

**MODEL CONTRACT  
CUMIS-COUNSEL HOURLY OR  
CONTINGENT PERCENTAGE RETAINER AGREEMENT**

USE NOTES: The policyholder desires to hire independent counsel. Adapt the contract below by using the Legend. Before sending the text below, delete everything above this line.

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**CUMIS-COUNSEL HOURLY OR  
CONTINGENT PERCENTAGE RETAINER AGREEMENT**

Date: &Date&  
Client: &Client&  
Matter: &Plaintiff& v. &Client&  
Retainer: \$

**1. PARTIES.**

This Retainer Agreement (“Agreement”) is between the Client identified above on the one hand and **&IndependentCounsel&** on the other hand (“Attorneys”).

**2. NATURE OF LEGAL SERVICES.**

Client hires Attorneys to provide legal services in connection with the Matter described above. Attorneys shall provide those legal services reasonably required to represent Client in the Matter and shall take reasonable steps to keep Client informed of the status of the Matter and to respond to Client’s inquiries. Attorneys shall advise Client of all written settlement offers made in the Matter. Client has sole discretion to compromise or settle the Matter or any portion of the Matter. Client also hires Attorneys to provide legal services in connection with Client’s liability insurer(s) who may owe obligations to Client regarding the defense, settlement, or judgment in the Matter.

**3. ATTORNEYS’ DUTIES.**

Attorneys have a fiduciary relationship to Client of the very highest character. Attorneys owe fiduciary duties to their Client which include undivided loyalty, full disclosure, confidentiality; and competent representation. Attorneys are bound by the State Bar Act and the Rules of Professional Conduct. A client may discharge Attorney at any time with or without cause. Upon Client’s discharge of Attorneys, or upon Client’s refusal to follow Attorneys settlement recommendation and at the option of Attorneys, Client agree to pay Attorneys based on the Contingent Hourly Fee measure, regardless of any Recovery. Upon discharge or withdrawal, Attorneys shall withdraw from representation of Client in the Matter and shall retain a lien upon any recovery by Client. Client’s original file shall be returned to Client, but Attorneys may retain a copy of the file, and the cost of duplicating the file will be paid by Client. The scope of Attorneys engagement includes defending **&Plaintiff&** v. **&Client&** and securing available insurance coverage for Client in **&Plaintiff&** v. **&Client&**.

**4. CLIENT’S DUTIES.**

Client agree to keep Attorneys apprised of all developments regarding the Matter, cooperate with Attorneys and be reasonably available to attend meetings, court appearances, or other proceedings in connection with the Matter. Client shall keep Attorneys advised of Client’s current address and telephone number. If there is more than one Client, then each Client agrees to be jointly and severally liable for all legal fees and costs. Attorneys have more than five years of

civil litigation practice which includes substantial defense experience in the subject at issue in the Matter.

**5. HOURLY FEE**

Client agree to pay monthly to Attorneys the following hourly fees which are twice the amount of Attorneys normal hourly fee for the time which Attorneys reasonably spent on the Matter. The fee set forth in this Agreement is not set by law but is negotiable between Attorneys and Client.

Partners of Attorneys	\$/hr.
Associates	\$/hr.
Paralegals	\$/hr.

In addition to the hourly fee described above, Client agree to pay to Attorneys a bonus of percentage of any Recovery. After Attorneys have been paid all hourly fees described above, Client shall receive an equal sum from the Recovery. Thereafter, Client and Attorneys shall share any remaining Recovery equally.

**6. CONTINGENT FEE**

In a contingent fee contract, Attorneys take a gamble on the result of the Matter, for which Attorneys may properly collect larger compensation than would otherwise be reasonable because a contingent fee compensates for the legal services and for the loan of those services. A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. Fee enhancements are intended to compensate for the risk of loss generally in contingency cases. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-33.)

Upon the receipt of any Recovery from the proceeds of any insurance policy related to the Matter, Client agree to immediately pay to Attorneys, the Contingent Hourly Fee identified below for the time which Attorneys have reasonably spent on the Matter plus interest as set forth in paragraph 8.

“Recovery” means all sums paid to or benefits conferred upon or on behalf of the Client, or any of them, by way of settlement, compromise, arbitration, judgment, discharge of an obligation, or otherwise arising out of all or any portion of the Matter. Recovery shall be calculated before deducting fees, costs, disbursements or third party liens, which may reduce Client’s recovery. Recovery includes sums which any insurer may pay to or on behalf of Client for the defense of any claim against the Client. Monetary sanctions awarded during the course of this Matter shall not be considered part of Client’s recovery in this action. However, if the sanction award includes any cost items, the amount thereof shall be credited to Client’s costs account when received by Attorneys.

**7. COSTS.**

Client agrees to pay all costs in the Matter. Attorneys are not required to advance costs, although they may do so, in which case, Client agrees to reimburse Attorneys for all costs advanced by Attorneys on behalf of Client in handling the Matter, regardless of the outcome of the Matter. Costs commonly include, without limitation, fees associated with filing, service of process, depositions, investigation, jury fees, interpreters, delivery service, certification of public records, reference materials, medical illustrations, photography, telephone calls, deliveries, mileage, parking and other costs of trial or arbitration, postage and photocopying. Reimbursement for costs and disbursements may be made from any recovery. Attorneys shall select any expert witnesses, consultants or investigators to be hired. Reimbursement of costs may be made from any Recovery remaining after payment of Attorneys’ Fees.

**8. INTEREST.**

Client agrees that any sum due to Attorneys under this Agreement which is not paid within 30 days shall thereafter bear interest at the legal rate of ten (10%) percent.

**9. CLIENT'S LIMITED RECOVERY AND PURPOSE OF ENGAGEMENT.**

Client recognizes that it has been sued and are not likely to recover money from the plaintiffs who have sued it. Client recognizes that Attorneys services to compel Client's insurers to provide Client with a defense in the Matter may produce a Recovery to compensate Attorneys for defending the Matter, which will not result in any payment to Client. Client hopes to achieve certain goals in the underlying action which is not likely to produce the recovery of revenue to Client or Attorneys. Attorneys agree to represent Client even though Client may not pay for Attorneys legal services on a current basis and even though Attorneys risk that they may not recover any fees or costs at all. If any part or all of the Matter is settled without the written consent of Attorneys, or if Client discharges Attorneys, then at Attorneys' sole option, Attorneys may elect to require Client to pay Attorneys' hourly fee rate set forth herein for services rendered by Attorneys in the Matter regardless of any Recovery. Attorneys shall be entitled to collect their fee from any Recovery, even if the Recovery is paid after discharge or withdrawal. If (1) any Recovery is paid to anyone other than Attorneys' Trust Account; (2) Client discharges Attorneys; or (3) Client fails to follow Attorneys written settlement recommendation, then Client agrees to be personally responsible for payment of costs and fees incurred in the Matter from Client's personal assets.

**10. DISBURSEMENT AFTER RECOVERY.**

The Fee shall be payable from any Recovery. After payment of the Fee and any third party liens, then costs advanced by Attorneys shall be paid from the Recovery. Any Recovery shall be placed into Attorneys' Trust Account. The recovery shall then be applied to pay any unpaid fees and costs in this Matter and any other matter in which Attorneys represent Client. If there is more than one Client, costs will be allocated on a pro rata basis in proportion of the recovery by each Client to the recovery of all Client to the time of disbursement. If there are outstanding liens against the Recovery, they shall then be paid from the Recovery. Client acknowledge that Attorneys may be required to pay third party liens before payment to Client. If Client owes Attorneys legal fees in connection with Attorneys' representation not covered by this Agreement, they shall then be paid from any Recovery.

**11. NO GUARANTEE.**

Client acknowledges that Attorneys have made no guarantee regarding the successful termination of the Matter, or that Client will recover any sum whatsoever. All questions or comments relative to the recovery, resolution or termination of the Matter have been are and will be mere expressions of Attorneys' opinions.

**12. APPEALS NOT REQUIRED.**

Representation of Client in any appeal in the Matter is not included within the scope of this Agreement. Client acknowledges that no appeals will be taken in the Matter without consent of both Client and Attorneys. The fee for an Appeal is separate and negotiable between Client and Attorneys. Client hereby give their informed written consent to this limitation upon the scope of this engagement.

**13. ARBITRATION.**

The State Bar Act provides that arbitration of fee disputes is voluntary for Client, but mandatory for Attorneys. If any dispute arises out of, or related to, a claimed breach of this agreement, the professional services rendered by Attorney, or Client's failure to pay fees for professional services and other expenses, or any other disagreement of any nature, type or

description regardless of the facts or the legal theories which may be involved, such dispute shall be resolved by arbitration. Attorneys and Client agree to be bound by arbitration pursuant to Civil Code § 2860. Arbitration hearings shall be held in the Los Angeles in which each side shall bear his/her/its/their own costs and attorneys fees.

**14. MALPRACTICE INSURANCE.**

Attorneys maintain errors and omissions insurance coverage which may be applicable to the services to be rendered.

**15. CONDITIONS.**

This Agreement will not take effect, and Attorneys shall have no obligation to provide legal services, until Client delivers to Attorneys a signed copy of this Agreement.

**16. USE OF CONTRACT ATTORNEYS.**

Attorneys may contract with lawyers who are neither partners, associates, nor shareholder of Attorneys to perform work on the Matter with Attorneys on behalf of Client. Attorneys will pay such contract lawyers a fee for their work and bill Client for their work as set forth above. The total fee charged by all attorneys is not increased solely by reason of the use of contract lawyers. Client herewith gives informed consent to the use of and payment to contract lawyers.

**17. GRANT OF LIEN.**

In order to secure payment to Attorneys of all sums due under this Agreement or any other debts by Client to Attorneys, Client grants to Attorneys a lien upon Client's claims, any cause of action or lawsuit filed thereon, and on any recovery whether by settlement, arbitration, judgment or otherwise in this or any other Matter. Client also grants to Attorneys a lien upon any insurance benefits which may be paid to or on behalf of Client in connection with this or any other Matter, including any insurer's obligation to defend Client in the Matter. Client authorizes Attorneys to give written notice of this lien in the Matter. Client gives its informed written consent that Attorneys may "accept compensation for representing a client from one other than the client" pursuant to Rule 1.8.6. Client hereby assigns to Attorneys and authorizes payment directly to Attorneys of all insurance policy benefits otherwise due to Client for the defense of the Matter.

**18. CLIENT'S INSURANCE COMPANY.**

Client represents that it has purchased one or more policies of liability insurance which it believes should protect it in the Matter. Client shall remain liable for all Attorneys' fees and costs related to the Matter regardless of whether any insurer does or does not honor its obligation to reimburse Client in the Matter for Attorneys fees. Client directs and Attorneys agree that Attorneys shall not establish an attorney-Client relationship nor any direct financial relationship with any such insurance company. (Rule 1.7). Pursuant to the grant of lien and assignment mentioned above, Client gives its informed written consent that Attorneys accept compensation for representing client from Client's insurer(s), provided that there is no interference with Attorneys' independence of professional judgment or with the client-lawyer relationship and that Attorneys protect Client's confidential information. (Rule 1.7).

Client gives its informed written consent for Attorneys to disclose to Client's insurers invoices for defense fees and costs and "to disclose to the insurer all information concerning the action except privileged materials relevant to coverage disputes, and timely to inform and consult with the insurer on all matters relating to the action" and to "cooperate fully in the exchange of information that is consistent with . . . counsel's ethical and legal obligation to the insured." as required by Civil Code § 2860(d)(f). Client hereby authorizes Attorneys to demand and conduct on behalf of Client, Civil Code § 2860 arbitration of any attorneys fee dispute raised by any of Client's insurers. Client acknowledges that Client's insurers may not be required to pay all attorneys fees which Client is obligated to pay to Attorneys pursuant to this Retainer Agreement.

Any of Client's insurers that agree to provide a defense to Client in the Matter, may do so under a reservation of a right, implied-in-law, to seek reimbursement of Attorneys' fees and costs incurred in the Matter and paid by such insurer for claims not even potentially covered by the insurer's policy. Client acknowledges that Attorneys may be called as witnesses to testify what work they have performed on such claims and that such testimony given by Attorneys may be contrary to the interests of Client. Client hereby consents to Attorneys performing services pursuant to this Agreement and giving truthful testimony regarding Attorney's fees.

**19. INSURER'S DUTY TO DEFEND**

One of the duties that Attorneys owe to Client is the duty of disclosure. Client acknowledges that Attorneys have advised it of their insurer's duty to defend. The California Supreme Court stated the following: "We summarize familiar principles pertaining to an insurer's duty of defense. An insurer must defend its insured against claims that create a potential for indemnity under the policy. The duty to defend is broader than the duty to indemnify, and it may apply even in an action where no damages are ultimately awarded. Determination of the duty to defend depends, in the first instance, on a comparison between the allegations of the complaint and the terms of the policy. But the duty also exists where extrinsic facts known to the insurer suggest that the claim may be covered. Moreover, that the precise causes of action pled by the third party complaint may fall outside policy coverage does not excuse the duty to defend where, under the facts alleged, reasonably inferable, or otherwise known, the complaint could fairly be amended to state a covered liability. The defense duty arises upon tender of a potentially covered claim and lasts until the underlying lawsuit is concluded, or until it has been shown that there is no potential for coverage. If any facts stated or fairly inferable in the complaint, or otherwise known or discovered by the insurer, suggest a claim potentially covered by the policy, the insurer's duty to defend arises and is not extinguished until the insurer negates all facts suggesting potential coverage." (*Scottsdale Ins. Co. v. MV Transp.* (2005) 36 Cal.4th 643, 654-55 (citations, ellipses and quotation marks omitted).)

**20. CONFLICTS OF INTEREST**

Attorneys have done a conflict of interest check and have concluded that Attorneys have not represented any other party to the Matter, nor any insurer of Client in any capacity.

**21. INFORMED CONSENT.**

Client acknowledges that Client has had an opportunity to discuss the content of this Agreement with independent counsel, that Client has read and understands this Agreement, that it complies with the provisions of California Business and Professions Code Sections 6147 and 6148.

**22. WAIVER.**

The waiver of any breach of any of the provisions of this Agreement by Attorneys shall not constitute a continuing waiver or a waiver of any subsequent breach by Client either of the same or of another provision of this Agreement.

**23. SOLE AND ONLY AGREEMENT.**

This Agreement constitutes the sole and only agreement between Client and Attorneys regarding representation of Client by Attorneys as of its date. Any agreements or representations respecting Attorneys' representation of Client not expressly set forth in this Agreement shall have no effect and are null and void, except for subsequent written modification signed by both parties. This Agreement may be amended or modified at any time only by a written instrument executed by Client and Attorneys.

**24. CONSULTATION WITH INDEPENDENT COUNSEL.**

Client acknowledges that Client has had the opportunity to consult with independent counsel regarding the terms of this Agreement.

**25. RECEIPT OF AGREEMENT.**

Client acknowledges that they have carefully read and fully understand this Agreement, have had an opportunity to discuss it with independent counsel, and have received a duplicate copy of this Agreement signed by both the Client and Attorneys.

Dated: &Date&

&IndependentCounsel&

\_\_\_\_\_  
&Client&

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