Popular Threads on Solosez

Capping Hourly Fee?

I have a potential client with whom I am discussing a case. Referred by another attorney (his RE attorney) who speaks highly of him. Its not complicated and were going to seek about $35 -40K. Smaller case. Client wants to cap the fees at $10k. I think it's reasonable given the amount we are demanding and given the work involved, I should be OK. I have never done this before. Any thoughts?

Inquiring Lawyer, Someplace in America

It may work, but what you are doing is choosing the worst aspects of two possible fee choices. By taking an hourly fee you are setting a per unit profit,(say it costs you $120 per hour to work on the case, and you bill $150, you have a potential profit of $30 per hourly unit) and if you work more than the allotted hours you cut into the profit at a 4 x 1 scale (every extra hour you work loses the profit from 4 hours effort).

You could counter with a flat fee of $10,000, and if it takes you 100 hours you have netted $100 per hour, below cost, but at least it would be countered with a possibility of the reward of solving the issue in 50 hours, when you net $200 per hour.

With the current proposal you get the downside of it taking longer, without the up side of the same outcome for the client when it takes you longer. The risk is on you at that point.

There is a serious argument in the value billing literature that hourly billing is inherently illogical for the lawyer and the client. I tend to agree, but the clients are less likely to buy that on larger fee matters.

Ted A. Waggoner, Rochester, Indiana

I understand your point, but that large a flat would not be reasonable. Had I known that the client was going to do this, I would have charged a higher hourly rate in the retainer.

Inquiring Lawyer, Someplace in America

Sometimes the projects that are "not complicated" turn out to be a lot worse than they look in the beginning.

I do a lot of flat fee work, but I wouldn't sign up for a situation where I had an unlimited obligation to keep working for a fixed amount of money - especially not without the ability (per the fee agreement, + local practice regarding withdrawals, etc) to walk away if the case gets really stupid.

It sounds like the risk is all wrong here - if it turns out to be an easy case, you don't make much money. If it turns out to be an ugly case, you don't make much per hour, and the worse it gets, the less you make per hour. What's the upside for you? If the case is so easy, why does the client want a cap?

I frequently set things up so that I do flat-fee work up to a milestone - and then the client & I sit down and re-evaluate & re-negotiate given what we've learned about the case. Maybe one of us has had enough and wants to get out because it's not what it looked like early - or maybe we both want to keep going, but now we've got some idea how strong the facts are, how good the law is, how easy the other side is to negotiate with, etc.

That would be my approach to this, although it's not really clear to me exactly what sort of case this is - e.g., to propose that you'll bill at $X/hr, but not to exceed $Y, to reach a certain milestone; or that you'll charge $Z to reach a milestone, however long it takes. However, the milestone *must* be something that's entirely within your control - e.g., drafting & filing something, or reviewing something, or putting together & presenting a settlement package, or whatever. If the milestone is outside of your control, you are set up to get clobbered, because it may never be reached.

Greg Broiles, San Jose, California

I effectively always cap my fees. In other words, when I give an estimate, I stick to it and if I go over, I eat the costs. The only exception is where the overage is caused by the client, e.g., doesn't provide docs timely so I have to go get them another way or gives me inaccurate information that undermines the assumptions I relied on in making my original estimate. My feeling is that I am the expert - and if I can't estimate the cost of the case, I should bear the loss, not the client who relied on me for my advice in giving an assessment.

Here, this guy is effectively saying that if it costs him more than 10k to recover $40k, then the case is not worth it to him. So from a value billing perspective, your value to him is 10k no more. And from an hourly perspective, you can simply divide the 10K by your hourly rate and determine if the number of hours is sufficient to handle the matter. If the 10K is reasonable, then take it.

Carolyn Elefant

Heads he wins, tails you lose. Fee caps should only be done when you have a good track record with a particular style of case, and are comfortable with the client and facts, IMHO.

New client, never done it before, odds are too high that it is a misevaluation. I would sit down and think of all of the bad things that could happen, discount for those, allow for a margin of error, and then decide if interested.

You can spend $10K on depositions and subpoenas in the wrong case.

What about counterclaims? What about unknown facts? You are buying a pig in a poke. PC knows the case and facts. You don't.

Darrell G. Stewart, San Antonio, Texas

You take all the risk with the cap. If the client wants the cap, try to negotiate for higher than your usual hourly rate or a percentage of the recovery as a bonus. The ABA law practice management section has several books with fee agreements for value billing. Richard Reed is the author of one or two of them. see www.abanet.org/lpm/catalog

Joel P. Bennett, Washington, DC

OK all, thanks for beating me up -- and telling me what I need to hear. Yes, I am aware that the simple cases are sometimes the ones that blow up in the worst way, but I do know this case. The RE lawyer who sent it to me, had asked me to handle parts of it along the way. He does RE and doesn't want to go to court. So I know enough facts to draft the complaint -- today. Client is not hiding anything and he is less than familiar in the litigation process to seek the cap -- he just knows that it could be expensive. The way I see it, even if we were to try this case, it probably wouldn't cost $10k. (Client bought property supposed to be vacant; wasn't. Money held in escrow if tenant not out by X date. Rent paid until X. Tenant doesn't vacate but other RE releases escrow to seller. Suing Seller and atty. Atty will likely default. Seller claims tenant vacated, but that is contradicted by dated letters on the subject.) The only bump is that I have to transfer a pending action on this subject and combine it with the one to be filed -- an extra motion unusual for a case at this stage.

The comment about the client being unreasonable in settlement is something I did not consider.

Inquiring Lawyer, Someplace in America

Be sure it specifies just how far you will take the case. I'd hate to have a judge reject the theory advanced and the client wants you to take it all the way to the Supreme Court on a 10k budget. Be very clear that this is through trial only, or whatever benchmark you establish in your written fee agreement.

Bruce Dorner, Londonderry, New Hampshire

<<<<Client is not hiding anything>>>>>

And we know this precisely how?

A capped fee under these circumstances is folly for the lawyer, IMNSHO.

I've been doing civil litigation for decades : I've never capped a fee.

Even giving a so-called "estimate" is risky.

"But you GUARANTEED me the fees wouldn't exceed $10K!"

"No, I didn't."

"Yes, you did."

"No, I didn't. Read my letter. It clearly says it's an estimate."

"I don't care what that letter says. I was bereft. I was under duress. You took advantage of me!"

And it's off to the Ethics Committee or Fee Arbitration or whatever.

Yeah, maybe the lawyer will prevail in the end.

Or not.

Charlie Abut, New Jersey

I'm a huge believer in explaining to clients that it is just not possible to provide a cap or anything like a firm estimate on what litigation will cost because the cost is so dependent on what the lawyers on the other size will do. Of course clients, even when they tell you that they're not hiding anything may not be telling you all you need to know.. because they don't recognize what's important to to tell you.

On the rare occasions early in my career that I lost a matter because I refused to commit to a number I've been very pleased to discover that the matter was more complicated than I thought. One of the cases continued on for more than 4 years and went up and down to the Court of Appeals several times and the other side went pro se several times. The attorney who took the case with a cap cried to me repeatedly about how this case is killing him.

Of course, your mileage may vary.

Peter Aufrichtig

True as stated, but actually it is the OPPOSING PARTY that is the problem most of the time, and I tell the potential client that. They usually know the Opposing Party and will believe it about them. Not necessary to make this a "lawyers are bad and will run up fees" comment. They seldom know who Opposing Counsel is, and if they do and the OC has a reputation that they have heard about, they know that the other party chose the OC due to that reputation.

Ted A. Waggoner, Rochester, Indiana

I have found this discussion of capping hourly fees very troubling. I want

to make money as much as anyone else. And I realize that litigation is frequently unpredictable, but over time, things balance out between cases.

What I have found disturbing about this discussion is that no one here seems to want to put themselves in the client's shoes. What if you were a client seeking legal advice? Would you not want a detailed estimate giving a best and worst case scenario (e.g., 20 hours if this happens, 40 hours if OC challenges this, 60 hours if discovery disputes)? So what is wrong with a lawyer providing a best/worst case scenario and capping fees at the top? Is it that it requires too much work to put together?

My husband and I hired a contractor to build out our kitchen and remodel several years ago. Three contractors gave a ball park estimate, no details - and only one guaranteed that he'd stick to it. I said no way. One contractor gave a 3 page line item estimate and another one gave a bid of slightly less detail but went through the other bid to explain where his costs differed. Ultimately, I hired the contractor with the detailed line item even though he was about $3K more expensive than one of the ballpark figures who would not agree to a cap (he was cheaper than the others). Moreover, as the job progressed and the contractor needed to charge an extra $1000 for something he'd overlooked in his bid, I gladly paid it because he'd been so upfront to begin with.

In the example that the lawyer gave that started this discussion, client wanted to pay $10 K to recover 40K. From the client's perspective, paying more than $10 K to get 40K is not worth it. You could tell the client "No, I won't cap my fee." Or you could give a line by line estimate of the likely costs if litigation runs smoothly, the costs of if things go bad and an idea of what the chances of either one happening is. At that point, client could make an informed decision to go forward, with a 25% chance that costs might exceed 10K - or he might simply say no.

Just because the court system and lousy opposing counsel make litigation protracted and unpredictable does not mean that we ought to throw up our hands and say, that's our system, so I'm not going to try to guess at costs. And I do not see why a client who is willing to pay a sizeable retainer up front should bear the full risk of a lousy court system and a jerk of an OC. (At the same time, I fully agree that the lawyer should not bear the risks either). But somehow, there must be some way to balance these risks without totally disregarding the client.

I know that we've all dealt with jerks before and been burned, it's happened to me too. But not all clients are like that. Some just honestly want to know what's going to happen in the case so that they can make an informed decision to take it forward or not. And finally, when you explain things up front and then explain what's happened, the client might pay anyway. That has happened to me at least once in a flat fee case - and as I noted, I paid the contractor an extra $1000 though I wasn't required to do so based on the estimate.

Carolyn Elefant

Well, there's a way to do this.....

I agree that a fee cap might be risky from your viewpoint; I also understand that the client does not want to spend unlimited money on a small case; and that the way that is proposed is a bit of a tails you lose, heads client wins.

How about a minimum fee, as well. Say, minimum fee of $5000; with credit against the minimum fee for hourly work performed; if the case settles quickly, you're ahead of the game; if it drags out, client has a max he is out of pocket.

The point is, if client is asking you to take some risk, it is fair to ask client to take some risk as well.

Ronald A. Jones, Florida

Caring for others is admirable.

But before we can put ourselves in the client's shoes, we have to think of our own shoes. In fact, we have to have shoes. And food for our children. And shelter. And the rent. And the phone bill. And our malpractice premiums. All of which have a nasty way of going up every year.

Yes, the law is a noble calling and a profession. But it's also a business. Those who can afford to work pro bono or on some other-than-profitable basis deserve our praise and thanks.

But the rest of us toiling in the trenches are entitled to earn our daily bread. And, yes, to be wary of clients who may not have their lawyer's best interests as their primary goal.

So when it comes to capping fees, I dare say that this is designed to benefit the client, with all of the risk on the lawyer. Thanks, but no thanks.

Charlie Abut, New Jersey

Lets look at the client's shoes in this case. Client can recover $40K for something (I don't recall if we know whether it is a contract action or what). C decides that the fees to collect it should not exceed 25% of the amount recovered. Why did C choose that number? 10K is a nice round number, but there is nothing else I can see that makes that reasonable.

Assuming it is a contract collection, then we are talking about several possible items. Did the contract provide for attorney fees in event of litigation, and if not, why? C had more control over that than attorney. If contract recovery case, some portion of the $40K is the C's profit, I suspect. Whether it is 2K or 15K, he took the risk on the contract, usually wins, and lost this time, unless he gets paid by Attorney's efforts.

This was not set up as a potential pro bono candidate. This is a business deal. I had the same offer earlier this week. Quoted a flat fee for some development work which would save the client about $15 for every $1 in

fees, the SCORE consultant asked if that fee was negotiable. Only if the scope of the work was negotiable.

Ted A. Waggoner, Rochester, Indiana

Please read my emails carefully. I am not advocating pro bono and I am not advocating free work. I am simply saying that as a service provider, we have an obligation to give people an idea of what they will be paying. We have more of an ability than the client to predict the costs. I think in most cases, we can set an upper limit and a lower limit which are sufficient to cover ourselves and ensure that we're paid for the work we do.

Giving an estimate has nothing to do with being an attorney, part of a noble profession or all that jazz. It has everything to do with being a competitive service provider. I believe that any person doing business should give an estimate so that the purchaser of those services can make an informed decision.

Basically, my position boils down to this question that I put out to the group: Has anyone here ever agreed to write a carte blanche check, to any service provider - a contractor, a lawyer whatever, only knowing the hourly fee, without any idea how much the upper limit is? If you've never agreed to do that, then why is that same concept OK when you're the one in the position of being the service provider?

Carolyn Elefant

Yeah. I have. Because I desired a particular result. And I knew that even if I threw money at it, it might not achieve the desired result; but I was willing to give the service provider unlimited discretion to deal with the matter as they saw fit.

I won't do this on everything; but if it is worth it to me, I'll give the professional carte blanche.

In law, there may be a difference between a contract case, like this, where you are only talking about money, and a custody dispute, where the kids are at stake. You are much more likely to get carte blanche on the custody dispute.

Ronald A. Jones, Florida

I see providing an estimate and providing a guaranteed maximum as two very different things. Providing an estimate seems like part of a good intake/counseling process. Providing guaranteed minimum/maximums seems like a good way, over time, to end up with only crappy cases.

Let's say that there's a 50% chance that a matter can be resolved for $100, and a 50% chance that a matter can be resolved for $1000. I am a nice guy, and I want to make life simple for my clients, so I tell them "Hey, I will take all of the risk of litigation costs. You pay me a flat fee of $550, and I

promise you won't have to pay me another dime." This looks like a nice situation because, statistically, I will get the same fees out of a group of 20 clients that I would have if I billed per matter, but my clients are happy because they know exactly what they're going to spend, right?

Nope.

In the real world, clients are going to shop around - they will find an attorney who will quote them $100 to $1000 on an hourly basis. Clients who think their cases are going to be really easy are going to sign up with the hourly guy - clients who think their cases are going to be really tough are going to sign up with me.

Now I don't have a statistically unbiased group of clients to even out the chances of easy/hard cases - I'm going to get mostly cases where my clients think they get to pay $550 instead of $1000, so they're $450 ahead. My life starts to suck because I'm losing money on every case, and the only way to fix that is to raise my flat rate to something more like $1000, which means that I get less and less work because the people with easy cases are even more attracted to the hourly guy, and the people with hard cases see the hourly guy as a better deal up to $1000; my flat-fee $1000 is only attractive if people think their case is a real disaster, a way-out statistical outlier, where the hourly rate really would be $2000 or so, and then they'll pick me and my flat fee which is approaching $1000, and my professional life just gets worse and worse.

I can't speak for others here, but I do this sort of thing not infrequently - when I drop my car off at the mechanic, or when I go to the dentist, and so forth. There's no upper limit on what I might have to pay, except for my ability (in some circumstances) to say, "well, forget it, we won't fix my car then" or "better just pull the tooth", or whatever.

On the other hand, sometimes there is no other option - my wife had surgery earlier this year in circumstances where it wasn't clear when we scheduled the surgery whether or not it would be covered by our insurance, or to what extent it would be covered - we could cover the cash price of the surgery, but if there were complications, it was possible that the care that would be needed would (within a week) wipe out all of our savings and all of our home equity and bankrupt us. We believed that the long-term health benefits were worth taking the risk. There's no way that the surgeon could tell us (a) what the chances of complications were, or (b) put some sort of upper limit on the costs if complications occurred, or (c) guarantee a good outcome. That's how medicine works.

I wish I could do better for my clients, but I don't know how. I am not smart enough to act like an insurance company (apropos the discussion above) and apportion costs statistically; and I don't have control over most of the factors involved in a contested or adversarial proceeding.

I do almost all of my non-adversarial/non-contested work on a flat-fee basis, because I think it's better for both my client and for me, but even there - where the only parties are involved are me and the client - there are any number of cases where I've charged more or less than I would have if I could have foreseen the future at the time I quoted the fee. Doing that is

tough enough without having to include the behavior/personality/randomness of litigants, attorneys, judges, and facts I know nothing about.

Greg Broiles, San Jose, California

I don't think there is an answer here, because both points are valid. Obviously, there are slam dunk cases that you have done before where a cap is OK. Other issues are not.

I know that I know enough of this case to make an initial determination (I have done some work on this case prior to formally accepting it as counsel and have been paid for it). The client agreed to the $5k minimum someone (Ted?) suggested earlier and capped at $10k. C will pay for expenses as they are incurred and our agreement does not include appeals. I will let you know how this plays out.

I think we do it all the time. It's just that in the case of say seeing a doctor, many of us have insurance that will ultimately pick up most of the tab regardless of what it is. But insurance companies are in the business of evaluating risk and managing it over a large volume of cases. So they get economies of scale (and portfolio benefits) that we don't get.

You don't go into you doctor and say "I have a pain in my chest can you look at it? But before you do and based on the facts you know now, I need you to cap the fee at $5K." No doctor would agree to that. What if the pain turns out to be a tumor that requires a $50K operation?

Even in your contractor scenario, a bid is just a bid. It's a ballpark. From what I've gathered, these bids rarely end up reflecting the final price paid and that price is usually higher.

The more uncertain context, the more difficult it is to cap things, unless you're prepared to eat fees. If you have enough volume to know that for every matter that goes over the cap, 5 will go under it, then having a cap for that sort of matter will probably work out in the end. Auto mechanics have this sort of volume. Most attorneys don't, especially in the context of litigation.

For it just seems to me that litigation is always an uncertain process if the possibility exists that the matter will go to trial. Too many wild cards there.

From my perspective, the legal system doesn't handle matters well where the amount one might recover is over the small claims limit, but under say $75,000-$100,000 (unless you have say mandatory arbitration for matters under $30k). Perhaps others will tell me different, but it just seems like there's a certain base level cost of preparing for the possibility of a full-blow civil trial, regardless of the amount in controversy, and this cost can be prohibitive for a lot of matters.

By putting a cap on a matter like the one Meyer describes, you are in effect shielding the client from having to face the reality of the situation,

which is that it could easily cost $40K or more to collect the $40K. And if the client isn't prepared to accept this outcome as a possibility, then perhaps they should just walk away now and eat the $40K. Nobody said that trying to get money back in court was a risk free proposition. It's a game of probabilities, just like many things.

I think that's what people are saying when they suggest milestones that allow either party to walk away short of a trial. The more contained the obligation, the easier it is for each person to get more facts, and offering a clearer estimate of costs. It's not unlike a mechanic who might say, "let me charge you for an hour, and I'll go in and see what's going on. From there, I can give you a clearer estimate and you can decide whether you want to spend the money."

Jake London

Carolyn, I must strongly disagree with you. I can give good estimates (at least as good as the next guy) but I will never *guarantee* a litigation's cost. I had one case a few years ago that was expected to cost less than $20K and take no more than 3 months. It took 21 months and several appeals and cost over 10 times the estimate. Why? Decisions by OC to drive up the cost. Should I have eaten the costs? More to the point, should my girls? I've got a simple case now in DC Superior court. It's been going on for 19 months. Discovery is just starting, there have been 3 OC, 4 Motions to Compel, no production or discovery from the other side, 3 awards of sanctions and 1 interlocutory appeal. When this case started I knew nothing of this, nor did my client. Again, are you seriously suggesting that because of this "stuff" my girls should go hungry? Why should I have to bear this risk?

And, btw, when your girls get sick & you go to the Dr., do you shop competitively first? [You don't have to answer, it's just a SAR. sorry]

David Zachary Kaufman

I can sympathize/empathize with Carolyn's comments, but why do we want to work for free? I, and I'm sure most of you, occasionally handle cases at little or no charge, but the choice needs to be ours; not a result of a client's choice.

I have kids that let me know that I don't spend enough time with them, I have a wife that says she wants more attention, I have a fishing pole that hasn't been used in nearly a year, etc.

Randy B. Birch, Heber City/Salt Lake City, Utah

Clients will usually understand why fees cannot be capped, if you can explain it to them in a language they understand. Pick a topic familiar to the client and make an analogy. Choose an unpredictable scenario in the client's life to make your point. If your client is an auto mechanic, say that your car makes really weird sounds at unpredictable times, and you

want to know what it will cost to fix it. If your client is a stay-at-home parent, them that you have a child with behavior problems and you would like to know how much it will cost for counseling and tutoring to get the child back to "normal". Then explain to your client how their legal case has similarly unpredictable circumstances which are beyond the control of the lawyers and the court system. Explain your billing procedures to your client and let them know that you appreciate feedback from them and questions from them on any of your billings.

Clients who are experienced and savvy in the business world usually understand from the get-go why an attorney cannot promise a cap on fees for litigation and other legal matters which involve minefields beyond the lawyer's control. (Of course there are flat fee cases for work which is predictable, legal work which does not depend on factors beyond the lawyer's control, but that is not the focus of this thread on the list serve.)

Joyce Maughan, Salt Lake City

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