

Handling Contingencies in Contingent Fee Cases: Sharing Fees with Successive Lawyers

by Beth E. Kennedy

Contingent fee agreements start out simple: you'll get a specified portion of any recovery. But they don't always stay that way. Your representation might end before the case is resolved, either because you fired the client or because the client fired you. What happens when the case is later resolved by a different lawyer? How do you get paid for the work you've done?

This situation – where a contingent fee case is handled by successive lawyers – can create a difficult problem. Each lawyer claims their share, and (typically) each lawyer believes the other one is asking for too much. Who did more work? Who took more risk? What hard feelings remain from the termination of the first lawyer? These disputes can bring out the worst in us.

But it doesn't have to be that way. By planning ahead, lawyers who handle contingent fee cases can protect themselves and better ensure that they'll get paid for their work. Although it's a bit more work on the front end, the time spent will pay dividends if it prevents a dispute and gets you what you deserve.

Applicable Rules

It's important to first understand the lay of the land. Our rules governing fee-sharing between lawyers have changed in recent years, and they are still changing. But the most important principles have remained constant.

We started with the American Bar Association's model rule 1.5. Until 2020, our rule allowed lawyers to share a fee if they split it in proportion to the work they performed, or alternatively, if they assumed joint responsibility for the case. Utah R. Pro. Conduct 1.5(e)(1) (2019). The client had to give written consent, and the total fee had to be reasonable. *Id.* R. 1.5(e)(2)–(3). And a lawyer couldn't share fees with a non-lawyer. *Id.* R. 5.4(a).

Then came the Sandbox. The Sandbox fundamentally changed how fees could be divided. Now, for the first time, lawyers could share fees with non-lawyers – as long as they did so within a

Sandbox business. Utah R. Pro. Conduct 5.4(c) (2020). And with these changes, the subsection governing sharing fees with lawyers was removed, too. *Id.* R. 1.5.

As the rules currently stand, nothing purports to govern how lawyers can share a contingent fee. But recently, the Supreme Court's Advisory Committee on the Rules of Professional Conduct has been working to craft just such a rule. Keep an eye out – changes are coming soon. So far, it looks like the proposed rule will put fewer limits on sharing fees than the old ABA rule did.

Until then, all we have is Rule 1.5 (fees). The rule is straightforward: a fee must be reasonable. *Id.* R. 1.5(a). For our purposes here, this means two things. First, the total fee paid by the client must be reasonable. And second, the amount each lawyer receives must be reasonable.

This is important in contingent fee cases where the client has signed contingent fee agreements with two different law firms. In each agreement, the client promised to pay the law firm a percentage – often 1/3 – of any recovery. Clients worry that they'll have to pay 1/3 of the recovery to both law firms and be left with only 1/3 themselves.

But 2/3 of a recovery is almost certainly an unreasonable fee. If a case warrants a 1/3 contingent fee, then 1/3 is the amount that is reasonable, and 1/3 is the total amount that the client should pay. Any lawyers who worked on the case will have to divide that amount among themselves.

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Tips for Predecessor Counsel

When we enter into a contingent fee agreement, none of us think we are “predecessor counsel.” If all goes as planned, we’ll handle the case from start to finish and we’ll be the *only* counsel.

But all doesn’t always go as planned. These representations can end early for a variety of reasons. Here are some tips to increase the chances you’ll get paid for the work you did before the representation ended.

Add contract language.

Use your retainer agreement with the client to lay out what will happen if the representation ends before the case does. Be clear that, if the client ends up with a recovery, you’ll be entitled to a reasonable fee for the work you performed before the termination. You might want to reference your statutory right to file an attorney’s lien on any recovery. And why not have the client agree to provide a copy of your fee agreement to any successor counsel? Or reserve your right to provide it to successor counsel? It couldn’t hurt.

Keep an accounting.

I get it. One of the luxuries of a contingent fee case is that you don’t have to provide the client with monthly bills detailing your work in six-minute increments. But if there’s ever a dispute with successor counsel over how much of the contingent fee you’re entitled to, you’ll need to show what work you did to determine what fee is reasonable. This task can come up years after the representation ended, when the details of this case might blend

with the details of dozens of others. Keeping contemporaneous records of what you’ve done on each case will allow you to prove what part of the fee you’ve earned.

Provide the accounting.

Those records also will be useful when the representation ends. You’ll be able to show the client exactly what you did – and exactly what you’ll be seeking payment for if they obtain a recovery in the case. Can you get them to sign off or otherwise acknowledge that you performed all the work in your accounting? That would help defend against any later claims that you’ve inflated your contribution to the case. Even better, can you get the client to give the accounting to their new lawyer? If the new lawyer knows from the start exactly how much work you’ve done, that can reduce the likelihood that there’s a dispute later.

Consider a lien.

Attorneys have a statutory right to file a lien to recover fee’s they’ve earned. This is in Utah Code Section 38-2-7. But if you’re going to do this, pay attention to the deadlines – being even three days late can mean you get nothing. *Fadel v. Deseret First Credit Union*, 2017 UT App 165, ¶ 26, 405 P.3d 807.

Tips for Successor Counsel

Successor counsel are in a better position because they already know the fee will be split. But they still can’t be sure they’ll be the last. Successor counsel would therefore be wise to consider the contract language and accounting tips mentioned above to protect themselves if the representation ends before the case does.

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There are some additional things successor counsel should consider, too.

Add contract language.

Your retainer agreement must acknowledge the situation. ABA Formal Ethics Op. 487 (2019). But it also should explain how you intend to split the fee. Most likely, you'll split it in proportion to the work each lawyer did. Of course, this agreement won't bind prior counsel. And it might be tempting to tell the client that they owe you your fee regardless, and that it's up to them to work it out with predecessor counsel. But remember – the total fee they pay must be reasonable. Utah R. Pro. Conduct 1.5(a). If the client is paying both of you separately, it's probably not a reasonable fee, and you're setting yourself up for a lawsuit and/or an OPC complaint.

Contract with counsel.

If possible, see whether prior counsel will agree in advance to a division. Now is the best time to reach an agreement on how you'll split any eventual fee. Otherwise, a court might later decide for you that you each intended to divide the fee in proportion to the services you performed – or at least that was true under the old version of the rule. *Christensen & Jensen, P.C. v. Barrett & Daines*, 2008 UT 64, ¶ 47, 194 P.3d 931.

Ask for an accounting.

Even better, ask for an accounting from the previous lawyer. How much work did they perform? Get them to lock this in

while memories are fresh so they won't be able to inflate those numbers later. This not only protects you but also gives you a better idea of what the case might be worth to you in the end.

Disburse the remainder.

Maybe you did none of this. Maybe you got the client a recovery, but you and predecessor counsel are in complete disagreement about who should get what. If that's true, give the client the undisputed portion of the recovery. Utah R. Pro. Conduct 1.15(e). You and predecessor counsel will then need to resolve your dispute among yourselves, which might require you to go to court. In the meantime, keep the disputed fees in your trust account. *Id.* Or if the two of you have resorted to handling it in court, the OPC recently suggested in a CLE that you could interplead the disputed funds.

Conclusion

No one begins a contingent fee case believing they'll be fired and forced to fight to be paid for the work they performed. But it happens far too often to be unprepared.

Thinking through the worst-case scenario can help us avoid a number of problems. And taking a few preventative steps on the front end is easy compared to cleaning up the mess that can result if we don't. After all, isn't that what our clients hire us to do for them? Let's do it for ourselves, too.

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