

## Contingency Fee Question

Hi fellow Sezzers,

I'm picking up some new cases on contingency where there is a decent possibility of recovering fees from the other side if I prevail. My question is how to deal with that issue in the legal services agreement with the client. Does anyone have some standard language addressing this contingency within a contingency that they'd be willing to share with me and/or the group?

Trying to understand, for example, how to place in the contract language something to deal with the following hypothetical:

Client recovers \$50,000 and I have fees of \$75,000, as well as a one-third contingent fee agreement.

So, does client get:

- (1) Two-thirds of \$50,000, leaving me the other third plus the \$75,000 fee award?
- (2) Two-thirds of \$125,000, and I get one third of \$125,000? or,
- (3) Some other possibility I've not thought about?

I know it's important in how you draft and define "amount recovered" or similar concept in the contingency portion of the fee description, since that can include/exclude a lot. But I'm trying to manage client expectations up front and not deal with a situation where the client could recover, say, even less than my hypothetical while I recover a huge six-figure fee award. (Hey, we can all wish for the latter.) Just doesn't smell good when the client walks away with the potato skin and you get the porterhouse. Maybe I'm way out there, but I remember one of my few contingency cases from many years ago where I was awarded 2-3 times in fees what my client recovered (not terribly huge amounts for either of us) and it was, shall we say, a bit awkward.

Suggestions or thoughts? Feel free to answer directly to my email below if you prefer. Apologize if this topic has been discussed or beaten to death before I joined the "firm." Just trying to catch up.

Thanks in advance, and Happy New Year to all!

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I don't do contingent fee work (heck, I don't even do litigation to speak of), so take this with a HUGE grain of salt, but....

What about saying that you get the larger of one third of the total award (that is, both the award to your client plus the attorneys' fees awarded by the court) and the amount of the fees awarded by the court?

In your example, that would mean that you would get \$75,000 and your client would get \$50,000. But if your client gets awarded \$200,000 plus attorneys' fees of \$75,000, you would get \$91,667 (and your client would get \$183,333). On the other hand, if the client is awarded only nominal damages (say \$1) plus the \$75,000 attorneys' fees, you still get the \$75,000 that the court ruled you were entitled to for pursuing the matter.

In this way, if the court awards attorneys' fees, the amount paid by the opposing party for attorneys' fees "subsidizes" your client, so that your client gets a greater portion of the amount that had been awarded as the "base" award, and you participate in the total award in addition to getting the amount awarded as attorneys' fees (which provides you an incentive to take on a risky case).

People that actually do this type of work for a living may say I'm crazy, but that seems relatively fair to all concerned.

Brian H. Cole, California

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I would write the agreement so that fees and other recovery are lumped for purpose of the contingent fee. You get one third of the sum, client gets two thirds.

Shell Bleiweiss, Illinois

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My agreement is two sided. Intake, client & matter information on one side and standard agreement language on the other. The front side has a fill in place for a contingency fee and hourly rates. The back says where both amounts are stated, my total fee will be the higher of the two

Frederick G. Irtz, II

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California's ethical rules are different from the ABA Model Rules which almost all other states adopt. That said the same issues and questions you raise arise in all states and many federal courts too. I recommend you read the pertinent parts in Chapter 5 of the Rutter Group on Professional Responsibility (Tuft) though focused on California it is very informative and provides guidance.

Michael Boli

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I approach it like Shell says. You want to make sure you're clear on whether costs come off the top before splitting, or out of the client's share. Here's (part of) the language from my Agreement. The final paragraph is actually a footnote in the Agreement.

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**Fees:** References to Fees in this agreement specifically refer to the amount to be paid by the Client for professional legal services, whether provided by a lawyer, paralegal, or other employee or contractor of the Firm. Fees do not include costs related to any filing or ancillary transactions required for the pursuit and resolution of this Matter. Items not included in Fees are referred to as "Costs." Common terminology used in attorney fee agreements, and the Firm's general policies regarding fees and billing are set out in the leaflet Billing Policies and Procedures; if you have not already received a copy, please ask for one.

**Contingency:** This agreement also involves a contingent fee. This means that the Firm will receive some or all of the Fee only in the event that the Client recovers damages, back pay, front pay, costs, or other compensation. The contingent fee shall be equal to 30% of the Recovery(1).

**Costs:** Costs include, but are not limited to: court costs, court filing fees, service of process, travel-related expenses, and any other costs incurred by the Firm that are specific to the pursuit of this Matter. The Firm does not charge or surcharge for routine postage and administrative expenses, trivial copying, routine legal research, etc. Any specific administrative cost greater than \$n may be billed. Costs will be billed monthly (if any charges are outstanding), and the Firm will strive to notify the Client of any foreseeable expenses greater than \$xx before they are incurred. If the Matter proceeds to litigation, the

Firm may request, and the Client agrees to advance, as much as \$yyy to cover these expenses, or the actual amount of the expense if it exceeds \$500 (e.g., a court reporter for a deposition). Any such advances and any charges made against them will be reported on a monthly statement and replenished as necessary. If especially high expenses are anticipated, we can discuss options for securing third-party financing for those expenses. The following is, without limitation, a list of estimated costs that could arise in resolving this Matter:

- Filing Fees, Superior Court: \$200
- Filing Fees, District Court: \$150
- Filing Fees, Magistrate Court: \$96
- Issue of Summons: \$15
- Filing Fees for Motions: \$20 (per filing)
- Service by Sheriff: \$30 (per party served)
- Service by Certified Mail: \$6 (per party served, estimated)
- Service by Designated Courier: \$15 (per party served; estimated)
- Private Personal Service: \$75 (or more for parties avoiding service)
- Service by Publication: \$231 (Winston-Salem)
- Service by Publication: \$175 (Greensboro)
- Service by Publication: \$250 (varies; estimated)
- Private Investigator: \$75 (and up; varies widely)
- Publication of Legal Notices \$75 (and up, varies by locale and notice)
- Mediator Fees: \$300 per hour (varies; split by parties)
- Arbitrator Fees: \$300 per hour (varies; split by parties)
- Certified Copies of Records: \$15 (varies by document; estimated)
- Recording with Register of Deeds: \$26 (varies by document; estimated)
- Travel: 50¢ (per mile; or IRS rate if higher)
- Travel Expenses: Varies

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(1) References in this agreement to "Settlement," "Award," "Judgment," or "Recovery" are intended to be inclusive of any compensation or remuneration tendered by the opposing party as a result of this

action. Awards for "costs," "expenses," or "attorney fees" will be aggregated for the purpose of determining the fee (i.e., payments designated as "attorney fees" will be "put into the pot" and allocated together with other payments received), as will payments made by Opposing Party on your behalf, including but not limited to payments to third parties, payment of insurance premiums, or indemnification that results in reimbursement or compensation from a third party. See the attached illustration for a simplified example.

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Also, if your matters are likely to seek to recover Attorney Fees, it \*may\* be important (depending on your state's rules) for you to specify your normal hourly billing rate in the Agreement, even if you're not charging it. Because my typical agreement includes provisions for doing work outside the scope of the Agreement, should the need arise, it does set forth my "Reference Rate." This would be the rate you intend to seek (that's not to say you'll get it) when you move for Attorney Fees.

And I am reminded how important it is to review your own documents periodically, as I now realize I have not been attaching/including the illustrative example for a couple of years...

-Rick

Richard J. Rutledge, Jr., North Carolina

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My contingent fee agreement states that my fee is the greater of either

1/3 of the amounts collected, OR the amount of attorney fees awarded by the Court. Payment still contingent on being collected and the collected funds are disbursed in accordance with the contingent rate. I will likely have to keep collecting attorney fees from debtor after the client is paid.

In your option (1) the attorney fees are \$75,000.00, but debtor still liable to pay you. Client cannot share in amount awarded for attorney fees.

Phil A. Taylor, Massachusetts

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