

CONSULTING AGREEMENT KIT

Consulting arrangements raise many of the same issues as other industry agreements (see [Red Flags in Industry Research Documents](#)). But you also need to ensure they do not violate conflict of interest rules. In addition, they may raise personal issues requiring the attention of your own attorney (such as tax and stock ownership issues).

This "Kit" is not legal advice or a substitute for legal advice from your attorney. But it is intended to alert you to pertinent issues so you can look carefully at consulting documents that companies offer you. **Generally, consulting agreements are very negotiable; companies are eager to enter into consulting agreements with you because of your expertise and reputation. Do not just accept whatever a company gives you.**

A chart starting on page 3 below compares the provisions typically seen in a first draft consulting agreement with those you should demand. As you will see, many terms need to be addressed. For example, **generally, no malpractice or other Children's or HMS insurance protects you if you are sued for services under or related to a consulting agreement.** Simple issues like travel reimbursement may need to be addressed. We have prepared a [model consulting agreement](#) for you and/or your attorney to adapt.

While the chart summarizes many issues, the issue of "Conflicts" deserves special attention. There are generally three ways your consulting agreement can cause serious conflicts with your academic, clinical and research appointments:

First, certain consulting agreement provisions are likely to place you in a position where you cannot meet academic obligations without breaching your consulting agreement. For example, if you agree to broad "noncompete" provisions, or if you consult in a broad "field" overlapping your academic work and assign all inventions and data to the company, this will constrain your academic research, and may place you in violation of federal regulations and NIH policy concerning how scientific discoveries should be made publicly available. If you use any Children's resources in doing such consulting and assign the invention to the company, you will be in violation of the Children's Policy on Inventions and Intellectual Property, and you will have placed yourself in the middle of a potential lawsuit between the company and Children's.

Second, if your agreement violates conflict-of-interest rules of Harvard Medical School, HHMI, NIH, or other sponsors and agencies, you may endanger your academic appointment and your funding, and expose yourself to direct government penalties. At the least, the agreement may need to be undone, at some embarrassment to you.

For example, the Harvard Medical School conflict rules generally limit receipt of research funding from companies depending on the form and amount of compensation. They also may require advance review of arrangements which shift research from the academic to the corporate environment, and certain Board and other positions.

The NIH requires you to report, and Children's to eliminate or manage, any conflict of interest. A "conflict" exists if you have any financial relationship or interest, above a certain threshold, in any entity which may be affected (positively or negatively) by your NIH-funded research. If you consult for a company in your area of NIH-funded research, and are compensated in securities or above the thresholds, it is quite likely you will have a conflict of interest to report to the Vice President of Research. You are encouraged to discuss whether a conflict exists with the Vice President of Research or Office of General Counsel before signing a consulting agreement

Other agencies (including the Food and Drug Administration, and other funding agencies) also have conflicts rules, as does the Children's Hospital Committee on Clinical Investigation. Help is available to you from the Vice president of Research and the Office of General Counsel in assessing conflicts.

Third, even if your agreement is legal on its face, it may conflict in practice with civil and criminal laws. For example, if you are a clinician who is paid above market or fair value for consulting services to a pharmaceutical company, the arrangement can subject you to criminal prosecution and civil penalties if the government believes there is a link between the payments and your referral and prescribing practices. Actions you take with unregistered stock may conflict with various federal and state laws limiting the liquidity of such stock. Similarly, trading stock, when you have "inside" knowledge because of the consulting arrangement, may subject you to criminal and civil penalties for insider trading. These violations may also violate Children's or Harvard policy. For these reasons, you should ensure that the compensation you receive is reasonable, not excessive or clearly above market, and you should consult with your own attorney carefully before you exercise any rights or options involving securities you receive as consulting compensation.

The chart below contrasts typical company consulting agreement provisions against those in Children's model draft. Remember that this is for guidance purposes only, and that your own attorney will need to examine the impact of any agreement on you based on its specific terms and your personal objectives. In addition, you are welcome to send questions to the Children's Office of General Counsel (for example, concerning conflicts of interest, and suggestions for modifying a consulting draft in accordance with this "kit"), recognizing that it can not address personal issues for you.

<u>PROVISION</u>	<u>TYPICAL COMPANY DRAFT</u>	<u>CHILDREN'S MODEL DRAFT</u>
SCOPE OF SERVICES	Broad - includes your academic work.	Precise; carves out your academic work, or preserves your rights in areas of overlap.
SCHEDULING	Whenever they want you.	Mutual agreement. You can participate by telephone.
REIMBURSEMENT of your expenses	Depends on undisclosed company 'travel policies' and documentation requirements.	They make travel arrangements for you, and reimburse all other reasonable expenses promptly. Company policies have to be disclosed in advance or won't apply.
COMPANY CONFIDENTIAL INFORMATION <u>Definition</u> <u>Publication and control of data</u> <u>Exceptions to what is considered confidential information</u> <u>Return of copies</u>	<p>1. Defined to include (a) anything that you receive from Company; and (b) anything you prepare for Company or using its information, even if the use is not part of the consulting, overlaps your academic work, and is an entirely new idea that you could publish without publishing the Company information. Includes all data.</p> <p>2. Company has exclusive control for all purposes. You may not publish or use the data for any purpose without the Company's permission.</p> <p>3. You have the burden of proving exceptions, or you are in breach.</p> <p>4. You must return all copies at end.</p>	<p>1. Limited to Company's own information, and information prepared by you that doesn't overlap your academic work.</p> <p>2. Not a breach for you to use data and Company confidential information for academic work. Your right to publish is preserved.</p> <p>3. Exceptions apply automatically.</p> <p>4. You can keep one copy for files.</p>

<p><u>Company's obligation to give you the information you need to reach sound conclusions</u></p>	<p>5. Even if you are on its SAB, Company has no obligation to give you full and fair information relevant to your judgment and conclusions.</p>	<p>5. Company must give you all information you think is relevant to forming your conclusions -- especially important if Company will publicize your conclusions.</p>
<p>DISCOVERIES</p> <p><u>Who owns and controls discoveries?</u></p> <p><u>Do you get further payment for use of your discovery?</u></p> <p><u>Can you do research on your discovery? Can you obtain research funding to do so?</u></p>	<p>1. Without further compensation, Company owns all of your innovations and discoveries, if they arise during the consulting, or result from it, or use any company information or "<i>relate</i>" to the same topic as the consulting.</p> <p>2. Since Company owns all discoveries, as broadly defined above, you cannot do further research on discoveries without Company's permission. No requirement that Company fund such research even if it permits it.</p>	<p>1. Company owns none of your discoveries if they overlap your academic work; instead discoveries are disclosed to both company and Children's IPO, and Company has an option to license them. Any license fees and royalties will be shared with you under Children's licensing policy (25%+).</p> <p>2. Your right to continue research is preserved. If you wish, Children's Intellectual Property Office will seek industry funding for your research in connection with licensing the discovery.</p>
<p>LIABILITIES</p> <p><u>Promises you make creating special personal liability.</u></p>	<p>1. You "represent and warrant" that the Agreement complies with all institutional policies, that it always will, that you will never use academic facilities or resources, that you'll never do anything inconsistent with the consulting agreement, and that you'll never use anyone else's confidential information in the consulting. If you breach these, you are personally responsible for all damages (for example, all the loss in</p>	<p>1. You make no representations and warranties except that you know of no inconsistent agreement, and will not knowingly and intentionally enter into an inconsistent one.</p>

<p><u>Do you have insurance coverage for any lawsuits that arise out of the consulting or its subject matter?</u></p>	<p>value to the Company if it does not own an invention because Children's owns it, and all lawsuits by any other companies for which you consult claiming that something you learned from one was wrongfully used by another). You are personally liable even if the lawsuit is unfounded and unfair.</p> <p>2. You have no insurance coverage for defense or payment of any lawsuit that arises out of or relates to the consulting (for example, a product liability lawsuit which includes you because of your role on the Company's scientific advisory board).</p>	<p>2. The Company provides you with insurance for a defense and for all costs.</p>
<p>USE OF YOUR NAME AND PHOTO</p>	<p>Company can use as it chooses.</p>	<p>Company needs your permission, and must describe your role accurately. Company cannot use you as a publicist with investors, without your consent.</p>
<p>ASSIGNMENT</p> <p><u>Transfer of your obligations to any other company</u></p>	<p>Company can transfer your obligations to any other company without your permission, so that you end up consulting to a different company than you intended, including one you are uncomfortable with.</p>	<p>Your obligations cannot be transferred to anyone else without your permission.</p>
<p>TERMINATION</p>	<p>Company can terminate without or without cause on little notice. Costs you've incurred already may not be reimbursed.</p>	<p>Either party can terminate with or without cause. All costs you incurred are covered.</p>