

March 23, 2018

Advertising and Fee Arrangements Issues Working Group  
Law Society of Ontario  
130 Queen Street West  
Toronto, Ontario  
M5H 2N6

To the Law Society of Ontario Advertising and Fee Arrangements Issues Working Group:

**Re: Response to the Law Society's request for comment on its proposed contingency fee reforms**

In response to the Law Society of Ontario's (LSO's) February 2018 request for comments on its proposed mandatory standard contingency fee agreement, the *Know Your Rights* guide for the public and related rule amendments, Insurance Bureau of Canada (IBC) is writing to provide advice.

IBC's member companies represent 90% of the Canadian property and casualty (P&C) insurance market. Our industry employs 56,000 people in Ontario through 8,000 agencies, brokerages and related firms across the province.

**The P&C insurance industry's interest in rules and practices regarding contingency arrangements**

The core business of the insurance industry is to protect people against losses and liability arising from injuries incurred unintentionally. In these cases, the purpose of insurance resources is to compensate injured people for their losses and return them to their pre-injury functional capabilities to the extent that this is possible. The industry respects the right of people to seek the assistance from lawyers in advancing and settling their claims. It also respects the right of legal advisors to receive fair compensation for their services, so long as that payment is not excessive and does not compromise the needs of injured people.

There is ample evidence that in auto insurance injury claims and other types of insured personal injury actions, legal and related costs (for example, disbursements and HST) incurred by injury victims are built into the settlements reached. Building discipline into these costs through the combination of consumer protection measures and facilitation of greater competition among plaintiff legal firms should make a positive contribution to reducing the cost of personal (auto and home) insurance in Ontario. For these reasons, we recognize the efforts of the LSO to bring greater transparency to Ontario's contingency fee regime by introducing a standard form contingency fee agreement and a *Know Your Rights* guide for the public.

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## **The P&C insurance industry's assessment of the standard form contingency fee agreement and the *Know Your Rights* guide**

For the purposes of this commentary, we limited our review to those versions of the documents that took into account the LSO's proposed amendments to the Solicitors Act and its regulation, and the LSO's new requirements. In reviewing the proposed documents, IBC considered the following questions:

- Is the information provided in the draft documents complete, unambiguous and likely to be readily understood by personal injury clients?
- Does the policy content articulated in the draft standard agreement and the *Know Your Rights* guide empower accident victims in working their way through Ontario's contingency fee system?

### **Clarity and completeness of information provided**

The two documents should help improve the layperson's understanding of how contingency fees work and what the client's rights and obligations are under contingency fee agreements. Until now, it has too often been the case that injury victims enter into such agreements without fully understanding their implications. Subsequently, injured people are often unpleasantly surprised when they are informed of their share of settlements and awards from successfully resolved actions. Below, we identify some important areas where the draft documents do not yet provide clear and accessible information that we believe consumers require to enable them to make informed decisions on the choice of compensation method for their legal representative.

1. How legal fees are calculated: On p. 18 (Part 4) of the mandatory standard form contingency fee agreement, there is a confusing explanation of the method for calculating fees when a case does not go to a hearing: "If you receive money for your claim, you agree to pay us a contingency fee of xx% of the total amount recovered including legal costs, plus all disbursements and HST." While we understand that the intent of this language is to apply the contingency percentage to the total of amounts received for damages and legal costs, it could also be interpreted to mean that the percentage is applied to the amounts for damages, legal costs, disbursements and HST. To avoid misunderstanding and possible friction following a settlement, this language needs to be clarified.

The same section deals with the calculation of fees when a case goes to a hearing. Among the options that are described, those that incorporate the lawyer's option to use a complex formula for calculating the fee when costs are awarded on a partial indemnity basis would, in our view, be completely unintelligible to the average claimant. While we do not object to lawyers choosing to employ a graduated percentage fee structure linked to the stage at which a matter is settled, we submit that authorizing lawyers to employ a complex compensation formula in contingency fee agreements would utterly defeat the purpose of providing usable information to consumers and enabling their informed choice.

*We recommend that the standard agreement offer fewer options for determining lawyers' compensation under contingency fee arrangements, and any options that are offered should be readily understandable by ordinary clients.*

Regarding the clarity around the calculation of legal compensation, we observe that some of the complexity in the options presented in the draft agreement arises from the differential treatment of awards to the successful party of "partial" versus "substantial" versus "full" indemnification of legal costs. While these are very difficult concepts for the layperson, the draft documents do not provide sufficient information to explain and justify the differential treatment in a formula for calculating fees.

2. Value of sample calculations: We appreciate that the LSO appears to have understood the difficulties arising from the complexity of the compensation options set out in Part 4, and that this is the reason for the compensation calculation examples provided in Schedule A of the mandatory standard contingency fee agreement. On examination, however, the examples provided amplify our concerns about the complexity of the contingency fee calculation options that the standard form would make available to lawyers. Specifically, the examples themselves are difficult to follow, and the fact that the lawyer is given the opportunity to pick the most lucrative (to himself/herself) calculation option makes it impossible for clients to form a good sense of how they may benefit from a successful outcome on their case, and by how much.

We agree that it is important for the mandatory standard contingency fee agreement to provide sample calculations to show the disposition of settlement or award amounts under different scenarios. However, this does not solve the problems arising from the document providing too many options, and ones that are too complex, for determining compensation for legal services. As stated in the previous section, we recommend that the number of options be reduced and the complexity removed from the options that remain available. It is as critical for clients to understand their rights and obligations under the contingency fee arrangement as it is for them to be able to "shop around" at different law firms and determine the best arrangement to meet their needs.

Regarding the sample calculations, it is particularly important that the most severely injured people (i.e., those most likely to choose a structured settlement) can understand the implications of the contingency fee method adopted for the amount of their share of the monies paid by the at-fault party. Consequently, **we recommend that a sample calculation be provided in the mandatory standard contingency fee agreement to illustrate the effect of the contingent compensation on the amounts that would be provided to a severely injured plaintiff through a structured settlement.**

3. How contingent compensation compares with the lawyer's standard hourly fee and estimate of total costs using hourly fees: Part 3 of the mandatory standard contingency fee agreement talks about the compensation options at a theoretical level, but imposes no requirement on the lawyer to provide information on the firm's hourly fee and/or estimate of the total fee costs under the hourly fee option. Without this information, clients have no

basis for comparing compensation options and, thereby, for making their own decisions as to what combination of cost and risk they are most comfortable with. ***Therefore, we recommend a stipulation in the standard agreement that lawyers must provide accurate statements of the law firm's hourly fee(s), together with reasonable estimates of the range of costs to the client of pursuing his or her case under an hourly fee arrangement.***

Similarly, the explanation of advantages and disadvantages of the contingency fee option appears to be biased in favour of the client using a contingency fee. As stated in this part of the standard agreement, the primary disadvantage of the contingency fee option is that it will cost the client more – quite possibly a lot more. Yet this important statement is qualified with the tacked-on clause "...but on the other hand you will only pay if your matter is successful." The client's choice of compensation option should be based not only on full information, but also on objective and unbiased information.

4. Making personal clients aware of risks: Many people attracted to contingency fee arrangements may be under the impression that they are under no risk, or very limited risk, in undertaking legal action under the contingency fee format, especially when their case may be weak and the outcome is uncertain. While Part 10 of the proposed mandatory standard contingency fee agreement is clear about there being no guarantee of a successful outcome, neither of the LSO documents pulls together in a single section the various risks that personal injury litigants are exposed to. These risks go well beyond the possibility that the case could be lost, and include the potential for high disbursement costs; that it may take a long time before a resolution is achieved; that they may end up having to pay the legal costs of the other side; that there are unknown rates of interest that may be charged; and so forth. Injury victims need to fully understand the risks involved in becoming a litigant and that entering into a contingency fee arrangement does not protect them from many of these risks.

***We recommend including in the standard agreement a requirement that lawyers provide full and frank disclosure to clients of the risks associated with the pursuit of their cases.***

5. Independent legal review of contingency fee agreements and court review of bills: Individuals should understand their right to have an unsigned contingency fee agreement reviewed by a second law firm and their right to request a court review of a law firm's statement of account. On this point, we make two recommendations:
  - ***In the mandatory standard contingency fee agreement, immediately above the space for signatures, there should be clear statement advising clients of their right to seek a second legal opinion on the agreement.***
  - ***The Know Your Rights guide should provide a complete explanation of how to appeal a legal bill, what to expect of the process and whether engaging in this process could result in a delay in the lawyer's release of any funds from the settlement or award.***

6. Need for an online support tool: Noting the inherent complexity of the issues around contingency fee agreements and the associated rights of both the lawyer and the consumer parties to these arrangements, *we urge the LSO to establish an online support tool to provide guidance to users of the contingency fee system and answer questions that may arise. A link to the support tool should be included in the standard contingency fee agreement and in the Know Your Rights guide.* We believe that given the widespread use of contingency fee agreements in personal injury actions, the LSO's provision of such a tool would be consistent with its mandate to promote access to justice. Moreover, a specific advantage to the LSO would be to enable more effective monitoring of the contingency fee system and early identification of problems that users encounter and that may require further information or other solution(s).

### **Fairness criterion**

As signalled earlier in this submission, the P&C insurance industry has also examined these documents from the standpoint of whether the policy content articulated in the mandatory standard contingency fee agreement and the *Know Your Rights* guide improves on the fairness to clients accorded by Ontario's contingency fee system. In this regard, several problematic content issues were identified and we draw the LSO's attention to the specific issues noted below:

1. Basic formula for calculating contingency fee compensation: For injury victims, the key interest lies in how much of the final settlement will be made available to them to compensate for their losses and support their recovery. And, indeed, much of the recent public and media interest in contingency fee issues came with the perception that, in some cases, too small a share of settlements and awards was being made available to injured persons to meet their needs.

In previous correspondence, we have offered our view that the proposed formula supported by the LSO for calculating contingency compensation would, all other factors remaining the same, generally result in a greater share of settlement resources going to lawyers than under the current rules. This point is illustrated using the examples of the allocation of settlements provided in Schedule A: under the existing Solicitors Act formula, the net cost of legal fees to the client for a \$100,000 damages award and \$15,000 costs award, assuming a 20% contingency rate, would be \$5,000 (20% multiplied by \$100,000, minus \$15,000); by contrast, pursuant to the LSO formula, the net cost of legal fees to the client would be \$23,000.<sup>1</sup> This difference represents a considerable loss to the client.

A further and likely unintended implication of the proposed new compensation formula relates to the arguably unfair allocation of risk between the client and the legal representative. Put simply, while the formula will have the lawyer sharing the reward of legal costs when the case is successful, the client alone is exposed to the risk of having to pay the other side's costs if the action is not successful.

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<sup>1</sup> For the sake of simplicity, this comparison does not incorporate the HST effect of the two formulas.

2. Disbursements: In many personal injury actions today, retaining experts can significantly increase the size of a settlement and can also have negative effects on the share of the settlement that is ultimately paid to the personal injury litigant. Moreover, given the stipulation in the standard contract that the client will always be fully responsible for disbursements, there is no material incentive for the lawyer to control his or her cost.

Given the potential impact of disbursements on the amount of money that clients can realize, IBC holds the view that it is unfair for clients to have no say in the decision to commit to large disbursements. *We therefore recommend including in the standard form a stipulation that large, single-purpose disbursements (for example, evidence from experts) should be subject to the prior agreement of the client. A reasonable threshold for application of this requirement might be the undertaking of an expense commitment that exceeds \$5,000.*

3. Interest rate: While we agree that lawyers should be permitted to charge a reasonable rate of interest on an unpaid balance of accounts, we are also aware of cases when the interest rate charged has been far in excess of current market rates. When this happens, the amount of interest costs typically comes as an unpleasant surprise to – and burden on – the litigant. Moreover, even when the interest charge is blatantly unreasonable, the client has no option but to pay it. *We recommend that the mandatory standard contingency fee agreement require disclosure of the rate of interest chargeable on late payments.*
4. Interim cost awards in excess of amounts that the lawyer is entitled to under the contract: On p. 20, the option is offered for the lawyer to claim title to any cost award that exceeds the lawyer's fee and reimbursement entitlements. While we expect that this would be a rare occurrence, we see no acceptable rationale for such excess payments to flow to the lawyer. *We recommend that this option be removed from the standard contract.*

## CONCLUSION

The LSO's review of the contingency fee system is intended to result in a more transparent contingency fee system, which can only be accomplished by reducing the complexity for the users of that system. It is our collective obligation to ensure that client users are fully equipped with readily understandable information to enable informed decisions on their choice of legal compensation method and, in the case of contingency fee arrangements, the content of the contract they are bound to.

IBC's perspective is that any changes made to the contingency fee system should aim to protect users from abuse and surprise costs at the conclusion of litigation, and fairly allocate risks and rewards between injury victims and their legal representatives.

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The decisions of the LSO that affect contingency fee compensation and supporting documents constitute a partial step toward meeting these objectives. We have attempted in this submission to identify the significant areas where improvements need to be made to achieve the public's expectations of the LSO's review and to offer practical recommendations for the content of those improvements.

We look forward to further opportunities for discussion and would like to offer our assistance in reviewing revised drafts of this documentation.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Donaldson", with a long horizontal flourish extending to the right.

Kim Donaldson  
Vice-President, Ontario

c.c. Hon. Yasir Naqvi, MPP, Attorney General  
Malcolm Mercer, Chair, Law Society of Ontario Advertising and Fee Arrangements Issues Working Group