

# Fee Structures for Managing Patent Litigation Costs



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There's no way around it: patent litigation costs can come as a surprise to those who have not been involved in it. One economic survey estimated that, in 2019, the cost of patent litigation through trial and post-trial motions ranged from \$700,000 to \$4 million<sup>1</sup> for cases where \$1 million to \$25 million was at stake. Copyright litigation costs and trademark litigation costs do not come with the same sticker shock but can still be surprising as well.

While patent litigation costs can be significant, clients should keep in mind that over 95% of patent litigation cases settle before going to trial. According to some studies, over 90% of patent litigation cases settle at or soon after the claim construction hearing.<sup>2</sup> Despite these statistics, it is never a good strategy to rely on statistics in developing a plan for how to pay for the patent litigation costs, as you should assume that your case will go to trial.

Patent litigation attorneys in the United States can use a variety of fee structures to tailor the economics of each case to the economic needs and realities of the client. For example, the client may want cost certainty, or the client may be able to pay for a portion (or none) of the costs of patent litigation. Below is a brief description of several different litigation fee structures that can be used to match each intellectual property litigation

matter with the client's expectations.

## Hourly Fee Structure is Common to Cover Patent Litigation Costs

An hourly fee arrangement to cover patent litigation costs is the most straightforward and common fee structure. Under this arrangement, the patent litigation attorney records the time spent working on the patent litigation matter and then bills the time at counsel's hourly rate. Even though it can be difficult to predict the ultimate cost of a specific matter, comparing hourly rates between firms can give a client some idea of the relative costs between different patent litigation attorneys that you may be considering. The hourly fee arrangement has been subject to abuse by unscrupulous attorneys who run up the billings unnecessarily, but most attorneys who are ethical and want repeat business do not engage in such practices.

In any event, to give more certainty to clients regarding the patent litigation costs to expect, it is common for the patent litigation attorney to provide the client with a budget for the expected fees after conducting an analysis of the particular case. Of course, a budget is just that, and sometimes budgets can be exceeded as a result of unexpected circumstances through no fault of the attorney. Unreasonable conduct by the opposing party, for example, can purposely cause the patent litigation costs to go up significantly, knowing that

<sup>1</sup>AIPLA, 2019 Report of the Economic Survey

<sup>2</sup><https://www.iam-media.com/litigation/why-plaintiffs-us-patent-cases-who-understand-odds-victory-are-almost-always-best>



increasing the costs for the other side might pressure the party to settle.

### **Capped Fee Structure Can Reduce Uncertainty of Patent Litigation Costs**

If budgets do not provide enough certainty for the client, a patent litigation attorney may agree to cap the fees. In one example of a capped fee arrangement, each stage of litigation can be assigned a not-to-exceed budget. Counsel bills hourly until the capped budget is reached and does not bill for any time exceeding the budget. Capped fees provide the client with predictability and limits the ultimate cost exposure if the case does not settle.



One of the downsides of a capped fee arrangement is that it can, in some cases, put pressure on the attorney to take shortcuts during the litigation to avoid exceeding the budget. However, prudent patent litigation attorneys will not succumb to this pressure and will do whatever is necessary to provide competent representation to the client. Because of this problem, it is not uncommon for the client and the attorney to agree as part of the capped fee arrangement that there should be a willingness to negotiate an increase in a capped fee if unforeseen circumstances arise. Of course, an attorney will generally want to avoid re-negotiation if possible, as this may defeat the purpose of the capped fee arrangement. Open, up-front, and frequent communications between the parties can help prevent unexpected increases in the fees.

### **Contingency Fee Structure Can Shift the Risk of Patent Litigation Costs to the Attorney**

In some cases, the client may be unwilling or unable to shoulder the burden of paying all of the attorney's fees in a patent litigation case. In that case, assuming that the patent litigation attorney has determined that the potential upside of the case is worth the risk of not being paid for services rendered, the parties can enter into a contingency fee agreement. A contingency fee structure is results-based and typically only used as a way for a plaintiff to avoid or share the risk of patent litigation costs.

In a pure contingency fee structure, the client does not pay anything out of pocket for attorney's fees. Instead, the lawyer or law firm will receive a percentage of any monies recovered in the case (whether through verdict or settlement). Depending on the type of case, the percentage can be a fixed percentage throughout the case, or it can start at a lower percentage early in the case and increase as the case progresses and more resources are invested.

Some clients who retain counsel on a contingency fee basis agree to pay the non-attorney-fee costs involved in the litigation, while others look to the law firm or a third-party funding source to cover litigation costs. The latter option usually involves the client giving up a higher percentage of any recovery due to the law firm or funding source taking on additional risk.

### **Hybrid Hourly/Contingency Fee Structure Can Allow the Client and Attorney to Share Risk**

In a hybrid contingency fee model, which again is typically used on the plaintiff side, the patent litigation attorney will work the case on an hourly basis but at discounted hourly rates. Typically, the discount provided is 20% or more off the attorney's standard hourly rate. For the contingency fee portion of the structure, the attorney would receive a percentage of any recoveries. Still, the percentage is lower than the percentage paid in a pure contingency fee arrangement.



This fee structure may also include elements of the other structures, such as fee caps for different stages of litigation and escalating contingency percentages as the case progresses.

### **Results-Based Defense Fee Structure May Reduce Patent Litigation Costs**

Because the contingency fee structure is difficult to apply to the defense side of a patent litigation matter, other results-based compensation models have arisen. A patent litigation attorney representing the defendant may agree to represent the client on an hourly basis, but with a bonus payout if the firm obtains a winning result. Various bonuses can be paid depending on the stage of the litigation at which the case is dismissed, settled, or judgment rendered in favor of the defendant.

For example, the law firm could initially work at a discounted hourly rate, but with the client agreeing to pay a lump sum bonus in addition to the hourly rate if the case is dismissed or settles favorably. Or, the client could pay the law firm's standard hourly rate to defend the case, with a portion of those fees going into a trust account. If the firm wins the case, it would then earn the portion in the trust account, sometimes along with an additional bonus.

### **Conclusion**

The best fee structure for any given client will depend heavily on the client's goals and the economics of the case. If cost containment and predictability are the primary goals, perhaps a flat fee structure would be best. A results-based model may be the only option if the client cannot afford an hourly or flat fee structure. Risk tolerance also plays a big part. Tailoring the fee structure of representation to the specifics of the patent litigation case can appropriately incentivize, and distribute risk and reward, all while providing parties with the representation they need to win.

