Does a Plaintiff's Case Taken on Contingency Change How a Defendant Litigates?

Dear firm, I'm in a case representing a small business with strong claims for good damages against a much larger competitor with the money to defend this through trial and appeal. The litigation is in discovery. Defendant has continued to lowball us and all but explicitly said that they know my client doesn't have the resources to litigate this through trial/appeal, so client should take defendant's low offer.

In reality, I'm taking this contingency and am willing to put in 100% of the work necessary, even through excessive discovery disputes and trial, to get justice and judgment for my client.

What would be the pros/cons of actually telling defendant that this case is contingency? Is it a terrible idea? Or could it be good strategy to show them that are not backing down at any point?

The question you raise has roots in business and ethics. You must abide by both.

If the question is whether informing the defendant of the payment terms under which your representation contract rely will make the defendant produce a "reasonable" offer or make the defendant modify their discovery attitude then my answer is no, I do not believe it will have a positive effect.

If the contract were hourly then your client would have "skin in the game." The defendant's actions would have a direct effect on your client's bottom line. It is contingent, so the question becomes how much time are you willing to put into the case for the potential windfall if your client prevails. I understand that you're "willing to put in 100% of the work necessary," but the defendant does not need to believe that you will follow the case through trial/appeal. Rather than your client not having the resources to litigate through trial/appeal, the question they will ponder is whether you have the resources to do so.

There really isn't a lot to go on with the information you provided. Have you checked the defendant's litigation history? You do not mention the "bottom line," potential jury verdict both—both odds of success and monetary.

Just one person's opinion.

William M. Driscoll, Massachusetts

I do not think it is appropriate to discuss your fee arrangement with your client in the circumstances you describe. I do not think it is like to alter the dynamics in your client's favor. Just do not ever make it appear that you don't have the resources to litigate the case, through trial, effectively. Also, consider either referring the case to a plaintiff's contingency business litigation firm or to associate them in, to help and to provide funding.

Roger Rosen, California

I agree with Roger.

William M. Driscoll

Nothing. That's what you tell them.

Barry Kaufman, Florida

Don't tell them what you do not have to tell them. Outwork them by doubling up on everything they do. Show them that your client is serious by being serious yourself. A contingency agreement makes it easy for your client to reject low settlement offers. Handle the case as you would if you were being paid hourly. That is the way to make the other side take your case seriously.

Robert "Robby" W. Hughes, Jr., Georgia

I've told opponents about contingency arrangements before, and had good result. I've also kept that information secret. I've always discussed my reasons for doing so with the client before the disclosure, and never acted against my client's wishes.

The contingency fee changes everything. Take, for example, a case about to transition from hourly to contingency with negotiations stalled near the client's bottom line. Might it change negotiations for a defendant to know that (1) my firm has elected to pursue a case without cash upfront from the client, putting in the funds for experts and costs ourselves and (2) the purchasing power of their settlement dollars will be

cut by 40% (in my client's perception) should the current offer be rejected? Yes, that might change things.

But disclosing fee agreements has costs, too. As with many things in litigation, I don't think there's a blanket right answer.

In this case, I can't imagine it matters. I've never been in discovery and had negotiations be at such a low point and then have some disclosure unrelated to the facts of the case change a defendant's bargaining position. Sounds like it's time to bury your head and fight.

Jacob M. Small, Virginia

I agree with Barry. You tell them nothing (for now). Here's why:

1) defendant will be surprised with every continued turn of the litigation road that your client "continues" with the case. This would = crazy factor in D's eyes >> No one likes crazies in litigation >> Advantage to you
2) if they know that you are the real thorn in their litigation strategy they will try to "take you out" I e. disqualify you or try other strategies to get rid you off the case.
3) they may ratchet up specific costs quickly to exhaust your resources. (use of expensive legal and non-legal domain experts that you will need to counter)
4) they may offer deals that sideline you and entice the plaintiff.

Roman R. Fichman

I wouldn't tell the other side anything.

Your actions will speak louder than words; if you show in the course of the litigation that you will go all the way and do what needs to be done, as you say, that is all you will need to do.

My practice is almost all contingency fee matters and I can tell you a common defense strategy is to discourage plaintiffs' attorneys from putting their resources (i.e. time and money) into a case by saying all kinds of things. So, I don't see any upside in you telling them this.

If it was me, the next time they say something about the client's limited resources, I'd just say that we are fully committed to litigating this case and the money is not an issue, and show them.

Robert Weiss

Bad idea across the board. Running down the other side of the case has always existed. If offers are low, work harder. Many settlement offers get serious on the eve of trial or when you are seating a jury. Devote your efforts to getting the case ready for trial.

Always document you advise your client of the existence of a settlement offer, no matter the terms. Your client may lose at trial and your documentation on settlement offers and client response may save your neck.

Darrell G. Stewart, Texas