

ROSNER & NAPIERALA, LLP

ATTORNEYS AT LAW
26 BROADWAY - 22ND FLOOR
NEW YORK, NEW YORK 10004-1808
212.785.2577 MAIN / 212.785.5203 FAX

WWW.RMNLDP.COM

RULES OF ENGAGEMENT

By Natalie A. Napierala

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Working as a freelance consultant offers many perks: as a consultant, one is, essentially, self-employed, with the opportunity to accept only those assignments that are interesting and challenging. Consulting also provides for novelty, as one moves from one employer and assignment to another, and flexibility, as the work location or amount of time spent working can vary from project to project. A consultant is, however, akin to a small-business owner, and will have the most successful and stress-free consulting experience if he or she sets the ground rules for the engagement at the outset. In particular, a consultant should negotiate an agreement with his or her prospective employer, addressing some or all of the following issues:

1. Compensation: The agreement should specify whether the consultant will be compensated on an hourly or project basis. If the consultant is to be compensated on a project basis, the agreement should clearly delineate the amount of work that is included in the project fee, and provide for the payment of additional sums if unanticipated work is required to complete the project. If the consultant is a commissioned salesperson, the agreement should describe how wages, salaries, commissions, draws against commissions, and all other monies earned and payable are to be calculated, particularly upon termination of the consulting relationship. The agreement should also specify what benefits (such as health, dental, life, disability or insurance and so forth), if any, the employer will be providing, and should specify which, if any, of the consultant's expenses will be reimbursed by the employer.
2. Supervision: The agreement should identify to whom the consultant will report, set forth a schedule as to when progress reports will be expected to be made, and specify the deadline, if any, for completing the project.
3. Exclusivity: The agreement should specify whether the consultant is precluded from working for others during the term of the engagement.
4. Competition: The agreement should clarify whether the consultant will be precluded from competing with the employer, either during the term of the engagement or once the engagement has terminated. If the consultant is precluded from competing, the agreement should specify the length of time in which the non-compete provision will be in effect and the geographical region in which the consultant will be precluded from competing.

5. Solicitation: The agreement should specify whether the consultant is precluded from soliciting the employer's clients or employees, and, if so, the length of time during which this prohibition will be in effect.
6. Confidentiality: The agreement should clarify the consultant's confidentiality obligations with respect to information (for example, a business's prices, profit margins and customers, operational structure, and growth strategy, among other things) to which the consultant has access during the term of the engagement.
7. Intellectual Property Rights: If the consultant will be creating intellectual property (for example, work qualifying for copyright, trademark or patent protection) during the course of the engagement, the agreement should specify who will own the intellectual property rights and whether the consultant will have a non-exclusive license to use the intellectual property he or she has created. The consultant may, for example, wish to use such intellectual property as a work sample in soliciting future work.
8. Publicity: The employer and consultant right's to use the employer's or consultant's name in connection with one another's advertising or promotional material should be set forth in the agreement.
9. Insurance and Indemnification: Since a consultant is generally not an employee, is not subject to the employer's direction and control, and is not an agent of the employer, a consultant is ordinarily not an insured under the employer's insurance policies (such as directors and officers, errors and omissions, surety and fidelity policies). Therefore, the consultant may wish to include an indemnification provision in the consulting agreement, requiring that employer indemnify the consultant for certain losses arising out of or relating to the consultant's provision of services to the employer. In addition, the consultant may wish to include in the agreement a defense provision, requiring that the employer defend the consultant in connection with claims arising out of or relating to the consultant's provision of services to the employer.

In addition to securing a consulting agreement that addresses the issues set forth above, a consultant should also obtain legal and accounting guidance as to the most appropriate business entity (for example, a limited liability company or corporation) through which the consulting business should be operated; this determination may have significant ramifications in terms of taxation and personal liability for the consultant.

Natalie A. Napierala is a partner of the New York City law firm Rosner & Napierala, LLP, www.rmnlp.com, where she advises small businesses and executives on corporate governance, litigation and general employment matters. She received her MBA from Columbia Business School in September 2008.