

10 TIPS

to Adapt to the New Contingency Fee Regime

On July 1, 2021, Ontario's contingency fees became subject to significant changes, with amendments to both the *Solicitors Act* and the Law Society of Ontario's *Rules of Professional Conduct* coming into force. The changes will affect how contingency fees are calculated and will impact how contingency fee matters are managed from marketing and new client intake through to client offboarding.

10 practical tips to help you adapt to the new contingency fee regime.

1

Get familiar with the new requirements now

Under the new regime, lawyers and paralegals will need to:

- Consider how to set contingency fees given changes to how they may be calculated under the *Solicitors Act* and heightened transparency requirements.
- Post their maximum contingency fees online, or if they do not have a website, inform potential clients of this maximum fee when first contacted.
- Provide potential clients with a new Law Society guide entitled *Contingency Fees: What You Need to Know*.
- Use a prescribed form of contingency fee agreement in most cases. The agreement is available [here](#).
- Provide written estimates of the approximate net amount a client will receive from a settlement, including a breakdown of the legal fees, disbursements and any other deductions from the amount the client will receive.
- When billing, unless the fee has been approved by a court, provide a statement that shows the total settlement or award and the net amount including itemized disbursements, fees, and taxes, and that explains the reasonableness of the fee.

Start by consulting the Law Society's contingency fee resources including:

- Contingency Fee Reforms
- Contingency fees
- Frequently Asked Questions about Contingency Fees

Follow the Law Society of Ontario instructions and checklists to meet new contingency fee retainer agreement requirements:

- Checklist – Standard Form Contingency Fee Agreement
- Checklist – Non-Standard Form Contingency Fee Agreement

If you have further questions, contact the Law Society's Practice Management Helpline for guidance.

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Treat this as a chance to enhance your client's experience, which can help reduce your risks

Beyond making clients unhappy, confusion or disputes over fees and disbursements frequently lead to allegations of negligence and malpractice claims. Effectively implementing these changes can help make sure your clients better understand how fees will be charged, thereby reducing the likelihood of an unhappy client and a malpractice claim.

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Bring in your team to get the changes right

These changes require all hands on deck. When firms have to rapidly change processes, mistakes can be made and a lack of understanding of new roles and responsibilities can lead to errors.

Bring in your team to determine how the new requirements will fit into your process from client intake to client off-boarding, or how certain processes will need to be changed. Use your staff and other professionals to identify the changes and implement them effectively.

Staff: Your staff needs to know how these reforms will change your firm's processes and their particular responsibilities. Work with them to understand how these changes will affect workflow at all levels and develop new workflows as necessary. Train your staff on the new requirements and their new responsibilities.

Other professionals: If you work with IT and/or marketing professionals, work with them to update your website and client intake processes to meet the new requirements.

Remember – it's up to you to guide your staff and contractors, such as website content marketing professionals, to make sure that your website meets the new fee marketing and other requirements.

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Market to get the clients you want

a) Have answers for prospective client's questions

The Law Society's consumer guide includes a section with questions that consumers can ask legal professionals as they search for legal representation. There are a range of questions related to the legal professionals' expertise, what contingency fee will apply, how disbursements will be paid etc.

Review these questions, and prepare standard starting point responses. Consider posting answers to these questions on your website. Train your intake staff to be ready to answer these initial prospective client inquiries. Consider how you can answer these questions honestly and candidly and in a way that reflects your approach to cases and client communication.

You can use these prospective client inquiries to show your expertise and value proposition to attract the clients you want.

b) Marketing your maximum rates, and beyond

As required, post the maximum contingency fee you charge. Take the opportunity to explain when this maximum amount is charged.

At the same time, consider listing caps by area of practice. You may have different fee caps by type of matter – fees for a slip and fall case may differ from a medical malpractice case, for example. By posting this detailed information clients can:

- gain a more complete and accurate understanding of the fees that could apply to their case;
- be less likely to be deterred by the highest general cap (which may not apply to their type of case); and
- have a greater understanding of the highest fee range they can reasonably expect for their type of case, which reduces the risk of fee disputes later.

You can also take the opportunity to describe your experience by area of practice. This will help prospective clients get a better sense of who you are, your experience, approach, and value proposition.

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Use the consumer guide as part of your onboarding

The Law Society of Ontario's consumer guide needs to be shared with prospective clients – use this opportunity to bring your marketing and client onboarding to the next level.

There are different ways you can share the guide. Consider emailing it to prospective and new clients to give them a chance to review it before you meet with them. This will give them a chance to read it and help them prepare for their initial meeting with you. Or you can provide the document to them as part of your initial client package.

Use the guide as a starting point for further discussions with prospective clients and with clients when you meet them on intake. Take the time on intake to review questions they have.

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Tailor your retainer letters to clarify the scope of services

The standard form retainer letter has certain prescribed parts, and parts which can be tailored. Consider tailoring your retainer letters to:

- *Provide a detailed description of the scope of the retainer:* For example, for a personal injury matter, consider including the date or approximate date and location of the accident, and what services will be provided regarding the incident.
- *Expressly state what services are not being provided:* For example, in a motor vehicle accident case, a prospective client could have several issues – a claim for SABS benefits, a tort claim, an employment dispute arising from time off required to recover from the accident, and perhaps other legal issues. Consider expressly including in the retainer agreement which matters are within the scope of the retainer, and which are not.

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Retainer Letters: Keep the key terms in the retainer agreement and the agreement summary consistent

The standard form contingency fee agreement is available in Microsoft Word and contains both the agreement itself and a summary of the key terms called “Your Agreement Summary.”

The agreement does not automatically populate the summary section with key terms from the contingency fee agreement. While document automation software providers may develop versions of the standard form agreement that will autofill the summary with terms from the agreement, at the moment, the summary needs to be manually inputted.

Take care to properly reflect the key terms of the retainer agreement in the summary section, as differences between the agreement itself and the summary could lead to misunderstandings, disputes with your client, and a report of a potential claim to LAWPRO.

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Settlement Discussions – Put it in writing

Under the new *Rules*, when a contingency fee agreement is in place, a lawyer should provide details about proposed settlements in writing (new *Rule* 3.6-2.1, Commentary [4]). Provide the client with a written estimate that:

- Gives the approximate net amount the client will receive.
- Breaks down the lawyer’s fees, disbursements, and any other charges that will be deducted from the amount the client will receive.

When lawyers document key client discussions such as settlement offers in this manner, it protects both the lawyer and the client, and helps reduce the risk of misunderstanding.

To develop the habit of providing detailed settlement estimates in writing, consider:

- Creating a standard “settlement offer” reporting form or reporting letter where you can insert the detailed estimate. Consider using such a form to email clients with settlement offer information or to complete during negotiations at mediation.
- Updating any file master checklists or file specific to-do lists to include this requirement.
- Setting a note in your calendar when scheduling mediations to remind you of this requirement.

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Use your final reporting letter to help create a great client offboarding experience

The new fee transparency rules require that a detailed statement of account is provided to the client unless the fee has been Court approved. The final account will need to explain the reasonableness of the fee referring to the common law factors.

Use this as a final self-check to make sure that you believe that the final fee you are charging your client is reasonable. Consider the time spent on the matter, the complexity, results achieved and risks you assumed in taking on the case.

- If you conclude that the fee is reasonable, use your final reporting letter and detailed account to highlight the success. Consider meeting with your client to review the final settlement and make sure that the client understands the results, and even celebrate the resolution of their legal matter where appropriate.
- If you aren’t sure if the fee is reasonable, consider asking a colleague for their assessment of whether the fee is reasonable.
- If you conclude that the fee is not or is unlikely to be viewed by your client or an assessment officer as reasonable, lower it to an amount you believe is reasonable when the factors are considered. Clients often appreciate when fees are marked down. It can reduce friction when there may be disagreement about whether a fee is reasonable.

The final account is one part of a successful client offboarding experience. It can be used to help make sure that the client understands the settlement and the value of your services.

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If things don’t go as planned, contact LAWPRO

Sometimes lawyers make mistakes. Sometimes clients do not understand or are dissatisfied with the results. In such cases, let LAWPRO know by reporting a claim. Report when you learn a client is dissatisfied or you realize you may have made an error. If you aren’t sure whether to report or about timing to report, just report. It’s always better to let us know right away. We can work with you from there. We often help with repairs that can help prevent a claim from occurring, or minimize the damages if one does occur. And remember, reporting a real or potential claim does not trigger the payment of a deductible. We’re also here to help before issues arise. For general risk management questions, contact us at practicepro@lawpro.ca ■

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