

When You And Your Contingency Fee Client Disagree

Law360, New York (August 06, 2010) -- Congratulations. Your big contingency fee case is set for trial within weeks. It's taken you three years to get to this point — dozens of depositions, discovery battles, summary judgment motions and multiple Daubert challenges.

Despite private mediation and other attempts at settlement, the defendant is offering only a fraction of what your client has consistently told you she is prepared to accept. Your firm has made a big investment in the case, but your partners agree it is worth taking to a jury.

Your client has been terrific. Everything she told you about the case in your first meeting has proven true. She has depleted most of her savings to pay disbursements. You are relieved that her credit card worked to book hotel rooms for the trial.



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Ten days before trial, she calls and instructs you to reopen settlement discussions. As you discuss her objectives, you realize her outlook has fundamentally shifted from prudent negotiating to accepting whatever she can get, as soon as she can get it.

She's worried about trial expenses, risks and her retirement. You try to reassure her that her case is worth at least five times the defendant's last offer, but her new goal is to exit the case quickly, not maximize settlement.

Her new objective raises a problem: If you accept defendant's last offer, the resulting contingency fee would cover only a fraction of the time your firm has put into the case. You consult your written engagement agreement, which says if either party terminates the representation, your firm has a lien on the amount the plaintiff recovers for the reasonable value of your services.

Your Ethical Obligations

ABA Model Rule 1.2(a) requires that you seek the lawful objectives of your client and specifically requires that you abide by your client's settlement wishes. Your interest in a potentially larger recovery and fee is significant and material to the representation, but it cannot interfere with your pursuit of the client's interests. Model Rule 1.7 (conflicts of interest between lawyer and client).

Your agreement with the client concerning the scope and terms of representation can be modified if both agree, but you may not ask your client to surrender the right to settle litigation that you might wish to continue. Model

Rule 1.2 (commentary). You might have more discretion if your client were a child or operating under some mental disability, Model Rule 1.14, but your client is not disabled, only frightened and unreasonable.

What Next?

At moments of stress and doubt, the most important service you provide is communicating your professional judgment. If your client's emotions prevent her from hearing your advice, you are not communicating. Your first task is to dispel the client's sense of emergency.

Rather than making critical decisions over the telephone, set up a personal meeting, perhaps at a coffee shop. Make sure that you listen and understand why the client has changed her objectives. You can then review the legal status and the client's options, including the option of unhurried settlement negotiations or involving a mediator, and give your best advice.

If the client refuses your advice, you have limited options. The most obvious is to negotiate the best settlement you can within the time constraints dictated by your client. Strongly encourage your client to allow you as much time and flexibility as possible to negotiate a settlement.

Involving a neutral mediator, either through a judicial settlement conference or with a third party, may produce a better result in a shorter time and assuage the client's anxiety.

Unless your client expressly instructs you otherwise, the rules do not dictate that you accept the defendant's last offer or limit your negotiation tactics. The rules allow the lawyer flexibility to exercise professional judgment in pursuing the client's goal of quick settlement.

"Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters." Model Rule 1.2 (commentary).

In some cases, where the attorney-client relationship has broken down completely or where you determine that your contingency interest in the outcome is adversely affecting your representation, you may need to consider withdrawing from the representation. (The attorney would be more attracted to this option if he were facing the converse of the situation described above, i.e., if the client insists on taking a weak case to trial.)

Withdrawal requires permission from the court, and depending on your engagement letter, might entail a loss of some or all of the modest fees you might have otherwise earned had you negotiated a quick settlement.

A third option is to modify your client contract to alleviate some of her concerns. Nothing prohibits a lawyer from renegotiating a fee agreement so long as the revised agreement still complies with the general rules.

To address your client's fear about trial expenses, consider advancing those expenses or even assuming responsibility for your litigation team's meals, transportation and lodging. In exchange for these modifications, the client may be willing to pay a higher contingency percentage if the recovery exceeds a certain threshold.

Alternatively or in combination, to address her fear of a low verdict, consider significantly decreasing your contingency fee percentage if the verdict is less than a certain threshold, e.g., less than defendant's current offer. Be sure to consult Model Rule 1.8(a), which requires that the terms of your revised contract be fair, reasonable and fully disclosed in writing. The client must also have a reasonable opportunity to seek the advice of independent counsel and consent in writing to the modifications.

Concluding Thoughts

A contingency fee relationship theoretically aligns the client's and attorney's interests. But if the attorney and client disagree on whether to settle or try a case, the attorney's contingent interest in the recovery may elevate the disagreement into an ethical predicament.

An attorney is most vulnerable to a client's changing her objectives after investing substantial time in the case. Interview the prospective contingency fee client carefully at the outset. The rules prohibit any engagement letter that restricts the client's ability to terminate the relationship or accept a settlement, so if you doubt her fortitude, avoid the case.

As with any client, communicate frequently and candidly concerning case status, and consider memorializing important strategic decisions in writing. The earlier you learn of diverging goals, the easier it is to address them.

If your goals do diverge as the case nears trial, communication is critical. Consider modifying your fee agreement to reduce your client's risk.

If your client still rejects your advice, obtain as much flexibility in settlement negotiations as possible and consider involving a mediator. Ultimately, however, you must follow your client's settlement instructions or withdraw from the case.

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