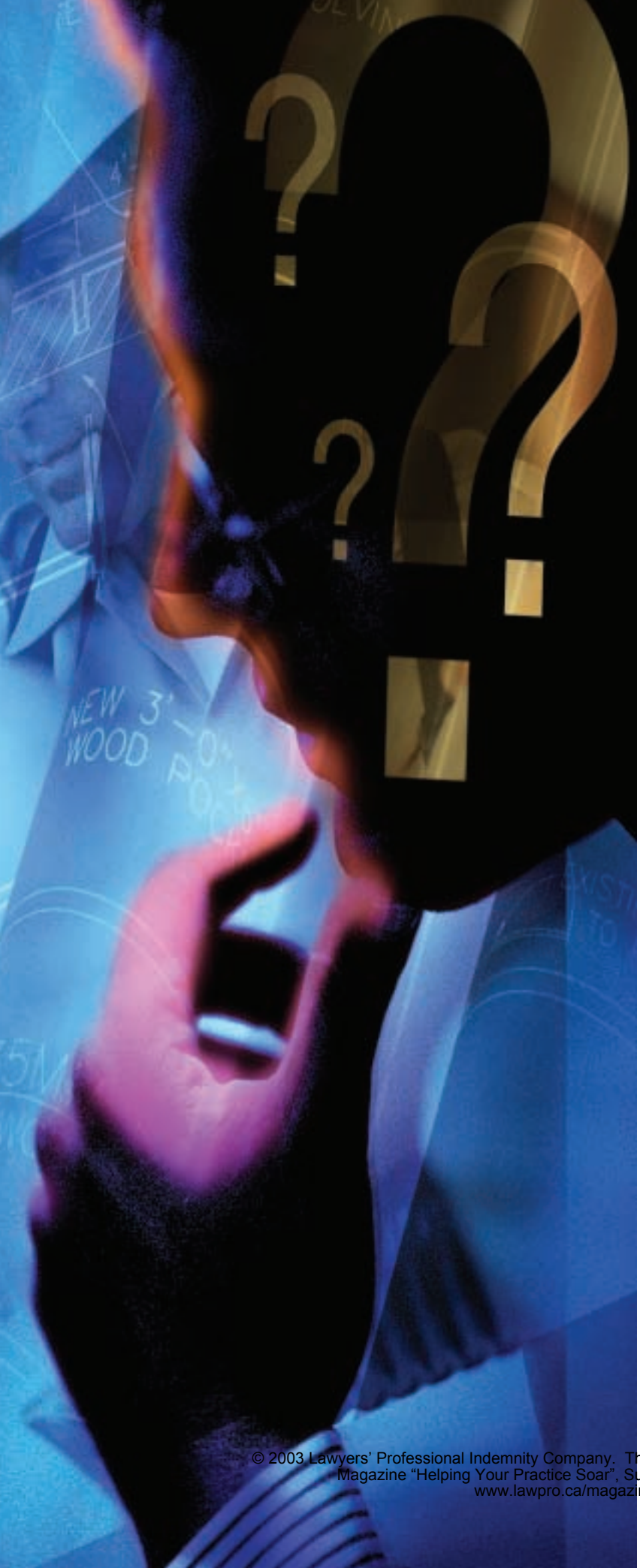

Indemnity & holdharmless provisions:

A request for reasonable or excessive protection?

Protecting yourself and your firm against possible claims by clients may not come naturally to you, when your usual focus is protecting your clients.

Increasingly though, law firm clients are looking to enhance protection for themselves by including indemnity and holdharmless provisions in their legal service agreements, much as they do in their contracts with other types of service providers.

Usually, these clients are substantial corporate entities, or provincial, municipal or other governmental bodies, who are holding out the prospect of some substantial volume of legal work in tender or other form. On occasion though, this type of protection has also been raised in the context of a substantial client or perhaps the only client of a single lawyer. Similar provisions may also be found in various types of software and other user and subscription agreements, which law firms and others routinely enter into.

In the usual circumstance, the contract is unilateral in form or is presented as a standard form contract with little or no opportunity to negotiate. Some contracts include provisions which are quite specific in nature and form, perhaps to address the prospect of intellectual property right infringements or the like. Many are broad in form and onerous in nature. Often, your client's administrator is unaware of the indemnity and holdharmless provision and the significant burden that it may place on the lawyer and law firm.

For our part, LawPRO encourages you to recognize the significance of indemnity and holdharmless provisions in your contracts, to consider the implications to you and your firm with care, and to negotiate the removal or restriction of these provisions, where you can.

Often clients who first present these contracts on a "take it or leave it" basis, are, in fact, prepared to modify terms when the unreasonable aspects of the provision are brought to their attention. Ultimately though, you may need to consider whether the benefits to you and your firm in entering the contract warrant this type of provision.

Clearly, turning a blind eye to this type of provision is of no benefit to you or your firm when the client subsequently goes to exercise its rights against you under this part of the agreement.

Of course, it is not unreasonable for the client to expect the lawyer to bear responsibility for his or her legal services. In fact, the *Solicitors Act*, R.S.O. 1990, c. S.15 expressly provides that any provision in a client contract providing that the solicitor is not to be liable for negligence is void, unless it is in the context of an employment relationship.

Specifically, Section 22 of the *Solicitors Act*, R.S.O. 1990, c. S.15 provides:

> **"Agreements relieving solicitor from liability for negligence void**
> 22. (1) A provision in any such agreement that the solicitor is not to be liable for negligence or that he or she is to be relieved from any responsibility to which he or she would otherwise be subject as such solicitor is wholly void. R.S.O. 1990, c. S.15, s. 22.
>
> **Exception, indemnification by solicitor's employer**
> (2) Subsection (1) does not prohibit a solicitor who is employed in a master-servant relationship from being indemnified by the employer for liabilities incurred by professional negligence in the course of the employment. 1999, c. 12, Sched. B, s. 14."

Many indemnity and holdharmlesss provisions, however, go well beyond protection for them in the case of the lawyer's negligence. Consider, for example, the following clause used by one government agency:

> "The bidder agrees that the bidder shall at all times indemnify and save harmless the Board, and their employees, members, and agents from and against all claims, demands, losses, costs, damages, actions, suits or other proceedings by whomsoever made, sustained, brought or prosecuted in any manner *based upon, occasioned by or attributable to anything done or omitted to be done by the bidder*, or its officers, employees, or agents in connection with the provisions of Services by the bidder under the Contract." (emphasis added)

Some provisions of this nature also impose a broad obligation on you and your firm to defend the client, its employees and agents, against such claims and suits. Of course, this is not intended to ensure that your firm actually acts on behalf of the client in the underlying matter, but rather to ensure that you are obligated to make arrangements to ensure their active defence. Where their own interests diverge, this may mean multiple defences. For its

part, your firm may be unable to act by virtue of its own conflicting interests under the services agreement.

Policy coverage

Entering into an agreement with an indemnity and holdharmless provision of this nature does not jeopardize your policy coverage *per se*. If a claim is covered in accordance with the ordinary terms and conditions of the policy, the fact that you have entered into an agreement with the client which includes this type of clause will not void your policy coverage.

On the other hand, the contractual provision will not operate to expand your policy coverage either. Any claim made in reliance upon the indemnity and holdharmless provision will be solely and exclusively governed by the policy terms and conditions, which will remain unmodified by this contractual provision.

However, it is important to recognize that an indemnity and holdharmless provision such as this is considerably broader in scope than what you can expect would be covered under a professional liability insurance policy, including your Law Society program coverage or any excess policy coverage your firm may carry with LawPRO. Where the policy coverage is triggered, of course, you can expect your various policy obligations (deductible payment, claim surcharges, etc.) to apply in the ordinary course.

Although it is clearly open to you to accept uninsured exposures, we suggest that you consider the extent of your contractual obligations and what exposures are likely to be uninsured.

Consider, for example, that:

- the indemnity, defence and holdharmless obligations in the contract are not limited to negligent acts or omissions, which is the basis of the LawPRO coverage;
- appreciating your remoteness to the claimant, you may not have otherwise owed any duty to the claimant or you may have been held to a different standard than the client or its agents;
- appreciating your remoteness of the client's agent, you may not have otherwise owed any duty to the client's agent or you may have been held to a different standard as the client;
- not all losses, suits or claims for damages are likely to be covered, appreciating that your policy covers claims for damages only and not other types of remedies (such as injunctive relief), and that there is no coverage for most types of statutory and other types of fines or penalties;
- the scope or measure of damages claimed against the client may not otherwise have been compensible by you (e.g. as the client and its agents' relationship with the client is different from your own, and may also involve circumstances of special knowledge on their part);
- not all expenses incurred in the defence of the client and its agents may otherwise have been compensible by you at law, appreciating that your litigation cost obligations are ordinarily limited to that prescribed by the courts;
- the contracted obligations may apply to you in whole without any right of contribution, even though accompanied by fault on the part of the client, its employees or agents, or others; and
- your indemnity and expense obligations are likely unlimited in amount, whereas your policy protection is limited to the amount of the stated policy limits.

As such, your contractual commitments may exceed the scope or measure of coverage available under the Law Society program and any LawPRO excess policy that you and your firm may carry.

As well, most indemnity and holdharmless provisions do not provide that:

- you be advised promptly by the client and its agents of any claim or suit brought or likely to be brought against them;
- you have rights of investigation and defence with respect to such claims or suits;
- you be allowed to actively defend such claims or suits, or that the client and its agents take active steps to defend such while allowing you to associate in the defence;
- you be allowed to take steps to actively resolve or settle the dispute, or that the client and its agents take active steps to resolve or settle the dispute while allowing you to participate in this process; and
- your views and recommendations in the handling of the defence, in the resolution of the or settlement of the dispute, and any decisions concerning any appeal, be given appropriate consideration.

Consider as well that LawPRO insures you and not the client or its agents, and as such would not afford the client or its agents a defence in the event of a claim. Ultimately, your Law Society policy and any excess policy your firm may carry with LawPRO will only protect you to the extent that your liability would otherwise have existed at law as a result of an error, omission or negligent act in the performance of professional services, so you may well have uninsured exposures in agreeing to this type of provision. You may also have some protection through the Innocent Party provision under the Law Society program.

Although it is clearly open to you to accept uninsured exposures, we invite you to be cautious in doing so and to consider the limitations under both your primary and excess policies. If your firm's excess insurance is with other insurance providers, you will want to be sure to review this type of contractual provision with your insurance broker.

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