Contingency Fees in Patent Litigation: A Double-Edged Sword

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How much should one be paying their attorney for patent litigation? Patent holders consistently face this question when they need to defend their patent against an infringer. Unfortunately for clients, the standard for how one should pay their attorney for such work depends on the firm. Some firms operate using a flat fee while others operate using the contingency fee method.[1] Despite the split market, however, opinions vary on whether contingency fees are beneficial to either clients or attorneys.

Contingency fees are widely associated with personal injury cases.[2] In a personal injury case, the only issue at hand is damages, not liability, so firms will always get a payment, and the question is simply how large of a payment.[3] When it comes to patent litigation however, liability is central to the dispute and is always in question.[4] For clients, contingency fees strike them as attractive because patent litigation fees often appear very large, and the contingency fee model allows them to invest no money into counsel if they lose, thus eliminating risk.[5] In theory, this suggests that the interests of the attorney and the clients would be aligned. The attorney would have to establish liability both for their client and their own paycheck.[6] Additionally, they would theoretically be motivated to get as much in damages as possible.[7]

While contingency fees appear to promote the interests of both the client and the attorney, they create significant risks for both parties as well. For attorneys, patent litigation can last for periods of up to two or three years.[8] By using contingency fees, attorneys could be without any pay until the case wraps up, and most attorneys cannot stay in business without revenue for that length of time.[9] On the other hand, clients may be harmed by contingency fees when they have to pay attorneys a disproportionate amount for the work they do.[10] For example, a client may ask an attorney to write a demand letter for $100,000 on a thirty percent contingency fee basis.[11] If the letter results in payment, the attorney could walk away with $33,333.33 even though if they had

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[1] William R. Towns, *U.S. Contingency Fees: A Level Playing Field*, WIPO MAGAZINE (Feb. 5, 2010), https://www.wipo.int/en/web/wipo-magazine/articles/us-contingency-fees-a-level-playing-field-37140 [https://perma.cc/N66G-BAQB].
[2] Russ Krajec, *Contingency Fee litigation Is Only a Last Resort*, BLUEIRON IP (Nov. 28, 2023), https://blueironip.com/contingency-fee-litigation-is-only-a-last-resort/ [https://perma.cc/H75D-MMVA].
[3] Anton Hopen, *Patent Cases on Contingency Do Not Work*, SMITH HOPEN (Jan. 12, 2020), https://smithhopen.com/ufaqs/patent-cases-on-contingency-do-not-work/ [https://perma.cc/EMG3-ZR92].
[4] *Id.*
[5] Krajec, *supra* note 2.
[6] *Id.*
[7] *Id.*
[8] Hopen, *supra* note 3.
[9] *Id.*
[10] *Id.*
[11] *Id.*

charged the client a flat fee, the work would only cost under $1,000.[12] Additionally, clients often lose control of the litigation when their attorneys operate on a contingency basis and will tend to make decisions to end the litigation early so they can get paid sooner.[13]

In addition to the logistical downfalls of contingency fees in patent litigation, critics also highlight concerns about contingency fees enticing companies to partner with attorneys to buy patent portfolios and then begin frivolous lawsuits to settle and get significant payouts.[14] Despite these concerns, contingency fees remain an appealing option to many inventors, especially when they do not have the money to afford the generally large cost of patent litigation.[15] As long as the client aligns their interests with those of the attorney, contingency fees can be an effective model.

Regardless of one's views on whether contingency fees are good or bad for both attorneys and clients, it is important for clients and assignees to understand the pros and cons before choosing an attorney and a payment method.

[12] *Id.*
[13] Krajec, *supra* note 2.
[14] Towns, *supra* note 1.
[15] *Id.*