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Provisions for CBVs to Consider for Joint Retainer Engagement Agreements

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A joint retainer is an engagement structure used when a CBV is asked to provide services (generally business valuations, income determinations, or damage quantifications) for opposing retaining parties in a disputed matter (“Retaining Parties”). Having a clear engagement letter for joint retainers is critical in setting out expectations and ensuring each Retaining Party is aware of the practical realities and challenges that may arise under this engagement structure.

The following content is intended to help minimize conflict between Retaining Parties and to establish best practices when preparing a report under a joint retainer structure. This content is not intended to be a comprehensive list of all considerations for joint retainers – CBVs may require additional provisions beyond what is considered below.

Keep in mind that a joint retainer agreement is a commercial arrangement between the CBV and the disputing Retaining Parties setting out certain terms and conditions – nothing in this document should be interpreted as legal advice. Since different jurisdictions maintain legislation governing joint retainers (subject to change from time to time), CBVs should consult with local counsel to ensure that their agreements comply with appropriate legislation.

As well, the CBV should ensure that the agreement complies with the CBV Code of Ethics and Practice Standards. As joint retainers become more commonly used and different issues arise, the following document is subject to amendment.

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When a CBV becomes an Arbitrator

Occasionally the Retaining Parties to a dispute will agree that the decision of a CBV on some or all of the issues will be legally binding on the Retaining Parties. When this occurs, a CBV may inadvertently become an arbitrator and the provisions of that province's Arbitration Act may apply. As an arbitrator, the CBV may have certain obligations (agreement formalities, appeal rights, training requirements, domestic violence screening, for example) of which he/she is unaware. When these situations arise, the role of the CBV should be clearly defined in the retainer agreement and CBVs should familiarize themselves with the provisions of the Arbitration Act of the province in which they practice and seek proper legal advice.

- It is understood by the Retaining Parties that the CBV is being jointly retained to provide the services noted herein and that the CBV is not an arbitrator, and therefore the Retaining Parties acknowledge that the CBV's conclusions are not binding on them.

Scope of Work

- The agreed-upon scope of work is _____ (describe in as much detail as possible). Changes to the agreed-upon scope of work will only be made if agreed to in writing by the Retaining Parties and the CBV, and sufficient time is provided.
- The Retaining Parties acknowledge the importance of the CBV's independence and objectivity in providing credible and properly supported conclusions and reporting. While the Retaining Parties may provide instructions and input, the CBV must not be unduly influenced by the Retaining Parties and will use their professional judgement when assessing the scope of work, appropriate inputs, and assumptions.
- Where conflicting instructions or statements of fact are provided, the CBV will cease working on that portion of the report or the report in its entirety until the Retaining Parties agree in writing on one set of instructions. Where the Retaining Parties cannot agree on instructions, the CBV will have the discretion to provide multiple scenarios to address all Retaining Parties' concerns.
- All information (e.g., documentation, notes from conversations, emails, etc.) provided to the CBV and relied upon in the preparation of their report will be shared with both the Retaining Parties and their lawyers. No information shall be considered confidential/private and withheld from any Retaining Party in this agreement except where explicitly agreed to in writing by all Retaining Parties.

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Fees

- Clearly describe the basis upon which fees are going to be calculated (e.g., flat fee, hourly rate, etc.). Clearly describe in as much detail as possible the anticipated scope of work that the fee covers (i.e., is trial or mediation included, excluded, or billed as a fixed fee per day), and what it does not cover.
- The allocation of fees amongst the Retaining Parties should be clearly addressed – the Retaining Parties may be jointly responsible (50/50 basis), or a set % split may be stipulated. For example: “The Retaining Parties are both jointly and severally responsible for all fees for this engagement and any related subsequent work including but not limited to attendance at meetings, negotiations, mediations, and trial or further analysis required.”
- Seek a retainer upfront and if possible, ask the lawyers to hold the funds in trust for the Retaining Parties for payment of your account.
- CBVs should communicate with Retaining Parties regularly throughout the engagement and provide regular accounts regarding status of fees incurred. If, for whatever reason, it comes to the CBV’s attention that costs may exceed the initial fee estimate, this should be communicated to the Retaining Parties promptly.
- Include a provision that changes to the scope of work and multiple scenarios may result in additional fees to the Retaining Parties.
- Consider a policy not to release a final report or work product until all outstanding accounts are paid in full.
- Consider a policy that any Retaining Party wishing to terminate the engagement is still responsible for outstanding fees incurred to date, and payment is due immediately.

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Communications between Retaining Parties (meetings, written correspondence, etc.)

Some Retaining Parties may wish to be on all communications. Consult with the Retaining Parties and their lawyers about who needs to be on what communications and amend the clauses below accordingly.

Two Options

1) To All Retaining Parties

The Retaining Parties and their lawyers agree that all communications involving the CBV will be shared with all Retaining Parties, including their lawyers. Any correspondence that was not provided to one Retaining Party, but was provided to the CBV, will be provided by the CBV to the opposing Retaining Party and their lawyer.

If requested, all Retaining Parties and counsel will be invited to all meetings with any Retaining Party or surrogate (e.g., accountant, corporate lawyer, etc.).

For example, if the CBV is required to have a meeting with the business owner's accountant, the business owner, their lawyer, the non-business owner, and their lawyer should be invited to attend the meeting. It should be established prior to the meeting whether the non-business owner/the lawyers will be allowed to ask questions or simply attend the call without speaking privileges.

2) As Needed

It is agreed that one-on-one communication may take place with any Retaining Party. The information relied on by the CBV will be available to all Retaining Parties at any time upon their request.

Disclosure

- Adequate and timely disclosure from the Retaining Parties is important if the CBV is to meet the agreed upon terms and deliver a high-quality report on a timely basis as part of the dispute process, and to assist the Retaining Parties. If we do not receive a response to our request for disclosure from either of the Retaining Parties within a reasonable time, for example, 30 days, we have the discretion to release a draft report based on the

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information provided to date and make necessary assumptions to complete the draft report, or to issue a report with a scope limitation or qualified conclusion. We will also have the discretion to not release a report due to a lack of information and to terminate the assignment.

Finalizing the report

- After issuing our draft report, we reserve the right to issue our final report within thirty (30) days of being requested to do so by one Retaining Party if the other Retaining Party receives the request and fails to provide any further instructions. If a Retaining Party does not wish the report to be finalized, they must provide their concerns and supporting documentation within the (30)-day time period.
- Upon release of our draft report, we will allow a maximum of X (e.g., 3 or more [for the CBV to decide based on the circumstances of the engagement]) rounds of comments (i.e. one set from the initial provider [whomever provides their comments first], comments from the other side, and a response by the initial commenter).
- A draft report is circulated for the purpose of obtaining comment, instruction, confirmation or other information required to complete the report (Practice Standards Nos. 110 and 310).
- In the event that either Retaining Party wishes to terminate this joint retainer engagement, the other Retaining Party(ies) shall be permitted to continue to retain us as their own expert. The fact that [firm] has previously acted under a joint retainer for this matter shall not be used by either Retaining Party to suggest any future potential conflict of interest. By agreeing to the terms of this engagement letter, each Retaining Party hereby waives any such conflict of interest and consents to allowing the other Retaining Parties to continue to use our services related to this matter. The information provided under this joint retainer agreement is not considered confidential/private and will not be withheld from the continuing Retaining Party except where explicitly agreed to in writing by all Retaining Parties.
- In the event that the CBV completes their work or if the assignment is terminated and in the future one Retaining Party wishes to reengage the CBV for work related to the

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original assignment, the CBV agrees not to be solely retained by either Retaining Party without the consent of both Retaining Parties, which should not be unduly/unreasonably withheld.

Collaborative Process

The process is based on negotiating a separation agreement (Collaborative Process may be applicable to other areas of law such as commercial/business disputes, estate disputes, etc.) out of court and predominately uses experts who are jointly retained. The lawyers used in the Collaborative Process do not continue if the Retaining Parties terminate the process and move to formal litigation, whether the CBV continues is something that the Retaining Parties and the CBV will have to agree upon.

Due to the nature of the Collaborative Process, different provisions for termination are required compared to those for joint retainers outside of the Collaborative Process.

Termination – CBV Does NOT Continue with Retaining Parties

- If either Retaining Party wishes to terminate the Collaborative Process, the report can NOT be used in litigation and the services of our firm will cease. All work done to date will be billed and payment will be due immediately as per the fee agreement.

Termination – Continue with One or Both Retaining Parties

- If either Retaining Party wishes to terminate the Collaborative Process, the report can be used in subsequent litigation and the services of our firm will continue (if requested by the continuing Retaining Party). All work done to date will be billed and payment will be due immediately as per the fee agreement. Should one Retaining Party wish to continue with the services of the CBV and the other Retaining Party does not, both Retaining Parties must agree in writing that the CBV may continue their services, which shall not be unduly/unreasonably withheld.