

5-9-2016

## A Business Owner's Dilemma: Is Hiring an Attorney to Handle my Case Worth It?

Jason Astle

Follow this and additional works at: <https://digitalcommons.du.edu/dlrforum>

---

### Recommended Citation

Jason Astle, A Business Owner's Dilemma: Is Hiring an Attorney to Handle my Case Worth It?, 93 Denv. L. Rev. F. (2016), available at <https://www.denverlawreview.org/dlr-online-article/2016/5/9/a-business-owners-dilemma-is-hiring-an-attorney-to-handle-my.html>

This Article is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review Forum by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

## A BUSINESS OWNER'S DILEMMA: IS HIRING AN ATTORNEY TO HANDLE MY CASE WORTH IT?

JASON C. ASTLE<sup>†</sup>

"[T]he power of the lawyer is in the uncertainty of the law." -Jeremy Bentham<sup>1</sup>

Most attorneys turn down small business clients with litigation needs because the amounts involved are too small. One survey of attorneys identified the average threshold for accepting cases as \$100,000 in controversy.<sup>2</sup> Compounding the problem, on the other side, clients often will not seek an attorney because the cost of hourly fees appears higher than the benefit of such legal representation. Because of this dichotomy, a substantial population of American small businesses generally goes without legal representation. However, alternative fee agreements may solve this problem, and become more important than changes to rules of civil procedure in providing "just, speedy and inexpensive determination of every action and proceeding."<sup>3</sup>

Before hiring a lawyer, clients want to know if they will win. Thus, clients often measure the value of legal representation after-the-fact, based principally upon the results. Yet, clients also value attorneys for their advice and problem-solving skills. Sometimes, even the comfort of "talking with your attorney" is valuable itself. Conversely, attorneys value the services they offer clients differently because results, and the time and effort to necessary to achieve them, can be difficult to forecast.

Ultimately, attorneys strive to provide their clients with the best outcome *under the circumstances*. Good representation includes providing advice and counsel so that a client can make highly informed decisions. But, the "circumstances" of a case are, nevertheless, driven by client decisions—good or bad, rational or irrational, even though some clients would rather not make the decisions at all.

---

<sup>†</sup> Jason Astle represents businesses and individuals primarily as a litigator, in Colorado and across the country. He graduated from the University of Denver Sturm College of Law in 2006, then went on to hold a state judicial clerkships in Colorado and a federal judicial clerkship New York. He currently practices at Springer & Steinberg P.C. in Denver, Colorado.

1. JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM*, VOL. 10 415 (John Bowring ed., 1843).

2. See Brittany Kauffman, *Study on Estimating the Cost of Civil Litigation Provides Insight into Court Access*, IAALS ONLINE (Feb. 26, 2013), <http://iaals.du.edu/blog/study-estimating-cost-civil-litigation-provides-insight-court-access>.

3. Fed. R. Civ. P. 1; Colo. R. Civ. P. 1.

Also included in the circumstances of each case is the amount of time necessary to effectively resolve the client's problem. Win or lose, attorneys measure the value of representing a client based on the possibility of receiving fair compensation for their work, skills, experience, and, most importantly, time. Because time is the most valuable asset an attorney has, lawyers must assess the opportunity cost of working on one case over another case. The risk faced by attorneys is spending uncompensated time on any particular case.

Retainers (in non-contingent cases) reduce an attorney's risk of not being fairly compensated, but can be an immediate obstacle for a cash-poor client. Yet, the possibility of future work and establishing a long-term relationship is very valuable to both the attorney and the client.

On the other hand, fees based on the time spent by the attorney shifts the risk of cost to the client who could pay or commit to pay fees that exceed the post hoc "value" of the representation. This cost/benefit analysis is particularly important to low-margin, small businesses as studies suggest that the median cost of litigation ranges from \$43,000 to \$122,000.<sup>4</sup> For many reasons both small businesses and lawyers struggle to determine a value for representation and properly weigh it against the costs of hiring an attorney when representing small businesses.

Neither clients nor counsel want to take on a case that is "not worth it" in the end. For that reason, when representing small businesses, an attorney's fees are best determined as part of a dialogue—one size does not fit all, but deciding how to pay a lawyer is not a-la-carte either.

The answers to the following questions may help both attorneys and clients reach an agreement on the best way to structure the representation:

- 1) What is the goal of the representation or the need for an attorney?
- 2) Will the client be a plaintiff or a defendant, or will there be counterclaims?
- 3) How many people will be involved who have knowledge about the claim?
- 4) How many documents/emails relate to the issues generally?
- 5) How "complex" are the issues? Complexity is determined by looking at the legal issues, the discovery necessary to obtain evidence, and the procedural rules likely to be utilized.<sup>5</sup>

---

4. See Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20 CASELOAD HIGHLIGHTS 1, 1, 6 (2013).

5. Broadly, this may be a choice between entire sets of rules such as Colo. R. Civ. Proc. 16 or 16.1, or specific rules for early determination of claims such as Rule 12, (Motion to Dismiss), Rule 55 (Default Judgment), and Rule 56 (Summary Judgment).

6) What does the best day and worst day in court look like?

Nonetheless, under most circumstances, an hourly fee is almost certainly going to be how a lawyer is paid.<sup>6</sup> Much of the literature on the topic is, however, focused on large businesses, large firms, or is attorney-centric. Although informative for attorneys seeking to attract small business clients, the discussions often overlook the circumstance in which a small business needing litigation services has either an up-side of less than \$100,000, or a down-side over \$100,000.

Yet, the problem remains, as the theme of this note suggests, litigation is filled with uncertainties and the simplest issue can be complicated by nothing more than a persistent opponent (a factor over which neither the client nor the attorney has any control).<sup>7</sup>

Alternative fee agreements can bridge this gap of uncertainty in cases too small for hourly fees, but too important not to have a lawyer. While there is no formula for what kind of fee arrangement would work under all circumstances, hourly fees may be the only option for small business litigation due to the uncertainty of the time needed for resolving the dispute. However, here are some creative alternative arrangements:

1) An attorney could provide more limited (unbundled) services, such as assisting clients to represent themselves. These fees could be on a per-service or per-project basis (often as a flat fee as described below) rather than full-service general representation.<sup>8</sup>

2) For businesses with long-term growth potential but cash-flow problems, retainers do not have to be a large up-front payment. For example, retainers could be scheduled and paid in smaller but more frequent rates at different stages of the case. Retainers could also be held back and repaid to the client at the conclusion of a case, rather than drawn down immediately.

3) Blended fees may also be attractive, particularly to clients.

- Hourly rates could be reduced, but offset by a contingent component.
- Fees could be capped and combined with a contingency fee.

---

6. See Andrea Paterson, *Fee Agreements: Structuring Alternative Fee Agreements To Enhance Recovery Of Fees And Align Interests Of Attorneys And Clients*, 35 THE ADVOC. (TEXAS) 10, 10 (2006) (noting that, despite twenty years of debate and pressure to change, hourly and contingent fees still dominate how legal fees are paid).

7. There are some cases where hiring a lawyer does not make sense, such as when the involvement of an attorney escalates an unnecessary or minor dispute beyond a rational or efficient means of resolution.

8. Be sure to review Colo. R. Civ. P. 11(b), however, for rules regarding limited representation.

- Fees could be paid as multiple flat-fees at various stages of a case.
- Flat fees could be combined with hourly fees so that payments are the same each month even if the total amount of the fee is higher or lower for any particular month.
- Flat fees could be charged for certain kinds of work and hourly fees for more complex or difficult to define work.

4) Hourly fees could also be tied to bonus payments for early resolution at defined stages of litigation. This is a more attractive alternative for taking cases in which a client's legal position appears to be strong, settlement less likely, and the course of litigation is unpredictable.<sup>9</sup>

5) Clients could pre-pay for legal services. As such, payments could be made on a monthly basis without respect to whether there is a current need, and then used later if the need arises.

Clients may benefit from each of these alternative fee arrangements because they create more certainty and stability as to the timing or amount of legal bills. Further, they also create incentives for the attorney to be as efficient as possible while pursuing each case.

Small business clients should bring up and explore these options when hiring an attorney. Similarly, attorneys should make time and space to discuss these alternatives if they want to attract and keep potential small business clients.

Despite well-meaning revisions and additions, changes to the rules of civil procedure have not provided small businesses access to attorneys and courtrooms.<sup>10</sup> Rather, individual discussions between attorneys and prospective small business clients, addressing the uncertainties of a specific case and exploring possible alternative fee arrangements that provide value to both clients and attorneys, will move reform efforts closer to achieving a "just, speedy and inexpensive determination" of each and every small business case deserving of justice.<sup>11</sup>

---

9. See PATERSON, *supra* note 6, at 13 (noting that one advantage to blended hourly and bonus fees is that it can provide "adequate safety nets for attorneys to expend more hours on a matter than anticipated due to factors out of their control while not risking the firm's financial well being.")

10. See, e.g., Colo. R. Civ. P. 1, cmt. 1.

11. Fed. R. Civ. P. 1; Colo. R. Civ. P. 1.