



Alternative Language to Harmful Indemnification Clauses in Contracts

Suggestions gathered by Melanie Padgett Powers, of MelEdits and Deliberate Freelancer podcast, as of December 13, 2023.

****This is NOT legal advice, only information-sharing I've gathered.**

Here are examples:

1. I asked a client to remove harmful indemnification language and this was their response, which I accepted:

Please understand that we routinely require the mutual indemnification language found in the contract we sent over. That said, in this instance, we are willing to substitute the following representations and warranties from you in lieu of the indemnification language:

12. REPRESENTATIONS AND WARRANTIES: Contractor hereby represents and warrants that:

- a) she will comply with any and all municipal, state and federal laws, rules, and regulations applicable to the performance of her obligations hereunder; and
- b) to the best of Contractor's knowledge, upon diligent inquiry and investigation, all statements contained in Contractor's work product are true and accurate, and such work product does not and will not infringe upon any copyright, trademark, right of privacy, proprietary right, right of publicity or any other right of a third party.

2. I asked another client to remove harmful indemnification language and they agreed, replacing it with:

Guarantee

Consultant guarantees that the articles, blogs, website content, brochures, newsletter, op-eds written will not contain material that is consciously libelous or defamatory. Furthermore, Consultant certifies that all written materials are original and free of plagiarism. Consultant agrees to use reasonable care to ensure that all facts and statements in the Work are true and that the Work does not infringe upon any copyright, right of privacy, proprietary right, right of publicity or any other right of a third party. CONSULTANT agrees that NAME OF ORGANIZATION has the right to edit the

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Work as it deems appropriate for publication, and that Consultant will cooperate with NAME OF ORGANIZATION in editing and otherwise reviewing the Work prior to publication. Consultant will cooperate with NAME OF ORGANIZATION if any complaints, claims or litigation should arise regarding the Work. Consultant further agrees that NAME OF ORGANIZATION will not be held liable under all third-party claims, damages, costs and expenses if the Consultant violates any of the aforementioned guarantees.

3. A client asked me to sign a noncompete and a contract with an indemnification clause. This was a small business, and I took it as an educational opportunity and suggested alternative language, which they accepted. I said, in part:

- a) Non-compete. As a freelance journalist, I can't sign a non-compete. This would potentially prevent me from working on articles about NAMED TOPIC for other clients. I cannot write exclusively about a particular topic for just one client. And I won't discuss potential projects with a client with another client. That would break the confidentiality I maintain with all my clients.
- b) Indemnifier. I cannot sign an indemnifier either. These are broad statements that can potentially hold freelance writers liable if the company/client is sued later, whether or not the writer provided the offending material or not (for example, if the article is edited at some point by the company or contains a photo or infographic the writer had nothing to do with, but the writer's name remains on the article).

If you wish for me to guarantee my work, you could add a clause that says:

Guarantee

The writer guarantees that the articles she writes will not contain material that is consciously libelous or defamatory, to the best of her knowledge and belief.

I hope this is satisfactory and we can begin to work together. Let me know if you have questions.

4. Not all indemnification clauses have the same language. In my opinion, some are less harmful than others and I may consider signing them. This is a personal decision that you should weigh carefully. If I do sign them, I try to add the phrase "to the best of her knowledge and belief" wherever I can. This phrase was shared by the late Milt Toby, a freelance writer and lawyer who gave great advice on freelance contracts.

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