5 Tips for Determining Your Contingency Fees

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It's simple—unless you've agreed to work pro bono, contingency fees are a common way to ensure you receive compensation in exchange for your legal services. That's how business works.

Contingency fees often come up in legal situations like personal injury claims, where a client may not have the funds to pay expensive attorney fees upfront–This is where contingency fees become crucial. A contingency fee agreement between a lawyer and a client stipulates a provisional payment after the successful resolution of a case where monetary compensation is achieved.

In this blog, we dive into contingency fees and provide lawyers the tips they need to begin accepting them as a payment method.

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What are contingency fees?

Contingency fees operate on the principle that if your case is successful or settled out of court, you'll compensate the lawyer with a percentage of your winnings. However, in the event of an unsuccessful outcome, the lawyer does not receive payment from you.

Most states, and the ABA Model Rules, prohibit the use of contingency fees in all criminal law cases, most family law cases, and some immigration and contract law cases. If you practice in these fields, you might be better off double-checking whether they can be used or skipping this article (and checking out this handy post on flat fees instead).

For other lawyers—especially personal injury and workers compensation warriors—why wouldn't you love contingent compensation? Contingency fees allow you to get paid (because many slip-and-fall victims don't have money for an hourly rate retainer). Also, you may end up with a case that pays nothing. Or you may end up with 40 percent of a multi-million dollar verdict—the latter would take an unfathomable amount of billable hours to reach the same payout. A contingency-based practice can be lucrative for those who can stomach the risk. Contingency fees allow you to serve clients that otherwise couldn't afford your services.

But how do you set your contingency fees? And how do you know if your contingency fees are reasonable? Read on to find out.

What is considered a contingent fee?

A contingent fee is a payment arrangement where a lawyer only gets paid if the case is won or settled. The lawyer typically takes a percentage of the awarded amount, and if the client loses, no fee is owed, though certain costs may still apply. This arrangement is common in cases like personal injury claims.

What is a retainer fee?

A retainer fee is an upfront payment made by a client to secure the services of a professional, such as a lawyer or consultant. This fee ensures the professional's availability and is often deducted from the total cost of services as work progresses. Retainer fees can be either non-refundable or refundable, depending on the agreement. They are commonly used in legal services to guarantee that the lawyer will handle the client's case.

1. Discover common contingency rates in your area

My advice on any legal question is to start with the statute or rule book. Of course, even if you do read the rules, you probably still won't come away with a clear answer to, "What is reasonable?" Most of the rules don't have a solid number–it's simply a bunch of factors like the riskiness of the case, the amount of time it will take away from other cases, etc.

Start by asking mentors and colleagues. Yes, the "what's your hourly rate?" and "what are your contingency fee percentages?" questions are just about as tacky as asking someone their age or if they are pregnant. But lawyers need to be comfortable making uncomfortable requests, and if that person really is your mentor or your trusted colleague, they almost certainly won't mind.

2. Check your state's rules on contingency rates

Take your mentor or colleague's suggestion for an attorney contingency fee arrangement and check it against the rules. This may seem obvious (and it should be). But we've all met lawyers who never consult a statute, a case, or the ethics rules and instead just download template forms off of the internet. Plus, rules change.

For (an admittedly obscure) example: California's Business and Professions Code § 6147, which sets forth statutory requirements for a contingency fee agreement, used to apply to plaintiffs and litigation matters only. The requirements did not apply to transactional cases or defendants (the reverse contingency fee discussed below). The switch tripped up an attorney in Arnall v. Superior Ct. (Liker) (2010) 190 Cal. App.4th 360, whose contingency fee agreement in a transactional matter failed to comply with the statutory requirements.

The California Rules of Professional Conduct contingency fees clause also stipulates that while family law matters must be charged on a flat fee basis, contingent fees may be applied where a client seeks to recover balances due under child or spousal support after a judgment has been reached. For another example: Florida. I tried to understand their Joyce-ian Rule 4-1.5 on reasonable fees and contingency fees but then realized that (a) I don't live in Florida, (b) the rules stretch onward for 22 pages (including sample forms). If you do live in Florida, that's twenty-two pages of ethical traps that you could fall into if you fail to simply check your state rules before you practice.

3. Weigh the factors before setting your contingency rate

You have a percentage that you borrowed from your mentor. And you've got your state's rules handy. What's next? It's time for the "only lawyers could make things this complicated" weighing-of-factors test! You'll want to make sure you comply with the requirements for a contingency agreement and any state-required tests for a reasonable fee generally.

To return to our painful example, Florida has eight distinct factors for weighing the reasonableness of a fee. And six more for weighing the reasonableness of a cost that you pass on to a client. Plus, there are a separate set of rules for contingency fees. The rules set forth obvious requirements (in writing) and a schedule of what is reasonable absent court approval. With breakdowns by the amount and when the case is resolved (pre-answer, post-answer, when the defendant admits liability, when the case is appealed, etc.). And there's a waivable element of the Florida Constitution that caps contingencies in medical malpractice cases.

Conversely, ABA Model Rule 1.5 on Fees has eight factors for generally determining the reasonableness of fees. The rule also includes a few special requirements for contingency fees, and that's pretty much it—no 22-page odyssey to find the reasonable fee there. They are:

- The fee typically charged in the locality for a similar legal service;
- The amount involved and the results obtained;

- Any time limitations imposed by either the client or circumstances;
- The professional relationship between client and attorney;
- The experience, reputation and skill of those performing the services; and
- Whether the fee is fixed or contingent.

4. Scrutinize hybrid and reverse contingency fees

You're not sick of contingency fees yet, are you? Because we still have to deal with hybrid fee arrangements and reverse contingency fees.

Hybrid fee agreements

A hybrid fee arrangement typically includes both (1) a fixed (often hourly) rate and (2) a fee based on a favorable outcome. In the aforementioned California case of Arnall, the court, in reaching its holding that hybrid agreements had to comply with rules for contingency agreements, stated:

The term "contingency fee contract" is ordinarily understood to encompass any arrangement that ties the attorney's fee to successful performance, including those which incorporate a non-contingent fee based on a fixed rate of payment. (Arnall, at 373)

In short: hybrid agreements are contingency agreements and need to meet the state-prescribed requirements, no matter how small the contingent "bonus" might be. (Arnall dealt with bonuses of 1 and 2 percent across two separate agreements.)

Reverse contingent agreements

The basis of reverse contingency agreements is on how much the client avoided loss. For example, picture a defendant who was issued for $2.7 million, but his lawyer negotiates a settlement for only $100,000. That's a massive win for the defense. A reverse contingent fee would give the defense lawyer a cut of the savings of $2.6 million.

The problems are plentiful with these kinds of arrangements. For one, plaintiffs are nuts. They ask for insane amounts because hope springs eternal in the plaintiff's lawyer's breast. In the above example, the defendant might not have saved $2.6 million if we are talking about the actual value of the case—a "real" judgment might have only been worth a few hundred thousand dollars.

Do you see the problem? Trying to figure out what is "reasonable" in such a case is extremely difficult. However, reverse contingent fees are not outright impossible. At least under the ABA rules—your state may vary: ABA Formal Opinion 93-373 allows these odd

fees so long as “the amount saved is reasonably determinable, the fee is reasonable in amount under the circumstances, and the client’s agreement to the fee arrangement is fully informed.”

What do most lawyers charge for a contingency fee?

The average contingency rate falls between 20-40%, with most lawyers charging around 33% to 35% of the total amount recovered in a case. The exact percentage can vary depending on the complexity of the case, the lawyer's experience, and the stage at which the case is resolved.

Will the client pay my contingency fee?

When it all comes down to it, the real question is this: Will the client pay the fee without complaining to the state bar? That may sound a bit cynical. But assuming that you have explained the risk inherent in the case, getting informed consent for contingency fees shouldn’t be too big of an issue. Obtaining informed consent should also insulate you from later complaints about your “unreasonable” fee.

There is a reason why many states require such informed consent, and more specifically, a statement that “the fee is not set by law but is negotiable between attorney and client.” It may seem like common sense, but negotiations should always be done upfront before a contract is signed, not at the end of the case. For cases where the liability is crystal clear to the client (e.g., a legitimate accident resulting from workplace negligence that requires significant medical treatment), a client may negotiate a lower fee as the case does not present substantial risk.

The safeguard of negotiation and a lack of enforced contingency protects the client from thinking that the “standard 60% contingency” is required by law and protects attorneys from defending their fee agreements in front of ethics boards.

What happens to my contingency fee if my client files bankruptcy?

Prevention is the best protection. Where applicable, an attorney should seek insight into whether a client has recently filed for bankruptcy or intends to. Creditors may require a bankrupt client to pay them back over three to five years, under a plan that the court enforces.

Get informed consent for contingency fees

Ultimately, your entitlement to compensation is dependant on both individual circumstances and your ability to abide by the requirements of the Bankruptcy Code.

When it all comes down to it, the real question is this: Will the client pay the fee without complaining to the state bar? That may sound a bit cynical. But assuming that you have explained the risk inherent in the case, getting informed consent for contingency fees shouldn't be too big of an issue. Obtaining informed consent should also insulate you from later complaints about your "unreasonable" fee. By the way, the risks inherent to the case could be the particular difficulties in securing a victory, the amounts at stake, etc.

What is the standard contingency fee for an attorney?

There is no 'standard' attorney contingency fee—every lawyer charges different fees, whether contingent or fixed. Some may have set attorney contingency fees by percentage, and others may be more open to negotiation. Some may charge higher fees based on risk, and others may often take a smaller fee.

Many states require attorneys to provide informed consent. They may also require the attorney to state that "the fee is not set by law but is negotiable between attorney and client." These safeguards prevent the client from believing that the "standard 60% contingency" is mandated by law. These requirements also safeguard attorneys from having to defend their fee agreements in front of ethics boards.

But while the lawyer contingency fee average number you're after may not be immediately available, following the tips above should help you determine how much to charge based on the circumstances of the case, your professional experience, and more.

Final thoughts on contingency fees

Contingency fees or not, putting the client at the center of your practice will undoubtedly benefit everyone. Considering alternative fee arrangements is a big decision. But, it's also a decision you should make as a legal professional and business owner.

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