

2019 ASA PERSONAL PROPERTY  
CONNOISSEURSHIP CONFERENCE

MARCH 10-13, 2019  
SANTE FE, NEW MEXICO

*EXPLORING MARKETS:  
NAVIGATING THE ROUTES*

# ***Protection: Airtight Agreement Letters***

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# Purpose of an Agreement

- Define the relationship
- Set out each side's rights and obligations
- Avoid uncertainty in worst case scenarios
- Provide for how disputes will be resolved

# KEY PROVISIONS

- I. Scope of Work
- II. Compensation & Expenses
- III. Representations & Warranties
- IV. Limitation of Liability & Indemnity
- V. Dispute Resolution, Governing Law, Forum & Venue
- VI. Termination
- VII. Miscellaneous

Make sure your client signs  
the Agreement . . .

before you begin the work!

# I. Scope of Work

- Work to be performed
- Type of Valuation
- Purpose of Appraisal
- Product of the Work



Dear Rodrigo,

# I. Scope of Work

Thank you for engaging me to perform an appraisal of *El viejo guitarrista ciego* by Pablo Picasso (the Work), a painting owned by the Estate of your late father, Gabriel García Márquez (the Estate). This appraisal agreement between Santa Fe Fine Art Appraisals and you, as personal representative of your father's estate, sets forth the terms and conditions by which I will perform the appraisal. If this agreement is acceptable to you, please sign and return a copy to me at your earliest convenience.

1. **Scope of Engagement**. You have asked me to complete a fair market valuation of the Work on behalf of you as the Estate's personal representative for use in a tax valuation of the Estate (the Appraisal). Upon completion of the Appraisal, I will provide you a written report that complies with the Uniform Standards of Professional Appraisal Practice (USPAP).

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## II. Compensation & Expenses

- Hourly vs. Flat Rate
- Retainer
- Invoicing
- Costs and Expenses

## II. Compensation & Expenses

Fees for Services. I will have primary responsibility for the Company's work on this matter. My current hourly rate is \$\_\_\_\_. If necessary others will assist to ensure that we provide effective and efficient service to you. [List rates of others, as applicable]. We will charge for the time actually devoted to the Appraisal. Hourly rates are subject to periodic adjustment.

**Hourly versus flat rate**

**Assistants**

**Periodic Adjustments**

## II. Compensation & Expenses

**Retainer.** You have agreed to provide us with a retainer of \$1,500 before we begin work on the Appraisal. We will deposit those funds into a separate account and apply them to pay our initial monthly invoices. When your retainer is depleted, it will be your responsibility to pay any balance on our monthly invoices upon receipt. An additional retainer may be required in the event representation extends beyond the initial scope described above.

**Replenishing versus non-replenishing retainers**

## II. Compensation & Expenses

**Invoicing.** You will receive detailed monthly invoices showing our work and any costs incurred on your behalf. Our invoices are ordinarily emailed near the beginning of each month, and are due and payable upon receipt. Interest may be added to amounts more than 30 days overdue.

- Gross receipts tax on services in certain states
- Interest for amounts past due
- Reserve right to withdraw

**Costs and Expenses.** In addition to the fees for appraisal services, you will be responsible for any charges we incur on your behalf such as mileage, title research, testing, copying costs, postage, courier/messenger services, or other incidental costs. These will be reflected on your invoice.

- Consider whether to bill for certain expenses

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# III. Representations & Warranties

- Made by the Client
- Made by You

Another opportunity to

- Lay out your expectations
- Limit your exposure

# III. Representations & Warranties

6. Representations and Warranties by Client. You represent and warrant that you have all right, power and authority to enter into this Agreement; you have not engaged the Company, nor will you use the appraisal report for any purpose that violates any federal, state or local law, regulation or ordinance; you acknowledge the Appraisal is only for the purpose provided in this Agreement; you will provide us with all information we require to conduct an accurate Appraisal of the Work and you understand that the Company will rely on the information you provide and that the Company has no obligation to evaluate or verify the information; and you have not made any material omission regarding ownership or authenticity of the Work.

# **III. Representations & Warranties**

- **Info is true**
- **No material omission**
- **Reliance by appraiser on info**
- **No improper or illegal purpose**
- **No use other than for purpose provided**



# III. Representations & Warranties

Client represents and warrants that he has engaged Appraiser to provide only an Appraisal of the Work and acknowledges that nothing in the Appraisal shall be taken as a statement, representation, or warranty relating to authenticity, genuineness, attribution, authorship, or provenance of the Work

**Appraisal, not authentication**

# III. Representations & Warranties

7. Representations and Warranties by Appraiser. We represent and warrant that we will comply with the standards set forth in the Uniform Standards of Professional Appraisal Practice and will maintain certification through the American Society of Appraisers during the Term of this Agreement. You acknowledge that we have made no guarantee as to the outcome of the Appraisal or the results to be accomplished by our services.

**Agree to reps you know you can fulfill**  
**Avoid reps that place unnecessary burden**

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## **IV.           Limitation of Liability & Indemnity**

- Make the client protect you
- Limit your exposure

# IV. Limitation of Liability & Indemnity

**Indemnification.** Client shall indemnify Appraiser for any claim, loss, or expense (including attorney fees) that results from Client's provision of and Appraiser's reliance on inaccurate or false information.

Client shall indemnify Appraiser for any breach of Client's representations and warranties contained in this Agreement.

Client will not use the Appraisal for any purpose other than the Scope provided herein without prior written approval of Appraiser, and shall indemnify Appraiser for any claim, loss, or expense (including attorneys' fees) resulting from use of the Appraisal by anyone for any purpose other than provided herein.

# IV. Limitation of Liability & Indemnity

## Indemnification of Client

**Avoid indemnifying at all if you can**

**... but if you can't:**

Appraiser shall indemnify Client for any breach of Appraiser's representations and warranties subject to the limitation of liability clause provided herein.

# IV. Limitation of Liability & Indemnity

## Client's Indemnification Provision:

Appraiser shall indemnify Client for any claim, loss, or expense (including attorney fees) related to inaccuracies or errors in the Appraisal.

# IV. Limitation of Liability & Indemnity

## Client's Indemnification Provision:

Appraiser shall indemnify Client for any claim, loss, or expense (including attorney fees) related to inaccuracies or errors in the Appraisal.

**First, reject it.**

**If that doesn't work, add qualifiers:**

Appraiser shall indemnify Client for any claim, loss, or expense (including attorney fees) ~~related to~~ **resulting from** inaccuracies or errors in the Appraisal **arising from material failure by Appraiser to comply with professional standards.**



# IV. Limitation of Liability & Indemnity

## Example 1

Limitation of Liability. The client agrees not to sue Appraiser for any reason whatsoever.

**Enforceable?**

**No way Jose!**

# IV. Limitation of Liability & Indemnity

## Example 2

Limitation of Liability. Appraiser's maximum liability under this Agreement to the Client or to any third party (regardless of whether such party's claimed use or reliance on the appraisal was authorized by Appraiser) for any and all claims or causes of action arising from or relating to the Appraisal is limited to three times the total compensation received by Appraiser under this Agreement. In no event shall Appraiser be liable to the Client or any third party for special, consequential, or punitive damages, including, without limitation, lost profits . . . .

## Enforceable?

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# V. Dispute Resolution, Law & Venue

- Agreement governed by the laws of the State of New Mexico
- Forum for disputes
- Waiver of personal jurisdiction

# V. Dispute Resolution, Law & Venue

Governing Law and Venue. The laws of New Mexico govern all matters arising under this Agreement or related to its subject matter. Any dispute arising under or relating to this Agreement may only be brought in the federal or state courts in Santa Fe, New Mexico, and the parties hereby agree to the jurisdiction and venue of such courts.

# V. Dispute Resolution, Law & Venue

Arbitration. Any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The arbitral award is final and binding upon both parties. Arbitration shall occur in Santa Fe, New Mexico, United States.

**But do you really want to arbitrate?**

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# VI. Termination

**Mutual Right to Terminate.** Either of us may terminate this Agreement at any time, for any reason. You will remain obligated for all invoices for work performed until the date of termination. In the event we are ultimately required to bring suit to collect any unpaid fees or costs, you understand and agree that we will be entitled to the reasonable value of our attorneys' fees and costs.

- **Clarify when the Agreement Ends**
  - Occurrence of certain acts**
  - Completion of services rendered**
- **Tell client how long you'll hold on to documents**

VI.

Termination

Send a closing letter!

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## **VII. Miscellaneous**

### **Severability**

If any provision of this Agreement is determined to be illegal or unenforceable, such provision shall be limited only to the extent necessary to render it legal and enforceable, and the remaining provisions of this Agreement shall remain in full force.

## **VII. Miscellaneous**

### **Merger**

This Agreement represents the entire agreement between us with respect to the subject matter and supersedes any prior agreement or negotiations, whether written or oral.

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