

GUIDANCE NOTE
DAMAGE BASED AGREEMENTS (DBA)
CONDITIONAL FEE ARRANGEMENTS (CFA) & SUCCESS FEES

Regulator: Costs Lawyer Standards Board

Effective date: 10 July 2013

This guidance note sets out the current position of the Costs Lawyer Standards Board on DBA's, CFA's and Success Fees.

What is a DBA?

A client can choose between a CFA and a DBA. A DBA is an agreement whereby a lawyer is paid so long as the client obtains a specified financial benefit with the lawyer's payment being determined by reference to the amount of that benefit.

Can a Costs Lawyer enter into a DBA?

Section 58AA of the Courts and Legal Services Act 1990 (CLSA) provides for DBA's in employment matters. Section 45(1)-(5) of the Legal Aid, Sentencing & Punishment of Offenders Act 2012 (LASPO) widens the permissibility of DBA's to all matters save those which cannot presently be subject of a CFA.

DBA's in relation to non-contentious business agreements (other than those relating to employment matters) are specifically exempt.

Any sums received "between the parties" by way of costs will be taken into account as part of the total fee the lawyer is allowed to charge the client. In brief, a lawyer will not be allowed to keep costs recovered "between the parties" over and above the contingency fee.

A DBA must be in writing and Costs Lawyers have a duty to provide prescribed information and explain the implications of any DBA to their client (in accordance with the duty to provide an estimate and explain charging structures under Principle 3.4(i) of the Costs Lawyer Code of Conduct).

Section 55AA(4)(b)-(d) of the CLSA as amended by Section 45(6)-(7) of LASPO requires:

- (i) a DBA can only be made after the lawyer has provided prescribed information to the client; and
- (ii) regulations to cap the lawyers remuneration.

There is currently a cap of 35% on a lawyer's fees in employment tribunal cases.

What is a CFA?

A CFA is a type of funding arrangement which may be entered into where the level of fees payable is dependent upon a particular event. A CFA may either provide that fees are only payable if a "successful" outcome is achieved or alternatively that a reduced fee is received if the outcome is "unsuccessful". A CFA may include a "Success Fee", which will involve a percentage "uplift" being added to the fees payable, in circumstances where a successful outcome is achieved.

Can a Costs Lawyer enter into a CFA?

Yes, it is a matter for the Costs Lawyer as to whether they chose to enter into this arrangement. However, a CFA may only be entered into which is dependent upon a particular event which has not yet occurred. In relation to the work of Costs Lawyers, this will normally depend on the outcome of the costs proceedings rather than the proceedings as a whole (depending upon the particular arrangements and whether a Costs Lawyer is instructed internally or is independent and instructed by a Solicitor or directly by an unrepresented client).

A CFA cannot be used in criminal or family proceedings. A CFA must be in writing and Costs Lawyers have a duty to provide prescribed information and explain the implications of any CFA to their client (in accordance with the duty to provide an estimate and explain charging structures under Principle 3.4(i) of the Costs Lawyer Code of Conduct)

In-house Costs Lawyers and CFA's

The work of an in-house Costs Lawyer may be covered by a Solicitor's CFA with a client, which will usually be stated to include negotiations about and/or a court assessment of the costs of a claim. In these circumstances, a Solicitor who is "successful" in a case may recover the reasonable costs of preparing the Bill of Costs and the costs of negotiating the Bill and/or any Detailed Assessment proceedings. As the fees form part of the overall service provided by the firm, the recovery of fees and attachment of any Success Fee will apply to the overall fees.

Independent Costs Lawyers and CFA's

An independent Costs Lawyer will usually be instructed to deal purely with the costs aspect of a case, where costs are awarded, usually at the end of a case. A Costs Lawyer could either be instructed by a Solicitor to deal with the preparation of or opposition to a costs claim or directly by the lay client. Any CFA already entered into between a Solicitor and their client in relation to funding of the original claim (even where this extends to Detailed Assessment proceedings) will not apply to the Costs Lawyer's fees charged to their instructing Solicitor (although the instructing Solicitor would be entitled to recover these base fees and any additional liability from a paying party – see *Crane -v- Canons Leisure Centre* [2007] EWHC Civ 1352). A Costs Lawyer must therefore enter into a separate

agreement with the instructing party (whether Solicitor or client) in relation to payment of their fees and this agreement may be a CFA.

Can a Costs Lawyer receive a Success Fee?

It is not clear whether a Costs Lawyer can receive a Success Fee, as the law links Success Fees to "damages" in proceedings. A Costs Lawyer may act "in-house" under a Solicitor's CFA, which includes a Success Fee where their fees will appear in the Bill of Costs as a Profit Costs item. A Success Fee will not apply in circumstances where the Costs Lawyer's work is claimed "between the parties" as a disbursement. However, an independent Costs Lawyer's fees can be included in a Bill of Costs as a profit costs item (see - *Smith Graham -v- The Lord Chancellor's Department (Regina -v- Carr) High Court of Justice, Queen's Bench Division - 30 July 1999* and *Stringer -v- Copley (2002)*) upon which a Success Fee can be applied in accordance with the terms of the CFA between the Solicitor and their client (see – *Crane* above). This will however be the Solicitors' Success Fee and not belong to the Costs Lawyer. If a Costs Lawyer enters into a CFA including a Success Fee, which relates solely to the provision of costs services, they will need advice on whether such a fee/CFA as a whole would be unenforceable.

In conclusion

It should be noted on reading this guidance note (effective 10 July 2013) that this is a developing area of law with many technical challenges and it is for the Costs Lawyer to establish prevailing law at the time.