RETAINING AN ATTORNEY

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Knowing when and how to retain an attorney may be one of the most important decisionsthat a consumer facing a potential or actual legal problem can ever make. It is the consumer who makes an *informed decision* about their choice of legal counsel who is most likely to obtain a satisfactory result from their retaining of an attorney.

This requires an understanding of **four basis concepts** that apply to the consideration of retaining an attorney: (1) *When* should an attorney be consulted? (2) *Which* attorney should be selected? (3) *How* should the attorney be retained? (4) *What* should the client do if problems develop in the attorney-client relationship after the attorney is retained?

When To Retain An Attorney:

The most obvious time to consult with an attorney is when a consumer is put on notice that they are involved in a legal claim or problem. The notice may consist of a letter from another party's attorney, demanding that they take some action in regard to a dispute, or it may consist of service of a subpoena or summons and complaint pertaining to an existing lawsuit.

Many consumers, believing that they can save money, will ignore the above in the belief that the matter will "go away", or because they believe that they are not legally responsible and/or that the service of process on them of a summons and complaint or a subpoena was not properly done or doesn't apply to them, so that they can safely ignore it.

If a consumer receives a letter from an attorney for another party that they are involved in a dispute with, then the most prudent course of action is to consult with an attorney of their own choice so that they can better understand if the letter is the first step in future litigation, or is simply an attempt by the other party's attorney to resolve a dispute without litigation.

Ignoring a letter from an opposing attorney may or may not lead to a lawsuit, even if the letter threatens litigation, depending upon the legal resolve and commitment of the other party to the dispute. The bottom-line is that the more prudent course of action is retain one's own attorney to respond to the other attorney, to set forth your position from a legal perspective, and then hopefully see if the other party will either drop the matter, or reach some sort of compromise.

Of more concern is when a consumer has been served with legal process, such as a summons and complaint where they have been named as a defendant in a lawsuit. Many times the consumer will simply find the summons and complaint stuck in their mail box, or dropped on their front porch, such that they may believe that they haven't been correctly served and can therefore ignore the matter, or they alternatively may try to play "hide and seek" with the process server until they are personally served.

Legal service of process requires the process server to either personally serve the defendant, or (after making an attempt at personal service), serving an adult at the defendant's residence or place of business and then mailing the summons and complaint to that address thereafter (this is called substituted service). However, it is not uncommon for an unscrupulous process server to just drop the paperwork off on a front porch, and then file a declaration of service with the court attesting that the defendant was personally served.

A defendant has thirty days from the date of personal service and forty-five days from the date of substituted service to respond to the lawsuit by filing legal pleadings with the court, unless they obtain an extension from the plaintiff's attorney. Failure of a defendant to file a timely legal response to the lawsuit will result in the entry of a default against them, which will cut off their right to contest the action.

Consumers who don't believe that they were correctly served and ignore the paperwork may next find themselves to be owing a default judgment to the plaintiff, and being subjected to legal execution by having a lien put on their property, their wages garnished, or their bank account levied.

Any notice of a summons and complaint should be a matter upon which to immediately consult with an attorney for appropriate advice. Many times the consumer may have insurance (auto, homeowner's, business, renter's or professional liability) that will cover the claim and/or pay for a legal defense.

Outside of notice of an actual or potential legal action, a consumer should always consult with an attorney if they are dealing with another party in any transaction where the *potential* for a legal problem exists. This may include, but is by no means limited to, the following: (1) entering into a sale or purchase of real estate without using the services of a broker and a traditional escrow company; (2) forming a business enterprise with another person, be it as a corporation, partnership, or joint venture; and (3) loaning money to another in excess of $7500.00 (this is the cut-off number for submitting disputes to the jurisdiction of Small Claims Court).

It has been the bewildering experience of this law firm that many individuals will commit themselves to transactions in which thousands of dollars are at stake, and then either forego preparing appropriate contracts and legal paperwork, or prepare it themselves without an attorney, in the misguided notion that they can trust the other party or that they will save several hundred dollars in legal fees by doing the paperwork themselves. Preparation of contracts and legal paperwork by non-lawyers is almost always wanting in legal sufficiency, should a dispute arise. Spending a couple of hundred dollars in legal fees to prepare appropriate documents relating to a legal transaction is always cheaper than paying thousands of dollars to a litigator if the deal goes bad.

Which Attorney Should Be Retained:

Similar to physicians, most attorneys in the legal marketplace tend to specialize. There are transactional attorneys, who may chiefly prepare contracts and incorporate businesses, and there are litigators. Within the litigator speciality there are usually further sub-specialities, with some litigators handling primarily personal injury suits, either for plaintiffs or defendants, and other practitioners handling business, real estate, insurance, or employment related litigation.

The careful consumer should attempt to pre-screen a prospective attorney, to see if they are the right legal counsel for their particular problem. This can be done a number of ways, including the solicitation of referrals from family and friends who may know a particular attorney, doing research on the internet, visiting a prospective attorney's website, and viewing a prospective attorney's on-line record with the State Bar (www.calbar.ca.gov/state/calbar/calbar_homejsp) and clicking on "Attorney Search", which will provide the address of any given attorney, his years in practice, and his record of discipline, if any.

Upon meeting with a prospective attorney in an initial interview, the consumer should not hesitate to inquire of the attorney about their experience in the legal area of the client's concern, including the number of such cases they have handled, the number of such cases they have tried, what they would propose to do in the matter to resolve it, and how the matter might turn out.

If they are more comfortable doing so, there is nothing wrong with bringing a spouse or trusted friend to the initial attorney interview. The consumer should not be pressured into making a decision about hiring the attorney at the time of the initial interview. The consumer may be well-advised to consult with more than one prospective attorney before making a final decision to retain legal counsel.

The consumer should feel comfortable with whatever attorney they decide to finally retain. Thismeans that they should be able to talk to the attorney in such a way that they understand the legal issues in their case from a layman's perspective, without the attorney resorting to "legalese" and being unable to explain their case to the client in everyday language.

How To Retain An Attorney:

Of chief initial concern to the consumer will be the matter of legal fees. Attorneys invariably handle legal matters in one or a possible combination of three different means: (1) the hourly fee; (2) the fixed fee; and/or (3) the contingency fee.

Hourly fees are completely negotiable between attorney and client. The more experience that an attorney has, the presence of a large number of attorneys in the law firm, and an upscale geographic location will usually result in a higher hourly fee quote. The client shouldn't hesitate to see if the attorney will take the matter at a lower hourly rate, or inquire if some kind of fee cap or partial contingency fee may be negotiated. The worst the attorney will say will be "no". Most business and real estate related litigation is done on an hourly rate, plus out of pocket costs for such items as postage, photo-copying, court filing fees, service of process, courier charges, expert witness fees (if necessary), jury fees, and other costs.

Most attorneys on an hourly fee matter will require an initial up-front retainer, which will be deposited into their trust account, and then withdrawn as fees are billed and costs are charged. The amount of the retainer fee is also completely negotiable, and should be in relation to the amount in dispute in the case, the type of case, and the type of relationship between the attorney and client.The contingency fee, in which the attorney only obtains a fee based upon an agreed upon percentage of any recovery, is most often utilized in personal injury, medical malpractice, legal malpractice, and sometimes collection cases. The fee is completely negotiable, however contingency fees in medical malpractice cases cannot exceed certain percentages set by law, and contingency fees for representing minors must be approved by the court if court approval of a settlement is sought.

Contingency fees can be set upon the gross or the net amount of any recovery (ie., before or after subtracting the costs), depending upon what attorney and client agree to. Costs, like an hourlycase, would be in addition to the fees. The attorney may defer payment of costs until the case is resolved, depending upon what is agreed to.

Fixed fees are also generally completely negotiable as well (except in probate matters, where the fee is based upon a percentage of the value of the estate and must be court approved), and lend themselves more to legal matters where litigation is not contemplated, such as a transactional matter or the retaining of counsel to communicate with another party to a dispute. Care should be taken by the consumer to understand exactly what is and what isn't included in the fixed fee, ie.: Are costs included or extra? Is litigation included, and if so would it include trial, arbitration, and/or an appeal? Over how long a time period would the legal services contemplated in the flat fee be rendered?

Care should also be taken to understand whether the adverse party will be responsible for the attorney's fees and costs incurred by the client with their own attorney. Absent a written contract with an attorney's fees clause, or a statute or case law providing for same, the general rule is that each party to a litigated matter must bear their own attorney's fees and costs. If the particular legal matter involving the client is one where attorney's fees and costs may be assessed against the other party to the dispute, then the client must reach an agreement with their attorney as to how that will factor into the retainer agreement: Is the client primarily responsible for the fees/costs, with the right to credit or reimbursement to the extent the same items are collected against the adverse party; or will the attorney look solely to the adverse party for collection of the fees/costs?

Paramount to any agreement to retain an attorney is a *written retainer agreement*, setting forth how the client will be charged and what services will be included in the retention. The client should understand the retainer agreement, read it before it is signed, and must secure a copy forthemself. Again, the client should never feel pressured to sign the retainer agreement in the initial interview, and should be leery of attorneys who want an immediate decision on retaining them at that time.

On hourly and contingency fee cases, the client should request that they be billed for the fees and/or costs being incurred on a monthly basis, so that any issues or questions with regard to same can be addressed before a bigger problem or surprise surfaces later on down the road.

The client should also insist on being copied with all correspondence and legal documents that are generated by the attorney on their behalf, so that they can see how the matter is progressing and what they are being charged for. Most responsible attorneys will do this as a matter of course, but it bears emphasis from the client's standpoint.

What To Do If Problems Develop After Retaining An Attorney:

Many clients don't understand that they have an unqualified right to discharge their attorney and to retain new counsel atanytime in the case. Obviously, from a pragmatic and economic standpoint, this may be more difficult to do if the matter is on the eve of a trial date.

Clients need to be aware of potential problems in the attorney-client relationship as they first develop, and then confer with the attorney to attempt to resolve such matters before they become chronic. Potential problems can include the attorney not responding to client inquiries, having the client's concerns being consistently routed to a legal assistant or junior associate who don't address the concern, not being kept up to date on the status of their case, and being requested to pay additional amounts of fees without an explanation as to what happened to the initial retainer fee payments.

In contingency fee cases, the client only pays *one* contingency fee, such that the originalattorney and any successor attorneys will divide the one fee amongst them, subject to the amounts of their respective efforts. This is usually resolved by negotiation between the various attorneys, and ordinarily should not involve the client in any dispute resulting therefrom.

If problems with an attorney cannot be resolved, and the client believes that they have been improperly charged for fees or have had their case mishandled to their detriment, then consideration can be given to one or more of several options, including:

Fee Arbitration: Any client with a fee problem with an attorney can insist on *mandatory fee arbitration* with the attorney, through the local bar association. The fee arbitration can be final and conclusive, or only advisory, depending upon what the client and attorney agree to. The fee arbitrator is an attorney, but the client should not believe that this means that the arbitrator is going to favor their former attorney in any fee dispute. Attorney fee arbitrators take these matters very seriously. If non-binding fee arbitration does not resolve the matter, then client and attorney would each have the right to take the matter to court, if that was the only way to resolve it.

Complaints To The State Bar: While fee arbitration disputes are processed through local bar associations, only the State Bar of California has the authority to discipline attorneys. Discipline can consist of disbarment, suspension, public reproval, and private reproval. As a general rule, the State Bar is only going to discipline an attorney over certain types of offenses, including: (1) criminal convictions, (2) court imposed sanctions in excess of $1000.00, (3) misappropriation of client funds, (4) trust account irregularities, and (5) abandonment of a client's cause.

Subject to the above, the State Bar will generally not intercede on a matter that would be characterized as a garden variety legal malpractice complaint, because the client already has a remedy available, through the filing a legal action. The State Bar has limited resources and should not be expected to be interested in every client complaint about an attorney. If the matter is truly one concerning legal malpractice, the unwary client may have the statute of limitations foreclose any such action while they are waiting for the State Bar to do something.

Legal Malpractice Actions: An attorney is liable for legal malpractice if he/she fails to adhere to the standard of care that other legal practitioners would adhere to in handling a client's legal matter, if the failure to so act was a substantial cause of damage or injury to the client, and if in fact the client has sustained actual damage or injury.

The chief element of damages in a legal malpractice action is the value of the loss of the underlying case or transaction. If there was no financial loss in the underlying case, or if the financial loss would be

extremely conjectural or speculative, then generally there would not be a realistic basis for a legal malpractice case, even if the attorney failed to adhere to the standard of care in handling the matter for their client.

Recovery for emotional or mental distress in a legal malpractice action is generally prohibited, unless the attorney is guilty of something more than mere negligence, such as a breach of fiduciary duty, fraud, or an intentional act of wrongdoing. This is because a legal malpractice action is actually a species of breach of contract, which is a commercial transaction or occurrence, and emotional distress damages cannot ordinarily be claimed in a commercial transaction dispute.

One ordinarily must sue an attorney for malpractice within one year from the date that the client discovers or should have reasonably discovered the malpractice, or within four years from the date of malpractice, whichever time runs out first [C.C.P. sec. 340.6]. However, there are exceptions to this statute of limitations, and an experienced attorney should always be consulted incomputation of any applicable statute of limitations, be it legal malpractice or any other type of case.

Conclusion:

Curiosity is the consumer's best tool in deciding how to retain an attorney. Don't be afraid to ask questions, don't be afraid to "attorney shop", and get everything in writing.