

# Hiring a Lawyer to Help Protect the Enterprise



*Being a smart legal consumer can be the best weapon against lawsuits.<sup>1</sup>*

## A. INTRODUCTION

Entrepreneurs are, by definition, risk takers. However, this does not mean that an entrepreneur should be a risk enhancer or should act in a reckless manner. While risks are unavoidable in the business environment, the prudent businessperson, and certainly the prudent entrepreneur, takes steps to minimize some, if not all, of the risks being faced.

After the prudent entrepreneur decides that he or she can meet an unmet need, or meet a need better than competitors, he or she must make several crucial decisions. First, and most important, is deciding on the *nature* of the business being started. Will the enterprise sell goods to customers (retailing or wholesaling) or will it provide services to customers? This, in turn, will help the entrepreneur decide whether the business will initially be operated locally, regionally, nationally, or internationally. Of course, the entrepreneur should also have some idea about the future plans and objectives for the geographic scope of the business operation since this will directly impact the second decision.

Next, the entrepreneur needs to decide on the best *organizational form* for the business. (This topic is covered in detail in Chapter 3). Does the entrepreneur want to form a sole proprietorship, a partnership, a limited partnership, a limited liability partnership (LLP), a limited liability company (LLC), or a corporation? If the corporate form is chosen, should it be an “S” corporation or a “C” corporation? Should it initially be closely held or publicly traded? What are the implications, the benefits, and the burdens of choosing one form over the others?

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<sup>1</sup> Citizens Against Lawsuit Abuse of Central Texas, found at <http://www.calactx.com/about-us/>.

The decision reached here will potentially have long-term and far-reaching effects on the enterprise and should not be made lightly or hastily.

The first two of the three “crucial decisions” are rather obvious to anyone who is considering launching a business venture, and the entrepreneur has

#### MAKE A NOTE

There is no one perfect form of business organization. One size does not fit all! Consider the expenses of formation, the taxation of the enterprise and its owners, and the potential for personal liability in each form of organization before deciding on the form the enterprise will initially take.

probably been considering them. The third “crucial decision” to be made, however, is much less likely to have been considered: Who will provide legal representation to the venture? Once the entrepreneur has decided on the attorney that he or she wishes to hire, a decision should be made about *how* to hire the attorney. For example, should the attorney be on **retainer**, or

consulted on a case-by-case basis as needed? Most entrepreneurs avoid hiring an attorney on retainer because doing so requires an expenditure of funds early in the relationship. This is potentially disadvantageous because new ventures are often strapped for cash.

Retainers usually take one of two forms: either the client pays a certain amount of money for legal work to be performed, with the attorney then deducting fees and expenses as they are incurred, or the client pays a “retainer fee” in order to have the attorney “on call,” available to the client as needed—and with fees charged for each time that such services are needed in addition to the retainer fee initially paid.

## B. CHOOSING AN ATTORNEY

### 1. Gathering Recommendations

Choosing an attorney is easy, but choosing the right attorney is more difficult. It requires an investment of time and energy, and the right attorney for one purpose will not necessarily be the right attorney for another purpose at another time. For example, Stacey may be very adept at drafting contracts, but not nearly as adept at dealing with human resource issues. If you have Stacey on retainer, you may be hesitant to hire another attorney to represent you if an employee sues you for an alleged human resource violation.

Many people select an attorney based on references from family and friends or word of mouth, basing their decision on their general perception of the

attorney's qualifications and reputation. While this method has some validity, it is also fraught with danger. Before following the recommendations of friends and family, entrepreneurs should be certain that these friends and family members have had similar legal issues. Selecting an attorney who is very highly regarded for his or her ability in preparing wills or handling divorces may not be a good selection for handling negotiations with a union or in drafting a contract for the international sale of goods to a foreign customer. Yet this may be the only type of attorney your friends and family know. For these reasons, an entrepreneur might be better advised to solicit recommendations from other entrepreneurs or venture capitalists.

Many ventures regularly deal in one or more specific legal areas as a part of the firm's normal business practices. In such circumstances, the firm should seek lawyers who specialize in these areas. The firm may find that one lawyer is excellent in one or more of the areas in which representation is needed but is not as well versed or qualified in other areas. In such a situation, the firm may need to have multiple attorneys, depending on the legal issue involved in any given situation. It is not necessary to rely exclusively on one attorney or even one law firm for all of one's legal needs, although it is much simpler if the entrepreneur can do so. Just as some people choose a general practitioner to handle and coordinate their medical care, many entrepreneurs hire a general business attorney to coordinate their legal affairs. The general business attorney can anticipate legal problems in many legal areas and coordinate the efforts of the specialists.

The National Federation of Independent Business (NFIB) and the Citizens Against Lawsuit Abuse (CALA) issued a guide that provides *Four Helpful Tips for Hiring a Lawyer*.<sup>2</sup> According to this guide, a businessperson can find legal counsel through any of the following resources:

1. The State Bar Association, through the local bar association, which will provide names of attorneys in the locality who specialize in the type of legal issues involved, and also will inform the businessperson if any of these attorneys have been the subject of an ethical inquiry or complaint.
2. Lawyer referral services, which will refer the businessperson to an attorney who handles legal issues similar to those the businessperson is facing. There is normally a fee, frequently \$30,

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<sup>2</sup> Karen R. Harned, *Four Helpful Tips for Hiring a Lawyer*, National Federation of Independent Business (NFIB) website. (Sept. 13, 2013). Found at <http://www.nfib.com/article/four-helpful-tips-for-hiring-a-lawyer-63643/>.

associated with the use of a referral service. This fee is paid by the businessperson. Often the businessperson is entitled to a half hour consultation with the attorney to whom he or she is referred for no additional fee.

3. Recommendations, which were discussed above, especially those from fellow entrepreneurs who have faced similar situations, and from venture capitalists. Recommendations should also be sought from the entrepreneur's attorney, if that attorney does not specialize in the legal issues for which assistance is needed.
4. Advertisements, whether through the Yellow Pages, billboards, the Internet, or the media. The NFIB does point out that many lawyers do not advertise, and the entrepreneur should not believe everything that he or she sees in these advertisements. (The prudent entrepreneur would be well advised to cross-reference any attorney who has a particularly effective advertisement with the State Bar Association to see if the attorney's résumé matches the advertising claims put forth).

The recommendations of fellow entrepreneurs and the entrepreneur's attorney are probably the most relevant of these. Fellow entrepreneurs are likely to have faced similar situations and can call on their experience in making a recommendation, while the entrepreneur's attorney has a vested interest in the success of the venture and is also likely to have worked with—or against—any attorney he or she recommends, and has firsthand knowledge of the recommended attorney.

In addition, entrepreneurs may want to check *The Martindale-Hubbell Law Directory*, an excellent source of all-around information about attorneys. The directory is available on the Internet, through services such as Lexis. Martindale-Hubbell lists practicing attorneys by state and by city; it also lists areas of practice, backgrounds, honors, and publications. Perhaps the most important aspect of the listings in Martindale-Hubbell is a rating system under which attorneys are rated in three areas: legal skills, ethics, and professionalism. Ratings are voluntary, and not all attorneys choose to be rated. These ratings are derived from confidential surveys of local judges and attorneys, and provide a good indication of the respect with which any given attorney is held in his or her local legal community. These ratings are less important, but they do provide the entrepreneur with a measure of the respect of the local bar for the rated attorney, which should be a factor in selecting an attorney.

For those times that the entrepreneur needs a trial attorney, the National Board of Trial Advocacy (NBTA) publishes a membership directory that contains information on experienced trial attorneys. This is the only American Bar Association-approved directory of trial lawyers, and the board is the only national organization that certifies civil trial lawyers based on objective data. An attorney certified by the board “has demonstrated skill and expertise in a particular field and has proven it through rigorous examinations and testing by the NBTA.”<sup>3</sup>

Before the entrepreneur interviews the attorneys, he or she should think about the venture. Where is it now? Where will it be in three years or five years? What legal issues does he or she anticipate? Every venture will deal with contract law issues, an area in which virtually all attorneys are competent and comfortable, but many ventures will face legal issues in specialized areas. For example, if the venture will be manufacturing goods for export, an attorney who specializes in trade law will be needed. A venture that will be dealing with unionized employees will need an attorney who is familiar with labor law. An entrepreneur who is relying on a patent to gain access to an industry will need an attorney who regularly handles patent law issues. The entrepreneur should carefully consider which legal issues he or she expects to encounter at present and in the near future to help clarify the particular skills he or she is likely to need in a lawyer.

## 2. Interviewing the Attorneys

Once the entrepreneur has gathered the names of those attorneys who possess the desired skills and characteristics, it is time to make a selection. In order to do so, the entrepreneur should contact at least four or five of the lawyers on the list to arrange for interviews. (Some recommend that the entrepreneur should interview as many lawyers as possible. However, the entrepreneur wants to start the venture, not become an expert in hiring lawyers). As one commentator noted, “There is no substitute for a face-to-face meeting when you are trying to select an attorney.”<sup>4</sup> Before calling to schedule an appointment, the entrepreneur should be prepared to explain his or her situation and why an appointment is necessary. The entrepreneur should clarify whether the attorney will charge for the meeting and the information that he or she should bring to the meeting. He or she should also be certain to find out what the attorney will expect from him or her as the client.

The entrepreneur may decide to invite the prospective lawyer to lunch, since a luncheon is less formal and it provides an opportunity to get to know the lawyer

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<sup>3</sup> *Welcome to the National Board of Trial Advocacy*, found at <http://www.nbtalawyers.org/>.

<sup>4</sup> James J. White, *What You Need to Know Before You Hire a Personal Injury Lawyer*, at How Lawrence White Bowes website, found at [http://www.scotialaw.com/resources\\_primer.htm](http://www.scotialaw.com/resources_primer.htm).

and his or her personality. If the lawyer is going to use junior associates or paralegals, it would be advantageous to invite them as well. The entrepreneur may find that he or she has more direct contact with these assistants than with the attorney.

After interviewing each attorney, the entrepreneur should answer the following questions:

1. Am I comfortable enough with this individual to work with him or her?
2. Does this lawyer have the experience and the skill to adequately represent me and my business interests?
3. Do the lawyer's explanations seem clear and logical? (For example, does he or she communicate in plain English or speak "legalese," making it difficult to follow the explanation? Is he or she condescending and aloof, or does he or she seem to be genuinely interested in working with the entrepreneur?)
4. Do the lawyer's fees and expenses seem reasonable and justified?
5. Will the fee arrangement be in writing?

If the answer to each of these questions is "yes," the entrepreneur should consider hiring the attorney. If any question results in an answer of "no," the search for an attorney should continue.<sup>5</sup>

The final hiring decision may be affected by a few other questions that the entrepreneur will need to ask of the attorney(s) that he or she finds acceptable. Many of these questions can also be answered with a simple "yes" or "no."

1. Can the entrepreneur pay over time? Larger law firms are more likely to offer payment plans. The entrepreneur should ask for monthly billings even if he or she is spreading the payments over time, thus allowing the entrepreneur to better manage the legal fees and his or her cash flow.
2. Does the law firm use secure Internet connections so that email communications are relatively safe?
3. How long does it normally take the attorney to reply to messages?

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<sup>5</sup> 10 *Questions to Ask Your Prospective Lawyer*, FindLaw website, found at <http://hirealawyer.findlaw.com/choosing-the-right-lawyer/questions-to-ask-a-lawyer.html>.

4. How much does the lawyer know about the industry that the entrepreneur is entering?
5. Does the lawyer have much experience dealing with entrepreneurs or handling their legal issues and problems?
6. Is the lawyer acquainted with other businesspeople, including venture capitalists and bankers?

### 3. Hiring the Attorney

Once the entrepreneur has decided which attorney to hire, he or she will need to decide on what basis the attorney will be hired. There are a number of standard fee arrangements that are likely to be available, and the entrepreneur-as-client and the attorney will need to discuss which arrangement is best for their situation. As with any contractual relationship, it is important that the entrepreneur understand how he or she will be billed and what services will be provided. The standard fee arrangements are listed in Exhibit 1.1. The entrepreneur will have to determine which fee arrangement is best in his or her particular situation. There is no “best” fee arrangement for entrepreneurs, consequently each individual entrepreneur should determine which fee arrangement works best in his or her particular situation. Even then, as the venture grows and matures, the best fee arrangement for that venture is likely to change. Thus, the entrepreneur will need to decide how to proceed based on his or her particular circumstances and the financial wherewithal of the venture at the time. If the venture is in its start-up phase, an hourly fee arrangement is likely to be most appropriate since it only requires the commitment of funds on an as-needed basis. A more stable venture may be better served by a retainer with the attorney, especially if the entrepreneur has confidence in the attorney or the law firm based on prior transactions.

If the attorney is being hired for a particular purpose or to handle a specific case, he or she is likely to be hired on either a **flat fee** basis or on an **hourly** basis. With a flat fee arrangement, the attorney is paid a specified dollar amount to provide a specific service. This arrangement is most likely to be used for something relatively standard and straightforward, such as incorporating a business or filing for bankruptcy.

**Exhibit 1.1      Standard Fee Arrangements<sup>6</sup>**

| Type of Fee Arrangement | How the Fee Is Determined  |
|-------------------------|--|
| <b>Consultation fee</b> | The lawyer charges either a fixed or an hourly fee for the first meeting with a client.  |
| <b>Contingency fee</b>  | The lawyer's fee is based on a percentage of the amount awarded in the case. If you lose the lawyer receives nothing, although you may still be obligated to pay the lawyer's expenses. The entrepreneur should have a clear idea about which expenses he or she will need to pay.<br>A one-third contingent fee is common, although if the case goes to trial the percentage is likely to be higher.<br>(May not be used in certain types of cases, i.e., criminal cases, child custody.) |
| <b>Flat fee</b>         | The lawyer charges a specific total fee for all work involved in handling the matter.<br>Normally used only in relatively simple and/or routine cases such a drafting a will or incorporating a business.  |
| <b>Hourly rate</b>      | The lawyer charges the client for each hour or fraction of an hour devoted to the handling of the situation. (Hourly fractions may be in any agreed manner, such as 6, 10, 15, 20, or 30 minutes.)<br>The rate may also depend on whether the time is spent in research, consultation with the client, or courtroom appearance.  |
| <b>Referral fee</b>     | A lawyer who refers you to another lawyer may request a portion of the total fees you pay in the case.<br>Referral fees may be prohibited or restricted under a state's code of professional responsibility for lawyers.   |
| <b>Retainer fee</b>     | The lawyer is paid a set fee (think of this as a down payment or a pre-payment for legal representation) against which future fees are billed. A retainer often means that the attorney is "on call" for any legal problems you may encounter.   |
| <b>Statutory fee</b>    | The fee in some cases may be set by statute, while in other cases the court will set and approve any fee the client pays. These are used in a limited number of cases, such as bankruptcy and probate.   |

*Source:* FindLaw website, <http://hirealawyer.findlaw.com/attorney-fees-and-agreements/types-of-legal-fees.html>.

<sup>6</sup> *Types of Legal Fees*, FindLaw website, found at <http://hirealawyer.findlaw.com/attorney-fees-and-agreements/types-of-legal-fees.html>.



If the legal situation is not so simple and straightforward, the lawyer is more likely to insist on being hired on an hourly basis. In this arrangement, the lawyer charges a set fee per hour for each hour devoted to the legal issue or case. The hourly rate will also vary if the lawyer has to go to court, as opposed to handling the case less formally outside the courtroom. There is no set hourly rate for all lawyers, and lawyers with more experience and expertise will normally charge more per hour than lawyers with less experience or expertise. Despite the higher hourly fee, the experienced lawyer may still cost less because he or she may complete the task in fewer hours. It also increases the total costs to the business if a lawyer makes a mistake handling the venture's affairs. There are also regional differences in the hourly rates that attorneys charge.

If the entrepreneur would like to use the attorney for more general representation, he or she should discuss hiring the attorney on a **retainer** basis. When an attorney accepts a retainer, he or she is paid a set amount "up front" in exchange for agreeing to represent the client for some specific time. The attorney is agreeing to be "on call" for the client, and has guaranteed to be available during the retainer period. Depending on the terms of the retainer agreement, the client may have to pay the retainer first in order to assure that the attorney is "on call" and available, and then the client will have to pay an hourly rate when the attorney is actually used. Generally, with a retainer the attorney is committing not to accept another client who wants to sue or negotiate with the entrepreneur. The retainer agreement may also be viewed as a form of prepayment for legal services to be rendered, with any actual legal expenses being deducted from the balance in the retainer account as work is performed. Remember, however, that this up-front payment may be a financial strain on a new venture, perhaps with severe cash flow consequences. As a result, the entrepreneur will likely be better served, at least initially, by hiring the attorney on an hourly basis.

#### MAKE A NOTE

When an attorney is hired on an hourly rate, the entrepreneur should ask for a written estimate of the number of hours likely to be needed. This provides an estimate of the expected total cost so the entrepreneur does not suffer from "sticker shock" when the bill is received. Also, if it actually takes much longer than estimated, the attorney may feel obligated to bill for the number of hours on the estimate. The entrepreneur should also ask whether junior associates or paralegals will be doing any of the work and what the hourly rate is for their services.

The attorney and the entrepreneur may also agree to a **contingency fee** arrangement, an arrangement in which the lawyer agrees to accept a percentage of any settlement acquired on behalf of the entrepreneur rather than being paid on

#### MAKE A NOTE

Retainer fees can be interpreted in a number of ways. If you decide to have your attorney “on retainer,” be certain that the attorney explains the retainer fee in detail and that you understand what it does—or does not—assure you.

the basis of either an hourly rate or a flat fee. Contingency fees are most often used when the entrepreneur is the plaintiff in a tort action and the attorney expects to recover a significant verdict. The contingency fee agreement often calls for one percentage rate if the case is settled out of court, with a second and higher

percentage if the case goes to trial. The agreement might, for example, call for the attorney to receive one third of the settlement if the case is settled and one half if the case is decided at trial. Even if the parties agree to a contingency fee arrangement, the client generally will be expected to pay the litigation expenses incurred by the attorney. Sometimes the lawyer is willing to pay these expenses initially and then bill the entrepreneur for them. It is also important for the entrepreneur to find out whether the contingency percentage is taken from the recovery before such expenses are deducted or after the deduction of expenses.

#### 4. Large Law Firms or Smaller Firms

Large law firms with many lawyers also have many clients. When entrepreneurs choose such a firm, they may discover that the firm cannot represent them in a particular matter because the “opponent” is also a client of the firm.

Large firms often charge a higher hourly rate, although they may be more efficient resulting in a lower overall cost. This may be attributable to the use of lower-cost junior associates and paralegals.

Large firms often have specialists in a variety of areas. If the entrepreneur chooses a large firm, he or she may not need to search for other counsel when a new legal issue arises. It is likely that the firm will have attorneys who specialize in areas such as trial work and patent law. It is probable that the entrepreneur did not meet these attorneys during the interview process. The entrepreneur may discover that he or she does not care for the personality of other attorneys in the firm.

One of the most important aspects of the large firm/small firm decision is how important will the entrepreneur be to the firm. If the entrepreneur hires a small firm, he or she may be one of the firm's most important clients. If the entrepreneur selects a large firm, he or she may be one of its smallest clients. This may influence how quickly the lawyer responds to the entrepreneur's urgent needs. If there is a conflict between clients of a law firm, the firm will have

to choose which one it will continue to represent. The law firm will consider the relative importance of each of the clients in making its determination.

#### MAKE A NOTE

Assume the entrepreneur uses a general business lawyer and needs an attorney in another area, for example, to defend the venture from a negligence claim. The entrepreneur may be inclined to hire another attorney from the same law firm. This may be easier. However, the entrepreneur may not have the same good rapport with the new attorney. He or she should not feel compelled to continue to use the new attorney.

### C. USING A LAWYER EFFECTIVELY

Selecting and hiring an attorney with whom the entrepreneur is comfortable and in whom the entrepreneur has confidence is only the first step in obtaining adequate legal representation. The entrepreneur needs to utilize this lawyer effectively to generate the greatest benefit with the least expense possible. An attorney's time is precious—and expensive—and the entrepreneur should take care to not waste his or her own time or the attorney's time when legal services are needed. In order to use legal counsel effectively, the entrepreneur should make every reasonable effort to be prepared before contacting the lawyer and to communicate clearly and concisely during the contact. The entrepreneur should also realize that the mere fact that an attorney has been hired or is available does not mean that the attorney needs to be consulted on every matter. Since entrepreneurs are generally proactive, they are less likely to take the time to consult with their attorney on every matter. They may be more likely to underuse their attorney than to overuse him or her.

Obviously, there will be times when the entrepreneur needs to contact his or her attorney promptly because legal services are needed right away. If the entrepreneur receives service of process because he or she is being sued, the entrepreneur needs to contact the attorney as quickly as possible. Similarly, if the entrepreneur determines that he or she needs to file suit against another party, the

#### MAKE A NOTE

While an entrepreneur is likely to want to save money, especially if the venture is still in the start-up stage, choosing the least expensive attorney is not necessarily a good strategy. An attorney who is much less expensive is also more likely to be relatively inexperienced. As a result, he or she may take longer to find a recommendation than a more expensive, but more experienced, attorney would.\*

\* *Attorneys' Fees: The Basics*, Nolo website, found at <http://www.nolo.com/legal-encyclopedia/attorneys-fees-basics-30196.html>.

entrepreneur should contact legal counsel in a timely manner to discuss the matter and to ensure that the necessary steps are taken before the **statute of limitations** expires. The statute of limitations governs how long a plaintiff has to file a lawsuit. However, many of these situations will arise owing to the commission of a tort, a civil wrong, most commonly in a non-business setting. An entrepreneur who has legal issues that arise in the normal course of his or her business will usually have the time to review the situation, to consider options, and to decide whether the attorney needs to be brought into the process. Of

course, if there is any doubt about the advisability of bringing the lawyer into the process, the lawyer should be asked. If the entrepreneur has chosen the attorney wisely, the entrepreneur will be able to trust that the attorney will become involved only if his or her involvement is appropriate.

Before contacting the lawyer, the entrepreneur should formulate a brief statement that summarizes the issue, so that when the lawyer is called the entrepreneur can recount the problem succinctly. A 20- to 30-word summary of the issue is ideal. The entrepreneur then calls the attorney to make an appointment and provides the prepared statement summarizing the reason for the appointment; the attorney will be able to estimate the amount of time likely to be needed and can schedule the appointment accordingly. The attorney can then request the necessary background information from the entrepreneur. The entrepreneur may be surprised about what information is relevant to the legal matter since he or she often lacks legal expertise.

Prior to the appointment itself, the entrepreneur should prepare a summary of the relevant information, together with a listing of dates, times, names, and

addresses.<sup>7</sup> The summary of the relevant information should, ideally, be reduced to one or two pages, with the names and addresses and any other information appended. If there are any documents that are germane to the issues, a copy of these documents should also be appended. By providing the attorney with a concise summary and copies of the relevant documents, the attorney can more quickly and easily determine the best course of action for the entrepreneur. The attorney will also be able to determine whether the situation will require the services of another attorney who specializes in the legal area that is involved in the particular case. In addition, by providing the information in an organized manner, the entrepreneur can minimize the time that the attorney needs to make an informed decision and provide a recommendation. The old adage “Time is money” should be amended slightly in these situations; when meeting with one’s attorney, the saying should be “His time is my money.”

When the entrepreneur is entering into contracts, he or she may find it cost effective to write up the contract terms and then have the attorney write the actual contract. These documents are sometimes called term sheets. Obviously, the entrepreneur should avoid inserting terms that he or she does not understand. In the alternative, the entrepreneur may obtain a standard form contract and mark what should be changed and what he or she does not understand. The entrepreneur can then review the draft with the lawyer. (These ideas will be addressed in more detail in Chapter 12).

For example, suppose Andrea, an entrepreneur, is planning to hire Khalil for an executive position. Khalil will have access to proprietary information that is being treated confidentially within the enterprise, possibly even treated as a trade secret. If Andrea intends to include a non-disclosure statement, or a covenant not to compete in the employment contract, she should prepare some appropriate guidelines and then consult with her attorney to have the contract drawn up. The attorney will be able to ensure that these restrictions are likely to be upheld by the courts if a case should arise, being neither too restrictive nor too lax. If the court decides the terms are too restrictive they may possibly be found unconscionable and thrown out; if the terms are too lax they may fail to provide the protections sought by the entrepreneur, Andrea in this example.

The entrepreneur may also want occasionally to send the lawyer links to news articles that relate to the venture, a subtle reminder of the relationship between the two and ensuring that the attorney is at least aware of news affecting the entrepreneur and the venture. In turn, this may make it more likely that the

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<sup>7</sup> Alexander, *supra* note 4.

attorney will think of the potential impact on the entrepreneur's venture when he or she reads about a new statute, regulation, or court case related to the venture.

The entrepreneur should also consider having the attorney periodically attend meetings with the venture's board of directors or management team. Often the entrepreneur will not realize that a planned action may have potentially negative legal implications. By having the attorney attend some of these meetings, the attorney will be able to recognize the potential problems and warn the entrepreneur in advance, thus possibly avoiding a misstep. The attorney will also be available if the entrepreneur, his or her management team, or the board of directors have questions about potential legal implications of an action or the best way to address a particular issue from a legal perspective. Some lawyers specializing in small businesses may agree to attend a certain number of meetings without an additional charge. However, even if there is an hourly fee charged for the attorney's attendance and participation, the savings from avoiding legal problems may make the expenditure a wise "investment."

## D. USING LEGAL SPECIALISTS

Many attorneys develop a specialty in some area of law, whether through interest, experience, or serendipity. "Entrepreneurial law" is not recognized as a legal specialty at this time. However, the current business trends and practices that form the impetus for many entrepreneurial ventures also tend to drive the

development of some of these legal specialties as attorneys recognize a growing demand for a particular specialization that coincides with their interests. There are attorneys and law firms that seek out entrepreneurs and small businesses as clients, thereby developing an expertise in the area even though it is not recognized as a "legal specialty" yet. The use of such a specialist, when appropriate, can be of tremendous benefit to the client, even

### MAKE A NOTE

The attorney may want to include associates and paralegals when attending these meetings. If he or she asks about this, find out whether the venture will also be billed for their time. If so, the entrepreneur should find out how their attendance will benefit the venture. If he or she is dissatisfied with the reply, he or she should deny the request.

though such a specialist is likely to charge more per hour than the client's regular attorney. However, the specialist may still be more cost effective because he or she can perform the service more quickly and accurately. For an entrepreneur, the use of attorneys who specialize in different areas of the law may, on occasion, work to the advantage of the venture.

If an entrepreneur is launching a business on the basis of an invention, he or she will be well advised to seek the advice and guidance of a patent attorney. Patent law falls into the category of intellectual property law, a complicated field, and the lawyers who specialize in this area are apt to have a significant advantage over an attorney who has a more broad-based practice. It is also an area that has had significant recent changes with the Leahy-Smith America Invents Act (AIA), effective with new patent applications filed on or after Mar. 16, 2013.<sup>8</sup> Patents, copyrights, licensing, and trademarks involve very specific laws domestically and somewhat complex treaties in the international environment. Unless the attorney is familiar with these statutes and treaties, he or she is not likely to provide the same quality of advice and guidance as the specialist, and the time that it will take for the attorney to acquire even a portion of that expertise will be billed to the client. Thus, the added expenses of the specialist may be offset by the reduced number of hours needed to resolve the issue.

An entrepreneur who will be involved in a technology-related endeavor is likely to need a lawyer who possesses special technical expertise. Technical knowledge, whether involving computers and software or e-commerce, is a relatively new specialization, but one that is growing in importance and popularity.

If the entrepreneur will be dealing with unions, he or she may be better served by procuring the services of a labor law specialist than by relying on his or her regular attorney. While the regular attorney is likely to be very qualified and efficient when it comes to drafting a contract, he or she may be much less qualified to draft a collective bargaining agreement. Familiarity with the various federal and state labor and employment laws and knowledge of “hot button” issues that regularly arise in these areas will more than offset the extra expense of hiring the specialist, while also allowing the entrepreneur to take preventive steps to avoid the problem areas.

In a similar vein, employment law is an area in which an entrepreneur would be wise to rely on specialists because of the ever-changing scope of such areas as the Americans with Disabilities Act, the Family and Medical Leave Act, and the various Equal Employment Opportunity topics that fall within the jurisdiction of the Equal Employment Opportunity Commission (EEOC).

Environmental law is another legal topic that is likely to require the use of a lawyer with special expertise. Compliance with the various environmental laws, both federal and state, is essential, and violations can be extremely expensive. The entrepreneur who will be operating a manufacturing facility, or who will be

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<sup>8</sup> Leahy-Smith America Invents Act, Pub. L. No. 112–29, 125 Stat. 284.

generating wastes and by-products that may pose an environmental hazard, will need the guidance of an environmental specialist. This specialist can also steer the entrepreneur through the many problems dealing with environmental impact statements.

Immigration law is a specialization that is increasingly in demand, especially for entrepreneurs engaging in any of a number of service industries. For example, the construction industry in many parts of the country has a significant number of immigrant employees, and the entrepreneur employer needs to ensure that he or she is in compliance with the immigration laws and that all of the employees are legally able to be employed by the venture. The increasing concern about illegal immigrants across the country makes this a specialization that is quite likely to grow significantly in the near future.

Entrepreneurs need to remember that lawyers are licensed by the individual states, and most U.S. lawyers are not licensed to practice outside their home state. They are generally not licensed to practice in foreign countries either. However, lawyers who are involved in international trade tend to specialize in certain countries. They are commonly used to assist in negotiations and review documents. Establishing a factory in China involves different issues and nuances from establishing a factory in Mexico. An attorney or law firm with experience dealing with a particular country or region can help the entrepreneur avoid some of the pitfalls that often arise in dealings within that country or region.

If an entrepreneur plans to establish the business as a partnership, a limited partnership, an LLP, an LLC, or a corporation, he or she will need to comply with federal and state securities regulations. While many attorneys are quite competent to handle the legal issues involved with securities at the state level in a particular state, a significant number will be less prepared to address the same or similar issues when the Securities and Exchange Commission's (SEC) rules and regulations are potentially at issue. In fact, a number of attorneys will recommend that the entrepreneur either consult with a specialist in securities law or allow the attorney to do so. Of course, the entrepreneur will be paying for this consultation in either case.

Recognizing when a legal specialist should be consulted, and then finding the correct specialist for the situation, will likely carry a higher initial expenditure, but the benefits over time will more than offset this initial cost, especially when the specialist helps the entrepreneur to avoid problems that might otherwise have occurred.



Exhibit 1.2 lists the current “top five” areas of legal specialization, as determined by LawCrossing, a website listing jobs in law.

Other specialization topics listed as potential growth areas include environmental law, financial services, commercial real estate, and corporate compliance, especially with the new regulations imposed under Sarbanes-Oxley. Sarbanes-Oxley will be covered in more detail in Chapters 3 and 6.

### Exhibit 1.2 Today’s Top Legal Specialties<sup>9</sup>

1. Intellectual Property Law
2. Technical Expertise
3. Corporate Transactions
4. Private Equity
5. Immigration

*Source:* Karen Maheu, *What’s Hot? Today’s Legal Specialties*, LawCrossing, found at <http://www.lawcrossing.com/article/index.php?id-3767>.

## E. HOW MUCH WILL THE ATTORNEY COST?

While the entrepreneur wants to work with an attorney or a law firm with whom he or she is comfortable, the attorney or law firm needs to be one that he or she can afford. Given the fact that cash is often tight, especially in the initial days of the venture, costs must be reasonable for the venture and must fit within the overall budget of the operation. Thus, the entrepreneur needs to understand how much the legal representation will cost, and how the expenses will be billed.

## F. BILLING PRACTICES OF LAW FIRMS

The entrepreneur should ask the lawyer to provide a sample bill of the sort that he or she is likely to receive. This will give the entrepreneur a good idea of how readable the bill is and what types of things will be included. For example, law firms generally charge for things like making copies, using courier service, and talking on the phone. For business advice most lawyers charge by the hour or by the job. If the lawyer is charging by the hour, what increments does the firm use for billing? Does the attorney bill for 30-minute increments or 6-minute increments? A lawyer generally bills each time he or she gets the file out and speaks

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<sup>9</sup> Karen Maheu, *What’s Hot? Today’s Legal Specialties*, LawCrossing, found at <http://www.lawcrossing.com/article/index.php?id-3767>.

to the entrepreneur. Some lawyers charge for responding to emails, and some do not. Some lawyers may agree to attend one board meeting a month without charging for the time. The entrepreneur may want to negotiate for this. It is extremely valuable because the lawyer can alert the board and the chief executive officer to potential legal problems implicit in certain decisions. It will also keep the enterprise in the mind of the lawyer, who may know about opportunities or have valuable contacts.

One issue that may arise involves “hidden head counts,” discussed in a Make a Note earlier in the chapter. The lawyer may request that junior associates and paralegals attend meetings. This can result in being billed for two or three legal representatives from the law firm at the same meeting. The entrepreneur should ask that only one legal representative attend meetings unless he or she expressly approves more than one. Before approving the additional people, the entrepreneur should ask whether he or she will be billed for these additional people and how their attendance at the meeting will benefit the entrepreneur. The entrepreneur does not want to pay for the legal training of junior associates and paralegals.

It is not only permissible but also advisable to ask questions about bills and billing that the entrepreneur does not understand. The entrepreneur should also keep track of his or her contacts with the law firm, with whom he or she spoke, and the issue that was discussed. Such a record may prove valuable if there is ever a billing dispute.

## **G. ATTORNEY-CLIENT PRIVILEGE**

Entrepreneurs tend to be somewhat reluctant to discuss the details of their enterprises, fearing that someone may take what one learns in the discussion to launch his or her own competing business, potentially to the entrepreneur’s detriment. This is especially true for entrepreneurs involved in businesses that concern intellectual property. This reticence makes perfect sense when talking with most people, but it will be a detriment to the entrepreneur and his or her interests when talking with his or her lawyer. In order for a lawyer to provide the best advice and guidance possible, the lawyer needs access to all of the relevant information. Without full disclosure by the client, the lawyer cannot properly provide the services for which he or she was hired.

Fortunately for all involved, these communications between the client and the attorney can be open, candid, and unfiltered, thanks to the existence of the **attorney-client privilege**. “Attorney-client privilege protects confidential

communications between an attorney and his or her client ‘made for the purpose of furnishing or obtaining professional legal advice and assistance.’”<sup>10</sup> This privilege prohibits an attorney from revealing any communications between the attorney and the client without the client’s permission except when the client informs the attorney of the client’s intention to commit a crime in the future. The privilege belongs to the client, not to the attorney, and only the client can waive this privilege. The privilege is considered to be a fundamental right. It is found in the common law or statutes of all 50 states, complementing the constitutional right to having the assistance of counsel.<sup>11</sup> However, once the entrepreneur officially begins the business, for example, by forming it as a corporation, LLP, or LLC, the business itself may become the client. The entrepreneur should make it clear in his or her relationship with the attorney who is the client.

In a similar vein, the **attorney’s work product** is privileged, although this privilege is not an absolute one. The attorney’s work product refers to those tangible items the attorney has prepared for a trial, or in anticipation of a possible trial at some later date. The work product privilege is not a complete protection since a court may compel the disclosure of “factual” work product if the opposing counsel can show a substantial need for the information sought.<sup>12</sup> By contrast, the protection afforded to “opinion” work product, work reflecting the attorney’s subjective beliefs and strategies, is nearly absolute.<sup>13</sup>

#### MAKE A NOTE

If at any time the entrepreneur becomes disenchanted with his or her attorney or the legal services the entrepreneur is receiving, he or she should be prepared to terminate the relationship. The attorney works for the entrepreneur and the entrepreneur has the right to terminate the relationship.

## H. FINAL THOUGHTS

The act of hiring an attorney is likely to be the third most important act of an entrepreneur who is launching a new venture. He or she wants to be able to rely on the attorney who is selected, and the decision is seldom easily made. “After

<sup>10</sup> *In re LTV Securities Litigation*, 89 F.R.D. 595, 600 (N.D. Tex. 1981).

<sup>11</sup> Sue Michmerhuizen, *Confidentiality, Privilege: A Basic Value in Two Different Applications*, American Bar Association’s Center for Professional Responsibility. Found at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/confidentiality\\_or\\_attorney.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/confidentiality_or_attorney.authcheckdam.pdf).

<sup>12</sup> *Attorney Work-Product Privilege*, Legal Information Institute (LII), found at [https://www.law.cornell.edu/wex/attorney\\_work\\_product\\_privilege](https://www.law.cornell.edu/wex/attorney_work_product_privilege).

<sup>13</sup> Thomas D. Sawaya, *The Work-Product Privilege in a Nutshell*, 32 FLA. BAR J. 67 (July/Aug.) 1993. Found at <https://www.floridabar.org/divcom/jn/jnjournal01.nsf/Autor/39BB2FD0FA1AD5E885256ADB005D5EEC>.

all of your research and consultation meetings, the final decision on whom to hire is yours. Don't underestimate your gut instinct. Rapport is important in an attorney-client relationship, and your relationship can last several years. Thus, it's important to select a lawyer you feel comfortable with and can trust."<sup>14</sup> However, it is important to keep in mind which party is the employer and which party is the employed.

In applying the information in this chapter, the entrepreneur should reflect on the application questions set out in the box below:

#### APPLICATION QUESTIONS

1. When an entrepreneur is considering hiring an attorney, what is the single most important thing that he or she should consider in making the selection?
2. What sort of fee arrangement should an entrepreneur seek when hiring an attorney, and does the maturity of the venture affect the fee arrangement that he or she is seeking?
3. What should an entrepreneur look for in his or her legal representation if the venture will be involved in international trade? How does this differ from what the entrepreneur would look for if the venture has no current international trade aspirations?
4. What legal specialties are likely to be involved in a given entrepreneurial venture, and how can these specialty topics best be addressed?
5. Why is attorney-client privilege important to an entrepreneur, and how does the existence of this privilege help to protect the entrepreneur in dealing with his or her attorney?

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#### SUMMARY

Choosing an attorney is one of the three most important decisions an entrepreneur makes when launching a venture, following the nature of the business and the organization of the business. The attorney will provide advice and guidance through the potential legal "minefields" that the entrepreneur may face in the venture. The process of choosing an attorney should not be taken in haste. The entrepreneur should use a careful and thoughtful approach to this decision.

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<sup>14</sup> Brian Farkas, *Selecting the Lawyer Who's Best for You and Your Legal Needs*, Lawyers.com, found at <http://research.lawyers.com/selecting-a-lawyer.html>.

The entrepreneur should seek recommendations from a variety of sources, including other entrepreneurs, venture capitalists, the State Bar Association, and the Martindale-Hubbell directory. Once a list of recommended attorneys has been developed, the entrepreneur should narrow the list down, based on what he or she perceives as the legal needs of the venture at the time, and interviews should be arranged with four or five of the attorneys at the top of the “short” list.

When the entrepreneur finds an attorney with whom he or she feels comfortable, and in whom he or she has confidence, that attorney should be hired. The entrepreneur will need to discuss the various fee arrangement possibilities and reach an agreement with the attorney on the type of arrangement they will be entering.

It is essential that the entrepreneur utilizes the attorney’s time and expertise efficiently, taking advantage of the attorney’s knowledge without misusing his or her time. The entrepreneur should make certain that, whenever possible, his or her discussions with the attorney are confidential, and made for the purpose of obtaining legal advice or assistance so that the communication is protected by the attorney-client privilege.

#### KEY TERMS

|                           |                        |
|---------------------------|------------------------|
| attorney-client privilege | flat fee               |
| attorney’s work product   | referral fee           |
| contingency fee           | retainer               |
| consultation fee          | statute of limitations |

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#### END-OF-CHAPTER QUESTIONS

1. What sorts of questions should an entrepreneur ask of an attorney during the interviewing process in order to determine which attorney he or she should hire? Explain why these questions are appropriate.
2. What sources should an entrepreneur use in developing a list of attorneys who might be appropriate legal representatives for the venture?
3. When should an entrepreneur hire an attorney who has a specialized practice?
4. When should an attorney who specializes in a particular area be selected as the primary counsel for the venture? Explain your reasoning.

5. Janelle, an entrepreneur, reached an agreement with the Chatham and Howe (C&H) law firm in which C&H agreed to represent her venture, with the fee based on an hourly rate. One morning Janelle called the law firm to obtain its fax number. When the receptionist answered the call, Janelle asked to speak to Mr. Howe, the lawyer who normally represented her venture. The call was put through to Mr. Howe, who talked with Janelle for a few minutes, gave her the fax number, and ended the call. A few weeks later C&H sent Janelle a bill, including a charge for 10 minutes of Mr. Howe's time for the phone call. What could/should Janelle have done differently in order to get the requested information while possibly avoiding this charge for "legal services"? Explain your reasoning.
6. What can the entrepreneur do to assure that a communication will be covered by the attorney-client privilege?

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### SUGGESTED ACTIVITIES

1. Find out what the hourly rates are for lawyers who specialize in business-related legal issues in the community where the venture will be located. Discuss the variations in the hourly fees and possible reasons or justifications for these variations.
2. Check advertisements for local lawyers and law firms. Determine how many of them claim to emphasize or specialize in a particular type of law. On what do you think this claim is based, and how would you go about verifying it before agreeing to hire one of these attorneys?