

Risk Management: Contractual Indemnity and Hold Harmless Agreements

*Indemnification language in both hospital contracts and insurance provider agreements has become pervasive. Unfortunately for anesthesiologists, such contractual provisions may give rise to additional claims, lawsuits, and costs that **may not be covered** by the anesthesiologist's malpractice insurance.*

What is a contractual indemnity provision or a hold harmless agreement?

This is a contractual provision in which one party agrees to protect the other from claims or losses. For anesthesiologists, this type of provision is often inserted in hospital and insurance contracts in order to obligate the anesthesiologist to protect the interests of the hospital or insurance company. When included in a contract, this type of provision can generally be identified by the use of the terms "indemnify" or "hold-harmless."

What is the purpose of such contractual provisions?

In general, the inclusion of such language is to either define each party's responsibilities for anticipated losses, or to shift these responsibilities from one party to the other.

Why should I be concerned with this type of contractual provision?

Depending on the language used, such contracts may redefine your malpractice exposure and in many cases may obligate you to accept responsibility for malpractice losses that are not covered by your insurance policy. In other words, you may be accepting personal responsibility for losses, legal fees and expenses incurred by someone else.

At the very least, such contractual provisions create a theoretical exposure that may not be covered by most malpractice insurance policies. Almost every medical malpractice insurance policy, including Preferred Physicians Medical's, includes some exclusion for liabilities assumed under contract. Many insurance policies have a blanket exclusion for all such contractual obligations. More progressive malpractice insurance companies, including Preferred Physicians Medical, have modified this exclusionary language to better reflect the fact that such contracts are now a standard feature in

the practice of medicine. Our policy excludes contractual liabilities except to the extent that such claims would have been covered regardless of the contract. See, Part 4(i) of the Policy Booklet. Our approach to this issue is designed to extend insurance coverage to those areas that fall within the traditional framework of professional liability coverage. This approach also recognizes the need to prevent contractual overreaching that may attempt to inappropriately shift significant exposures to the anesthesiologist.

Why are these provisions included in contracts?

In recent years, hospitals and health insurance companies have become concerned about plaintiff attorneys looking to them as the "deep-pocket" in the event of an adverse medical outcome. Hospitals and health insurance companies believed that the inclusion of such language in their standard contracts with physicians would avoid attempts by plaintiff attorneys to shift responsibility for physician malpractice to them. Unfortunately, hospitals and health insurance companies failed to appreciate that such contractual provisions could place an additional exposure on physicians that in many cases would not be covered by insurance. In addition to the fact that such losses may be specifically excluded by your malpractice policy, you should note that most indemnification provisions contain no limit on the amount recoverable. Even if your insurance policy would respond, it would only do so within the limits of coverage purchased. The physician would remain contractually and personally responsible for any claims exceeding the insurance limits.

What should I do if a hospital or health insurance company attempts to include an indemnification provision?

Given the potential exposure created by the contractual provisions, policyholders should resist the inclusion of such language. Alternatively, you should attempt to

negotiate the most favorable language that both parties can accept. Your goal should be language that defines the responsibilities of each party rather than language that shifts responsibility to you.

Here is an example of language that attempts to shift responsibility and additional loss exposure from a hospital to the anesthesiologist.

Anesthesia Group agrees to indemnify, hold harmless and defend the Hospital from any and all liability arising from anesthesia services provided pursuant to this contract.

Not only does this language broadly shift exposure to the anesthesia group; it is lacking in mutuality.

Here is an example of better language.

Anesthesia Group agrees to indemnify, hold harmless and defend the Hospital from liability in the event the Hospital is sued solely as a result of the physician's negligence. Hospital agrees to indemnify, hold harmless and defend the Anesthesia Group in the event the Anesthesia Group is sued solely as a result of the Hospital's negligence.

This language, while still attempting to shift responsibility and loss, does so on a more limited basis. Also, unlike the earlier language, it is mutual with both parties agreeing to assume responsibility for claims that are solely their responsibility. Note, however, that even this language may not conform to your malpractice insurance policy.

Here is an example of the alternative language that avoids the shift of responsibility and loss, while helping to define the relationship.

Anesthesia Group agrees that Hospital shall not be responsible for any claims, actions, liabilities or damages arising from the acts or omissions of the Anesthesia Group, its physicians or employees. Hospital agrees that Anesthesia Group, its physicians and employees will not be responsible for any claims, actions, liabilities or damages arising out of the duties or obligations of the Hospital or its employees.

Such language separates the responsibilities of the respective parties and avoids the pitfalls of indemnification language. A hospital can bolster this language with requirements that the Anesthesia Group maintain adequate levels of insurance. In addition, the hospital can ask for additional provisions that underscore the Anesthesia Group's status as an

independent contractor. All printed materials (informed consents, billing invoices and other anesthesia materials) can emphasize that anesthesia services at the hospital will be provided by an anesthesia team employed by the Anesthesia Group and not the hospital. Similar language would also work in a health insurance provider contract as well.

How often have these contractual provisions become a problem?

Without going into a lengthy discussion of the legal issues that have given rise to indemnification language, we should note that language similar to the first two examples is being included in many hospital and health insurance contracts. While we have handled numerous claims subject to such contractual terms, we have encountered relatively few situations where such indemnification language has become an issue.

In several cases, however, hospitals have attempted to use this type of indemnification language to force a greater settlement on an anesthesiologist or anesthesia group. Other situations have arisen where hospitals have asked anesthesiologists to assume the hospital's defense. In most cases, these demands were resisted based on the language contained in our policy. It is for this reason that the practical impact of indemnification language remains largely theoretical. The extent to which this language remains theoretical is probably related to the overall value of a malpractice claim. Likewise, the significance of undertaking an uninsured exposure would be most acute on significant claims.

What general recommendation can PPM provide?

Based on our experience, we continue to encourage physicians to avoid the inclusion of this language. Absent leverage to avoid its inclusion, you should ask that the language be narrowly tailored and mutual in nature. You should also recognize that the organization you are contracting with might be exposing you to claims that are outside your insurance coverage. To the extent this is a valuable contract, you will want to balance its value against this theoretical exposure. Finally, we encourage policyholders to obtain the advice of personal or corporate counsel that can advise you more specifically on the entire contract as well as address any issues of local concern. Our in house attorneys cannot provide you with legal advice. Our recommendations are based solely on our experience and concerns.