Nuts and Bolts of Contingent Fees

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The contingent fee is the customary method of compensating plaintiffs' lawyers in personal injury and death cases. The practice of paying an attorney a share of the damage recovery is an American-born invention dating back to the early 1800s. All U.S. jurisdictions permit contingent fees subject to the general ethical requirement that such fees be reasonable and not excessive. In addition, federal and state laws impose a patchwork of limits on the fee percentage ranging from 10 percent to 50 percent.

Contingent fees generate heated debate. They provide access to courts to victims who cannot afford to litigate against well-funded adversaries. Unlike defense counsel working for an hourly fee, the contingent fee lawyer is financially motivated to resolve the case as quickly as possible for the highest sum. "Tort reform" advocates have argued, however, that contingent fees encourage needless litigation by incentivizing lawyers to take on a large number of doubtful cases knowing that only a few need to be successful. Also, comparing the amount of a contingent fee to the risk and effort actually undertaken by the attorney is a difficult task. Many attorneys automatically charge the same standard percentage no matter whether a case requires a tough fight to establish liability or is a "slam dunk" with a clearly culpable defendant.

The U.S. Court of Appeals for the Second Circuit has held that a contingent fee retainer contract "is 'the freely negotiated expression both of a [client's] willingness to pay more than a particular hourly rate to secure effective representation, and of an attorney's willingness to take the case despite the risk of nonpayment.'"[1] Courts "should seek to enforce the parties' intentions in a contingent fee agreement, as with any contract" and "be reluctant to disturb contingent fee arrangements freely entered into by knowledgeable and competent parties."[2] Nevertheless, courts retain the inherent power to review attorney's fees, and as the U.S. Court of Appeals for the Seventh Circuit has observed, a judge should not be an "unwitting accessory to an excessive fee."[3]

Ethical codes bar all attorneys from charging fees that are excessive[4] or unreasonable.[5] The reasonableness of a contingency fee agreement must "be evaluated at the time it was made."[6] The factors used to determine whether a contingency fee is fair and reasonable under New York law include:

• the difficulty of the case and the risk undertaken by the attorneys;

• the skill, background and experience of the attorneys;

• the time and work effort of the attorneys in pursuing the claim;

• the result achieved given the facts presented in the case;

• the fees ordinarily charged in similar cases.[7]

A contingency fee attorney is not obligated to maintain contemporaneous time records to substantiate his or her work, although such records can prove helpful in the event of a dispute.[8]

New York court rules impose a maximum fee in tort cases of one-third of the recovery and establish the presumption that a fee equal to or less than one-third "is deemed to be fair and reasonable."[9] In medical malpractice cases, the Judiciary Law establishes a maximum sliding scale fee starting at 30 percent of the first $250,000 down to 10 percent of the recovery over $1.25 million.[10] Both fee limits provide that an application for higher fees can be made where, because of "extraordinary circumstances," the fee does not provide "adequate compensation." Such applications have frequently been made in large medical malpractice cases where the fees are capped at a low percentage and significant effort is required to obtain a proper result.

Connecticut rules establish a sliding fee limit of 33 1/3 percent on the first $300,000 ranging down to 10 percent of the recovery over $1.25 million.[11] The Connecticut fee limit, however, may be waived in writing by the client in the retainer, provided that the total fee does not exceed one-third of the recovery.[12]

New Jersey also has a sliding fee scale from one-third down to 20 percent of the recovery on the first $2 million, with court review and approval of the fee on a recovery above $2 million required.[13] New Jersey courts have approved fees as high as 33 1/3 percent on the excess recovery.[14]

Federal law imposes a strict 25 percent cap, subject to criminal penalties, on fees in all cases brought under the Federal Tort Claims Act.[15]

In cases involving minors, all contingent fees are subject to court approval based on an application filed by the attorney.[16]

In cases not involving minors or an incompetent party, there is generally no court review of a contingent fee. New York courts have routinely approved contingent fees of 33 1/3 percent as fair and reasonable.[17] Several New York cases involving minors have reduced fees in cases settled before trial to 25 percent.[18] New Jersey expressly limits fees charged to minors in a settled action to 25 percent.

One frequent question concerns the fee to an attorney who refers a case to litigation counsel. New York ethical rules require that such fee division between the referral and litigation counsel be approved in writing by the client, and that the referring counsel share responsibility and perform some work on the case.[19] Provided these requirements are met, it is not necessary for the fee to be divided in proportion to the work performed by the referring and litigation counsel.[20]

Numerous proposals have been made to regulate contingent fees. While some have suggested that courts review all contingent fees following a settlement, judicial resources are limited and there is a strong desire to avoid turning a fee issue into a second litigation. Some jurisdictions have imposed low fee limits, such as the 10 percent cap in New York medical malpractice cases, but such limits are unrealistic in many instances and have placed an added burden on the judiciary to decide applications to increase the fee. Such low limits can also hand an unfair litigation advantage to a defendant who has the resources to spend without limit.

One California proposal would require plaintiff at the outset of a case to provide the defendant with the information to make an "early settlement offer" and then limit contingency fees on any subsequent recovery to 15 percent of the defendant's offer plus the agreed fee on the excess.

While certain additional safeguards may be in order, it is unlikely that the contingent fee system can or should be replaced. There is no other satisfactory method by which ordinary citizens can gain access to the courts and have the wherewithal to battle large heavily funded corporations.

To paraphrase Winston Churchill, a contingent fee is the worst method of compensating a plaintiff's counsel—except for all of the other methods. It is telling that England, which has never allowed contingent fees, is seriously considering whether to adopt the practice. The English bar on such fees is based in part on the belief that an attorney with a stake in the outcome could not give impartial advice. A recent review performed by the English Lord Justice has concluded, however, that on balance contingent fees will open access to courts and should be adopted subject to a 25 percent fee limit in personal injury and death cases, and a requirement that the client obtain independent advice regarding the fee agreement.

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Endnotes:

1. *Alderman v. Pan Am World Airways*, 169 F.3d 99, 103-4 (2d Cir. 1999).

2. Id.

3. *Rosquist v. Soo L. Railroad*, 692 F.2d 1107, 1111 (7th Cir. 1982).

4. NY Rule of Professional Conduct 1.5(a).

5. ABA Model Rules of Professional Conduct Rule 1.5

6. *Alderman*, supra, 169 F.3d at 103.

7. *White v. Daimler Chrysler Corp.*, 57 A.D.3d 531, 871 N.Y.S.2d 170 (2d Dept. 2008).

8. *Alderman v. Pan Am World Airways*, 169 F.3d 99, 103-4 (2d Cir. 1999).

9. 22 NYCRR 603.7(e)(1), (2). The rule also provides for an alternative sliding scale fee starting at 50 percent on the first $1,000 down to 25 percent of the recovery above $25,000, but the scale is rarely used.

10. NY Judiciary Law §474-a.

11. Conn. Stat. §52-251c(b).

12. Conn. Stat. §52-251c(c),(d),(e) & (f).

13 . N.J. Court Rule 1:21-7.

14. *King v. County of Gloucester*, 483 F.Supp.2d 396 (D.N.J. 2007) (excellent work and result merited 331/3 percent fee on recovery above $2 million).

15. 28 USC §2678.

16. NY Judiciary Law §474.

17. *Barretta v. NBKL Corp.*, 298 A.D.2d 539; 748 N.Y.S.2d 669 (2d Dept. 2002) (appellate court reversed trial court's decision to lower attorney's fees on settlement for infant's share to 25 percent and ordered fees of one-third because that fee "was consented to by the plaintiff and was consistent with the retainer agreement"); *Harris v. Kem Corp.*, 1990 U.S. Dist. LEXIS 11150, adopted, 1990 U.S. Dist. LEXIS 11119 (SDNY 1990) (then-Magistrate Gershon filed a report and recommendation later adopted by Judge Knapp for the infant compromise of a settled wrongful death action and approved the one-third fee set forth in the retainer "based on my conclusion that there is no reason for the fee contracted for to be reduced…."); *Estate of Lorenzo Pavia*, 2008 N.Y. Misc. LEXIS 7315 (Richmond Cty. 2008)(one-third fee approved in $5 million settlement of wrongful death action involving infant beneficiaries). *Newman v. Polskie Linie Lotnicze LOT*, 1980 U.S. Dist. LEXIS 16414 (EDNY 1980) (court approves one-third fee in death action arising from air disaster, noting that New York law provides that such a fee is "deemed fair and reasonable").

18. *Mahler v. American Airlines*, 49 Misc.2d 693, 269 N.Y.S.2d 342 (West. Cty. 1966).

19. N.Y. Rule of Professional Conduct 1.5(g).

20. *Alderman*, 169 F.3d at 104 (referring counsel included in contingent fee agreement who did some work on the case entitled to the agreed percentagefee).

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