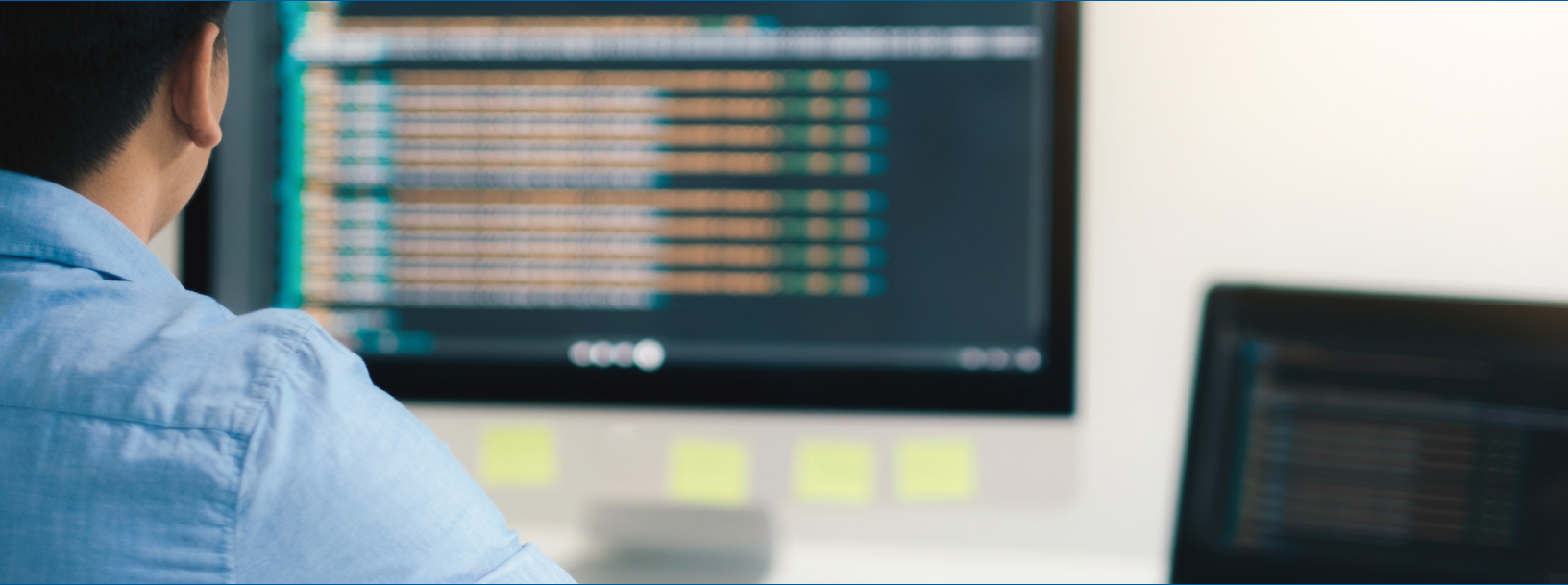


HOW TO

Improve Your Company's Form Software License Agreement

PART 5: MAINTENANCE AND SUPPORT



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ATTORNEYS

PART 5: MAINTENANCE AND SUPPORT

KEY TAKEAWAYS

A form software license agreement should clearly set forth:

- 1 the maintenance and support services that will be provided under the form software license agreement, if any;
- 2 whether maintenance and support services have their own separate term and fees or whether maintenance and support services are provided for the entire duration of the software license agreement and included in the license fees; and
- 3 the distinction between maintenance releases of the software that are included with maintenance fees and new software that may require new license fees under a new agreement.

In the software licensing context, “maintenance” typically refers to the licensor’s obligations to provide software updates, upgrades, releases, bug fixes and patches; and “support” typically refers to the licensor’s obligations to provide technical support (ex. telephone help desk). If the licensor intends to offer maintenance and support services under a separate agreement than the form software license agreement, the form software license agreement should expressly say so. If maintenance and support is provided under the form software license agreement, the following key concepts should be addressed:

- (1) scope of maintenance and support services;
- (2) term (duration) of maintenance and support services; and
- (3) fees for maintenance and support services.

The scope of maintenance and support obligations should be clear, and the agreement should address the distinction between maintenance releases of the software that are included with maintenance fees and new software that may require new license fees under a new agreement. To help define the scope of maintenance and support services, licensors may include a service level agreement (“SLA”) in their form software license agreement. The SLA is often an exhibit that sets forth the specific standards that the licensor promises it will achieve while providing maintenance and support services. A licensor-friendly SLA contains “easy to achieve” obligations, such as setting forth:

- (1) *estimated response* times (as opposed to *guaranteed fix* times) after the customer contacts the licensor with an issue with the software;

(2) specific, limited windows of time during which support is available (ex. Monday – Friday 9 a.m. ET to 4 p.m. ET);

(3) the licensor’s obligation to use “commercially reasonable efforts” to correct software errors (rather than guarantying successful outcomes); and

(4) “sole and exclusive remedy” language.

The sole and exclusive remedy language, in essence, says that the customer is only entitled to a small fee credit on future amounts owed under the software license agreement if the software or licensor fails to satisfy the requirements of the SLA. The customer is not entitled to sue the licensor, claim any additional damages associated with a breach of the agreement, or otherwise terminate the agreement. A licensor-friendly SLA will not contain promises that software errors will be corrected within a certain period of time or promises that updates or new versions of the software will be released on a certain schedule.

A software license agreement should also address the term of the maintenance and support services. It is common for maintenance and support services to have a separate term from the term of the software license agreement itself. For example, the software license agreement may be a 3-year agreement while the maintenance and support services under such software license agreement are year-to-year with options for the customer to not renew maintenance and support services.

The software license agreement should also be clear with respect to maintenance and support fees. A

common issue in software license agreements is determining whether or not certain maintenance and support activities are included within a warranty (and related remedial provisions) at no additional charge to the customer or part of maintenance and support services that may be subject to additional fees.

In addition, a licensor should consider the maintenance and support fees when a customer “signs up again” for maintenance and support services after it previously terminated maintenance and support services. A licensor wants to avoid a situation where a customer turns maintenance and support “on and off” at the customer’s discretion so that it only pays for maintenance and support when the customer needs such services. To address this situation, a licensor may require such customer to pay the licensor all maintenance and support fees as if such customer was enrolled in maintenance and support services for the entire term.

Moreover, if a customer elects not to subscribe to maintenance and support, certain representations, warranties and performance guarantees under the software license agreement arguably should not apply to that customer and its use of the licensed software. Maintenance is often used to release patches and other updates that correct errors or address other defects in software. A software license agreement should make it clear that promises made as to performance, non-infringement, errors, etc., may be dependent on the customer accepting and implementing certain maintenance and support services.

This article is one part of a ten-part article published by Koley Jessen to help software licensors improve their form software license agreements.

Please contact Koley Jessen’s Commercial and Technology Contracts Practice Group for further assistance.