

# Attorney Fee Agreements for Disability Claims: What is a Fair and Legal Agreement?

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*The following article will provide some answers to basic questions for Massachusetts attorney fee agreements; similar rules and laws may or may not govern fee agreements in other states.*

Individuals with disabilities must often seek the assistance of an attorney either to obtain or keep disability benefits to which they are entitled. A fee agreement is a contract between the individual and the attorney in which the attorney sets the fee and other charges for his or her services.

Sometimes, a client will question whether the total amount of money an attorney is asking for is fair or unfair. *How can an individual determine if the fee or other charges are reasonable, proper, and legal given the particulars of his or her case?*

In some rare instances the client knows that the fee the attorney is asking for is clearly excessive and unfair, sometimes even outrageous. Yet the client may feel desperate: the disability insurance company is wrongly trying to deny or terminate his or her rightful disability benefits, and a knowledgeable lawyer is promising to help obtain or maintain the benefits.

However, the attorney is asking for more money than would, by any stretch of the imagination, be fair for the amount of work that would be done by the attorney. Often finding a disability lawyer is difficult, the client doesn't know where else to turn, and there may be tremendous pressure to make a decision quickly.

So the disabled person can be in a terrible conflict: sign an agreement against his or her better judgment, or perhaps go without help and lose the disability benefits. What should the person do? *If he or she has already signed an unfair or excessive agreement, what can be done to terminate the agreement?*

## The three types of fees

An attorney is entitled to a fee for the legal services he or she provides. The attorney may also be entitled to charge for certain other legal costs. The fee is generally charged in one of three ways:

1. a flat fee of a fixed amount
2. a fee charged at an hourly rate
3. a contingent fee

A flat fee would cover the entire fee for the attorney's work.

A contingency fee, by contrast, is normally a fixed percentage of the total award of monies, if and only if an award is obtained. The lawyer cannot charge a fee if he fails to obtain monies for the client. The attorney is taking a risk, and therefore may claim a larger sum than he or she might normally obtain at an hourly rate. The contingent fee is designed to allow people to obtain legal services they might never be able to afford should they lose the case.

Sometimes, a lawyer may fairly charge, if agreed to with the full knowledge of the client, a fee using more than one of these methods: for example, a contingent fee with the addition of a limited flat fee or hourly charge should the case be lost. Most often, however, a lawyer charges by only one of the three methods.

But how is a client to know whether what a particular lawyer charges for a disability case is the fee normally charged by most lawyers, or is in itself fair and legal?

People with Myalgic Encephalomyelitis/Chronic Fatigue Syndrome (ME/CFS) in particular often lack the energy to go "comparison shopping", and in any event not all disability lawyers are even familiar with ME/CFS.

## Social Security fee agreements

Most disabled individuals seek one of two forms of disability insurance: 1) Social Security disability, or 2) private disability insurance through an employer. Often a person will be applying for both types of insurance, since private disability policies usually require the person, if eligible, also to apply for Social Security.

Fortunately, attorney fee agreements for Social Security benefits are regulated by Social Security. Generally, attorneys use contingency fee agreements in Social Security cases. A lawyer using this type of agreement is allowed, by law, only to charge 25% of a person's *retroactive benefits*, up to a maximum of \$6,000. [Ed. Note: *The maximum dollar amount may have increased after 2015.*]

A lawyer may successfully petition Social Security for more than the maximum if he or she can document a valid reason for an increased fee. A lawyer may additionally charge reasonable expenses in addition to the fee.

## Employee disability policies

More complicated and problematic are fee agreements in private disability insurance cases. These cases usually consist of an insurance company attempting to deny an application for benefits; or a company trying to terminate benefits that are already being paid.

Often an insurance company ignores the individual's legitimate disability and intentionally attempts to deny benefits on a false or dubious pretext. At this point the disabled person needs an experienced lawyer to stand up to the insurance company. The lawyer may be able to pressure the insurance company by asserting the client's contractual rights through one or more letters, by utilizing appeal procedures, or when these options fail, by suing the insurance company.

Often in these cases there is not as significant an accumulation of retroactive benefits as occurs in Social Security cases. Hence, it may be more difficult for a lawyer to obtain his fee by taking a percentage of the retroactive benefits on a contingency basis.

Several other possibilities exist for obtaining a fair fee. One would be an hourly fee; the drawback here would be that most people would not be able to afford more than a few hours of the lawyer's work, and cases which go to trial would entail many, many hours of the lawyer's billable time. Beyond several hours of such time, most people would only be able to afford a lawyer's time if they actually succeed in winning their benefits. So this sets up an intrinsic need for some type of contingency agreement.

## Monthly vs. lump sums

Generally, disability benefits are paid monthly as a percentage of the person's former salary for as long as the person continues to be disabled. Sometimes, the benefits can be paid, instead, in one lump-sum payment. This type of payment may be preferred by the insurance company and will not be to the benefit of the disabled person. One does not know how long s/he may be disabled with ME/CFS, FM or other chronic illness. Benefits may be needed for many years.

A lump-sum payment is a one-time payment and as a total benefit might only cover an equivalent of 5 years of monthly payments. A person should be very cautious in deciding to take a lump-sum payment. However, sometimes one is forced to decide whether to take a lump sum or possibly face an insurance company's threat to limit or terminate monthly benefits.

In other types of lump-sum payment cases (such as auto insurance cases), a lawyer will take the case on a contingency basis. This is perfectly possible in a disability lump-sum case. Different lawyers will charge different percentages—often from 25% to 40%. One should determine the average rate and not pay a higher fee than what most lawyers charge.

Again, however, be careful of a lawyer pressuring you to take a lump sum as a way of collecting his fee if you would be better served by collecting monthly payments for as long as you are disabled.

## The Worst Case

*Now I am coming to the most excessive fee payments that patients with ME/CFS might be asked to pay.*

Because of the practical difficulties of collecting a contingency on retroactive monthly benefits, *there may be some lawyers who seek to collect what may be an unfair and clearly excessive fee by attempting to take a percentage of the individual's actual ongoing monthly benefits for as long as he or she continues receiving benefits. The lawyer may try to take a percentage of the person's monthly income into the indefinite future, perhaps for 10 or 20 years.*

Such a fee agreement might require a person to pay a percentage, say 10%-40% of a person's past, present and future monthly benefits. Think about it. If a person receives a check for \$1,000 a month, and the lawyer takes 25%, that's \$250 a month or \$3,000 per year. If the person were on disability for 10 years, this would be \$30,000 or for 20 years, \$60,000. And who can afford to have 25% of their monthly income drained off to an attorney for what may be many years?

*Is such an agreement fair or legal?*

In Massachusetts, attorney fee agreements are legally governed by the Massachusetts Supreme Judicial Court Rule 3:07, 1.5, "Fees." The rule on the legality of an agreement reads: "*A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.*" Among the factors to be considered in determining whether the fee is clearly excessive are" the following:

- 1) *the time and labor required*, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly...
- 2) the fee *customarily* charged in the locality for similar legal services...
- 3) the *amount involved and the results obtained*...
- 4) whether the fee is fixed or contingent."

A fee must bear a relationship to the amount of work reasonably performed by an attorney on a case. Although a contingency agreement rewards the attorney for taking a risk, the actual amount obtained must not be "clearly excessive": the fee must bear some relationship to the actual work performed by the attorney. Any agreement which attaches a percentage of a person's future benefits indefinitely in exchange for a fixed amount of a lawyer's time raises a serious question of excessiveness and enforceability.

Moreover, the amount of work the attorney actually performed must be reasonable, given the nature of the case. (In other words, if most attorneys take 20 hours to complete a case, a lawyer probably cannot bill 100 hours, even if he actually works that many hours.)

For instance, in the example above, a contingency in which the attorney attempts to collect 25% of a disabled person's monthly check indefinitely into the future (\$30,000-\$60,000) for doing only 20 hours work is most likely to be found by a Court to be clearly excessive, and therefore the agreement would not be enforceable.

Moreover, according to the Massachusetts Supreme Judicial Court decision, *In the Matter of Fordham, 1996*, the Court cited case law which holds that the above factors for evaluating excessiveness are to be evaluated by the standard of "a lawyer of ordinary prudence."

Additionally, the decision holds that the "*test...is whether the fee 'charged' is clearly excessive, not whether the fee is accepted as valid or acquiesced in by the client.*"

*This means that the client cannot be held to a clearly excessive fee agreement even if he or she signs it.* The SJC rule holds that fees "must be reasonable to be enforceable against a client."

## Other matters to be wary of

An attorney may attempt to obtain monies unfairly in another way. One such way is to deceptively obtain a fee by claiming unreasonable charges for certain expenses such as "overhead," "disbursements," etc.

If the amount charged in an agreement clearly has no reasonable relation to such expenses, then it may be an attempt to collect a flat fee deceptively. Relatively large amounts for such "expenses" may really be fees which normally should be applied to hourly rates. For instance, if a lawyer asks for several thousand dollars as a "retainer" or "initial payment," the lawyer must take from this amount only what he earns hourly—he generally must return any unearned amount. All charges in an agreement must be explained fully; there must be no deception.

As explained above, the mixing of hourly rates, contingency fees, and flat fees is potentially permissible—but make sure that the attorney justifies in terms of work to be performed any agreement which calls for both a contingency percentage and a substantial flat fee. Remember, an excessive fee is defined as one which bears no reasonable relation to the justifiable work performed on a case.

No matter what the fee arrangement, always ask for an actual accounting of the time the lawyer spends on your case. Determine if the total charges of hourly work bears a reasonable relationship to the fee; also check to be sure you are paid any refund from your retainer for hours not worked.

In my opinion, *you should avoid signing* an agreement which you believe to be clearly excessive.

And *avoid signing* an agreement in which you sign away a portion of your monthly income for an indefinite future. The lawyer could be obtaining an undefined excessive amount for what might be a fairly limited number hours worked.

It is more reasonable if your case has to go to Court to agree with your attorney to pay a *fixed dollar amount* as a contingency fee only if your case is won. The contingency would probably reflect both the lawyer's expected work time as well as a dollar amount for the contingent risk. You then could make partial payments from your benefits for a period of time necessary to payoff that amount. Perhaps some other contingent fee could be arranged; but remember such a contingency should be a fixed dollar amount having some relation to the amount of work actually performed.

If you believe an agreement you have already signed is clearly excessive and therefore unenforceable, you can go to the *Massachusetts Board of Bar Overseers and make a complaint.*

*The Board can terminate any improper agreement and discipline the attorney.* The address of the Board is: Board of Bar Overseers, Office of the Bar Counsel, 75 Federal St., Boston, MA 02110, 617-728-8750.

Don't continue to pay an unjustified amount of money for the legal services you obtained.

*(This article is not providing legal advice; if the reader has a specific legal question, s/he should seek competent counsel.)*