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Understanding the Implications of "Defending" Your Client

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As many of you are by now aware, the most important contractual clause to consider from a litigation standpoint is the indemnity clause. Indemnity is defined as the right of an injured party to claim reimbursement for its loss, damage or liability from a person who has such duty. In other words, your Client wants you to promise to reimburse them for damages caused by your negligence. Part and parcel of many indemnification clauses you may come across is an expectation from your Client that you also "defend" them. It has become increasingly important to recognize the difference between "indemnity" and "defense," and the implications it has on you as a design professional.

Webster defines "defend" as "to ward off attack from; guard against assault or injury." Unless you sport a royal blue leotard with a big red "S" on your chest, my guess is you are neither ready, willing, nor able to take on such a monumental task, particularly when your Client is in a much better position to assume the risk (and pocket the profits) of the project.

Here is the problem: When you agree by contract to "defend" your Client in the event of a claim against them, you are agreeing to pay your Client's attorneys' fees and costs *from the first day a claim is made against them, regardless of your liability.* In essence, the Client has every right to hire an attorney of their choice and send you the monthly invoice. And perhaps the biggest clincher is that your professional liability insurance will probably not cover you for defense obligations you have assumed vis-à-vis the contract. At minimum, the question of coverage among carriers remains unclear.

Take, for example, the recent Court of Appeal case of Kirk Crawford, et al. v. Weather Shield Mfg., Inc. (2006) 38 Cal.Rptr.3d 787*. In that case, homeowners brought a construction defect action against the project Developer, the window manufacturer and the window framer, alleging that the windows leaked and fogged. The Developer cross-complained against the manufacturer and framer, seeking defense costs. The Developer settled with the homeowners, then proceeded to trial against the manufacturer and the framer. The jury found against the framer, but in favor of the manufacturer.

Importantly, however, the manufacturer's contract with the Developer provided that it would defend and indemnify the

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Developer in actions brought against the Developer founded on claims growing out of the execution of the window manufacturer's work. Specifically, the clause read:

Contractor does agree to indemnify and save Owner harmless against all claims for damages to persons or to property and claims for loss, damage and/or theft of homeowner's personal property growing out of the execution of the work, and at his own expense to ***defend*** *any suit or action brought against Owner founded upon the claim of such damage or loss or theft…"*

The trial court found that the manufacturer had no duty to indemnify (since the jury found no fault on the manufacturer's part), but allocated 70% of the Developer's defense costs to the window problems, and split that 70% amount between the framer and the manufacturer ($131,000 each).

The Court of Appeal agreed with the trial court's findings regarding the award of defense fees and costs, indicating that ***the absence of negligence did not excuse a defense obligation undertaken by the subcontractor in the indemnity agreement.*** The duty to defend was triggered upon tender, i.e., at the moment the Developer first gave notice of the claim to the manufacturer. This duty arose *independent* of any negligence on the manufacturer's part.

As you can imagine, shivers ran up and down the collective spine of insurance carriers and defense attorneys alike when this ruling came down. It goes against our basic understanding of fairness and equity to hold someone liable for the legal expenses of another when there is a finding of no fault. However, from a historical perspective, the court was consistent in following a basic premise in law that a contract between two capable parties is binding absent a showing of duress, unlawfulness, etc. Additionally, although the Crawford case involved a dispute between a developer and a manufacturer, the court's decision can be argued by analogy to apply to all such agreements, regardless of the parties involved.

There is a lesson to be learned here. An agreement to "defend" can be quite costly. If your Client continues to fight you on this, and insists that you pay their costs of defense from the moment a claim rears its ugly head, consider whether this is a Client you truly want to work with. Of course, that is easier said than done, particularly when the Client seduces you with the promise of a prosperous working relationship for years to come. There are means to negotiate. Perhaps you can negotiate a "cap" on defense costs coming from your firm's pocket. Another option is to include language that will limit your duty to defend to your adjudicated share of responsibility. (From a practical standpoint, this has the potential effect of creating a battle at the time of litigation if your Client pursues up front payment of defense costs, since you will not know your adjudicated share of negligence until trial is completed.) Creativity can play an important role in this very litigious and competitive environment.

And finally, if you have any questions or doubts about what your Client is asking you to sign, contact your insurance broker and your attorney. Ultimately, you become a better business person when you are armed with the knowledge of the risks involved in the agreements you sign.

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*This case is currently under appeal with the California Supreme Court. The Court will consider the following issue: “Did a contract under which a subcontractor agreed ‘to defend any suit or action’ against a developer ‘founded upon’ any claim ‘growing out of the execution of the work’ require the subcontractor to provide a defense to a suit against the developer even if the subcontractor was not negligent?” 44 Cal.Rptr.3d 632

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