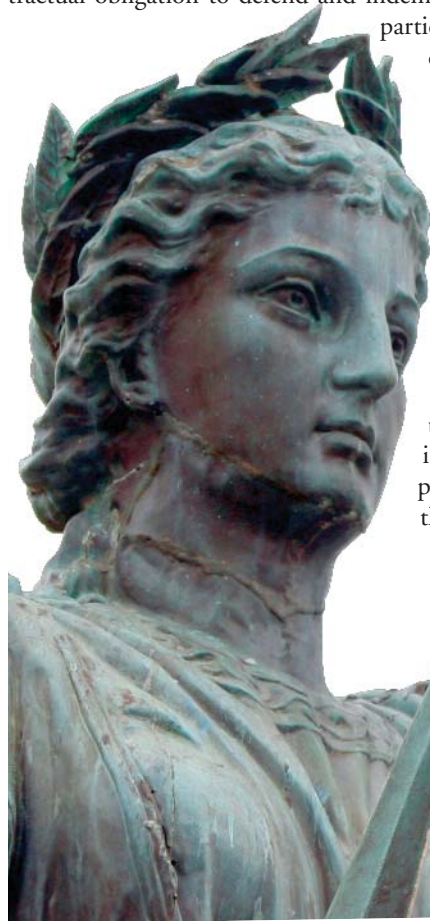# Defending and Indemnifying a Client

A professional service firm is responsible for rectifying any harm to its client that is the result of the firm's negligence. That is a basic tenet of United States law. And, it's the basis of professional liability insurance coverage. But firms are increasingly facing demands from clients that exceed this responsibility.

Clients are demanding contractual provisions that extend their right to recover for losses and damages. They usually want indemnity for any costs incurred when a third party sues the client based on the negligence of the professional service firm. And now clients want to shift defense, and subsequent costs, for such claims directly to design professionals.

Professional liability insurance is a specific coverage. It does not cover contractual obligations, except the obligation to carry out duties according to the professional standard of care. Assuming a contractual obligation to defend and indemnify your client against third parties may go beyond the scope of coverage. Most insurers will indemnify a policyholder's client for reasonable costs to the client when those costs resulted directly from the negligence of the policyholder. Some insurers will defend a policyholder's client when it is in the best interests of the policyholder to maintain control of the case, or to strategically present a united defense. And most insurers will defend both the policyholder and the client if there is an unequivocal case of liability against the policyholder.

Some policies offer broader coverage than other insurers by honoring an obligation to defend, indemnify and hold a client harmless provided that the obligation is limited to the extent caused or alleged to be caused by the negligent acts, errors or omissions of their policyholder in the rendering of professional services for that client.

Any contractual obligation to indemnify a client extends the exposure of a policyholder. In some states – those with contributory negligence theories for tort claims – a firm may not be responsible to a client for damages caused by the firm's negligence if the firm can show that the client's negligence was a contributing factor. Thus, an indemnity provision creates risk beyond the normal scope of liability. And in most states, statutes of limitations and repose cut off the exposure for claims resulting from construction-related services. A contractual obligation to defend a client, and to indemnify a client for harm to the client, may extend exposure indefinitely.

Indemnity agreements hinder the resolution of disputes. Arguments over coverage and the extent of harm are typical. But agreeing to defend a client exacerbates coverage and cost issues. And this may result in tremendous expenditures of time and money by policyholders. Some of the issues that arise whenever a defense obligation is assumed by a design firm include:

Can the firm afford to defend the client? Any allegation triggers a cost to the firm. And any insurance expense erodes policy limits. The firm may want to collect a fee from its client to fund its internal and insurance costs.

How open-ended is the commitment? The language of defense and indemnity provisions is extremely "jurisdiction specific" and should be reviewed by local legal counsel. In application, the commitment is "case and client specific," causing insurers to modify the defense depending upon the circumstances of the claim.

Who controls the defense? When a client tenders the defense, that client should be willing to give up all control. That's not likely; clients often want it both ways. They want a role in selecting counsel, a final decision on settlement offers, and the ability to stretch out the final resolution, thus increasing defense costs.

Does the provision mean the client can be reckless? Clients have a duty to act responsibly. Forcing someone else to defend them takes away an incentive to be a reliable part of the design team.

Clients need to understand the limitations of coverage. When you discuss an indemnity provision that includes an up front defense obligation, make sure your client knows the following:

1) Your professional liability policy covers your firm for its wrongful acts that are based on an unmet standard of care for professional services. Coverage is only for the firm's negligence in providing professional services to the client.

2) The defense of a policyholder's client may be included in the defense of the policyholder when it is clear that the allegation against the client is the result of harm caused by the policyholder's negligence.

3) If a client tenders its defense, it gives up control. If the client wants control over the defense, it must defend itself and seek indemnity from the design firm. Any indemnity payment will result only if the policyholder is found to have committed a wrongful act causing harm to another party and expense to the client.

4) Nothing in a professional service contract expands the duty the insurer has to a policyholder; that duty is based on the contract of insurance. Onerous contract language usually produces nothing but an illusory sense of protection to the client.

Contractual commitments can distort legal relationships. An indemnity agreement that includes a defense obligation often puts the firm at great risk. And it may jeopardize the ability of their insurer to represent the firm's best interests.▪

> *"The language of defense and indemnity provisions is extremely "jurisdiction specific" and should be reviewed by local legal counsel."*

Sample Contractual Indemnity Language

CNA/Schinnerer program's "Terms and Conditions Review Guide" offers the following as a contractual provision that addresses this issue.
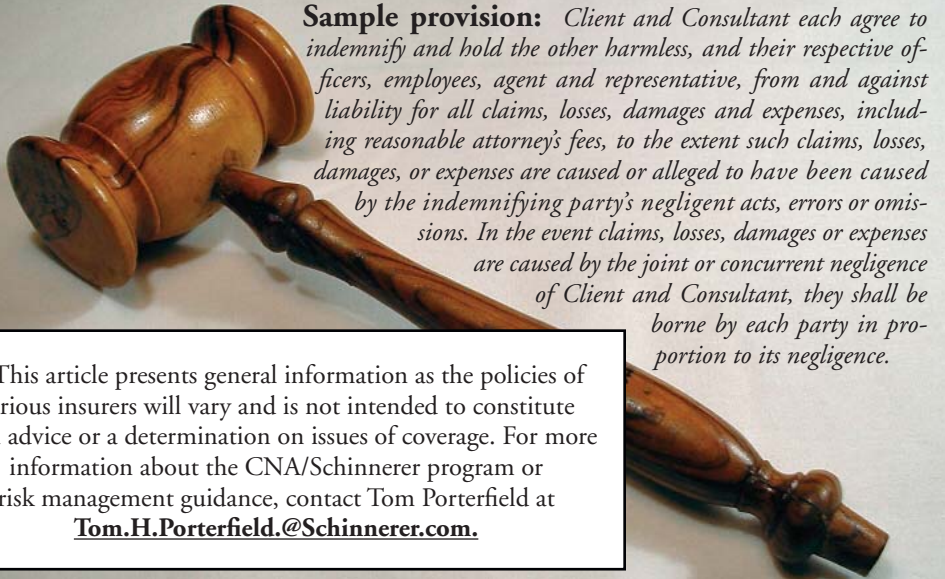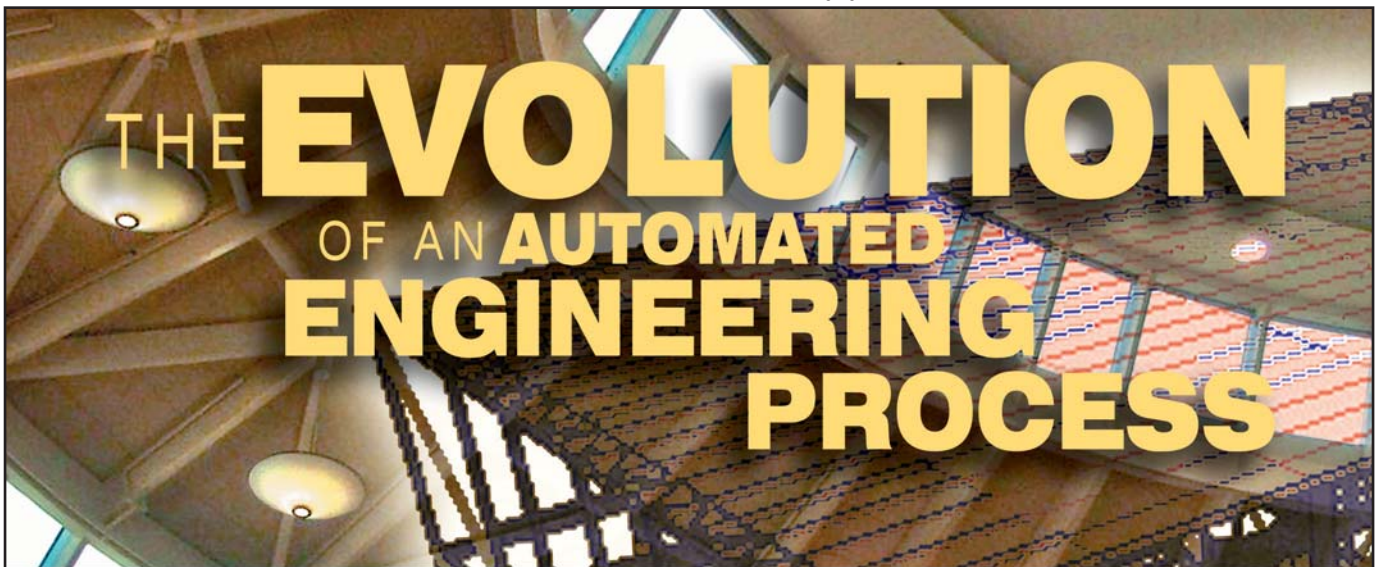
Sample provision: *Client and Consultant each agree to indemnify and hold the other harmless, and their respective officers, employees, agent and representative, from and against liability for all claims, losses, damages and expenses, including reasonable attorney's fees, to the extent such claims, losses, damages, or expenses are caused or alleged to have been caused by the indemnifying party's negligent acts, errors or omissions. In the event claims, losses, damages or expenses are caused by the joint or concurrent negligence of Client and Consultant, they shall be borne by each party in proportion to its negligence.*

This article presents general information as the policies of various insurers will vary and is not intended to constitute legal advice or a determination on issues of coverage. For more information about the CNA/Schinnerer program or risk management guidance, contact Tom Porterfield at **Tom.H.Porterfield.@Schinnerer.com.**