

Do Solo PI Lawyers Often Advance Fees?

Hello everyone:

As solo personal injury attorneys, do you often agree to advance fees on your PI cases? Naturally, the costs of litigating such claims are unpredictable and potentially burdensome for those private practices that do not have the financial resources to risk... so I want to prepare myself for this professional dilemma.

1. If you don't advance fees, what separates you from the attorneys that do?
2. If you do advance fees, do you have any suggestions for making the right bet, or for limiting or minimizing this risk?

Thanks for your insight!

To be competitive in this crazy market, I believe it is necessary to advance costs. You can hold off on retaining experts until absolutely necessary and often find some that will work on a lien. You can always charge filing fees on a credit card with low interest.

It is rare for a client to be willing to pay for them.

Lawrence Freiman

Sorry, let me clarify. I do not mean attorney's fees or advancement on potential settlement value. I meant costs of litigation in general, inclusive of expert witness fees, process server fees, significant administrative costs, and so on.

In FL most attorneys advance fees..u want cases with damages, an insurance carrier and at least some liability on the insured party would nice...g
alba Miami

I don't litigate or have anything to do with PI cases, although in my previous life I did.

Check your state's Code of Professional Responsibility etc. to see if or how your advancing expenses is permitted. Your engagement agreement should spell out how the expenses will be handled, both the advancing, if you can do that, and how they will be reimbursed to you out of any settlement/judgment and collection of the proceeds.

Don't forget, you may not win, and then you're out the expenses. But my experience is that's the way it works. Hence, the PI law firms I worked for did very careful "underwriting", because no one can afford to take lots of losing cases. Getting business is not your only goal; getting business that results in income to you is. The only exception is if you decide, in advance, that you want to provide pro bono services to a client. They you have to still make a written provision for expenses.

Miriam N. Jacobson, Pennsylvania

Thanks. I understand that there is a risk that you can lose your "investment." Do you only take on cases that are clear winners then?

Since there are major names and firms in the PI business that can afford advancing limitless costs on the clear winners, I would think that if the client is willing to take on the costs of litigation you, as the solo attorney, would be able to take on more cases that aren't clear winners, since the financial risk to the solo attorney is evidently less apparent.

In other words, if the costs are handled by the client for lackluster cases, you aren't necessarily limiting yourself to those clear winners, while intelligently increasing your opportunities with cases that have some merit. Does that make sense to anyone?

Best regards,
Joseph D. Kamenshchik, New York

SoloSez Popular Threads, November 2012

Ok, look, you got two issues: Can you advance the costs? Sure, you can. Should you? It depends. From the perspective of someone who does contingency cases, not just PI cases, these are the arguments:

For: clients who are signing up on contingency cases may not have the money to cover all, or most of the costs: if you want to be able to handle the case you are going to have to advance the costs.

Against: the client needs skin in the game; they need to have something to lose other than the case itself. If the client has nothing of their own in the case, they are more likely to be unreasonable in settlement and case evaluation. The case becomes the equivalent of a lottery ticket; except they didn't even have to spend their own money to buy the ticket.

MY personal solution; I draft my contracts with language to the effect of:

Upon instruction by client to file suit, a cost deposit of \$XXXX will be required before suit is filed. The \$ covers basic filing fee, service of process on however many defendants there are, and maybe a couple of hundred dollars beyond that. It's modest; 3 figures, maybe \$1000 at most; Will it cover all of the costs? Probably not; but it will cover the cost of filing suit. I don't have to enforce that provision if I think other side is being unreasonable; but if I got a client who's got good settlement offer on the table, but has unreasonable expectations as to the value of the case, I can tell them, fine, you want me to file suit, get me the cost deposit. It can bring the client to their senses.

Ronald Jones, Florida

Yes, a lot do advanced fees and costs. I do, unless I'm shaky about the defendant for whatever reason. Normally I would just reject the case. But if the client wants to, I'm willing to take on a challenge and will tell them they must advanced the filing fee. Just spell it out in your contract.

Contract also says they are responsible for any fees but I know it'll be terribly hard to recoup those expenses if you lose. You might though.

Pick winners. Clear liability, insurance, good Plaintiff.

The big ticket PI lawyers around here advance them, and one even told me she doesn't really try and collect expenses if they lose.

Joseph D. Dang, California

SoloSez Popular Threads, November 2012

That's interesting Joseph, so your contract essentially says that the costs, apart from counsel fees, are still the responsibility of your client, even if you lose. My understanding was that PI attorneys ordinarily agree not to hold the client liable for such advancements if the case is lost -- or is that incorrect?

Also, with regard to advancement of costs/fees, do you folks ordinarily express that the decision to incur such costs/expenses are made in your professional discretion?

Good advice so far everyone, thanks a lot.

Best regards,
Joseph D. Kamenshchik

I've never seen a clear case..no case or client is perfect. But if client is willing and u chose to accept go for it...I practice family law but wouldn't mind the occasional personal injury. If you get in deep financially like a med mal or other catastrophic hard to prove case consider cocouncil with a deep pocket p.I. law firm they wont say no but if they do, shop it to another big firm..good luck g alba

I see you practice in new york(like me). I and every attorney in NY I know advances the costs. If you won't, you will get few if any clients. That is the reality of this practice.

I suggest your retainer agreement says that you may but aren't required to advance costs. This way, if you want to stop you can. This is when you have gone as far as you are willing to go with a case.

Also a line of credit for disbursements is a good idea. There are ethics opinions that you can even charge the interest as a disbursement.

Robert Weiss

I love the idea of putting the discretionary language in the K. This is a serious dilemma but that helps. I've just changed my draft/WIP contingency agreement to add your idea, so thank you!!

Tina Willis

Another great idea that I've just added to my K.

Thanks Ron. :)

Tina Willis

I'm just thinking that maybe at least some of the clients may not know what is normal and just sign whatever you present to them, not really thinking about the reality that you have discretion to advance fees (or not) and can require a deposit from them if you have to file suit (to cover costs). That's my hope and really only option because I am far to risk-averse to fund litigation without experience in this practice area. If I can get the phone to ring, I think some of them will bite. But, of course, I've been very wrong plenty of times before!

Tina Willis

It is possible to make money on small cases that other attorneys aren't interested in because of their smallness. There is a relatively competition-free segment of the market consisting of PI cases that aren't attractive to most established PI lawyers. If the choice is between the client paying the costs and going unrepresented, the client should choose to pay the costs, if able, and so often with small cases you can have the client agree to pay costs up front, or you can take the case on a bigger contingency than is typical (40% or more), or both, and in either event you have to be very careful about controlling your costs. Take cases that don't need experts or where you can use relatively cheap experts e.g. high school science teacher, auto mechanic (as opposed to, say, an orthopedic surgeon). Take cases where you need 0-2 hours of depositions total. File in lower court to save filing fees (and perhaps also to jury shop). There's a useful book published by James Publishing for \$99 called *Maximizing Damages in Small Personal Injury Cases* which is helpful if you are building such a practice. You have to be very careful about what cases you take, of course, specifically trying to predict and avoid the cases where defendants are going to be willing to pay 20 times what the case is worth to defend it rather than either settle or let it go to trial; and you have to be very disciplined about what you put into the case in terms of discovery, etc., not putting in more than the case's value justifies; and have to be willing to take cases to trial. Many consumer and civil rights practices are built on such principles, and frankly my own civil rights practice foundered on my having failed to put into practice the aforementioned cost controls. My consumer practice did better.

SoloSez Popular Threads, November 2012

On the other hand I have sort of an ethical problem with the idea that in a case that would be attractive to other attorneys who would advance costs, you'd have the client paying the costs due to the latter's sheer ignorance. If I couldn't absorb the costs myself I'd either refer those cases out or develop a co-counseling or referral relationship, depending what your local rules are on referral fees.

Matthew Parham, New York

Yea, I ask clients to contribute to costs in employment lawsuits. I still pay for most of it, but they need to feel invested.

They need to have some skin in the game. Employment plaintiffs can be very demanding sometimes, so it helps to screen out the weaker cases. I doubt I could do that in the more competitive world of PI cases.

Tom Crane, Texas

Thanks for the info.

I don't think there's an ethical problem bc I think I bring other things to the table. I don't subscribe to the belief that trial experience and/or experience in a particular practice area = everything in the law. (I'm not saying that I don't value and appreciate the input of more experienced attorneys--I do, very much--I just do not think that means their representation is necessarily superior to what I could provide). So if I think the client is getting something from me that they cannot get elsewhere (which I do), then I don't think asking them to pay costs where other firms do not is unethical. And our rules don't prohibit.

However, our rules are extremely prohibitive when it comes to co-counsel relationships. Basically we are required to have a 75 (primary)/25 (secondary atty) split. This makes what is possible in many other states, which is to grow a practice using a 50/50 split with other PI attorneys, impossible in Florida.

Tina Willis

Thanks for your input Matthew and Thomas.

I'm thinking that requiring the client to be financially invested, to some degree, is generally good for screening cases, but Ronald's suggestion on requesting such funds in anticipation of trial seems like a good practical consideration for the retainer agreement.

Based on your experiences, is it common for the plaintiff to incur a majority of the costs during discovery or during trial for PI cases? I know that's a pretty loaded question, but the answer may influence the timeline on requesting financial contribution from the client.

Good discussion folks! I'm sure this will be useful for others as well.

Best regards,
Joseph D. Kamenshchik

In NC, attorney can pay costs of the case such as medical records, filing fees, etc and then recoup them from a settlement/award... what you cannot do is pay non-case related expenses such as client's rent, etc.

Edward M. Branscomb, North Carolina
