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Drafting and Negotiating Consulting and Professional Services Agreements

Commercial and Contracts

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Companies hire professional services firms or consultants with subject matter expertise to help improve specific areas of business, analyze a problem, or achieve a certain goal. Consultants specialize in fields such as law, marketing, finance, information technology, and human resources. The contracts detailing service-based relationships must be carefully drafted in order to minimize legal risk and ensure that the company maximizes the return on its investment.

Make sure to consider the terms outlined below when drafting or negotiating a professional services agreement. Of course, each agreement should be tailored to the applicable jurisdiction and the nature of the services offered. In general, the party providing the first draft will be at a tactical advantage.

Intellectual property

Most consultants create written materials or other work products on behalf of the company in connection with their services, which means that the intellectual property (IP) rights of both parties should be well-defined before the relationship begins.

By default, in many jurisdictions, the consultant and the company jointly own IP created by the consultant on behalf of the company. To ensure that the company has rights to the IP, the company should consider specifying in the agreement that the company retains ownership, title and rights to the IP created by the consultant pursuant to the agreement. The consultant should be prohibited from using or disclosing IP to third parties absent the company's prior written approval.

It is imperative to ensure intellectual property rights are well established between both company and

consultant parties. Jiw Ingka / *Shutterstock.com*

Under the US Copyright Act, a consultant who produces a creative work is the author and owner of the copyright, unless the agreement specifies that the work is a “work made for hire,” in addition to meeting other criteria. In such a case, the company would be considered both the author and the copyright owner of the work. However, not all creative work can be classified as a work made for hire. For example, the deliverables must fall within one of nine categories in order to qualify for the classification, which include, for example, a contribution to a collective work, a part of an audiovisual work, or a supplementary work.

In some jurisdictions, the work made for hire classification has larger implications that need to be considered in conjunction with the other terms in the agreement, and including that phrase might even be detrimental to the company.

For example, in California, a consultant whose work is made for hire pursuant to an agreement is considered an employee of the company, which triggers many obligations for the company that are not required to be afforded to an independent contractor. Moreover, consider that the consultant might be using the same IP to provide services to other clients, and such an arrangement might require the client to own that IP or for the parties to own it jointly.

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If the company is limited in its ability to own IP, for whatever reason, careful drafting can retain rights sufficiently for the company’s purposes, such as language granting the company a worldwide, non-exclusive license to use the IP for internal use consistent with the agreement. It might also be helpful to state that, if the deliverables fail to qualify for any reason as works made for hire, the consultant assigns them to the company automatically. In any consulting agreement, if the company and consultant each have rights to the IP, the contract should clearly state which party is the owner and what rights are granted to the non-owner.

Early termination

Most consulting agreements address a variety of circumstances in which the relationship could end, including automatic termination, or termination for cause. But the language addressing early termination requires careful consideration of many factors, and transparency surrounding this possibility during the negotiation stage can help to avoid disputes and legal action down the road. The parties should give as much attention to their potential exit strategy as they give to describing the consultant’s milestones and deliverables. Regardless of which party invokes early termination, it is imperative to ensure a smooth transition by anticipating the expectations of both parties, financial and otherwise, in the event of early termination.

Early termination requires the same attentiveness as outlined objectives in the agreement to prepare for any potential outcomes. Abscent Vector / *Shutterstock.com*

Depending on the nature of services, the company might want the right to terminate for convenience, or upon the consultant's failure to timely satisfy a critical milestone. It might make sense to allow for termination in whole or in part, with corresponding cost adjustments provided under the scenario of continuing certain services while other services cease. The financial consequences of early termination must be carefully laid out, in addition to the ways the company expects services to be provided during the period between notice and the effective date of termination. The language surrounding the notice period should accurately reflect the amount of time required to effectively end the relationship, given the nature of the services involved.

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If the company will shift services to another consultant or service provider, the agreement should specify that the consultant or professional services firm is expected to cooperate during the transition. For example, the agreement should anticipate whether the company requires access to data or content that is in the consultant's possession. Finally, it is imperative to think about whether the parties will have a relationship after termination and, if so, how it will be adjusted, and which provisions of the agreement will survive termination.

Confidentiality and related provisions

Because most professional services firms and consultants have multiple clients within the same industry, agreements with them must address confidentiality and non-disclosure, and potentially related clauses such as trade secrets and non-solicitation. At a minimum, be sure to carefully define confidential information and specify that it should only be used in furtherance of the agreement. It is a best practice to protect the confidentiality of the agreement itself, and limit the consultant's access to confidential information outside the scope of the services provided.

It is in the best interest of the company to limit consultants' access to confidential information to further prevent any violations or breaches. ProStockStudio / *Shutterstock.com*

The agreement can prohibit the consultant from altering or duplicating confidential information and describe the procedure the consultant must follow in the event of a breach (i.e., promptly inform the company and be proactive in preventing any further breach). The consultant can also be banned from sharing the company's trade secrets or using trade secrets for the benefit of other companies during or after the termination of their services. In addition, any trade secrets developed by the consultant during the course of the agreement can be protected as confidential, and either licensed by or owned by the company. The consultant should be liable for breach of any confidentiality provisions.

> At a minimum, be sure to carefully define confidential information and specify that it should only be used in furtherance of the agreement.

Depending on the jurisdiction and the services involved, companies might want to consider prohibiting the consultant from soliciting employees for a certain period during and/or after termination of the relationship.

Indemnification

All consulting agreements should address indemnification and consider related concepts such as a party's obligation to defend and hold harmless, all of which vary widely depending on the jurisdiction and nature of the relationship. If a consultant has complete control over the subject matter of the services, it will typically benefit the company to draft a unilateral provision requiring the consultant to indemnify the company for damages arising out of negligence or breaches of any warranties relating to the performance of services. These provisions can be drafted to apply to additional conduct such as violations of applicable laws, intentional acts, and other wrongful conduct. Consultants can also agree to indemnify their clients for any tax obligations incurred as a result of the agreement.

Consulting agreements should address indemnification as a way to guarantee compensation in the event of misconduct. TK 1980 / *Shutterstock.com*

Complex agreements, and those involving large sums, often necessitate quite lengthy indemnification provisions. For example, the company might want to detail notification procedures, requiring the consultant to provide the company with prompt notice of any claim along with relevant documentation. The consultant can also be required to maintain sufficient insurance to cover their indemnification obligations under the agreement.

During negotiations, if the professional services firm or consultant insists on mutual indemnification, be sure to tailor the language based on the nature of the services. It often does not make sense to simply repeat the indemnification provision with the company as indemnifier when the consultant is the one who has control over the services. A carefully drafted indemnification provision can have a significant impact not only on litigation itself, but it can also prevent disputes relating to the agreement

from arising in the first place.

Balance flexibility with reality

As with any contract, the content of the foregoing provisions will depend on the jurisdiction, nature of the services offered, value of the contract, and many other factors. The flexibility and tailored nature of consulting must be balanced with the reality of potential disagreements, which are amplified if the agreement is poorly drafted. The more careful consideration that is given to the terms and conditions of the agreement, the easier it will be to avoid — or at least quickly resolve — any disputes that arise during the relationship.

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