

'The report from hell'

by Kerry Underwood

Conditional fees have existed for nearly six years. Not the slightest shred of evidence has been produced to suggest that solicitors are under-settling to ensure a 'win' or concealing documents to ensure a win or indeed doing anything else unethical or not in the clients' interests.

As far as I know there has not been a single solicitor-client taxation/assessment relating to the success fee in conditional fee cases. The Lord Chancellor's Department receives almost no complaints about CFAs. Likewise the Law Society, Members of Parliament, Consumer Groups and the Press. Contrast this with legal aid and hourly rates - almost universally detested by clients (see, for example, 'When lawyers behave like plumbers', *The Times*, 6 March 2001).

Now that the success fee in CFAs is recoverable from, and only from, the other side, any remaining ethical problems have largely disappeared. Although solicitors are allowed to charge the client a success fee element in relation to cash flow, my view is that the market will sort that out and solicitors who seek to charge clients such a sum will not get the business. I would agree with any proposal that prohibited a solicitor from charging any element of the success fee to a client. This would meet the working group's concerns.

Richard Southwell QC, chairman of the working group, is openly hostile to conditional fees. I would make the point that he has no experience in this area, whereas the pre-conditional fee solicitors have all had vast experience of legal aid and private paying clients and can make a meaningful and informed comparison, based on practical experience.

So why didn't the working group actually ask those real solicitors, with real clients, with real cases, to contribute? Why not ask the Law Society and the Lord Chancellor's Department about complaints and ethical considerations relating to other methods of funding? (I appreciate that Michael Napier was involved in the working party discussions at a time when he was president of the Law Society, but he did not lend his name to the final report).

Why not ask the Consumers' Association or the National Consumers Council? Why not ask clients?

Given that CFAs undoubtedly offer the best protection for clients of any funding method, the suggestion that there should be a cooling-off period before a client signs up to a CFA, but not for any other method of funding, verges on the surreal:

'Good morning Mrs. Jones. My rates are £180.00 per hour. Please give me £5,000.00 on account. Sign here', is OK, but:

'Good morning Mrs. Jones. Put your chequebook away. You pay nothing. We will do this on a conditional fee basis', requires a

cooling-off period.

Oh, come on! Are we to have a cooling-off period before anyone is charged on an hourly rate before being drawn into the Byzantine world of the Legal Services Commission, or has counsel instructed on his or her behalf?

The report considers other alternatives, but in my view the fact remains that for very many potential clients there is no realistic financial alternative to a conditional fee agreement. Even under the pre-1 April 2000 regime, where solicitors deducted a success fee (almost always capped at 25 percent) clients realised that 75 percent of damages retained is a whole lot better than 0 percent of damages, or 100 percent of low damages, because they could not afford legal advice as to the correct level of settlement.

The report recommends training in risk assessment for lawyers doing CFA work but not legal aid or hourly rate work. So it is apparently acceptable to run up a huge bill for a client paying by the hour, or to milk public funds, because of a failure to assess risk, but it is not alright on a CFA case where the loser will be the lawyer, who receives no fee. I cannot follow the logic of this.

I was also disturbed to hear at the launch of the report that some people failed to understand the difference between Claims Direct-type schemes and conditional fee arrangements. One member of the working group confused the Claims Direct cases exposed on the BBC Watchdog programme with conditional fee cases!

The Claims Direct-type scheme is the antithesis of conditional fees as the lawyers are paid 'win or lose' and the client pays a massive insurance premium, almost certainly irrecoverable, to ensure that the lawyers are paid win or lose. Lord Phillips of Sudbury, a member of the working party, is a partner in a Claims Direct firm.

In my view this report is a travesty of academic research. It is a bunch of old-fashioned, out of date lawyers clinging on to a system that served lawyers well and clients ill. Those of us committed to access to justice and a court system available to all must be vigilant against any attempt to turn the clock back to the bad old days when the law was a cosy club for lawyers and their well-off clients.

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Kerry Underwood

Underwoods