

Guidance for Barristers and Clerks Relating to Privately Funded Civil Litigation



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Acknowledgements

This guide has been written by Mark Friston with the assistance of the Remuneration Committee's Civil (Private) Panel and in consultation with other main Bar Council committees. Any errors and omissions should be drawn to the attention to the Bar Council's Remuneration Team (Remuneration@Barcouncil.org.uk).

This guide draws heavily on the textbook published by Jordans Publishing Ltd entitled *Civil Costs: Law and Practice* (2nd Edition), and they are to be thanked for their permission to do this.

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Introduction

This section introduces the guidance including the flowcharts which are an essential part of the guidance. It also introduces the Bar Council model agreements counsel should use.

The nature of this guide

1. This guidance gives practical advice about funding civil cases. In recognition of the fact that barristers must survive financially in an increasingly competitive market, it unashamedly focuses on the practical and commercial aspects of civil litigation funding; this includes the methods by which barristers can fairly protect their own business interests whilst at the same time providing excellent service and value for money.
2. Rather than focusing solely on the means by which counsel's own services may be funded (so-called '**counsel funding**'), this guide also addresses funding in general ('**case funding**'). It addresses the latter only very briefly: it is very much an introductory guide in that regard.
3. This guidance is not part of the Code of Conduct and (save where clearly indicated) should not be regarded as describing an expected or minimum standard of care. Instead, it is a 'living document' that will be updated as the profession learns how to grapple with the post-Jackson funding regime. It should not be regarded as being a definitive document setting out the duties expected of counsel. It should also be borne in mind that there is no single good practice in relation to funding matters that applies to all types of case. What is good practice in one type of case may not be good practice in another.
4. This Guidance is best read electronically and care should be taken that the most up to date version is accessed. This is to ensure that hyperlinks in the Guidance lead to the correct sources.
5. The Civil (Private) Panel is able to answer general queries and can be contacted at Remuneration@BarCouncil.org.uk. Please attach any relevant information to the email and provide as much background information as you can. For more specific queries you should consult a costs lawyer.¹
6. The Bar Council has also published a complementary Q&A document to help answer the most common queries.²

¹ The Association of Costs Lawyers, Directory of Members
<http://www.associationofcostslawyers.co.uk/Find-a-costs-lawyer>

² Privately Funded Civil Litigation: CFAs and DBAs: Frequently Asked Questions
<http://www.barcouncilethics.co.uk/documents/conditional-fee-agreements-cfas-damages-based-agreements-dbas-frequently-asked-questions/>

The flowcharts

7. This guide contains flowcharts (Part 8) that will reward careful scrutiny. If they are to be used (and this is very much recommended), it is important to follow them step-by-step; if this is not done (or if shortcuts are taken) the reader may miss important points or fail to take into account commercially relevant considerations.

Changes in the law in 2013 (the Jackson reforms)

8. In April 2013, success fees became irrecoverable between opposing parties. A number of other changes in the law were also made at that time. These changes will be referred to as '**the 2013 Changes**'. This guide applies to funding arrangements made after those changes.

The model agreements

9. This guidance is intended to be used alongside the suite of templates known collectively as the Bar Council Model Agreements ('**the Model Agreements**').³

10. The Model Agreements should not be confused with the *Standard Contractual Terms for the Supply of Legal Services by Barristers to Authorised Persons*.⁴ Those conditions are standard terms recommended by the Bar Council that may be used where counsel is paid regardless of the outcome of the claim. One of the Model Agreements is based on the *Standard Conditions*, but there is no such thing as the *Standard Conditions of Contract* relating to Conditional Fee Agreements or Damages-based Agreements.

Decisions concerning funding

11. Counsel should ensure that their agreements are fair to lay clients and appropriate for the lay clients' needs; no more than a proper fee should be charged in any particular case. This guide does not dwell upon that aspect of the matter because barristers are already well-equipped to ensure that their lay clients' interests come first. Ethically difficult cases may arise from time-to-time. Where this happens, then counsel's first port of call should be the Bar Council's ethical enquires service (020 7611 1307 or ethics@barcouncil.org.uk).

12. The lay client is not the only person to consider, however. Counsel need to consider their position and a balance needs to be struck between their desire to be properly remunerated for the risk that they are taking and the client's right to be charged no more than a proper and fair fee. Barristers tend not to be very good at taking risk and their own financial interests into

³ The Bar Council Model Agreements <http://www.barcouncilethics.co.uk/documents/privately-funded-civil-litigation/>

⁴ <http://www.barcouncilethics.co.uk/documents/contractual-terms/>

account, so in order to make this task easier, this guide identifies three commercial considerations that may assist in this regard.

The three commercial considerations

This section introduces the three considerations (suitability, viability and transparency) that should underpin counsel's commercial decision making.

The three principles

13. While there is no obligation to do so, it is recommended that whenever counsel makes a commercial decision about funding, the following three factors are taken into account:

- a. **Suitability** Where appropriate, counsel should ensure that the proposed method of funding is suitable for the category of case in question. This means ensuring that the correct type of agreement – such as a Damages-based Agreements, a CFA Lite, etc – has been chosen and that where necessary, it has been properly adapted for use in the case in question.
- b. **Viability** The type of agreement may be suitable (see above), but the case itself may not be up to scratch. Counsel should ensure that the case is viable in terms of potential profit and good cash flow.
- c. **Transparency** The type of agreement may be suitable and the case may be commercially viable, but the proposed written agreement may not accurately reflect what has been agreed or counsel's expectations. Counsel must ensure that the agreement is transparent (which, in this context, means that it is accurate, complete, and comprehensive).

14. The last of these points may lead to counsel changing the way in which they interact with those who instruct them. Counsel may need to have discussions about how and when they are going to get paid. In particular, thought should be given to what would happen in the following hypothetical circumstances:

- a. If the lay client fails to put the professional client in funds for counsel's fees
- b. If the recovery of costs from the opponent is markedly less than the amount claimed, and
- c. If counsel's fees are assessed downwards by the court (between opposing parties).

15. The ideal is to create a written agreement that is clear, complete and comprehensive so that no subsequent discussions will need to take place. Put otherwise, it should negate the need for any discussions at the end of the claim about how much counsel is going to get paid. This ideal may not be achievable in some instances, but the vast majority of other businesses manage to achieve that ideal - it is not an impossible goal to reach.

16. In summary, where appropriate, counsel should choose the most suitable type of agreement. Once this has been done, then it will be necessary to consider whether the case is commercially viable. If it is viable, then the parties to the agreement should communicate with each other and ensure the proposed agreement is transparent (i.e., it is comprehensive and that it reflects what counsel will actually be paid).

The responsibilities of counsel

17. As set out in the introduction to this guide, there are two broad issues that counsel may need to comment upon when considering the suitability of any given method of funding: the method by which counsel's own fees are to be funded (**counsel funding**) and the method by which the claim in general is to be funded (**case funding**). Each is considered in turn, but counsel would need to get involved with the latter only rarely; this is because, in general, the professional client would be responsible for giving the requisite advice. Circumstances in which counsel might wish to advise on **case funding** would include:

- a. where they have been instructed to advise on that issue and are competent to do so
- b. where there is no instructing solicitor (or other professional client), and
- c. where it becomes clear that the professional client's advice was obviously wrong or substantially incomplete.

18. Even in these situations, it is questionable whether counsel has a duty to advise (other, of course, than (a)). In most cases there is no general duty to give advice about **case funding**, though in certain types of case it may be desirable to address that issue. This may be so where the proposed funding arrangement has the potential to erode the lay client's damages (as may happen with a Damages-based agreement). Counsel should be careful, however, not to undermine their professional clients, who, as a rule, will already have advised the lay client about **case funding** (often because they are under a professional duty to do so). Counsel should be careful not to meddle by giving advice that is neither required nor desired.

19. The issue of **counsel funding** is very different, however, in that counsel will always owe a duty to themselves to ensure that they are going to be properly and fairly remunerated for their work. Counsel (or, in reality, counsel's clerks) will need to address their minds to that issue. This may be a very brief exercise. If, for example, the case is offered on a CFA Lite basis (see Part Four), then there would be little point in considering other methods of funding. The only question would be whether the case was sufficiently viable to be commercially worthwhile. At the other end of the spectrum, if instructions are received from a commercial organisation on a private client basis (i.e. the level of the barrister's fee is not dependent on the outcome or success of the case), no one is going to be assisted by counsel questioning that arrangement.

20. **Counsel funding** is usually about what is suitable for counsel, but the position of the lay client may be a relevant factor in certain types of case. From time-to-time that may become an issue upon which counsel should give advice. Any advice should be on the basis of what counsel has been told. Other than the circumstances where there is no professional client, it would almost never be the case that counsel would be expected to initiate or supervise a search for alternative means of funding. If counsel believes that the lay client's best interests would be served by a method of funding that is different to that which has been proposed, it would usually be appropriate to explain why. Similarly, if counsel is not prepared to accept any of the methods of funding that are appropriate for the case in hand, then it would usually be helpful to explain that that is the case and to point the professional client in the right direction (such as to another barrister).

Where there is a professional client

21. Where counsel gives advice about **counsel funding**, that advice would normally be given to the professional client. Counsel would not be expected to check the advice that the professional client had given to the lay client (unless, of course, there was a specific reason why counsel should do that). Where advice needs to be given, however, and where it is complex or likely to be controversial, it would usually be befitting to give that advice in writing this often saves time and reduces the risk of misunderstanding.

Where there is no professional client

22. Where written advice is given in a form that is intended to be considered directly by the lay client, it would be helpful to ensure that it is written in language that the lay client is likely to understand. Where there is no professional client (or where the professional client is not a lawyer or is not the type of lawyer who is under a professional duty to give advice about funding), then it may – depending on the facts - become appropriate to give full advice about both **case funding** and **counsel funding**. Further guidance is provided in Annex 1.

Case funding

This section deals with case funding whether directly with a lay client or a professional client

Determining the most suitable type of funding for the case in general

23. The following applies to the commonest type of case, namely, where instructions have been received from a solicitor⁵ (or equivalent⁶). If no such professional client exists or if **case funding** has become germane for other reasons, then the guidance given in Annex 1 (i.e. full advice about **case funding**) may become relevant, particularly where:

- a. the instructions come directly from a lay client
- b. counsel has been instructed to consider the issue of **case funding**
- c. it has become clear that the advice given to the lay client is based on a mistake or is otherwise wrong⁷
- d. the professional client is not a lawyer, or
- e. the professional client is that type of lawyer who does not owe a professional duty to give advice about funding (such as a costs lawyer).

For most counsel these situations will arise only rarely. What is set out below is what should be done in those cases that do not fall within any of those categories (i.e., the vast majority of cases).

24. There are three topics that merit some discussion:

- a. how to find out what the options are (so called “funding enquiries”)
- b. how to choose the best of those options (i.e., the best way of funding the claim), and
- c. how to consider the effect of the proposed method of funding on the lay client.

Funding enquiries: discovering the options

⁵ The reason that solicitors fall into a separate category is because they are under a professional duty to enter into funding arrangements that are suitable for their lay clients’ needs and that take account of the clients’ best interests (see SRA Code of Conduct 2011, O(1.6) <http://www.sra.org.uk/solicitors/handbook/code/content.page>); moreover, they are under a duty to ensure that lay clients have the best possible information about the likely overall costs of the matter (see SRA Code of Conduct 2011, O(1.13)).

⁶ Most other professional clients do not have a professional duty to give advice about funding.

⁷ Where a mistake has been made, it would usually be appropriate to draw it to the professional client’s attention. For the avoidance of doubt, this does *not* mean that barristers must double-check the professional client’s advice in every case. The circumstances in which a barrister would have an affirmative duty to advise would very rarely arise.

25. Where there is no professional client then the guidance in Annex 1 will become appropriate instead of the guidance below.

26. Funding enquiries are enquiries made for the purposes of deciding how the case is to be funded and what the options are; they are intended to find out whether the lay client has legal expenses insurance, trades union legal assistance, etc. In the vast majority of cases they will be of little interest to counsel other than as a background fact. If, however, counsel suspects that the lay client has been misadvised, then it would usually be appropriate to ask what the funding enquires revealed.

27. As a matter of professional courtesy, any corrective or additional advice would normally be given first to the professional client rather than directly to the lay client. It would usually be sensible to record that advice in a written note. It may, however, be necessary to give the advice directly to the lay client if, for example, there is a conflict of interest.⁸ In this regard, it is worth bearing in mind that counsel's primary duty is to the lay client.⁹

Selecting the most appropriate method of funding

28. In the vast majority of cases counsel will not have to consider this issue at all. That said, it is useful to be able to recognise mistakes. It has to be emphasised, however, that in the vast majority of cases counsel is not under a duty to check the advice given to the lay client.

29. A selection of common mistakes are as follows:

- a. *Rejecting BTE funding or trades union funding because the professional client is "off-panel"*: A frequent occurrence is that a lay client has been advised not to use BTE insurance (or trades union funding, as the case may be) because the professional client is not a member of the funder's panel. Where this is the only reason for rejecting that form of funding, advice of that nature is nearly always incorrect. This is for two reasons:
 - i. Firstly, if the funder is a BTE insurer and if the claim has already been issued, then the insurer is obliged to allow the insured (i.e., the lay client) to choose their lawyer; it is only in pre-issue that the client does not have a choice, and Code
 - ii. Secondly, even where the lay client does not have a choice, it is rarely in the lay client's interests to eschew an entirely suitable form of funding solely for the purposes of instructing a particular firm of solicitors.

⁸ Where this is so, then it would be sensible to discuss the matter with the Bar Council's ethical helpline on 020 7611 1307 or ethics@barcouncil.org.uk

⁹ See rC15.1 of the Code of Conduct

- b. *Rejecting BTE funding because the limit of indemnity is too low*: If the limit of cover is too low for the purpose of funding the whole of the case, there is usually no reason why it cannot be used for funding part of the claim; it would rarely be necessary to reject that form of funding altogether.
- c. *Accepting public funding without considering alternatives*: Public funding is very far from being perfect and it would be wrong to use it merely because it is available. This is particularly so where the statutory charge is likely to “bite” (i.e., where the client is likely to have to pay part of their damages as being a contribution towards the costs); in those circumstances, other forms of funding may well be better in the long run.

The effect of the method of funding of the lay client

30. Unlike the two considerations set out above, this is an issue that will often arise, especially in claims in which the costs are likely to be large in comparison to the damages. It will also be particularly relevant in cases that are funded by litigation funding agreements. Indeed, the issue will arise whenever the lay client is asked to bear the difference between the fees charged by the lawyers and the costs recovered from the opponent (e.g. most types of Conditional Fee Agreement).

31. It may be appropriate to consider the effect of the method of funding on both the management of the litigation and on the overall benefit that the client is likely to get from the claim. Any such advice would form part of counsel’s advice about the claim generally. It is often a good idea to calculate the “net benefit” — the figure that is likely to be allowed once costs, fees and expenses have all be paid — for a number of different outcomes.

Counsel funding

This part deals with counsel funding and determining the most suitable way forward for funding counsel.

32. The issue here is what barristers should do about how their own fees are to be funded. This is an issue that is usually focuses on counsel rather than the lay client. When reading what is set out below, it should be borne in mind that most of what is said is directed at counsel's interests rather than the lay client's interests; nothing in what is set out below is intended to create any duties towards the lay client.

33. The three criteria in Part 2 form the basis of the discussion; they were:

- a. Suitability
- b. Viability, and
- c. Transparency.

34. Again, it is important to recognise that whilst it is possible to apply those factors to the interests of the lay client, that is not their primary function. Their primary function is to assist counsel in their deliberations about their own commercial interests. Each is considered in turn.

Determining the most suitable type of funding for counsel's own fees

35. The issue here is what barristers should do when they are deliberating how their own services are to be funded. Counsel is under no obligation to enter into a Conditional Fee Agreement or a Damages-based Agreement, and as such, the starting point is the type or types of agreement counsel is willing to accept. Factors counsel may wish to take into account include:

- a. the level of fee
- b. the amount that the client can fairly be asked to pay and is willing to pay, and
- c. the risks involved.

36. This question will arise only infrequently because instructions are usually proffered on a take-it-or-leave-it basis or on a privately-funded basis.¹⁰ In the first of those circumstances (take-it-or-leave-it), the question is not whether the proposed agreement is suitable but whether the case is viable: this is addressed in the next section. In the second (private fee agreement), issues may arise as to the terms of the agreement; some of those issues — can be surprisingly problematic. Where, on the other hand, instructions are offered on the *Standard Conditions of Contract for the Supply of Legal Services by Barristers to Authorised Persons 2012*, counsel would have no option but to accept those instructions under the cab-rank rule.

¹⁰ For the avoidance of doubt, where instructions are received on a private fee basis, there is no obligation upon counsel to consider whether the lay client would be better off with a conditional fee agreement.

37. Cases will arise, however, in which counsel would be expected to express a view as to the best method by which their own services could be funded. These would include:

- a. Where counsel is tendering for bulk instructions
- b. Where counsel is competing with other barristers for instructions
- c. Where counsel is instructed to give that advice
- d. Where counsel's fees are likely to be unusually large in comparison to the damages, and
- e. Where the lay client asks for such advice.

38. To put it candidly, counsel may be expected to bid for instructions on the basis that they provide better value than their competitors; those barristers who are familiar with the ways in which their services can be funded will be at a distinct advantage. This will be particularly so if they are so familiar with the topic that they can suggest novel and ingenious methods of funding. The commonly encountered methods of funding are set out below along with their pros and cons, and "risk ratings".¹¹

The methods of funding that are available

Traditional private fee agreement

Counsel will be paid their full fees regardless of the outcome of the claim. Expenses may or may not be payable in addition.

Pros and cons: This type of agreement is simple and easy to understand (namely, the client must pay for the supply of legal services notwithstanding the fact that the claim may ultimately fail).

Risk rating: Nil to * (depending on probity and solvency of the professional or lay client).

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.

¹¹ The risk rating is an indication of the risk to counsel; the greater number of stars, the less suitable the fee arrangement is likely to be in riskier cases

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.

Risk rating: ***

Ordinary Conditional Fee Agreement with quantum risk

As above, 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.

Risk rating: ****

CFA Lite ("no-cost-to-you" or "eat what you kill")

The main characteristic of a CFA Lite is that 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. After the 2013 Changes counsel will not be compensated for bearing those risks (i.e., no success fee will be payable).

Risk rating: *****

CFA Max ("success-fee-only agreement")

This is a type of agreement that would be worth considering after the 2013 Changes. 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 made after the 2013 Changes, counsel will be compensated by way of a success fee.

Risk rating: ****

Discounted Conditional Fee Agreement (“no win, low fee”)

This is otherwise 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.

Risk rating: * to ****** (depending on level of discount)

Discounted CFA Lite

The oxymoronic phrase ‘discounted CFA Lite’ is used to describe a type of agreement in which 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. Where the agreement has been made after the 2013 Changes, 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. If it provides for a success fee, it is suitable only if success fees are recoverable in principle; this will not be the case if the agreement is made after the 2013 Changes.

Risk rating: ** to ******* (depending on level of discount)

Discounted CFA Max

This is a type of agreement in which 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).

Risk rating: ** to *** (depending on level of discount)

Damages-based Agreement (or contingency fee agreement)

A Damages-based Agreement is an agreement where the amount of counsel's fee is linked to the amount of damages or debt recovered (or, in non-contentious matters, to the price received, the premium, etc).

Pros and cons: The main benefit of a Damages-based Agreement is that the client will pay costs which are proportionate to the benefit received. The main disadvantage is that the costs actually paid may bear no relation to the work undertaken. Another disadvantage is that Damages-based Agreements are fairly heavily regulated.

Risk rating: ** to **** (depending on the facts)

Before the event insurance

Many lay clients will have before the event insurance (otherwise known as legal expenses insurance). It is a type of insurance that will protect the client for having to pay their own lawyers' fees or those of the other side. It will usually result in counsel being paid on a private fee basis (often at a lower hourly rate than would normally be appropriate), but some insurers will require counsel to work on a conditional fee basis.

If counsel is asked to accept a lower rate than they would normally be paid, it would usually be worth asking the insurer to work on a discounted CFA Lite basis such that the lower fee is payable regardless of the outcome of the claim, but if the case is won, then counsel keeps whatever is recovered from the other side.

Pros and cons: Unless they asked to work on a conditional fee basis (which is rare) counsel has the comfort of knowing that they will be paid something regardless of the outcome of the litigation. Most policies are limited to either £50,000 or £100,000.

Risk rating: Nil to * (unless funded on a conditional fee basis and/or if the limit of cover is exceeded).

Litigation funding (otherwise known as third-party funding)

A litigation funding agreement is an agreement where a commercial organisation (often a hedge fund) will purchase a share in the litigation (often 30 to 40 percent of the damages) in return for providing funding. This form of funding would almost never be made solely for the purposes of funding counsel, but it is commonly used to fund counsel's fees (often on a discounted Conditional Fee Agreement basis) as part of a larger funding package. Before the 2013 Changes it was a type of financial product that was almost always combined with after the event insurance; it is not known what will happen after the 2013 Changes.

Pros and cons: From counsel's point of view, litigation funding may either be irrelevant (i.e., it will not be used to fund counsel's fees) or it will provide a degree of relatively risk-free funding (be that under a private fee agreement or a discounted Conditional Fee Agreement). From the point of view of the lay client, it will spread the risk of litigation but at the cost that the client will recover less if they win: it is, therefore, best used in cases that cannot be funded solely on a conditional-fee-agreement basis.

Risk rating: Nil to * (unless funded on a conditional fee basis)

Civil legal aid

Civil legal aid is available for certain types of civil action, in the following categories: actions against the police, clinical negligence, community care, consumer and general contract, debt, education, employment, family, housing, immigration and asylum, mental health, public law and welfare benefits.

Whether or not cases within these categories are covered by civil legal aid is mandated by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). Individual eligibility for legal aid is determined by a means test and an interest of justice test. Applications for civil legal aid funding are submitted by providers who hold contracts with the Legal Aid Authority to provide publicly funded legal work.

The Bar Council has produced guidance on the scope of civil legal aid following LASPO.¹²

How to choose the best form of counsel funding

¹² See *Civil legal aid: Practical guidance for the Bar* <http://www.barcouncilethics.co.uk/documents/civil-legal-aid-practical-guidance-bar/>

39. This guide contains two sources on this topic: the first is the set of flowcharts in Part 8, and the second is the commentary above of the different methods of funding. The flowcharts are self-explanatory. The text gives general guidance and deals with each form of funding in turn, but it will not provide much assistance with the decision-making process; this is better addressed by faithfully following the flowcharts.

40. Neither the flowcharts nor the text cover every contingency. If the case is particularly difficult or if the answer cannot be found in the flowcharts, then it would be best to discuss the matter with a costs lawyer or other specialist.

Which flowchart to use

41. The decision as to which type of agreement to select will depend on many factors; there are several flowcharts and sub-flowcharts that may be relevant. The decision-making process will depend on counsel's instructions:

- a. ***Instructions on a private-client basis or as a disbursement:*** Where instructions are received to act on a private-client basis or as a disbursement (i.e., where counsel will get paid in full regardless of the outcome of the matter), then it would rarely, if ever, be necessary for counsel to spend much time considering the issue of funding.¹³ Consideration may need to be given to the terms of the agreement, and in particular, consideration may need to be given to how payment is going to be enforced.
- b. ***Instructions to act on a basis to be agreed or to tender for work:*** If counsel is asked to tender for work the significant thought ought to be given to the issue of funding. This may, in some cases, merely be a matter of offering the best hourly rate or the most competitive fixed price, but in other cases it will mean offering the most appropriate form of retainer for the purposes of satisfying the lay client's (or, on occasion, the professional client's) commercial requirements. In this regard, all three of the considerations set out above will be relevant. The starting point will be *Flowchart A: Main Chart*.
- c. ***Instructions to act under a Conditional Fee Agreement where the type of agreement is not specified:*** Where counsel is asked to act under a Conditional Fee Agreement, then the first step will be to find out what the client actually means. If the reality is that the client is prepared to pay only those monies that are recovered from the other side, then there is no point in considering anything other than a CFA Lite. Very often, however, the client will have only a rough idea of what is required, and in

¹³ Any such advice would form part of counsel's advice about the claim generally. It is often a good idea to calculate the "net benefit" — the figure that is likely to be allowed once costs, fees and expenses have all be paid — for a number of different outcomes. but that would be far from mandatory.

those circumstances, counsel may wish to offer some guidance (assuming this has not already been given by the professional client).

There are two routes. The first would be to consult *Flowchart A: Main Chart* (but to disregard those questions and options that do not relate to the Conditional Fee Agreements), and the second route — and, in most cases, the preferred route — would be to use the *Flowchart B: Selecting the type of Conditional Fee Agreements to use*. If, however, counsel's fees are likely to be substantial, it may be best to apply the numeric analyses detailed in *Flowchart C: Traditional CFA sub-flowchart* and *Flowchart D: Discounted CFA Sub-flowchart*; this would mean that the first route would be appropriate

- a. ***Instructions to act under a specific type of Conditional Fee Agreement:*** Where instructions are to act under a specific type of Conditional Fee Agreement (such as a traditional Conditional Fee Agreement, a CFA Lite, a discounted Conditional Fee Agreement, etc), then the first task will be to ensure transparency by asking the clients to confirm that they actually intend to pay those monies that may fall due but which are not recovered from the other side; it may be that the reality is that the offer of a putative traditional Conditional Fee Agreement is, in reality, an offer to enter into a CFA Lite (or CFA Max). Assuming this not to be the case, then the only issue that will arise in most cases will be whether the case is viable (i.e., whether to accept the case on the offered terms); this can be addressed by one of the following:
 - i. *Full method:* follow one or the two routes described under the previous heading (Instructions to act under a Conditional Fee Agreement where the type of arrangement is not specified) and disregarding those parts of the flowcharts that do not apply; or
 - ii. *Shortcut:* carry out the calculations in *Flowchart E: CFA Lite sub-flowchart* and deciding whether the likely reward justifies the work involved.
- b. ***Instructions to act under a Damages-based Agreement:*** This will largely be a matter of considering whether the proposed agreement is likely to be sufficiently profitable to justify the work involved (i.e. whether the case is viable). In this regard, *Flowchart G: DBA sub-flowchart* might be of assistance. It may be that counsel is not willing to supply legal services on the basis that has been suggested; if so, then in most cases it would usually be good client care both to explain why and to say whether counsel would be prepared to act on some other basis. In this regard, it may be necessary for counsel to work through the *Flowchart A: Main Chart* for the purposes of determining the basis or bases upon which services could be offered.

Factors relevant to the choice of counsel funding

42. The following very general comments are intended to supplement (but not replace) *Flowchart A: Main Chart* (i.e. the central flowchart that is used when selecting the basis upon which counsel would be prepared to supply legal services):

- a. ***The type of case:*** Certain types of fee agreement are not lawful in certain types of cases. Conditional Fee Agreements may not be used to fund family or criminal matters¹⁴ and Damages-based Agreements are lawful only in certain circumstances.
- b. ***The wishes of the client:*** The wishes of the client are a highly relevant factor. Usually the client will want the type of agreement that is the best in terms of containing costs, but this would not always be the case. Some clients (especially businesses) will want to ‘incentivise’ their lawyers, and this may mean that they specifically want to pay more than is strictly necessary. This is done in the hope that they will get a better result.
- c. ***Legal expenses insurance and other forms of funding:*** Some clients will have legal expenses insurance (otherwise known as ‘before the event’ or ‘BTE’ insurance). Others may have trades union legal aid or legal aid as a perk of membership of a professional body.
- d. ***Commercial realities:*** If the commercial reality is that the case is *de facto* offered on a CFA Lite or CFA Max basis, then this needs to be identified at an early stage; this is so that counsel can get the benefit of that knowledge either by declining the work or by claiming an appropriately high success fee.
- e. ***The level of risk generally:*** If a case is laden with risk, it would be best to avoid any form of Conditional Fee Agreement or damages based agreement entirely. In general, if a client wishes to pursue a case that is risky, it is only fair that the client bears that risk; this would tend to indicate a private fee agreement. Alternatively, thought should be given to a discounted Conditional Fee Agreement with a relatively high discounted fee (such as 75 or 80 percent of normal fees). A CFA Lite and a CFA Max should be avoided entirely.

¹⁴ Proceedings under section 82 of the Environmental Protection Act 1990 <http://www.legislation.gov.uk/ukpga/1990/43/section/82> may be conducted under a conditional fee agreement provided that no success is charged.

- f. *The nature of the risk:* In general, there are three types of risk:
- i. **Liability risk:** the risk of losing
 - ii. **Quantum risk:** the risk of not beating Part 36 offer or admissible offer, and
 - iii. **Recovery risk:** the risk of not getting paid in full because the costs are reduced on assessment or the court awards only part of the full costs.

It is usually best to match the risk to the type of agreement. CFA Lites and discounted CFA Lites expose counsel to all three types of risk. Ordinary Conditional Fee Agreements with quantum risk provide for liability risk and quantum risk. The other types tend to provide only for liability risk.

- g. *Specific risks:* Counsel is not obliged to accept each and every risk that the case presents, and it may be that counsel wants to avoid a particular aspect of the risk by writing it out of the agreement. If, for example, counsel are prepared to accept the risk of losing but not the risk of failing to beat a Part 36 offer, they may choose an ordinary agreement without a quantum risk. This may be done even though the quantum risk is considerable.
- h. *Whether it will be practicable to determine if the case has been ‘won’:* If it is likely to be difficult to decide whether the case has been ‘won’¹⁵ then it might not be appropriate to enter into a Conditional Fee Agreement at all; usually, however, the definition of ‘win’ can be adapted to suit the case.
- i. *Whether a success fee is likely to be recoverable from the other side:* Save for limited exceptions,¹⁶ no success fee is recoverable under a Conditional Fee Agreement made after 1 April 2013. This means that, in an appropriate case, the lay clients will have to decide which risk they want to bear and which risk they want counsel to bear: the greater the risks borne by counsel, the higher the success fee. Where the success fee is not recoverable, the clients must pay that success fee themselves. A compromise may have to be reached where counsel bears some of the risk (say, the liability risk), but the client bears the other risks.
- j. *Whether a success fee is payable by the client:* If the reality is that no success fee is going to be paid to counsel at all, then — in the interests of transparency — that fact needs to be identified at an early stage. If counsel has other work that is more profitable, it would be commercially sensible to reject the claim entirely.

¹⁵ Such as where liability is not in dispute and no clear offers have been made.

¹⁶ Mesothelioma proceedings (see section 48 of the Legal Aid, Punishment of Offenders and Sentencing Act 2012 <http://www.legislation.gov.uk/ukpga/2012/10/section/48> and CPR rule 48.2) and insolvency-related proceedings (see CPR rule 48.2).

Alternatively, counsel may agree to bear only part of the risk (i.e. a discounted conditional fee agreement).

- k. *The amount counsel is prepared to risk:* In addition to the level of risk, another factor to be borne in mind is the effect that losing would have on counsel's finances; it would make no sense at all to accept a risk (even a very low risk) that might lead to bankruptcy if it eventuated. Thus, if the case is a very large case in terms of counsel's fees, then caution should be exercised; on the whole, only agreements with lower risk ratings should be used.
- l. *Cash flow:* Some types of agreement (such as private fee agreements) will lend themselves to prompt payment and interim payments; others (such as CFA Lites) will mean that payment is likely to be made only at the very end of the case. Some types (such as discounted Conditional Fee Agreements) are in-between in terms of cash flow.
- m. *The difference between the damages, debt or value of the matter and costs:* Where the ratio of damages, debt or value of the matter is very high when compared with the costs, then it may be to counsel's advantage to enter into a Damages-based Agreement (assuming this to be lawful). Where the ratio is very low, however, in personal injury cases, thought should be given to the restriction imposed in such cases.¹⁷

Factors relevant to specific types of funding

43. The following paragraphs expand upon some of the factors that might be relevant to the following specific types of funding:

- a. Alternative means of funding (such as BTE insurance, trades union funding, etc)
- b. Private fee agreements and funding as a disbursement (including via litigation funding)
- c. Conditional Fee Agreements (or all types), and
- d. Damages-based Agreements.

Alternative means of funding

44. "Alternative means of funding" is a catchall phrase that includes before the event (BTE) insurance, trades union funding, civil legal aid, etc.; in a nutshell, it means any form of funding where someone other than the client has an obligation to fund the claim or part thereof. Its relevance is that where it exists and where it is suitable, it may be better to make use of it rather

¹⁷ See article 5 of the Conditional Fee Agreement Order 2013
http://www.legislation.gov.uk/ukdsi/2013/9780111533437/pdfs/ukdsi_9780111533437_en.pdf

than to ask the lay client to bear the cost. This would be particularly true if the arrangements that would otherwise be proposed required the lay client to pay fees that would, in principle, be irrecoverable (such as a success fee or a damages-based fee).

45. Save where it is obvious from the facts that he has a duty to do so, counsel is not obliged to make enquiries of the lay client as to the existence of alternative means of funding.

46. It is possible to make an offer to supply legal services conditional on the professional client confirming that the lay client does not have alternative means of funding. There are many circumstances in which such a conditional proposal would not be necessary. These include:

- a. Where counsel already knows that the funding enquiries have been carried out and that the lay client does not have suitable alternative means of funding
- b. Where, on the facts of the case in question, there is a good reason why alternative means of funding should not be used for counsel funding, and
- c. Where, through previous experience, counsel knows that the professional client has put in place a funding regime that is suitable overall notwithstanding the terms on which counsel is to be funded.

Where legal expenses insurance already exists

47. A fairly common situation is where a client has legal expenses insurance but the instructing solicitors still wish to act (or for counsel to act) under a Conditional Fee Agreement. Counsel should be aware that more often than not this is because professional clients are concerned about not being on the insurers' panel of solicitors. In those circumstances it may be helpful to advise the professional client about the matters referred to in paragraph 28. Once the professional client knows the true position they may not feel that a Conditional Fee Agreement is necessary.

48. Where counsel has explained the correct law to the professional client and where the professional client still wishes to instruct counsel under a Conditional Fee Agreement (or, for that matter, a damages based agreement), then counsel will have to decide whether to accept the case on those terms. Counsel may do this only if the proposed method of funding is fair to the lay client. The pros and cons need to be weighed. They are likely to be:

Advantages of using a Conditional Fee Agreement

Disadvantages of rejecting BTE insurance

Free choice of lawyer even before the claim is issued (NB the free choice of lawyer under BTE exists only after the claim is issued).

No restriction on the hourly rate charged by counsel (which may be a decisive factor in whether counsel accepts the instructions).

Possibility that the use of the counsel (i.e., the particular barrister in question) will result in better recovery of damages.

No access to the insurer's panel of counsel (if there is one).

No funder willing to pay the lawyer in the event that there is a shortfall in the recovery of costs.

No cover for costs orders made against the lay client (although in personal injury cases this is a fairly low risk because of one-way costs shifting).

49. The issue usually boils down to a question of whether the use of the particular barrister in question is likely to result in sufficiently higher damages to justify the success fee and to justify the risk of the lay client having to pay legal costs.

Private fee agreements and funding as a disbursement

50. In most instances in which counsel are instructed under a private fee agreement, this is on the specific instructions of the lay client (or other person paying counsel's fees). Where this is so, then it would be rare for any issues concerning funding to arise. It would generally be prudent (from counsel's point of view) to ensure that neither the lay client nor the professional client expect an adjustment to the fees if the case goes badly; if the reality is that such an adjustment would be required, then it would be best to look at discounted Conditional Fee Agreements (or something similar).

51. It may be that the impetus that counsel be paid under a private fee agreement comes from counsel or from the professional client rather than from the lay client. This may happen in the following circumstances:

- a. *Where counsel is not prepared to act on any other basis:* It may be that counsel has rejected a Conditional Fee Agreement (perhaps because the case is too risky), and that the only basis on which they are prepared to provide legal services is under a private fee agreement. This is counsel's prerogative and there is no duty to give reasons or to give advice about how counsel's fees may be funded. That said, many counsel would seek to be helpful and would comment on those two matters, where appropriate.

b. ***Where the professional client is not prepared to allow counsel to act on any other basis:*** This may happen in a number of circumstances. These include the following:

- i. Where the professional client wishes to act under a Conditional Fee Agreement that is limited by damages but wishes to fund counsel as a disbursement for the purposes of avoiding the need to share the success fee with counsel.
- ii. Where the professional client wishes to act under a Damages-based Agreement but wishes to fund counsel as a disbursement for the purposes of avoiding the need to share the damages-based fee with counsel.
- iii. Where the professional client intends to or has already arranged litigation funding for the purposes of funding counsel's fees, and
- iv. Where the professional client has some other form of funding in mind or has already arranged that other form of funding.

Where one or more of these situations exists, counsel will often be unaware of that fact; this is because counsel's instructions will usually be ordinary instructions to which the cab-rank rule will apply. This is not usually a problem, however, as it would be very rare that counsel would be able to – or wish to – object to receiving instructions on any of these bases.

c. ***Where litigation funding is being considered:*** It may be that counsel is not prepared to stake the fruits of their labours on the case being successful. Where this is so, one option that may be worth bearing in mind is litigation funding. In order to attract the interests of a funder the merits of the case have to be good (i.e., the prospects of success need to be at least 60 percent or, for many funders, 70 percent) and the case has to be large (i.e., theoretically cases as small as £500,000 can be funded, but in practice, the case must be worth at least £2m-£3m). One way of managing the situation is to invite instructions to draft a full advice once a funder has indicated that it is interested in the case.

In large cases there is often a degree of negotiation as to whether that advice should be funded by the funder, by the lay client, by the professional client, or by counsel (i.e., through a conditional fee agreement relating just to the advice). If counsel agrees to act under such a conditional fee agreement, care must be taken to ensure that (a) the ambit of the conditional fee agreement is clearly and accurately set out therein, and (b) a private fee agreement (preferably in writing) can be evidenced for any subsequent work. If the Advice is to be funded by the funder or the professional client but not by the lay client, then the advice of a costs lawyer should be obtained

as to how that arrangement can be made to comply with the indemnity principle; any such enquiry should be accompanied by a copy of the retainer (or proposed retainer) between the lay client and the professional client and (if it exists) the most recent draft of the litigation funding agreement.

Enforcement provisions

52. There are only limited ways in which counsel can enforce payment of his fees, and now that the *Withdrawal of Credit Scheme 1988* no longer exists, it is essential that the agreement contains a contractual provision relating to enforcement. Any request to act on the basis of a “gentleman’s agreement” or on the basis of there being no contractual rights at all ought to be rejected out of hand.

53. The following contractual methods of enforcement are available. There is not a great deal that can be done about the second of these problems other than by asking for payment in advance. As to the first, this should not be a problem if it has been possible to make an agreement that deals with every eventuality (including the possibility of the lay client not putting the professional client in funds for counsel’s fees); in reality, however, many professional clients will be reluctant to do this. It may be worth explaining why a solicitor should be liable for counsel’s fees. Those reasons include (but are not limited to) the following:

- a. *Unqualified enforcement against the professional clients:* This is the usual (i.e. traditional) method of enforcing a contractual right to payment. The two largest problems with it are:
 - i. That it is unpopular with professional clients and some may refuse to offer instructions on that basis; and
 - ii. That if the professional clients become insolvent, counsel’s fees may be reduced accordingly.

As to the first, this should not be a problem if it has been possible to make an agreement that deals with every eventuality (including the possibility of the lay client not putting the professional client in funds for counsel’s fees); in reality, however, this is difficult to do. The rationale for fixing the professional client (and in particular, solicitors) includes (but is not limited to) the following:

- i. *Consumer protection:* There is no method of assessing counsel’s fees as against counsel; as such, consumer protection is best achieved by the solicitors standing between the lay client and counsel (this being because counsel’s fees can be assessed as against the solicitor (i.e. A solicitor and client assessment)

- ii. *No handling of client monies*: Barristers, unlike solicitors, are not permitted to handle client money; as such, it is not possible to take fees from monies already held. In certain circumstances an Escrow service may be able to provide assistance.¹⁸
 - iii. *No effective lien*: Solicitors often (or usually) hold items belonging to the client which are of sufficient value to be able to claim effective lien (such as money, the case papers, documents, etc); barristers rarely hold such items and if they were to claim lien, it would almost always be ineffective;
 - iv. *No statutory right to security for costs*: Solicitors have a statutory right to seek security for costs;¹⁹ barristers do not have that right;
 - v. *No statutory right to charging orders*: Solicitors have a statutory right to seek a charging order in the event of non-payment of fees;²⁰ barristers do not have that right.
 - vi. *Design of system*: The system of the Bar is based on the premise that counsel is able to rely on professional clients for the purposes of enforcing fees as against the lay client; if this were not the case, then barristers would have to carry similar overheads to those carried by solicitors, and this would increase fees; and
 - vii. *Preservation of market forces*: The market will become distorted if the person carrying out the negotiations has no genuine interest in the amount charged by counsel.
- b. ***Qualified enforcement against the professional clients***: This is becoming a much-requested form of contract. It is based on the premise that the professional client will go so far in trying to enforce the debt against the lay client, but if that fails, the debt is assigned to counsel; this is not recommended for the following reasons:
- i. *No right to render "final bill"*: the right that would be assigned would be the same right as the solicitor had, and in view of that, if a final bill has not been rendered, it would need to be rendered in a way that is compliant with the relevant provisions in the Solicitors Act 1974; barristers are not able to do that.

¹⁸ "Shieldpay <https://www.shieldpay.com/legal/third-party-managed-accounts> and Transpact <https://www.transpact.com/>, have been identified as suitable escrow providers for the self-employed Bar." <https://www.barcouncil.org.uk/supporting-the-bar/barco/>

¹⁹ See section 65 of the Solicitors Act 1974 <http://www.legislation.gov.uk/ukpga/1974/47/section/65>

²⁰ See section 73 of the Solicitors Act 1974 <http://www.legislation.gov.uk/ukpga/1974/47/section/73>

- ii. *No ability to attend solicitor and client assessment*: likewise, the client's right to a solicitor and client assessment is in no way diminished by the assignment, and it is highly doubtful whether counsel can attend a solicitor and client assessment in place of the assignor-solicitors.
- iii. *No statutory safeguards*: The points made above about "no statutory right to charging orders" and "no statutory right to security for costs" are just as relevant in this context as they were in the context above; this is particularly so when one takes into account the fact that it will only be difficult lay clients — i.e., where those rights may be most relevant — whose debts will be assigned.
- iv. *No effective redress for male fides behaviour*: It is not unknown for solicitors to seek to prefer their own financial well-being over that of counsel whom they instruct; if this happened to an improper degree (such as the solicitors taking counsel's fees from the client but then not paying them to counsel, or solicitors claiming for the same work as that done by counsel) it would be very difficult for counsel to seek redress.
- v. *Enforcement against the lay clients*: The points made immediately above are repeated (although those points do not apply where counsel is instructed directly by a lay client).
- vi. *Enforcement against the funders (if any)*: The Third Parties (Rights against Insurers) Act 1930 does not apply to enable a lawyer to recover costs directly from insurers upon the bankruptcy.²¹ This situation was going to be remedied by the Third Parties (Rights against Insurers) Act 2010, but the relevant sections have not been brought into force. In any event, it would be very difficult indeed to bring a claim against an insurer under those Acts. It is possible that a claim could be brought against a funder (be it a liability insurer or another type of funder) under the Contracts (Rights of Third Parties) Act 1999, but this would be possible only if the retainer between the insurer and the professional client contained a provision that gave counsel a right to payment; this is rarely the case.

²¹ *Tarbuck v Avon Insurance plc* [2001] 2 All ER 503 at 509

Conditional Fee Agreements

Counsel may have to decide whether to enter into a Conditional Fee Agreement, and if so, what type of agreement to make. This section deals with the decision process that spans all three 'principles' (i.e., the Suitability Principle, the Viability Principle, and the Transparency Principle).

Whether to enter into a Conditional Fee Agreement

54. The 'cab rank rule' does not apply to Conditional Fee Agreements; as such, counsel should decide whether to accept instructions offered on the basis of such factors as the merits of the case, the needs of the client and the chances of making a profit. In addition to the issue of whether there are alternative means of funding (where this is relevant: see paragraphs 44 to 49), counsel's decision will depend on factors that will include the following:

- a. the category of case
- b. commercial considerations, and
- c. ethical considerations.

55. Each of those considerations is considered in turn, but first, attention is drawn to the decision-making process as set out in the flowcharts. There are two routes by which counsel may wish approach the flowcharts. The first would be to consult Flowchart A: Main Chart and the associated sub-flowcharts and, where appropriate, to disregard those questions and options that do not relate to the Conditional Fee Agreements, and the second route, and if other forms of retainer have been ruled out, the generally preferred route, would be to consult *Flowchart B: Selecting the type of Conditional Fee Agreement to use*. The latter is easier to use and is less demanding in terms of numeric analysis.

Category of case

56. Criminal proceedings and family proceedings²² may not be the subject of a Conditional Fee Agreement.

57. Another factor that may be worth considering is whether a success fee would be recoverable from the opposing parties; this would be so only if the proceedings are mesothelioma proceedings (see section 48 of the Legal Aid, Punishment of Offenders and Sentencing Act 2012 and CPR rule 48.2) or insolvency-related proceedings (see CPR rule 48.2).

²² There is an exception for proceedings under [section 82 of the Environmental Protection Act 1990](#); that type of case may be funded by way of a conditional fee agreement that does not provide for a success fee.

Commercial considerations: Conditional Fee Agreements

58. There are three factors that might be relevant to the issue of whether a Conditional Fee Agreement is commercially viable; the first is the level of risk, the second is likely recovery of base costs, and the third is the likely recovery of the success fee.

Risk

59. A risk assessment should be carried out in all cases (see Administrative matters); that assessment should take into account the risk of losing (this being ‘**the liability risk**’), and – where appropriate – the risk of failing to beat Part 36 offers (‘**the quantum risk**’ or ‘**risk on quantum**’) and the risk of recovering only a part of the base costs (‘**the recovery risk**’). If the success fee (or other commercial benefits) do not justify the risk, then it would normally be prudent to reject the case. That said, it may be worth considering the options set out in paragraphs 39 and 40. This is because riskier cases can be made commercially viable by tailoring the agreement to those risks. Thus, if (for example) the risk is too great to bear the whole of the liability risk, then it may be worth looking at discounted Conditional Fee Agreements.

Base costs

60. A view needs to be taken at an early stage as to whether (in reality) counsel is going to be paid base costs in full. In this regard, it will be necessary directly to ask the instructing solicitor what is going to happen if only part of counsel’s fee is recovered from the opponent. If the answer is that counsel will not be paid the shortfall (or if the answer is vague or inconclusive), then this is a factor to be taken into account (either when setting the success fee, or when deciding whether to accept the case).

Success fee

61. Thought needs to be given to whether the client is going to be asked to pay a success fee and if so, how much.

62. Success fees may or may not be fixed by law. If they are not fixed, then the table attached to the Model Agreements will help set the appropriate amount. The maximum that can be charged is 100 percent. An additional limit applies to personal injury work, where at first instance the success fee will be limited to 25 percent of the damages (excluding damages for future pecuniary loss and net of CRU) or, on appeal, to 100 percent of those damages.²³ In many (if not most) cases, this will be the limiting factor rather than the aforesaid 100 percent cap.

²³ See The Conditional Fee Agreements Order 2013

http://www.legislation.gov.uk/ukdsi/2013/9780111533437/pdfs/ukdsi_9780111533437_en.pdf

63. It is worth pausing here to say that some personal injury solicitors are seeking to avoid the effect of that cap by entering into discounted Conditional Fee Agreements that do not provide for a success fee but which provide for payment of a much higher rate of base costs in the event of a win. The Bar Council neither endorses nor condemns such an approach, but it is worth pointing out that if the court were to find that such an agreement was a sham and that in reality it was a Conditional Fee Agreement that provided for a success fee that exceeded the aforesaid cap, then it is possible that counsel would not get paid anything at all.

64. Once these factors have been addressed, then a view needs to be taken as to the 'present value' of the proposed arrangement (i.e., the present value to counsel; this would include monies recovered from the client but not recovered from the other side). The 'present value' is the overall amount that is likely to be recovered in the event of a win is adjusted for risk (i.e., a 40% chance of getting £1,000 is a present value of £400). Once the present value has been estimated, then this needs to be compared with the sums that would be earned doing other work. The relevant arithmetic can be fairly complex, but the formulas are set out in the sub-flowcharts governed by *Flowchart A: Main Chart*.

Ethical considerations relating to Conditional Fee Agreements

65. It would not be appropriate to enter into an agreement where there was an unacceptable conflict of interests between counsel and the lay client. This will be exceptionally rare, however, and counsel should be careful not to get tied up in knots by focussing on unlikely, extreme or unreal hypothetical circumstances. In this regard it should be remembered that all Conditional Fee Agreements will, to some extent, give rise to a conflict of interests. That conflict will become unacceptable if, for example, it interfered with counsel's freedom to comply with the Code of Conduct or if it was obviously in the lay client's best interest to fund the matter in some other way. Detailed guidance is not given here because if a barrister is concerned about his or her ethical position, he or she should seek guidance on the matter from the Bar Council. If counsel wishes to do this, the following information or documentation should be to hand: a copy of the agreement between the lay client and the professional client or a brief description as to the nature of that agreement; a copy of the proposed agreement with counsel or a brief description as to the nature of that agreement; some indication as to the benefit that the lay client will obtain if the case is successful; some indication as to the lay client's *realistic* options if counsel were to decline to act under the proposed Conditional Fee Agreement; and some indication as to the likely merits of the claim and the nature of the main areas of risk.

Damages-based Agreements (or contingency fee agreements)

This section deals with Damages-based Agreements which have been widened in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to cover all areas of civil litigation which can be otherwise funded by a Conditional Fee Agreement.

Regulatory requirements

66. Damages-based Agreements must specify the following:²⁴

- a. the claim or proceedings or parts of them to which the agreement relates
- b. the circumstances in which the representative's payment, expenses and costs, or part of them, are payable, and
- c. the reason for setting the amount of the payment at the level agreed.²⁵

67. A Damages-based Agreement must not require an amount to be paid by the client other than:²⁶

“(a) the payment,²⁷ net of—

(i) any costs (including fixed costs under Part 45 of the Civil Procedure Rules 1998); and

(ii) where relevant, any sum in respect of disbursements incurred by the representative in respect of counsel's fees, that have been paid or are payable by another party to the proceedings by agreement or order; and

(b) any expenses incurred by the representative, net of any amount which has been paid or is payable by another party to the proceedings by agreement or order.”

68. Persons who are considering entering into a Damages-based Agreement should be aware that some commentators are of the opinion that it is not possible to comply with these requirements in such a way as to be able to enforce the entirety of the fee. This is because the provisions in regulation 4 of the Damages-based Agreements Regulations 2013 mean that the

²⁴ See regulation 3 of the Damages-Based Agreements Regulations 2013

http://www.legislation.gov.uk/ukdsi/2013/9780111533444/pdfs/ukdsi_9780111533444_en.pdf

²⁵ In an employment matter, this must “include having regard to, where appropriate, whether the claim or proceedings is one of several similar claims or proceedings”.

²⁶ See regulation 4 of the Damages-Based Agreements Regulations 2013

²⁷ “[P]ayment’ means that part of the sum recovered in respect of the claim or damages awarded that the client agrees to pay the representative, and excludes expenses but includes, in respect of any claim or proceedings to which these regulations apply other than an employment matter, any disbursements incurred by the representative in respect of counsel's fees: see regulation 1(2) of the Damages-Based Agreements Regulations 2013.

only way that costs can be recovered from an opponent is by setting aside the indemnity principle. Surprisingly, they say, that has not been done (this being despite the fact that the CPR has set it aside for other purposes). As such, the lay client will not be able to obtain a costs order, so – they say -- they would have a reasonably good case for refusing to pay those monies to the lawyers who created that problem. It remains to be seen whether that view is correct.

Whether to enter into a Damages-based Agreement

69. The ‘cab rank rule’ does not apply to Damages-based Agreements; as such, counsel should decide whether to accept instructions offered on the basis of such factors as the merits of the case, the needs of the client, and the chances of making a profit. That decision will depend on factors that will include 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.

70. Each of those considerations is considered in turn, but first, the reader should look at the decision-making process as set out in *Flowchart A: Main Chart* and *Flowchart F: DBA Sub-Flowchart*.

Category of case

71. There are three types of work that need to be considered:

- a. ***True non-contentious work***: Whilst there is a small risk that Damages-based Agreements are unlawful at common law, the Bar Council believes that there can be no objection in principle to a DBA-like agreement (i.e. a traditional contingency agreement) in those cases that do not involve disputes between parties.²⁸ This is often called “true non-contentious work”. Thus, if counsel were to advise on the sale of a company’s assets or on a tax-saving measure, there would be no objection in principle to counsel being paid on a percentage of that company’s assets or fraction of the tax saved. Certainly, there is no rule or policy that would specifically prevent barristers from entering into such agreements.

²⁸ The Bar Council’s view as to the legality of damages-based agreement in non-contentious work (see below) has changed since the last time it issued guidance on this topic; any previous guidance the Bar Council may have given is revoked.

It is not clear whether the legislation covering Damages-based Agreements is intended to extend to true non-contentious work.²⁹ It would appear that the provision that disapplies the regulation of Damages-based Agreements in non-contentious work applies only to solicitors.³⁰ The most cautious route counsel can take is to comply with the relevant legislation. The Model Agreements can easily be modified for that purpose.

- b. ***Disputatious non-contentious work:*** Work becomes contentious if proceedings are issued in a court (or a tribunal that has the same status as a court); this will not be the case if proceedings have not yet been issued or if proceedings are issued in other tribunals, such as an employment tribunal.³¹ This means that non-contentious work may be carried out in a dispute that a layman would describe as being contentious. That type of work is disputatious non-contentious work (otherwise known as “litigated non-contentious work”). Section 58AA of the Courts and Legal Services Act 1990 will apply.³² As such, the Model Agreements ought to be used. A Damages-based Agreement must not relate to work which is of such a type that it cannot be the subject of an enforceable Conditional Fee Agreement.³³
- c. ***Contentious work:*** This means business that is litigation in court (or in a tribunal that has the same status as a court). By and large, the comments made immediately above apply.

Alternative means of funding and Damages-based Agreements

72. Given the special features of Damages-based Agreements, it would often be necessary to consider litigation funding (but, assuming the market conditions have not substantially changed since the time of writing, only in cases where the sums involved are in the millions or at least high six figures) and the various flavours of Conditional Fee Agreement.

Commercial considerations: Damages-based Agreements

²⁹ This is because there are competing arguments. On the one hand, [sub-section 58AA\(3\) of the Courts and Legal Services Act 1990](#) appears to define damages-based agreement by reference to advocacy services and litigation, yet sub-section 58AA(9) <http://www.legislation.gov.uk/ukpga/1990/41/section/58AA> of that Act and the draft delegated legislation made under that Act appears to contain a provision that disapplies that legislation in non-contentious work, but only for solicitors.

³⁰ See sub-paragraph 1(4) if the Damages-Based Agreements Regulations 2013

³¹ See section 87 of the Solicitors Act 1974 <http://www.legislation.gov.uk/ukpga/1974/47/section/87> and *In re Simpkin Marshall Ltd* [1959] Ch 229

³² See section 58AA(7A) of the Courts and Legal Services Act 1990 <http://www.legislation.gov.uk/ukpga/1990/41/section/58AA>

³³ See sub-section 58AA(4)(aa) of the Courts and Legal Services Act 1990

73. There are three factors that are likely to be relevant to the issue of whether a damages fee agreement is commercially viable; the first is the level of risk in terms of whether a payment will be made, the second is the way in which that risk is distributed, and the third is the amount that is likely to be recovered.

74. A good way to decide whether a Damages-based Agreement is likely to create a profit is to work out the “present value” of the proposed agreement; this would involve estimating the monies that are likely to be recovered and adjusting them for risk. In a simple case this may be as simple as multiplying the likely size of the damages-based fee (in money terms) and then multiplying this by the percentage chance that the case will be won. This should then be compared the present values of other types of agreement (or other types of work). The starting point is *Flowchart A: Main Chart* but this will then lead to *Flowchart F: DBA Sub-Flowchart*. Where it is not possible to estimate the amount of likely damages, then (in very large cases) it may be necessary to take advice from an actuary.

75. When calculating the “present value”, it should not be forgotten that there are limits on the amounts that may be recovered. The relevant limits will be as follows:

- a. In a personal injury matter, the damages-based fee must not exceed 25 percent of the damages (excluding damages for future pecuniary loss)
- b. In an employment matter, the damages-based fee must not exceed 35 percent of the monies recovered, and
- c. In any other matter, the damages-based fee must not exceed 50 percent of the monies recovered.

76. All of these figures are inclusive of VAT. Those limits apply only at first instance. It is not clear what the interplay is where both counsel and the professional client are acting under Damages-based Agreement; it could well be the case that the aforesaid limits apply to the aggregate of their damages-based fees rather than to each individually.

Ethical considerations: Damages-based Agreements

77. As with Conditional Fee Agreements, it would not be appropriate to enter into a Damages-based Agreement where there was an unacceptable conflict of interests between counsel and the lay client. In this regard, the following factors should be taken into account:

- a. *The views of the lay client:* Some lay clients want to ‘incentivise’ counsel, and they may prefer to pay more in order to get a better result; if a client wishes to do this and if he or she fully understands the alternatives, then this is not in any way objectionable.

- b. *The alternatives available to the lay client:* Very often, the alternatives available to the lay client would be more unattractive than a Damages-based Agreement; in particular, for a commercial client the alternative would often be a litigation funding agreement. It should be borne in mind that if the lay client cannot instruct counsel in the way that he or she wants, he or she may be forced to instruct someone other than counsel or a less suitable barrister; thus, it may be in the client's best interests to accept an invitation to work under a Damages-based Agreement if this is the only means by which they can receive expert legal advice.
- c. *Access to justice:* Sometimes (such as where the chances of success are remote but the damages are very large) a Damages-based Agreement is the only method by which a lay client can secure the services of legal advisors without having to fund the proceedings privately; where this is the case, then it would usually be wrong to reject the case on the basis that it was not in the lay client's best interests to enter into a Damages-based Agreement.

78. Finally, it should be borne in mind that where there are concerns about the amount that the lay client may have to pay, this can be addressed by limiting that amount in the agreement.

Miscellaneous matters

The section deals with the model agreements and some other matters.

How to complete the model agreements

79. The following guidance refers to the standard Model Agreements. Variants of the Model Agreements exist for use where the lay client is a Defendant and where the agreement is intended to be a collective Conditional Fee Agreement. The latter should only be completed with the assistance of a specialist and therefore no guidance is given in this guidance.

80. The Model Agreements³⁴ are intended to be completed part-by-part:

- a. **Part One:** The administrative details should be entered. The details of the claim and the opponent should be sufficient to allow the case to be identified; they should not be so specific as to narrow the ambit of the agreement. Thus, 'the claim for damages arising out of the road traffic accident in February 2011' is better than 'the Part 7 claim for damages for injury to the left arm arising out of the road traffic accident on 24 February 2011 at 2.32 pm'. The Agreement Date is merely a date for identifying the Conditional Fee Agreement; it does not matter whether it is the date the agreement was signed or whether it is the date it was printed.
- b. **Part Two:** Thought should be given to whether the agreement is or is not retrospective.
- c. **Part Three:** The type of agreement should be selected.
- d. **Part Four:** The default success fee is the relevant fixed success fee (if there is one) or a sliding scale. The agreement will still work if no risk assessment is entered, but this is poor practice. A risk assessment should be entered and a success fee recorded accordingly.

There are, in essence, two approaches to a success fee that is not fixed:

- i. *Single stage success fee:* This is the traditional method. The risk is estimated as a single figure (which should include an allowance for quantum risk and recovery risk). That figure is then turned into a success fee by using the ready reckoner at the end of this guidance. This will, in a personal injuries case, need to be limited to the appropriate percentage of damages.

³⁴ See The Model Agreements <http://www.barcouncilethics.co.uk/documents/privately-funded-civil-litigation/>

- ii. *Staged success fee*: This is the preferred method. The success fee rises as the case goes on. The final stage is nearly always 100%. The starting stage will depend on the level of risk generally, but – obviously – the first stage should not be higher than the amount that would have been sought if a single stage success fee had been claimed. The stages can be based on any identifiable step or steps in the proceedings: thus, the first stage could be, for example, up to 14 days before trial or service of the Directions Questionnaire. Again, in a personal injuries case, then be limited to the appropriate percentage of damages (see page 33).
- e. **Part Five**: Counsel's normal fees should be recorded.
- f. **Part Six**: A record should be made of what counsel will charge if only a part of their fees are recovered. It is good practice to discuss this with the solicitor in advance of the agreement being made.
- g. **Part Seven**: Definition of 'win': The standard definition will usually work, but it may not be optimal for the case in hand. In a case involving non-financial matters, this definition should be examined very carefully indeed.
- h. **Part Eight**: The agreement should be signed.
- i. **Part Nine**: Some versions have a Part Nine which sets out certain advice that needs to be given to the lay client; the correct advice needs to be selected.

81. Some of the variants of the Model Agreements (such as the Private Fee Agreement) do not have all of the above Parts; the number is the same as in other agreements, however, so Part Two might be followed by Part Five with no intervening Parts Three and Four.

82. There are two types of agreement that merit special attention: Damages-based Agreements and Conditional Fee Agreements which are the first to be made with the lay client in the claim in question.

Damages-based Model Agreement

83. The following applies to the Damages-based Agreement Model Agreement:

- a. It contains a section that deals with the damages-based fee rather than the success fee. Again, however, the numbering is broadly the same as the other variants.

- b. It is particularly important that the following details are entered correctly (because otherwise it may be found to be unenforceable).³⁵
 - i. The reason for setting the amount of the payment at the level agreed, including having regard to, where appropriate, whether the claim or proceedings is one of several similar claims or proceedings.
 - ii. The claim or proceedings or parts of them to which the agreement relates.
 - iii. The circumstances in which the representative's payment, expenses and costs, or part of them, are payable, and
 - iv. An explanation as to the point at which expenses become payable; and a reasonable estimate of the amount that is likely to be spent upon expenses, inclusive of VAT.
- c. It will rarely be the case that the first of these points will require counsel to set out any form of mathematical calculation; this is because no calculation exists that would allow one to calculate "the" fee. Whilst there is no authority on the point, it is likely that a narrative explanation would be appropriate where each factor is identified and then taken into account in the round; if so, the following forensic sieve would be as good as any (it being loosely based on the "seven pillars of wisdom"³⁶):
 - i. *Risk*: The risk that the claim will not be successful or that only a relatively small amount is recovered (this may need to be set out in some detail).
 - ii. *Value*: The amount or value of any money or property involved;
 - iii. *Counsel's skill and position in the market*: The skill, effort and specialised knowledge that counsel would have to bring to bear on the matter and what other counsel with the same skills and knowledge would be likely to charge (i.e., the state of the legal services market and counsel's position).
 - iv. *Importance*: The importance of the matter to all the parties;
 - v. *Time and conduct*: The time spent on the case; the anticipated conduct of all the parties may be relevant, especially where the other side's conduct is likely to generate extra work;

³⁵ See regulation 3 of the Damages-Based Agreements Regulations 2013

http://www.legislation.gov.uk/ukdsi/2013/9780111533444/pdfs/ukdsi_9780111533444_en.pdf

³⁶ See CPR rule 44.5(3)

- vi. *Complexity*: The particular complexity of the matter or the difficulty or novelty of the questions raised; and
 - vii. *Other circumstances*: Where relevant, the place where and the circumstances in which the work or any part of it will be done.
- d. In addition, whilst not a regulatory requirement, the client should be given such further explanation, advice or other information about any of those matters as the client may request.
 - e. In a personal injuries case, an explanation must be given as to how the damages-based fee will be calculated; whilst there is no authority on this point, counsel would be well advised to deal with the interplay (if any) with the fees sought by their professional client.
 - f. In a claim for personal injuries, there must be an explanation as to how the payment will be calculated; if the Model Agreements are used, then this should not be a problem.
 - g. In an employment matter, the client must be told about the following (in writing):
 - i. The circumstances in which the client may seek a review of costs and expenses of the representative and the procedure for doing so.
 - ii. The dispute resolution service provided by the Advisory, Conciliation and Arbitration Service (ACAS) in regard to actual and potential claims, and
 - iii. Whether other methods of pursuing the claim or financing the proceedings, including (i) advice under the Community Legal Service, (i) legal expenses insurance, (iii) pro bono representation, or (iv) trade union representation, are available, and, if so, how they apply to the client and the claim or proceedings in question.
 - h. The regulations relating to Damages-based Agreements differ from those that relate to Conditional Fee Agreements in that there is no provision that releases additional legal representatives from the obligation to provide the type of advice set out above.

Administrative matters

84. The Model Agreements work best with Word 2007 or later; with earlier versions, the drop-down lists may not work.

Points for chambers and for groups of barristers

85. The following miscellaneous matters may apply to chambers or other groups of barristers (such as departments and specialist groups within chambers):

- a. *Equality and diversity (maternity leave, paternity leave, disability, illness, etc):*
The Model Agreements contain a provision that permits counsel to suspend the agreement and to ask a counsel of similar standing to carry out the work in the event of counsel being unable to provide legal services because of maternity leave, paternity leave, disability, etc. Chambers should make sure that there is a proper system for supporting counsel who transfer cases in this way. That system should be sufficiently reliable for counsel to be able to accept cases without having to be concerned about whether cover is available. Chambers should specifically consider:
 - i. whether the case should be covered by another member of chambers until the chosen Counsel is expected to be available again
 - ii. whether the case should be transferred to another to handle until its conclusion, or
 - iii. whether the issue could best be dealt with by chosen Counsel retaining overall control but another member of chambers assisting.
- b. *Screeners:* Some chambers operate a screening policy where cases are screened before they are allocated. Where this is done, a record must be kept of the name of the person or persons who have carried out the screening. They must not act for the opponent in any case that they have screened. Issues of client confidentiality may arise, and as such, it is best to obtain the client's consent to the case being screened.

When withdrawal is permitted

86. Counsel may withdraw from the case in any of the circumstances set out in the agreement (regardless of its type), but only if satisfied that they are permitted to withdraw pursuant to the Code of Conduct.

87. The Code of Conduct takes priority over the agreement. Thus, if counsel is required to withdraw for professional reasons, they must do so regardless of whether the agreement is silent on the point.

How to repair 'broken' agreements

88. It will often be the case that counsel will find that their agreement (be it a Conditional Fee Agreement, Damages-based Agreement or other type of agreement) is defective. If this happens after conclusion of the claim or matter, then there is not a lot that counsel can do to save the

situation. In those circumstances, counsel will have to make the best of it. If, on the other hand, counsel discovers the error before the conclusion of the claim or matter, then steps can be taken to secure their position. Those steps include the following:

- a. Asking the client to enter into a new (retrospective) agreement.
- b. Asking the client to agree to the existing agreement being remedied.
- c. Formulate an argument that will persuade the court to interpret the agreement in a way that is favourable to counsel, and
- d. Rely on the fact that it is rare for counsel's fees to be challenged on the grounds of a defective retainer.

The flowcharts and sub-flowcharts

This part contains the decision flowcharts mentioned in the guidance.

89. The flowcharts are as follows:

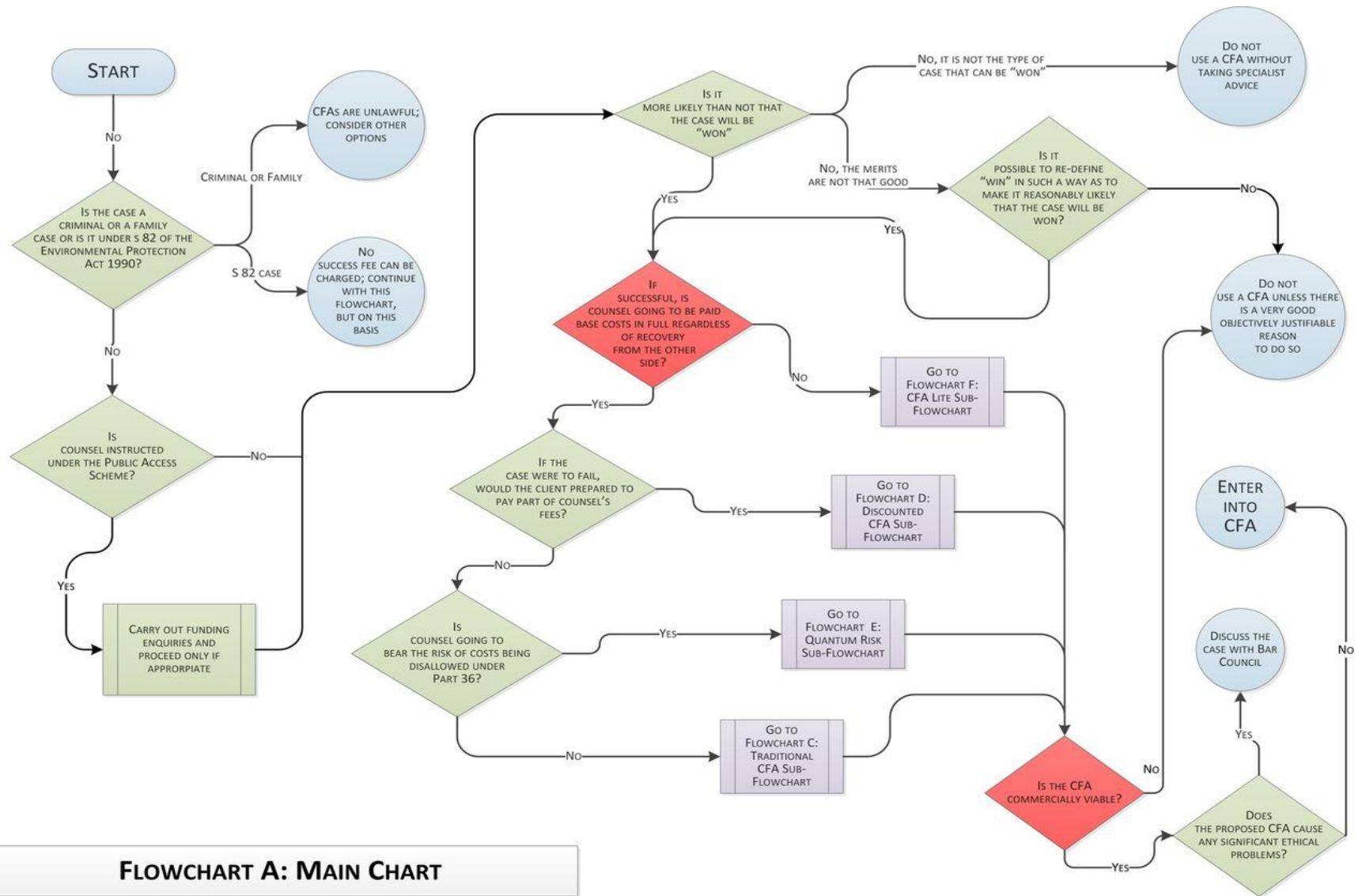
- a. Main Chart
- b. Selecting the type of CFA to use
- c. Traditional CFA Sub-Flowchart
- d. Discounted CFA Sub-Flowchart
- e. CFA Lite Sub-Flowchart
- f. DBA Sub-Flowchart, and
- g. Quantum risk Sub-Flowchart.

90. All the flowcharts are available in a separate document³⁷.

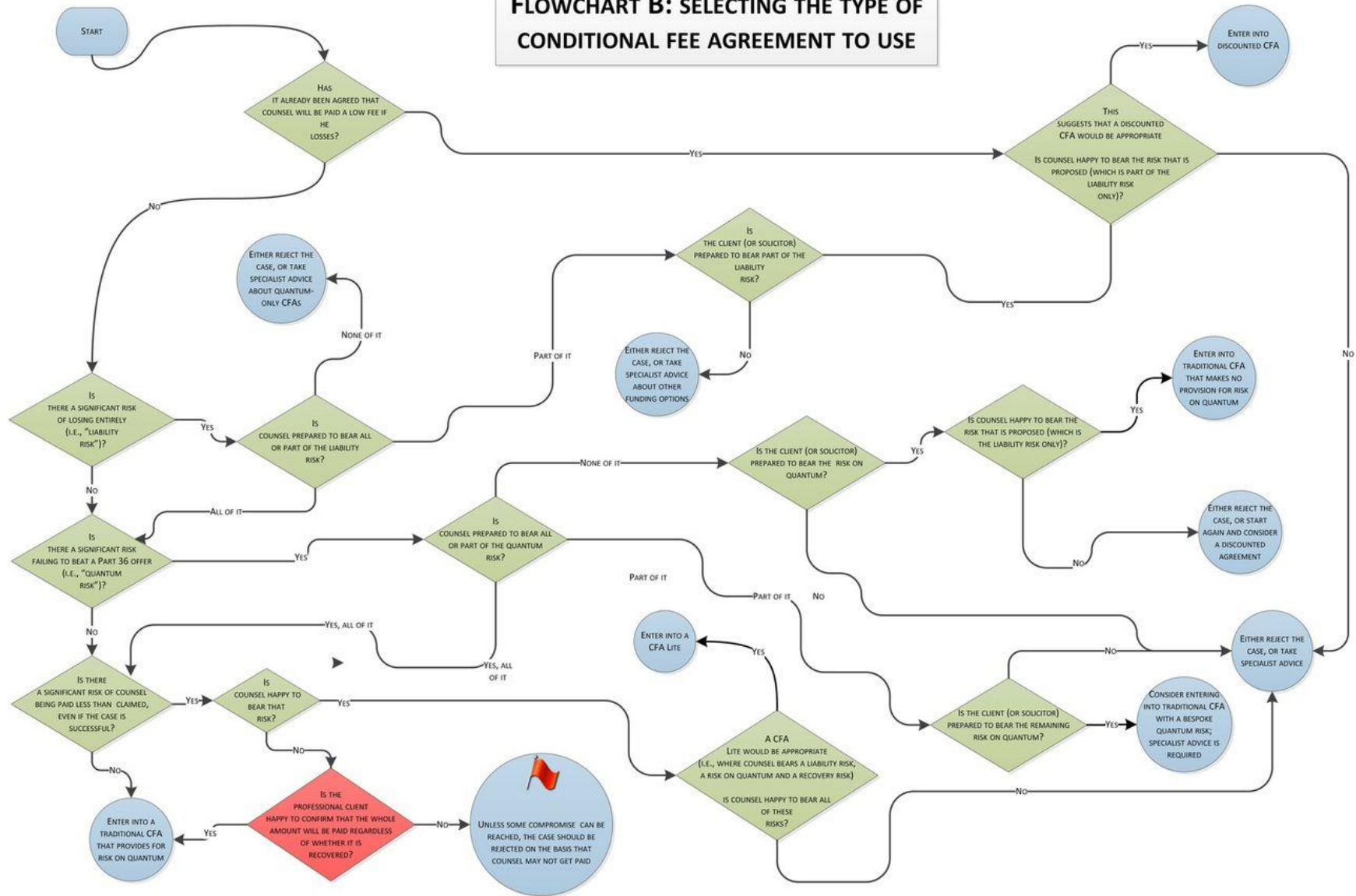
NOTE: Red Flags in the flowcharts warn of a particular danger and red diamonds indicate troublesome issues.

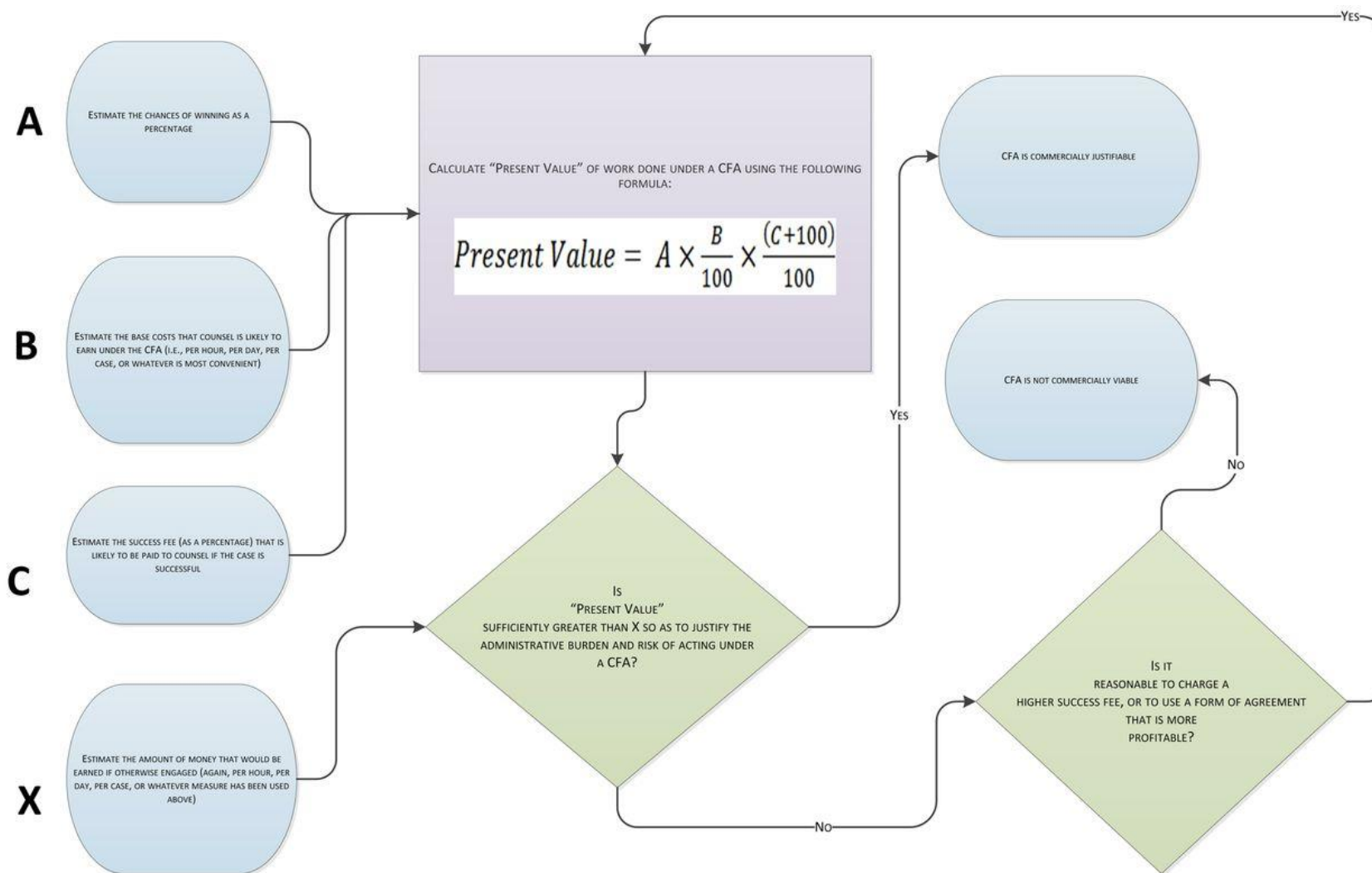
³⁷ See *Privately Funded Civil Litigation: The Flowcharts*

<http://www.barcouncilethics.co.uk/documents/privately-funded-civil-litigation/>

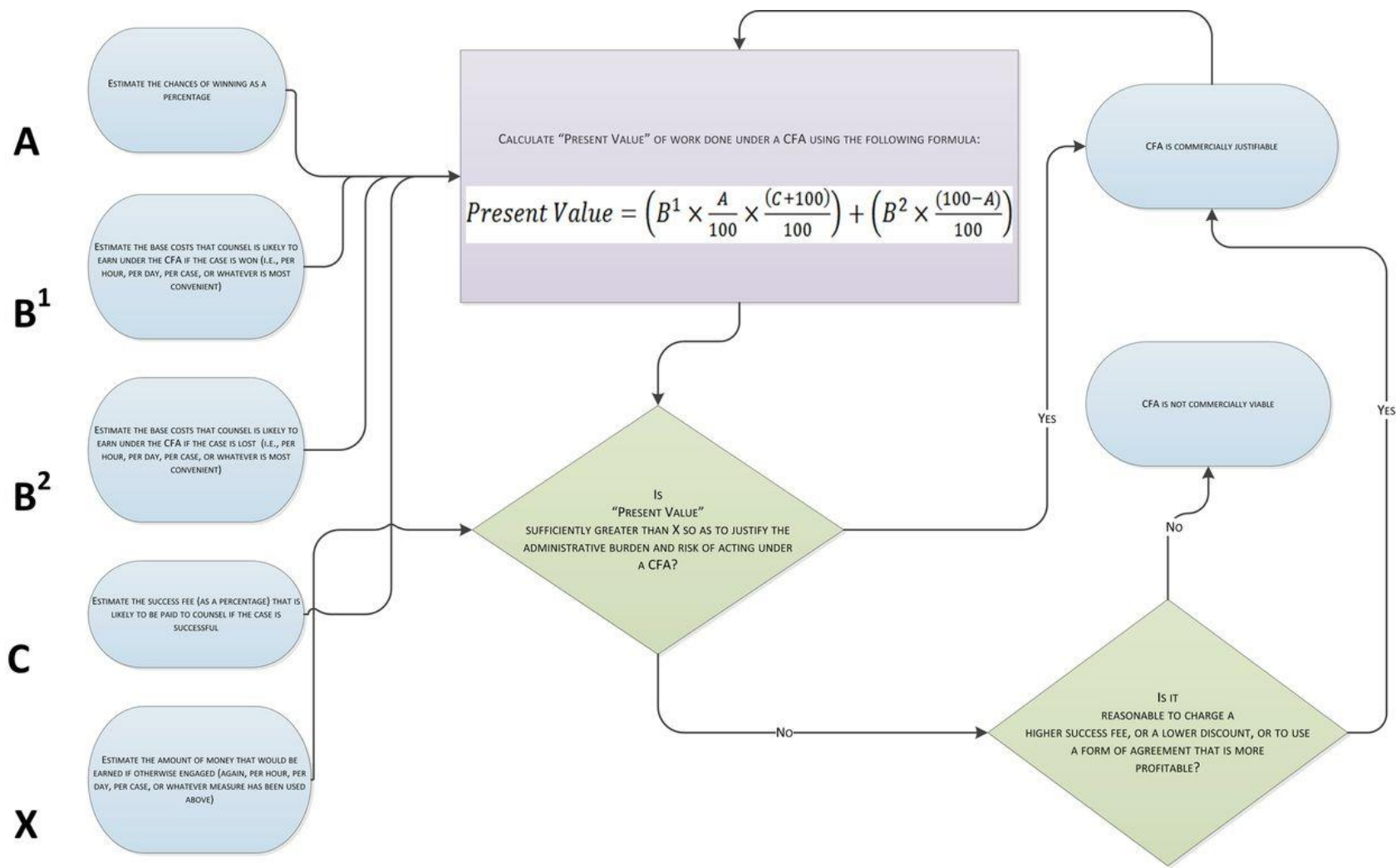


FLOWCHART B: SELECTING THE TYPE OF CONDITIONAL FEE AGREEMENT TO USE

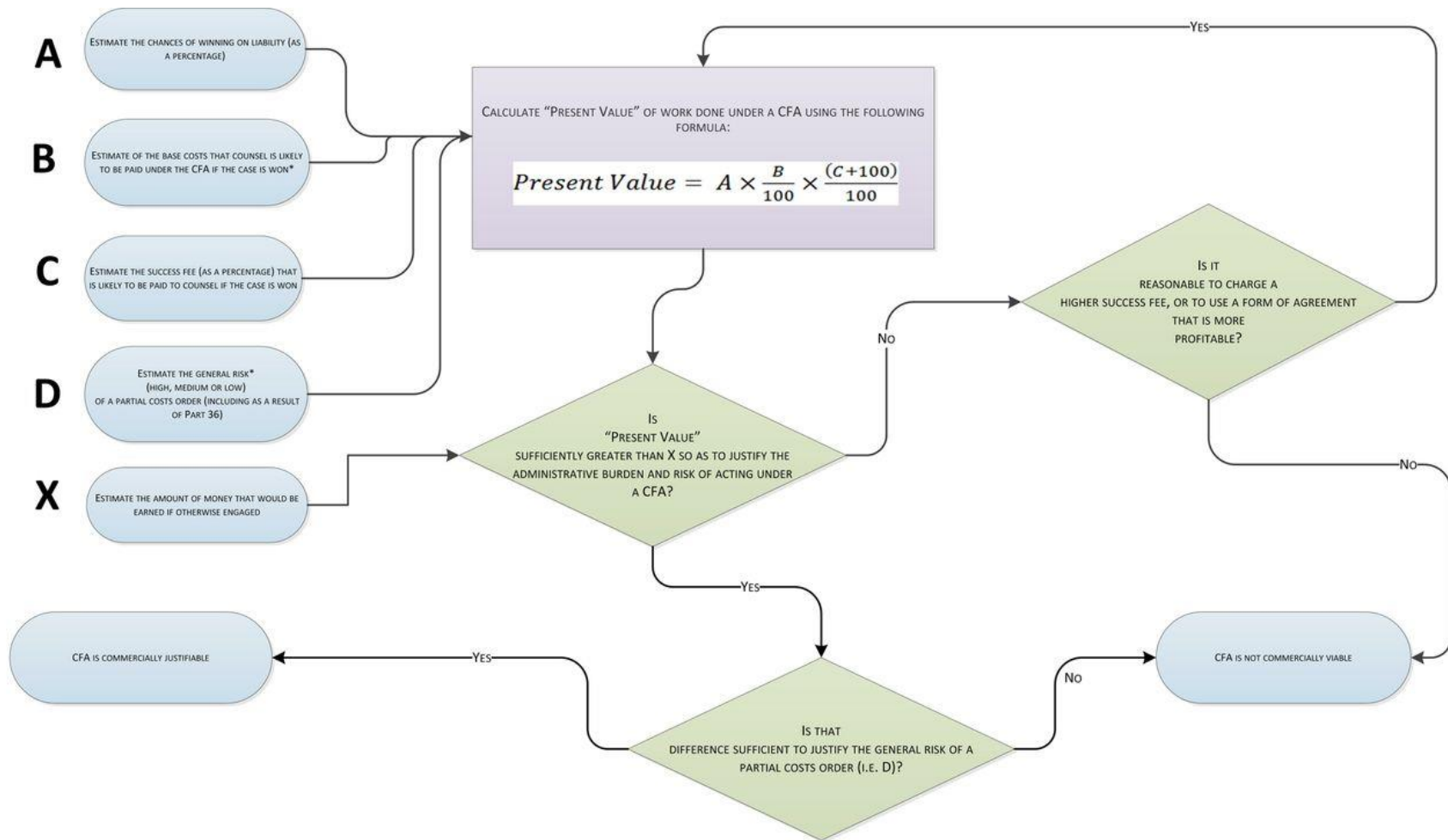




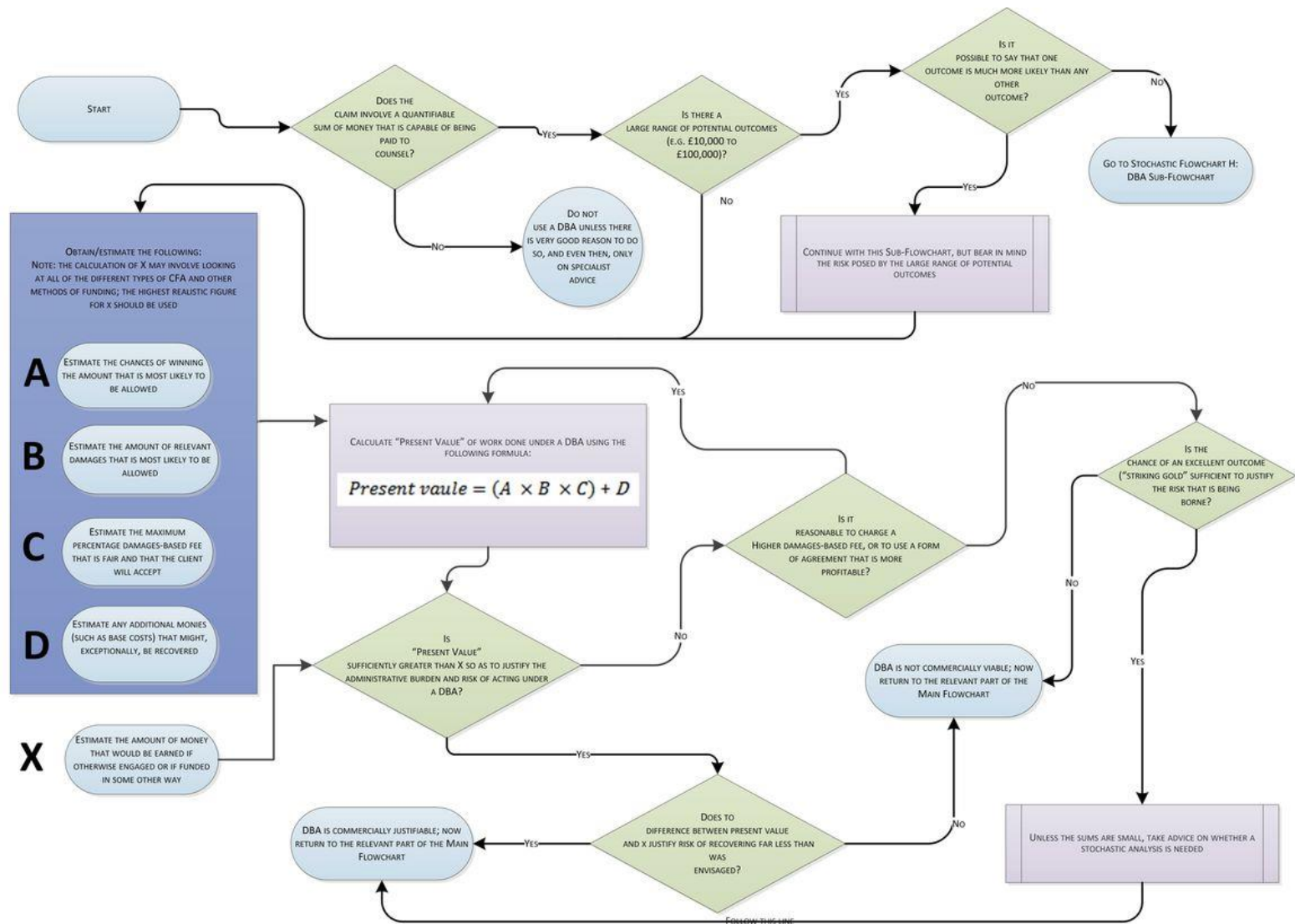
**FLOWCHART C: TRADITIONAL CFA SUB-
FLOWCHART**



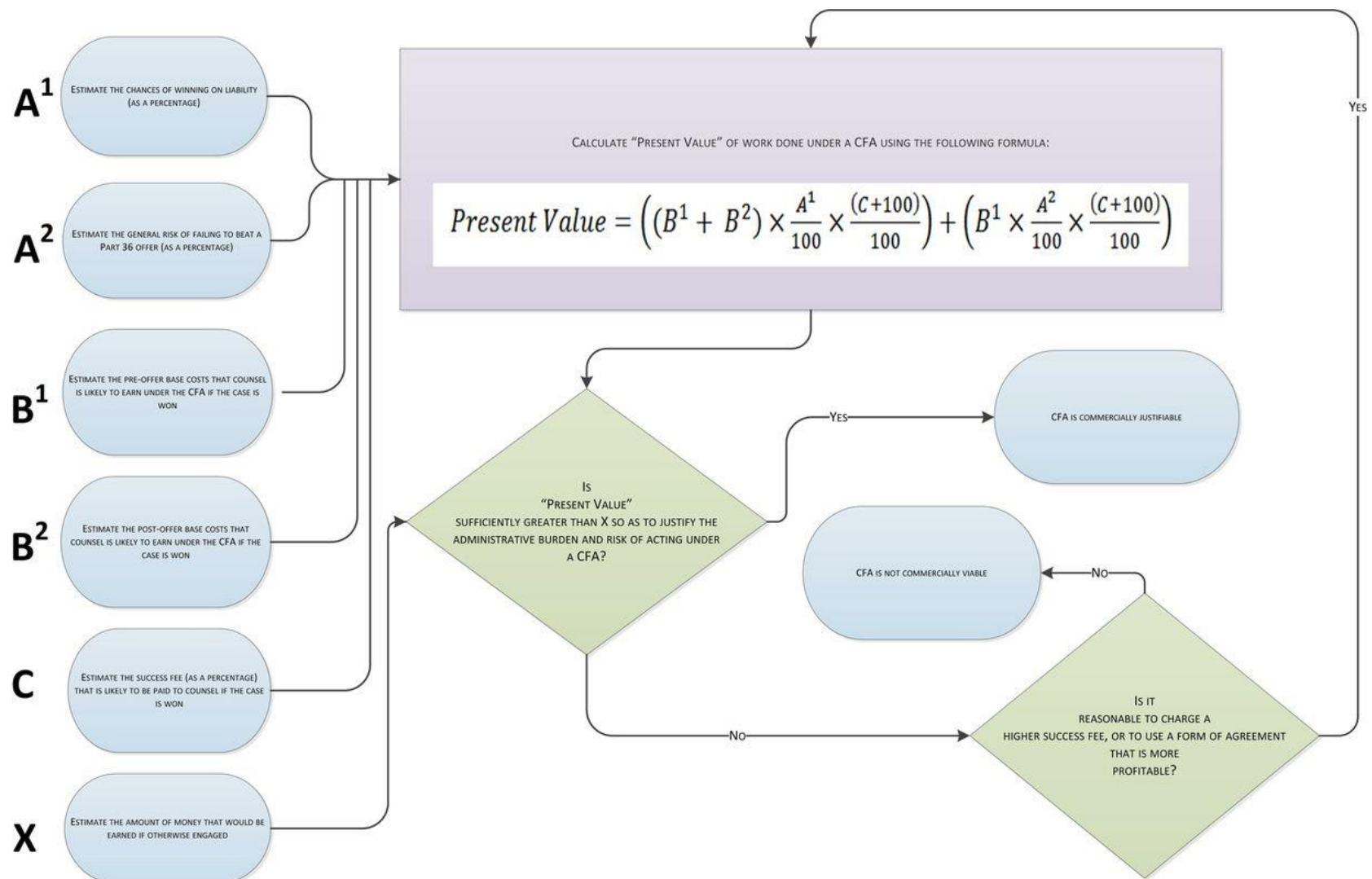
FLOWCHART D: DISCOUNTED CFA SUB-FLOWCHART



FLOWCHART E: CFA LITE SUB-FLOWCHART



FLOWCHART F: DBA SUB-FLOWCHART



FLOWCHART G: QUANTUM RISK SUB-FLOWCHART

Annex 1: Full advice on funding

1. Where counsel is primarily responsible for giving advice about funding directly, then it will usually be the case that **counsel funding** and **case funding** will be very similar. The following issues might need to be addressed.

Funding enquiries

2. The starting point would be to make funding enquiries (which are those enquiries that are made of or on behalf of the lay client for the purposes of deciding how the case is to be funded). They are intended to find out whether the lay client is able to use any of the following:

- a. Before the event (BTE) insurance (also known as “legal expenses insurance”)
- b. Legal assistance funded by a trades union or other similar body, and
- c. Civil legal aid.

3. Where counsel has not been instructed by a solicitor (or by another lawyer who is under a comparable duty to carry out funding enquiries), then it may be appropriate directly to ask the lay client whether any of these forms of funding exist. If they do exist, it would usually be appropriate to ask the lay client to produce the relevant documents for inspection, if the client agrees, by counsel. It is worth considering whether a charge should be made for this service and in any event how much time is required as part of the engagement of counsel (or considering whether to engage counsel). Any time spent on this topic needs to be factored in, especially if there is an urgency to the case.

4. In general terms, the following enquiries ought to be borne in mind:

- a. If it exists, the lay client may be asked to produce any legal expenses policy (also known as a ‘before the event policy’).
- b. In view of the fact that legal expenses policies are usually incorporated into other contracts of insurance, it may be appropriate to ask to see those other policies; home contents insurance, buildings insurance and motor insurance often contain legal expense insurance.
- c. If a legal expenses policy does exist, then it would be appropriate to form a view as to whether it is suitable for the matter in hand. Factors that may be relevant include:
 - i. The limit of insurance as compared to the likely cost of the claim (on both sides, where that is relevant);

- ii. The stage reached in the litigation (this being relevant because the right to choose a lawyer generally applies only after proceedings have been issued);
 - iii. Whether it is in the lay client's best interests to use a "panel" firm and whether the lay client reasonably objects to doing that;
 - iv. The limit on the hourly rate for "off panel" firms (if any) and whether this would realistically be sufficient to purchase the relevant legal services; and
 - v. Whether the insurance is for both sides' costs or only for an opponent's costs;
- d. If the legal expenses insurance is not suitable, then it may be worth making enquires of the insurer as to whether it is prepared to fund the matter notwithstanding the strict terms of the policy.
- i. It may also be appropriate to ask whether the lay client is or was previously a member of any trades union or professional (not regulatory) body; if so, it may be helpful to make enquiries as to whether that body or union provides suitable funding.
 - ii. The task of examining the policies is, in general, not a job for the lay client to do themselves. In particular, if comparison with the duties owed by solicitors is any guide, it would not be appropriate routinely to ask the lay client whether they have insurance that could be used for covering the claim in question. The better approach would be to ask them to produce all of the potentially relevant policies themselves. It is normally fairly easy to determine whether a policy contains legal expenses insurance as it is regulatory requirement to set it out in a separate section. Nonetheless, if counsel feels that considering the terms of the policy is something that requires advice from someone specialised in such matters, they should inform the client who should have the choice whether to seek separate specific advice on the scope of any insurance cover. Any such advice will have to be the subject-matter of separate instructions from the client.

The lay client should be told of all the potentially available funding options, including those that may be available if the lay client were to instruct someone else. If counsel reasonably believes that a funding option is, in practice, not going to be available, then there is no need to mention it. The lay client must be given clear and focussed advice and should not be overburdened with irrelevant information.

- e. If counsel believes that the lay client's best interests would be served by a method of funding that is different to that which their client proposed and if counsel is prepared to accept that method of funding, then it should be offered; if counsel is

not prepared to accept that method of funding, then they should explain that that is the case and that other lawyers may be willing to provide legal services on terms that are more favourable to the lay client. If counsel reasonably believes that that option is, in reality, not going to be available, then there is no need to mention it.

- f. Having identified all the funding options (including those that might be offered by other lawyers), counsel should explain the differences between them, including their most important pros and cons. Counsel should, in addition, make a recommendation as to which method of funding is best; if counsel is not prepared to act under those terms, then they should explain why. Counsel is under no duty to offer only the best method of funding but is under a duty to give best advice about funding.
- g. Counsel should explain the terms of the proposed agreement and (in general terms) its effect; the amount of information should meet the lay client's reasonable needs and should be proportionate to the matter in hand.
- h. Counsel should consider whether the lay client is at risk of being ordered to pay the other side's costs; if there is a significant risk of this, then counsel should consider how that risk could be minimised (such as by making tactical offers) or managed (such as by purchasing after the event insurance). If the lay client is at risk of paying costs in certain circumstances (such as if they behave unreasonably), then counsel should state what those circumstances are.
- i. Counsel should then provide their best estimate of the total costs of the matter (or, if appropriate, part of the matter) both in terms of their own fees, the lay client's own costs generally and the other side's costs generally. Counsel should then explain what is likely to happen in the event of the lay client winning, losing and (if appropriate) winning only part of the matter. The lay client should be told what their net liability or benefit is, this being the total that the client will actually pay or receive once all counterclaims, costs orders, fees, disbursements, etc, have been taken into account. That figure (which may be qualified in appropriate circumstances) should be given for: (1) the worst case scenario assuming that there is no dishonesty or unreasonable conduct, and (2) the most likely outcome. Unless it is inappropriate to do so, counsel should provide their best estimate of the chances of success.
- j. Counsel should express a view in clear and reasoned terms as to whether the likely benefit to the lay client of continuing with the matter justifies the costs. If the costs are likely to be disproportionate, counsel should state that fact and should explain what the effect of such a finding is likely to be.



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