

# Hold Off on the Hold Harmless

by Steve D'Antonio

Can you be released from the burden of professional responsibility?

Years ago while I operated my own marine electrical and mechanical service business, a boat owner asked me to install a radar antenna on the cabintop of his sailboat, which had an unstayed rig. Understandably, he was unwilling to drill holes in the spar to fit a conventional radar bracket. However, the on-deck installation he proposed would have placed the radar's beam at eye level for those in the cockpit, and eyes are very sensitive to electromagnetic radiation. While researching, I found a passage in an FCC engineering document that summed up my concern: "Two areas of the body, the eyes and the testes, are known to be particularly vulnerable to heating by RF energy because of the relative lack of available blood flow to dissipate the excessive heat load (blood circulation is one of the body's major mechanisms for coping with excessive heat)." That sounded serious, and because it was before the Internet, it was all I had to go on. In hindsight, my concern for such exposure to a small, civilian-grade radar may have been overly cautious, but there was something else: The proposed location was a clear violation of the radar manufacturer's installation guidelines. Also, I was sure that such a low mount would cause the radar to perform poorly.

I was young, hungry, and needed the work, but I explained to the owner that the installation was wrong and shared the section in the manual prohibiting the location he proposed. He was a retired New York City executive, a private pilot, and a member of the yacht club where I was a contractor. Who was I to tell him what he could and couldn't do on his own boat? He listened, and then had a hold harmless agreement drawn up, which he signed and gave to me. He even had the club commodore pressure me to proceed.

My brother, an attorney who specializes in insurance litigation, reviewed the document. He said, "This is essentially worthless. As a professional, you can't knowingly allow a layperson to sign away their safety, and then expect to not be held accountable if there is an injury, or loss of property or life." I reluctantly refused to carry out the installation, proposing instead a stern-mounted mast option. He declined and found someone else to install the radar.

Professional responsibility often comes up with industry clients I consult for and in lectures I deliver. "You are the professional," I explain. "You are expected to know better. You have to say no when something is wrong, regardless of what the customer is willing to accept. In the eyes of the law, you have a duty to put safety over profit, no matter what kind of release a customer is willing to sign."

While a hold harmless agreement may apply to an individual customer, it won't apply to the next owner of the vessel, who someday may still hold you liable for an installation you knew, or should have known, was incorrect, unsafe, or unreliable.

Imagine the following exchange that starts with you on a witness stand saying: "I knew the ABYC Standards prohibited this, but I did it anyway because the owner signed a hold harmless agreement when he asked me to install a non-GFCI receptacle on his hot tub because it kept tripping." The prosecutor interjects, "And if you didn't do what he wanted, he might not have hired you. Correct?" "Yes." "And how much did you get paid for this modification?" "\$106.29." "So you sacrificed your customer's safety, and life in this case, for the equivalent of dinner for two at a nice restaurant. Is that right?"

Your legal peril is obvious, and morally you are on thin ice.

At best, hold harmless agreements provide limited protection, especially if

the wording is vague. At the least, they must include a detailed fair assessment of the potential risk—"this could lead to electrocution, injury, and death"—so the signer understands what he or she is agreeing to. It can't simply say you are "absolved of all responsibility." Furthermore, if you initiate a hold harmless agreement, it could be viewed as an intentional act and an admission that you are knowingly subjecting someone to risk of harm. That's the difference between gross, rather than ordinary, negligence in most jurisdictions, the former likely leaving you subject to punitive damages.

In some states anti-indemnity laws limit or prohibit hold harmless agreements and clauses, particularly in certain professions or under specific circumstances. A host of caveats could apply to a hold harmless agreement, so unless you've paid an attorney well versed in this law to review what you've prepared or been asked to sign, there's a distinct possibility that it can be invalidated.

Amateurs and uninformed do-it-yourselfers can make foolish mistakes and often can't be held responsible, at least not legally. Their failing is usually referred to as incompetence. On the other hand, if professionals commit such errors, their failing is most accurately categorized as negligence, and waivers or hold harmless agreements rarely absolve them of responsibility.

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**About the Author:** A former full-service yard manager, Steve works with boatbuilders and owners and others in the industry as Steve D'Antonio Marine Consulting. An ABYC-certified Master Technician, he sits on that organization's Hull and Piping and Engine and Powertrain Project Technical Committees, and is also Professional BoatBuilder's technical editor.