The Best Defense...

> **ENGINEER agrees to hold harmless, indemnify, and defend CLIENT from and against damages arising from ENGINEER's errors, omissions, and negligent acts, to the extent of ENGINEER's negligence.**

You've probably agreed to contract language like that. And why not? It appears to be a limited-form indemnity, something which is probably covered by your professional liability insurance (PLI) policy. (A limited-form indemnity sets forth the basic common law tenet that you repay people for damages caused by your negligence; e.g., were your client to experience $100,000 in damages, and were your firm responsible for 65% of that loss, you would owe the client $65,000.) Not all clients might see the provision as you do, however. Some might say that, in the event of a third-party claim naming the client and the engineer (as many third-party claims do), the provision would obligate the engineer – you – to pay for the client's defense, *even though negligence against you was merely alleged.* "Oh, no," you'd say. "That's not what 'defend' means. It means that, if our firm is ruled to have been negligent to some extent – say, 65% – then we'd be obligated to pay 65% of the damages, and damages include the cost of defense."

And what would your client say? Something along the lines of, "Gosh, we made a mistake. Of course your interpretation is correct"? Dream on. In fact, the client – with the strong urging of its attorney – would likely argue that:

- the "defend" portion of the indemnity is a separate and distinct element;
- *no matter what*, the promise to defend begins with defense-dollar-one; and
- the "to the extent of ENGINEER's negligence" requirement applies to the rest of the provision, but *not* "defend," meaning that, no matter what, you'd have to pay 100% of the client's legal expenses.

So, assuming you and your client interpreted the provision differently, what would happen in the event of a third-party suit? You'd probably have to retain counsel to sort

out the issue in court, and your attorney might be less than optimistic about the prognosis: Even though many courts prefer to not enforce indemnities, they enforce them nonetheless. In the case of this particular language, some courts might even rule in favor of the client, at least to the extent that you would have to pay for the client's defense.

"That would be unfortunate," you might say, philosophically, "but, if I'm found not negligent, I'd get the money back." Not likely, because you probably wouldn't be found nonnegligent… or anything else, for that matter, because you'd probably settle out of court, and defense costs would likely be part of the settlement negotiation. And one thing's for sure: Your professional liability insurer would scrutinize those defense costs. In fact, you might be required to pay for that portion of defense costs that exceed your portion of fault, because the "extra" costs would have stemmed *not* from errors, omissions, or negligence – exposures your PLI policy covers – but rather from a contractual agreement (to defend), which no PLI I'm aware of routinely covers.

So what do you do if the client offers you a limited-form indemnity with a defend provision? Your lawyer might suggest that you simply drop the "defend" provision and change the provision to something like this:

> **ENGINEER agrees to hold harmless and indemnify CLIENT from and against damages arising from ENGINEER's errors, omissions, and negligent acts, to the extent of ENGINEER's negligence.**

The change is justified, you would tell your client, because, without it, you might be required to provide a defense solely because it's *alleged* you've been negligent. "Where there's smoke, there's fire," a client representative may respond, a silly notion you could counter by noting that almost all parties to a project are named as defendants when third parties file claims, for two reasons. First, as plaintiff's counsel might explain, "We can't tell who's really at fault until we begin discovery. If we omit parties from discovery, we may be unable to discover important information, so we name all parties as defendants." Second, and as some of those same attorneys may observe to their clients, "Besides, any

number of the parties we name may be willing to spend $5,000, $10,000, or more just to avoid the nuisance."

Fact: You are obligated to indemnify the client for damages caused by your negligence, and those damages could include the all or a proportionate share of the cost of the client's defense. Assuming your attorney agrees, you could actually make that obligation obvious by offering a replacement provision that might be similar to this sample:

> **ENGINEER agrees to hold harmless and indemnify CLIENT from and against damages arising from ENGINEER's errors, omissions, and negligent acts, to the extent of ENGINEER's negligence. ENGINEER and CLIENT expressly agree that these damages include CLIENT's reasonable cost of defense.**

You might also want to let the client know that it could cover its exposure far more effectively through its own insurance policy. Were the client representative to respond to all of that with an unmoved, take-it-or-leave-it attitude, you would have learned something important about the client. If you'd still be willing to accept the client's project, that would be your business. But, unquestionably, it would be risky business.