

## *SPRING 2012 EDITION*

### ATTORNEY FEES: A CONSUMER'S GUIDE

**Introduction:** When it comes to hiring an attorney, the average consumer is usually unaware of how attorneys charge fees for legal services, what type of attorney's fees may be charged, how fees may be negotiated by the client, and of how to ensure that the client has appropriate safeguards and controls over their responsibility for attorney's fees and related costs in the matter that they retain any attorney on.

The purpose of this article is to explain the different type of fee arrangements that may be available for any given type of legal case, and what the consumer should do to make sure that they understand what they are getting involved in and that they are not being taken advantage of.

#### TYPES OF FEES \*

**Contingency Fees:** Contingency Fees are the common fee arrangement when attorneys represent accident victims, but are also commonly used in other types of litigation as well, including debt collection cases, employment discrimination, insurance claim cases, legal malpractice, and other types of business litigation cases as well.

The paramount point to remember is that Contingency Fees are *negotiable*: the agreed upon fee percentage, the payment of which is *conditional* on the lawyer obtaining a monetary recovery for the client, is or should be the end-product of an arms-length agreement reached between attorney and client.

While most personal injury attorneys will routinely quote a client a Contingency Fee of one-third if they can settle the case, and a greater percentage such as 40% if the case is resolved at some later point in time if litigation is commenced, this doesn't mean that the potential client cannot try and negotiate a better rate with the prospective attorney. If their case merits it, most attorneys will be willing to negotiate.

In the experience of this practitioner, many personal injury attorneys will routinely quote a fee escalation from 33 1/3% at the inception to 40% once a lawsuit is filed. However, it takes no great effort for an attorney to prepare and file a personal injury complaint (which will either be a "fill in the blanks" form complaint provided for by the Judicial Council or which will alternatively be a boilerplate pleading template already in place on the attorney's word processor), and a careful consumer, if the attorney is seeking 40%, will want to make the fee raise conditional on some event other than just the mere filing of a lawsuit, such

as the case going to alternative dispute resolution (mediation, arbitration or a settlement conference), a trial, or an appeal.

Certain types of personal injury Contingency Fees have maximum contingency rates that an attorney is prohibited by statute or local rules of court from charging more than a specified rate. These would include medical malpractice cases, wherein there is a decelerating fee based upon the amount of the recovery after deducting the case costs off the top of the gross recovery (see Business & Professions Code sec. 6146, and which provides for 40% of the first \$50,000.00 of any recovery, 33 1/3% of the next \$50,000.00, 25% of the next \$500,000.00, and 15% of any amount on which the recovery exceeds \$600,000.00).

Also subject to fee restrictions are personal injury cases brought on behalf of minor children and/or disabled persons, wherein most local county rules of court will not allow a fee in excess of 25%, calculated after deducting the costs off the top of the gross recovery, absent exceptional circumstances.

In some motor vehicle accident (MVA) cases, some personal injury attorneys will also charge a contingency fee to the client on what they collect from the medical payment coverage (MPC) available under the client's own motor vehicle insurance. MPC is available as a matter of right to any injured person in the insured's motor vehicle if such coverage is provided for in the policy, but nearly all vehicular insurance policies provide that the MPC is reimbursable to the carrier if the injured person obtains a recovery from the at-fault party. However, the carrier is obligated to reduce the amount of reimbursement to allow for its pro rata share of the legal expenses obtained in getting the recovery under what is known as the "common fund doctrine", which in practical terms usually means that the carrier will accept about 2/3 of the MPC payout as satisfaction in full on its reimbursement claim from the settlement proceeds.

In the opinion of this practitioner, the charging of an additional contingency fee on the MPC by the client's attorney, in addition to the contingency fee being charged on the recovery being obtained from the at-fault party, amounts to the charging of an unconscionable fee, which is prohibited by the Professional Rules of Responsibility (Rule 4-200). If the attorney charges a contingency fee on one-third of the MPC, and then the MPC carrier is paid back two-thirds of the MPC on the conclusion of the claim, then the client does not see any benefit whatsoever from their MPC and which they have been paying premiums on. Charging fees on MPC is akin to charging the client a fee on whatever their health insurance pays on their

medical bills, assuming that they have health insurance.

To prevent this from happening, the cautious consumer, if they have MPC pertinent to MVA, should make sure that the Contingency Fee is in writing and that the MPC recovery is excluded from the calculation of the fee therein.

Another consideration in entering into a Contingency Fee is the treatment of “costs”. Costs are the out of pocket expenses normally incurred in making a legal claim, regardless of whether the consumer hires an attorney or not. Depending on how far the claim goes and what the attorney may opt to bill for, such costs could include the expenses of postage, photocopying, investigation, courier services, filing fees, service of process, expert witness fees, jury fees, court reporter charges, and other expenses.

The consumer needs a written Contingency Fee agreement (and which is required by law anyway as per Business & Professions Code sec. 6147) that spells out how the costs are to be handled: Is the client responsible for paying the costs as they are incurred, or is the attorney expected to advance the costs during the tenure of the claim and then be entitled to reimbursement if a recovery is had? If there is no recovery, is the client still responsible for the costs advanced by the attorney? Is the Contingency Fee to be calculated after the costs are deducted from the gross amount of the recovery (as per medical malpractice and minor’s cases), or are the costs payable out of the client’s share of the recovery after first deducting the Contingency Fee?

All of these above-referenced scenarios for costs are, again, *negotiable*.

As pointed out, Contingency Fee agreements are required to be in writing, per Business & Professions Code section 6147. If such a fee agreement isn’t in writing, then the fee agreement is *voidable* per the option of the client, and the attorney is restricted to a “reasonable” fee, whatever that may be. However, having a written fee agreement does the client little good unless the client is provided a copy of the Contingency Fee agreement after both the client *and* the attorney sign it. The attorney is required to do this anyway per section 6147, but not all practitioners will do so.

Should the client discharge a Contingency Fee attorney and retain another Contingency Fee attorney to handle the same case (clients have an absolute right to change attorneys for any reason or for no reason), then the client is only obligated to pay for *one* contingency fee out of the total recovery, which would then

be allocated between the original and successor attorney(s) pro rata based on who did what, and which is usually negotiated between the different attorneys without having to get the client involved.

Lastly involved in the consideration of a Contingency Fee (as well as other types of fee arrangements explained hereafter) is what is to happen if the client recovers their attorney's fees in the contemplated litigation. While each party must bear their own attorney's fees in the typical personal injury case, in some types of cases the prevailing party at trial has a right to also be awarded their attorney's fees, if such a right is provided for either by statute or a written contract with an attorney's fees provision as entered into between the client and their adversary before a dispute occurred.

If attorney's fees are a matter of right to the prevailing party, then the Contingency Fee agreement should spell out how that is to be handled if such fees are actually collected: Is the client to be reimbursed their fees from the attorney if the court awarded attorney's fees are actually collected by the attorney? What if the amount of attorney's fees awarded by the court is lesser than or greater than the amount of the agreed upon Contingency Fee (trial courts have broad discretion in adjudicating what is to be awarded for "reasonable fees" when that is an issue in the case)?

While it would probably be unconscionable for an attorney to collect both the agreed upon contingency fee and the court awarded attorney's fees, a typical provision in some Contingency fee agreements would be that the attorney is to be paid a fee equal to the agreed upon contingency fee *or* the court awarded attorney's fees, whichever is greater, and the client is to receive the lesser sum. Again, this is all a product of *negotiation* between attorney and client.

**Hourly Fees:** Hourly fees are the mode that most usually apply to family law cases, some probate cases, some criminal defense cases, and many varieties of general civil and business litigation.

Again, the amount of the hourly fee is *negotiable* between attorney and client.

Business & Professions Code sec. 6148 requires such fee arrangements to be in writing when the foreseeable fees will exceed \$1,000.00, subject to certain exclusions.

Among the factors that may enter into an attorney's hourly fee would be their years of experience, whether they are a specialist or exclusive practitioner in the type of case contemplated for the client, their reputation, and the complexity or time commitment related to the specific type of case.

As a practical matter, another factor entering into the hourly rate may be the attorney's geographic location – in general, expect to pay a higher hourly rate for Los Angeles attorneys with offices on Wilshire Boulevard or Century Park East, and expect to pay a higher hourly rate for Orange County attorneys with offices in Newport Beach.

In an hourly case, the attorney will typically bill in tenths of an hour for all tasks related to the case. This would include minimum charges for making phone calls and reviewing correspondence, and if a trip out of the office to a deposition or court hearing is had then most attorneys charge their travel time as well, from portal to portal.

Many larger firms will assign multiple attorneys and/or paralegals to any given legal case, each of whom will bill their time on the same case at their specified hourly rate. Many larger firms place minimum billing thresholds that their associates and partners must meet, so the strategy of capturing all possible time related to any given case is emphasized by such a firm, if not mandated.

Costs, as explained prior, would be billed in addition to fees.

Most hourly attorneys will require the client to pay an up-front retainer amount, which is then deposited into the attorney's trust account, and the monies withdrawn thereafter as the fees and costs are incurred. If the retainer amount is exhausted, the hourly attorney may require payment of an additional retainer amount to cover any additional charges.

Some hourly attorneys will have a written agreement stating that the up-front retainer is a non-refundable "retainer", although whether that would be legally enforceable would depend on whether it is a "true retainer" (as explained hereafter); and/or the amount of the retainer in comparison to a time or work perspective as to when the client changed their mind and wanted to terminate the relationship and request a fee refund.

If an hourly attorney is retained, the client should insist on receiving a monthly itemized bill, and the client should also insist that they not be charged if they want to question items on the bill with the attorney or a staff member of the firm.

Before retaining an hourly attorney, a prudent consumer should "shop around" to get an idea what other attorneys would charge to handle the matter.

Just as importantly, the consumer should get an idea what their case is potentially worth (whether they are the plaintiff or the defendant) to see if it makes sense to pay an estimated fee when taken into conjunction with what they might collect (if they are the plaintiff), or what their ultimate exposure to the case may be (if they are the defendant). In other words, spending tens of thousands of dollars on attorney's fees as a plaintiff on a case that is worth significantly less generally doesn't make sense, anymore than paying tens of thousands of dollars as a defendant on a case that could be settled out of court for much less makes sense either.

Other considerations in deciding upon an hourly fee attorney would be to inquire as to the potential (if any) for collecting the attorney's fees from the adverse party, whether an estimate of the total fees to be charged can be obtained from the attorney (in writing, preferably), or whether the fees can be capped at a certain point in the case, beyond which nothing further can be charged.

Again, asking questions is the consumer's best safeguard, and you can't negotiate if you don't ask questions.

**Flat Fees:** Flat fees are the situation whereby the client is charged a specific dollar amount, usually on an up-front basis, to cover a certain legal task. This is most commonly used in transactional work (like preparation of a contract, processing a Chapter 7 bankruptcy, or setting up a corporation), criminal defense, or in claims that may not necessarily proceed to litigation such as when the attorney is retained to negotiate with the adverse party or that party's attorney short of filing a lawsuit.

Flat Fee arrangements should generally be reduced to a written agreement, depending upon the fee amount to be charged, and the client should be advised as to whether any costs are to be included in the Flat Fee, and how far the Flat Fee will carry the client in the particular legal task being contemplated.

**True Retainer Fees:** True Retainer Fees are a fee paid at fixed intervals to the attorney, whereby the attorney is to be available to the client as needed for certain services defined by the retainer agreement. This is often used when an attorney is retained by a business to advise them on routine matters occurring in the course of the company's business. It rarely makes sense for an individual consumer to get involved in such an arrangement, however.

**Hybrid Fees:** A Hybrid Fee may take two or more of the above fee components and combine them

to best suit the client's needs or requests.

For example, an attorney may take an Hourly Fee matter on a reduced hourly rate, plus a specified Contingency Fee as well.

A Contingency Fee agreement may provide for a Flat Fee to be paid first, either in addition to a Contingency Fee or to be credited against the Contingency Fee if a recovery is eventually had.

A True Retainer Fee may provide certain enumerated services, but with litigation to be done at an hourly rate.

### **THE FEE DISPUTE\***

Should an attorney and client get involved in a dispute over attorney fees, then the State Bar has a fee arbitration program which is administered by county bar associations, and which is mandatory on the attorney if the client elects that procedure (Business & Professions Code secs. 6200-6206).

The fee arbitration hearing can result in a binding or non-binding decision, based upon what the attorney and client both agree to. The arbitration can be presided over by an impartial attorney arbitrator, or by a three arbitrator panel consisting of one lay person and two attorneys. There is a modest filing fee based upon the amount in controversy. The client has the right to retain their own legal counsel to handle the arbitration, as does the attorney as well.

If a client feels that their attorney has charged them an excessive or wrongful fee, the client has essentially three options at their disposal: (1) opt for electing the mandatory fee arbitration procedure; (2) do nothing and wait and see what the attorney may do [the attorney cannot sue a client for fees without first providing the client written notice of the mandatory fee arbitration procedure, but if the client wants to take the initiative in suing an attorney over fees there will be applicable statutes of limitation in which a lawsuit must be timely filed]; (3) file a lawsuit against the attorney.

What will not assist the client in a fee dispute issue is to file a complaint against the attorney with the State Bar. This is because the State Bar has set up the mandatory fee arbitration procedure so that it won't have to deal with fee disputes itself. The State Bar will generally only discipline attorneys when the attorney has abandoned a client, stolen client funds, committed trust fund irregularities, or committed certain crimes. Other than that, the consumer has other more practical remedies that they can avail themselves of

to deal with the fee problem.

Because of the potential complexity of the law relating to attorney-client retainer agreements and the proper legal analysis of the factual circumstances leading up to a fee dispute, it is probably advisable for a client who has a grievance over an attorney's bill to consult with another attorney over whether their complaint is legitimate or not before they initiate any sort of formal action in fee arbitration or a lawsuit. Many attorneys have special expertise in dealing with fee dispute controversies, professional standards of practice, and billing standards applicable to the legal profession.

A fee dispute is not necessarily evidence or proof of legal malpractice, the latter situation being separate and distinct and addressing whether or not an attorney has failed to practice within the standard of professional care that other legal practitioners in the community would adhere to in handling a similar legal matter or case and which has caused the client economic damages.

### **CONCLUSION \***

To get the type of fee arrangement that best suits your legal problem and your budget, you need to ask questions of a prospective attorney and not necessarily make a final decision to retain counsel while you are sitting in the offices of the first attorney that you consult with.

Ask for a written proposed retainer agreement and take it home and study it before you sign at the dotted line.

Don't be afraid to bring a family member, friend, or significant other to the initial attorney consultation so you have somebody to help you with any questions and to be a sounding-board in any follow-up discussions thereafter.

Attorneys negotiate for a living, and consumers shouldn't shy away from negotiation in retaining legal counsel.