

# LITIGATORS CORNER:

## The Ideal Contingent Fee Client



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Last year, I wrote a column about what made a bad contingent fee case (“How to Recognize the Lousy Contingent Fee Case,” July, 2001), in which I dealt with some of the factors that distinguish the good contingent fee cases from the bad. Two of the factors discussed were reading the claim and evaluating damages. Evaluating the potential client was another. In this month’s column, I will give some additional thoughts on what distinguishes the good contingent fee client from the bad.

Charles Dickens once said, “If there were no bad people, there would be no good lawyers.” Our system of justice depends on making a distinction between the character of the litigant and the litigant’s right to a fair, impartial resolution of the issue at hand. Criminal defense attorneys are presumed to know it best: the rat is a rat, but is entitled to a defense, nonetheless. The rule makes sense. If the ability to present a defense depended foremost on the charac-

ter of the client, who would make the judgment that the defendant had sufficient character to merit a defense? Somebody with “bad” character would be a permanent loser. The corollary is that someone with “good” character would repeatedly get off scott-free, even if that person had committed a crime. Second, we want to insure that the right to a defense is uniformly available to all, and the only way to insure that this right to a defense extends to everyone is to make no exceptions.

The same is true in civil litigation: everyone can litigate (so long as they have enough money to hire a lawyer, of course). The plaintiff or the defendant can be a real, gold-plated jerk. Nevertheless, that party can pursue or defend against a claim of patent infringement. Intent only matters when judging whether the infringement is willful, or whether the case is frivolous. With rare exceptions — such as where character is an element of the defense, or where a party introduces his character into issue — the kind of person a litigant may be is off limits and irrelevant.

But character does matter in contingent fee litigation. In billable cases, you have the ability to pay for help, like technical experts. The client has employees who can assist you. In a contingent fee case, and especially one where your client is a solo inventor, you must depend on your client for help. Your client is an individual, and does not have the resources of a corporation. In the contingent fee case, your client must do much more, and you must rely on him much more. Second, since the attorney does not get paid unless the case is a winner, having a client who may lose the case for him — in other words, a client who is “trouble” — is not an option. Of course, we do our best, and have the best chance of success, when our client is a person of character. I am not saying the client has to be perfect; none of us is. But a client who has good character is easier to represent and gives the contingent fee attorney a better chance of winning. We have had clients of good character, and others who are not so good. Almost uniformly, our experience is

better when we have a client we respect. Why is that so? I would like to touch on just some of the characteristics of the best client in contingent fee litigation.

Before you even assess your potential client’s character, you need to candidly assess the quality of the case for infringement. If you have to do this entirely on your own, it will be very difficult, particularly if the technology involved is complex. Some clients tend to think that there is infringement just because someone is doing something that looks like what the claim in his patent covers. These clients have not evaluated the potential infringement on an element-by-element basis. Others think that the person or company in question must have infringed because “there is no other way to do it.” These clients are myopic. You need to do a closer evaluation, and candor on the part of your client will help you do that.

In a contingent fee case, you must be able to depend on your client for a great deal of help in preparing the case, much more than is required in a billable case, since most contingent fee cases require that expenses be minimized. The single best way to do that is to have your client assist you in every way possible. He must collect documents for you, with your guidance on what to look for. He must help with his technical expertise to prepare claim charts, to analyze the defendant’s documents, to answer technical questions, to review prior art, and to help respond to interrogatories. In short, he must make a commitment to the case, and to making it a success. Your requests for help will usually come at inconvenient times, so his commitment must be total.

Your client must have the strength of character and willingness to trust you. In one of our cases, we were representing two extremely intelligent and well-educated scientists who owned a patent. We believed there was infringement, and approached a number of companies to encourage them to take a license. The patent had not been litigated before, and we wanted to offer a better deal to the first company to take a license. We repeatedly recommended making an offer that was much lower than would be achieved after litigation. Our clients were unwilling to rely on our judgment; they kept analyzing our position as if they were investigating a new scientific theory, and could not bring themselves to trust us. The case went nowhere.



You also need a client who is dedicated and responsive. Another of our clients is nearly seventy years old. Nevertheless, he has volunteered information, done research on the infringing products, reviewed documents, analyzed the documents produced by the defendant, and answered every question we have put before him. If you have to do this completely on your own — remember, you don't have lots of money to spend on experts — your contingent fee case will be twice as hard to pursue. If you are going to persuade anyone to take a license without litigation, you have to be prepared to deal with every question that potential licensee may ask.

In a contingent fee case, your client should not be greedy. It is often possible to construct reasonable damage theories in patent litigation that call for the payment of tens of millions of dollars, or even more. Such theories can be advanced in good faith based on, for example, the large royalties that can result from litigation, from a large volume of sales, from prejudgment interest, and the like. The numbers can be big. Some clients see these damage theories and become convinced that this large number is the only possible valuation of the patent, the only just outcome, and the only acceptable result. They become stuck on this damage figure.

But those large damage figures are not guaranteed, since it may take years of litigation to attain them. In order to obtain judgments like that, you will probably have to survive Markman hearings, motions for summary judgment, trials, post-trial motions, and appeals. That is why we

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encourage our contingent fee clients to be realistic when negotiating settlements. The trouble starts when your client sees too many stars, or too many dollar signs, and becomes greedy. We have had clients like this. The pair of inventors I mentioned in the first example above wouldn't consider licensing their invention to someone for a sum less than they calculated they would receive after litigation. Such clients begin to think they are playing Power Ball with a guaranteed winning ticket. The client of character knows the risks, and does not succumb to greed.

You need a client the jury will like and respect. In three of our biggest contingent fee victories, the testimony of our inventors was our strongest asset. In each case, the jurors understood that they were seeing a truthful person — a person they could identify with and like. A criminal defense attorney may have no option; his client cannot testify because of the facts of the case, or because of prior convictions bearing

upon credibility. But in a patent case, the inventor must testify. If you can put someone on who impresses the jury as genuine, imaginative, and hard-working, you have advanced a long way toward victory.

A client in a contingent fee case must have grit. He will be accused of cheating the Patent Office and cheating the public. Every word he uttered in his patent and patent application will be twisted and warped and gauged with complete and perfect hindsight. Your client must be able to handle the assaults with equanimity and a smile.

Of course, the ideal client doesn't exist. And clients who may not be so nice may also have meritorious cases. But it is worth keeping in mind in contingent fee litigation that the client with real character is the best client you can have. And there's a bonus: that kind of person is the easiest to represent. He can send you into the courtroom with what Mark Twain called "the confidence of a Christian holding four aces." 

## THREE WOODCOCK IP ATTORNEYS JOIN COZEN O'CONNOR

Philadelphia, PA - Cozen O'Connor announced the expansion of its intellectual property department with the addition of three attorneys who are coming to the firm from Woodcock Washburn, LLP. Camille M. Miller has been named a senior member of the firm and will take over as chair of the department. Laura Genovese Miller has also joined the firm as a senior member, and Brian J. Urban has joined as a member. All three concentrate their practices in trademark, trade dress, copyright, and unfair competition law.

Camille Miller also focuses her practice on patent and intellectual property-related litigation. She brings a variety of experience working with clients in a wide range of industries including retail, pharmaceutical, manufacturing, education, and healthcare. She earned her law degree from Chicago-Kent College of Law (with honors, 1991), and her undergraduate degree from Franklin & Marshall (1987).

A 19-year veteran of Woodcock, Laura Miller has represented the interests of a wide array of clients, including the famous Myers Briggs Type Indicator. She earned a law degree from Villanova University (cum laude, 1989), a masters degree from the University of Pennsylvania (1986), and an undergraduate degree from Bryn Mawr (1983).

Brian Urban received his undergraduate degree in finance from Lehigh University College of Business and Economics (summa cum laude, 1993), and both his J.D. (cum laude, 1996) and LL.M. (1998) degrees from Temple University School of law.