Indemnification Traps in Physician Contracts

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A hospital or giant multispecialty medical group sends over a "standard" pro-forma agreement. It is 20 pages long and written in legalese. Buried mid-paragraph is one sentence that could turn a routine credentialing hiccup into a personal bankruptcy event. It is indemnification language. Harmless at first glance. Radioactive in practice.

What Is Indemnification?

Indemnification is a contractual obligation by which one party (the indemnitor) agrees to compensate the other party (the indemnitee) for losses or damages that may occur. It is a way of shifting financial liability for a specific event, such as a breach of contract, negligence, or property damage. It is common in contracts, insurance policies, and leases. The party being protected is kept "harmless" from these potential financial consequences.

At first glance, such general language may even seem reasonable. For example, you are hired as a pharmaceutical representative to make sales and marketing calls to physicians. In working for the pharmaceutical company, they expect you to drive from one doctor's office to another and do what pharmaceutical representatives do. What if you take a non-job-related detour, and head to a bar, imbibe four stiff drinks, and then resume driving? And then you hit a pedestrian. The pedestrian sues you, and since, in this example, it's a company car, he sues the pharmaceutical company. Why wouldn't he? It has the deepest pockets. The pharmaceutical company will want to argue that your detour was not part of your job description. You acted independently. You did not act the way a typical employee would act and thus would not be worthy of a defense.

For the pharmaceutical company, an indemnification clause forestalls this. You assume liability and legal defense for the company, based on language in the employment agreement. So, if the pharmaceutical company gets dragged in to a lawsuit, it will look to you to pay lawyers and a settlement/judgment.

Going 5 MPH over the speed limit getting from one doctor's office to another is not unreasonable.

Getting intoxicated in the middle of a workday, using the company car to get to and from the bar, is not reasonable.

So, some indemnification language is reasonable, even expected.

Still, indemnification clauses make the party an insurer of the other party for potential liabilities. You shouldn't directly indemnify for those things over which you have no control. To accept an indemnification clause that creates such an obligation would compel you to buy insurance to cover the accepted areas of indemnification. Most insurers would be reluctant. Then, your assets become the insurance policy. Before signing on the dotted line, caution is warranted.

For physicians parsing employment agreements, here is how the indemnification traps show up, and how to (potentially) defuse them before they destroy your balance sheet.

The Big Traps

"Arising out of or related to …" language broadly ropes you into paying for losses *well beyond your own conduct*—for example, hospital information technology (IT) failures, a vendor's breach, even a visitor's premises claim. Push for: **"to the extent caused by physician's gross negligence or willful misconduct."** Three words—*to the extent*—turn a blank check into proportional fault. If you had nothing to do with causing the problem, why should you be responsible for any "arising" liability?

"Duty to *defend*" vs. "duty to *indemnify*" forces you to start paying legal fees on day one, even if you did nothing wrong, and even if your malpractice carrier will not step in to honor a pure contract obligation. Better wording is to delete "defend" and replace with **"reimburse reasonable defense costs to the extent finally determined to have been caused by physician's gross negligence."** Let your insurer control defense when coverage exists. And, with the suggested language update, you delay legal responsibility until it is determined what role you had, if any, in causing said liability. Let the institution pay its own lawyers on day one.

Indemnity for **"all losses"** leads to **first-party loss creep**. It often includes the hospital's own internal losses—payer recoupments, fines, and penalties unrelated to your care. Limit the clause to **third-party claims** and exclude internal administrative losses, civil penalties, and consequential damages. In this exercise, a first-party claim is made by the hospital or large multispecialty group. A third-party claim is made by an external party, for example, a patient.

Intellectual property (IP) claims should be the responsibility of the **vendor**. Occasionally, device or software vendors try to make the physician indemnify *them* for IP claims tied to *their* product. That is backwards. If a marketing company uses someone else's copyright-protected images in your campaign, and a lawyer knocks on your door, you want the marketing company to be responsible for what it caused. You want *them* to indemnify *you*. So, pause to think through what different contracts are asking of you in terms of indemnification. You do not want to pay legal bills

or settlements/judgments when the other party in your contract fails to properly do its job. As one wise person said, "I know how to do my job. I know how to do your job. But my job is not to do your job."

Liabilities arising only from **contract duty** are excluded from many malpractice policies. A promise to "defend and indemnify" can sit outside of coverage. Insert: **"Only to the extent covered by applicable insurance; nothing requires physician to assume obligations beyond insurance coverage without prior written consent."** Loop in your carrier before you sign; endorsements exist. Any ambiguity needs to be clarified before a claim is triggered.

Obligations should not be triggered by allegations, without findings. If payment obligations start upon mere accusation, you will fund defense for the hospital's own mess. Use **"finally adjudicated"** or **"admitted in writing"** triggers, and demand proportionality. This means you may have to pay later, but only to the extent you were adjudicated to having caused the problem at issue. You do not want to have to write blank checks at the starting gate.

HIPAA/privacy cross-indemnities may be lurking in the contracts, which sometimes make you pay for system breaches housed in the hospital's information technology network. Move HIPAA terms to the Business Associate Agreement (BAA) and make indemnity **mutual** and **fault-based**: each party covers only breaches caused by its own workforce, systems, or vendors.

How to Negotiate without Setting Off Landmines

Lead with symmetry. If the hospital wants indemnity, make it **mutual** and **fault based**. Most legal teams accept fairness; they resist asymmetry.

Trade timing and control for "defend." Offer prompt notice, cooperation, and noninterference, while keeping **your insurer's right to select counsel** and **consent to settlement** intact. Add that no party settles in a way that assigns fault or creates non-covered obligations **without the other's consent**.

Carve out penalties and fines. Most physicians cannot insure against imposition of civil penalties, but you can exclude **punitive damages, fines, penalties, and indirect damages**.

Call your carrier before you sign. Two quick asks: (1) **Does my policy cover this indemnity as written?** And (2) **If not, what language would make it fit inside coverage?** A five-minute email now prevents the "we don't cover contract liability" letter later. You can always point the hospital to your carrier's email explaining that the carrier finds the contract's ask unreasonable.

Representative Examples

If there is a **slip-and-fall in the lobby**, your contract says you will "defend and indemnify any claim related to your practice." The plaintiff never met you. Facilities should own the premises claims. With a **third-party only, proportional-fault** clause, you step aside—exactly as you would have hoped and expected.

With **copyright claims**, damages can escalate rapidly. If a marketing company scraped copyright-protected images from the internet for use in your marketing campaign, in standard vendor agreements the marketing company may limit its liability to what you paid for its services. This means that their maximum liability might be your getting your money back. Since presumably you will have no role in selecting images for the campaign, language such as that illustrated below may move the risk back to the vendor, where it properly lies.

> Vendor represents and warrants that all materials and deliverables provided under this Agreement are original to Vendor or properly licensed, and do not infringe, misappropriate, or violate any intellectual property or proprietary rights of any third party. Vendor shall defend, indemnify, and hold harmless Client and its officers, directors, employees, and agents from and against any and all claims, demands, suits, damages, liabilities, losses, and expenses (including reasonable attorneys' fees and costs of defense) arising out of or related to any alleged or actual infringement or violation of third-party rights by the deliverables or Vendor's services. Vendor shall assume control of the defense of such claims with counsel reasonably acceptable to Client, and shall pay all settlements, judgments, and associated costs; provided that Vendor shall not settle any claim imposing liability or obligations on Client without Client's prior written consent. This indemnification obligation shall not be subject to any limitation of liability set forth in this Agreement. Vendor shall, at its own expense, obtain all necessary licenses and, if any deliverable is alleged to infringe, promptly replace or modify it to be non-infringing or secure Client's continued right to use it.

Americans with Disabilities Act (ADA) claims should be the responsibility of the landlord. A disabled patient might sue because the bathroom in your leased office does not comply with federal law. You are not an architect. You are a doctor. Rules change all the time. It is not reasonable to have you be the point person using a tape measure to see whether the bathroom in your leased office comports with relevant ADA laws. Since presumably you will have no role in detailed office design (other than, perhaps, the layout), language such as that illustrated below may move the risk back to the landlord, where it properly lies.

> Landlord represents and warrants that the Premises and all common areas, including restroom facilities, comply with the Americans with Disabilities Act and all applicable accessibility laws, local, state, and federal. Landlord shall, at its sole cost, correct any noncompliance relating to structural elements or conditions existing prior to Tenant's occupancy. Landlord shall defend, indemnify, and hold harmless Tenant and its physicians, employees, and agents

from and against any claims, damages, liabilities, and expenses (including reasonable attorneys' fees) arising from any such noncompliance, except to the extent caused by Tenant's alterations. This obligation includes the duty to defend and is not subject to any limitation of liability.

The physician should not be responsible for behavior of employees he does not control. If you are a clinical employee of a healthcare organization, you have no control in hiring or firing employees, particularly those performing non-clinical roles. You do not want to be liable for a scheduler whom you do not truly supervise failing to make a timely appointment for a patient. The following wording may help:

> Employer shall defend and indemnify Physician from any claims arising out of administrative or operational failures of Employer or its personnel. Physician shall have no liability or indemnification obligation for any acts or omissions of Employer or its employees, agents, or contractors, including without limitation scheduling, registration, triage, staffing, or other administrative or operational functions, except to the extent arising directly from Physician's own negligent clinical acts or omissions. Physician shall not be deemed to supervise or control non-clinical personnel unless expressly assigned in writing, and no vicarious liability shall attach to Physician for such personnel. (Expect some pushback and narrowing of such language.)

Conclusions:

Physicians are generous with patients and far too generous with indemnity language. A few surgical edits—"to the extent," mutuality, insurer control—turn a one-sided risk dump into a manageable allocation of responsibility. Send the changes to your carrier, make the fixes in blackline, and sleep better.

Some indemnification language makes sense. If you did not cause a specific problem, you do not want the liability or the expense of defending. The other party in the agreement will likewise want the same protection. If you caused a problem and they did not, they also do not want to accept liability. There are exceptions. For example, if you are acting within the scope of your employment, and you are sued for negligence, and your employer is sued for vicarious liability, everyone is legally fair game. Indemnification language should align with reasonable expectations of apportionment of risk.

Physicians often believe they have no negotiating power and that employment contracts are "take it or leave it." That is sometimes true. Sometimes not. It depends upon how much the institution wants you, and what their options are. If what you are asking is reasonable, it is easier to yield on that term, as opposed to yielding on more contentious line items such number of call days/month or dollar value per relative value unit. If an institution will not yield on anything, that is a reflection of its corporate culture. And it is unlikely to get better than when they are actively wooing you to join their ranks.

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