# Attorneys: Would A Consulting Arrangement With Me Be Useful? "Seasoned Lawyer On Tap"

**by**
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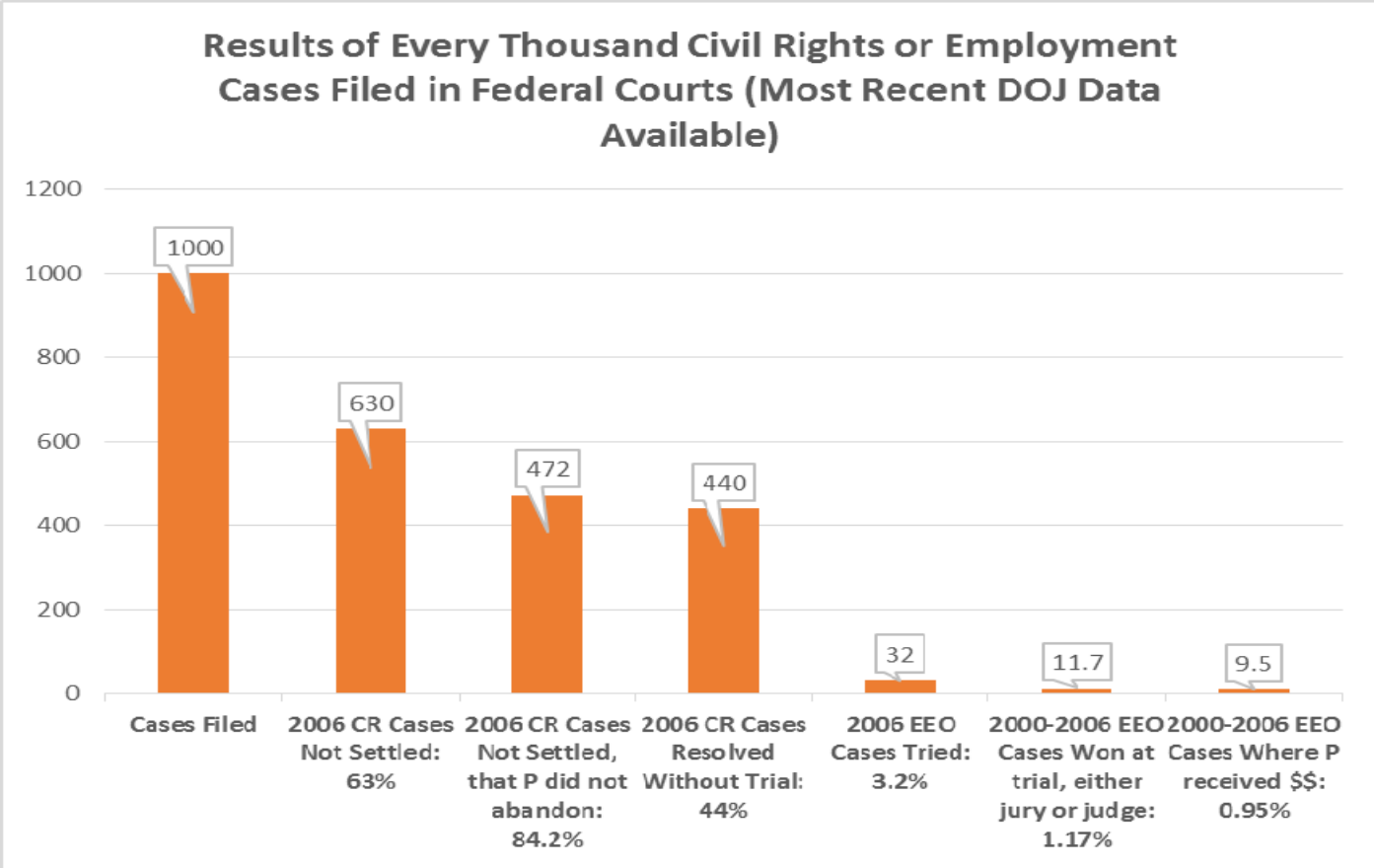
Here's a clear picture of what happens with every thousand civil rights or employment discrimination cases field, using data limited to 2006, and limited to employment cases, where the Justice Department's data allow the limitations:




In those 9.5 trial victories out of every thousand cases filed, the Justice Department's estimate of the median award was $158,460. See the explanation in Part B below.

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[1] Admitted in D.C., Maryland, and various Federal courts across the country. Admitted *pro hac vice* in numerous courts.

## Contents



### A. Why You're Seeing This

Increasingly, law firms have retained me to consult on a variety of issues from the trial to the appeal levels and everything in between, on ethics, on settlement issues, and the like. In case you—or someone you might know—would also like to use me as a consultant or in another capacity, I will describe a few situations in which firms have found me useful.

Consulting has been a growing part of my practice, and it's something I especially enjoy. By being retained as a "seasoned lawyer on tap," I can put my experience to use by helping more attorneys succeed for their clients.

Solo practitioners and senior attorneys in small firms have told me they've found it useful to retain me so they can work with someone else experienced, whether to bounce ideas around, or come up with a draft approach to a knotty problem. When attorneys who primarily work in other areas of the law take on some employment cases, they may feel they may need a jump-start on problems. Even some friends who are senior defense attorneys have sometimes called to talk about what makes sense in given situations.

My over 45 years of experience in courts around the country is a big help in bringing an "outside" perspective to a case. My perspective is broad because my career has spanned so many different situations:

- I came of age as a lawyer when employment law was relatively new to us all, including the judges, and we had to develop and respond to new concepts as we went along;

- I've experienced the differences in approach required when appearing before judges who were sometimes hostile, sometimes friendly, or sometimes bemused;

- Twenty-four years of my experience was with a civil rights organization that was interested in law reform as well as enforcement. For 24 years I filed amicus briefs in courts of appeals across the country and in the Supreme Court, and I helped prepare attorneys for Supreme Court arguments in civil rights cases by organizing moot courts and working with counsel on their oral arguments right up to the point they were given;

- For most of my career, I've handled class actions and collective actions as well as individual claims, and have spoken and written across the country about the best ways to handle all types of claims and the pitfalls to avoid;

- More recently, as part of my *pro bono* work on behalf of civil rights or lawyers' organizations, I have continued to prepare amicus briefs to help attorneys with appeals, and have frequently served as a mock judge in moot courts to prepare attorneys for oral argument in a variety of Federal and State courts;

- I have been a partner of a national law firm as well as a solo practitioner;

- I have served, and am currently serving, in a variety of positions in the American Bar Association and its fourth-largest unit, the Section of Labor and Employment Law with more than 24,000 members. I've attended meetings of its governing body for many years and served as Chair of the Section, so it's fair to say that I've pretty much heard it all.

- I am an arbitrator so I'm familiar with fact-finding;

- I'm a mediator, so I'm familiar with Rashomon-like differences in perceptions of facts and with the widely varying motivations of parties and their counsel;

- I have served as an expert witness on the fairness of class settlements, one of the few areas where attorneys can acceptably deliver expert testimony; and

- I have been an adjunct law professor teaching postgraduate-level employment law.

This is a kaleidoscope of experience, often enabling me to see a situation with fresh eyes, or old issues unexpectedly reappearing in new cases.

Since my consulting work for other attorneys is on retainer, this ensures that—apart from time or other conflicts—I am regularly available. It is paid on an hourly basis, currently or by advance trust deposits, so it does not cut into your contingent percentage. My time might be recoverable in your fee award if you win, whether as a contract attorney or under another heading. Sometimes, I am asked to enter an appearance to help the recoverability of my time. My rates are lower than the market rates in some jurisdictions, so some attorneys can even earn a profit on my time.

### B. Many Plaintiffs Are Not Doing So Well

The table on the first page was created from data in the Justice Department's most recent study on the subject, the August 2008 Civil Rights Complaints in U.S. District Courts, 1990-2006, downloaded from *www.bjs.gov*/content/pub/pdf/crcusdc06.pdf on March 23, 2015.

As you know, and as that chart proves, it is not easy to be a plaintiff's employment attorney. Some of you, of course, get consistently better results. Some may have absolutely no need for my services. You may, however, know others who could use a seasoned consultant. I would appreciate your forwarding this information to these others anywhere in the country.

The chart makes clear that the first major dividing point between good and bad results is **settlement**. A well-pleaded case avoids traps and snares. Well-thought-out discovery and analysis, as well as a strategy that spikes possible defenses, are all key. Such planning, strategy, and tactics help position a case for settlement.

Often, the case that a client presents to us has a lot of problems that can be fixed by persuading the client to do things differently for a time, so that we can fight on a better battleground. Choosing the right time and place to fight can mean the difference between a success and a loss.

I may be able to help with these problems.

The Justice Department data also makes clear that the second major dividing point is surviving **dispositive motions**. I do not believe for a second that over 90% of cases not settled and not abandoned are unworthy of trial.

We get nowhere by just inveighing against summary judgment in general, or just arguing the summary-judgment standards about drawing all inferences in favor of the party against whom summary judgment is sought. Federal judges are very fond of reciting those standards just before they ignore them and draw all inferences on behalf of the employer or adopt special evidence rules designed to make it hard for employees' cases to survive.

The key is persuading judges that the particular case before them is worthy of trial, regardless of what the judge thinks of other employment cases. The way to do this is by making the critical facts stand out in a compelling narrative.

My kind of seasoned perspective brought in from outside may be able to bring a fresh view of the case and the facts, hopefully fine-tuning strategies to help make good cases survive.

### C. Why Bother with a Consultant?

We attorneys commonly try to be jacks of all trades. Consider the length and variety of this list:

- we investigate a case,
- we prepare the pleadings,
- we take and respond to discovery,
- we take and defend depositions,
- we decide on the relevant statistics,
- we handle the experts,
- we handle the motions practice,
- we negotiate to see if the case can be settled,
- we try the case if it survives until then,
- we make or defend against post-trial motions,
- we take an appeal or defend against one,
- we write the appellate briefs,
- we handle the oral argument,
- we file or respond to petitions for rehearing,
- we seek or defend against Supreme court review, and
- we negotiate and litigate our claims for fees and costs.

In each of these activities, we have a far deeper understanding of the facts we like and of the legal theories that support our case than judges or jurors do. We may even have a better understanding of our case than defense counsel. But the same is true for defense counsel as to the facts they like and their theories, and they may understand their own case better than judges, jurors, or even we do.

Now let's focus on the people who will actually decide the case: judges and juries. They have only a narrow perception of the facts because their viewpoint is limited to what the parties present and the impression it makes on them. They will either (a) pick a

theory of the case offered by our opponents or by us, or (b) come up with their own if they think the parties' theories do not fit enough of the facts. Theirs are the eyes the law presumes to be neutral and objective, untainted by the hopes and fears of the parties and their counsel.

Judges and jurors' approach to the parties' theories of the case are also the opposite of the parties' approach. While counsel for each side pick the facts to support their theories, judges and juries instead pick theories or develop their own to fit the facts.

Wouldn't it be good if we attorneys could divest ourselves of our hopes and fears about the result, and look more objectively at the facts, to re-calibrate our theories and presentations, and to choose our exhibits better, to be as persuasive as we can be to someone with that neutral objective focus in mind?

It is hard to do this in our own cases. As B'rer Rabbit said, "the seein' is dimmest where the hopes is brightest." That's one place where using a consultant can be helpful. Just as good jury consultants and focus groups can be very helpful in winning a case, so, too, might be the insights of another attorney acting as a litigation consultant. My kind of seasoned inside view of litigation but outside view of the particular case sometimes enables me to spot issues or develop strategies improving the odds.

Another situation where an outside litigation consultant can be helpful is in avoiding obstacles, pitfalls, and waivers the other side may spot before you do. At the same time, a good consultant may be able to help you position the case to create obstacles, pitfalls and waivers for the other side that they do not appreciate until it is too late.

A frequent problem in litigation is the unintended waiver of strong arguments and claims. It's easy to do, and hard to recover from. My blog on the many ways to waive arguments and claims, "Ah, Winning Argument! How Did I Lose Thee? The Many Ways to Waive Claims or Defenses," shows some of the risks all along the path to the ultimate result. It can be downloaded from "Waiving Winning Arguments" on my web site. (Download the PDF file so you can get the full text with footnotes.)

Another recurring problem in litigation is that the law's presumption of the objectivity of judges and jurors is more of an aspiration than a reality. Judges sometimes admit that they disfavor employment cases, seeing them as a kind of divorce court of the workplace. They come up with doctrines ruling out various kinds of evidence that could have helped employment plaintiffs, to make it easier to get rid of our cases. Federal judges, in particular, are too often plague-ridden by their desire to try cases on paper and their tendency to draw undeserved inferences on behalf of employers. Jurors have been conditioned by corporate advertising campaigns painting trial lawyers as greedy demons.

I have often told clients that winning employment litigation requires us to climb a glass mountain without suction cups. We have to position our cases so that even a defense-predisposed judge or juror thinks this case is different from all the bad cases they've ever heard about, one of the few that has to result in victory if the civil rights laws are to have any meaning at all.

The question to think about is: In this difficult field of practice, would it help you—or someone you know—to have a "seasoned lawyer on tap"?

**D. <u>Some Kinds of Work Law Firms Have Retained Me to Do</u>**

- Firms facing time crunches, when they have more to do than they can handle in the time available, have asked me to handle particular tasks or draft papers for their review, so that everything gets done on time with the required level of quality.

- In a Southern State, a Magistrate Judge recommended that summary judgment be granted against the sexual harassment plaintiff. I was asked to work with an associate attorney in the firm to prepare objections to the recommendation. We came up with a different strategy that succeeded in persuading the district judge to reject the Magistrate Judge's recommendation.

- In a different Southern State, I was asked to reframe some of the arguments in a reply brief to sharpen them and focus the judges on our view of the case. It worked, and the party won.

- In the same Southern State, I consult regularly with an attorney at the beginning or in the middle of cases on which theories and arguments have the best chance of success, and I help prepare the attorney for oral arguments in appeals.

- In an Eastern State, I was asked in a Federal court to serve as an expert witness on the fairness of a nationwide class action and collective action settlement, on the distribution of the proceeds, and on the objections filed by members of some State subclasses. I had to compare the Federal and State laws and regulations on the key issues, and give an opinion on the propriety of the settlement's allocation among the Federal and State claims. The court's opinion cited my report, relied on it, and approved the settlement.

- In another Eastern State, I was again asked in a Federal court to serve as an expert witness on the fairness of a class action and collective action settlement, and on the distribution of the proceeds. In the hearing on final approval, the court stated that my report was persuasive, and that he had relied on it in granting approval.

- In a Mid-Atlantic State, I was asked to serve as part of two-person "focus group" of arbitrators—one from a plaintiff's-counsel perspective and one from a defense

counsel's perspective—to help claimant's counsel prepare for an upcoming high-value arbitration, and to help them focus their strategy and strengthen their presentation. The "mock arbitration" helped lead to a very successful result in the real arbitration.

- In the same mid-Atlantic State, I was asked to serve as a special master to resolve any disputes that arose in connection with a sex discrimination consent decree. This was a little unusual, because I had previously had a racial discrimination class action against the defendant. That decree had expired, and it was defense counsel—who had also defended the earlier case—who suggested my name as the special master.

- In a Midwestern State, I was asked to get involved in settlement discussions in a single-plaintiff case, and when that failed, I was asked to assist appellate counsel by providing ideas for the brief and for the oral argument. The settlement did not succeed, but the court of appeals reversed the grant of summary judgment.

- In a Midwestern State, I was asked to help on a State-court appeal from the grant of summary judgment.

- In a number of matters, I've been asked to help build strategies and manage problem areas, to help the attorney handling the oral argument on appeal, or sometimes to make the argument myself.

- Several firms have retained me on an ongoing basis to be the "senior lawyer down the hall," to talk through legal, ethical, strategic, tactical, or practical issues before they make their decisions, or to get my reaction to something off the top of my head.

### E. Advice from List-Serves and Volunteer Moot Courts

Of course, there are ways for attorneys to get help for free. I am a great believer in the value of list-serves for lawyers. Some ABA, State Bar, and ADR list-serves are open to both plaintiffs' and defense attorneys. Others are for only lawyers representing a particular side as the major part of their practice.

List-serves are great ways to get late-breaking information, quick feedback and suggestions, exemplars of key documents, and eye-opening differences of opinion. However, in order to preserve privilege, the questions must be general. The result is that the answers may be partial, may not be tailored to the needs of your case, may be true in a different jurisdiction but not in yours, or may need real work to be right for your case and your judge. List-serve inquiries also are limited to the questions you already know to ask. You need to look elsewhere for questions you're not thinking about, but which might transform the case.

I am also a great believer in the value of moot courts to help attorneys preparing for oral arguments. Appellate judges have sometimes told me or my friends that they can tell which attorneys have gone through a moot court because those lawyers seem so much readier to handle the hard questions, and they are better focused on the issues the judges most want to explore.

I have also heard appellate judges estimate that, about a quarter of the time, they change their minds in the 45 minutes or less between the start and the end of oral arguments. Oral arguments MATTER.

Some law schools offer moot courts to help attorneys on both sides—sometimes both sides in the same case, which troubles me. Moot courts are also organized by nonprofit organizations and local attorneys' groups.

So, notwithstanding these free resources, there are still reasons why you, or an attorney you know, might find retaining a consultant like me useful:

- Sometimes, attorneys practice in a location where it is not possible to put together a moot court of experienced appellate practitioners.
- Sometimes, it takes more than the couple of hours friendly volunteer attorneys can commit, to pull together an argument that improves the chances of winning.
- Sometimes, it is better to have new eyes get deeply into the record, in order to craft a winning argument.
- Sometimes, the process of detailed tuning and fine-tuning an oral argument is lengthy and needs follow-up discussions or sessions.
- Sometimes, a key point may have been lost sight of and a strategy is needed to try to resurrect that point and be able to rely upon it.
- Sometimes, it takes the kind of investment of time that the judges' law clerks would spend, to see in advance that a key argument will likely turn out to be a losing argument, and to find a way to make an argument that better appeals to the judicial perspective.
- Sometimes, a delicately worded F.R.A.P. Rule 28(j) or State-rule equivalent letter is needed to provide additional authority or to correct a mistake noticed after the brief was filed.

These are among the times when retaining a seasoned consultant may help.

### F. When I'm Called in After a Case is Already in Trouble, Sometimes I Can Help, But Sometimes It's Too Late

I've set out below some of the types of situations in which I've been called in and retained. Since there is generally already trouble, sometimes the case can be rescued and sometimes it cannot. As we all learned in law school to say, "it all depends."

Too often, I have been retained after a problem has arisen and the key strategy or argument might have been waived. Waivers are never intended but they are really frequent, and they normally lead to bad results. Again, see the attached blog.

Sometimes, there are ways to rescue a case from waiver. The first step is realizing the risk as soon as possible, or realizing that the key point has to be resurrected. The second step is figuring out how. Like everything in law, rescuing cases is an art, not a science, and the factors that work in rescuing a party in one case may not work in the next.

The key is when to bring in a consultant with a new set of eyes, a creative cast of mind, and a willingness to upset an applecart. A fresh look may maximize your opportunities and minimize your risks. If a consultant can also help you to do the reverse to your opponents, or get them to open the door to a point you want to emphasize, it's even better.

A half-hour or one-hour consultation early in the case, or a relatively brief consultation when working on a response to a dispositive motion, may avoid a waiver. Avoiding the waiver may make it unnecessary later on to spend anywhere from ten to a hundred hours or more trying to rescue a case that is falling into a hole, without any guarantee of success. Consulting at the key decision points is most helpful.

Early in a consultation, I try to find out enough about a case to get an idea whether I can help. If the facts are bad, I may conclude that there does not seem to be anything I can do that would be successful, based on the limited amount I then know, and will let you know so you and your client can decide whether I should spend more time probing more deeply.

### G. Why Me?

My having more than 45 years of seasoning in courts across the country, either by admission[2] or *pro hac vice*,[3] may enable me to spot issues or approaches that improve the chances of success. Fairly often, a new strategy can make all the difference in a case.

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[2] I am admitted in the District of Columbia and in Maryland, in the U.S. District Courts for the Central District of California Bankruptcy Court, the District of Columbia, the District of Maryland, the Eastern District of Michigan, the Northern District of

As an arbitrator and as an expert witness, I have some experience acting as a factfinder. This can help me figure out how a judge or jury may see a case.

As a mock arbitrator retained to help fine-tune a planned trial as a small "focus group," and as an attorney who over the years has fielded thousands of quick inquiries from other attorneys, I have a lot of experience in reshaping cases.

As a mediator, I have seen how often each side's perception of key facts can be totally different from the other side's perception. Disagreement is not necessarily bad faith, and appreciation of the other side's perspective can be critical to framing the case differently—to alter the other side's perception, value the case properly, persuade one's client to be reasonable, and to successfully settle the case.

Working with management co-authors, I have written fifteen editions of *Equal Employment Law Update*, published by Bloomberg BNA from 1996 through 2007, on behalf of the American Bar Association Section of Labor and Employment Law. To write this book, I had to analyze several thousand employment discrimination cases handed down by the U.S. Courts of Appeals over the time period covered by the book.

I've contributed or edited chapters to particular editions of other ABA books, EMPLOYMENT DISCRIMINATION LAW, and HOW ADR WORKS. I also speak regularly to meetings of the ABA and some State Bars, as well as to private attorneys' groups such as ALI-CLE, ALI-ABA, and the National Employment Lawyers Association.

I have had a lot of to-and-fro with the defense bar. This has helped me understand the way they think, and this, in turn, has helped me a lot in my own cases.

If you draw on this background, you too could find it useful.

My books, my web site, my blog entries, and the papers I have available on my web site will give a good sense of the background I bring to the table.

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Mississippi, the Northern District of New York, and the Southern District of Texas, in the U.S. Courts of Appeals for the D.C., Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits, and in the U.S. Supreme Court.

[3] I have been admitted *pro hac vice* in State courts in Kentucky, New Jersey and Washington, and in the U.S. District Courts for the Northern District of Alabama, the Southern District of Florida, the Southern District of Indiana, the District of Idaho, the District of Kansas, the Eastern District of Louisiana, the Southern District of Mississippi, the Southern District of New York, the Northern District of Ohio, the Eastern District of North Carolina, the District of South Carolina, and the Eastern and Western Districts of Virginia.

**H. <u>You Control the Scope of My Work</u>**

Some firms put me on retainer and make deposits to my trust account in order to use me in occasional telephone consultations. Some firms want me to look at motions or memoranda filed by the other side, while others want me to look at their own drafts and make suggestions. Still others want help in preparing for oral arguments by figuring out what the judges might be interested in asking based on the briefs, and so on.

For anything you ask me to do, you can specify what you need, such as whether you want limited or extensive input, or want me to take just an initial look at some ideas and then decide which to develop. Sometimes, it helps for you to pick up the phone or have a meeting, and talk with me confidentially, in detail, about problems and opportunities in cases. Wouldn't it be great to have someone already signed up to help this way when it's most useful to you and timing is important?

Again, the amount of my work is up to your firm. It varies enormously. Sometimes, a law firm only wants a quick consultation by phone to get a reaction off the top of my head with minimal research. Sometimes, a firm wants me to prepare memoranda to them with written suggestions. Sometimes, a firm wants me to rewrite or draft a section of a brief. Sometimes, a firm wants me to participate in a moot argument or mock arbitration and make suggestions for fine-tuning. Sometimes, a firm wants help in preparing for oral argument, such as drafting potential judges' questions and suggested answers, or wants me to handle the argument. Remember, you choose how much information to give me, so you have control.

However, the less information, the cheaper but less valuable the consultation. Without specifics, a litigation consultant is placed in the same situation as on attorney list-serves, where someone asks for advice on rules without identifying the court, asks for substantive advice without identifying the claim, or asks for advice on evidence questions without providing enough information about the case to enable others to evaluate admissibility or the balancing test or to suggest a possibly winning pitch.

What you should <u>not</u> use me for is to advise on local rules or practices or the peculiarities of your State or local law. You may already know these much better than I would be able to know them. If not, you should tell me and we should discuss what you need.

There are some matters I will not take. The offered arrangements do not require me to do anything requested in any case. Party conflicts, issue conflicts, timing problems, ethical constraints, and personal choices mean that I reserve the right to turn down any particular consultation.

There are also some restrictions under which I will not work because they would interfere too much with my ability to give sound suggestions. We need to discuss scope and particular limits in advance and come to an agreement.

You are in control of timing, subject to my commitments to other clients and my availability at a given time. A number of clients simply call or e-mail me when a question arises, and I try to get back to them either that day or the next. When I am asked to evaluate a record or review a draft brief, or draft something, it helps to have reasonable advance notice.

If we arrange it in advance, I may sometimes be able to make myself available evenings and on weekends. Everyone is busy, and trial and litigation schedules may make evening and weekend work unavoidable even if it is undesirable. We do need to arrange it in advance, however.

## I. What Are Our Financial Arrangements?

If you decide to retain me as a consultant, we will have a signed retainer agreement between your firm and me, and you will pay a nonrefundable retainer fee of $2,500 and a refundable trust deposit of another $2,500.

That covers a little more than ten hours of work at my rate of $485 an hour for individual cases, and a little more than nine hours of work at my rate of $550 an hour for class actions and collective actions. Paralegal time is $100 or $120 an hour, depending on who does the work.

I do consultant work on an hourly basis, plus expenses such as WestLaw and travel. I bill time and expenses first against the nonrefundable retainer fee until it is exhausted, and then against the trust deposit. If you like the results enough to want to continue, you should replenish the trust deposit, as you draw down upon it or add to the trust account if there is a task that you know will require significantly more time than the amount on deposit will cover.

My trust account is an IOLTA account.

You make the decision on which matters or parts of matters you want to use my services. I will need to decide if the matter will trigger conflict rules, see if I am booked up during particular time periods, and estimate whether the deposit on hand will cover the work.

I must also make a discretionary decision not to become involved in a particular matter. I am not trying to be a common carrier, serving everyone who asks, and both you and I retain the element of choice.

The check for the nonrefundable retainer fee should be made out to "Law Office of Richard T. Seymour, P.L.L.C." It can also be paid by credit card.

The trust deposit check should be made out to "Law Office of Richard T. Seymour, P.L.L.C. Trust Account." This cannot be paid by credit card. It the task in question will involve a lot of time, you may need to make a larger deposit in the trust account.

Bills and payments are not contingent on the matter's success.

If you are handling cases for a percentage of the recovery, you do not have to split your percentage with me.

As a contract lawyer or in some other capacity, you may be able to include my time in your fee application. My hourly rates may be less than the market rates in some jurisdictions. Where this is so, you may be able to earn a profit on my time. If so, you will need to give me a case code or name if you want my statements to be specific to a particular matter, which is useful for fee applications. You can use a code if you do not want to reveal the name of your client.

To keep expenses low, it would help me if you let me know in advance what level of detail you want from me: off-the-cuff suggestions with minimal research, full-court press, or something in between. It does no one any good to give you either too little or too much feedback.

Unless there is a reason to do it differently, my client would be your law firm, not your law firm's client. If I am asked to enter my appearance in a case and your client and I agree, of course, that would be different.

### J. There Are No Guarantees of Success

The availability of the "senior lawyer down the hall" might improve your chances of success, but does not by itself guarantee success. We all know that there are too many possibilities in negotiation and litigation for anything to guarantee success. We also all know that the same approach might work differently for different attorneys because of differences in style.

Improving the odds is the best either of us can aspire to achieve, and that may be enough to help win some cases or win them bigger, but may not be enough for others.

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