

## Contract Basics for Professional Service Firms

Professional service providers perform services for a wide variety of clients. Frequently services are rendered based upon an oral agreement, without the benefit of a written contract. The only documentation provided to the client regarding the services rendered is contained in the invoice for services rendered.

Written contracts promote healthy business relationships by clarifying mutual obligations and expectations. They help mitigate the risk of “expectation gaps” between providers and clients regarding the scope, timing, and extent of services to be provided, as well as billing disputes. Additionally, they serve as evidence of the service agreement negotiated between the parties.

While in many professional service arrangements a very simple written contract will suffice, in situations wherein a range of services will be provided, services will continue over an extended period of time, or the service provider is dependent upon the timely performance of services or provision of data by the client, a more complex contract may be required.

As most contracts have liability implications, they require careful drafting and review to protect your firm’s interests. A centralized contract development process strengthens your organization’s negotiating capabilities and reduces the potential for misunderstandings about contractual obligations. The process involves three major phases: negotiation, drafting, and review and distribution. Within each phase, the following strategies can help promote agreements that are fair and enforceable.

### Phase 1: Negotiation

*Identify any provisions that require in-depth research and legal review.* If the client is in an industry subject to state or federal oversight and regulation, certain contract provisions may be required for compliance with regulations. Additionally, if in the course of rendering services your firm will have access to confidential client data or patient data, federal and state privacy laws will apply. Discuss these issues with the client prior to drafting the contract. If the client presents you with required contract language, indicate that it will need to be reviewed by your attorney.

*Identify potential conflicts of interest.* Based upon your interview with the client, identify any existing client or vendor relationships that could be viewed as potential conflicts of interest. Clarify that the client agrees to the terms of the engagement notwithstanding these issues, and that the client agrees to waive any objections to these relationships through disclosure in the contract.

*Proceed deliberately.* Carefully analyze opportunities and risks before and during negotiations, taking into consideration past partnership experiences and available information about prospective partners.

### Phase 2: Drafting

*Customize all contracts as needed for the engagement.* While a generic template can be used as a general guide in drafting contracts, attempting to use a template for all engagements may result in unintended legal consequences. Customize your format to accurately address the following items:

- scope of work
- goods or services to be provided
- obligations of contracting parties
- performance expectations
- quality requirements
- timeframes
- costs involved
- payment terms
- insurance requirements (if applicable)
- consequences of breach of contract
- termination provisions

*Clearly articulate expectations.* For contracts to be enforceable, they must specify the services each party has agreed to perform and formalize the parties’ acceptance of these terms. Ensure that the contract itself contains all terms and conditions without reference to sidebar documents, except for necessary attachments and/or exhibits.

*Identify the names and forms of ownership of all parties*, including names of third parties or subsidiaries that will supply services, as well as the primary and alternative legal names of the main parties to the agreement (i.e., DBA status).

*Include a default and termination provision*. Potentially costly misinterpretations of contract provisions can be avoided by carefully defining circumstances of breach of contract and grounds for termination. Establish timeframes for advance notice of renewal and termination and list sufficient causes for termination. Specify available remedies, giving consideration to mediation, arbitration and other methods of dispute resolution.

*Refrain from incorporating or referring to other documents in the contract*. Contracts should be self-contained, defining all material terms affecting the obligations of the parties. The terms of related prior contracts should be incorporated within the new contract, if appropriate. Technical terms should be defined in the contract or through the attachment of necessary exhibits.

### **Phase 3: Review and Distribution**

*Determine who is authorized to sign contracts on behalf of your organization*. In addition, designate the parties responsible for reviewing contracts before signing and those responsible for retaining executed documents.

*Ensure that all documents are reviewed by an attorney conversant with contract law*. No contract can anticipate and address all risks. However, a competent lawyer can minimize unintended consequences by identifying foreseeable legal and liability issues, and by specifying forms of recourse and venues should disputes arise.

*Promptly communicate the status of contracts, amendments, addenda and renewals*. By both formalizing the contract process and routinely informing your staff of new relationships and obligations, you can help your organization adapt quickly to these business arrangements and obtain immediate benefits.

A sample template covering basic contract provisions is attached for reference. An explanation of each contract provision is included, along with explanations of additional provisions that should be considered for inclusion in a contract.

Appropriately drafted contracts can help protect professional service firms from malpractice claims, and mitigate the risks associated with claims in the event they are made. Always consult with competent legal counsel regarding the content of contracts prior to presenting them to clients or executing them.

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The following Example is designed and furnished as an aid to be used in the preparation of contracts; it is not a model form. **It is not intended as legal advice.** This Example does not necessarily reflect all the terms and provisions you may need. This Example does not necessarily reflect the laws in any or all of the fifty states. The Example is not intended to be used without considering the facts and law applicable to the specific situation. CNA accepts no responsibility for the accuracy or completeness of this material and recommends the consultation with competent legal counsel and/or other professional advisors before applying this material in any particular factual situations. This material is for illustrative purposes and is not intended to constitute a contract. **All contracts should be reviewed by legal counsel prior to use.**

#### EXAMPLE: PROFESSIONAL SERVICE CONTRACT

This Professional Service Contract ("Contract") is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 20XX, by and between \_\_\_\_\_ (hereinafter "Service Provider") and \_\_\_\_\_ (hereinafter "Client").

1. **Professional Services to be Provided to Client by Service Provider:** Upon the mutual execution of this Contract, Service Provider shall provide the following professional services to Client:

- A. \_\_\_\_\_
  - B. \_\_\_\_\_
  - C. \_\_\_\_\_
- (collectively "Professional Services").

Client agrees to pay Service Provider for the Professional Services in the following manner: (describe the hourly rate, project fee or some combination of the two and include specific dollar amounts).

*This provision establishes the type of professional service to be provided under the Contract. The Provider should define the type and scope of services to be provided to avoid any future misunderstanding with the Client. It also establishes the Client's payment obligations to the Provider, quantified by an hourly rate, a project fee, a specific dollar amount, or some combination of these pricing mechanisms.*

2. **Client's Payment for Service Provider's Professional Services.** After performing Professional Services for Client, Service Provider shall submit an Invoice to Client on a (weekly, monthly, quarterly, yearly) basis. Client agrees to fully pay the Invoice within 30 days after Client's receipt of the same ("Grace Period"). Client's failure to fully pay the Invoice to Service Provider within the Grace Period shall result in an additional late fee of X % being added to the outstanding balance on Client's existing Invoice each month.

*This provision establishes how/when the Client will be billed for the Provider's professional services. Written invoices should be issued, listing the services performed as defined in the contract. Defined grace periods and late fees are recommended to ensure timely payment.*

3. **Cancellation of Contract.** Both Service Provider and Client can unilaterally cancel the Contract by giving the other party written notice ("Cancellation Notice"); however, Client shall remain responsible to timely and fully pay Service Provider for all Professional Services provided under the Contract before the Cancellation Notice was received by the non-cancelling party.

*This provision allows either the Provider or the Client to cancel the contract if they become dissatisfied. The parties are still obligated to fulfill their contractual obligations to each other through the Contract's termination date.*

4. **Modification/Amendment of the Contract.** The Contract may only be modified/amended by a writing signed by both Client and Service Provider. This Contract contains the entire agreement between the parties. There are no other understandings or agreements, verbal or otherwise, between the parties except as expressly set forth herein.

*This provision precludes any Contract amendment without a mutually signed new contract. It also precludes either party from enforcing any obligation not contained in the Contract. In short, no oral agreements and no oral modifications are allowed.*

5. **Notices.** All notices under this Contract must be in writing, signed by the party giving the same. Notices may be hand delivered or sent by certified mail, return receipt requested. Notices shall be addressed and delivered as follows:

If to Service Provider:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If to Client:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*This provision establishes the address where notices will be sent under the Contract. To ensure that they are received, all such notices are required to be either hand delivered or sent via a confirmed mailing system (i.e., certified mail). Note that e-mail notification is not permitted. Both the Provider and the Client should fill in their respective addresses on the Contract.*

6. **Indemnification/Hold Harmless.** Service Provider shall indemnify, hold harmless and defend Client (including payment of reasonable attorney fees and costs) from all liabilities, losses, damages, claims and causes of action incurred by Client arising out of Service Provider's negligent or tortious performance of Professional Services under this Contract. Client shall indemnify, hold harmless and defend Service Provider (including payment of reasonable attorney fees and costs) from all liabilities, losses, damages, claims and causes of action incurred by Service Provider arising out of Client's use of Professional Services under this Contract.

*This provision establishes mutual indemnification between the parties to hold each party accountable for their own negligent and/or tortious actions under the Contract. Note that any liability assumed under contract may be subject to insurance policy limitations or exclusions. Consult with your agent or broker prior to including such provisions in contracts.*

7. **Construction by State Law.** This Contract is entered into in the State of \_\_\_\_\_ and shall be construed and interpreted in accordance with its laws.

*This provision establishes which State's laws will be applied to the Contract's interpretation and enforceability. This is a particularly important provision, as it eliminates questions regarding the applicability of contract law in the state where the client is domiciled or does business.*

8. **Limitation on Damages.** Regardless of the total damages caused by any alleged breach of this contract by either Service Provider or Client, the non-breaching party hereby formally represents and agrees to the breaching party that the total recoverable damages for such a material breach of the Contract shall be limited to the non-breaching party's actual, monetary injury.

*This provision establishes a limit to the collectible damages that both parties are entitled to receive if the Contract is breached. This provision primarily protects the Provider against the Client pursuing a tort-type lawsuit alleging significant (and unquantifiable) emotional damages (i.e., pain and suffering) caused by the Provider's alleged breach of the Contract.*

\_\_\_\_\_ (“SERVICE PROVIDER”)

By: \_\_\_\_\_

Its: \_\_\_\_\_

\_\_\_\_\_ (“CLIENT”)

By: \_\_\_\_\_

Its: \_\_\_\_\_

**Additional Provisions:**

*Depending upon the type of service provided by the Provider as well as the contract amount and the relationship (new versus existing) between the Provider and the Client, below are some additional provisions that could be added to a Contract:*

**Warranty Provision:** *This provision would establish, in writing, any warranty associated with the Contract's services. This provision is favored by Clients and could be added depending on the Contract's subject matter.*

**Dispute Resolution:** *This provision would establish the forum in which any dispute between the Provider and Client would be resolved. Utilizing mediation or an Industry Board to resolve such a dispute can be more cost effective and quicker than formal litigation.*

**Interest Provision:** *In addition to charging late fees, the Provider could charge interest on past due contractual obligations. Interest rates must be reasonable within the marketplace to avoid the possibility that a Court could invalidate the same as “usury.”*

**Attorney Fee Provision:** *This provision would establish that the non-breaching party is entitled to reimbursement of its reasonable attorney fees and costs from the breaching party if a dispute arises under the Contract.*