

Table of Contents

PART I. TEXT

CHAPTER 1. INTRODUCTION AND OVERVIEW

- § 1:1 Introduction
- § 1:2 Some common issues
- § 1:3 —Which forms to start with
- § 1:4 —Contract formation
- § 1:5 —How to handle multiple documents
- § 1:6 —Compensation arrangements
- § 1:7 —How to handle the competition issue
- § 1:8 —How to deal with confidential information
- § 1:9 —Consultant qualifications
- § 1:10 —Who should be authorized to tell the consultant to do something for which the consultant expects to be paid?
- § 1:11 —How to strike the proper balance between respecting the consultant's knowledge capital and getting full rights to what you paid to have created
- § 1:12 —How to deal with the client's/company's responsibilities in the documentation
- § 1:13 —Relationship between the parties
- § 1:14 — —Agency
- § 1:15 —Cure provisions
- § 1:16 —What position should you take on alternative dispute resolution—Including arbitration?
- § 1:17 —Statutes of limitation
- § 1:18 —Choice-of-law
- § 1:19 —Statute of frauds
- § 1:20 —What should the position be on insurance requirements?
- § 1:21 —Should there be project management clauses?
- § 1:22 —Jurisdiction
- § 1:23 —Forum selection clauses
- § 1:24 —Privilege
- § 1:25 — —Consultant corollary
- § 1:26 — —Work product
- § 1:27 —Insurance coverage
- § 1:28 —Indemnification
- § 1:29 —What if the consultant is a former employee?

- § 1:30 —How should actual transfer of intellectual property be handled?
- § 1:31 —Corporate restructuring
- § 1:32 — —Bankruptcy
- § 1:33 —Termination
- § 1:34 Breach
- § 1:35 —Recovery
- § 1:36 Summary and conclusion

CHAPTER 2. CHECKLIST FOR DRAFTING CONSULTING AGREEMENTS

- § 2:1 Introduction
- § 2:2 Checklist

CHAPTER 3. CONSULTING AGREEMENTS CLAUSE COLLECTION

- § 3:1 Names of the parties
- § 3:2 Whereas clauses
- § 3:3 Definitions of preliminary matters
- § 3:4 Description of the work to be performed
- § 3:5 Payments to the consultant (See also no. 22. payment/invoices/expenses)
- § 3:6 Term of the agreement (see also no. 18. cancellation, termination, or suspension, as some consulting agreements combine the term and termination clauses in a single section)
- § 3:7 Description of the responsibilities of the client
- § 3:8 The standard of performance—Warranties of the consultant
- § 3:9 Independent contractor status
- § 3:10 Key persons/consultant's personnel
- § 3:11 Best efforts language
- § 3:12 Intellectual property rights
- § 3:13 Proprietary or confidential information
- § 3:14 Changes
- § 3:15 Indemnification—Limitation of liability—Consequential damages
- § 3:16 Patent/intellectual property infringement indemnity
- § 3:17 Risk of loss—Personal injury
- § 3:18 Cancellation, termination, or suspension
- § 3:19 Mechanics of termination
- § 3:20 Remedies
- § 3:21 Delays—*Force majeure*
- § 3:22 Payment/invoices/expenses (see also no. 5. payments to the consultant)
- § 3:23 Insurance

TABLE OF CONTENTS

§ 3:24	Taxes
§ 3:25	Accounting, records, and audits
§ 3:26	Reports
§ 3:27	Advertising and public announcements
§ 3:28	Notices
§ 3:29	Assignment or subcontracts
§ 3:30	Equal employment opportunity
§ 3:31	Nonwaiver/no oral modification
§ 3:32	Nonsolicitation/noncompetition/exclusivity
§ 3:33	Authority/supervision
§ 3:34	Licenses and permits
§ 3:35	Severability
§ 3:36	Mechanic's liens
§ 3:37	Time is of the essence
§ 3:38	Gratuities/conflicts of interest
§ 3:39	Compliance with laws
§ 3:40	Export controls
§ 3:41	Compliance with company safety and security rules
§ 3:42	Company facilities and materials
§ 3:43	Smoking policy
§ 3:44	Behavior of consultant's employees (including drug abuse and sexual harassment)
§ 3:45	No third-party beneficiaries
§ 3:46	Other agreements
§ 3:47	Dispute resolution
§ 3:48	Governing law/choice of forum
§ 3:49	Attorneys' fees
§ 3:50	Entire agreement
§ 3:51	Affiliations of the consultant
§ 3:52	Employment law releases
§ 3:53	Change in control
§ 3:54	Injunction
§ 3:55	Cooperation with litigation
§ 3:56	Representation by counsel
§ 3:57	Indemnification and insurance
§ 3:58	Representations of the consultant to the company
§ 3:59	Representations of the company to the consultant
§ 3:60	Miscellaneous
§ 3:61	Signatures

CHAPTER 4. ENVIRONMENTAL CONSULTANTS

§ 4:1	Introduction
§ 4:2	Selecting environmental consultants
§ 4:3	—Evaluating the consultant as a witness
§ 4:4	—Writing samples and styles

- § 4:5 —Subcontractors
- § 4:6 —Conflict of interest
- § 4:7 —Public and employee relations
- § 4:8 —Type of consulting work
- § 4:9 —Referrals
- § 4:10 —Personnel
- § 4:11 —Costs
- § 4:12 — —Availability
- § 4:13 — —Scope of work
- § 4:14 — —Written contract
- § 4:15 — —Consider attorney-client/work-product privileges
- § 4:16 — —Lender's preferred/qualified consulting firms
- § 4:17 — —State transfer laws requiring audits
- § 4:18 Drafting the contract
- § 4:19 —Scope of work
- § 4:20 —The attorney-client/work-product privileges
- § 4:21 —Confidentiality
- § 4:22 —Limitations on liability/indemnifications
- § 4:23 —Third-party liability issues
- § 4:24 —Warranties
- § 4:25 —Insurance
- § 4:26 —Applicable law
- § 4:27 —Costs
- § 4:28 Standards consultants use for conducting site assessments
- § 4:29 Negligence standard
- § 4:30 Reading the environmental consultant's report
- Appendix 4-A. Checklist for Selecting and Contracting with Environmental Consultants
- Appendix 4-B. Selecting and Working with Environmental Consultants

CHAPTER 5. HIRING CONSULTANTS UNDER GOVERNMENT PRIME CONTRACTS

- § 5:1 Introduction and overview
- § 5:2 Things to consider
- § 5:3 Observations
- § 5:4 Prime contract
- § 5:5 Streamlining
- § 5:6 Conclusion
- Appendix 5-A. Selected Federal Acquisition Regulation Provisions

CHAPTER 6. RETENTION OF INTERNATIONAL CONSULTANTS

- § 6:1 Introduction

TABLE OF CONTENTS

§ 6:2	Consultant versus sales agent
§ 6:3	Registration requirements
§ 6:4	Authority
§ 6:5	Termination
§ 6:6	International business ethics considerations—The Foreign Corrupt Practices Act
§ 6:7	— —Bribery
§ 6:8	— —Red flags—Things to look for
§ 6:9	— —Background checks
§ 6:10	— —Scope
§ 6:11	—International business ethics conventions
§ 6:12	—Money laundering
§ 6:13	Alternative dispute resolution
§ 6:14	Travel-related matters
§ 6:15	The Arab Boycott of Israel
§ 6:16	Intellectual property
Appendix 6-A.	Foreign Corrupt Practices Act Opinion Procedure Releases Regarding Consultants or Agents

CHAPTER 7. *QUANTUM MERUIT*

§ 7:1	Introduction
§ 7:2	Authorization of work done
§ 7:3	<i>Quantum meruit</i> and implied contracts—When does an implied contract arise?
§ 7:4	—Reasonable expectation of payment
§ 7:5	—Plaintiff's conduct
§ 7:6	—Statute of frauds
§ 7:7	—Additional services
§ 7:8	—Partial performance
§ 7:9	—The statute of limitations
§ 7:10	<i>Quantum meruit</i> and express contracts
§ 7:11	Indirect <i>quantum meruit</i> liability
§ 7:12	Unjust enrichment
§ 7:13	Recommendations
§ 7:14	Illustrative clauses
§ 7:15	Conclusion

CHAPTER 8. CORPORATE COUNSEL'S GUIDE TO INDEPENDENT CONTRACTORS

§ 8:1	Introduction
§ 8:2	General rules for determining employee status— Common-law tests
§ 8:3	—State statutory tests
§ 8:4	— —Borrowed employees

- § 8:5 Determination under federal tax laws—Employment and withholding taxes
- § 8:6 — — Trust fund taxes
- § 8:7 — — Nontrust fund taxes
- § 8:8 — — IRS procedures—Form 1099
- § 8:9 — — Form SS-8
- § 8:10 — — IRS common-law rules
- § 8:11 — — Instructions
- § 8:12 — — Training
- § 8:13 — — Integration
- § 8:14 — — Services rendered personally
- § 8:15 — — Hiring, supervising, and paying assistants
- § 8:16 — — Continuing relationship
- § 8:17 — — Set hours of work
- § 8:18 — — Full-time employment
- § 8:19 — — Doing work on employer's premises
- § 8:20 — — Order or sequence set
- § 8:21 — — Oral or written reports
- § 8:22 — — Payment by hour, week, or month
- § 8:23 — — Payment of business and/or traveling expenses
- § 8:24 — — Furnishing of tools and materials
- § 8:25 — — Significant investment
- § 8:26 — — Realization of profit or loss
- § 8:27 — — Working for more than one firm at a time
- § 8:28 — — Making services available to the general public
- § 8:29 — — Right to discharge
- § 8:30 — — Right to terminate
- § 8:31 — — Safe harbor of § 530
- § 8:32 — — Actual treatment
- § 8:33 — — Reasonable basis
- § 8:34 — — — Judicial precedent, published rulings, and technical advice
- § 8:35 — — — Past IRS audits
- § 8:36 — — — Industry practice
- § 8:37 — — — Access to IRS communication with other taxpayers
- § 8:38 — — Filing of IRS forms
- § 8:39 — — Statutory employees
- § 8:40 — — Audits—Source of audit
- § 8:41 — — What to expect
- § 8:42 — — Time limitations
- § 8:43 — — Review
- § 8:44 — — Classification settlement program
- § 8:45 — — Penalties
- § 8:46 — — Amount of penalty
- § 8:47 — — Who is liable?
- § 8:48 — — Notices

TABLE OF CONTENTS

§ 8:49	— —Backup withholding
§ 8:50	— —Abatement and offsetting
§ 8:51	Determination in other contexts—Workers’ compensation insurance
§ 8:52	—Fair Labor Standards Act
§ 8:53	—National Labor Relations Act
§ 8:54	—Employee Retirement Income Security Act
§ 8:55	—Employment discrimination laws
§ 8:56	—Occupational Safety and Health Act
§ 8:57	—Unemployment compensation
§ 8:58	—Bankruptcy proceedings
§ 8:59	—Americans with Disabilities Act
§ 8:60	—Family and Medical Leave Act
§ 8:61	—Wage claims under state law
§ 8:62	—Federal Arbitration Act
§ 8:63	—Franchise laws
§ 8:64	State misclassification laws
§ 8:65	Liability for independent contractor’s negligence
§ 8:66	Duty owed to employees of independent contractors
§ 8:67	Safeguards—A good independent contractor contract
§ 8:68	—Making a hopeless case better
§ 8:69	—Employee leasing and incorporation of independent contractors
§ 8:70	Summary and conclusion
Appendix 8-A.	Checklist for Determining Independent Contractor Status
Appendix 8-B.	IRS Form SS-8
Appendix 8-C.	Sample Terms and Conditions for Establishing an Independent Contractor Relationship with a Consultant
Appendix 8-D.	Publication 15-A Employer’s Supplemental Tax Guide (Internal Revenue Service—2025)
Appendix 8-E.	Voluntary Classification Settlement Program (VCSP) IRS Announcement 2012-45
Appendix 8-F.	Independent Contractor (Self-Employed) or Employee (Internal Revenue Service—March 26, 2025)
Appendix 8-G.	Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (Department of Labor, Wage and Hour Division—March 2024)

CHAPTER 9. RECORD RETENTION REQUIREMENTS FOR COMPANIES USING INDEPENDENT CONTRACTORS

§ 9:1	Introduction
-------	--------------

- § 9:2 Government record-keeping requirements
- § 9:3 Retaining documents that are not subject to government record-keeping requirements
- § 9:4 Records retention when involved in a government contract
- § 9:5 Checklist of suggested documents to retain
- § 9:6 Conclusion

CHAPTER 10. COPYRIGHTS AND CONSULTANTS

- § 10:1 Introduction
- § 10:2 The “work-made-for-hire” doctrine
- § 10:3 —Who qualifies as an employee under the Copyright Law?
- § 10:4 —Copyright status of nonemployees
- § 10:5 —Web site development
- § 10:6 — —Works made for hire
- § 10:7 — —Jointly owned web sites
- § 10:8 — —Use of copyrighted material on the web site
- § 10:9 —Software
- § 10:10 Obtaining an assignment of the copyright
- § 10:11 Other copyright issues—Should you register the copyright?
- § 10:12 —Is the work copyrightable?
- § 10:13 —Copyright infringement
- § 10:14 — —Contributory
- § 10:15 —Copyright ownership issues of joint works
- § 10:16 —Economic considerations
- § 10:17 —Derivative works
- § 10:18 —Digital Millennium Copyright Act
- § 10:19 —Copyright licensing
- § 10:20 — —Scope of the license
- § 10:21 — —Licenses and new technology
- § 10:22 — —Termination of the license
- § 10:23 Trademarks
- § 10:24 Patents
- § 10:25 False advertising

CHAPTER 11. CONSULTANTS AND TRADE SECRETS

- § 11:1 Introduction and overview
- § 11:2 General legal principles
- § 11:3 —Trade secrets
- § 11:4 —Confidentiality and nondisclosure
- § 11:5 —Obligations to protect trade secrets
- § 11:6 —Technology factors should be addressed

TABLE OF CONTENTS

- § 11:7 —Physical steps to protect trade secrets
- § 11:8 —Documenting who owns work created by a consultant
- § 11:9 —Exit interviews
- § 11:10 The Economic Espionage Act
- § 11:11 —Defend Trade Secrets Act
- § 11:12 Causes of action
- § 11:13 —Recovery
- § 11:14 —Injunctive relief

CHAPTER 12. RESTRICTIONS AGAINST COMPETITION BY CONSULTANTS

- § 12:1 Introduction
- § 12:2 Relationship between noncompetition, trade secret, and copyright laws
- § 12:3 —Examples
- § 12:4 —Illustrative cases
- § 12:5 —Inevitable disclosure doctrine
- § 12:6 Specific aspects of restrictions
- § 12:7 —Parties bound
- § 12:8 —The geographic restriction
- § 12:9 —The time restriction
- § 12:10 —The activity restriction
- § 12:11 Expiration or termination
- § 12:12 Anti-poaching
- § 12:13 Breach of fiduciary duty
- § 12:14 The antitrust laws
- § 12:15 —Example
- § 12:16 —Summary and conclusions
- § 12:17 Damages
- § 12:18 Injunctive relief
- § 12:19 Tort claims
- § 12:20 Bankruptcy
- § 12:21 Counseling suggestions

CHAPTER 13. CONSULTANT MALPRACTICE

- § 13:1 Introduction
- § 13:2 Who is a professional?
- § 13:3 Proving the standard of care
- § 13:4 Theories of recovery—Tort versus contract
- § 13:5 — —Expert testimony
- § 13:6 —Breach of implied warranty
- § 13:7 —Negligence
- § 13:8 —Strict liability
- § 13:9 —Statutory

- § 13:10 —Third-party beneficiary
- § 13:11 Defenses
- § 13:12 —Estoppel
- § 13:13 —Lack of privity
- § 13:14 —Absence of duty
- § 13:15 —Lack of causation
- § 13:16 —Limitation of liability clauses
- § 13:17 —Indemnification clauses
- § 13:18 —Preemption
- § 13:19 —Statute of limitations
- § 13:20 —Lack of standing
- § 13:21 Form of pleading
- § 13:22 Insurance
- § 13:23 Conclusion

PART II. FORMS

CHAPTER 14. SAMPLE CONSULTING AGREEMENTS—GENERAL

- § 14:1 Consultancy agreement—SmartKem Inc.
- § 14:2 Consulting Agreement—Visionology, Inc.
- § 14:3 Consulting agreement—Helius Medical Technologies, Inc.
- § 14:4 Consulting Agreement—Axon Enterprise, Inc. (2024)
- § 14:5 MTI Technology Corporation—Independent contractor agreement; confidentiality and nondisclosure agreement
- § 14:6 General conditions for purchase of technical and consulting services
- § 14:7 General terms and conditions for consulting services
- § 14:8 Request for proposal from a public agency for consulting services relating to electronic publishing
- § 14:9 Request for proposal for consulting services for a municipality
- § 14:10 Inet Technologies, Inc—Agreement for consulting services with Epygi Technologies, Ltd
- § 14:11 Consulting Agreement—Goodness Growth Holdings, Inc. (2023)
- § 14:12 Termination agreement
- § 14:13 Termination agreement (Willbros Group Inc.)
- § 14:14 Consulting agreement (biotechnology company)
- § 14:15 Master services agreement
- § 14:16 Master agreement for professional services
- § 14:17 Consulting agreement (Stamps.com)
- § 14:18 Consulting agreement—Marketing services (Stamps.com)

TABLE OF CONTENTS

- § 14:19 Consulting services agreement (auditing of trucking contracts)
- § 14:20 Consulting agreement and related materials for the loaning of employees between merger partners during premerger period
- § 14:21 Consulting agreement—Financial services (software publishing)
- § 14:22 Consulting agreement between software publishing and an individual for investor relations and public relations consulting services within the European Union and the United Kingdom
- § 14:23 Financial consulting contract (Aristo International)
- § 14:24 Consulting agreement (geological drilling)
- § 14:25 Consulting and advisory agreement (university professor as consultant)
- § 14:26 Consulting agreement (agricultural consultant)

CHAPTER 15. SAMPLE CONSULTING AGREEMENTS—COMPUTER SOFTWARE/HARDWARE CONTEXT

- § 15:1 Sample consultant agreement (computer programming)
- § 15:2 Consulting agreement for corporate software consultants
- § 15:3 Educational services U.S. strategic alliance agreement (Sun Microsystems/Applied Relational Information Systems Corporation)
- § 15:4 Professional services form from ARIS Corporation

CHAPTER 16. SAMPLE CONSTRUCTION-RELATED CONSULTING AGREEMENT

- § 16:1 Consulting agreement for construction services
- § 16:2 Consultant agreement between The GEO Group, Inc. and Thomas Wierdsma

CHAPTER 17. SAMPLE ENVIRONMENTAL CONSULTING AGREEMENTS

- § 17:1 Agreement for professional services
- § 17:2 Agreement for Professional Services between Natural Resources Group, Inc. and Minergy

CHAPTER 18. ASSIGNMENT OF INTELLECTUAL PROPERTY RIGHTS/ NONCOMPETE/CONFIDENTIALITY AGREEMENTS

- § 18:1 Basanite, Inc.—Confidentiality, Noncompetition and Invention Assignment Agreement

- § 18:2 Proprietary Information and Invention Agreement
(Shift Technologies, Inc.)
- § 18:3 Creative rights agreement
- § 18:4 Sample terms and conditions for purchasing creative
services

CHAPTER 19. SAMPLE CONSULTING AGREEMENTS—GOVERNMENT CONTRACTING/SUBCONTRACTING CONTEXT

- § 19:1 Cost-reimbursement technical services agreement
- § 19:2 Sample technical services agreement (fixed-price)
- § 19:3 Sample technical services agreement
(cost-plus-fixed-fee)
- § 19:4 Time and materials/labor hours technical services
agreement

CHAPTER 20. SAMPLE CONSULTING AGREEMENTS WITH EXECUTIVES AND FORMER EXECUTIVES

- § 20:1 Commercial Metals Company—Consulting Agreement
- § 20:2 Consulting Agreement—Fossil Group Inc. (2024)
- § 20:3 Separation and Consulting Agreement and General
Release of Claims—Petco Health and Wellness
Company Inc. (2024)
- § 20:4 Confidential Separation, General Release and Post-
Separation Consulting Agreement—NextNav Inc.
(2023)
- § 20:5 Horizon Global Corporation—Separation and
Consulting Agreement
- § 20:6 Lyft, Inc.—Consulting Agreement
- § 20:7 Silver Bull Resources—Consulting Agreement
- § 20:8 Consulting Agreement and Form of General Release
Agreement—Sabra Health Care REIT Inc. (2025)

CHAPTER 21. FINANCIAL AND GENERAL BUSINESS CONSULTANTS

- § 21:1 Hemisphere Media Group, Inc.—Amended and
Restated Consulting Agreement between Hemisphere
Media Group Inc. and James M. McNamara
- § 21:2 Consulting Agreement between Innovate
Pharmaceuticals, Inc. and David Olert
- § 21:3 ANSYS, Inc.—Consulting Services Agreement
- § 21:4 Life Time Group Holdings, Inc.—Consulting
Agreement

TABLE OF CONTENTS

- § 21:5 Consulting Agreement—Gelteq Ltd. (2023)
- § 21:6 Crocs Inc.—Consulting Agreement between Crocs Inc. and Gregg Ribatt
- § 21:7 Gasco Energy Inc.—Financial advisory services agreement between Gasco Energy Inc. and Energy Capital Solutions LLC
- § 21:8 Opticare Health Systems, Inc.—Agreement for consulting services between Opticare Health Systems, Inc. and Morris Anderson & Associates, Ltd.
- § 21:9 Agreement for Financial Consulting services between American Soil Technologies, Inc. and BSW & Associates

CHAPTER 22. PUBLIC RELATIONS CONSULTANTS

- § 22:1 Nexeon MedSystems Inc.—Professional Relations and Consulting Agreement between Nexeon MedSystems Inc. and Acorn Management Partners, LLC
- § 22:2 MyWeb Inc.com—Settlement agreement between MyWeb Inc.com and Merger Communications
- § 22:3 —Letter of agreement between MyWeb Inc.com and Ogilvy Public Relations Worldwide
- § 22:4 The MACReport.Net Inc.—Consulting agreement between The MACReport.Net Inc. and Michael Adams Consulting, Inc.
- § 22:5 BSD Medical Corporation, Inc.—Consulting agreement between BSD Medical Corporation, Inc. and de Jong & Associates, Inc.
- § 22:6 Carolina National Corporation—Memorandum of understanding between Carolina National Corporation and Joe Pinner

CHAPTER 23. FINDERS AGREEMENTS

- § 23:1 Mossimo, Inc.—Cherokee-Mossimo finders agreement between Mossimo, Inc. and Cherokee, Inc.
- § 23:2 4net Software, Inc.—Mergers and acquisitions advisory agreement between 4net Software, Inc. and Catalyst Financial LLC
- § 23:3 Eye Cash Networks, Inc.—Fee agreement and noncircumvent between eConnect, Inc. and Red Iguana Trading Company, Inc.
- § 23:4 Montana Mills Bread Company, Inc.—Merger, acquisition, and other business arrangement agreement between Montana Mills Bread Company, Inc. and Kirlin Securities, Inc.
- § 23:5 MedSource Technologies, Inc.—Closing fee agreement between MedSource Technologies, Inc. and Kidd & Company, LLC

- § 23:6 Able Energy, Inc.—Advisory and investment banking agreement between Able Energy, Inc. and Kashner Davidson Securities Corporation

CHAPTER 24. SAMPLE CONSULTING AGREEMENT FOR WEB SITE SERVICES

- § 24:1 Web site consulting agreement

CHAPTER 25. SAMPLE CONSULTING AGREEMENT—RESTRUCTURING CONTEXT

- § 25:1 Paramco Financial Group, Inc.—Consulting agreement between Paramco Financial Group, Inc. and Resource Capital Management, Inc.
§ 25:2 Third Coast Bancshares Inc.—Consulting Agreement

CHAPTER 26. INTERNATIONAL CONSULTANTS

- § 26:1 Consulting agreement between software publishing and an individual for investor relations and public relations consulting services within the European Union and the United Kingdom
§ 26:2 Financial consulting contract (Aristo International)
§ 26:3 Thomas Group, Inc.—Consulting agreement with Toby Marion

Table of Laws and Rules

Table of Cases