

THE LAW SOCIETY OF UPPER CANADA

THE ANNOTATED RETAINER

THE CONTINGENCY FEE RETAINER AGREEMENT

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April 29, 2009

“CONTINGENCY FEE RETAINER AGREEMENT”

Annotation: *Regulation 195/04 made under the Solicitors’ Act¹ requires that all contingency fee agreements be entitled “Contingency Fee Retainer Agreement” (s. 1(1)(a)).*

Section 2.08 (3) of the Rules of Professional Conduct allows for contingency fee agreements in accordance with the Solicitors Act which provide that “the lawyer's fee is contingent, in whole or in part, on the successful disposition or completion of the matter for which the lawyer's services are to be provided”.

This contingency fee retainer agreement is

B E T W E E N :

**J. Doe & Associates
Main Centre
1 Main Street West, Suite 1
Toronto, Ontario
M1M 1M1
Tel: 416-555-5555
Fax: 416-555-5555**

(Hereinafter called the “Solicitors”)

and

**M. Smith
1234 Main Street
Toronto, Ontario
M1M 1M1**

Tel: 416-555-5555

(Hereinafter called the “Client”)

Annotation: *The Solicitors Act requires that the agreement include the names, addresses and telephone numbers of both the solicitor and the client (s. 2.1).*

¹ R.S.O. 1990, c. S. 15, as amended (hereinafter the “Solicitors Act”).

1. What we are retained to do

J. Doe & Associates are being retained by the client to provide the following services, namely, to represent the client in respect to injuries, losses and damages resulting from a medical malpractice which occurred on or about the ____ day of _____, 20__.

Annotation: *The Solicitors Act requires a description of the “basic type and nature of the matter” to which the agreement relates (s. 2.2.).*

In representing the client’s interest in respect to the above-noted matter, J. Doe & Associates will be incurring a significant amount of time and out-of-pocket expenses for and on the client’s behalf. In retaining the services of J. Doe & Associates, the client has the option of retaining the solicitors other than by way of a contingency fee agreement, including retaining the solicitors by way of an hourly rate retainer. An hourly rate retainer is a retainer whereby the solicitors charge the client for each hour or a portion thereof that they work on the client’s file at a specified hourly rate. Hourly rates may vary among solicitors and the client can speak with other solicitors to compare rates. Notwithstanding that the client has been advised of the hourly rates of J. Doe & Associates and that hourly rates may vary among solicitors and notwithstanding that the client can speak with other solicitors to compare rates, the client has chosen to retain J. Doe & Associates by way of a contingency fee agreement. The client acknowledges and understands that all usual protections and controls on retainers between a solicitor and client, as defined by the Law Society of Upper Canada and the Common Law, apply to this contingency fee agreement.

Annotation: *The Solicitors Act obligates the solicitor to advise the client of the following (s. 2.3):*

- a. his/her option to retain the solicitor by means other than a contingency fee agreement, including a retainer by hourly rate;***
- b. that hourly rates may vary among solicitors;***

- c. *that the client may speak with other solicitors to compare rates;*
- d. *that the client has chosen to retain the solicitor via a contingency fee agreement; AND*
- e. *that the client understands that (s)he is protected by the usual protections regarding retainers which are offered by the Law Society of Upper Canada and contained in the case law.*

The Act also requires that the agreement including a statement confirming that this discussion took place.

2. The Amount of the Contingency Fee

The contingency fee paid by the client to J. Doe & Associates is equal to _____% of all amounts recovered on behalf of the client for injuries, damages, and losses, excluding disbursements (out-of-pocket expenses), regardless of the source of the said recovery whether by way of settlement of the client's claim or by way of judgment following a trial.

Annotation: *The Solicitors Act requires that the agreement include a statement that explains the contingency upon which the fee is to be paid: in other words, a statement advising the client under what circumstances the fee is payable (s. 2.4.).*

For example:

To help you understand how our percentage will be determined, we offer the following sample calculation. This sample calculation does not apply to your case; it is for illustration purposes only.

Initials

Suppose that before trial, your case is settled for the following amounts (paid as lump sums):

Damages plus interest:	\$100,000
Costs (from the Defendant), including GST:	\$ 10,000
Disbursements (reimbursed by the Defendant):	<u>\$ 10,000</u>
Total:	\$120,000

In this example, our fee would be _____% of the total damages and interest awarded to our client (excluding costs). The invoice delivered to our client would consist of the following:

Fee of _____% x \$100,000:	\$ _____
GST on our fee:	\$ _____
Disbursements (reimbursed by defendants):	\$ 10,000
Client Disbursements (faxes, photocopies, Long distance telephone, courier, etc.)	(included in our <u>percentage fee</u>)
Sub-total:	\$ _____

Your recovery will then be \$_____ (\$_____ for claims plus \$10,000 costs payable by the other side).

Annotation: *The Solicitors Act specifically requires that the method by which the fee is to be determined, as well as an example, be included in the retainer (ss. 2.5-2.6.).*

The Act also requires that an agreement in which the fee is determined as a percentage of the recovery shall exclude any amount designated as for costs and disbursements (s. 6).

The Commentary under section 2.08(3) of the Rules of Professional Conduct reads as follows:

Initials

In determining the appropriate percentage or other basis of the contingency fee, the lawyer and the client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. The lawyer and client may agree that in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as a part of a settlement is to be paid to the lawyer, which agreement under the Solicitors Act must receive judicial approval. In such circumstances, a smaller percentage of the award than would otherwise be agreed upon for the contingency fee, after considering all relevant factors, will generally be appropriate. The test is whether the fee in all of the circumstances is fair and reasonable.

It is agreed that J. Doe & Associates shall not recover more in fees than the client recovers as damages or receives by way of settlement.

Annotation: *If the client is a plaintiff, the Solicitors Act mandates that the retainer include a statement that the solicitor's fee shall not exceed the amount received by the client as damages or through settlement (s. 3.1.). The Act also prohibits the solicitor from recovering more in fees than the plaintiff recovers (s. 7).*

As client, you are responsible for the repayment to J. Doe & Associates of all disbursements (out-of-pocket expenses) including G.S.T. that J. Doe & Associates have paid on your behalf. Such disbursements (out-of-pocket expenses) are likely to include but are not limited to photocopying charges, faxes, postage, courier charges, long distance telephone calls, mileage, experts' reports, court filing fees, computer assisted legal research, as well as other miscellaneous out-of-pocket expenses. The client acknowledges that J. Doe & Associates are entitled to be reimbursed for any of these disbursements that they have expended on your behalf subject to section 47 of the *Legal Aid Services Act, 1998* and such entitlement is a first charge on any funds received as a result of a judgment or settlement of the within matter.

Annotation: *The Solicitors Act requires that the retainer include a statement in respect of disbursements and taxes that indicates whether the client is responsible for payment of same, and if so, that the statement also include:*

- a. a general description of disbursements likely to be incurred, “other than relatively minor disbursements”; AND*
- b. a statement indicating that if the solicitor pays these expenses during the course of the matter, the solicitor is entitled to be reimbursed for those payments, subject to s. 47 of the Legal Aid Services Act, as a first charge on any funds received as a result of judgment or settlement (s. 3.2.).*

So long as we act for the client and the retainer is not terminated, J. Doe & Associates will absorb the following client disbursements in our fee. These disbursements include courier, taxi, photocopies, postage, long distance telephone calls, etc.

3. The Partial Indemnity Costs Paid by the Other Side

In addition to being awarded money in compensation for the injuries, losses and damages that you have sustained inclusive of interest, either by way of settlement or if settlement cannot be obtained, by way of a judgment following a trial, the other party may also be required to pay an amount of money towards your legal costs and disbursements. Unless otherwise ordered by a judge, you are entitled to receive any costs contribution or award, on a partial indemnity scale or substantial indemnity scale, if you are the party entitled to costs, such costs payable by the other side. By executing the within contingency fee agreement, you agree and direct that all funds claimed by J. Doe & Associates for legal fees, costs, taxes and disbursements shall be paid to J. Doe & Associates in trust from any judgment or settlement money.

Annotation: *The Solicitors Act mandates that the retainer include a statement that explains costs and the awarding of costs and that includes the following provisions:*

- a. unless otherwise ordered by a judge, that the client is entitled to receive any costs contribution or award, on a partial indemnity*

scale or a substantial indemnity scale, if the client is the party entitled to costs; AND

- b. that the client is responsible for paying any costs, contribution or award, on a partial indemnity scale or substantial indemnity scale, if the client is party liable to pay costs (s. 3.3.).*

In the case of a plaintiff, the Act also requires that the client direct that all funds claimed by the solicitor for legal fees, costs, taxes and disbursements shall be paid to the solicitor in trust from any judgment or settlement (s. 3.4.).

The amount of the contingency fee payable herein to J. Doe & Associates shall exclude any amount awarded or agreed to that is separately specified as being in respect of costs and disbursements.

Annotation: *This last sentence is required under s. 2.5. of the Solicitors Act, which requires that the retainer specifically state that any amount paid for costs and disbursements is excluded from the calculation of the fee.*

4. Your Rights to have the Court Assess this Fee:

You as client have the right to ask the Superior Court of Justice to review and approve the bill submitted to you by J. Doe & Associates if payment of their fees and disbursements is by way of this contingency agreement. Should you wish to ask the Superior Court of Justice to review and approve the solicitor's bill, you may apply to the Superior Court of Justice for an assessment of the solicitor's bill rendered in respect to this contingency fee agreement within six months after its delivery.

Annotation: *The Solicitors Act requires that the retainer include a statement informing the client of his/her right to seek a review of the fees from the Superior Court of Justice, as well as information regarding the applicable timeline for asking for such a review (s. 2.8). The six-month assessment deadline is set out at s. 10.*

5. What Happens if you Terminate this Agreement

At any time during the course of the representation by J. Doe & Associates, you or J. Doe & Associates may wish to terminate this contingency fee agreement and to enter into a new retainer agreement. Such termination by either J. Doe & Associates or you, must be in writing. In the event that either J. Doe & Associates or the client terminates this contingency fee agreement, the terms of this contingency fee agreement no longer apply to the calculation of the fees to be charged by J. Doe & Associates for the services that they have performed. Instead, J. Doe & Associates will charge you on an hourly rate for the work that they have done and will continue to do on your behalf based on the following hourly rates as at January 1, 2007:

1.	Senior Partner	called to Ontario Bar 1983	\$_____ per hour
2.	Senior Associate #1	called to Ontario Bar 1985	\$_____ per hour
3.	Senior Associate #2	called to Ontario Bar 1993	\$_____ per hour
4.	For lawyers with four to six years of experience		\$_____ - \$_____ per hour depending on the year of call
5.	For lawyers with one to three years of experience		\$_____ - \$_____ per hour
6.	For all law clerks and/or paralegals		\$_____ - \$_____ per hour

These hourly rates would apply to all of the work performed on the file from the inception of the file to the completion of the file either by way of settlement or by way of a judgment after trial.

Should you decide to no longer retain the services of J. Doe & Associates while the matter is ongoing, the termination of the services of J. Doe & Associates must be in writing and all disbursements (out-of-pocket expenses) paid by J. Doe & Associates on your behalf are immediately payable. You will be billed by J. Doe & Associates for all services performed up to and including the date of termination of the retainer in

accordance with the hours or portions thereof performed by the various members of the firm of J. Doe & Associates based on the hourly rates referred to above. Until such time as all bills, accounts, disbursements and expenses have been paid by you, J. Doe & Associates retains a solicitor's lien on your file and will only release your file to a new solicitor upon satisfactory arrangements being made for protection of and payment of the accounts of J. Doe & Associates from any settlement or judgment after trial.

Annotation: *The Solicitors Act provides that the retainer include a statement outlining when and how both the client and the solicitor may terminate the agreement, the consequences of the termination for each party and the manner in which the fee shall be determined in the event of termination (s. 2.9.).*

6. What Happens if the Client is a Minor or Person Under Disability

If you are a party under disability as that term is defined under the *Rules of Civil Procedure*, for the purposes of the *Rules of Civil Procedure*, you, the client, as represented by a litigation guardian, shall be entitled to 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*. Further, the amount of the legal fees, costs, taxes and disbursements is 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*.

Annotation: *In the case of parties under disability, the Solicitors Act requires that the retainer include statements that (s. 3.5):*

- a. the contingency fee agreement must be reviewed by a judge either before the agreement is finalized or as part of a motion for Court approval;*
- b. the quantum of fees, costs, taxes and disbursements is subject to the approval of a judge; AND*
- c. any money payable to a person under disability shall be paid into court, unless a court orders otherwise.*

7. Motions

During the course of the lawsuit, Motions in Court maybe brought on the client's behalf or defended on the client's behalf. In the event that the Court awards J. Doe & Associates costs on the Motion, J. Doe & Associates will be rendering an interim account and any account so rendered will be credited to the fee that will be charged to the client.

8. What Happens if there is no Recovery: You Don't Pay Anything to J. Doe & Associates

It is agreed that if no money is recovered by settlement or judgment, no fees shall be charged or billed to you. However, in the event that costs of the other parties are awarded against you, those costs are solely the responsibility of you, the client, and not the responsibility of J. Doe & Associates. We will discuss with you at different times during the litigation, whether there is any chance of the case being lost and no recovery obtained.

9. Appeals

You further acknowledge that costs for an appeal of any judgment or order, or services rendered for the collection on said judgment or order, are separate and apart from the services performed under this contract and are not covered by this contract. In the event of an appeal or in the event that collection on a judgment is necessary, a new retainer agreement that is mutually agreed upon shall be entered into between you and J. Doe & Associates.

In executing the within contingency fee retainer agreement, you, the client, acknowledge that you have had the opportunity to obtain and have been advised to obtain independent legal advice but notwithstanding such advice, you have chosen to execute the within document willingly and voluntarily without undue influence or coercion of any sort. You further confirm by executing the within contingency fee agreement that you understand all of the terms and conditions contained herein and have had an opportunity to review same before signing.

Dated at Toronto this _____ day of _____, 20____.

Witness

Client

Witness

Client

Witness Name (Please Print)

Witness

J. Doe & Associates
Per:

Witness Name (Please Print)

The client acknowledges receipt of a duplicate copy of this contingency fee retainer agreement signed by all parties.

Dated at Toronto this _____ day of _____, 20____.

Annotation: *The Solicitors Act requires that a contingency fee agreement be dated signed by both the client and the solicitor, with both signatures being witnessed (s. 1(1)(b) and (c)). The Act also requires that the solicitor provide an executed copy of the retainer to the client (s. 2.1.). Having the client sign an acknowledgment of receipt will ensure compliance with the rule.*

Witness

Client

Witness

Client

Witness Name (Please Print)

Annotation:

ADDITIONAL COMMENTS:

The Solicitors Act prohibits the following from forming part of a contingency agreement (s. 4):

- a. a provision that requires the solicitor's consent before a claim may be abandoned, discontinued or settled in accordance with the client's instructions;***
- b. a provision that prevents the client from terminating the agreement or from changing solicitors; OR***
- c. a provision that permits the solicitor to share their fee with any other person, except as provided by the Rules of Professional Conduct.***

The Rules of Professional Conduct, s. 2.08, "Division of Fees and Referral Fees" provides that a lawyer may share his/her fee with "licensee" (a lawyer or a paralegal licensed by the Society to provide legal services in Ontario) on the following terms:

2.08 (6) Where the client consents, fees for a matter may be divided between licensees who are not in the same firm, provided that the fees are divided in proportion to the work done and the responsibilities assumed.

2.08 (7) Where a lawyer refers a matter to another licensee because of the expertise and ability of the other licensee to handle the matter and the referral was not made because of a conflict of interest, the referring lawyer may accept and the other licensee may pay a referral fee provided that,

- (a) the fee is reasonable and does not increase the total amount of the fee charged to the client, and***
- (b) the client is informed and consents.***

2.08 (8) A lawyer shall not,

- (a) directly or indirectly share, split, or divide his or her fees with any person who is not a licensee, or***
- (b) give any financial or other reward to any person who is not a licensee for the referral of clients or client matters.***

SOLICITORS ACT
ONTARIO REGULATION 195/04
CONTINGENCY FEE AGREEMENTS

Signing and dating contingency fee agreement

1. (1) For the purposes of section 28.1 of the Act, in addition to being in writing, a contingency fee agreement,

(a) shall be entitled “Contingency Fee Retainer Agreement”;

(b) shall be dated; and

(c) shall be signed by the client and the solicitor with each of their signatures being verified by a witness. O. Reg. 195/04, s. 1 (1).

(2) The solicitor shall provide an executed copy of the contingency fee agreement to the client and shall retain a copy of the agreement. O. Reg. 195/04, s. 1 (2).

Contents of contingency fee agreements, general

2. A solicitor who is a party to a contingency fee agreement shall ensure that the agreement includes the following:

1. The name, address and telephone number of the solicitor and of the client.

2. A statement of the basic type and nature of the matter in respect of which the solicitor is providing services to the client.

3. A statement that indicates,

i. that the client and the solicitor have discussed options for retaining the solicitor other than by way of a contingency fee agreement, including retaining the solicitor by way of an hourly-rate retainer,

ii. that the client has been advised that hourly rates may vary among solicitors and that the client can speak with other solicitors to compare rates,

iii. that the client has chosen to retain the solicitor by way of a contingency fee agreement, and

iv. that the client understands that all usual protections and controls on retainers between a solicitor and client, as defined by the Law Society of Upper Canada and the common law, apply to the contingency fee agreement.

4. A statement that explains the contingency upon which the fee is to be paid to the solicitor.

5. A statement that sets out the method by which the fee is to be determined and, if the method of determination is as a percentage of the amount recovered, a statement that explains that for the purpose of calculating the fee the amount of recovery excludes any

amount awarded or agreed to that is separately specified as being in respect of costs and disbursements.

6. A simple example that shows how the contingency fee is calculated.

7. A statement that outlines how the contingency fee is calculated, if recovery is by way of a structured settlement.

8. A statement that informs the client of their right to ask the Superior Court of Justice to review and approve of the solicitor's bill and that includes the applicable timelines for asking for the review.

9. A statement that outlines when and how the client or the solicitor may terminate the contingency fee agreement, the consequences of the termination for each of them and the manner in which the solicitor's fee is to be determined in the event that the agreement is terminated.

10. A statement that informs the client that the client retains the right to make all critical decisions regarding the conduct of the matter. O. Reg. 195/04, s. 2.

Contents of contingency fee agreements, litigious matters

3. In addition to the requirements set out in section 2, a solicitor who is a party to a contingency fee agreement made in respect of a litigious matter shall ensure that the agreement includes the following:

1. If the client is a plaintiff, a statement that the solicitor shall not recover more in fees than the client recovers as damages or receives by way of settlement.

2. A statement in respect of disbursements and taxes, including the GST payable on the solicitor's fees, that indicates,

i. whether the client is responsible for the payment of disbursements or taxes and, if the client is responsible for the payment of disbursements, a general description of disbursements likely to be incurred, other than relatively minor disbursements, and

ii. that if the client is responsible for the payment of disbursements or taxes and the solicitor pays the disbursements or taxes during the course of the matter, the solicitor is entitled to be reimbursed for those payments, subject to section 47 of the *Legal Aid Services Act, 1998* (legal aid charge against recovery), as a first charge on any funds received as a result of a judgment or settlement of the matter.

3. A statement that explains costs and the awarding of costs and that indicates,

i. that, unless otherwise ordered by a judge, a client is entitled to receive any costs contribution or award, on a partial indemnity scale or substantial indemnity scale, if the client is the party entitled to costs, and

ii. that a client is responsible for paying any costs contribution or award, on a partial

indemnity scale or substantial indemnity scale, if the client is the party liable to pay costs.

4. If the client is a plaintiff, a statement that indicates that the client agrees and directs that all funds claimed by the solicitor for legal fees, cost, taxes and disbursements shall be paid to the solicitor in trust from any judgment or settlement money.

5. If the client is a party under disability, for the purposes of the Rules of Civil Procedure, represented by a litigation guardian,

i. a statement that the contingency fee agreement either must be reviewed by a judge before the agreement is finalized or must be reviewed as part of the motion or application for approval of a settlement or a consent judgment under rule 7.08 of the Rules of Civil Procedure,

ii. a statement that 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, and

iii. a statement that 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. O. Reg. 195/04, s. 3.

Matters not to be included in contingency fee agreements

4. (1) A solicitor shall not include in a contingency fee agreement a provision that,

(a) requires the solicitor's consent before a claim may be abandoned, discontinued or settled at the instructions of the client;

(b) prevents the client from terminating the contingency fee agreement with the solicitor or changing solicitors; or

(c) permits the solicitor to split their fee with any other person, except as provided by the Rules of Professional Conduct. O. Reg. 195/04, s. 4 (1).

(2) In this section,

"Rules of Professional Conduct" means the Rules of Professional Conduct of the Law Society of Upper Canada. O. Reg. 195/04, s. 4 (2).

Contingency fee agreement, person under disability

5. (1) A solicitor for a person under disability represented by a litigation guardian with whom the solicitor is entering into a contingency fee agreement shall,

(a) apply to a judge for approval of the agreement before the agreement is finalized; or

(b) include the agreement as part of the motion or application for approval of a settlement

or a consent judgment under rule 7.08 of the Rules of Civil Procedure. O. Reg. 195/04, s. 5 (1).

(2) In this section,

“person under disability” means a person under disability for the purposes of the Rules of Civil Procedure. O. Reg. 195/04, s. 5 (2).

Contingency fee excludes costs and disbursements

6. A contingency fee agreement that provides that the fee is determined as a percentage of the amount recovered shall exclude any amount awarded or agreed to that is separately specified as being in respect of costs and disbursements. O. Reg. 195/04, s. 6.

Contingency fee not to exceed damages

7. Despite any terms in a contingency fee agreement, a solicitor for a plaintiff shall not recover more in fees under the agreement than the plaintiff recovers as damages or receives by way of settlement. O. Reg. 195/04, s. 7.

Settlement or judgment money to be held in trust

8. A client who is a party to a contingency fee agreement shall direct that the amount of funds claimed by the solicitor for legal fees, cost, taxes and disbursements be paid to the solicitor in trust from any judgment or settlement money. O. Reg. 195/04, s. 8.

Disbursements and taxes

9. (1) If the client is responsible for the payment of disbursements or taxes under a contingency fee agreement, a solicitor who has paid disbursements or taxes during the course of the matter in respect of which services were provided shall be reimbursed for the disbursements or taxes on any funds received as a result of a judgment or settlement of the matter. O. Reg. 195/04, s. 9 (1).

(2) Except as provided under section 47 of the *Legal Aid Services Act, 1998* (legal aid charge against recovery), the amount to be reimbursed to the solicitor under subsection (1) is a first charge on the funds received as a result of the judgment or settlement. O. Reg. 195/04, s. 9 (2).

Timing of assessment of contingency fee agreement

10. For the purposes of clause 28.1 (11) (b) of the Act, the client or the solicitor may apply to the Superior Court of Justice for an assessment of the solicitor’s bill rendered in respect of a contingency fee agreement to which subsection 28.1 (6) or (8) of the Act applies within six months after its delivery. O. Reg. 195/04, s. 10.

11. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 195/04, s. 11.