Guidance Note

Contingency retainers

Conditional Fee Agreements and Damages Based Agreements

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Costs Lawyer Standards Board

This guidance note is intended to help Costs Lawyers understand their obligations and options in relation to making Conditional Fee Agreements (CFAs) and Damages Based Agreements (DBAs) with clients when dealing with contentious work.

Context

1. CFAs and DBAs are forms of contingency agreement entered into between a lawyer and their client. Under a contingency agreement, the amount you are paid for your professional services depends on a stated outcome; usually a "win" in a contentious matter, as defined in the agreement.

2. The main difference between a CFA and a DBA is the method by which remuneration is calculated once the "win" is triggered. In general, under a CFA you would be remunerated by way of a fixed fee or hourly rate multiplied by the number of hours worked, whereas a DBA provides for remuneration as a percentage of a financial benefit secured by the client.

3. Historically, all forms of contingency fee retainers in contentious litigation were considered unlawful, based largely on an outdated belief that such a stake in the affairs of others was immoral. This is no longer the case.

4. We are conscious that many Costs Lawyers will have a detailed understanding of the legal requirements for CFAs and DBAs, and will have advised on costs matters that relate to contingency agreements. This guidance note focuses on situations in which you might enter into a CFA or DBA with your own client, including factors you should think about when doing so.

Legal framework

5. Statutory provision for lawful CFAs was first made by the insertion of section 58 of the Courts and Legal Services Act 1990 (CLSA 1990). DBAs for employment claims followed in 2009 with section 154 of the Coroners and Justice Act 2009 inserting a new section 58AA into the CLSA 1990. DBAs for wider civil litigation were permitted from 1 April 2013 with section 45 of the Legal Aid Sentencing and

Punishment of Offenders Act 2012 (LASPO) amending section 58AA of the CLSA 1990.

6. You should consider the relevant sections of the above legislation, together with The Damages Based Agreements Regulations 2013 (SI/2013/609) if relevant, before entering into a CFA or DBA with a client.

7. It is important to note that the legal framework is only concerned with contentious matters (and employment law cases). Non-contentious business agreements are outside the scope of this framework.

Legal requirements

8. There are some types of claims in relation to which a CFA or DBA retainer cannot lawfully be used. These mainly relate to family and criminal matters.

9. The CLSA 1990 also contains requirements as to the form and substance of contingency retainers. For example, they must be made in writing. See sections 58 to 58AA of the CLSA 1990 in the first instance.

10. There are additional formal requirements for DBAs in Regulation 3 of The Damages Based Agreements Regulations 2013.

What is a CFA?

11. Section 58(2) of the CLSA 1990 defines a CFA as: "an agreement with a person providing advocacy or litigation services which provides for his [or her] fees and expenses, or any part of them, to be payable only in specified circumstances".

12. Broadly, this means that a retainer will be a CFA if it provides for different sums (fees and/or disbursements) to be paid for different outcomes.

13. In addition, upon a "win", a CFA may provide for an "uplift" or "success fee" over and above the basic level of remuneration. The success fee is usually a percentage

of the base fee rate and is intended to reflect the risk that you would be wholly or partly unremunerated in the event of a "loss".

14. Success fees are subject to a statutory cap of 100% of the base fee rate. That is, you cannot receive more than twice your base fee rate in the event of a "win". Case law suggests that you should take care to ensure that any success fee is set at a percentage that properly reflects the actual risk of being wholly or partly unremunerated (see for example *Herbert v HH Law Ltd* [2019] EWCA Civ 527).

Can a Costs Lawyer enter into a CFA with a client?

15. Yes, so long as the subject matter of the retainer does not render the CFA unlawful (broadly, it must not relate to family or criminal matters).

16. You can enter into a CFA with a lay client or with an instructing legal professional, such as a solicitor.

17. When drafting a CFA, the relevant "outcome" would be a future event ("win", "lose", "more advantageous than a Part 36 offer" etc). Remuneration under the CFA can be by way of a fixed fee or via multiples of a specified hourly rate. The CFA can be drafted as a "discounted CFA" that allows for a full fee in the event of a "win" but a lesser fee in the event of a "lose".

18. As explained below, a CFA is more flexible than a DBA in facilitating "no win no fee" or "no win some fee" arrangements. It is also relevant that under a CFA it is usual for the client to remain liable to pay your professional fees regardless of what they recover from the other side. It is the triggering of the "win" that obliges the client to pay you, not the actual recovery of the sums "won" or associated costs. This is not usually the case for DBAs.

19. If you work in a solicitors' firm, your fees for advising on the costs elements of a contentious matter can be covered by a broader CFA between your firm and the client in relation to the claim. You should ensure that the CFA includes costs work (usually by including a provision in the CFA extending the agreement to

negotiations about, and proceedings to recover, costs) and that any definition of a fee earner includes a Costs Lawyer.

What is a DBA?

20. Section 58AA(3) of the CLSA 1990 defines a DBA as: "an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that (i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and (ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained".

21. Broadly, this means that a retainer will be a DBA if it provides for remuneration by reference to a financial benefit obtained by the client.

22. Regulation 4 of The Damages Based Agreements Regulations 2013 provides that a DBA must not require the client to pay any other fees to their lawyer, except expenses. This means that remuneration under a DBA is intended to be confined only to a percentage of the financial benefit obtained by the client and nothing more.

Can a Costs Lawyer enter into a DBA with a client?

23. Yes, so long as the subject matter of the retainer does not render the DBA unlawful (broadly, it must not relate to family or criminal matters).

24. As for CFAs, you can enter into a DBA with a lay client or with an instructing legal professional, such as a solicitor.

25. When drafting a DBA, the triggering "outcome" will be a future event that involves a specifically identified financial benefit to your client, usually money paid by the losing party.

26. Remuneration would be a percentage of the financial benefit, calculated net of any costs recovered or payable from the other side. Under a DBA costs awarded are credited to the benefit of the client and lower the sum actually deducted from the financial benefit the client obtained.

27. At first instance, the remuneration charged by you under a DBA must not exceed 50% (including VAT) of the relevant financial benefit. There is no equivalent cap in appeals.

28. If the client is unsuccessful then you will not be remunerated.

CFA or DBA?

29. CFAs are well known and, when properly drafted, allow for flexibility as to payment. Generally, DBAs lack that flexibility and a failure to comply with The Damages Based Agreements Regulations 2013 will render the DBA unenforceable.

30. The government periodically reviews this situation and could consider amendments to the Regulations in the future. For now, you should be alive to the fact that the legislative framework governing DBAs is generally considered to be unclear in a number of respects and, while it will be appropriate to use DBAs in some circumstances, there is a risk that they could create uncertainty for you or your client.

31. You can choose whether, as part of your practising arrangements, you offer clients a CFA, DBA or neither. However, in offering any particular fee arrangement, you should consider what is in the best interests of your client and advise them accordingly. If you feel a CFA or DBA is the most appropriate retainer for your client in their individual circumstances, but you do not generally use that type of contingency agreement, you should advise the client of all their options.

Treating your clients fairly

32. As for all other aspects of your work, you should consider your obligations under the CLSB Code of Conduct when advising your clients about potential remuneration structures for your work. The following provisions of the Code of Conduct are of particular relevance:

    1.6 You must not enter into any fee arrangements which are unlawful.

    1.7 You must not act in any way which is likely to diminish the trust the public places in you or in the profession of Costs Lawyers.

    2.1 You must at all times act within the law.

    3 You must act in the best interests of your client.

    3.4 You must advise new clients in writing when instructions are first received of details of your charging structure.

    4.6 You must ensure your client is able to make informed decisions about the work being undertaken on their behalf throughout the lifetime of a matter, including how it will be priced, the costs incurred and the likely overall cost of the matter (including any potential liability for the costs of other parties).

33. In the context of contingency retainers, this means you should:

- not enter into an unlawful CFA or DBA with a client;
- comply with the legal requirements for entering into a CFA or DBA;
- advise a client about their options in relation to entering into a CFA or DBA in sufficient detail to allow them to make an informed decision;
- advise a client to enter into a CFA or DBA only if it is in the client's best interests to do so;
- be alive to and manage the potential for conflicts between your client's interests and your own interests (or your organisation's interests) when advising a client in relation to a CFA or DBA.

34. You should make sure that, before your client signs a CFA or DBA, they understand when they will be liable to pay you and how your remuneration will be calculated.

If you have any doubt about your client's understanding, you should encourage them to seek independent legal advice.

35. In considering whether a CFA is the right arrangement for your client, you should keep in mind that any success fee element of your remuneration in the event of a "win" will not usually be recoverable by your client from their unsuccessful opponent. This means that your client must bear the full cost of the success fee. You should ensure that your client understands the implications of this prior to entering into the CFA, including any cap that applies to the success fee.

36. Where your remuneration includes a success fee element, you should explain how this has been calculated to your client at the outset of the matter. This includes clearly explaining whether the success fee is based on risk, and any other elements that have been factored into the calculation alongside risk. If the success fee is not based on risk, you should explain what it is based on to your client. You should make your client aware that other lawyers might not adopt the same approach and that lower success fees might be available elsewhere so that the client can make an informed choice.

37. Where your arrangement includes a price cap or fixed fee, you should ensure that your client understands what this will cover. If the circumstances of the case change, you should tell your client about what has changed, and the reasons for the change in good time, and explain what impact – if any – this has on your initial agreement.

38. It is good practice to provide cost information in writing, and to keep records of the costs information you provide to clients. This will help to ensure that clients understand how they will be charged at the outset, and can help to avoid disputes over what was discussed later on. It can also help you to show that information was provided to enable clients to make an informed decision. If providing information in writing is not suitable (for example, because your client is unable to read), then you should record the information you provided about costs, including how and when it was provided. It is also good practice to keep records

of payments made to, and received from, clients. See our guidance on dealing with consumers for more details.

39. Finally, you should keep up to date with any legal requirements that might be put in place from time to time in relation to prescribed information that lawyers must provide to their clients before entering into a CFA or DBA.

Further guidance

- The pre-engagement chapter of An ombudsman's view of good costs service, published by the Legal Ombudsman, contains advice on price transparency based on common problems and complaints from consumers. It also sets out how the Legal Ombudsman will approach consumer complaints that relate to costs.
- The CLSB's guidance note on client care letters in the Costs Lawyer Handbook contains further suggestions for presenting information to clients.

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