



Practice Management

I understand it is not uncommon for consultants to charge a retainer prior to entering into an agreement with certain parties. What are the typical situations when this should be considered?

At all times with attorneys.

—Gary R. Mullane, RCA #241

I'm not sure that a retainer is needed PRIOR to entering into an agreement, but the retainer should be a PART of some agreements. Always with attorneys, sometimes with insurance companies, and most of the time with private parties. I often use the explanation that because the situation might end up in a court of law, my opinions must be independent. To be independent, it must not be dependent on pleasing the client or tied to needing to voice a certain opinion or value in order to get paid.

—Lew Bloch, RCA #297

To be technically accurate, the retainer payment is received upon entering an agreement, but before providing any services. It is a condition of the agreement. A retainer should be considered whenever you are unsure of payment. This might be with a client you either don't know, or with whom you have had prior payment problems. This is especially true if the fee is substantial.

Some consultants require a retainer simply for being "on call," that is for

being available for certain appearances that may or may not happen but tie up your time; or for foregoing a competing assignment.

Some ASCA members require retainers in every assignment or in any litigation assignment.

—Scott Cullen, RCA #348

A retainer may be an advance payment on account, with costs credited as work is performed. Upon completion, the balance may be refunded. It may also represent or include a minimum fee, with no refunds. Retainers may or may not, depending upon individual policy, require renewal as costs exceed the balance retained.

A retainer is also commonly associated with stipulated terms, such as binding an agreement. They are sometimes required simply to review and consider a project or case.

An advance payment (retainer) might be advisable for:

- *legal cases,*
- *projects where payment does not appear secure, projects with multiple responsible parties,*
- *projects that may continue for an extended period of time,*
- *any project where the payment process may be delayed,*
- *...or any other project as you see fit.*

Retainers, minimum fees, and handling of refunds are as the consultant chooses, but all related terms should be clearly disclosed in writing before accepting funds.

—Torrey Young, RCA #282

I usually ask for a retainer in cases where the amount of time involved is unknown and in cases that are likely to be litigated. I always ask for a retainer when hired by an attorney—otherwise I might not get paid. If I don't think a retainer is warranted, I always ask to be paid in full before I turn over the final product.

—Marty Shaw, RCA #470

I use the retainer along with a written agreement regarding scope of work as a means of establishing a business relationship when litigation is involved. Depending on the jurisdiction of the case, some correspondence between parties may be privileged if there is an established attorney-client relationship, and that can be shown to exist when both documents and money has changed hands. I also use a retainer arrangement if I have to lay out substantial amounts of money for materials or travel to begin a project.

—A. Wayne Cahilly

When being an expert witness for timber trespass or arboricultural issues. When doing tree inventory or protection plans,

when you know the person asking is terrible at paying bills in a timely manner.

—David D. Hunter, RCA #408

I charge an up-front retainer for all legal cases. If I'm retained as a Consulting Expert, the unused portion of the retainer is refundable, no minimum. If I'm retained as a testifying expert (as most of the time) OR if I'm a consulting expert but I'm "disclosed" in some manner (incidental, accidental, drop-of-the-name during a settlement conference) the retainer is a non-refundable, minimum fee. When the retainer is used up I bill conventionally, hourly. Some consultants demand to renew the retainer so that they're always "prepaid." I do this with two particular developers but haven't found it necessary with attorneys. Lawyers respond well to threats to report their behavior to the state bar association, but only if you have a contract in hand, with their signature on the acceptance line.

—Joseph D. McNeil, RCA #299

These are some "typical situations":

- a. When you are considering a large job/case (you have to decide what is large by your yardstick),
- b. When considering a case that has the possibility or certainty of contention,
- c. When going to work for another professional entity, i.e., insurance company or attorney, and
- d. When you may want to use it as a qualifier to test a prospect's sincerity—which may have a direct bearing on you being paid.

—Lawrence T. Hoffmeier

A retainer should be considered in situations where an extended work sequence is expected (e.g., 12 months), or where an initial outlay of human resources or physical machinery will be required on the part of the consultant.

—Walter Levison, RCA #401

In our practice we have gone to retainers or large deposits on essentially all of our work. In particular, we request retainers in any sort of conflict, claim or dispute work, especially in advance of trials or other forms of testimony. We have found that when our clients are attorneys, requesting a retainer doesn't raise any concern at all. Conversely, when working directly for insurance companies, they seem less amenable to this arrangement. Generally speaking, the larger and more corporate our clients, the less concerned we are with working off of retainers.

—Michael L. LaMana, RCA #435

Any job for which a written report will be needed now requires a retainer. Then, when the final report is finished, I won't send it until they pay me for it. I send the invoice first, by email. This may sound callous, but I've "learned from experience." All attorneys must pay a retainer; and when that's exhausted, I won't do any more work until they send me another retainer. My hubby's an attorney; and he's encouraged me to do this.

—Judith L. Thomas, RCA #484

On several occasions I have been asked to agree to a contract price (as opposed to my normal hourly rate), for consulting services where the services requested are somewhat vague or open ended. Are there ways of dealing with this situation, or should I simply decline arrangements like this?

Obviously it is up to the comfort level of the individual consultant in being confident to offer a lump sum proposal. I do this very frequently and actually prefer an arrangement such as this. After listening to the client (lawyer, insurance company or homeowner) discuss the situation, I will quote a lump sum price to visit the site in order to determine whether both of us agree if I can be of help to the situation. I may not be comfortable with the case or the client might

not like what my opinions are likely to be. If we agree that a report would be warranted, I will then give them a lump sum price for that process. **OF COURSE BOTH OF THESE ITEMS ARE PAID AT THIS SITE VISIT, OR BEFORE: NO BILLING!** Then, if it becomes a lawsuit, we will enter into a retainer agreement on an hourly basis—with a retainer up front. In my opinion, estimating the fees to be charged for these services is actually easier than doing estimating for tree contracting services.

—Lew Bloch, RCA #297

By contract price, I'm assuming that you mean fixed, lump sum. Based on that, this assignment looks like it's very likely to go bad for the consultant because of the vague and open-ended nature of it. There are two ways to go about this: either reject the assignment at hand if they are unwilling to agree to the hourly nature of the work and fee structure, or accept the assignment as a fixed lump sum but be sure to define the assignment, narrow it down, and include all points of your involvement. Our experience has been that when we receive this kind of request, we are most often dealing with contractor-clients who are themselves working on a lump-sum contract.

—Michael L. LaMana, RCA #435

You may be able to contract for an amount "not to exceed 'X' without additional approval," either at your normal rate or for a limited amount of time. Alternatively, you may be able to contract for a fixed price, initial investigation or "scoping" to clarify the more complete scope. You can then feel more confident about a fixed price for subsequent phases, or insist that you will only work at your normal rate.

In any case, consider the risk that the time you spend will not be covered by a fixed price, the amount of additional time that might be involved and what the effective discount to your normal

rate could be. If you are busy and have a backlog of work, you might decline such an arrangement, but if you are short on work you might take the risk. Or you might take the risk to establish yourself with a particular client or in a particular market or practice niche.

—Scott Cullen, RCA #348

I always use a well-defined scope of work in my contract proposal so that the client knows exactly what he or she is getting (or not getting) for the agreed upon contract price. I would meet with the project team and define the scope of work myself if I were not given a definitive one by the client. We have enough knowledge and experience to create our own scope of work in most situations, as long as we understand the client's goals.

—Walter Levison, RCA #401

I decline arrangements like this, since I don't want to end up "working for nothing" if the estimate is wrong. To me, it's just not worth the aggravation. I can tell them approximately how long it might take to do a report, but tell them that it's only an "educated guess."

—Judith L. Thomas, RCA #484

Don't enter into a fee agreement on a project where you are being asked to be finite and the project may be infinite. If the project is within your scope and you want to do it, rewrite the specifications and present them to the client with the appropriate fee; if they accept the scope and fee then you are on your way, but if they want more and more for less and less... well there is a time to move on.

—A. Wayne Cahilly

The appropriateness of firm price fees varies with project character. Firm prices can be a useful negotiation tool, but can work for or against you, depending upon how clearly terms are disclosed. A firm price requires a very clear assignment

description and should also include specific work parameters and limitations. It is not advisable if the project character is substantially unknown, is likely to change, or may have an indeterminate duration.

—Torrey Young, RCA #282

As far as price is concerned, you know what you are worth better than anyone else, so you have to decide whether the offer is good or not. On smaller projects,

where the scope is narrow enough and where you know how much time you will need to invest, it makes good sense to give your client a set fee. If you can't have a retainer and you don't know how much time is going to be involved, you can establish a fee schedule so that your client will know how much each piece will cost. Always get paid before you hand over the final product.

—Marty Shaw, RCA #470

If the scope is open ended the fee must

ASCA Needs Your Expertise!!

ASCA is looking for some volunteers to help the work of two task forces.

ARE YOU ACTIVE IN YOUR LOCAL ISA CHAPTER?

If so, ASCA would like your help in reaching out to your fellow members through focus groups at Chapter meetings or through telephone interviews to better understand what the diversity of needs is for education related to becoming/enhancing skills as a Consulting Arborist. This work follows on the heels of another ASCA task force that defined the core competencies of a Consulting Arborist. Now we need to explore the details of what the different levels of Consultants need and their preferred method for learning, i.e. Face-to-Face meetings, online, etc.

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Did you teach in a previous life? Do you now? Create a comprehensive curriculum template for consistent development of educational program content and quality.

1. Create an overall grid that captures ASCA educational programs and their relevance to each learner category.
 - (a) Prospective Members
 - (b) Members
 - (c) RCA
 - (d) Seasoned Professionals
 - (e) Buyers, Clients and Stakeholders
2. Establish best protocols for development and delivery.

If you feel you have something to offer either task force, please call the ASCA office at (301) 947-0483.

be as well, unless they'll accept a contract price that is so high you're comfortable that it covers every contingency. You can rarely be sure though, especially if the scope is vague. I commonly provide an incremental price. I restate the scope to confine it within limits as much as possible. Then I provide a "not-to-exceed" amount for that scope or a defined sub-scope, with the clear statement that the work even in the not-to-exceed portion will be done at my hourly rate. If more time is needed to complete the scope, the contract is clear that I'll get client approval, and if that's not forthcoming, I'm not under obligation to complete the original scope. Or, I may offer to advise the client as I approach increments of some magnitude, \$5K, \$10K, \$15K, or for a different client, 1K, \$2K, \$3K. If it's less than the not to exceed limit, I charge less. If it's more, I'm covered. Otherwise, enter into a contract price with a vague scope at your own peril.

—Joseph D. McNeil, RCA #299

On clients like this (as outlined in my answer to the previous question), I ask for and receive a retainer or get monies to be paid on a timeline that is agreeable.

—David D. Hunter, RCA #408

Entering into an agreement that is vague is a mistake from the get go. For me and my client to be happy, both must agree on the quality and completeness of the final product. I often give the client a maximum price for the job based on my hourly rate.

If an agreement cannot be reached, neither party will be satisfied in the end. If the client is happy, an addendum can be added to the agreement covering any additional work.

—Don Howell

When the services are vague or open ended is when you really need an hourly rate. You could try to better define what your services are. Or you could set a contract dollar limit, and once that is reached, review your services. Simply declining arrangements is not a good option as there is always a way to accomplish what they want. You just have to direct or lead them there.

—Gary R. Mullane, RCA #241

When a navy captain was assigned to take command of an aircraft carrier (for which he had no experience) just before sailing into the Battle of Midway, he went to hospitalized Admiral William Halsey for advice. "Bull" Halsey barked at him, "When you're in command, by !*#@+ command!" They called you. If they are not there to work out the parameters with you are they going to be there to pay you? (See previous answer.) Now, about that "On several ..." thing. Is it time to move up to a higher market level?

—Lawrence T. Hoffmeier

As a full-time consultant I commonly refer my clients to a tree service to perform the work that I have recommended. Are there any problems with my accepting a small fee from the tree company that I have referred the work to?

Not if you disclose this. Your consulting client has every right to expect you to be Independent, Objective and Disinterested. Accepting a "finders fee" gives you a stake in the outcome of the process. You lose your Disinterested status and your Independence may be called into question. There's at least an appearance of conflict, a violation of the ASCA SPP. If you must accept a fee, you must disclose your interested status to your client.

—Joseph D. McNeil, RCA #299

I never accept any fees from companies to whom I refer my clients, and I

consider that to be a conflict of interest. However, those tree service providers do reciprocate by periodically sending their clients to me for small consulting projects.

—Walter Levison, RCA #401

Always look to the ASCA SPP, §4.3 Compensation. §4.3(E)(i)(c) Recommended Work states: "Members shall not [emphasis added] request or accept finder's fees, referral fees or commissions (or gifts or other valuable consideration)..." in the situation you describe. There are no listed exceptions. Your entire compensation should come from the fee for your consulting service.

Go back to SPP §4.1(B) Independent and Objective Character of the Results of Arboricultural Consulting Assignments.

—Scott Cullen, RCA #348

YES, YES, YES, a definite conflict of interest. In my opinion, accepting a fee for this is similar to being a general contractor and we should decide if we are going to be contractors or consultants.

—Lew Bloch, RCA #297

I would never give recommendations for money. Sooner or later, this would "come back" to anyone who gets paid by the tree company in this way. Other tree companies could find out, and there could be potential legal implications. I usually recommend several reliable tree companies, and let the client decide whom to hire.

—Judith L. Thomas, RCA #484

I believe the best business relationship is one of mutual respect and confidence, rewarded with an exchange of referrals. Although allowed in some circumstances by our SPP, in my opinion it is best to avoid any appearance of a conflict of interest or lack of objectivity. Consider also that your reputation is

affected by the performance of anyone you refer.

—Torrey Young, RCA #282

Only as long as the arrangement is consistent with the ASCA SPP. Remember, when in doubt disclose!

—Michael L. LaMana, RCA #435

The following is taken from the ISA Code of Ethics:

“B. Certified Arborist responsibilities concerning conflicts of interest and appearances of impropriety. Certificants and candidates must:

4. Refrain from offering or accepting significant payments, gifts or other forms of compensation or benefits in order to secure work or that are intended to influence professional judgment.”

If the payment, gift, compensation or other benefit is “significant” it is an infraction of the ISA code of ethics.

I recommend tree services that employ ISA certified arborist and tree workers in my reports. If I am asked to recommend a tree service to do the work, I will not recommend a specific company that I have not worked with or am not familiar with the quality of its work. I try to give the names of at least two qualified companies, but this is not always the case.

—Dan Howell

It sounds like there could be a conflict of interests. The real problem here is that you’ve missed a good opportunity to serve your client. By having him/her pay you to find the best company for their need, you create greater value and income for yourself while maintaining your independence and objectivity.

—Marty Shaw, RCA #470

Finder’s fees and adding more dollars is what I run into all the time. There is always someone wanting something for doing nothing.

—David D. Hunter, RCA #408

You should provide a list of tree services to the client. Accepting a kickback (fee) is a very dangerous path to follow. It will compromise your integrity.

—Gary R. Mullane, RCA #241

If you referred a specific tree service by name, you are guilty of two counts of stepping in it. Got some words for you—integrity, independence, transparency.

—Lawrence T. Hoffmeier

I am currently engaged by the slowest paying law firm I have ever done business with. I have significant time invested and have collected evidence pertinent to the case. Do I have the right to insist that the firm becomes current with my invoices before I perform any other services for them?

Yes.

—David D. Hunter, RCA #408

Indeed. You will be amazed at how quickly a check can be provided when the firm reaches a filing deadline for your affidavit and you remind them of their agreed-to financial obligations.

—A. Wayne Cahilly

Absolutely. Ideally, you would have specified in detail all such work-payment parameters in a written agreement before agreeing to accept the case. This is a situation that can be complex, if you are subpoenaed for deposition or testimony, or upon disclosure to parties and the court as a case Expert Witness. In such cases, it would be wise to consult with your own attorney promptly.

—Torrey Young, RCA #282

Depends on your contract. That document should allow you to withhold services for non-payment, or to terminate (or threaten to terminate) the contract, and provide no more services for specified or non-specified reasons, including non-payment of invoiced fees.

—Joseph D. McNeil, RCA #299

Of course. And just so you know, there are remedies for such things within the judicial system itself. What you have here is a classic reason for retainers.

—Lawrence T. Hoffmeier

I would send them an invoice every week, until they pay, and then refuse to do any more work for them without a retainer in advance. Since the invoices are sent by email, it’s easy to do. In a couple of cases, I called their office several times and left messages with the attorney or with their secretaries. This helped too.

—Judith L. Thomas, RCA #484

The written requirement should include a penalty for late payment. When clients are reminded of this, they usually pay on time.

Once, crossing into Mexico, I tried to ask an official how much the bribe would be. I knew ahead of time that a small bribe was expected and was ready to pay it. I was taken off-guard when the official went into a diatribe about his wife and kids needing food, clothes, mortgage, etc. I gave him an extra buck.

This tactic is not beyond me if it will prevent a trip to small claims court.

—Dan Howell

Yes, you have the right.

—Gary R. Mullane, RCA #241

Of course you have the “right” to demand payment before performing

additional services, but there goes the relationship between client and consultant. Also, of course, one would not get into this situation if you got paid in advance or with a retainer. I don't know how to spell "schmuck," but attorneys will think that way of you if you run your business that way. Attorneys work off of retainers and expect you to do likewise. My agreement states that a new retainer will be requested when I get within 80% of the original retainer. Getting paid in advance is such a great concept—we should relish it. I remember the contracting days, when we would do work and send out invoices wondering when or if we would get paid.

—Lew Bloch, RCA #297

Yes, but be diplomatic. If you have a long track record of allowing them to be late, you may have to be patient and work with them a little. My clients always seem to be able to pay on time when they really need something in a hurry.

—Marty Shaw, RCA #470

Your rights in this regard are a matter of law, and I suggest you consult with a local attorney regarding your rights in this situation. That notwithstanding, I would hope that your contract with the firm covers these issues—so there is no question that you will not be performing anymore work until you have been paid according to the terms of your contract.

—Michael L. LaMana, RCA #435

ASCA SPP, §4.3(H)(ii) Unpaid Fees states: "It is proper for Members to withdraw from assignments if agreed fees are not being paid in a timely fashion or if the Member reasonably believes agreed fees will not be paid." A key consideration will be just what was "agreed" about the relative timing of payment and your deliverables. Any provision of the ASCA SPP does not relieve you of your contractual obligations.

I would also want to be clear whether you can conceal or withhold "collected evidence" as distinguished from your opinion or other work product. There may be legal considerations or duties beyond your contract.

—Scott Cullen, RCA #348

Am I required to obtain a signed contract when I enter into any arboricultural consulting contract?

In my experience and to my understanding, a verbal contract is a contract unless some provision of law where the contract is executed provides otherwise. In Maryland, Licensed Tree Experts (you have to be one to consult or provide any other tree care services) must enter into a written contract that contains certain items including contact information of the licensee and client, objective and scope of services, amount and method of remuneration for the services, and dated signatures of the licensed tree expert or the licensed tree expert's designee, or be subject to penalty.

—Michael F. Galvin, RCA #432

Required by whom? The ASCA SPP does not require a written consulting contract. Some E&O or Professional Liability insurance policies may require a written contract in all assignments. Some clients (including government agencies, large corporations or institutions) may require a written contract or purchase order. Business partners or investors may require you to obtain a written contract in all assignments.

Your spouse may impose certain requirements as well.

—Scott Cullen, RCA #348

Based upon the structure of the question, I'm assuming that you believe there are other forms of contract that

may be permissible in this situation, other than a signed written contract. While this may be true in your locality, I see absolutely no benefit to engaging in verbal contracts with anyone for anything. Even a simple one-page retainer letter, "professional services agreement," or possibly even a corroborated exchange of e-mails is better than a verbal contract for a small project. Regardless of your laws in your locality, I would never engage in any large project without a fully executed written contract.

—Michael L. LaMana, RCA #435

No. In certain instances it will be required (government contracts, large jobs). I've worked without signed contracts for many years. Just because you have a signed contract does not guarantee payment. However, if having a signed contract makes you feel better, then, yes, get them signed.

—Gary R. Mullane, RCA #241

No, but it is very helpful to have everything in writing so there is no confusion when the assignment is fulfilled. You will probably wish you had a signed contract if you ever make the mistake of delivering your product without a payment—good luck collecting.

—Marty Shaw, RCA #470

I doubt if anyone is "required" to obtain a signed contract, but it certainly is good business to do so. In the real world it is not always practical and we all have existing clients and repeat clients for which we waive this practice.

—Lew Bloch, RCA #297

I always require a signed contract prior to commencing consulting work. This is a requirement per my professional insurance agent, as spelled out in the consultant insurance application on file with the agent. The signed and

dated contract also becomes a useful backup document when a client is late to remit payment for consulting services rendered.

—Walter Levison, RCA #401

No. You can shake hands and call it good if you like.

Two of the significant questions the judge asks in small claims court are, "do you have a contract" and "do you have a license." No to either question will get you tossed out of court.

If I am not paid up front, a written agreement is entered with signatures of both parties. The agreement is designed to protect both parties. If the work is not acceptable to the client, it can take me to small claims.

Be very careful when signing a government contract. Its contracts are usually written only to protect the government. It can, and will, spend 10 times over the disputed amount in an attempt to win a case. Search the web for: AGBCA No. 2003-137-2. Thanks to an honest judge that didn't rely on hearsay.

—Dan Howell

It's foolish and unprofessional not to. Every worthwhile client, even clients who may be friends or colleagues, should expect it. It clarifies exactly what the scope will be, what will and won't be provided, and for what compensation. It's a win-win process.

—Joseph D. McNeil, RCA #299

Anytime I need to do a report, I require a signed contract. For small hourly homeowner consulting jobs, I usually don't need to do this, unless my "intuition" tells me I should. I ask the homeowner to pay me while I'm still there, just before I leave.

—Judith L. Thomas, RCA #484

Required?, no. Any?, no. But if it is a case of contention or possible contention, or you feel a little bit uneasy about the case and they don't want to sign - - WALK. Verbal contracts are binding in many jurisdictions so I have been told, though hard to prove.

DISCLAIMER: The responses herein that are of a legal nature are passed along as they have been told to the writer and are not legal interpretation by counsel nor are they law at any level of or in any jurisdiction and are not to be used or interpreted as such.

Remember readers, we practice arboriculture, not law. And lawyers practice law, not arboriculture. We're both dumb as a box of rocks in the others arena.

—Lawrence T. Hoffmeier

There is no absolute answer to this question for all circumstances, roles and jurisdictions. However, it is advisable to obtain at least a brief written agreement before performing work. Describing your assignment and disclosing limitations and terms in advance, in writing and with signed agreement can avoid the vast majority of contracting and payment difficulties. Many entities and agencies require you to sign their contract form before completing an assignment. Approach this with caution and diligence, reviewing all terms, requirements and connected documents carefully before accepting.

—Torrey Young, RCA #282 🌿

ASCA and Anti-trust [continued from page 12](#)

I usually bill by the job, but I know many consultants who use a flat per hour fee. Some charge more for certain kinds of jobs, which is no different than a contractor charging more for a particularly nasty take-down than he would for spending the same time pruning a beautiful Japanese maple. Some charge for travel, while others build that cost into the fee. One size does not fit all.

When starting out, it takes awhile to figure out what to charge, and consultants may not make much money early on. Successful consultants became successful by developing a good reputation one job at a time, whether they made money or not on each job. They became successful by:

- Understanding exactly what was being asked of them, having competency in that area, and doing what they said they would do.
- Getting the job done on time and within the agreed price, even if that job made no money.
- Being honest and professional to the degree that all they interacted with saw them as such.
- Making sure their clients received value for the fees paid to them.

To be successful, a consultant must understand what the costs are in his particular situation, he must include a fair profit in his fee structure, and he must deliver competent services for the fees he requests his clients pay. 🌿

Upcoming Events

2010 Annual Conference
December 5–8
Amelia Island Plantation
Amelia Island, Florida

2011 Consulting Academy
February 14–17
Omni Severin Hotel
Indianapolis, Indiana

Webinars

Anytime you want! <http://eo2.commpartners.com/users/ascacon/>