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Management Consulting – Client and Engagement Intake: Practical Considerations and Tools



A CNA RISK CONTROL GUIDE **FOR MANAGEMENT CONSULTANTS**

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Executive Summary

Consultants provide advice and recommendations to clients so that they may act accordingly to produce results. Management consulting services encompass a wide range of subjects and subspecialties, such as technology, operations, supply chain, business growth, mergers and acquisitions, cash and inventory. They also can include extensive analysis of existing client systems and assisting clients in formulating implementation plans, managing the implementation of processes and training staff.

The pervasive theme in all consulting services reflects active client participation in the consulting process. Responsibility for plan implementation, as well as for taking actions to improve business efficiencies or profitability, based on such recommendations, is imposed upon the client. As successful plan implementation typically depends on the experience, qualifications, resources and support of client management, orchestrating the professional risks associated with consulting services requires a holistic approach to both screening prospective clients and engagements, and coordinating client intake.

Client and Engagement Screening

In marketing their services, consultants actively promote their capabilities and the improved business results that a prospective client can realize. The parties often solicit and share background information about one another prior to the submission of a written proposal by the consultant. As a result, the screening process begins with the first contact and ends when the consultant reaches a written agreement with the prospective client regarding the terms and conditions applicable to the contractual relationship.

Business Analysis

Initially, the consultant must determine the consulting needs of the prospective client and whether its firm has the necessary resources, background, qualifications and experience to render the services required.

The consultant also must determine if the client has the internal staff needed to participate in the consultation and provide requested information. A judgment must be rendered regarding management's commitment to support the project and execute on the proposed recommendations. Long term projects may require a significant commitment of time and resources.

The prospective client's ability to pay for services is also a material consideration. Is the cost for the proposed project within the budget and approval authority of the client representative? Will additional approvals be needed before the professional services commence? Will the consulting project conclude within the current year budget or extend into the following year? The client's ability to both pay for services and provide needed support for a project until its conclusion are key considerations in the business analysis.

Ethical Analysis

The next step involves consideration of whether there are ethical concerns evident at the outset of the relationship. An internet search regarding the prospective client and its business principals, including a search of personal and professional social networking sites, will assist in evaluating publicly available information including their education and experience, as well as obtaining feedback from personal and professional colleagues. Determine how long the prospective client has been in business and whether there is a known history of civil litigation involving the firm or its principals. Also consider whether the engagement with the client may result in a conflict of interest.

Examples of some issues to consider include:

- Ownership: Do any of your owners and employees or their immediate family members share ownership in the client or related entities?
- Management: Do any of your owners and employees or their immediate family members perform management responsibilities for the client or related entities?
- Key Client and Vendor Relationships: Does your firm share any key client or vendor relationships with the prospective client or related entities?

A conflicts of interest analysis should focus on whether or not both the client and a disinterested third party would view the judgment and objectivity of the consultant as potentially being compromised by the affiliation. Any such relationship should be disclosed and consented to in writing by the prospective client prior to acceptance of the engagement. The written contract with the client should recognize this relationship.

Applicable ethics rules, laws and regulations also must be considered. Licensing and regulation applicable to consultants vary based upon the specific services rendered and the jurisdiction in which the services are delivered. Consultants should research laws and regulations in each state where they render services regarding the applicable ethical constraints and work with their attorneys in evaluating legal and ethical guidelines. For example, in New Jersey, a career counseling service business must be licensed.

Consultants subject to regulation or that hold licenses, as well as those that hold professional designations or are professional association members should consult with the regulatory and licensing authorities or professional association regarding applicable ethics rules, laws and regulations as part of the ethical analysis.

Professional Liability Analysis

Professional liability risks to consultants tend to relate to the financial cost to the client if the consulting project does not lead to expected results. Establishing realistic expectations is a key element in this equation. Are the client's assumptions reasonable and projections achievable within the time frames established? To the extent there is significant financial risk to the client if expected results are not achieved, the engagement should be viewed as presenting elevated risk to the consultant. If the financial risk to the client is low but expected results are not achieved, fee disputes and loss of future revenue to the consultant may result.

Client and Engagement Intake

Consultants present both written and oral proposals to prospective and continuing clients for services. These proposals vary in format from short discussions to lengthy written documents explaining proposed services and related benefits to clients.

In presenting a proposal, both prospective and continuing clients should be informed that while this constitutes an offer to perform services, a proposal does not represent a service agreement. Written proposals should not be used as a substitute for an engagement contract. All clients should be advised that a written contract will be drafted for their signature before services will commence.

Consultants may propose services to prospective clients in response to a specific request. For example, a prospective client may request a proposal to analyze the material requirements of a service provider they are considering hiring in connection with a time-sensitive construction project. When an existing or prospective client requests a proposal to provide consulting services in connection with a planned or proposed business transaction or a project with fixed deadlines, a determination on whether or not to proceed with the proposal should be made quickly. If the consultant declines to submit a proposal or concludes that proceeding with the engagement under the terms required by the client is not feasible, a declination letter should be sent to the rejected client.

For marketing purposes, consultants may issue follow up letters to prospective clients that do not hire them to render services. A declination letter serves the additional purpose of establishing that the consultant was not retained to render services. A sample letter is included in **Appendix A**.

Engagement Contracts

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

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

As most contracts have liability implications, through coordination with legal counsel, careful drafting and review is required 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/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. Moreover, 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 require review by your attorney.

Identify potential conflicts of interest. If a potential or actual conflict of interest is identified in the screening process, but the consultant has concluded that services can be rendered objectively and that the proposed services are permissible under applicable ethics rules, regulations and laws, a written conflict of interest waiver should be included in the contract. This waiver should confirm that the client agrees to the terms of the engagement notwithstanding these issues. In addition, the waiver should state that the client agrees to waive any objections to these relationships through an affirmative contractual disclosure. Legal counsel should be engaged to draft conflict waivers, as state law regarding conflicts of interest varies.

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

Phase 2: Drafting

Customize all contracts, as needed, for the engagement. While a generic template may 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
- 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. The contract should contain all terms and conditions without reference to sidebar documents, except regarding contract 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 parties to the agreement (i.e., DBA status).

Include a default and termination provision. Potentially costly misinterpretations of contract provisions can be avoided by expressly defining circumstances of breach of contract and grounds for termination. Timeframes should be established for advance notice of contract renewal and termination. Termination for cause provisions should be defined to minimize the risk of unnecessary disputes. Dispute resolution remedies, such as mediation and arbitration, should be considered and addressed before the contract is finalized and signed by the parties.

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 explicitly incorporated within the new contract, if appropriate. Technical terms should be defined in the contract or through the attachment of necessary exhibits.

Define the timing of the engagement. Clients sometimes attempt to assert professional liability claims several years after the service they allegedly relied upon was rendered. In many cases, these claims would be time-barred based upon applicable state statutes of limitations. A successful statute of limitations defense may be dependent upon producing evidence that an engagement terminated on a specified date. A contract signed by both the client and consultant can serve as such evidence if it states that the engagement concludes upon delivery of the work product.

In large consulting engagements, services may continue over many months, or in some cases, years. In such engagements, at the conclusion of services described in the contract, consider issuing a closure letter which clearly explains that the engagement has been completed. A sample letter is included in **Appendix B**. If the consultant is engaged to perform additional services outside of the scope of the original contract, a new contract should be drafted and executed addressing these new services.

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 them, as well as those responsible for retaining the executed documents.

Ensure that all documents are reviewed by an attorney conversant with contract law. No contract can anticipate and address all future and unknown risks. However, a competent lawyer can minimize unintended consequences by identifying foreseeable legal and liability issues and by specifying avenues for recourse and venues in the event that a dispute arises.

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 will help your organization adapt quickly to these business arrangements.

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

Effective client and engagement intake processes that incorporate the use of appropriately drafted contracts, non-representation letters and closing letters can help protect management consultants from potential malpractice claims and mitigate the risks associated with defending such claims. Always consult with competent legal counsel regarding the content of a contract prior to presenting the contract to a prospective client for signature.

Appendix A – Sample Declination Letter

[Date]

[Prospect Name]

[Prospect Address]

Dear [Prospect]:

This letter confirms that this firm will not render professional services to your firm. We have not performed any work and have decided to decline the engagement. Enclosed with this letter are the documents that you provided to us. [You did not provide us with any documents when we met with you to discuss your engagement]. (Optional)

We strongly recommend that you engage other consultants about this matter without delay to ensure your needs are fulfilled in a timely manner.

Again, we will not be representing you in this matter and will not be taking action on your behalf. Thank you for your consideration of our firm.

Very truly yours,

[Consultant Name]

[Title]

[Firm Name]

APPROVED:

[Client Name]

[Authorized Officer]

[Title of Officer]

[Date]

This sample letter is for illustrative purposes only. As each consulting practice presents unique situations and statutes may vary by state, we recommend that you consult with your attorney prior to use of this or similar letters in your practice.

Appendix B – Sample Closure Letter

[Date]

[Client's Name]

[Client's Address]

RE: [Name of Project]

Dear [Client's Name]:

[Consulting Firm Name] appreciates having had the opportunity to render [describe scope of service] to [Client's Name]. As of [date of closure letter], we have completed all services as described in our contract dated [insert date] and consider this engagement closed. We have enclosed our final billing for this matter, which reflects application of any remaining unapplied retainer paid by you. Please remit payment for the remaining balance.

We have issued and previously provided to you [describe deliverables if applicable]. Data included in deliverables was obtained from you on or before [date of deliverable]. Please note that we are not obligated to update our deliverables or to revise the information contained therein to reflect events and transactions occurring subsequent to [date of deliverable].

The advice, recommendations and information in the deliverables were prepared solely for the benefit of [Client's Name], were based on the information you provided, and are only to be used for the purpose noted in the contract. Deliverables are for your exclusive use and are not to be distributed externally to third parties, in whole or in part, or used for any other purpose.

As previously discussed with you, you are responsible for taking the following actions:

- List as necessary (Optional)

Please contact [consultant name] at [telephone number] if you have any questions or comments regarding the closure of this engagement. We enjoyed working with you on this matter and look forward to working with you in the future.

Very truly yours,

[Consultant Name]

[Title]

[Firm Name]

This sample letter is for illustrative purposes only. As each consulting practice presents unique situations and statutes may vary by state, we recommend that you consult with your attorney prior to use of this or similar letters in your practice.

Appendix C – Sample Contract Provisions

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 may 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 prior to termination if they become dissatisfied. The parties remain 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 permitted.

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. Discuss with your attorney whether the indemnitor shall pay the attorney fees of the other party, or whether each party shall bear the costs of its own attorney fees. 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 the state governing laws that will be applied to the interpretation and enforceability of the contract. This is a particularly important provision. Unless the state where the client is domiciled or transacts business is selected as the governing law for purposes of interpretation, this eliminates questions regarding the applicability of state contract laws.

8. Limitation on Damages. In the event of a 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 (not including late fees or interest charges) for such a material breach of the Contract shall be limited to either payment of the remaining outstanding fees and expenses for the Professional Services rendered, or reimbursement of the fees already paid for the Professional Services.

This provision establishes a limit upon the collectible damages that both parties are entitled to receive if the Contract is breached. This provision can protect the Provider against the Client pursuing a tort action alleging significant (and unquantifiable) noneconomic damages (i.e., pain and suffering) caused by the Provider's alleged breach of the Contract. Refer to applicable state law regarding the recoverability of noneconomic damages.

_____ ("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 may be added to a contract:

Warranty Provision: This provision would establish, in writing, any warranty associated with the contractual services. This provision is favored by Clients and may be added depending upon the contractual 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 expeditious 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." Applicable statutory interest rates also should be reviewed,

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. Consideration also should be given to whether each party will bear its own attorney fees and costs in the event of a dispute.

This sample contract is for illustrative purposes only. As each consulting practice presents unique situations and statutes may vary by state, we recommend that you consult with your attorney prior to use of this or similar contracts in your practice.

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