

ACADEMIC CONSULTING

Potential Problems, Solutions and Issues for the Consultant and the Client

Presented by

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**2015 Florida Research Administration Conference
Friday January 16, 2015, 12:45 p.m. – 1:45 p.m.**

BACKGROUND/CONTEXT

- Faculty/staff outside consulting
 - Rationale – CONSULTING faculty may provide important opportunities to advance science and research BUT–
 - Prerequisites
 - Understanding faculty member’s responsibilities
 - Understand university policies relating to conflict of interest, intellectual property, time allowed for consulting, etc.
 - Understand what consulting faculty member is signing!
 - University’s responsibilities
- Retirees/entrepreneurs

BASIC DEFINITIONS ESSENTIAL TO CONSULTING AGREEMENT

- The precise nature of work
- Contractual and commercial relationship between consultant and client
- Employee v. independent contractor

STARTING OR SELECTING A CONSULTING BUSINESS

- Begins with understanding the difference between the work of consulting and the consulting business
- The work of consulting is providing services to clients

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STARTING OR SELECTING A CONSULTING BUSINESS (2)

- The business of consulting is:
 - Attracting and keeping clients
 - How business will operate: its processes, procedures and administration
 - How business operates financially
- A smart client understands what a consultant does and does not do and acts accordingly

WHAT NEITHER THE CONSULTANT NOR THE CLIENT SHOULD BE LOOKING FOR

- Consulting business with a set of *employment* related habits
 - Job or work focused
 - Functioning as an “employee”
- Successful consultants switch focus from consulting work to consulting business
 - Business focus = Solution oriented, cost conscious for repeat business
 - Work focused = Higher costs and random chance of success

DISTINGUISHING BETWEEN A SUBCONTRACT AND A CONSULTING AGREEMENT

- What is a subcontract?
- What is a consulting agreement?
- Appropriate uses of each
- Implications of using each

WHAT IS A SUBCONTRACT?

- A financial assistance mechanism used when the intent is to have another institution carry out an integral portion of the project's scope of work
- A formalized agreement that spells out the fiscal arrangements, defines the scope of work to be carried out by the subcontractor, and flows down the terms and conditions of the prime award to the sub-recipient

WHEN TO USE A CONSULTANT

- When individual/firm rendering service does not participate in programmatic decision-making
- When consultant is affiliated with another academic institution, the services provided must be:
 - Outside of their institutional time and commitments
 - without use of their institutional resources (including students and staff)
 - Paid directly to the consultant, above and beyond their institutional salary with attendant tax liability

DISTINGUISHING FACTORS

- IRS factors (employee vs. independent contractor)
 - (http://www.finance.upenn.edu/comptroller/tax/contractor_guide.shtml)
- Will they be contributing to the project in a programmatic manner?
- Will they be considered as “Key Personnel” on the proposal? If so, how will effort be quantified?

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DISTINGUISHING FACTORS (2)

- Will a consultant agreement interfere with faculty member's institutional responsibilities? Consider conflict of commitment
- Where is collaborator going to do the work and will institutional resources be used?

TRANSITIONING

- Consulting business functions
 - Administration
 - Management
 - Marketing and sales
 - Personal development (R & D)
 - Production (billable consulting work with clients)

ISSUES TO REVIEW WHEN STARTING OR SELECTING CONSULTING BUSINESS

EXPERTISE NEEDED

- Skills and experience
- Professional licenses or certifications required or desired
- References

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ISSUES TO REVIEW WHEN STARTING OR SELECTING CONSULTING BUSINESS (2)

Intellectual Property

- Prior art and ownership of new consultant's body of work
- Who owns existing intellectual property **when** (that is, does the Consultant have obligations to turn over work product to other employer or prior client/ employer?)
- Identify all of the papers, materials, reports, business models, ideas, insights, and methodologies already created by Consultant , prior employers and clients and by present Client

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ISSUES TO REVIEW WHEN STARTING OR SELECTING CONSULTING BUSINESS (3)

Financial Planning

- Consultant's and client's current financial situation including, cash flow, risk management (insurance and assets) and future financial requirements
- Determine financial goals
 - Is client looking for inexpensive solution or "world-class" support?
 - Can Consultant forgo immediate fee for share of future revenue or return?
- Understand the cash flow implications including cost of retainer to client and cost of self employment to consultant

ORGANIZING A CONSULTING BUSINESS

- Step 1: Write a business plan
- Step 2: Select advisors
 - Attorney, accountant and insurance agent at a minimum
- Step 3: Choose a business location
- Step 4: Finance your business
- Step 5: Determine the legal structure of your business
- Step 6: Register business
- Step 7: Get a tax identification number
- Step 8: Register for state and local taxes
- Step 9: Obtain business licenses and permits
- Step 10: Understand employer responsibilities

WHAT IS CONSULTING?

- Advice
 - Technical
 - Business
 - Personal
- Research
 - Experimental
 - Surveys
 - Validating
- Design and development
 - "Think pieces"
 - Engineering
 - Building prototypes
 - Testing
- Teaching/training
 - Skills and abilities
 - Management
 - Social/organizational

PRIMARY CONSULTING ISSUES

- Confidentiality
- Ownership of results
- Liability to client
- Liability to third parties
- Conflict of interest
- Scope of work
- Fee
 - How measured
 - How much
 - When
- Directions
 - From whom?

ISSUES – THE CONSULTING PLUS DILEMMA

- Conflicts of interest and conflicts of commitment
 - Consulting + sponsored research
 - Consulting + equity ownership
 - Consulting + management position
 - Consulting + clinical trial (human subjects)
 - Use newspaper test

OBTAINING CONSULTING SERVICES

- Requests for proposals/proposal process
 - Developing requests for proposals for different kinds of consulting
 - Solicited and unsolicited proposals
 - Compliance – meeting the RFP mandatory requirements
 - Qualifications, licensing issues and partnering

PRICING

- Two elements to price
 - Actual cost
 - What the market will bear

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PRICING (2)

- Actual costs
 - Hourly rate
 - Lets say that it is \$40/hour
 - That's \$320.00/8-hour day
 - Or \$1,600/week
 - Or \$6,933/month assuming you work every work day of the year – a total of 173 hours/month
- REASONABLE COST TO CLIENT = ??

Now lets take a look at the reality of consulting

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PRICING (3)

- Take the \$1,600/week and the 40 hours/week
- Deduct 1.5 hours for travelling per day between clients etc.
 - = 7.5 hours/week
- Deduct 1 hour per day for admin and paperwork
 - = 5 hours/week
- Deduct 10 hours/week for marketing, networking, etc.
 - = a total of 22.5 hours/week
- Thus, 40 hours - 22.5 hours = 17.5 hours
- Let's assume that a consultant has the ability to work 80% of the available hours every week of the year ...

PRICING (4)

- This would the equate to 14 hours/week
- $14 \times \$40 = \$560/\text{week}$ or $\$2,426/\text{month}$
- From your current earnings of $\$6,900$ to $\$2,426$ per month
- Reality – $\$113.75/\text{hour}$ to equal an income of $\$6,900.00/\text{month}$

**GROSS INCOME TO CONSULTANT IS \$82,800
NET IS LESS THAN \$70 AFTER SELF-
EMPLOYMENT TAXES AND NO COSTS OF
BUSINESS HAVE BEEN RECOVERED**

- BUT – WILL THE MARKET PAY THIS PRICE FOR THE SERVICES?

THE CONSULTING CONTRACT

- What:
 - A common understanding of help that will be provided by the consultant
 - Defines expectation the client and consultant have of each other - deliverables, needs, role each will play
- Why:
 - Mutual agreement
 - Start the project off on the right track
 - Maximize efficiency of both parties
 - Avoid surprises

PHASE ONE: ENTRY AND CONTRACTING

- The initial contact with the client about the project/issue
- Keys to success are:
 - Exploring what the problem is
 - Is consultant the right person/organization to work on this issue? Who else should be involved?
 - What are the client's expectations?
 - What are consultant's expectations?
 - How to get started?

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PHASE ONE: ENTRY AND CONTRACTING (2)

- When things go astray, it's often because the initial contracting stage was faulty
- Core transaction of any consulting contract is the transfer of expertise from the consultant to the client

PHASE TWO: DATA COLLECTION AND DIAGNOSIS/DISCOVERY

- Who is going to be involved in defining the problem?
- What methods will be used?
- What kind of data should be collected and where is it? Who else is needed to provide information?
- How long will it take?
- What research, testing, and experimentation or prototyping/modeling is needed?

PHASE THREE: FEEDBACK AND DECISION TO ACT/PLANNING

- Reduce raw data to a manageable number of issues
- Involvement of the client in the process of analyzing the information
- Resistance to the data/issues/possible solutions/"side-effects"
- Ultimate goals for the project—best action steps/interventions

MINDSETS ARE OFTEN MISUNDERSTOOD AND IGNORED

•What we see and usually try to change

Behaviour

•What we cannot see, make assumptions about and often do not address

Thoughts and feelings

Values and beliefs

Needs – met and unmet

A desire to change ends up like most New Year's resolutions if root causes are not identified and addressed

PHASE FOUR: IMPLEMENTATION

- This involves carrying out the planning of the previous step
- Often falls entirely on the line organization – not the staff that consultant has dealt with
- Can take a variety of forms and different degrees of involvement
- Focuses on 2 aspects:
 - The technical work
 - Building ongoing support to maintain the business or technical change

PHASE FIVE: EVALUATION, EXTENSION, TERMINATION

- Evaluate the main event/implementation
- Hold a “lessons learned” meeting
- Extension of the project/process to a larger segment of the organization?
 - Often only after implementation occurs—clear picture of the real problem emerges
 - Iterations and new work?
- Further engagement?

PRODUCTS, CUSTOMER EXPECTATIONS AND OUTCOMES

- Consultant will provide the client one or more ***products***. Products are deliverables. They are nouns, and can be made plural with an "s." Examples of products consultants deliver:

Plans

Designs

Programs

Analyses

Audits

Reports

Procedures

Diagnoses

Systems

Proposals

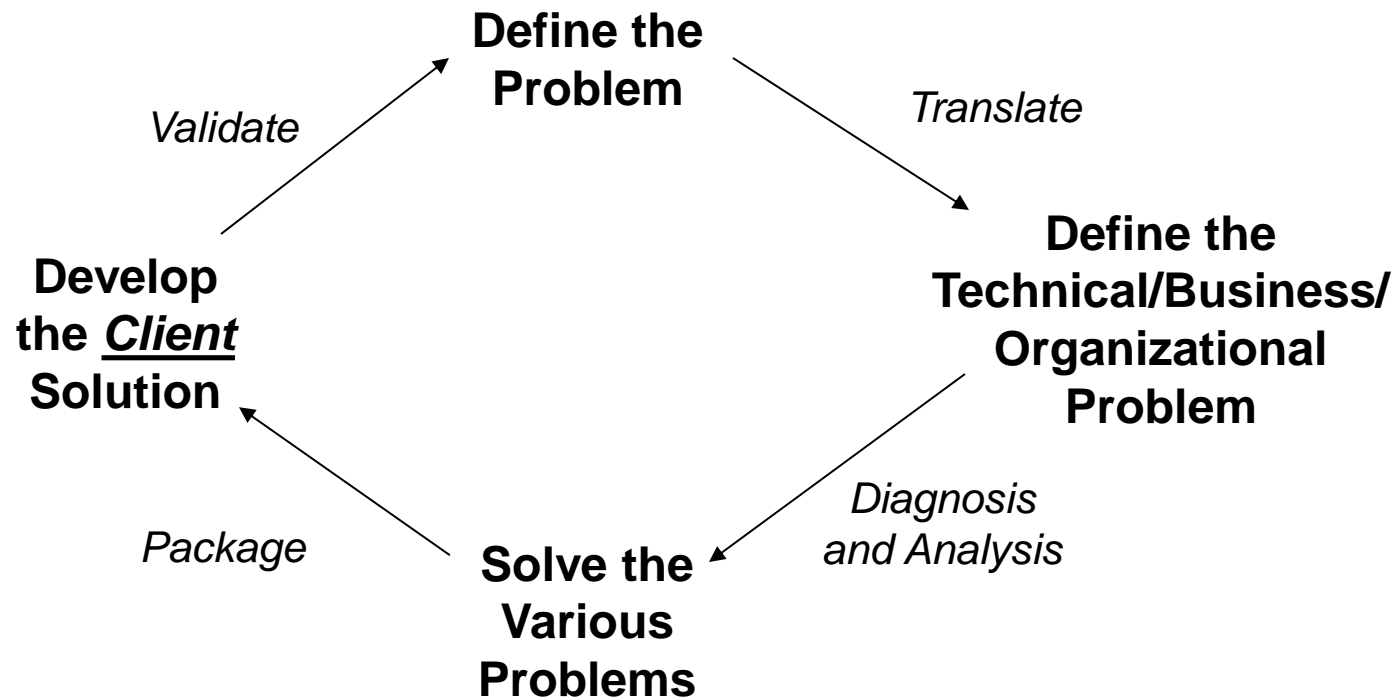
Models

Answers

Installations

Training courses

THE CONSULTING (PROBLEM SOLVING) PROCESS VERBS IN THE SOW



CONTRACTING CHECKSHEET

- Situation Understanding
 - What is the existing situation as the client sees it?
 - Who is the prime client?
 - Are there “factions?”
 - What is the motivation of the client and the personnel working for the client?
 - What are the desired outcomes of the project?
 - What deliverables does the client expect?

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CONTRACTING CHECKSHEET (2)

- Needs
 - Client's needs?
 - Consultant's needs?
- Roles
 - Client role?
 - Consultant role?
 - Who else is involved?
- Barriers, constraints, potential problems
- Drafting

THE BASIC COMPONENTS OF AN CONSULTING AGREEMENT

- Parties to the contract
- The term (duration) of the contract;
- Services to be provided
- Fees to be paid
 - Taxes, etc. as appropriate
- Location of assignment
- Communications between client and consultant
- Reimbursement of expenses
- Commissions, royalties, or other non-effort based compensation
- Training; either training of the consultant or by the consultant
- Warranties
- Site security requirements
- Insurance
- Ownership of intellectual property
- Confidentiality
- Restrictions on competition/circumvention
- Employment offers to staff
- Independence of consultant
- Publicity
- Termination
- Rights of substitution
- Force majeure
- Remedies and limitation of liability
- Assignment
- Notices
- Compliance/regulatory issues
- Law applicable and jurisdiction

PARTIES

- Identifies the parties to the agreement
- Clarifies how each party will be referred to in the main body of the contract
- **MAKE SURE THAT THE ORGANIZATION IS PARTY IF THE CONSULTANT IS A PART OF A CORPORATION, LLC, OR OTHER ENTITY AND NOT A SOLE PROPRIETOR**

THE TERM

- Fixed term
- Completion
- Until notice
- Options and extensions
- Early termination/cancellation/completion

STATEMENT OF WORK AND DELIVERABLES

- Distinguish what is to be done and what is to be provided
- Phases and interim efforts and deliverables
- Timing of efforts and deliveries
- Clear statement that the relationship is business-to-business rather than employer-to-employee and that **consultant** is responsible for methods and processes, except where client has technical direction rights

COMPENSATION

- Fees payable
- Frequency of payment
- Taxes and other charges against or in addition to fee
- Payment period
 - Days to payment from date of invoice
- Place and form of billing and payment

LOCATION

- Place of performance
- Permissions, security, limits on access, etc.
- Travel and related expenses such as accommodation – reimbursable, included, rates and methodology for payment

DOCUMENTATION OF WORK

- Timekeeping requirements (especially if allowable cost under U.S. contracts or grants)
- Meeting notes, lab records, patient records, etc.
 - Form, format, frequency, storage, ownership, destruction, and transmission between client and consultant
- Arrangements for reporting, controlling and reimbursing expenses related to the delivery of the assignment
- Overtime

NON-EFFORT BASED COMPENSATION

- Any commission, royalty or other compensation the consultant will receive as a result of the assignment should be very clearly specified within the contract
- Verify legality of/allowability of commission or other compensation
- Stark, Anti-Kickback, FCPA, Byrd Act restrictions and equivalent international restrictions

TRAINING

- Preliminary training on specific aspects of the client operations
- Training by consultant as part of assignment or follow-on
- Who is to pay for the training; included in fee?
- For preliminary training should the Consultant cover the expense?

WARRANTIES

- Should **Consultant** warrant
 - Necessary expertise, skill and experience
 - Unbiased and independent advice
 - Compliance with representations and descriptions
 - Capabilities, performance, completeness, accuracy, characteristics and specification

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WARRANTIES (2)

- Should **consultant or client** warrant
 - No infringement or violation any third party proprietary rights including but not limited to any copyright, patent, trademark, trade name, registered design, trade secret, proprietary information, contractual, property, employment or non-disclosure rights

INDEMNITY AND INSURANCE

- What loss, damage, costs and expenses
- As a result of what acts, omissions, negligence or defaults
- Which party, and should employees, subcontractors, assignees or agents be included
- To what extent does the loss have to be in direct connection with or performance of the services
- Insurance
 - Evidence of such insurance to **the other party, and language in endorsement.**
- Cap or limit to potential liability
- Amounts of coverage for each type of insurance

BUSINESS INSURANCE

- All risks insurance
- Business interruption insurance
- Employers liability insurance
- Key man insurance
- Legal expenses insurance
- Transportation and related insurance
- Product liability insurance
- Professional (E&O) insurance
- Property and contents insurance
- Infringement insurance
- Health, life and disability insurance

OWNERSHIP

- Rights in any data, materials, or systems
- Actions, documents or instruments reasonably necessary to enable **a party** to obtain, defend and enforce its rights
- Delivery, storage and ownership of copies of such data, materials or systems

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OWNERSHIP (2)

- Intellectual Property Rights in software, documentation, drawings, data, information, database or product
 - Background
 - Specified
 - Incidental
 - After-developed or acquired
 - Joint development
 - Territory and field of use

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OWNERSHIP (3)

- Actions, documents and steps necessary to effectively vest such Intellectual Property Rights
 - Expense
 - Assistance required

PUBLICATION

- Who may publish data
- Separately or only in a joint publication
- Authorship
 - Uniform Requirements for Manuscripts Submitted to Biomedical Journals (<http://www.icmje.org/>)
 - Credit for that party's contributions

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PUBLICATION (2)

- Review of any proposed publication or other presentation
 - Amount of time prior to the date of submission for publication or other presentation
 - Removal of confidential information
 - Potentially patentable subject matter – delay
 - Period of time
- Future use of publications

CONFIDENTIALITY

- What information
- Who may divulge such information to whom
- What consent is needed to divulge information
- What information is not covered
 - In the possession prior to Agreement
 - Already in the public domain
 - Judicial or government access
 - Patients, students, lawyers of party, etc.

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CONFIDENTIALITY (2)

- Compliance by employees, subcontractors, assignees or agents
 - Confidentiality agreement for same
- Survival of obligation

COMPETITION AND NON-CIRCUMVENTION

- Restriction on work on any assignment or project similar to the services
- Restriction on person, company or firm for whom work can be performed
- Period of restriction
- Scope of restriction
- Territory or extent of restriction
- Non-circumvention/offers of employment

CONFLICTS AND RESTRICTIONS ON ACADEMIC FREEDOM

- Potential for problems
 - Consulting for multiple companies
 - Academic involvement in start-up companies
 - Industry support of graduate students or postdocs
 - Industry funding of academic research
 - Sale or licensing of patents by universities to industries
 - Sale or licensing of patents by consultants to industries
- Academic use of materials for which they need a license from industry

TERMINATION

- Notice
- Inability to continue business (bankruptcy, etc.)
- Inability to continue (Force Majeure)
- Breach or default
- Loss of key personnel (death, disability, move by key person from employer, etc.)
- Accrued rights or liabilities on or after such termination
- Action on materials, data and other property if the contract terminates
- Payment on termination/withholding/damages

REMEDIES AND DISPUTES

- Remedies and limitations on remedies
- Choice of law
- Choice of forum
- Dispute resolution method
- Costs and expenses of dispute resolution
- Costs of collection
- Third party claims

TYPES OF CONTRACTS

- Retainers
- Fixed rate (labor hour)
- Fixed price
- Time and material
- Cost reimbursement
- Commissions and “success fees”
- Royalties and licensing