

**Q: We're negotiating to hold a Section meeting at a local hotel, and the contract specifies that we will indemnify the hotel for our use of the meeting space. Should I agree to that clause?**

Whether you're negotiating with a hotel for meeting room space or with a client for professional services, indemnification provisions are an invaluable tool in controlling your risks in the event of a third-party lawsuit. Done properly, an indemnification clause sets out each party's responsibility for its own actions and helps minimize the uncertainties associated with civil litigation. But for the unwary, an indemnification clause can tip the balance too heavily in favor of one party, leaving the other party with a far greater contractual liability than would exist under the common law.

Many hotels, vendors, and other entities begin dealings with a prospective client by offering a standard contract form. While using such standard contracts avoids the delay and expense of drafting a personalized agreement, common sense dictates that these standard contracts have been drafted with terms that are the most favorable to the business's own interest. Often, such contracts may include a one-sided indemnification provision, such as the following:

Client shall defend, indemnify and hold Hotel harmless from and against any and all liability, loss, expense (including, without limitation, all costs and attorneys' fees), or claims for injury arising out of or in any way connected with your function, including claims for loss or damage to any property, or for death or injury to any person or persons.

The provision places an enormous burden on any Client who agrees to these terms, far greater than the Client would face under common law. Under this language, the Client may be obliged to reimburse the Hotel for losses arising not only from the Client's own actions but from any other person's actions as well—including guests, exhibitors, even the Hotel's own employees or contractors. This type of indemnification language should be avoided at all times.

Similarly, it is best to be cautious when the words "sole" or "solely" appear in an indemnification provision, e.g., as follows:

To the extent permitted by law, you agree to protect, indemnify, defend and hold harmless the Hotel and their respective employees and agents against all claims, losses or damages to persons or property, governmental charges or fines, and costs (including reasonable attorney's fees), arising out of or connected with your function, except those claims arising out of the sole negligence or willful misconduct of the Hotel.

This provision is saying that, if your group's actions, or the actions of any other person, made even the smallest contribution to the third party's loss, you are

obliged to pay the full amount of the Hotel's liability, even if the Hotel itself shared the larger part of the responsibility.

One additional clause to watch for is one in which the Hotel accepts responsibility only for the "gross negligence" of its staff:

Except for injuries and damages sustained by persons or property due to the willful misconduct or gross negligence of the Hotel, Group shall indemnify, hold harmless, and defend Hotel from and against any losses, claims, liability, damage, action, or expense (including costs and attorneys fees) arising in any manner out of, or related to, the use of the Center pursuant to this Agreement.

The term "gross negligence" is a legal term implying a greater degree of misconduct than simple negligence. Under this provision, the group would be required to indemnify the Hotel for the Hotel's own negligent behavior, unless the behavior was not merely a failure to exert reasonable care, but an act of such carelessness as to suggest reckless indifference to the probability of harm. In clauses such as this, be sure that the Hotel bears responsibility for negligence as well as gross negligence and willful misconduct.

It must be noted that courts do not look favorably on agreements where a party seeks indemnity for its own negligence, and many such courts will refuse to enforce such a provision if it is not clear that the language expressly states an intent to shift the liability to such an extent, or if there is any hint of a lack of sophistication or uneven bargaining power that may have led the indemnifying party to agree to greater liability than it desired. However, it is clearly unwise to rely on a court to reject the language of a signed contract, particularly in agreements between two sophisticated parties, in which a court may have no choice but to conclude that the indemnifying party freely and fully intended to assume liability for the other party's actions.

If you must sign a one-sided indemnification provision, the best provision is one that commits you to indemnify only to the extent of your responsibility for the Hotel's losses. However, the most equitable indemnification provision—and the one that you should always strive to include in contracts with hotels or other commercial vendors—is a mutual indemnification clause, such as the following:

Each Party shall indemnify and hold harmless the other Party and its affiliates, directors, officers, employees, partners, contractors or agents, from and against any and all claims, actions, causes of action, demands, or liabilities of whatsoever kind and nature, including judgments, interest, reasonable attorneys' fees, and all other costs, fees, expenses, and charges (collectively, "Claims") to the extent that such Claims arise out of or were caused by the negligence, gross negligence, or willful misconduct

of the indemnifying Party or from any breach of the Agreement by the indemnifying Party.

If you have questions about this article, or about any legal matter concerning your ASCE section or branch, please contact Tom Smith, ASCE General Counsel, at (800) 548-2723 x6061 (e-mail: [tsmith@asce.org](mailto:tsmith@asce.org)) or Tara Hoke, Assistant General Counsel, at (800) 548-2723 x6151 ([thoke@asce.org](mailto:thoke@asce.org)).