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Week of **November 4, 2008**

Making a Retainer Relationship Work

From the [small business client's perspective](#) [[click to hear podcast](#)], is it better to keep legal counsel on retainer, or to engage a lawyer only when the need arises? As with so many other things involving the law, the answer is, "It depends." A business client who has a variety of ongoing legal needs—ensuring compliance with employment law, reviewing terms of contracts, structuring a real estate deal—needs full confidence before putting a lawyer on retainer that the lawyer can indeed handle every issue that comes up. The lawyer does himself or herself no favors by offhandedly saying, "of course I can," and then being unable to come through on a time-sensitive issue.

The ideal arrangement in such instances might be for the lawyer to offer assurance of being able to call on other lawyers for help if a need outside his/her normal field of expertise arises. This requires a substantial level of trust between lawyer and client. The lawyer under such an arrangement in effect functions as general counsel to the small business, drawing on other "outside counsel" as needed.

Such contract arrangements can contribute to work and cost efficiencies if used correctly, particularly if the lawyers involved bill at different rates. Model Rule 1.5 holds that fee splitting is acceptable if both lawyers involved contribute something of value, if the client agrees in writing, and if the total fee is reasonable. Whatever the fee arrangement is, to protect the lawyers and the client, it must be in writing.

Being on retainer has its own ethical concerns. Accepting a retainer from a client means that work is promised in exchange for that fee. Failure to perform the work requires a refund. However, if the fee is accepted in exchange for "coming off the market" (as is often the case in family law matters), the lawyer has done the required work by that act



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alone. In other words, there is a value that can be assigned to being prevented by the rules of conflict of interest from representing other parties.

From both the client's and the firm's perspective, maintaining an ongoing relationship is critical. For example, successfully representing a small business involves recognizing its unique dynamics, learning the owner's personal and business plans, helping to refine them and making sure they're carried out. The successful lawyer treats small business clients as friends and partners, and builds relationships upon trust and loyalty, by reaching out proactively, seeking out their opinions, visiting them at their business. The client thus develops trust and confidence that the lawyer will be there when needed - which, after all, is the foundation of a retainer relationship.

And, again, however the relationship is structured, you are well-advised to outline its parameters in writing with the expectations of responsibilities and expectations of each party set forth clearly.

Personal Commentary

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-David R. Hagen, San Fernando Valley Bar Association

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Best wishes,

Ed Poll

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