

**SCREENING CLIENTS IN A CONTINGENT FEE ENVIRONMENT -
WHAT YOU DON'T KNOW CAN HURT YOU!**

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Litigation is not for the faint of heart. Both the client and the lawyer have to be prepared, mentally and financially, for almost anything. Historically the client has shouldered most of the risk. Good client and practice management could significantly reduce the risk for the lawyer, who could insist upon a retainer and refuse to continue working for the client unless the retainer was replenished from time to time. However, this type of fee arrangement creates a number of problems. It encourages disputes between the client and the lawyer about fees; it holds the lawyer slave to the billable hour; and most importantly it does nothing to encourage access to justice or creativity. What about the destitute client with a legitimate claim? What about the long-term client who runs into short-term financial problems? What about the lawyer who would like to take on a very risky, very expensive, but potentially huge case?

The personal injury bar has long dealt with these issues using some form of contingent fee agreement. Now that the Court (*McIntyre v. Attorney General of Ontario, Raphael Partners v. Lam*) and the government of Ontario (Bill 213, *Justice Statute Law Amendment Act, 2002*, Schedule A) have recognized the importance of these agreements to encourage access to justice, all lawyers should consider whether or not this form of fee agreement is suitable for their practice.

Litigation under a contingent fee agreement ("CFA") is an investment for the plaintiff's lawyer. It is an investment of time, money and energy, all of which are limited resources. Any

prudent investor would obtain as much information as possible before making an investment, advice that should certainly be followed by the lawyer who contemplates entering into a CFA. The more information that you have at the beginning of a case, the better you will be at estimating, and maximizing, the potential for your investment. This paper will attempt to identify the matters that lawyers need to concern themselves with before entering into a CFA. I practice exclusively in the area of personal injury law, and therefore I will use a personal injury claim as the model for many of my comments.

Litigation has become highly specialized over the past decade. Assessing the potential value of a case, and therefore the decision to take a retainer, has become increasingly complex. The law, especially in the area of motor vehicle litigation, is constantly changing. The only way to accurately assess a case and advise a potential client is to obtain as much information as is reasonably possible before taking on the file. Appendix "A" is a detailed checklist of the information that should be obtained and the factors that should be considered in most personal injury cases. This is by no means an exhaustive list. Every case will have its own unique facts or characteristics and a good lawyer will always be looking at those factors in addition to matters set out in this list. The purpose of the initial interview is to obtain as much information as possible on the issues of damages (i.e. the potential value of the claim) and liability (i.e. the responsibility of another party to pay the damages being sought). The other main purpose of the interview is to assess the honesty and presentation of the client. With these purposes in mind, a similar checklist can be crafted for non-personal injury claims. Once this information is collected, the lawyer can estimate the expected fee, or a range for the expected fee, under a CFA, and decide whether to take the case on that basis.

DAMAGES

The potential value of the claim is usually the biggest unknown in personal injury matters. With few exceptions, the lawyer has to use his or her experience to make an educated guess.

However, in other areas of litigation, where the claim is in respect of a debt or liquidated damages, this assessment is easy. In determining the potential value of the claim, for the purpose of determining whether a CFA is appropriate, it is important to focus on a figure that represents a **reasonably good result on a reasonably good day**. The value should not be overly optimistic, nor overly pessimistic. Be sure to consider all reasonable heads of damages, as well as prejudgment interest, in this calculation.

Be realistic about the negative contingencies as well. For example, in a wrongful dismissal claim, consider the client's prospects of finding another job during the reasonable notice period.

In a claim to enforce a debt, determine if there is any claim for set off that is likely to be made by the defendant. In a claim for damages, mitigation must always be considered.

Consider screening the client before they get to the office for the initial interview. This will provide an opportunity to instruct the potential client to gather other information and documents that you may need to accurately assess the value of the claim. This will also permit a more focused interview with the client.

LIABILITY

In this exercise, liability is defined to be the probability of recovering the damages that the lawyer calculated to be the potential value of the claims. There are a number of legal and practical matters to consider under this heading.

Legal matters include potential limitation or notice periods, contributory negligence and causation in a tort action, and any other legal factor (statutory, contractual, etc.) that might disentitle the client to the damages being sought. If necessary, conduct some legal research to get make a more accurate estimate of the chance that any such defence will succeed.

Practical matters include any potential collection issues, the age and health of the plaintiff and other key witnesses, and any other factor that might prevent the plaintiff from recovering the damages to which he or she may be otherwise legally entitled.

HONESTY

Given that litigation under a CFA is an investment, a lawyer must consider whether or not the client is an appropriate person with whom to make such an investment. Estimating the potential value of the case, and the resulting potential fee, is based almost entirely upon information received from the client. If this information turns out to be false, the value of the case and the fee may be significantly less than the original estimate. The ability to recover disbursements expended on behalf of the client may be compromised. Most importantly, the lawyer's credibility may be at risk.

Evaluating the truthfulness of the potential client is a difficult exercise. The lawyer must be cognizant of cultural issues that may play a role in the client's presentation. For example, in some cultures direct eye contact is a sign of disrespect, while in other cultures it is an indication of sincerity. Overall, give the client the benefit of the doubt but do not ignore any strong feelings or indications that the client is not being sincere.

CONCLUSION

With all of this information in hand, the lawyer can now determine whether to enter into a CFA with the client. Multiplying the potential value of the claim by the probability of success will give you an estimate of the realistic value of the case. The lawyer can then multiply this figure by the proposed contingency fee percentage to arrive at an estimate of the expected fee in the case. The lawyer can then determine whether or not they would be willing to take the case on for that fee, given the risks involved and the investment of time and money the case will require. It is important to track the expected fee in every case and compare it to the fee that is ultimately earned at the end of the case. Over time this comparison will play an important role in deciding whether a contingent fee agreements are appropriate for your practice.

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SCHEDULE "A"

Initial Interview

- Date of interview
- Date of incident
- Referral source
- Personal information
 - Name, address, all phone numbers, DOB, alias
 - Health card, social insurance, DL
- Employment information
 - Employer, address, supervisor, job, rate of pay, length of service
 - Employment history (chronology)
 - Educational background
 - Post accident employment
 - WSIB considerations
- Litigation history
 - Previous/current lawyers (and their accounts)
 - Adjusters
 - Statements, settlement discussions
- Injuries
 - Head to toe
 - Timeline
 - Psychological/emotional

- Head injury
- Scars
- Treatment
 - Ambulance/hospital
 - GP (pre and post)
 - Specialists
 - Therapists
 - Medication
 - Appropriate specialists and treatment?
- Medical history
 - Accidents, injuries, WSIB claims (litigation history)
 - Family history
 - Other medical conditions
- F.L.A. claimants
 - Identity and DOB (Litigation Guardian)
 - Pecuniary claims
- Out of pocket claims
 - Receipts and journal
- Accident facts
 - Date, time, place, lighting, weather
 - Description and diagram
 - Seatbelt, headrest, airbag, shoes
 - Alcohol

- Statements
- Police officer, investigator, charges
- Photos, measurements
- Newspaper articles
- Witness information
- Insurance
 - Your client (auto, workplace, personal, spouse)
 - Damage details
 - Defendant (auto, homeowners, CGL, limits)
 - Policy renewal date (Bill 198 issue post Jan. 1, 2004)
- Authorizations
 - Takeover, medical, hospital, OHIP, Revenue Canada, insurance

Damages

- General damages (deductible)
- Past loss of income
- Future loss of income, earning capacity or potential
- Out of pocket expenses
- Future medical, rehab, housing, transportation, care expenses
- Fatalities (FLA claims, loss of support, loss of services)
- Collateral benefits (deductible or not)
- FLA claims (deductibles)
- Emerging claims (e.g. loss of marriagability)

- The numbers game

Liability

- Assessment
- Contributory negligence
- Effect of liability split
- Potential Defendants
 - Protected vs. unprotected
 - Deep pockets

Limitation Periods

- Notice (motor vehicle, slip and fall, Crown property, highway repair)
- MVA
- FLA
- Highway repair
- Medical malpractice
- Accident Benefits
- Unidentified/Uninsured/Underinsured
- Assault
- Public Authorities
- Railways
- Shipping

- Products liability

Pleadings

- When
 - Notice and information
 - Investigation
 - Settlement vs. litigation
- Precedents
- Forum
 - Superior Court
 - Simplified Rules
 - Case Management
 - FSCO
 - Criminal Injuries Compensation Board
 - WSIB
 - CPP, ODSP

Subrogated Interests

- OHIP
- COMSOC (general welfare, ODSP)
- Private insurers
- Protecting accounts
 - Treatment providers

- Previous counsel

Retainer

- Risk/Reward
- Can the client afford one?
- Can you afford to not get one?
- Outside counsel
- Requesting a retainer during the litigation

The Letter

- Not retained
 - Make it clear!
 - Notice and limitation periods
 - Potential claims
 - Business development
- Retained
 - Financial arrangements
 - Expectation management
 - Possibility of a retainer
 - Retain documents, evidence, journal
 - Opening the file

After reviewing this checklist, it is easy to see why the trend has been towards specialization, not generalization, in this area of the law. In developing a personal injury practice, the emphasis should be on the quality, not quantity, of cases. Not only is it important to gather as much knowledge as possible in order to assess the quality of a potential case, it is equally as important to recognize when you don't know something important about the case. A personal injury lawyer must be able to recognize the information and evidence that is necessary to obtain in the future, identify the potential legal issues that require further research, and put all of it together in the form of a reasonable, cohesive and persuasive package in order to maximize the value of the claim for the client. Finally, the competent personal injury lawyer must recognize when they need help. When in doubt, consult other lawyers in your firm or outside lawyers and experts for an opinion. If necessary, retain outside counsel to address complexity, workload or financial concerns. But before you do anything, gather as much information as possible. Your success in this area depends on it.

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CBAO – Proceed with Caution: Personal Injury Litigation

