

Agreements With Outside Consultants: The Importance of Confidentiality Clauses

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Recent developments have highlighted the risk of hiring an outside consultant to work on a project without an enforceable confidentiality agreement in place. Increasingly, consultants are using the experience they have gained working for industry clients as a springboard to later sell that expertise in lawsuits brought against those clients and others in the industry. As the contracting party, you will be well served by having strong confidentiality agreements in place to prevent a consultant entrusted with sensitive information from turning around years later and using that same information against you in a future lawsuit.

The need for strong confidentiality agreements was highlighted in the environmental products liability litigation which last week culminated in a \$236 million verdict against ExxonMobil. One of the plaintiff's key witnesses was an expert who previously worked as a consultant for a defendant on projects directly relevant to the issues in the litigation who had been exposed to the defendant's confidential information. The defendant had not required the consultant to enter into a confidentiality agreement during the project. The defendant moved to prevent the plaintiff from using the expert against it in the lawsuit, but the court denied the defendant's request, in large part because of the lack of a confidentiality agreement with the consultant. Had the defendant really been interested in keeping the information confidential, the court reasoned, it would have made its expectations clear to the consultant in writing by including a confidentiality clause in the consulting agreement.

Drafting Concerns

In drafting a confidentiality agreement, there is often tension between the client's desire to keep sensitive information confidential and a consultant's possible obligation to report information to government regulators. Reporting obligations imposed by federal, state, and local statutes may restrict a client's ability to obtain full protection against disclosures by a consultant. In the environmental context, for example, if hazardous substance contamination is discovered in the course of transactional due diligence, anyone who arguably has "control" over the facility at which the release has occurred has an obligation to report it to the EPA if the magnitude of the contamination exceeds reportable quantities. In some states, like New Jersey, "any person" who discovers a release from an underground storage tank has an obligation to report it to state authorities. In those circumstances, even the best written confidentiality agreement will not protect information discovered by a consultant from disclosure. A reasonable confidentiality clause should accommodate the consultant's need to adhere to mandatory reporting requirements while preserving a company's desire to maximize confidentiality and maintain control over any communications with regulatory authorities that might become necessary.

The clause should also require that all communications with the government by the consultant need to be cleared by the client or its counsel. The proviso should include language to the effect that if the consultant believes that it must promptly communicate with a governmental agency before obtaining such consent, it will afford the client or counsel a reasonable opportunity to first undertake such communication and, in all events, oblige the consultant to promptly notify the client of any such communications.

Finally, it is generally advisable to also include a "conflict of interest" provision to prevent a consultant from using its work product against that client in any way, in any forum, without prior written consent of counsel, and to reserve for you or your counsel the final word as to whether a conflict or potential conflict exists.

Suggested Confidentiality Clause

A suggested confidentiality clause follows:

- (a) The work product of Consultant shall mean any and all tangible products, data, reports, information recorded by whatever means, documents, written materials, and any and all other work products, or any portion thereof, including drafts, prepared, generated or provided by Consultant in connection with Consultant's performance of the Services ("Work Product"). All Work Product shall be the sole property of the Client. Consultant hereby assigns to the Client all rights, title and interest in any and all Work

Product, including any and all copyright ownership rights in such Work Product.

(b) For purposes of this Agreement, all information that Client provides to Consultant, all information pertaining to the Services performed by Consultant, and all information regarding Client's business, including, without limitation, the identity of Client, shall be deemed and treated as strictly confidential, non-public information ("Non-Public Information") unless and until Client specifically authorizes Contractor in writing that any such information may be treated as public. Except as specifically required by law, Consultant may disclose Non-Public Information only with Client's prior written consent. Consultant shall have no authority to disclose Non-Public Information except in accordance with this section. Information already in the public domain shall not be considered Non-Public Information.

(c) Consultant shall neither deliver, reveal, nor report any Work Product or any Non-Public Information, obtained or created pursuant to this Agreement, to any federal, state or local government or agency, or to any other person or entity, public or private, without (i) express prior written permission of Client, or (ii) a court or administrative order requiring disclosure. In the event that Consultant forms the opinion that it is required by applicable law to disclose any Work Product or any Non-Public Information or is served with a court or administrative order requiring disclosure of any Work Product or any Non-Public Information, it will immediately notify Client in writing, and shall, in accordance with Client's direction, respond, appeal or challenge such subpoena, or court administrative order, prior to disclosure, and shall cooperate fully with Client in responding, appealing or challenging any such subpoena, or court or administrative order. Neither Consultant nor its related entities shall disclose any Work Product or any Non-Public Information to any person or entity, nor shall they use or allow the use of any Work Product or any Non-Public Information, to further any private interest other than as contemplated by this Agreement. Consultant shall take appropriate measures to ensure the confidentiality and protection of all Work Product and all Non-Public Information and to prevent its advertent or unintentional disclosure or its inappropriate use by Consultant or its subcontractors, or by its or their employees or related entities. This duty shall survive the expiration or termination of this Agreement.

If you have any questions or would like to discuss these developments or other related matters in more detail, please contact:

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