

# LEGAL ISSUES IN BECOMING AN INDEPENDENT SOFTWARE DEVELOPER—PART II

DALLAS CODE CAMP  
April 21, 2007

**DANIEL MARK OGDEN, ESQ.**

*Attorney and Counselor at Law*

**(972) 417-1916**

*[www.internationaltradeattorney.com](http://www.internationaltradeattorney.com)*

*[daniel.ogden@internationaltradeattorney.com](mailto:daniel.ogden@internationaltradeattorney.com)*

*© Daniel Mark Ogden, 2007. All Rights Reserved.*

# LEGAL ISSUES IN BECOMING AN INDEPENDENT SOFTWARE DEVELOPER

## **Four Steps**

 **Choose your form of business organization**

 **Protect your intellectual property**

 **Properly structure your software development contracts**

 **Hire an attorney to assist you in the above steps**

# LEGAL ISSUES IN BECOMING AN INDEPENDENT SOFTWARE DEVELOPER

## **Business Organization**

 **Sole proprietorship**

 **General Partnership**

 **Limited Partnership**

 **Limited Liability Company**

 **Corporation**

# LEGAL ISSUES IN BECOMING AN INDEPENDENT SOFTWARE DEVELOPER

## **Limited Liability Company-**

 **Registered legal entity consisting of members**

### **Advantages-**





1. **Management flexibility—can be member or manager managed**
2. **No personal liability for members**
3. **Creditors of members can only be assignees of member's interest**
4. **Can be taxed at federal level as either partnership or corporation**

### **Disadvantages-**

1. **Registration filing requirements**
2. **Inability to have passive investors or to have IPOs**
3. **Business franchise tax on entity and federal income tax if elected**

# LEGAL ISSUES IN BECOMING AN INDEPENDENT SOFTWARE DEVELOPER

## **Intellectual Property**

-  **Patents—protects product and process inventions**
-  **Trademarks—protects trade names and brands  
(Trademarks<sup>TM</sup> / Service marks<sup>SM</sup> / Registered ®)**
-  **Copyrights—protects written expressions (code)**
-  **Trade Secrets—protects proprietary information**

# LEGAL ISSUES IN BECOMING AN INDEPENDENT SOFTWARE DEVELOPER

## **Software Development Contracts**

-  **Contract Definition**
-  **Writing Requirement**
-  **Fixed–Rate Contracts**
-  **Work Product**
-  **Project Specifications**
-  **Litigation**
-  **Contract Negotiation**

# LEGAL ISSUES IN BECOMING AN INDEPENDENT SOFTWARE DEVELOPER

## **Contract Definition**

### **Legally Enforceable Agreement**

 **Agreement**—Parties have the same understanding as to the terms of the contract

 **Enforceable**—each Party benefits from the contract


 **Legal**—Subject matter of contract is legal


# LEGAL ISSUES IN BECOMING AN INDEPENDENT SOFTWARE DEVELOPER

## Writing Requirement

 Generally not legally required (with some exceptions)

 It is advisable, however, that contracts be in writing

 Having contracts in writing not only makes it easier to prevail in any litigation that might result, but also provides a reference for reviewing the terms of your agreement while a project is ongoing.

 If your agreement is the form of a letter, make sure either that the letter is signed by your client or that the letter is worded in such a way as to state that the employment of your services constitutes an express acceptance of the terms of the agreement as specified in the letter.

 Avoid “form” contracts—if you use them, make sure you tailor any form to the particular project at hand

 Even if you don't use an attorney to draft your contracts, always use one to review them for their appropriateness.








# LEGAL ISSUES IN BECOMING AN INDEPENDENT SOFTWARE DEVELOPER

## ✍ **“Fixed–Rate” Contracts**

- ✍ **Whenever possible, don’t structure your contracts so that you’re paid a fixed rate. These types of arrangements can result in you ending up as an “indentured servant”, so to speak, due to the fact that invariably clients want more than you agreed to provide up front.**
- ✍ **It is far preferable to bill on an hourly basis.**
- ✍ **If a client objects to billing on an hourly basis, use an hourly arrangement with a mutually agreed upon cap**
- ✍ **If a client insists on a fixed–rate contract, then make sure your agreement clearly and precisely specifies what services are being provided and that any additional services will only be performed for an additional charge**
- ✍ **Also, if you have a fixed–rate contract, make sure to include payment provisions for any change orders to project specifications**

# LEGAL ISSUES IN BECOMING AN INDEPENDENT SOFTWARE DEVELOPER

## **Work Product**

-  **Always make sure you specify who owns the work product, including copyright and trade secret ownership**
-  **The work product includes not only the final code and applications delivered to the client but also components such as ActiveX Controls, DLLs, etc., and all intermediate code used on the project**
-  **Such matters as the project design and layout are also included as work product since they are considered to be trade secrets**
-  **You must decide up front before you negotiate your agreement what aspects of the work product you desire either to retain ownership of or obtain a license for**
-  **If the project is originally for in-house development, but later is licensed to third parties, make sure you have such a contingency covered in your agreement.**


# LEGAL ISSUES IN BECOMING AN INDEPENDENT SOFTWARE DEVELOPER


## **Project Specifications**

 **Be as specific as possible**

 **Decide up front whether the specifications are to be determined by you or your client**

 **Always include the source of the specifications in your agreement**

 **If the specifications are by your client, make sure your agreement states that any amendments to the specifications must originate with the client**


 **If the you are the source of the specifications, make sure your agreement is structured in such a way as to give you the latitude to make specification changes without undue interference from your client**

 **Make sure all procedures for change orders are clearly specified**


# LEGAL ISSUES IN BECOMING AN INDEPENDENT SOFTWARE DEVELOPER


## **Litigation**

 **Always avoid if possible**

 **Structure your agreement to provide ongoing payments tied to specific, measurable milestones rather than one lump sum payment when the project is finished**




 **If an impasse results, consider alternative forms of dispute resolution such as arbitration or mediation.**

 **Use an arbitration clause in your agreement if you want to force the use of a dispute resolution forum other than litigation**

 **Careful drafting of your agreements and making sure that each party understands the other's expectations are the two most important factors in avoiding litigation.**

# LEGAL ISSUES IN BECOMING AN INDEPENDENT SOFTWARE DEVELOPER

## **Contract Negotiation**

-  **Leverage—know your what leverage, if any, you have in your contract negotiation**
-  **Goals—determine exactly what your goals and expectations are prior to entering the negotiation**
-  **Research—thoroughly research the other party to the contract to determine what their needs truly are and negotiate based upon your knowledge of those needs**

# LEGAL ISSUES IN BECOMING AN INDEPENDENT SOFTWARE DEVELOPER

**Powerpoints can be downloaded from**

***[www.internationaltradeattorney.com/articles.htm](http://www.internationaltradeattorney.com/articles.htm)***