**CHECKLIST – CONSULTING AGREEMENT**

1.Names of the Parties

--Generally straightforward, but can require thought in the context of a master consulting agreement intended to cover a company and its affiliates.

2.Whereas Clauses

--Opinions vary as to their utility. Can be used

--to "set the stage" for the rest of the agreement and provide an overall context;

--to have the consultant recite that it has experience relevant to the project;

--where the consultant is a former employee.

3.Definitions of Preliminary Matters

--Properly used, they can facilitate drafting. They can also, however, lead to length and complexity which may not be needed.

--Probably more importantly, they may help clarify the agreement if it is a follow-on to previous agreements.

4.Description of the Work to Be Performed

--This is obviously a key provision. Sometimes it can be a simple general statement (e.g., "consulting on sales and marketing matters"), but it may also be appropriate to use a separate document. That may be called a "statement of work" and might include the following:

--time and location of the work;

--listing and description of deliverables;

--description of the types of individuals who will do the work, their experience, and qualifications;

--specific objectives to be accomplished;

--reports to be provided;

--funding limitations.

--If there are particular things the consultant is expected to do, they should be itemized in the agreement or an exhibit:

--responsibility for certain accounts or relationships;

--use of the consultant's name, likeness, and reputation for the benefit of the company.

5.Payments to the Consultant

--fixed amounts;

--rates for individuals;

--contingent payments;

--equity payments (note that if equity payments are contemplated, there must be an analysis of the securities law implications);

--if agreement is with former employee, treatment of options should be spelled out.

6.Term of the Agreement

--Automatically renewed if not terminated.

--Renewal requires affirmative acts of the parties.

(See also No. 19 on the mechanics of termination.)

7.Description of the Responsibilities of the Client

--Facilities to be provided the consultant. If computer access is contemplated, the details and specifics should be spelled out.

--Reports or information to be provided the consultant. (Can an illustrative or sample form be provided?)

--Feedback to be provided the consultant:

--by whom;

--how often;

--in what form.

8.The Standard of Performance -- Warranties of the Consultant

--best efforts;

--standards of national firms;

--generally accepted industry standards;

--sound design and engineering practices.

Note: Warranties provision may also recite that consultant warrants he/she has the right to do the work without violating any other agreements, the right to use whatever tools, software, etc., that may be involved.

9.Independent Contractor Status

--Note that the agreement is important, but reality will govern, and the issue generally boils down to the degree of control the company exerts over the way in which the consultant performs the services.

--Consultant is independent contractor.

--Consultant is responsible for paying taxes and making appropriate tax filings.

--No agency, fiduciary, partnership, joint venture, or employment relationship is created by consulting agreement.

10.Key Persons/Consultant's Personnel

--Individuals named in agreement are key persons in performing services:

--expected to be on job until completion;

--if departing from company, client/consultant to confer about suitable replacement;

--departure or removal of key person may be grounds for client terminating the agreement.

--Client can ask consultant to remove unsatisfactory personnel.

11.Best Efforts Language

--Best efforts to stay on schedule, but if schedule falls behind, the consultant accelerates the project.

--Best efforts to perform work satisfactorily to the company's standards.

12.Intellectual Property Rights

--What the consultant starts with -- the consultant's knowledge, capital products.

--What the client starts with -- the client's intellectual property.

--What is jointly developed during the course of the consultancy.

--Work-made-for-hire and copyright assignments. (The technicalities of the work-made-for-hire doctrine should be considered with the usual result being that at least some of what the consultant creates simply does not fall under the statutory definition of work-made-for-hire and, therefore, assignments are required.)

--Patents and invention assignments. (Note that the agreement itself may be only part of this issue. It may also be appropriate to establish procedures or checklists to actually follow up with separate intellectual property assignment documents and, in some cases, it may be appropriate to record these.)

13.Proprietary or Confidential Information

--client-furnished data;

--possible injunctive relief;

--alternative dispute resolution/arbitration does not apply.

14.Changes

--What is the procedure to make changes?

--Who is authorized to make changes?

--What should the change orders or documents include?

15.Indemnification -- Limitation of Liability -- Consequential Damages

--indemnification of the company by the consultant;

--indemnification of the consultant by the company;

--procedures for indemnification useful.

16.Patent/Intellectual Property Infringement Indemnity

--Consultant warrants it will not use anything that infringes others' rights.

--Company warrants anything it provides is noninfringing.

17.Risk of Loss -- Personal Injury

--Consultant acknowledges existence of any hazards and/or risks. (Note this may be affected by the company Hazard Communication Rule procedures.)

18.Cancellation, Termination, or Suspension

--termination for cause;

--termination for convenience;

--listing of provisions that survive termination:

--confidentiality;

--nonsolicitation;

--indemnification;

--ownership of work product;

--injunctive relief;

--other.

19.Mechanics of Termination

--Consultant to return all documents.

--Consultant to make representation that all client information not returned has been destroyed.

--Individuals who worked on the project required to be covered by confidentiality agreements.

--Consultant has observed the company Code of Legal and Ethical Conduct and is not aware of any violations by anyone else.

20.Remedies

--May tie in with provision allowing injunctions, particularly for intellectual property issues.

21.Delays -- Force Majeure

--illness of the consultant;

--strikes, etc., on the part of the company;

--mutual excuse for any cause beyond the parties' reasonable control.

22.Payment/Invoices/Expenses

--Use the company expense policy for employees?

--What must invoices include?

--Define payment times and intervals.

--Charge interest on past due amounts?

23.Insurance

--What insurances should the consultant be required to have and maintain?

--automobile;

--workers' compensation;

--general liability;

--errors and omissions;

--other.

--What procedures should the company require to monitor this?

--certificates periodically supplied automatically;

--only at the request of the company.

24.Taxes

--Ties in with the independent contractor provision.

--Consultant required to file and pay all relevant tax returns.

25.Accounting, Records, and Audits

26.Reports

--Can a sample or illustrative form of report be provided?

27.Advertising and Public Announcements

--These clauses generally relate to the use of the company name by the consultant, as contrasted with clauses under No. 51 which deal with the use by the company of the name of those organizations with which the consultant may be affiliated.

28.Notices

29.Assignment or Subcontracts

30.Equal Employment Opportunity

31.Nonwaiver/No Oral Modification

32.Nonsolicitation/Noncompetition/Exclusivity

Note: Nonsolicitation, noncompetition, and exclusivity provisions are subject to applicable law.

33.Authority/Supervision

--It is often helpful to have a specific name (or title) of the person to whom the consultant reports or the person who is authorized to provide necessary direction or approvals for the consultant. This may relate to No. 14 on changes.

34.Licenses and Permits

35.Severability

36.Mechanic's Liens

37.Time Is of the Essence

38.Gratuities/Conflicts of Interest

Note: Consultants are frequently required to observe the same code of legal and ethical business conduct that applies to company employees.

This may also relate to No. 19 on termination. Does the consultant have to certify that it has complied with the code of legal and ethical conduct and knows of no violations? The same certification many companies require of their employees can be used.

39.Compliance with Laws

--These clauses can either be short and general or rather long and list all of the laws and regulations to which the consultant and the company may be subject while performing the work.

40.Export Controls

41.Compliance with Company Safety and Security Rules

42.Company Facilities and Materials

43.Smoking Policy

44.Behavior of Consultant's Employees (Including Drug Abuse and Sexual Harassment)

45.No Third-Party Beneficiaries

46.Other Agreements

47.Dispute Resolution

--Most consulting agreements do not contain an alternative dispute resolution provision, but an increasing percentage do.

--The "combination" techniques are becoming popular, such as clauses that start with negotiation and then go to various stages, perhaps including mediation, and culminate in binding arbitration.

48.Governing Law/Choice of Forum

49.Attorneys' Fees

50.Entire Agreement

51.Affiliations of the Consultant

--Company can disclose the consultant's affiliates.

--Often used where the consultant is a member of a university faculty or other prestigious organization.

52.Employment Law Releases

--Generally used where the consulting agreement is with a former employee.

--Often must comply with lengthy list of federal and state laws.

53.Change in Control

--Allows the consultant to terminate the agreement if there is a change in control -- used mostly where the consultant is a former employee.

54.Injunction

--Recites that company remedy at law is inadequate and injunctions are appropriate -- particularly for breach of intellectual property or confidentiality portions of the agreement.

55.Cooperation with Litigation

--Often used where consultant is a former employee and was involved with litigation.

56.Representation by Counsel

--May be a part of the "release" section.

--Often used where consultant is a former employee and such representation is desirable under federal and state anti-discrimination laws.

57.Indemnification and Insurance

--Generally used where the consultant is a former employee and was covered by the company director and officer insurance policies or indemnification agreements. Generally provides that the company will continue such coverage unless cost becomes prohibitive.

58.Representations of the Consultant to the Company

--Generally used where the consultant is an organization, and representation basically deals with valid organization, authorization of those signing the agreement, etc.

59.Representations of the Company to the Consultant

--Often a mirror image of the above.

60-98[Reserved]

99.Miscellaneous

100.Signatures