

## Consulting and contractor agreements

Companies often hire consultants<sup>[1]</sup> because companies have projects that might not be suited for an employee for any number of reasons, or because the projects require some particular expertise that the consultants can provide or the companies want to augment their engineering staff. The relationship between the company and consultant is oftentimes informal with the relationship based on verbal discussions and agreements. However, as this article will explain, having a written consulting services agreement is appropriate and highly desirable for both the company and the consultant.

### Why should I have a written consulting agreement?

If you are the company hiring the consultant, and the consultant is developing software or other technology that the company expects to own, unless that consultant has assigned ownership of the developed software or technology to the company in writing, the consultant will own the software or technology, even if the company has paid for it. This situation could create a real problem for the company, especially if the developed software or technology is significant or material to the company's business or is for its products.

Generally speaking for software and other technical services, the consultant will retain ownership of the work product and instead be considered under the law to have granted a license to the company. In this situation, it will be important that the terms of the license are clear so that there is no doubt about how the company can use the work product, and whether it owes the consultant any ongoing license fees, royalties or other consideration for that use.

It is important to remember that the work for hire doctrine under the Copyright Act only applies to consultants in very limited circumstances for a company (such as commissioning a sculpture or creating an atlas) and the work for hire doctrine does not apply to software, patents, trade secrets or trademarks. As a result, a consulting agreement that relies only on work for hire language to convey software, technology and intellectual property are generally not appropriate.

If you are the consultant, you probably want to make sure that you get paid for your work, and that you don't end up having to perform doing more work than you had expected. Having a written agreement that specifies the details of the work you are supposed to do, when the work will be completed, what will be delivered and how much and when you are expected to be paid is critical to ensuring that you will not find yourself upside down on a project.

The typical consulting agreement also has provisions regarding confidentiality to protect the company's confidential information (to prevent the consultant from, for example, disclosing the information to a competitor of the company) and the consultant's confidential information (for example, to prevent the company from sharing with consultant's pricing with other prospective consultants that might provide services to the company).

### What if a consultant does more than one project?

Most consulting agreements are structured as a master agreement with a statement of work<sup>[2]</sup> attached. The company and consultant can then enter into a statement of work for each project. The master agreement will address obligations that apply to all statements of work, such a confidentiality, ownership, warranties and liability. The individual statements of work will



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detail the terms applicable to each specific project, such as the details of the project, delivery schedule, milestones, deliverables, amounts and schedule of payments and acceptance criteria. Each statement of work should be signed by authorized representatives of both the company and the consultant.

Like proprietary information and invention assignment agreements between companies and their employees, forms of consulting agreements can be found from numerous online sources. However, it is important that the consulting agreement have enforceable intellectual property assignment language where ownership of the software, technology and related intellectual property is being transferred from the consultant to the company. Where a license is being granted instead, the license needs to be broad enough to give the company all the necessary rights it needs to make use of the software and technology. If you have questions about your form of consulting agreement, or if you want to make sure that you have the right form of consulting agreement for your situation, please contact a member of our [Technology, Data and Commercial practice](#).

[1] For purposes of this article, the term "consultant" is also intended to include "contractor."

[2] For purposes of this article, the term "statement of work" is also intended to include "project statement."

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