Contingent Representation in Patent Litigation

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Patent contingent litigation is on the rise. While scholars have studied contingent litigation in other contexts - such as medical malpractice, personal injury, products liability, and class action litigation, almost no attention has been paid to patent contingent litigation. Patent contingent litigation is different in important respects from other contingent litigation. First, the risks involved in patent litigation differ from other personal injury or medical malpractice, with many considering patent litigation to be more uncertain and unpredictable. Second, patents are freely assignable, and the assignment of a patent includes the right to bring patent infringement litigation. Free assignment had led to several large patent aggregators who purchase numerous patents with the goal of generating revenue through enforcement activity. In contrast, it is not possible for similar aggregation or transfer of claims in many other areas of law. Victims of medical malpractice, for example, are typically legally prohibited from assigning their causes of action to others. Third, the attorney fees and costs necessary to appropriately litigate patent infringement claims are substantially higher than in most other areas of the law.

Drawing upon several sources of data, including interviews with over two dozen lawyers involved in contingent representation in patent litigation and analysis of numerous contingent fee agreements, this Article provides a comprehensive description of how contingent representation operates in patent law. The article discusses how and why the lawyer-client contingent relationships established in patent contingent litigation differ from other types of contingent litigation. It also considers the various business models of firms that represent clients on contingent fee in patent litigation.