Bill Carmody *Partner* New York, NY bcarmody@susmangodfrey.com 212-336-8334

SUCCESS-BASED FEE ARRANGEMENTS

Clients are rarely happy paying lawyers by the hour.
Win or lose, litigation is expensive.

The average cost of litigating a complex commercial case exceeds several million dollars. In 2011, the average cost of litigating any significant patent case exceeded $6 million dollars.[1] These substantial investments are often difficult to justify because the litigation process can be very unpredictable.

Rather than making a large investment in uncertain litigation, clients are usually happier paying lawyers using success-based fee arrangements that limit their financial exposure. Clients prefer success-based arrangements compared to paying lawyers by the hour because, when paying by the hour:

- Attorneys' fees are unpredictable and can skyrocket for reasons not within the client's direct control;
- The client makes a huge investment (legal fees) with an uncertain return (over 50% of patent cases are reversed on appeal); and
- There is an inherent conflict between the client wanting to minimize costs and the lawyers needing to perform labor-intensive tasks.

As the following case studies illustrate, these pitfalls don't exist with alternative fee arrangements.

1. AIPLA Report of Economic Survey 2011

Contingency Fee

We only get paid if you win.

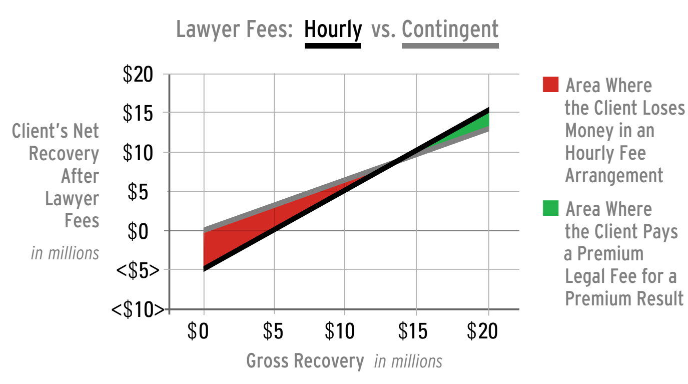
A contingency fee agreement involves the client paying the lawyer a percentage of the recovery in exchange for the lawyer's time. The lawyer and the client share the risks and rewards of the litigation.

Case Study

The General Counsel of a large corporation came to us with a patent infringement case. Damages were difficult to estimate, but ranged from $10 million to $100 million depending on the answers to several highly disputed questions. The client clearly had the ability to pay by the hour. But no one wants to pay more for a service just because they can. After considering its options and goals, the client decided that a contingency fee agreement better suited its interests, and agreed that Susman Godfrey would receive a sliding-scale contingent fee that ranged from 33% to 45%.

The client chose the contingency fee arrangement because: (i) if it lost, it paid nothing; (ii) if it settled in the low end of estimated damages, it would net more paying a contingency fee than paying the $5 million it estimated it would cost to litigate the case by the hour; and (iii) if it settled in the higher end of estimated damages, then it would obtain a great return on an investment that involved little downside risk. From prior patent litigation experience, the client knew that judgments in patent cases are overturned more than 50% of the time, and that large verdicts are even less likely to survive. Being fully aware of the potential risks and rewards, the client decided that it made much more sense to pay experienced trial lawyers a premium fee if they obtained an outstanding result rather than to pay millions in billable hours regardless of the outcome.

The client made the right decision. A number of problems with the client's theory of damages arose during discovery. Because the client had little financial exposure, Susman Godfrey was able to litigate the case as effectively as possible without the client being troubled by escalating attorneys' fees. In the end, Susman Godfrey successfully settled the case and the client's net recovery was higher than it would have been had the client paid by the hour. The contingency fee arrangement allowed the client to obtain the maximum result with minimal financial exposure.



Fixed Fee

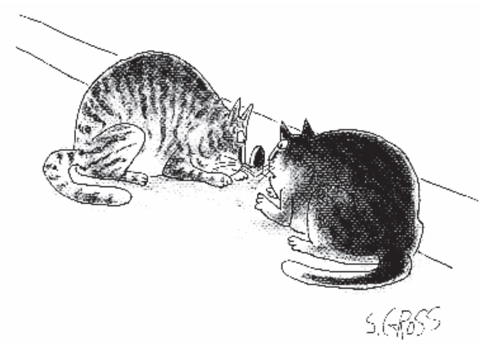
Litigation on a strict budget.

Many clients have relatively strict and highly stressed legal budgets. Others have a series of similar cases that they want one experienced trial firm to handle. To meet these clients' needs, Susman Godfrey often works for a fixed fee. Clients who enter into a fixed fee arrangement prefer it because it makes litigation costs predictable, alleviates the common pressure to settle for "cost of defense," and gives them the ability to manage their litigation budgets.

Case Study

A Fortune 100 company faced many similar large lawsuits throughout the United States. The company initially responded to the lawsuits by hiring a different firm in each state in which it was sued. Attorneys' fees quickly mounted as lawyers in different firms unknowingly duplicated time-intensive and costly tasks. To control fees and obtain the best trial counsel possible, the company asked Susman Godfrey to take over the defense of all cases heading to trial. After assessing the effort required to defend the lawsuits and their probable outcomes, we agree to do so for a monthly fixed fee – a solution that suited the client's goals perfectly.

By hiring Susman Godfrey to defend all of the cases, the client eliminated the costly duplication of effort, achieved economies of scale, and saved a lot of money. There was one additional great benefit to the client – having our firm handle all of the cases eliminated the risk that different lawyers would take inconsistent positions in similar cases. The fixed fee arrangement allowed the client to more predictably manage its litigation budget and obtain a stronger and more economical defense.



"If we were lawyers, this would be billable time."

Hybrid Arrangements

We can meet your needs.

Knowledgeable clients can tailor compensation arrangements to suit their specific needs. These arrangements can be as varied as the types of litigation challenges that our clients face. Even in defense cases, there is ample room to craft success-based fee deals that fairly compensate us for premium results.

Case Study

Susman Godfrey defended some of the world's largest insurers in coverage litigation arising out of attempted prepackaged bankruptcy settlements. The fee agreement for one such case provided for fixed annual payments of $2 million. If we achieved an outstanding result, we would also receive 10% of the amount our client saved below the reserves it established for the claim at the start of the litigation. The arrangement decreased the client's financial exposure and made the bulk of Susman Godfrey's compensation contingent on achieving an outstanding result.

Case Study

A client was bullish on the merits of its patent infringement claims, and, although it preferred paying its lawyers for results rather than for time spent, it did not want to give up a significant portion of the ownership of the case. The solution was a simple hybrid fee deal. Susman Godfrey was paid 60% of its hourly rates and a 20% contingent fee. The arrangement helped satisfy the client's competing goals of minimizing litigation costs while retaining most of the case ownership.

Case Study

Susman Godfrey represents a client in a series of unrelated cases covered by one fee agreement designed to promote the client's strategic litigation goals. This Fortune 500 company consistently faced a variety of products liability and employment cases, and historically had settled many of the cases early, and, it believed, cheaply. This strategy quickly backfired when plaintiffs' lawyers increasingly came to view suing the company as an easy way to make some quick cash. Not surprisingly, the number of lawsuits against the company mushroomed.

To change this disturbing and costly trend, the client asked Susman Godfrey to handle its most significant cases. We, in turn, proposed a different strategy, and a compensation arrangement that complemented it. Susman Godfrey defended a fixed number of cases for $1 million per year, and tried additional cases on an hourly basis. The client no longer felt pressured to settle for the "cost of defense" and openly discussed this fact with its opponents. Susman Godfrey's new strategy paid off for the client. Once word spread that the company was no longer an "easy settle," the client saw a material drop in the number of new cases filed against it.