Privately Funded Civil Litigation
CFAs and DBAs
Frequently Asked Questions

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The Bar Council frequently receives enquiries from barristers and clerks in relation to Conditional Fee Agreements (CFAs) and Damages Based Agreements (DBAs). The Bar Council's Remuneration Committee members give their time and expertise to the Bar Council without charge to help us to answer these enquiries. This document is the fruit of their expertise.

The FAQs will be updated when questions on new topics are received. Any errors should be drawn to the attention to the Bar Council's Remuneration Team: remuneration@barcouncil.org.uk

Disclaimer

The Bar Council has produced these FAQs to assist barristers. This document is not legal advice and cannot not take the place of direct advice in individual cases. The Bar Council and any person working for or with the Bar Council in the preparation or production of this guidance does not accept any liability in law for any loss or damage howsoever caused, including by any lack of care.

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Contents

Recommended model CFAs

Q.1 Which CFAs do the Bar Council recommend?

A. Commonly used CFA model agreements are:

- The Personal Injuries Bar Association (PIBA) has the APIL/PIBA 9 CFA: http://www.piba.org.uk/documents

- The Chancery Bar Association has a CFA: http://www.chba.org.uk/for-members/library/cfas

Are CFAs permitted in: Direct Access / when solicitor not on CFA / criminal / family / Environmental Protection Act / employment / adjudications / judicial reviews / Privy Council / Europe / for the defendant / in legal aid cases / second six pupillage?

Q.2 Can I do a CFA or DBA on Public/Direct Access?

A. While in principle there is nothing to prevent barristers undertaking public access work on a Conditional Fee Agreement or Damages-based Agreement, particular care should be taken with such arrangements. You should consider the level of risk and the likelihood of recovering base costs and the success fee in the case of a Conditional Fee Agreement and the likelihood of recovering the percentage of the claimant's damages in the case of a Damages-based Agreement.

You should also consider the question of payment. Payment in advance or on completion of a particular piece of work would not be possible since, by definition, no fee is payable until success has been achieved. Generally, any money paid in advance would be considered client money and barristers are not permitted to hold this (rC73 of BSB Handbook). Money deposited by the client in an escrow service, to be released on successful conclusion of the case, or returned to the client if there is no fee, would be a way of providing some security for the barrister without breaching the rule about handling lay client money.

The Bar Council's Direct Access Panel have produced helpful guidance here: https://www.barcouncilethics.co.uk/documents/conditional-fee-agreements-cfas-and-damages-based-agreements-dbas-in-public-access-cases/

Barristers should be aware that there is much debate as to whether it is ever possible to draft an enforceable DBA given the ambiguity arising out of the Damages Based

Agreement Regulations 2013. Considerable care needs to be taken in drafting such an agreement and very careful adherence to the requirements of the regulations is required.

Q.3 In a referral instruction case, can counsel be on a CFA with the lay client, without being on a CFA with the solicitor?

A. If you wish to make a CFA agreement with a client directly, even with a solicitor involved in the case, you are within your rights to draw up an agreement between you and the client. However, there should be a common consensus between yourself, your client and the solicitor involved in the case. Please be aware however that the agreement may prove very technical and it may be worth seeking legal advice on its content. Please also contact your insurance providers to ensure that they would cover an agreement of this type, (as it is different to a normal CFA agreement which is between solicitor and counsel) should anything go wrong. Furthermore, be wary that with such an agreement, should anything go wrong, you may only pursue the client for payment, and not the solicitor, as is the case with ordinary CFAs.

Q.4 Can counsel be on a CFA with the solicitor when the solicitor is not on a CFA with the lay client?

A. Yes, but you may wish to consider whether there is a good reason why the barrister is to bear all the risks of the case.

Q.5 Can I do a CFA on a criminal or family matter?

A. No, see Paragraph 58A of the Courts and Legal Services Act 1990 as amended by the Access to Justice Act 1999:

> "58A. – (1) (The proceedings which cannot be the subject of an enforceable conditional fee agreement are-
> (a) criminal proceedings, apart from proceedings under section 82 of the Environmental Protection Act 1990; and
> (b) family proceedings"

Proceedings under section 82 of the Environmental Protection Act 1990 may be conducted under a conditional fee agreement, provided that no success fee is charged.

Q.6 Although section 58A(1)(a) of the Courts and Legal Services Act 1990 states that it is legally permitted to prosecute cases under section 82 of the M1 Environmental Protection Act 1990 on a CFA basis, is there a conflict of interest given that, when prosecuting, a barrister is said to act as a "minister of justice" and not be influenced by extraneous matters such as fees?

A. The stated view of the Bar Council's Professional Practice Committee (now Ethics Committee) in July 2014 was as follows:

> "Based on the assumption, which it believes to be correct, that it is legally permissible to conduct an EPA 1990 s.82 prosecution on a CFA which complies with the statutory requirements, the PPC believes that it is also ethically permissible.
> Counsel appearing in such a case should be alert, however, to the fact that the proceedings may lead directly to a criminal penalty being imposed, and that this may carry with it the added responsibilities of a prosecutor to the court and to the administration of justice, including a duty not to be influenced in the exercise of that role by extraneous matters such as the barrister's own fee arrangements."

Q.7 Can I do a Judicial Review case on a CFA which relates to a civil hearing for recovery of proceeds of crime?

A. In general, no. Where the root is a criminal matter the Access to Justice Act prevents CFAs on criminal matters. There may be collateral parts of proceedings which are outside of the scope of the criminal proceedings - this question must be considered on the individual facts of the case.

Q.8 Can I have a CFA on an employment case?

A. Yes. However, the Employment Law Bar Association do not recommend it.

Q.9 Can I do an adjudication hearing on a CFA?

A. The Access to Justice Act 1999 states: 58(2)(a) "a conditional fee agreement is an agreement with a person providing advocacy or litigation services." One question is whether the barrister's services fall within the definition of providing "advocacy services". The Courts and Legal Services Act 1990, section 119 defines "advocacy services" as "any services which it would be reasonable to expect a person who is exercising, or contemplating exercising, a right of audience in relation to any proceedings, or contemplated proceedings". The next question is then whether this falls within the definition of "proceedings". The Access to Justice Act 1999 states: 58(A)(4) "...'proceedings' includes any sort of proceedings for resolving disputes (and not just proceedings in a court)..." Accordingly, adjudication proceedings are not exempt.

Q.10 Can I do a case before the Privy Council on a CFA?

A. No. The Privy Council have a Practice Note which forbids this.

Q.11 A case is going to the European Court of Human Rights; can I do it on a CFA?

A. Yes, but care must be taken to ensure that the particular national jurisdiction is followed. The BSB Handbook rules on Foreign Work - rC13 and rC14 - should also be complied with.

Q.12 Can I act on a CFA for the defendant?

A. Yes. Although many draft CFAs, such as the APIL/PIBA model, are designed for use where counsel is instructed on behalf of a claimant there is no bar in principle to extending such agreements to defendants. In that event, care will need to be taken to ensure that the terms are suitable for such use, particularly in relation to the definition of "win" or "success".

Q.13 Can counsel work on a part CFA, part legal aid certificate basis?

A. It is trite costs law that a lawyer cannot accept any fee privately (including CFA) for work which is funded by the Legal Aid Agency (LAA). The Legal Aid, Sentencing and Punishment of Offenders Act 2012 states:

> 28 "(2)A person who provides services under arrangements made for the purposes of this Part must not take any payment in respect of the services apart from—
> (a) payment made in accordance with the arrangements, and
> (b) payment authorised by the Lord Chancellor to be taken."

In other words, a barrister can't receive mixed funding (commonly known as "topping up") of legal aid and private fees unless the LAA give permission.

If counsel has a Legal Aid certificate that does not cover all work to be done, counsel could ask for the certificate to be limited to exclude counsel appearing at trial. That would mean that counsel would be able to appear under a CFA. What counsel must not do, however, is enter into a CFA (at all) until he has ensured that the certificate has been limited. If he does this, he could be committing an offence.

Q.14 Are second six pupils permitted to undertake work under a CFA agreement?

A. Yes.

Mixed CFAs; staged CFAs; staged payments

Q.15 What are the different types of CFA - can I do a CFA where I get something if I lose and an uplift if I win?

A. Yes, this is a Mixed Agreement. There are various different types of CFA:

a.) *Traditional Conditional Fee Agreement ("no win, no fee") with no quantum risk*
If the claim is successful, counsel will be paid their full fee (with or without a success fee) but if it is unsuccessful, no fees at all are payable. Expenses may or may not be payable if the case is lost. If the client wins but fails to beat a Part 36 offer, fees are still payable even for work done after the offer was made.
Pros and cons: The client must bear the risk of fees being incurred but not recovered in the litigation. Counsel bears all other risks (including the risk that the case is lost). It is suitable for cases that have reasonable prospects of success.

b.) *Ordinary Conditional Fee Agreement with quantum risk*
Like an ordinary CFA, save that if the client wins but fails to beat a Part 36 offer, fees will not be payable for work done after the expiry of the 'relevant period' which is generally 21 days after the offer was made, but the offer may specify a longer period.
Pros and cons: As above, but counsel bears the additional risk posed by Part 36 offers. If liability has already been admitted or if an offer has already been made, this may be a very important factor.

c.) *CFA Lite ("no-cost-to-you" or "eat what you kill")*
In ordinary circumstances the client will be liable only for those costs which are recovered in the litigation. Escape provisions may exist to take account of the possibility that the lay client may behave unreasonably or dishonestly.
Pros and cons: This type of agreement is simple to understand, namely, counsel bears all of the risks in the case and, unless the lay client acts dishonestly or unreasonably, the client bears no part of the risk of having to pay counsel's fees. Changes counsel will not be compensated for bearing those risks (i.e., no success fee will be payable).

d.) *CFA Max ("success-fee-only agreement")*
In so far as base fees are concerned it is a CFA Lite, but in addition to the monies that are recovered from the other side, a success fee is payable. That success fee is based on the amount of base costs recovered (i.e. an agreed percentage increase will apply to whatever is recovered from the other side). Escape provisions may exist to take account of the possibility that the lay client may behave unreasonably or dishonestly.
Pros and cons: Counsel bears considerable risks but, unlike under CFA Lite, counsel will be compensated by way of a success fee.

e.) *Discounted Conditional Fee Agreement ("no win, low fee")*
Also known as a 'partial Conditional Fee Agreement' or a 'guaranteed fee agreement'. Counsel's fees are payable in full in the event of success (with or without a success fee in addition), but a discounted fee will apply if the case is lost. Escape provisions may exist to take account of the possibility that the lay client may behave unreasonably or dishonestly.
Pros and cons: Counsel has the comfort of knowing that they will be paid

something regardless of the outcome of the litigation. The client must bear the risk of fees being incurred in the event of a win, but not recovered in the litigation.

e.) *Discounted CFA Lite*

A discounted fee is payable regardless of whether the case is won or lost, but any fees in addition to that guaranteed minimum will ordinarily be limited to those costs recovered in the litigation. This would preclude the payment of a success fee. Escape provisions may exist to take account of the possibility that the lay client may behave unreasonably or dishonestly.

Pros and cons: Counsel has the comfort of knowing that they will be paid something regardless of the outcome of the litigation and the client has the comfort of knowing that ordinarily they will not have to pay any more than the discounted fees.

f.) *Discounted CFA Max*

A discounted fee is payable regardless of whether the case is won or lost, but any base fees in addition to that guaranteed minimum will ordinarily be limited to those costs recovered in the litigation. A success fee is then payable in addition, that fee being calculated as an agreed percentage of the recovered base costs. Escape provisions may exist to take account of the possibility that the lay client may behave unreasonably or dishonestly.

Pros and cons: Counsel has the comfort of knowing that they will be paid something regardless of the outcome of the litigation and the client has the comfort of knowing that ordinarily they will not be required to pay more than discounted fees or a success fee (whichever is appropriate).

Q.16 Should Fee notes be sent periodically as the case progresses in a CFA case?

A. It is not normal practice to send fee notes as the case progresses, only if they are requested, in which case they should not include the uplift unless and until there has been a win.

Q.17 Can counsel enter into a staged CFA agreement?

A. See APIL/PIBA 9 agreement, under the heading 'Counsel's Risk Assessment'. A staged payment agreement is permitted, whereby the amount recoverable at each stage is defined in the agreement.

Q.18 Am I entitled to an Interim payment when on a CFA agreement?"

A. Assuming counsel has used APIL/PIBA 9 (or one of its predecessors), they are entitled to payment on success of the action. The solicitor is required to pay "promptly" following success and "in any event not later than one month after receipt of such costs". The fees on success are "payable whether or not the solicitor is or will be paid by the client or opponent (see APIL/PIBA 9 Short Form agreement paragraph 5(3)). From a practical point of view, counsel may agree to accept part

payment at this stage but he is not obliged to. It would be different if he agreed that his fees were limited to the amount of his fees actually recovered from the paying party.

Q.19 Is counsel permitted to review/increase their fees in a long running CFA?

A. Counsel should consider paragraph 8(c) of the Short From agreement of the current APIL/PIBA 9 agreement which reads:

> "Counsel's normal fees will be subject to review with effect from each successive anniversary of/first day of February from the date of this agreement but Counsel will not increase the normal fees by more than any increase in the rate of inflation measured by the Retail Price Index."

If this right is exercised, the solicitor should be notified, who in turn will notify the client, or the increased fee will not be recoverable. Such notification should be included in an amended APIL/PIBA 9 agreement.

Collective CFAs

Q.20 How do I draw up a Collective CFA?

A. Page 39 of the Bar Council's Guidance document states that these should only be completed with the assistance of a specialist.

Problems with the lay client; problems with the other side

Q.21 What happens when acting for a claimant under a CFA and it is discovered that the defendant has no ATE (After The Event) insurance and may be impecunious?

A. A claimant takes his defendant as he finds him. If the defendant is impecunious and has no insurance - whether BTE (Before The Event), ATE (After The Event) or otherwise - then if damages are the primary remedy sought, it would not be sensible to sue such a defendant and the lawyers for the claimant should tell him so. The lawyers for the claimant will be entitled to charge (subject to the terms of the CFA), but obviously if there is no physical receipt of any damages or costs then enforcement of any obligations to pay costs is likely to be difficult as between the lawyers and the claimant.

Q.22 What happens if I am acting for a defendant on a CFA and not arranging for that defendant to obtain insurance in circumstances where he might be impecunious?

A. A defendant's solicitor has a duty to him under the SRA Handbook and Code of Conduct to advise him on the risks and the desirability of insurance and to investigate what insurance he may already have under an existing policy. Any failure to carry out these duties may result in the CFA being invalid and this may even prevent a winning defendant recovering his costs from a losing claimant and from having any liability to pay his own solicitor.

However, there is no requirement that a litigant must have insurance or take out an ATE policy. So, if a winning claimant finds that a losing defendant has no ATE or other policy and is impecunious, then that winning claimant has no claim against the defendant's solicitor for the costs that he is unable to recover from the defendant unless that solicitor has been acting outside the traditional role of solicitor and has, for example, been funding the case and also has a financial interest in the proceeds - in which event he could potentially (although this would be a rare case) be treated as a non-party funder and liable for costs under s.51 Supreme Court Act 1981, but this very much depends on the facts of the case.

Q.23 What happens to the CFA agreement if the client disappears?

A. If the client disappears, the solicitor can no longer obtain instructions and so the solicitor-client CFA will presumably be brought to an end, giving rise to an automatic termination of the solicitor-counsel CFA under paragraph 8(3) of APIL/PIBA 9 Standard Terms and Conditions. This allows fees to be recovered by counsel only under Option B under paragraph 11.3.

A change of firm or solicitor

Q.24 What happens to a CFA when a solicitor changes firms?

A. Counsel should enter into a new CFA in this situation. If the client stayed with the fee-earner thereby sacking the firm of solicitors and terminating the solicitor-client CFA, this would be an automatic termination of counsel's agreement with the solicitor. Therefore it is very likely that counsel would have to enter into a new agreement, at which point a new risk assessment could be conducted and a new uplift arrived at.

Where the first CFA was entered into before 1 April 2013 and the new one will be entered into after 1 April 2013 the new provisions will apply to new CFA. This means that any success fee will be limited to the statutory maximum of 25% if indeed any is offered.

The first firm will still be liable for counsel's fees. Costs will be claimed by or on behalf of the old solicitors by the new solicitors during the process of detailed assessment proceedings, and this would include counsel's fees.

Care needs to be taken over the assignment of CFAs, as the current state of the law leads to some uncertainty over the ability of a legal representative to assign retainers from one firm to another.

Q.25 What happens to a CFA when the nature of the solicitors' firm changes, i.e. the firm becomes a Limited Liability Partnership company and counsel is asked to sign a deed of assignment to transfer the CFA to the new company?

A. Counsel should write to his instructing solicitors (i.e. the old firm) stating that he has no objection to them assigning their rights and obligations under the CFA to the LLP provided that:

(i) the partners for the time being in the old firm remain liable to pay him any fees to which he may become entitled under the CFA for work done prior to the assignment;

(ii) the LLP accepts liability to pay him any fees to which he may become entitled under the CFA for work done after the assignment;

iii) the old firm gives notice of such assignment in writing to the solicitors for the defendant;

(iv) the solicitor (old firm) - client CFA is similarly assigned and notice of the same is similarly given to the defendant's solicitors;

(v) the lay client gives his consent to these assignments in writing; and

(vi) Counsel is given copies of the assignments, the client's consent and the notice to the defendant's solicitors.

It should be noted, however, that there is a school of thought that such a contract may amount to a novation, in which case it will be a new contract. It is recommended that specialist advice is sought if counsel is asked to assign a CFA.

Q.26 Can counsel rely on his/her CFA even if the solicitor is on an unenforceable CFA with the client?

A. In principle, counsel could stand by his or her CFA with the solicitor i.e. provided that it was a standard enforceable agreement, like APIL/PIBA 9, properly entered into. Fees should be recoverable from the solicitor on success regardless of the enforceability of the solicitors' agreement with the client. The solicitors might in such a situation run the enforceability argument against counsel. It is worth noting that where work with the firm is likely to be ongoing, the lack of an enforceable agreement may mean that there are no costs paid from the other side and the solicitor may try not to pay counsel.

Backdating CFAs

Q.27 Can a CFA be backdated?

A. Retrospective CFAs have been permitted although the courts can best be described as reluctant in such cases. Only express language will suffice and the court has complete discretion to disallow the retrospective CFA fees if it is considered to be unreasonable. Those contemplating entering into a CFA which is retrospective should refer to:

- *Birmingham City Council v Forde* [2009] EWHC 12 (QB), [2009] 1 W.L.R. 2732
- *J N Dairies Ltd v Johal Dairies Ltd and others* (2011) Lawtel 23/08/2011
- *Beattie v Smailes* (2011) Lawtel 26/7/2011

Although retrospective CFAs (i.e. dated at the date it was made but stated to be effective from an earlier date) have been permitted, more generally 'backdated' CFA (i.e. dated at an earlier date than it was made) can mislead and should be avoided.

Disclosure of CFA

Q.28 The other side has asked to see a copy of the barrister-solicitor CFA, do I have to show it to them and if so, at what stage in the proceedings?

A. Counsel is under no obligation to disclose their CFA, unless for the assessment of costs where the court orders it. In practice counsel often agree to voluntarily disclose (pre-2013) agreements to remove any arguments as to its enforceability, see *Hollins v Russell* [2003] EWCA Civ 718.

Appeal hearings

Q.29 Does the APIL/PIBA 9 agreement cover work done in preparation for an appeal hearing and the hearing itself?

A.) No. The APIL/PIBA 9 agreement contains the following:

"(2) What is not covered by this agreement:
• Any Part 20 claim against the Client;
• Any appeal;
• Any appeal against an interim order or final judgment made by the Opponent(s);
• Any counter claim or defence by way of set off which is still in existence after the claim has settled or been won, lost or otherwise concluded;

• Any application under an award of provisional damages that might be obtained in these proceedings or to vary any order for periodical payments that might be made in these proceedings;
• Enforcement of any judgment or order."

LASPO Transitional Issues

Q.30 A solicitor has entered into a Conditional Fee Agreement pre-1 April 2013 but I have entered the CFA after 1 April 2013. Will the transitional provisions apply to counsel?

A.) Where a solicitor has entered into a Conditional Fee Agreement prior to 1 April 2013 which falls within the scope of Article 6 of the Conditional Fee Agreements Order 2013 (CFA Order) and section 44(6) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and counsel enters into a CFA for the same case after 1 April, it is not certain which regime applies to counsel's CFA. The Ministry of Justice's interpretation of the provisions is that in this situation, the provisions of the new LASPO regime will apply, with the consequent effect that any success fee would not be recoverable.

The Bar Council are not aware of any cases where this has yet been tested in the courts. In the meantime, we suggest that any CFA entered into after 1 April 2013 should be done on the basis that any success fee will be paid by the client.

Damages Based Agreements (also known as Contingency Fee Agreements)

Q.31 Can I do a contingency fee agreement – a DBA?

A. Contingency Fee Agreements in respect of contentious business are designated Damages Based Agreement (DBA) under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") and The Damage Based Agreement Regulations 2013 and s.58AA of the Courts and Legal Services Act 1990. LASPO renders such agreements lawful, so long as the regulatory requirements are complied with. There are concerns about the DBA Regulations as to whether they are sufficiently clearly drafted to enable a barrister to enter into a DBA without any risk of it being challenged in the future. Any DBA which fails to meet the requirements of the regulations and statutory regime will be deemed unenforceable.

Some commentators are of the opinion that it is not possible to comply with the DBA Regulations 2013 requirements in such a way as to be able to enforce the entirety of the fee.

In addition, and because the 'cab rank rule' does not apply to Contingency Fees, counsel will need to take into account several factors, including the following:
a. the category of case;
b. whether there are alternative means of funding (which in this context will mean alternatives such as Conditional Fee Agreements and litigation funding);
c. commercial considerations; and
d. ethical considerations.

In 2018, the Ministry of Justice arranged for Professor Rachael Mulheron and Nicholas Bacon KC to carry out an independent review of the Damages-based Agreements Regulations 2013, with a view to re-drafting the Regulations so as to resolve some of the difficulties which have arisen under the 2013 Regulations.

In 2019, Prof Mulheron and Mr Bacon KC consulted and published their recommendations for amendments to the Regulations:
https://www.qmul.ac.uk/law/research/research-impact//dbarp/

Legislative change from the Ministry of Justice is awaited.

CFA direct with the lay client when it is not a Public Access case.

Q.32 I've been offered instructions by a solicitor. The solicitor proposes a fee agreement by which I have a CFA direct with the lay client. I am not accredited to do Public Access (Direct Access) work. Can I do this?

A. What you could do is use a standard model CFA with the solicitor (so that it remains a referral instruction), but amend the terms of the success fee obligations in that CFA making it clear that payment of the success fee, if it becomes due, is to be made direct by the client alone and not the solicitor. The lay client could be asked to sign the CFA to agree to this.