DOLGIN PROFESSIONAL CORPORATION
BUILD A BETTER BUSINESS

Legal ABCs of Consulting Agreements

So…after years of sweat equity for the benefit of some corporate monolith, you've ready to break with tradition and form your own IT consulting business. You're minimizing start-up costs and have avoided lawyers and accountants at all costs. Three weeks after opening shop, you get your first piece of work and your new client wants you to sign an "Independent Consulting Agreement" before the job begins. You face a classic dilemma…dispense with legal advice and sign on the dotted line or obtain professional advice. While crafting contracts is never a "one size fits all" proposition, in my experience advising IT consultants, a suitable consulting agreement needs to address certain basic concerns. Here's my "Top 10" list:

1. **Term**: How long will the relationship last? Most contracts have a fixed duration (with or without renewal rights) or continue until terminated by one/both sides. As a consultant, you'll probably prefer the perpetual rather than fixed term to avoid forgetting to exercise renewal rights on a timely basis.

2. **Scope:** What services must you provide? Its crucial to detail specifically what you are required to do. If the scope is too open-ended, you run the risk of being stretched too far without fair compensation. Insist on a fixed list of services and resist any expansion without mutual approval or a right to revise payment provisions.

3. **Termination Rights:** What events permit early termination before expiry? Which party gets to exercise termination rights? Consultants should have rights to unilaterally terminate (whether or not for breach) after providing reasonable notice. Resist provisions which give the client unilateral rights to terminate without sufficient notice/compensation or under vague/ambiguous circumstances.

4. **Ownership of Work Product:** What intellectual property will be created from the relationship? How does the "ownership pie" get split? Ownership is a big issue for clients as they'll likely need to use/sell/exploit the work product long after the consultant leaves. For the consultant, giving up ownership in work products which they author may be onerous if they need to recycle work product from client to client. Before commencing a new job, consultants need to sort through and allocate ownership entitlements.

5. **Status:** Employee or not? The answer may compromise the consultant's ability to deduct normal business expenses. Client want to avoid duties to deduct/remit source deductions. The contract must document a relationship consistent with independent consulting (as opposed to employment). Key issues will focus on exclusivity, ownership/provision of tools, control over work product, place of work, etc.

6. **Warranties & Liability:** Consultants must understand how the agreement allocates risks of poor performance. Avoid unreasonably long warranties of product performance and try and limit damages to the value of the total contract. Avoid "implied" warranties under Sale of Goods laws.

7. **Fees & Expenses:** How much? When paid? Invoicing procedures? Is compensation royalty-based? If so, are audit and record keeping given to the consultant? How are expenses reimbursed?

8. **Post-Termination:** What client obligations survive termination? Ensure at least that the client is required to pay all outstanding fees/expenses to the date of termination.

9. **Confidentiality & Non-Compete:** Confidentiality provisions are not problematic if they exclude "public domain" information and do not extend forever. On the other hand, non-compete restrictions should be resisted for two important reasons – first, they are difficult to monitor; second, they can unduly restrict a consultant's future business opportunities. Ask yourself: to consider to what extent are you a competitive threat? What protection does the client really need? Why give the Sun, the Moon and the Stars when all the client really wants is Venus and Mars.

10. **Indemnities:** Clients typically will want to be "made whole" if they suffer losses as a result of the relationship. These clauses are usually poorly drafted and are far-reaching. While it might be reasonable for consultants to cover losses where they "materially fail to perform" but such losses should (a) be limited to direct losses (not consequential or remote losses such as loss of profits), (b) be limited to a financial cap and (c) exclude losses due to the client's own negligence, bad faith or wilful misconduct.

Typical consulting agreements consider these issues one way or another depending on who does the drafting. The best advice I could ever give to an IT consultant is to be pro-active and have your agreement reviewed by counsel.