

How to Choose a (Good) Attorney

Thomas E. Simmons

Selecting the right attorney for the right job is one of the more important decisions an individual makes, and every bit as important as choosing the right doctor, the right accountant, or the right financial advisor.

Civil, Criminal, or “Paper Law?”

If an individual has been arrested and charged with a crime, a criminal lawyer is needed, and an attorney with experience in criminal defense work should be sought out. Often, a reputable criminal defense attorney will have had a previous career as a prosecutor for the state (a State’s Attorney or Assistant) or federal government (a US Attorney or Assistant).

A litigated matter which does not involve criminal charges is a “civil” proceeding. Civil proceedings can include negligence claims, discrimination, breach of contract, foreclosure, probate or guardianship. Most private practice litigators have a “civil” rather than a criminal practice.

If you pursue a civil claim, you will be the “plaintiff” or “petitioner”; otherwise you will be a defendant in the matter. If you are not a named party, you may still be involved as an interested person, or a witness. In a probate proceeding, for example, heirs and potential heirs may receive official legal pleadings without being named defendants or parties in the case. Anytime you receive notice of a legal proceeding, however, you should consider whether to retain an attorney.

Other attorneys may focus their attention on non-trial work, including real estate transactions, estate, or business planning. This type of legal work is sometimes referred to as “paper law.” Transactional lawyers and estate planners are required to be zealous advocates for their clients’ best interests, even though this kind of advocacy occurs outside the courtroom.

Fees: Contingent, Hourly, or Flat?

In our part of the world, lawyers may charge an hourly rate, typically from \$150 to \$300 per hour in our area, a contingent fee, or a “flat” or “base” fee, depending on the legal matters you hire the lawyer to pursue on your behalf. A separate hourly fee may also be charged for paralegals or certified legal assistants who work under the supervision of a lawyer.

A contingent fee is one which is paid only if you recover a monetary award. A typical contingent fee is between 33.3% and 40%. Contingent fees enable individuals to hire a lawyer without any up-front cash commitments. The lawyer bears the financial risk that you may not ultimately prevail. It is important to understand that clients are generally

charged “costs” *in addition to* the contingent fee award. Costs include items like witness fees, expert fees, deposition costs, and travel expenses. Income taxes that may be assessed against certain types of award or settlements can also affect the amount an individual ultimately recovers.

Contingent fee arrangements have the benefit of enabling individuals to obtain competent representation where they might otherwise not be able to afford an attorney. Contingent fee arrangements also have the effect of “weeding out” lawsuits without merit, since the attorney must share the risk of recovery with the client. This risk sharing forces attorneys to turn away those contingent fee cases which represent an unacceptable risk in terms of low recovery amounts or high costs in relation to the recovery which is likely to be obtained.

Contingent fee arrangements are prohibited in family law matters such as child custody.¹ There are also a number of matters that as a practical matter do not lend themselves to contingency fee arrangements. One example would be a property boundary dispute, since the resolution of the dispute will not result in a cash award from which the attorney could be compensated.

A “flat” or “base” fee is often utilized in quoting clients fees for legal representation involving the formation of a corporation, the drafting of a will, or the closing on a commercial transaction. A “base” fee may be blended with an hourly rate in some circumstances. For example, an attorney may charge \$1,000 to draft the documents for a real estate transaction, and an hourly rate of \$200 for the time necessary to attend and supervise the closing or negotiate the terms and details of the sale with the other side. A flat or base fee arrangement gives the client a better idea of what the final bill from the attorney will be, and gives the client greater control over the fee.

Costs and Retainers

Out-of-pocket costs such as long distance telephone calls, online legal research fees, postage, copying and hand delivery charges may or may not be added to a bill. Lawyers in South Dakota are required to charge sales tax and you can expect to see an itemization for sales tax as well.

A “retainer” is often required in an hourly or base fee engagement. A retainer is an up-front deposit towards future legal services to be provided which is deposited in the lawyer’s trust account. The retainer is not a guarantee that the ultimate bill from your attorney will not exceed the amount placed in the trust account. However, if the

¹ SDCL ch. 16-18 appx. Model Rule 1.5(d). Contingent fees are also prohibited for representing a defendant in a criminal case. Id.

representation concludes before the retainer funds have been exhausted, the lawyer is required to refund the remaining balance to you.²

In South Dakota, trust accounts typically do not accrue interest. Instead, the interest which would otherwise accrue on trust account balances is paid to IOLTA (“Interest on Lawyers Trust Accounts”), a program which supports legal aid for individuals with low income, legal education for the public, and other activities which improve the quality of justice. See www.iolta.org. Every state operates an IOLTA program.

There are legitimate concerns about the costs of hiring an attorney. It is best to take a proactive approach. If an attorney has not explained how he or she will charge for legal services, be sure to ask. The least expensive attorney may not be the most cost effective if the job is not performed correctly. Fee agreement should usually be reduced to writing and written in plain English.

Discounted and Free Legal Services

Many lawyers perform a considerable amount of “pro bono” or free legal work.³ Court-appointed lawyers represent indigent criminal defendants at one-third to one-half of what their typical fees would be. The taxpayers receive a genuine bargain from these services, obtaining attorney services at a substantial discount.

Past State Bar President James Nelson wrote in 1996:

For the most part, low-income people cannot afford lawyers unless their particular legal problem can be solved with a contingent fee arrangement. Up to now, legal services for low-income people have been provided through pro bono work by lawyers and by taxpayer money paying for public defenders, court-appointed lawyers, and the likes of the Legal Services Corporation. What is alarming, however, is the realization that America’s so-called ‘middle class’ is becoming much less able to afford lawyers. These problems of affordability are not the lawyers’ fault. Greedy lawyers are not the problem. Not only cannot low-income and many middle-class people afford lawyers, but the lawyers themselves cannot afford to represent them. The cost of delivering legal services is more expensive than ever before.

Find a Specialist

Because laws are complicated and change every day, it’s a good idea to hire an attorney whose practice focuses on specific areas. Remember the old adage: “Jack of All Trades,

² See SDCL 16-18-20.2 (describing trust accounting procedures).

³ SDCL ch. 16-18 appx. Model Rule 6.1.

Master of None.” Hiring a specialist helps ensure that your attorney can meet your legal needs.

Many experts recommend finding a lawyer whose entire firm is devoted to handling matters like yours, whether that may be divorce, bankruptcy, personal injury or estate planning. In our area, however, most firms and attorneys practice in more than one area of law. In large metropolitan areas, you can find entire law firms focused entirely on a single specialty such as aviation law or products liability. That sort of highly focused specialization does not exist in South Dakota.

During an interview on the Elderlaw Forum radio show hosted by Law Professor Michael J. Meyers, the Dean of the University of South Dakota School of Law was asked how individuals should go about finding a lawyer. Dean Barry Vickrey said that first and foremost, people should ask around; they should ask their neighbors, ask their friends, and ask their coworkers for recommendations for a respected and reliable attorney. He went on to note:

“The lawyer who handled your neighbor’s divorce may not be the right lawyer to write your will. That lawyer that handled the divorce may not write wills, and even if he or she does, the kind of talent and knowledge that you have to have to handle a divorce may be very different from the skills required to draft a will.”

The full interview, which contains many helpful hints for finding a competent and affordable lawyer, can be heard or downloaded at www.usd.edu/elderlaw . The archive also contains information about different types of fee arrangements with lawyers.

Winning Track Record

Some legal marketplace experts recommend researching an attorney’s win/loss record. One such expert has written:

“Comparing past verdicts and results will allow you to separate the best lawyer from the others. Inquire, but don’t simply accept what you are told. Be certain to request some proof of prior verdicts such as the court records or newspaper reports. The percentage of winning cases and the dollar amount an attorney has won can be the single most important factor in hiring an injury or wrongful death lawyer. Why? Because all insurance companies base their settlement decisions on past verdicts. If your lawyer has a solid history of winning large verdicts at trial, the chances are the insurance company will want to avoid trial by paying you a top-dollar settlement.”

This advice is short-sighted. While a string of successful high dollar verdicts may indeed indicate a seasoned and successful plaintiff’s attorney, it’s difficult if not impossible to compare “apples to apples” with this kind of analysis. Some lawyers may handle a large volume of plaintiff’s cases, but avoid taking any risky lawsuits to trial. A successful trial

attorney who takes more defense cases may be an excellent choice, despite the fact that they have fewer plaintiff victory notches in their belt.

It is also difficult to compile meaningful statistics with which to compare attorneys' performance. Some attorneys are simply better at self-promotion than others.⁴ I personally do not know of any attorneys who keep up-to-date statistics on the cumulative amounts they have recovered on plaintiff's cases or win/loss records in jury trials to share with prospective clients.

Another important factor in selecting an attorney is finding an individual with whom you can communicate effectively. People tend to work better with certain types of people. Find an attorney that will get the job done effectively for a reasonable cost, but also one that listens to your concerns and can explain the risks and benefits of the different courses of legal action available to you, in a way that you can understand.

Online Resources

For individuals looking for a South Dakota attorney, the South Dakota State Bar's web page contains a listing of attorneys throughout the state. Martindale-Hubbell® also allows one to browse through listings of attorneys according to geographical location or area of practice. Martindale-Hubbell also contains a rating system for attorneys based upon their years of experience and reports of their peers. Lawyer search engine links are posted under the "Lawyers" tab at ThomasESimmons.com.

Adequate Resources

Some lawyers have the best of intentions, but limited staff and resources. If you have an important case that may require extended litigation, some experts recommend hiring a law firm rather than a solo practitioner so that you will have the resources necessary to prevail. Law firms, because of their size, may be better suited to advance the substantial costs associated with financing a difficult medical malpractice or products liability lawsuit. Many solo practitioners and smaller firms are staffed with outstanding, experienced attorneys, however, and you should not assume that only the largest firms have the best attorneys.

It may help to find a lawyer with membership or even a leadership position in a specialized organization. Experienced litigators will often be a member of the American Board of Trial Advocates (ABOTA). Experienced estate planners may be members of

⁴ Lawyers are prohibited from advertising predictions regarding the future success of representation by the lawyer. SDCL ch. 16-18 appx. Model Rule 7.1(c). Lawyer advertisements also cannot contain representations or "self-laudatory statements" regarding the quality of the lawyer's legal services which are not susceptible to reasonable verification by the public. Id.

the American College of Trust and Estate Counsel (ACTEC), while elder law attorneys often associate with the National Elder Law Attorneys Association (NAELA).

Don't be embarrassed to inquire about an attorney's academic credentials from law school. While there are many successful attorneys who graduated with only average grades and some failed lawyers who graduated with honors, success in law school is often correlated with successful results for that attorney's clients. Respected lawyers are also frequently engaged in writing and teaching about issues in their areas of expertise.

Hiring the right attorney is a critical decision. Finding an attorney will involve some research on your part. By following some of these suggestions, you will be on the right path to selecting the best lawyer for you.

Questions to Ask Before Hiring a Lawyer:

- ~ How long have you been practicing law?
- ~ How much of your practice is devoted to the kind of legal problem I'm facing?
- ~ Do you accept cases of only one type or category?
- ~ Do other lawyers in your firm have a similar specialization?
- ~ Have you taught seminars for other lawyers or professionals?
- ~ Have you published articles in your field?

WHERE TO FIND THE LAW

The law is generally comprised of statutes, regulations and caselaw (reported opinions by a court to specific facts). The law cited within the above discussion can be found at the links provided in the "Law" section of the ThomasESimmons.com website. South Dakota statutes are abbreviated as "SDCL" for South Dakota Codified Laws. South Dakota administrative rules are abbreviated as "SDAR." Federal statutes are abbreviated as "USC" for United States Code.

DISCLAIMERS

Pursuant to IRS Circular 230, these materials are not intended or written to be used -- and cannot be used -- by taxpayers for the purpose of avoiding tax penalties; taxpayers should seek advice from independent tax advisors based upon their particular circumstances; these materials do not promote any particular plan or arrangement; general information is provided here.

These materials are provided as educational and informational resources only. Consult with a lawyer before making a legal decision since many rules contain exceptions and refinements which are not summarized here. This information should not be interpreted as legal advice. No one legal rule can be applied to all individuals or situations. State law varies tremendously from state to state and unless otherwise indicated, the law discussed here is applicable only in South Dakota. Since the law often changes when

new statutes are enacted and cases are decided, no representations are made to the accuracy, completeness or timeliness of the discussions of law provided above.

© 2009 Thomas E. Simmons Inc.

Thomas E. Simmons
Attorney-at-Law
P.O. Box 8045
Rapid City, SD 57709-8045
Tel. (605) 342-1078
Email: Tom@gpnlaw.com