

Possible Circumvention of Contingency Fee

Hello all:

I wanted to get everyone's opinion on ensuring receipt of a contingency fee under the following scenario.

Client's lawyer issues a demand letter to X for an amount owed to client. Client has expressed to the lawyer a desire not to sue X as X is closely acquainted with client's family.

As client and X are relatively close to one another, I would surmise that there is a possibility that X will reach out to client directly after receiving the lawyer's demand, and X may then attempt to settle the dispute without the knowledge and/or participation of client's lawyer. Heck, client might even conceal the resolution of the matter and simply direct the lawyer to discontinue efforts/close the file.

What say you all about the lawyer ensuring receipt of his/her contingency?

In my agreements I say that should the client dismiss me before litigation, I'm owed one third of the last offer made in the case.

Realistically, not sure if I would try to enforce it.

In the case you mentioned, not sure what the lawyer can do. Is there a mention of pre lit offers and their treatment in the fee contract?

R. Gary Spencer, Georgia

--My simple solution to this is that I won't send a demand letter when the client expresses that they would not proceed with litigation. I am a plaintiff's attorney, not a threatening attorney. I wouldn't write a letter at all under this situation.

That being said, if you wanted to take on the case, get a retainer up front or do it hourly.

Jonathan G. Stein, California

Why take a case on contingency to write a demand letter? Do it hourly, you get paid for your time, and if the client later on does decide they want to litigate, then you can do a fee agreement for a retainer fee for that part of the representation

Erin M. Schmidt, Ohio

Thanks everyone for your comments. The retainer was drafted to ensure a narrow scope per the client's wishes. The contingency fee is spelled out in the retainer - "Law Office shall receive ____% of any recovery, whether by litigation, judgment, verdict, settlement, and/or otherwise."

Also, for those that mentioned getting my fees upfront, this is in an area of law that is ordinarily handled on contingency. My concern is that this client and X are sufficiently close that it is within the realm of possibilities that once I issue a demand, the client and X will directly reach a settlement and cut me out of the proceeds.

Practically speaking, I don't see much that can be done to rectify this.

Similar to what Erin said. I will sometimes write a demand letter on a flat fee basis. If the case doesn't resolve and the client wants to sue, then we can engage on a contingent fee.

David Truman, Ohio

Trying to enforce a contingency fee for merely drafting a demand letter may expose you to discipline by your state bar. You may want to run it past your bar ethics for their opinion. Situation often arises when client signs contingency agreement, then fires lawyer and hires a new lawyer on contingency. Generally, most bars will only allow one contingency fee to client and require the two attorneys to split the fee in an equitable manner. Regardless of what your fee agreement states, it still has to pass ethical compliance.

Duke Drouillard, Nebraska

As to your particular issue, it sounds like you're drafting a simple Demand Letter. I don't do contingency on those. I get paid up front, a flat fee; the money deemed "earned" and transferred to my operating account once I hand the finished work product over to the client.

The contract is explicit in that the work covers only the letter drafting and that litigation work of any kind must be separately negotiated and contracted to.

Be wary, because it is easy to contract to a Demand Letter only, and then get caught up doing all manner of litigation work. For example, the party receiving the letter calls and requests a meeting where the parties can discuss the matter (who will moderate that meeting?), handling phone calls from the other party's lawyer who writes an equally threatening response, etc.

Further, if I know up front that my client has no interest or intent in suing should the other party not pay, I take the bite out of the closing sentence where I put something to the effect that the client "reserves the right" to sue vs. a more certain declaration like the client "will" file in small claims court. That way, my firm's credibility doesn't take a ding after the party uses my Letter as toilet paper and ignores me.

Rashida Ayers, New York

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From a practical viewpoint, I agree; there isn't much you can do if they decide to do a side deal.

Let me tell you a story. Back when I first opened up, I had someone come to me with possible violation (not possible, it was a violation) of Florida Blue Sky Laws. Elderly couple had been approached by their Medicare insurance agent who sold them this fantastic investment; they put \$40,000 into it. Sounded too good to be true; 14% return on investment. Well, it was a fricking Ponzi scheme that wound up in bankruptcy; and they were going to get nothing back. But it seemed to me that the guy who sold it to them was liable under Florida Blue Sky laws; selling an unregistered investment.

So, I had them sign a contingency retainer agreement; 1/3 to me. I spend about 2 days researching this and writing a letter to the bozo that sold them this stuff; it was a beautiful letter. He gets the letter and calls me up and screams at me; my fraternity brother is a high power lawyer and he's going to rip you a

new one, lousy stinking low life lawyer, blah blah. Told him yeah he probably did need a lawyer and that I couldn't advise him.

Then, silence for the next 10 days. THEN I get phone call from client; oh, Mr. Jones, we want to drop this stuff. Entirely. Stop contact with him we simply want to drop this, period.

I was puzzled initially; and got kind of pushy with them as to why they wanted it dropped. They 'resolved' it with him. At which point I'm smelling them cutting an outside deal with him. They wouldn't actually say that but that was the distinct impression I was left with and I was more than a little ticked. They said, oh, we'll pay you for your time. So, fine, I drafted them an invoice and sent it to them; it was a low 4 figure invoice. They screamed, you charged that much for writing a letter? No, I charged that much for spending two days researching the law, researching the facts and then writing the letter. They screamed about that. So, finally I wrote them a letter firing them and returning the file and just kind of letting it be a lesson to me.

Point is, there's always a chance of someone cutting a deal and cutting the lawyer out of the cut.

Ronald Jones, Florida

Even if the area of law you are dealing with is typically on a contingency basis (i.e. personal injury and its ilk), that is separate and distinct from the a la carte nature of a Demand Letter.

Drafting a Demand Letter is a service in itself, and is not tied to the strictures of the area of law you are drafting it for. The contract can be structured so that the Demand Letter is a standalone service for a flat fee. The writing of the letter itself - and all of the legal research it entails - costs X dollars. Period.

Of course, this method could potentially be less lucrative than an arrangement where you receive a percentage of the amount recovered, but how much of a gambling man are you? A flat fee of \$1,000 beats 33 percent of zero any day.

The point being is this: your contract is limited only by your creativity. A contract can be drafted where you charge X for the Letter. Should the letter lead to settlement, you further get a percentage. In the event you are secretly cut out of a backdoor settlement by the parties, you still earned-and were paid- X for drafting the Letter. Nothing lost since you were paid for your services and didn't expend any extra time or resources litigating.

Again, this is likely less lucrative than the percentage/contingency arrangement but ask yourself, how much would you earn on the scenario where they went behind your back?

Rashida Ayers

Thanks for the input everyone.

The Original Poster