

**GOOD ETHICS - BETTER PRACTICE**  
**(NO. 2)**

**LLOYD BARNETT, CHAIRMAN, GLC**

**THE ENGAGEMENT**

The relationship of attorney and client begins with the retainer or engagement of the attorney by or on behalf of the client. It is at this stage that mutual trust and confidence must be established or confirmed and the terms of the engagement defined.

Nevertheless, very little attention is paid to this either at Law School or in practice. In the result, there is a good deal of uncertainty and even confusion about the relevant terms

A **general retainer** is the payment to an attorney of a lump sum of money in return for his undertaking to represent a party. In England a general retainer was required to specify the courts, tribunals or matters to which it applies but may be indefinite. In Jamaica there has been a long standing practice that the general retainer applied to any and all legal proceedings, including arbitrations, in which the client may become involved as a party but it lasts only for a year and must be renewed annually to be continued. If after the commencement of any proceedings to which a general retainer applies no brief or special retainer is delivered to the retained counsel, the counsel may treat the general retainer as determined and may accept a brief or retainer from another party. Boulton, *Conduct and Etiquette At the Bar* (6<sup>th</sup> ed.) Pp. 42-3; *Hals. Laws* (4<sup>th</sup> ed.) Vol. 3, para. 1149.

A **special retainer** relates to specific legal proceedings and although the traditional rule was that it should only be given after the commencement of the proceedings to which it relates the Jamaican practice has been to

give special retainers in respect of a dispute which is about to result in litigation.

By the **special retainer** a nominal sum (used to be one guinea; later raised to two guineas or approximately J\$120) is paid to counsel in consideration of his undertaking to represent the client in the particular matter. A counsel who has received a special retainer, unlike a general retainer, is entitled to be briefed on every occasion on which counsel is briefed in the proceeding to which the special retainer relates. Boulton, *op cit.*, pp. 44-5.

The distinguishing characteristics of retainers, properly so called, are that they constitute a payment to secure the lawyer's services and a contract with counsel to make himself available to represent the retaining party and not to represent his opponent or an adverse party. It does not relate to the actual performance of any legal services which only arises when the attorney is briefed.

**Payment on account of fees or fees paid in advance or on deposit** are amounts paid by the client to an attorney for legal work to be done in the future. Unless there is a clear written agreement to the contrary or it is a case in which the *quantum meruit* principle applies until the work is completed no fee is earned by the attorney and the advance payment represents client's money which in certain circumstances may have to be refunded. The phrase "retainer fee" is therefore a contradiction in terms and should not be used as it causes confusion.

Because of the possibility that some types of services undertaken by attorneys may give rise to the inference that the contract of engagement is an entire contract so that no fee is earned until the work is completed it is prudent to have clear terms of engagement which specify that charges will be made on an interim basis and to follow the practice of *billing against the payment on account of*

fees as soon as a reasonable amount of work has been done. The existence of clear terms of engagement properly explained to the client is an important means of avoiding future disputes and complaints.

The form of engagement may take different forms but the following is suggested as adaptable for most circumstances:

**LETTER OF ENGAGEMENT**

1. I agree to engage the services of Mr/Mrs/ Miss/Messrs. \_\_\_\_\_ of \_\_\_\_\_, in the parish of \_\_\_\_\_ to represent me [act on my behalf] in the matter of \_\_\_\_\_

[2. I agree to your charging for your services by way of time charges at the hourly rate of \$..... for time expended in connection with the matter [case] excepting that time expended in travel in connection with the case is charged at 50% of the said hourly rate.]

[2. I agree to pay a lump sum of \$..... for your services plus reimbursements for expenses and that in the event of this agreement being terminated for any cause, that you will be entitled to be paid a reasonable sum for work done and expenses incurred at the time of termination.]

[2. I agree to pay a fee of .....% of the value of the said property on the completion of the transaction.]

or to pay you your professional following basis:

- (1) \$.....per hour for conferences and visiting the locus in quo.
- (2) \$..... for making an application for bail.
- (3) \$..... per day for each mention day.
- (4) \$..... as the brief fee, inclusive of attendance on the 1<sup>st</sup> day of trial.
- (5) \$..... per day for the second and each subsequent day of trial.]

**DATED THIS DAY OF 1998**

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**B. CLIENT**