



ALTUS LEGAL LLC

CONDO AND HOA LAW

## LEGAL TIPS

### Are Monthly Retainer Programs Worth the Money?

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First, let's be clear what we're discussing here – the word “retainer” is used by attorneys to mean different things. An “initial retainer” or “fee retainer” is an advance payment for some legal fees that will be done in the future. Attorneys ask for these from new client associations with which they do not have a prior relationship to ensure that the bills are paid before any work begins.

More often, however, the word “retainer” is used to describe a “monthly retainer” which provides the association with dedicated counsel from an attorney without worrying about ballooning hourly fees for phone calls and emails. It's a flat monthly fee for legal services that fall within the scope of the retainer. To be clear, I'll use the term “monthly retainer” to describe this model.

Board members and property managers often ask whether monthly retainers “make sense” for associations. The answer (like nearly every answer from an attorney) is, “well, that depends.” When deciding whether a monthly retainer is worth the money, the primary factors for each board to consider are:

- 1. How much is the monthly retainer?**
- 2. How often does the association need legal advice?**

The math for the two aforesaid criteria is relatively easy; the board should estimate the *average* number of legal service hours the association needs, then multiply that estimated number of hours by the attorney's hourly fee and determine if the monthly retainer fee is less than that amount. If so, the monthly retainer is probably worth the money, *right?* **Not necessarily.**

Even if the monthly retainer seems like a great deal, there are a few other factors the board should consider before signing up, including:

- 1. How fast will the attorney respond to our calls and emails?**

A monthly retainer program is worth very little if the answers the association needs trickle in at a snail's pace. That means that the speed with which the attorney can respond with actionable information (i.e., a response with something more than just “sorry, I'm swamped, I'll get back to you next week or so!”) is essential when considering the value of the retainer to the association. If the turnaround from initial call or email to substantive information is quick, then the monthly retainer is that much more valuable.

## **2. How comprehensive are the answers?**

Legal issues can be much broader than managers and boards assume. Howard Dakoff, who taught me much of what I know about association law, would often tell me to **look for the questions that the client *should* be asking but did *not*, and then to answer those questions as well.** This is all to say that an attorney who answers only the questions the association asks, perhaps with the proper citation from the declaration, bylaws or statute, is just doing *part* of his/her job. A good attorney will review the initial question, get an understanding of the underlying issue, then answer the initial question as well as include other information the board or manager bear in mind when dealing with the situation.

So a monthly retainer that provides a prompt return call or email response from the attorney with a quick answer may be great, but if that attorney has not highlighted other information or probed deeper to understand the full issue, **the value of that monthly retainer drops considerably.**

## **3. Are those answers in writing?**

This final factor is perhaps the most important, as written answers from an attorney allow the association to shift liability to from the association to the attorney. Associations often make operational mistakes. Managers are busy, sometimes with entire portfolios of properties, and board members have to fit their association operation duties into their own busy lives, which often include family and careers. While the association often wants a quick answer via phone call, a truly valuable monthly retainer program will still have the attorney follow up on many phone calls with an email putting the opinion in writing.

That written record of legal advice not only helps the association act consistently over the years as boards and managers come and go, **it also shifts some legal liability from the association to the attorney if a lawsuit were to occur.** Owners upset with the board may file a lawsuit, and should that occur, the board will want evidence that its actions were based on advice from an attorney. An email or letter is far better evidence than a board member, manager and attorney trying to recall (and often disagreeing) the substance of a quick phone call that may have taken place years ago.

Monthly retainers can be a big money-making operation for law firms. They especially benefit the firm if it has associations on retainer that simply do not call or email very often. If your association is likely to fall into that camp, it's probably better to skip the monthly retainer program altogether and just find an attorney who bills hourly but responds quickly. If, however, the board believes that a monthly retainer would benefit the association, by all means, seek one out. **But be sure to consider the factors included in this article to measure the value of the program accurately, and certainly do not hesitate to terminate the retainer agreement if it appears the value is simply not there.**