

Contingency Fee Retainer Agreement (Personal Injury)



This document incorporates more than two dozen required clauses further to the *Solicitors Act*, R.S.O. 1990, c.S.15, Contingency Fee Agreements, O. Reg. 195/04. This document should be adapted to suit your practice and the matter for which it is being used. See endnote.

[Firm Name, Address, Telephone Number, Email]

[Date]

[Client Name]

[Client Address]

Re: Accident of [date of accident]

Part 1: Our Services

Legal services covered by this contract

[Firm Name and/or Lawyer Name] is being retained by the client to provide the following services and to represent the client in respect to injuries, losses and damages resulting from a [type of accident] which occurred on or about [date].

We agree to act for you in your legal claim against [name of Defendant(s)], once we receive a signed and dated copy of this contract. We will then be your lawyers throughout the whole legal process including going to trial if necessary. (The attached document called *Steps in a Lawsuit* explains the basic steps most lawsuits go through as well as some legal terms.) The limitation period, or the latest date by which we will commence a lawsuit, is [Day, Month, Year].

At the same time, we will try to *settle* your case to obtain a favourable *settlement* for you. A settlement is an agreement between the parties to a lawsuit which sets out how they will resolve the claim. If your claim is settled, it will not have to go to trial.

We will keep you informed about matters that arise, and discuss with you any significant decisions you must make. We will give you our legal advice, but you will make the final decisions. And, we will only settle your lawsuit if we have your written consent.

Meeting your expectations

This document may be adapted for use by lawyers and paralegals for their legal practices. It is available at practicepro.ca/retainers
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Money

You hope to obtain a fair and reasonable amount of money for your injuries to compensate you for:

- (1) your pain and suffering;
- (2) loss of wages;
- (3) your medical, drug, and other out of pocket expenses.

You also hope the Defendant(s) will pay for at least some of the legal fees we will charge you.

Even if you win your lawsuit, the Defendant(s) may only have to pay you some of these fees, not the whole amount. You still agree to pay us our fees which are discussed in Part 2 of this contract.

When we have the information we need, we will tell you how much money we think you could reasonably hope to obtain in a settlement or at trial. We will also tell you if our opinion changes as your case progresses.

Time

It can take up to **two years or longer** for a lawsuit to go to trial or settle. The amount of time your lawsuit will take will depend on factors such as how soon you recover from your injuries; when we receive the documents we need; the court's schedule; and when the other lawyers are available.

Your role as client

You understand the importance of giving us all the facts and of being totally honest with us. We can only do our best job if we have your trust and are fully informed.

In particular, we ask you to give us all information you have, or have access to, which could help us in working on your lawsuit. We need copies of all letters and documents relating to the accident; medical reports; physiotherapy records; income tax records; paycheque stubs; and medical, drug, and parking receipts. If necessary, we will ask you to give us written authorization to obtain this information from other parties.

You retain the right to make all critical decisions regarding the conduct of your claim.

Legal services not covered by this contract

At this time we have not been retained to represent you generally or in connection with any other matter. We will not be performing the following services:

(a) [describe, e.g., accident benefits, long term disability, CPP-disability, social security, etc.]

(b) [describe]

(c) [describe]

[If you are not being retained to assist with another possible cause of action you are aware of, add this sentence: In particular, although you told us [describe cause of action, for example: "you were let go from work"], you have not asked us to take any legal action concerning this.]

If your case goes to trial and either you or the Defendant(s) is unhappy with the court's decision, you or the Defendant(s) can *appeal* the decision of the court to get a higher court to change that decision. We will tell you what we think the likely outcome of an appeal would be. But this contract does not cover the work that will be involved in such an appeal. If you want us to act on the appeal, we will ask you to sign another contract to cover the new legal services and fees.

This contract also does not cover any steps you may have to take to force the Defendant(s) to actually pay you. If you ask us to help you *enforce* a court order or judgment, again, we would ask you to sign another contract. This contract does not cover such enforcement proceedings.

We have not agreed to give you legal advice or perform legal services for you relating to any other matter.

Sole Representation

We will be representing solely you in this matter. Our representation of you does not include the representation of related persons or entities, such as family members; friends; the individuals or entities that are shareholders, directors or officers of a corporation, its parent, subsidiaries or affiliates; partners of a partnership or joint venture; or members of a trade association or other organization. In acting for you, we are not acting for or taking on any responsibilities, obligations or duties to any such related persons or entities and no lawyer-client or other fiduciary relationship exists between us and any such related persons or entities.

[Multiple Clients – Optional in the alternative if not sole representation]

Representing Multiple Clients with Apparent Same Interest (Joint Representation)

As you know the following [party/parties] are involved with you in this matter and you and they have asked us to represent all of you:

[name(s)]

We have discussed with you the principles we must follow of undivided loyalty. No information received from one of you as a part of the joint representation can be treated as confidential as

between all of you. If we should receive information from one of you which we are instructed to keep confidential as between all of you, we will have to stop acting for all of you.

We have discussed these matters with you and have concluded that, at least at present, each of your individual interests in this matter are the same. The areas in which these individual interests may diverge in the future are:

[describe]

If we agree to act for one of you in a matter separate from this one, and we receive confidential information from that separate matter that is relevant to this matter, and the client in that separate matter wishes to keep it confidential, then

[Lawyer when drafting agreement must choose (i) or (ii) following]

(i) the information must not be disclosed to the other in this matter. This means we must withdraw from the joint representation.

or

(ii) the information must be disclosed to each of you in this matter and we may continue to act jointly for both of you.

Other conflicts may arise that cannot as yet be foreseen. A conflict of interest occurs when what is best for one of our clients somehow is not best for or hurts another of the firm's clients. At the present time we can represent all of you. However, if it later becomes apparent that there is a conflict, we confirm each of your instructions to attempt to resolve this conflict. If a successful resolution cannot be accomplished in a timely way or at all, or if our attempts to resolve the issue cause us ethical concerns, we will have to withdraw from representing all of you.

[if applicable] We confirm your agreement that if a contentious issue between you and _____ arises, we may continue to advise _____ about the contentious matter and that I we will refer you to another lawyer or paralegal.

Our billings will name and be sent to all of you and each client is responsible for payment of the entire amount. You will need to decide between you how our accounts will be divided.

Part 2: Our Fees, Expenses, and Billing Arrangements

Our fee is a percentage and contingent on a favourable settlement or trial outcome

We have explained to you that you have the option of retaining a lawyer other than by a contingency fee agreement.

There are two main ways a lawyer can bill you:

Option 1 — by charging an **hourly** fee for work done;

Option 2 — by charging a **percentage** of the amount of money awarded in a settlement or court judgment; or, *alternatively*, by accepting court ordered costs as the fee.

We have explained that hourly rates may vary among lawyers and that you can speak to other lawyers to compare rates.

You have asked us to charge you fees based on a percentage of the amount of money awarded to you in a settlement or court judgment, or by accepting court ordered costs as the fee, whichever is greater (option 2). We agree.

You acknowledge and understand that all the usual protections and controls on retainers between a lawyer and client, as defined by the Law Society of Upper Canada and the common law, apply to this contingency fee agreement.

The disadvantage of choosing a percentage arrangement (option 2) is that you may end up paying us more in legal fees than if we were to charge you an hourly fee for work done (option 1). This could happen if we are fortunate in favourably settling your lawsuit quickly.

There are also advantages to choosing a percentage fee. First, if we cannot settle your case or if you lose at trial, then you would only have to pay our disbursements. You would not have to pay us any fees. Second, if we go to trial and win, the percentage fee may be less than an hourly fee if we have spent a significant amount of time on the trial.

The contingency fee is to be paid to us contingent on a settlement or trial verdict.

Percentage based on work done

Our percentage fee will be less if your claim is settled than if it goes to trial. If it is settled, the fee will depend on the stage at which the lawsuit is settled. Our percentage fee will be:

- (1) [___, for example, 20]% of the damages awarded if we settle your claim before the *examination for discovery* (*Steps in a Lawsuit* explains this step)
- (2) [___, for example, 25]% of the damages awarded if we settle your claim during or after the examination for discovery and at least 90 days before trial
- (3) [___, for example, 30]% of the damages awarded if we settle your claim less than 90 days before trial or during trial, but before the court judgment
- (4) [___, for example, 33-1/3]% of the damages awarded if your claim does not settle and is decided by a trial.

For the purposes of calculating our percentage fee, any amount awarded in respect of costs and disbursements is excluded.

You understand that we will not recover more in fees than you recover in damages or receive through a settlement.

Costs

If we successfully settle your claim or win at trial, we will seek a sum of money called *costs* from the Defendant(s). If our fee is calculated as a percentage of the settlement or court judgment, you will receive the full amount of these costs since these costs are not included in the calculation.

You understand that unless ordered otherwise by a judge, you are entitled to receive any costs contribution or awarded to you, on a partial or substantial indemnity scale.

If, on the other hand, you are liable to pay costs, you are responsible for paying any costs contribution or award, on a partial or substantial indemnity scale.

Disbursements

In addition to our percentage fee or court-ordered costs as our fee, you agree to pay all disbursements, even if we cannot settle your claim or lose at trial.

Minor disbursements

We will charge you for the minor ongoing disbursements that we have to pay. Some of these disbursements are: long distance telephone calls; photocopying costs; costs to deliver documents to court or the other lawyers; faxes; court filing fees (which the court charges to keep an official record of court documents); and, necessary land or company registry searches (for example, to find out the proper name of the defendant).

If we successfully settle your claim or win at trial, the settlement or court judgment most likely will require the Defendant(s) to reimburse you for some of these disbursements.

Major disbursements

We may have to hire other people such as court reporters, expert witnesses, accountants, and property appraisers to help us with your lawsuit. If we need to hire these people, we will first discuss the matter with you. We usually ask you to pay these major disbursements in advance, or we will have the bill sent directly to you to pay. Again, please pay these bills within 30 days. After 30 days we will begin charging interest at [XX]% per annum.

Also, as with the minor disbursements, if we successfully settle your claim or win at trial, the settlement or court judgment most likely will require the Defendant(s) to pay you costs to reimburse you for some of these disbursements.

First Charge

We have first charge on any funds received in regards to disbursements or taxes as a result of a judgment or settlement of the claim, subject to section 47 of the *Legal Aid Services Act, 1998*.

HST

In addition to our legal fees and disbursements, you agree to pay any Harmonized Sales Tax (HST) that we must charge you.

Example of Contingency Fee Calculation

To illustrate how our percentage will be determined, we offer the following sample calculation. A claim settles before examinations for discovery for the following amounts paid as a lump sum:

| | |
|---|--------------|
| Damages | \$100,000.00 |
| Costs | \$10,000.00 |
| Disbursements | \$10,000.00 |
| HST (on costs and disbursements) | \$ 2,600.00 |
| Total (lump sum payment from defendant) | \$122,600.00 |

Since the claim settled before examinations for discovery, our fee would be 20% of the damages including interest awarded to the client. The client receives the total amount of the costs. The invoice delivered to the client would look like this:

| | |
|--|-------------|
| Fee of 20% x \$100,000.00 damages | \$20,000.00 |
| Disbursements (reimbursed by defendants) | \$10,000.00 |
| Other Disbursements (not paid by defendants) | \$ 300.00 |
| HST (on fee and disbursements totaling \$30,300) | \$ 3,939.00 |
| Sub-total | \$34,239.00 |

The client would then receive ($\$122,600.00 - \$34,239.00 =$) \$88,361.00

You have the right to ask the Superior Court of Justice to review and approve our bill if payment of fees and disbursements is by way of this contingency agreement. Should you wish to do so, you may apply to the Superior Court of Justice for an assessment of the bill within six months of its delivery.

Billing Arrangements

You agree and direct that all funds claimed by us for legal fees, costs, taxes and disbursements shall be paid to us in trust from any judgment or settlement money. We will then deduct our fee, any HST, and any unpaid disbursements, and give you the balance.

Structured Settlements

Instead of a lump sum payment, some claims are paid out by way of a structured settlement. A structured settlement will pay you tax-free payments at set time intervals for a period of time. If your claim is paid out by way of a structured settlement, our contingency fee is calculated and paid in lump sum based on the total damages award at the time of settlement.

Part 3: Dealing with Each Other

Ending the relationship

By you

You are free to end our services before your case is completed by writing us a letter or note. If you do, you agree to pay our disbursements and an hourly fee based on the actual time spent up to the date of ending those services.

Our hourly fee depends on which lawyer or assistant helps with the work. I will be the main lawyer responsible for your case, but some work may need to be done by a more senior lawyer, and other work can be done equally well by a more junior lawyer. There are also many services, such as gathering information and preparing routine documents, that our *paralegal* assistant is well qualified to perform. A paralegal works under the supervision of a lawyer, but may not give legal advice. Our paralegal can serve you at a lower cost than one of our lawyers can.

If you end our relationship, our hourly fee will be based on these rates:

| | |
|------------------------|---------------------|
| My rate | [\$amount] per hour |
| [senior lawyer's] rate | [\$amount] per hour |
| [junior lawyer's] rate | [\$amount] per hour |
| [paralegal's] rate | [\$amount] per hour |

If a lawsuit has already commenced, you will take the appropriate steps under the *Rules of Civil Procedure* to file and serve a Notice of Change of Lawyers or a Notice of Intention to Act in Person. If you do not do so within 30 days, we will bring a motion to remove ourselves as lawyers of record and charge you a flat rate of **\$1,000.00**.

By us

Subject to our obligations to you to maintain proper standards of professional conduct, we reserve the right to terminate our services to you for good reasons which include, but are not limited to:

- (a) if you fail to cooperate with us in any reasonable request;
- (b) if our continuing to act would be unethical or impractical; or
- (c) did not pay our bills on time without making other arrangements for payment.

Again, you agree to pay our disbursements and an hourly fee for our legal services up until the time we stopped acting for you.

[If the client is a minor or person under disability include the following section:

Minors or Persons under Disability

If you are a party under disability as defined under the *Rules of Civil Procedure*, you, as represented by a litigation guardian, must have the contingency fee agreement reviewed by a judge before the agreement is finalized or as part of the motion or application for an approval of a settlement or a consent judgment under Rule 7.08 of the *Rules of Civil Procedure*.

The amount of the legal fees, costs, taxes and disbursements are subject to the approval of a judge when the judge reviews a settlement agreement or consent judgment under Rule 7.08 of the *Rules of Civil Procedure*. Any money payable to a person under disability under an order or settlement shall be paid into court unless a judge orders otherwise under Rule 7.09 of the *Rules of Civil Procedure*.]

Confidentiality

As your lawyers, we have to share relevant information about your case with the Defendant(s) and the court. But unless we need to share this information as part of our work, all information you give us will be kept confidential between us. Your information will be collected, used and disclosed for the sole purpose of providing our services to you in accordance with our Privacy Policy.

You confirm communication via the following is confidential and consent to me/our firm contacting you at:

- [client address]**
- [client home number]**
- [client cell number]**
- [client email]**

No guarantee of success

We will work with you towards your desired outcome. However, all legal actions are subject to many possible variables such as the demeanour and recollection of witnesses, the availability of substantiating documents and other evidence, and the evidence marshalled by the other side - all of which affect the decision of a judge or jury. Accordingly, we cannot guarantee that your

desired result will in fact be achieved. For us to work towards your desired outcome, it will be necessary for you to abide by the terms described in this agreement. Remember that all lawsuits involve risks and uncertainties in the law, the facts, and the evidence.

Part 4: Signing this Contract

This contract contains the whole agreement between us about our relationship with each other and our legal fees and disbursements. It will not be changed unless we both agree and sign any changes. It will legally bind anyone such as heirs or legal representatives who replace either you or us, but it does not legally bind other lawyers who might act for you if you decide to end our relationship.

If you want us to proceed on the basis described above, please **sign both copies of this agreement in the space provided and return one copy to us** in the enclosed self-addressed envelope. If there is anything you do not agree with, or if there is anything you would like to discuss before signing, please write or call us.

Lawyer's signature

Date

Client's signature

Date

Steps in a Lawsuit

The timing of a lawsuit is difficult to predict. It depends on many things, including actions the Defendant(s) takes, court schedules, and decisions you make. A lawsuit can take up to two years or longer to settle or go to trial.

However, most lawsuits go through the same basic steps, although not always in the same order.

Some lawsuits skip some steps, and some steps are repeated many times over.

The steps listed here are the main steps that occur in a lawsuit. They will give you a general idea of what to expect.

1. Gathering the Facts

With our client's help, we gather all the available facts concerning the claim, including interviewing and taking statements from witnesses. We sometimes hire investigators or experts to help us, so this step can involve disbursements.

2. Starting the Lawsuit

We begin the lawsuit by preparing the necessary court documents and *filing* them in court. This means the court date-stamps all copies of the documents, keeping one copy for their official record. We then deliver filed copies to the Defendant(s). This step also involves disbursements such as court filing fees.

3. Interim Applications

After we start a lawsuit, but before trial, we or the Defendant(s) sometimes need to ask the court to decide certain things. Going to court to ask for an order is called an *interim application*. These interim applications are usually about how the lawsuit should be handled. For example, we might ask the court to order that the Defendant(s) show us a particular letter or document that the Defendant(s) would rather not let us see.

4. Examination for Discovery

After gathering the facts, either we or the Defendant(s) arrange an *examination for discovery*. At the examination for discovery, we question the Defendant(s) under oath about the accident. We also ask the Defendant(s) to show us what relevant documents the Defendant(s) has, and to tell us about all relevant documents he or she has ever owned or had access to. In return, the Defendant(s) also question our client about the accident and the injuries he or she suffered. We give the Defendant(s) copies of the documents we have that relate to the lawsuit, and our client describes all relevant documents he or she once had, or had access to.

5. Review of the Law

Once we have a good idea of all the facts, we review the law. We then give our client our legal opinion about what the likely outcome of a trial would be, and how much money our client can expect to obtain.

6. Negotiation and Settlement

When it is appropriate, we talk with the Defendant(s) to see if they will *settle* the claim. A *settlement* is an agreement between the parties to a lawsuit which sets out how they will resolve the claim. If the claim is settled, it does not go to trial.

7. Preparation for Trial

If a claim is not settled, it may go to trial. Preparing the case for trial includes putting together all the necessary documents, arranging for witnesses to attend, and preparing any legal opinions.

8. Trial

We act for our client at the trial. The trial may involve days or weeks of hearings, if not more. The judge or jury then decides the case, which could be a further few days, weeks, or months after the trial.

9. Completing the Claim

We do all the work necessary to complete the claim, from gathering the facts to trial. If the case resolves successfully, the Defendant(s) may be required to pay monies to our client. Once these monies are received, they will be distributed as per this agreement. If the case does not resolve successfully, our client may be required to pay monies to the Defendant(s).

However, this does not include starting new steps such as *enforcing* or *appealing* a court judgment. To *enforce* a judgment means to start proceedings to force the Defendant(s) to actually pay what he or she has been ordered to pay. To *appeal* a judgment means to start work to get a higher court to change the original court's judgment.

NOTE & DISCLAIMER: Model retainers are provided by LAWPRO for your consideration and use when you draft your own documents. They are NOT meant to be used "as is." Their suitability will depend upon a number of factors, such as the current state of the law and practice in each area of law, your writing style, your needs, and the needs and preferences of your clients. These documents may need to be modified to correspond to current law and practice. These documents do not establish, report, or create the standard of care for lawyers. The material is not a complete analysis of any

of the topics covered, and readers should conduct their own appropriate legal research.

Retainer letters or agreements should include reference to the following:

- identity of the lawyer and the client;
- scope of service (is your work to be limited in any way?);
- obligations of client;
- delegation of work;
- expected chronology;
- fee arrangement;
- billing format;
- rate changes;
- withdrawal or termination of services; and
- conflicts of interest.

Drafted originally by the Law Society of British Columbia, LAWPRO has revised this retainer for Ontario lawyers with permission. LAWPRO gratefully acknowledges the work of the Law Society of British Columbia in preparing this document.