SECURING THE RETAINER FEE

THE LONG VIEW OF PRICING, PAYMENTS AND PROFIT

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In 1839, John Bouvier's 'Law Dictionary' defined 'retain' as 'to engage the services of an attorney or counselor to manage a cause, when it is usual to give him a fee, called a retaining fee'. In 1850, Bouvier's follow-up work, 'Institutes of American Law' further elucidated that the purpose of paying the retainer was to insure the services of the attorney. Within a short amount of time, the practice of obtaining a retainer fee before undertaking legal services on behalf of a client became mainstream and has remained so but with some measure of refinement. We will examine where the practice stands today and how the mechanics differ depending upon the circumstances of the legal representation being requested and delivered.

Forming the Attorney-Client Relationship

Although the attorney-client relationship could be formed via a verbal agreement—or even based on certain conduct— both from an ethical perspective as well as a practical one, it is highly recommended that the relationship be memorialized in a written agreement. Such writing can help avoid the misunderstandings that can easily arise in cases of a verbal agreement and help crystalize the roles as to what is expected of the client and what the obligations are that the attorney is undertaking.

In Illinois, for example (as well as in various other states), while no written agreement is required in cases of 'limited scope transactional work', it is nevertheless recommended. Limited scope representation has been ethically permissible in Illinois since at least 2010, and pursuant to Illinois Rule of Professional Conduct 1.2(c), the only express requirements are that such limited scope representation be "reasonable under the circumstances" and—importantly— that the client give informed consent.

The Glue that Bonds the Agreement

So, if there is a written agreement between the parties, why the need for a retainer fee to be paid upfront? The reasons for this are many, not the least of which is that it puts 'skin (or cash) in the game' from the beginning so that the client has a financial commitment that is much more binding than a mere verbal or even written commitment. More than one young attorney has started to work for a client based on a non-funded retainer agreement, only to find out a short time later that the client has, without warning, switched to another attorney. Excuses such as 'I found someone cheaper' or 'I decided to use my cousin' are much more likely to be avoided altogether if the client has already committed financially to the attorney.

Can't the Attorney Just Sue?

The retainer agreement is, after all, presumably a binding contract, and in the event of a breach of the unfunded agreement by the client, one might think that the attorney could simply turn around and sue his or her client if the client reneges on the deal. But for attorneys, it's not so simple. Unlike the repossession of a car or an appliance, once the attorney has negotiated a settlement for the client, closed on the real estate transaction, or concluded the

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—Kansas Supreme Court ruling that the right to recover a retainer fee arises by implication whenever an attorney takes on representation of a client. (Blackman v. Webb, 38 Kan. 668 (1888))

family law or litigation matter, there is no 'rescind' button to push to undo the legal work. Therefore, the attorney is left with the prospect of having to sue the client for breach; however, three problems arise with that scenario:

First, it wastes the attorney's time to have to take away from a busy practice to chase after fees that are rightfully due; second, no attorney wants to get a reputation for suing his or her own clients; and third, the most common response by a client when sued for fees is to file a baseless counter-claim for malpractice which, besides having to be defended against, can adversely affect the attorney's standing with their malpractice insurance carrier.

By obtaining a retainer fee upfront, the attorney avoids all of those pitfalls and, at the same time, is provided with badly needed cash flow with which to represent the client's best interests professionally.

Types of Retainers

Although perhaps not strictly a 'retainer' in the conventional sense, an attorney can charge what is known as a 'flat fee' for a specific legal service that is basically a pre-determined fixed amount that will constitute the full payment for the performance of described services. The fee remains the same regardless of the number of hours, which might ultimately have to be expended for completion of the legal services. Special rules as to informed consent apply to flat fee arrangements, and in order to protect the attorney, the retainer agreement should be quite specific lest the client turns around and brings a whole host of demands to the attorney thinking that he or she is now 'on retainer.'

An advance retainer is typically employed where the attorney is engaged to represent a client in protracted (non-contingent fee) litigation or a complex representation for mergers and acquisitions, intellectual property, or other similar hourly billed legal work. Of course, any unearned funds must be returned to the client if what has been expended is less than the amount tendered as a retainer or upon the termination of the relationship. An attorney cannot charge a non-refundable retainer for legal services yet to be rendered.

An arrangement known as a "true retainer" is one in which money is paid by a client to ensure that an attorney will be available over a stated period of time. To a certain extent, it is an agreement whereby the attorney is 'on call' for the client due to the fact that the fee is not payment for legal work to be performed per se; rather, it is a fee paid for the attorney's availability to handle a problem for the client whenever the need arises.

ABA Rule 1.5

The ABA's Rule 1.5 addresses the issue of attorney's fees and, therefore, must be adhered to in matters of retainer fees as well. Of seminal importance is the provision that a lawyer must not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) The fee customarily charged in the locality for similar legal services;
(4) The amount involved and the results obtained;
(5) The time limitations imposed by the client or by the circumstances;
(6) The nature and length of the professional relationship with the client;
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) Whether the fee is fixed or contingent.

It is the second foregoing provision—that the attorney will likely be giving up the opportunity to utilize that amount of time in the billable service of others—that is perhaps least understood by clients. An attorney no more has unlimited time available than does any other professional, and as noted by none other than Abraham Lincoln, 'Time is an attorney's stock in trade'.

Executive Summary

1. The Issue

What is the purpose of an attorney receiving a retainer fee?

2. The Gravamen

The retainer fee binds the retainer agreement and commits the client to go forward with having the attorney render the agreed-upon legal services.

3. The Path Forward

Retainer fees are highly recommended in all cases regardless of the type of legal services to which the retainer fee applies.

Action Items:

1 Written Retainer Agreements:

Although the attorney-client relationship is capable of being established via an oral agreement, such an arrangement is never recommended and is indeed frowned upon by most bar associations.

2 Retainer Fees:

Regardless of whether the fee arrangement is one of a flat fee, advance fee for litigation, or a 'true retainer' for ongoing availability, there should always be 'money on the table' before the attorney renders any services at all.

3 Informed Consent:

Of major importance is that the retainer agreement recite the client's informed consent as to the attorney proceeding with the specified legal representation under specified financial terms.

4 Trust Fund Deposit and Withdrawals:

In most cases (aside from a flat fee arrangement), the attorney must deposit the retainer fee into a trust account, and track withdrawals from the trust account as well as disburse any unused retainer fees back to the client.

Further Readings

1. https://www.thebalancemoney.com/hiring-an-attorney-on-retainer-398441
2. https://www.legalmatch.com/law-library/article/what-is-a-retainer-fee.html
3. https://shernoff.com/articles/the-advocate-dos-and-donts-for-retainer-agreements-you-cant-do-it-on-a-handshake/
4. https://www.advocatemagazine.com/article/2019-february/ethical-considerations-in-retainer-agreements
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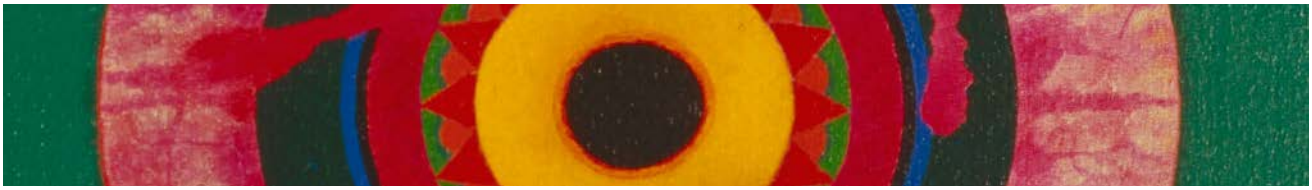

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After receiving his Juris Doctor degree from The John Marshall Law School in Chicago, Mr. Brochin served as an Administrative Law Judge with the Illinois Department of Labor for six years where he presided over cases dealing with job separation issues and matters pertaining to contested Unemployment Insurance claims. He also co-wrote the agency's administrative rules, and periodically served as a 'ghost writer' for Board of Review decisions. Following that position, he was Director of Development for a Chicago-area non-profit college where he was responsible for High Net Worth donations to the institution. For the next eighteen years he practiced as a solo practitioner attorney with an emphasis in the fields of Real Estate law and Commercial Contracts transactions, and was an agent for several national title insurance agencies.

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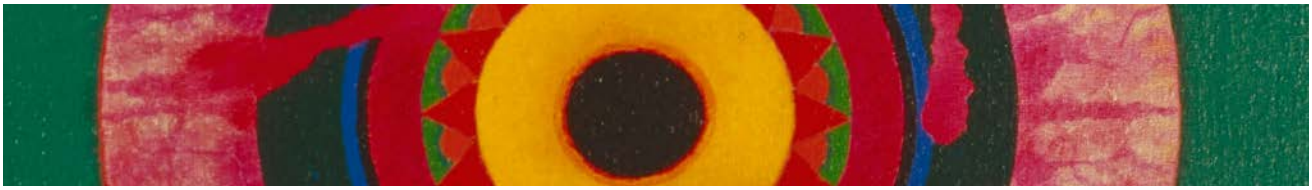

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