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Sample Engagement Letter for Litigation Consulting/Expert Witness Services:

Instructions for Use

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Introduction

The sample engagement letter addressed by these instructions is intended as a reference for litigation consulting and/or expert witness services within the United States. In 2018, sample engagement materials were developed by the Appraisal Institute and made available as a reference for non-litigation valuation services. Unique concerns arise, however, when appraisers provide consulting or expert witness services for litigation (whether in court or in arbitration), compelling the use of different terms of engagement. One primary concern is that an appraiser's engagement letter itself may become a subject of inquiry during cross-examination when an appraiser is serving as an expert witness. In addition, the liability risks for appraisers serving in a litigation consulting or expert witness capacity are substantially different than for non-litigation assignments. Accordingly, this sample engagement letter has been developed to assist appraisers and their clients in drafting engagement terms for litigation-related services.

The sample engagement letter results from the work of a project team comprised of Paula Konikoff, JD, MAI, AI-GRS and Stephanie Coleman, MAI, SRA, AI-GRS, AI-RRS, with assistance from Christina Mitakis, Esq., Associate General Counsel with the Appraisal Institute, and Peter Christensen, Esq. of Christensen Law Firm.

The sample letter referenced below together with the sample agreements for services relating to non-litigation assignments are available to appraisers and clients in the Professional Practice section of the Appraisal Institute's website at www.appraisalinstitute.org.

The sample engagement letter is designed to be edited or modified as appropriate for specific assignments and different jurisdictions.

Why Use an Engagement Letter for Litigation Consulting/Expert Witness Services?

Valuation standards recognize that an "assignment" or "engagement" is the result of an agreement between an appraiser and a client about a service. Valuation standards do not require that an agreement between an appraiser and client about a service be in writing. However, using a written agreement to set out the details of proposed services is a sound business practice for a number of reasons:

- A written agreement serves to clarify terms of the service.
- A written agreement provides written evidence of both the client's and the appraiser's agreement to those terms.
- Disputes that might arise about the services provided can be more easily resolved if there is a written agreement, prepared in advance, that details the client's and the appraiser's mutual understanding of the nature of the services to be provided.
- The act of drafting the written agreement and reaching a "meeting of the minds" encourages the parties to address issues that might not otherwise be addressed.
- A written agreement may also serve to protect an appraiser from unwarranted liability.

Either party—the appraiser or the client—can draft the engagement letter as long as both parties understand and agree to its entire contents. The engagement letter should be drafted after the client and the appraiser have discussed the service and have agreed to its scope, fee and other parameters.

To be effective, the engagement letter should be signed – either electronically as permitted by law or in ink – and dated by both the appraiser and the client, and both parties should retain signed and dated copies. If it is not possible for both parties to sign and date, the appraiser should at least document in writing the parties' mutual acceptance of all relevant terms, such as in a confirming email.

When the terms and conditions of the services to be provided are set forth in a written engagement letter, any subsequent modifications to the original agreement also should be in writing and agreed to by both parties. The documented modifications should be retained with the original signed engagement letter by both the appraiser and the client.

Completing the *Sample Engagement Letter*

The sample engagement agreement for litigation assignments has been titled as an "engagement letter" and uses a letter format because that is the conventional practice followed by most law firms and litigation consultants/experts. Regardless of title, an engagement letter is no less of a written contract when executed by both parties.

The sample engagement letter is designed to be as brief as feasible, while still covering the most important elements of an agreement for these kinds of services. This sample letter is drafted as a letter to be sent from the consultant/expert to the attorney (or other party) engaging the consultant/expert. It is common, however, for attorneys to use their own form letters or, alternatively, for engagement terms provided by consultants/experts to be placed in a letter addressed from the attorney. In such cases, the key items included in this sample letter can be adjusted appropriately and included in those alternative formats.

Suggested basic/formatting edits:

- √ Letterhead. Remove the heading at the top and replace with letterhead of your own design (printed or created in your word processor), indicating your and/or your firm's name, address and contact information.
- √ Date. Date the letter.
- √ Recipient. Insert the recipient information for the attorney/law firm (or other party) engaging you. For most litigation consulting or testimonial assignments, this will be an attorney who is retaining you for the purpose of the attorney's representation of a party-litigant. A primary reason for this is that when the attorney engages a consultant (as opposed to party in litigation), the communications and work by the consultant will likely be protected from disclosure by the attorney-work product doctrine. There may be some matters, however, where you may be retained directly by a party, such as in marital dissolutions or tax litigation or when the party is not represented by an attorney. In such instances, the party to the litigation will be the client and will be addressed as the recipient of the letter, and the letter will need to be revised to fit the circumstances appropriately by adjusting or eliminating references to the attorney.
- √ Matter. Identify the "matter" for which you are being retained on the "re" line. A shortened case name (*e.g., Jones v. Smith*) should generally be sufficient.
- √ Salutation. Insert the client's name in the salutation.

Editing "I/we" and "my/our":

The sample letter uses alternative phrasing such as "I/we" and "my/our." These should be changed throughout the text to fit the context of your business. If you work as a sole

proprietor, you may want to use the singular "I" and "my" in the text. If you work within a firm of multiple appraisers or are working on the matter with other colleagues, "we" and "our" may be more appropriate.

Editing first paragraph:

In the first paragraph, the sample letter states that you are being retained as a "consulting expert" and indicates that you "may be asked to provide expert witness services and testimony in the matter." The reason for this is that appraisers are often retained initially in a consulting expert role (in which their communications and work would usually be protected from discovery by the opposing party under the attorney-work product doctrine) and then later in the case may be designated as a testifying expert, if the attorney determines that the consultant's opinions will provide beneficial expert witness testimony. If you are being retained at the outset of the engagement as a testifying expert, however, you should edit this paragraph appropriately.

Editing "Fees and Expenses" section:

You should edit this section depending on how you and any staff will bill for services and costs. The sample letter references hourly rates only as an example. Some appraisers also choose to have separate minimum fees that they set for appearing in deposition or at trial to provide testimony.

This section includes a sentence addressing late payments. It is common for consultants/experts to include a provision imposing an additional charge or interest for untimely payment and to see invoices considered past due after a certain number of days. An additional provision in the letter provides that the consultant/expert also has the right to withhold services or withdraw from the engagement for untimely payment or other problems.

Editing "Responsibility for Payment" section:

This section addresses who is responsible for paying you. *Ideally* you want both the attorney retaining you as the expert and the party the attorney represents to be obligated to pay you. This maximizes security for payment. However, many attorneys resist committing themselves to payment of their experts and want/expect that the attorney's client only will be responsible to the expert. This issue should be considered and negotiated between you and the attorney. The sample payment provisions below address who is responsible for payment.

> Payment Example No. 1: Both party and attorney/law firm are responsible for payment.
>
> ***Responsibility for Payment.*** *I/we understand you are retaining my/our services in*

connection with the representation of your client. While I/we will be issuing my/our invoices directly to you for delivery to your client, your client shall be responsible for payment in accordance with the terms stated in this letter and has acknowledged that responsibility by signing below. However, in the event that your client fails to pay for my/our fees and expenses on a timely basis, your firm agrees to pay the balance owed.

Payment Example No. 2: Only party represented by attorney responsible for payment.

Responsibility for Payment. *I/we understand you are retaining my/our services in connection with the representation of your client. While I/we will be issuing my/our invoices directly to you for delivery to your client, your client shall be responsible for payment in accordance with the terms stated in this letter and has acknowledged that responsibility by signing below.*

Payment Example No. 3: Attorney/law firm is responsible for payment.

Responsibility for Payment. *Payment of the fees and expenses that I/we bill on this matter will be the responsibility of your firm.*

Editing "Retainer" section:

When an expert has a trusted relationship with the attorney or with the party represented by the attorney, an expert might not require an upfront retainer payment before beginning work. If you are not requiring a retainer, you can delete this section. In other circumstances, however, it is common for an expert to require a retainer, but the details about how the retainer is applied can vary significantly. The four sample provisions below provide alternatives for retainers, including how/when they are applied to balances owed and whether they are refundable or non-refundable. One of these provisions can be included in the "Retainer" section if a retainer is desired.

Retainer Example No. 1: refundable retainer required, retainer applied to final invoice, unused amount refunded.

Retainer. *It is my/our policy to collect a retainer and receive the fully executed engagement letter before I/we begin providing services. The retainer for this matter shall be $_____. This retainer will be applied to my/our final invoice for time and expenses, with any unused amount refunded to the party who paid the retainer unless that party directs, in writing, that the refund be paid to a different party.*

Retainer Example No. 2 – refundable retainer required, retainer applied to initial invoices. Comment: this retainer provision is "friendlier" to a client because it applies the retainer amount to initial billings, rather than holding it as security for

payment against the last invoice.

Retainer. *It is my/our policy to collect a retainer and receive the fully executed engagement letter before I/we begin providing services. The retainer for this matter shall be $_____. This retainer will be applied to my/our initial invoices for time and expenses until the retainer is exhausted. If the retainer has not been exhausted at the conclusion of my/our services on this matter, any unused amount will be refunded to the party who paid the retainer unless that party directs, in writing, that the refund be paid to a different party.*

Retainer Example No. 3 – non-refundable retainer required, retainer applied to final invoice. Comment: a "non-refundable" provision such as the following might be used by an expert where the expert is wary that a litigant or attorney in a case may just "tie up" the expert by retaining him or her and then not actually use any of the expert's services. This would prevent the expert from working for the other side in the case and deprive the expert of that opportunity. Accordingly, the retainer here is not refundable and constitutes a minimum fee just for being retained.

Retainer. *It is my/our policy to collect a retainer and receive the fully executed engagement letter before I/we begin providing services. The retainer for this matter shall be $_____. This retainer shall be a non-refundable minimum charge for my/our availability to provide services. The amount of the retainer will be applied to my/our final invoice. If the actual total charges for the time that I/we bill on this matter are less than the amount of the retainer, the excess will not be refunded.*

Retainer Example No. 4 – retainer required, partly non-refundable, remainder applied to final invoice. Comment: this retainer provision is "friendlier" to the client than the fully non-refundable retainer in example no. 3. Under this version, only part of the retainer is not refundable.

Retainer. *It is my/our policy to collect a retainer and receive the fully executed engagement letter before I/we begin providing services. The retainer for this matter shall be $_____, of which $_____ shall be a non-refundable minimum charge for my/our availability to provide services in connection with this matter. The retainer will be applied to my/our final invoice, with any unused amount refunded to the party who paid the retainer unless that party directs, in writing, that the refund be paid to a different party. However, if the actual total charges for the time that I/we bill on this matter are less than the non-refundable portion of the retainer, the excess of the non-refundable portion over the charges for time billed will not be refunded.*

"Valuation Dates" section:

For most litigation matters (such as those involving condemnation or determination of real estate damages) the valuation date relevant to any appraisals generally will be a legal

question – a question that properly should be the responsibility of legal counsel. Despite this, professional liability claims have been made against appraiser expert witnesses for erroneously chosen dates of value. For this reason, it is a good practice to clearly specify that the valuations dates with respect to any valuations performed by the expert are not the appraiser's responsibility.

"Confidentiality and Recordkeeping" section:

In some cases, this section may need to be edited in accordance with the specific requirements of any protective order that has been entered in a case. If such a court order imposes different recordkeeping requirements than USPAP's Record Keeping Rule (for example, by obligating in the order that an appraiser destroy or return materials that would otherwise be retained in a workfile), then USPAP's Jurisdictional Exception Rule and the Appraisal Institute's Code of Professional Ethics will permit the appraiser to comply with the order. It is important to note, however, that mere instructions from an attorney or client will not establish a jurisdictional exception. Appraisers should also understand that if a court order or subpoena requires production of materials that may be considered confidential under USPAP's Ethics Rule, such disclosure – to the extent of the order or subpoena – will fall under the exception in the Ethics Rule for disclosures "as may be authorized by due process of law."

Considering whether to include the "Hold Harmless and Limitation of Liability" section:

This optional section is intended to help protect consultants/experts from the threat of a legal claim by their client in the event that a client is not satisfied with the outcome of a litigation and seeks to blame the consultant/expert. While not uncommon to see such limitations of liability in the agreements of other types of professionals, the inclusion of such a provision must be the appraiser's own decision.

Obtaining Signatures on the Engagement Letter.

With regard to any engagement agreement, it is both obvious and critical that the engagement letter be signed by the parties engaging the appraiser. Accordingly, an appraiser should be sure to obtain the retaining attorney's signature on the letter. If the attorney's client will be responsible for payment of the appraiser, then it is important to obtain that party's signature as well; usually this would be requested by the attorney to his or her client.