Why Patent Attorneys (& Agents) Don't Work on Contingency

I frequently get inquiries from inventors who are interested in contingency fee representation. There is no such thing as contingency representation for purpose of preparing, filing and ultimately obtaining a patent. Patent attorneys and agents just don't take contingency clients when the matter is patent procurement.

Please don't take offense. This is a "tough love" article that may come across as a lecture. I have always believed that the overwhelming majority of inventors want to hear it straight and are looking for a road-map to get from point A to point B. The thing I preach all the time, and the theme of this article, is understanding the industry. The more you understand about what you should do, when you should do it, and the economic realities facing the various players you will come in contact with, the better off you will be to safely and successfully navigate the difficult waters of going from invention to money.

Yes, I'm sure you have seen those TV commercials where an attorney talks about them taking cases on contingency and not getting paid unless you get paid a recovery. If you look carefully at these commercials, however, they are universally from "injury attorneys," not from attorneys that do transactional work. The unfortunate aspect of these widespread commercials is that they lead many, including inventors, to believe that attorneys (and agents) work on a contingency basis regardless of the work to be provided. That is simply not true.

The fact is, litigation attorneys only take cases on a contingency when they know beyond a shadow of a doubt that there WILL be money ACTUALLY recovered. That is why it is perfect for personal injury attorneys. They can tell with great certainty, if they are being honest, if money will be recovered. So they need to be 100% sure when they take the case that money will be obtained because as it turns out cases can and do take on a life of their own and even when they are 100% certain at the outset, they make mistakes. If they are not 100% certain at the beginning, they quite often never recover anything.

Most inventors hate hearing this, but the invention part is the easiest part of the process. This is true because it is the only part of the process that can be controlled 100%.

When you file a patent application you need to depend on the fact that you will get a fair examination by a fair Patent Examiner, and even if you get a fair Patent Examiner they may just look at the law and your invention from a different point of view. The patent process cannot be controlled because ultimately you have a patent examiner you need to please, but you have complete ability to define the invention and guide the process to a positive outcome, which can be achieved in a high percentage of cases if the attorney or agent is familiar with the technology and the client is willing to pay enough to do the work actually required.

After the invention and patent process, there are all kinds of hurdles to money showing up and being available. You need to find a licensee and get the licensee to part with money, or you need to build the invention or implement the invention and wait for consumers to start buying. When it comes time to market your invention you may be told you have exactly what people are looking for, but then wind up getting beaten out by an improvement. There are costs all along the way, and even if there is an

extremely high likelihood the invention will be successful the time horizon to money (i.e., the time it takes for the first dollar of profit) is too far in the future and too speculative for any contingency representation agreement to make sense at all for what is a lot of work required to obtain a patent.

Aside from the fact that there are a great many things that can (and will) go wrong on the way from invention to money, inventors who have no skin in the game typically fold like a pup-tent the first time there is a glitch. Yes, I do have experience with this in the patent space, foolishly having tried at times earlier in my career to take work on a contingency basis. I think many patent attorneys and patent agents have foolishly tried to take contingency work, perhaps for a family member or friend, (as in my case). I have never made a dime and I know of no patent attorney or patent agent who has ever made a dime on a contingency deal. So you simply cannot realistically expect a patent attorney or patent agent to represent you with respect to your patent work on a contingency basis.

This rationale frequently doesn't get through or understood because most inventors will think that this all makes sense for the other inventor, but not for them because their invention is going to be worth billions of dollars and everyone is going to want it. This is typically the inventor who will say: "My invention is better than sliced bread, everyone will want it, and I am *willing* to let you in on this if you just do the patent work for free. You will be rich!"

Patent attorneys and patent agents don't want to be "let in on it," we want to work and get paid, just like you do. Everyone thinks their invention is the next grand slam homerun, and that is great. If you don't have confidence, you likely won't succeed; but expecting to find reputable professionals who are experienced and talented who will work for free, which is what you are asking, is unrealistic. Even crazy simple non-provisional patent application takes 20 hours to draft properly, and something of modest complexity, like a kitchen gadget, can take an entire week to do properly. How many people can take a week off to work for free in hopes of making money at some yet to be determined distant point in time in the future?

Over my career I have been amazed at how many people are creative in one manner or another. There are truly wonderful entrepreneurs and highly creative inventors out there, more so than most people would imagine. Successful inventors and entrepreneurs hire competent patent professionals and pay them so that they devote the necessary time to do a good job. It is at least somewhat common, however, for inventors to start down the patent path, perhaps with a patent search and provisional patent application filing, and then go out seeking investors. There are investors who will invest because that is their business. Patent attorneys and patent agents, on the other hand, are in the business of doing work for a fee. So asking a patent attorney or patent agent to invest in hopes of recovery is asking someone who is in the fee for service business to buy into your idea without really knowing you and without knowing whether you will continue to follow through as life challenges and business challenges mount.

The moral of the story here is this: inventors who spend a lot of time and energy searching out patent attorneys and patent agents who will work on a contingency basis are wasting their time. The time spent looking for contingency representation, which is the industry equivalent of a unicorn, could be better spent in any number of more productive activities to fund these activities, before going out to look for help developing the invention and finding investors.