THE SOCIETY FOR ADVANCED LEGAL STUDIES

ETHICS AND LAWYER FEE ARRANGEMENTS WORKING GROUP

THE ETHICS OF CONDITIONAL FEE ARRANGEMENTS

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SOCIETY OF ADVANCED LEGAL STUDIES

REPORT OF WORKING PARTY ON THE ETHICS OF CONDITIONAL FEE ARRANGEMENTS

Executive Summary

In this Report we consider the ethical implications raised for the legal professions by the advent of conditional fee arrangements. Conditional Fee Arrangements (CFAs) raise inevitable and serious conflicts of interest between clients and lawyers, and between lawyers' financial interests and their duties to the courts. The existence of lawyers' major financial interests in the outcome of cases, as a result of CFAs, will heighten pre-existing tensions in the lawyer-client relationship, and create new conflicts of interest. Furthermore, and crucially, the financial interests of insurance companies, which will now occupy a central role on both sides in legal actions, will have a profound impact on access to justice and the ethics of practice.

The Report is not a challenge to the introduction of CFAs or government policy on access to justice. Rather we examine in the Report areas of sometimes acute ethical difficulty and, where it is possible to do so, suggests what can be done to ameliorate the problems.

In this Report we first explain the policy and statutory framework for CFAs as the context for the Report's proposals (Chapter 2). We then analyse the ethical problems which the introduction of this statutory framework will be likely to create, and we make recommendations for changes to professional codes of conduct, and for training and research, which in our judgment are appropriate to ameliorate the identified ethical problems. We do so in relation to solicitors (Chapter 3), to barristers (Chapter 4), and consider the impact on the judges (Chapter 5).

A full summary of our recommendations is set out in Chapter 6. Our recommendations include:

- The role and conduct of insurance companies in the litigation process should be subjected to research and independent scrutiny.

- Proper training in risk assessment should be given to the legal professions.

- A firm cap of the total costs at a particular percentage of the damages should be applied compulsorily to all but the most exceptional cases (with more consumer protection for dealing with exceptional cases).

- A compulsory "period of contemplation" should be required between the explanation of a draft CFA and the client being asked to sign, except in cases of urgency. The benefit of such a period could be strengthened by

lending the client a video (prepared by the Community Legal Service) explaining the ins and outs of CFAs.

- Normally 'success' and 'win' should be defined (and cap measured) under claimant CFAs in terms of damages recovered, rather than damages awarded, to ensure transparency and fairness to consumers.

- Better rules about how and when lawyers can recover costs from their clients under CFAs should be laid down.

- Requirements should be placed on solicitors and barristers when taking witness statements to give certificates that the statements accurately represent the evidence of the witness/expert.

- It should be a rule of court that no expert or other witness is permitted to be paid on a speculative, contingent or conditional fee basis. A code of guidance will not suffice.

- Any undertaking which impairs the ability of members of the public to gain access to a particular solicitor or solicitors should be submitted to the court for the court's approval at the cost of the party seeking the undertaking. Rules of court governing such applications should emphasise the potential detrimental effect on access to justice and the court's obligations under Article 6 of the ECHR.

- The Law Society's Practice Rules should make clear that a solicitor's duty to their client under Practice Rule 1 puts the solicitor in a situation of conflict with their client if the solicitor is aware that insurance they advise the client to take out is either unnecessary or unnecessarily expensive.

- There should be written into the Bar's Code of Conduct stronger provisions requiring barristers always to act in accordance with their client's interest, and not the personal interests of the barristers. These provisions should be carefully drafted so that they can be used as the basis for charges of professional misconduct if evidence that they have not been complied with is forthcoming.

- Intra-chambers conflict problems should be covered by specific provisions in the Bar's Code of Conduct, and not be left merely to the Ethical Guidance provided by the Bar Council.

- Judges should play their appropriate part in maintaining and raising ethical standards in the legal professions.

SOCIETY OF ADVANCED LEGAL STUDIES

REPORT OF WORKING PARTY ON THE ETHICS OF CONDITIONAL FEE ARRANGEMENTS

1. Chapter 1

1.1. A Working Party was formed in July 1998 under the following terms of reference: "To consider the ethical issues raised for the legal professions by the advent of conditional fee arrangements and large scale block contracting of legal services, both publicly and privately provided, and to make recommendations on any desirable changes to professional rules of conduct." In this first Report we consider the ethical questions arising out of the use of Conditional Fee Arrangements ("CFAs"). Block contracting will be considered in a later Report.

1.2. The members of the Working Party are:

Geoffrey Bindman	Richard Moorhead (Convenor)
Ben Emmerson QC	Richard O'Dair
Max Findlay	Lord Phillips of Sudbury
Matthias Kilian	Professor Avrom Sherr
Professor Jennifer Levin	Dr. Hilary Sommerlad
The Hon. Mr Justice Lightman	Richard Southwell QC (Chairman)
David Mackie QC	Stella Yarrow
Bill Montague	

Further information concerning each of the members of the Working Party is set out in Appendix 1 at page 115.

1.3. The Working Party also received significant assistance from Michael Napier and Fiona Bawdon in relation to, in particular, the workings of the insurance market. Whilst neither Fiona nor Michael were able to agree with all of the Report's conclusions and recommendations, we thank them for their contribution to the Working Party's deliberations.

1.4. The context in which this Report has been prepared is the wide extension of a system involving the use of CFAs to a substantial proportion of the legal services provided to claimants in civil litigation, a development which has been the subject of statutory changes made by the Access to Justice Act 1999 ("the 1999 Act") and secondary legislation under powers contained in the 1999 Act. We make this Report, therefore, at a time of rapid change for the legal professions and the judiciary. The insurance market has been developing rapidly to increase the number of products and, it seems, to increase their cost. Whilst every endeavour has been made to reflect these changes in the approach of the report, new ethical problems will inevitably arise. There has also been a significant growth in the role of claims handlers funding solicitors to take on cases on an insured non-CFA basis. There are ethical questions in relation to these schemes, but they lie beyond the scope of this report.

1.5. During the passage of the 1999 Act through its parliamentary stages it became clear that the increased use of CFAs will inevitably lead to ethical problems for lawyers.

1.6. Proponents of substantial reliance on CFAs to fund claimants' civil claims have argued that:

1.6.1. the change is necessary to reduce the burden of government expenditure on civil legal aid;

1.6.2. the change is anyway desirable because it will shift onto lawyers more of the risk of success or failure of a civil claim, thus reducing the risk of unmeritorious claims being brought;

1.6.3. the benefits of a system of CFAs outweigh the ethical problems which it involves; and most importantly,

1.6.4. the change significantly increases access to justice for middle-income clients who are ineligible for legal aid and are otherwise unable to afford to litigate.

1.7. The opponents of this change argue that, because lawyers will gain from their clients' success, including an uplift in their fees of up to 100% or more, it is inevitable that the lawyers' direct financial interest in their clients' success or failure will involve:

1.7.1. a conflict between the lawyers' own interest and the lawyers' duty to their clients;

1.7.2. a conflict with the overriding duty owed by lawyers to the court, i.e. to the public interest in the administration of justice, and to their professions;

1.7.3. a marked decline in the ethical standards of lawyers in England and Wales, pointing in support of this to the worst practices of lawyers in the USA;

1.7.4. the shifting of greater financial risk onto lawyers and insurers which will compromise access for expensive and/or even marginally risky (but worthy) cases as well as for 'difficult' clients and cases where the lawyer is worried that a client may withdraw and, as a result, encourage 'cherry-picking' of easy cases;

1.7.5. the increased costs of CFA litigation (notably uplifts and insurance premiums) which will have to be borne by the general public through increased insurance premiums;

1.7.6. the system implicitly removing responsibility for access to justice from the state and placing it within the context of lawyers' economic motives and the commercial imperatives of insurance firms;

1.7.7. reduced access to lawyers, through loss of the Bar's "cab-rank" rule, loss of the obligations undertaken by solicitors who sign up to

the Legal Aid scheme, and the absence of any obligation on any lawyer to take on any CFA cases; and

1.7.8. loss of access to lawyers in matters which require any substantial amount of investigation before the chances of success can be evaluated.

1.8. It is no part of the Working Party's terms of reference to reach conclusions as to the overall impact of CFAs on access to justice, or to recommend that the statutory framework in and under the 1999 Act should be changed. The Working Party includes some members who are in favour of the use of CFAs, some who are against such use, and others who have yet to make up their minds for or against the use of CFAs. We proceed in this Report on the footing that the statutory framework will not be changed, and that our task is to consider what are the principal ethical problems which are likely to arise, and how these problems can best be alleviated so as to maintain, so far as practicable, high standards of conduct in the legal professions in England and Wales.

1.9. So the Working Party seeks to fulfil in this Report these three purposes:

- First, to explain the statutory framework as the context for the proposals in this Report;
- Secondly, to identify and analyse the ethical problems which the introduction of this statutory framework will be likely to create;
- And thirdly, to spell out our recommendations for changes to professional codes of conduct and other changes, which in our judgment are appropriate to try to ameliorate the ethical problems and to meet the requirements of the European Convention on Human Rights ("ECHR").

1.10. The introduction of the new statutory framework is related to changes in legal aid. For well over 30 years government-funded legal aid has played a primary role in the provision of legal services in civil litigation for those unable to pay for such services. The part played by civil legal aid has been declining as the

proportion of the population of England and Wales eligible on financial grounds for civil legal aid has decreased significantly. At the same time the net cost to the taxpayer of civil legal aid (i.e. the gross costs less any costs recovered from the losing side and any contributions from assisted persons) has increased. The development of CFAs in civil litigation is intended by the government, at least in theory, to enable (without resource to public funds) a larger proportion of the population to pursue civil claims on a "no win, no fee" basis. The risk to the lawyers of receiving no fee for their work, if the case is lost, is offset by an agreed uplift on the fees received, if the case is won, up to a maximum of a doubling of the normal legal fees. The client's risk of having to pay the costs of the other side if the case is lost is minimised by means of insurance.

1.11. This is a major change in the provision of legal services. It replaces any obligations on the State and the legal profession to ensure representation for meritorious clients, with a system premised on the commercial judgment of insurers and the financial self-interest of the professions. It is not surprising that it will bring new ethical problems for the legal professions, which will have to promote an appropriate climate of ethical conduct on the part of practising lawyers so as to minimise the disadvantages to lay clients. We will be recommending changes in the regulation of the legal professions. But it must be understood that, however strong the regulation of the legal professions may be, the new statutory framework will provide new and greater temptations and inducements to lawyers to allow their own financial interests to prevail over the interests of their clients and their duties to their clients and to the court.

1.12. The shape of this Report is as follows:

- In Chapter 2 the legal background to CFAs is summarised, and lessons are drawn from research, both theoretical and empirical, into the effects of CFAs (or analogous contingency fee arrangements) both here and abroad.

- In Chapters 3, 4 and 5 the ethical problems arising under CFAs for solicitors, barristers and the judiciary are described and analysed.

- In Chapter 6 the conclusions and recommendations of the Working Party are summarised.

1.13. This Report represents the broad consensus of all the members of the Working Party. In the interests of clarity and reasonable brevity we have not set out the differing emphases which different members might give to some of the recommendations. The Chairman wishes to express his considerable debt to each member of the Working Party for their contributions to this Report, but in particular to Richard Moorhead.

1.14. Because solicitors have the first and direct contact with most lay clients, and because the solicitor profession is much larger, it is inevitable that in this Report there is a greater degree of focus on the ethical problems faced by solicitors, than on the ethical problems for barristers. But the problems for barristers are dealt with in some detail with the aim of providing assistance to each of the two main branches of the legal profession.

CHAPTER 2

2. Conditional Fees in England and Wales: Law, Policy and Context

2.1. In this Chapter we consider the legal framework and policy context for CFAs. We begin by summarising the policy thinking which has placed an increasing emphasis on CFAs in the civil justice system. We then set out the common law position, showing the courts' traditional hostility to CFAs (and other types of success fee). We also consider the statutory legitimation of CFAs through the Courts and Legal Services Act 1990 ("the 1990 Act") and the 1999 Act.

2.2. To provide a context for the rest of the report, we discuss in outline the professional ethics and human rights frameworks governing CFAs. We also discuss some research findings relevant to CFAs and ethical issues: in particular, we look at work which provides some understanding of how the market for legal services (and especially those of solicitor firms) and the insurance market are responding, or appear likely to respond, in relation to civil claims for damages or other monetary claims.

2.3. The 1999 Act puts in place a new legislative framework for CFAs (section 27 and onwards). It will enable the court to order a losing party to pay the successful party's CFA uplift and any insurance premium paid by the successful party to insure against being ordered to pay legal costs. The intention is to ensure that the compensation awarded to a successful party is not unduly eroded by any uplift or premium. It also provides a mechanism for regulating the uplifts that solicitors charge unsuccessful litigants, because litigants ordered to pay the other side's costs will be able to challenge uplifts as being unreasonably high when the court comes to assess costs.

2.4. One innovation is the reassertion, in statutory form, of lawyers' ethical duties (in Sections 27 and 28 of the 1990 Act as amended by Section 42 of the 1999 Act). These sections emphasise lawyers' duty to the court to act with independence in the interests of justice, and their duty to comply with the

appropriate rules of professional conduct. The 1999 Act also facilitates the refusal of legal aid for cases where CFAs could be appropriate, something which was previously forbidden by statute.

Policy Framework

2.5. In the White Paper, which foreshadowed the Access to Justice Bill, the Government placed greater emphasis on CFAs in the civil justice system:

> "Where they are allowed, conditional fees have already greatly extended access to justice. With conditional fees, people can take good cases, in the certain knowledge that [they] will not be left out of pocket if they lose (except by the amount of any insurance premium)."[1]

2.6. The LCD summarised the aims which it considered could be met by greater use of CFAs alongside other legal aid and civil reforms, setting out the following arguments:

- The present civil justice system is too complex, takes too long to deal with cases, and is too costly.
- The proportion (and hence the number) of persons entitled to legal aid has gone down, affecting those on modest incomes who are deterred from starting a legal action by the potential costs of litigation.
- The current system does not sufficiently encourage lawyers to weed out weak cases.
- At the same time the cost of the Legal Aid Fund increases.
- CFAs 'work' by providing access to justice to those who are neither eligible for legal aid nor able to afford to litigate at full cost to themselves.

2.7. Accordingly the LCD proposed that the Legal Aid Board should cease to fund claimants who are capable of being funded under CFAs, using the money

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[1] Lord Chancellor's Department (1998), Modernising Justice: The Government's plans for reforming legal services and the courts (hereafter, *the White Paper)*, paragraph 2.43.

which would have been spent on those cases to fund other areas of litigation.[2] This policy is dependent on CFA cases being funded by the litigants' lawyers and/or insurance companies.

The Legal Framework for Success-Based Fee Arrangements (Before Implementation of the 1999 Act)

2.8. The main types of success-based fee arrangements which can be applied to civil cases are:

2.8.1. Conditional Fee Arrangements (CFAs)

2.8.2. Speculative Fee Arrangements; and,

2.8.3. Contingency Fee Arrangements.

2.9. There are variants on each of these three types of arrangement, but the following are the main features:

2.9.1. Under a CFA, a solicitor or barrister acts on the basis that if his client loses the case the solicitor or barrister will be paid nothing. If the client succeeds, the normal fees are paid with the addition of a fee "uplift" agreed in advance and currently required not to exceed 100% of the normal fees. The fee uplift is based on the lawyer's fees, rather than the level of damages. Solicitors have operated a voluntary cap on the fee uplift to no more than 25% of the damages awarded as recommended by the Law Society.[3] CFAs are subject to procedural requirements, and they are lawful in all areas except criminal work, matrimonial disputes and disputes over children.

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[2] "This will allow the Government ultimately to concentrate publicly funded support on legal services towards helping people secure their basic rights such as a decent home, appropriate social security benefits and challenging officialdom through judicial review, and towards assisting cases that raise issues of wider public interest. The present system does not allow the Government to do this. It allows no assessment of the importance of classes of cases or any way of targeting help towards priority needs. The Government simply pays for the amount and type of legal services that lawyers wish to provide." LCD (1998), *op.cit.* paragraph 1.6.

[3] The need for this practice has been reduced (but not eliminated) by the introduction of recoverable success fees under the 1999 Act.

2.9.2. Speculative fees are essentially the same as CFAs but without the uplift on the normal fee. They were reported as a common practice before the legitimation of CFAs. Lawyers are paid their normal fee if they win and nothing (or a lower fee) if they lose. There is no uplift or success fee. They are regarded by some lawyers as an appropriate alternative to CFAs where cases have very strong prospects of success. In the 1999 Act these are treated as a species of CFA.

2.9.3. Contingency fee arrangements operate on the basis that no fee will be charged unless the lawyer wins, with the fee being determined in advance either as a percentage of the damages awarded or recovered, or by reference to a specified sum. These arrangements are common in the USA. Some lawyers in England and Wales operate contingency fee arrangements under 'non-contentious business agreements'.[4] The lawful use of contingency fee arrangements is broadly limited to non-contentious work, pre-litigation negotiation and work in most tribunals, including in particular employment and social security tribunals.

2.10. Under each of these arrangements, unless there is an express term to the contrary, the client remains liable for disbursements, and for fees (other than those of the client's lawyer).

2.11. In this report, we use a number of terms which it may be useful to define now:

2.11.1. "Basic costs" are the solicitors' costs which would ordinarily be charged if the agreement was not a CFA (i.e., the solicitor's normal fee, usually charged on an hourly basis, without any uplift). Basic costs usually do not include disbursements.

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[4] In such an agreement it would be stated that it is entered into on the understanding that the client has not instructed the solicitor to issue proceedings in connection with the claim. If proceedings do need to be commenced the non-contentious business agreement may be abandoned and a CFA entered into instead. See (1999) 2 *Litigation Funding* 13.

2.11.2. "Uplift" is the percentage amount, fixed under a CFA, by which the CFA increases the basic costs. Therefore, as an example, if a CFA has an uplift of 50% and the basic costs are £1,000, the uplift would be £500 (50% of £1,000). There is a statutory limit on the permitted percentage of uplift of 100% which we refer to as the "uplift limit" so as to distinguish it from the cap.

2.11.3. The "cost of borrowing" is that element of the uplift which is not attributable to the risk of losing a case but is attributable to the solicitor or barrister having to fund the case until completion. It is the notional cost of borrowing the amount of the fees earned, and the other costs which are borne or paid upfront, or during the life of the case, by the solicitor or barrister prior to the case's conclusion. This is sometimes referred to as the "cost of work in progress".

2.11.4. The "cap" is a restriction on the amount of uplift which can be charged in the event of a case's successful conclusion. It is usually expressed as a proportion of a damages award. Before success fees became recoverable under the 1999 Act, the Law Society recommended a voluntary cap, for example, encouraging solicitors to limit any uplift to 25% of any damages awarded to a client.

2.11.5. "Disbursements" are any other costs which are chargeable under a CFA other than the solicitor's basic costs and uplift. This might include, for example, accident reports, payments to experts and barristers, or other costs such as court fees and insurance.

2.11.6. "Total cost" is the combined cost under a CFA of basic costs, uplift, and disbursements.

Common Law – Maintenance, Champerty and Third Party Funding

2.12. Historically, lawyers have been prevented from acting on the basis of success fees by case law, statute and Practice Rules. It is well known however that in practice some lawyers have tended to charge a fee if they win and a reduced fee if they lose, at least in special circumstances.

2.13. Traditionally, two common law principles, champerty and maintenance, have rendered success fee arrangements problematic for lawyers. These principles, in a form adapted by the courts to reflect modern circumstances, still apply to success fee arrangements which are not explicitly permitted by the 1990 and 1999 Acts (see below).

Maintenance

2.14. Maintenance occurs where someone, who is not a party to the action and has no interest in it, funds or otherwise supports one of the litigants. Under section 14 of the Criminal Law Act 1967 maintenance ceased to be a crime and a tort, but the Act specifically preserved the common law rule by which an agreement amounting to maintenance was to be treated as contrary to public policy.[5] Lord Denning MR said in *Orme -v- Associated Newspapers* [1980] CA Transcript 809 (the Moonies case):

> "No third person is allowed to support [a litigant] by paying the costs of [his suit] unless he has some legitimate interest sufficient to warrant his interference in it."

2.15. Another effect was that maintenance could be a ground for making an order for costs against a third party funder.[6] This restricted the ability of solicitors to act either conditionally, contingently or for free as they could be regarded as a non-party funder and as a result at risk of paying the other side's costs. The court sometimes found a legitimate interest in a non-party's funding of litigation: e.g. where a party was poor or a family relation[7], or where a trade union supported one of its members.[8] Even so, the existence of a legitimate

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[5] The courts have explained the public policy objection, describing it as "improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse": *Re Trepca Mines* [1963] Ch 199 CA.

[6] *Orme v Associated Newspapers* [1980] CA Transcript 809; *Singh v Observer Ltd* [1989] 2 All ER 751 Macpherson J (see for CA [1989] 3 All ER 777); *McFarlane v EE Caledonia* [1995] 1 WLR 360.

[7] *Neville -v- London "Express" Newspapers Ltd* [1919] A.C. 368 HL.

[8] *Adams v London Improved Motor Coach Builders* [1921] 1 KB 499

interest did not mean that the third party funder necessarily escaped liability to pay costs.[9]

2.16. The risk of costs (and sometimes damages) awards against lawyers operating on conditional funding arrangements significantly restricted the use of any success fee arrangements in England and Wales. With the passage of time the approach softened. The High Court of Australia held in *Clyne –v- New South Wales Bar Association* (1960) 104 CLR 186 at 203 that acting without charge was maintenance but permissible subject to two conditions:

> "One is that he has considered the case and believes that his client has a reasonable cause of action or defence as the case may be. And the other is that he must not in any case bargain with his client for an interest in the subject matter of litigation, or (what is in substance the same thing) for remuneration proportionate to the amount which may be recovered by his client in a proceeding....."

2.17. The cases imposing obligations on a third party funder, including a solicitor who acted without charge or contingently, were not consistent. Decisions turned on their particular facts and causes of action, including whether the solicitor was satisfied that there was a bona fide case, whether the funded party was claimant or defendant, and whether the funder knew the funded party was impecunious. In most of these cases the court emphasised the exceptional nature of an award against a non-party, whilst recognising the power of the courts to make such an award where they found maintenance: *Symphony Group plc -v- Hodgson* [1994] QB 179 CA, and *Aiden Shipping Co Ltd -v- Interbulk Ltd* [1986] AC 965 where the House of Lords held that the general power to award costs in Section 51 of the Supreme Court Act 1981 empowers the court to make costs orders against non-parties.

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[9] "It is perfectly legitimate today for one person to support another in bringing or resisting an action (by paying the costs of it) provided that he has a legitimate and genuine interest in the result of it and the circumstances are such as reasonably to warrant his giving his support... ... provided always that the one who supports the litigation, if it fails, pays the costs of the other side." In *Orme* Lord Denning MR cited his own earlier dicta in *Hill v Archbold* [1968] 1 QB 686 and *Trendtex Trading Corp v Credit Suisse* [1980] QB 629. The last words were suggested by the Court of Appeal in *Taylor v Pace Developments Ltd* [1991] BCC 406, "to be more a statement of universal practice than a binding legal principle, applicable to the exercise of discretion in every case". In this case the court refused to make a sole director and shareholder personally liable for costs when they unsuccessfully defended their company (in liquidation) against court proceedings.

2.18. Concerns that solicitors would have awards made against them for maintenance, particularly those acting pro bono, were resolved in *Tolstoy Miloslavsky -v- Aldington* [1996] 1 WLR 736 CA, where Rose LJ stated, "There is no jurisdiction to make an order for costs against a solicitor solely on the ground he acted without fee."

Champerty

2.19. Champerty occurs where a third party not only supports a litigant *but also takes a share of the damages awarded* or a "division of the spoils": *Giles -v- Thompson* [1994] 1 AC 142 in which the House of Lords laid down the modern approach to questions of maintenance and champerty. Since a solicitor's fee uplift may be paid from the damages his client is awarded (except to the extent to which it is recovered from the defendant), a CFA (and even more a contingency fee arrangement) has the potential to be champertous. In particular, champerty may remain an issue for lawyers utilising success-fee arrangements in an unscrupulous manner.[10]

2.20. Before the Criminal Law Act 1967 champertous agreements were also criminal and tortious. The 1967 Act abolished such liability but preserved the common law rules as to public policy. Historically, the courts have been concerned that champertous agreements may tempt solicitors to inflate their charges, and so champerty has been held to be contrary to public policy and champertous agreements are still void.

2.21. In *Aratra Potato Co Ltd -v- Taylor Johnson Garrett* [1995] 4 All ER 696 Garland J found that it was champertous to agree a differential fee arrangement depending on the outcome of the case. In that instance, the solicitor agreed a 20% reduction in his fee if his client lost. On this basis, a CFA even without a fee uplift could be champertous. In *British Waterways Board -v- Norman* (1993) 26 HLR 232, Tuckey J held that a solicitor could waive his fee if he lost, provided that this was not part of a prior agreement with his client.

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[10] See [1999] 2 Litigation Funding 1.

2.22. Most of these difficulties have now been resolved either by the courts changing the common law or by the statutory change referred to below.

Recent Cases about CFAs

2.23. The Court of Appeal considered the validity of a CFA in *Thai Trading Co (a firm) -v- Taylor and another* [1998] QB 781. In *Thai Trading* the plaintiff had made a CFA with her solicitor, who was also her husband and employer. The CFA was in an area where CFAs were *not* permitted under the statutory regime then in force. The court decided that the solicitor had a legitimate interest in the outcome of the case as the employer and a relative of the litigant. Consequently the CFA did not amount to maintenance. Moreover, the court expressly recognised that solicitors entering into CFAs and performing pro bono work may serve the public interest. This was consistent with the view expressed in *Tolstoy* (see above). In *Thai Trading*, Millett LJ stated that there was a good public policy reason for solicitors to be able to act without charging fees if they lose, and concluded that "it is not improper for a solicitor to agree to act on the basis that he is to be paid his ordinary costs if he wins but not if he loses".

2.24. The agreement in *Thai Trading* did *not* include a success fee. However Millett LJ considered the position if it had. He said that, "[where] the solicitor contracts for a reward over and above his proper fee if he wins, it may well be that the whole retainer is unlawful and the solicitor can recover nothing." He concluded "[there] is nothing unlawful in a solicitor ... agreeing to forgo all or part of his fee if he loses, provided that he does not seek to recover more than his ordinary costs and disbursements if he wins."[11]

2.25. The validity of CFAs in relation to arbitration was considered in *Bevan Ashford -v- Geoff Yeandle (Contractors) Ltd* [1999] Ch. 239. Sir Richard Scott V-C held that arbitration proceedings are not covered by the 1990 Act,

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[11] In *Hughes -v- Kingston upon Hull CC* [1999] QB 1193 the Divisional Court did not follow *Thai Trading* because the Court of Appeal had not been referred to the decision of the House of Lords in *Swain -v- The Law Society* [1983] AC 598. This had held (in a different context) that as the Solicitors Practice Rules had the force of law and had prohibited CFAs, solicitors could not enter into CFAs. The Rules no longer prohibit CFAs and so *Hughes* is not applicable to CFAs entered into after 7th January 1999.

but that, if a CFA (with an uplift of up to 100%) were made in relation to arbitration, in respect of proceedings which if brought in the courts would be "specified proceedings" under the 1990 Act, the CFA would not be contrary to public policy. In *Awwad -v- Geraghty & Co* [2000] 3WLR 1041, [2000] 1 All ER 608 the Court of Appeal in a judgment delivered by Schiemann LJ held that the speculative fee agreement in that case (and hence also CFAs and contingency fee arrangements) was unlawful at common law in the absence of any statutory legitimation. The agreement was to pay the full fee if the client won, and a lower fee if the client lost, the case, and was made before the 1990 Act provisions were brought into force. The judgment is a valuable one because it contains a full summary of the common law position before the statutes made CFAs of particular kinds lawful. *Thai Trading* was disapproved.

Statutory Interventions

2.26. The 1990 Act legalised CFAs in some fields through subsidiary legislation made in 1995: see The Conditional Fee Agreements Order 1995. In 1998 these fields were extended by the Conditional Fee Agreements Order 1998. Further changes are made by the 1999 Act. In this section we describe those changes.

Courts and Legal Services Act 1990

2.27. Section 58 of the 1990 Act provided a statutory basis for parties to litigation to enter into CFAs with their lawyers in "prescribed circumstances". The 1990 Act allowed lawyers to enter into CFAs where they are in writing and in respect of "specified proceedings" only. Section 58(1) defines a CFA as being an agreement in writing between a lawyer and his client which provides that the lawyer's fees and expenses, or any part of them, are to be payable only in specified circumstances. Under Section 58(2) the term "specified proceedings" "means proceedings of a description specified by order made by the Lord Chancellor". The Conditional Fee Agreements Order 1995, made under the 1990 Act, permitted CFAs for a narrow range of specified proceedings. This included claims in respect of death or personal injury, bankruptcy, insolvency or administration and some human rights cases. The

1995 Order limited the allowable uplift to 100% of the solicitor's normal costs.

2.28. The Conditional Fee Agreements Order 1998, which came into force on 30th July 1998, greatly widened the range of proceedings where conditional fee agreements are permissible. Regulations permitted all civil claims other than those prohibited by statute to be conducted under CFAs. The 1990 Act prohibited CFAs for proceedings in relation to crime and under a range of family legislation.[12] The maximum allowable uplift for a CFA was 100% of the solicitor's basic costs. Under the 1990 Act, the uplift (or 'success fee') was not recoverable from the losing party[13] (this has been changed under the 1999 Act).

The Access to Justice Act 1999

2.29. The 1999 Act extends the effect of CFAs still further by substituting a new s.58 in the 1990 Act and adding s.58A and s.58B. The main change is that when a costs order is made it can include "fees payable under a conditional fee agreement which provides for the payment of enhanced fees".[14] Similarly, the insurance premiums paid by successful litigants to cover the risks of litigation under a CFA, may also be recoverable under the 1999 Act.[15] The intention is to ensure that the compensation awarded to a successful party is not unduly eroded by any uplift or premium. (The position is complicated: see para. 2.76 below).

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[12] The Matrimonial Causes Act 1973; The Domestic Violence and Matrimonial Proceedings Act 1976; The Adoption Act 1976; The Domestic Proceedings and Magistrates Court Act 1978; The Matrimonial Homes Act 1983 S.1 (as amended), S.9; Matrimonial and Family Proceedings Act 1984; The Children Act 1989 Pt I, II or IV; and the inherent jurisdiction of the High Court in relation to children.

[13] Section 58(8), 1990 Act.

[14] Section 58A of the 1990 Act as added by s.27 of the 1999 Act.

[15] Section 29 of the 1999 Act.

2.30. Additionally, the 1999 Act provides a mechanism for regulating the uplifts that lawyers charge. Unsuccessful litigants will be able to challenge unreasonably high uplifts when the court comes to assess costs.[16]

2.31. There are also proposals for CFAs to replace legal aid for money claims generally as the CFA market develops. Initially, legal aid for most personal injury claims has been withdrawn, in accordance with the 1999 Act and the Legal Aid Board's Funding Code, from 1st April 2000.[17] The withdrawal of legal aid for such cases involves the assumption that the clients' solicitors will consider it to be in their own interests to fund insurance premiums and other costs under CFAs where the client is unable to pay, except where these are payable at the end of the case. This assumption was much contested during the passage of the Access to Justice Bill. Often solicitors would not consider this to be in their firm's interests, and would not take on the client's case. To counter this problem, 'magic bullet' schemes are being developed which enable insurance premiums to be paid at the end of the case and only in the event of a success for the client.

Conditional Fees and Professional Ethics

2.32. The 1999 Act reasserts in statutory form lawyers' ethical duty to the court to act with independence in the interests of justice, and their duty to comply with the rules of professional conduct of the relevant approved professional body. Under the 1999 Act, Section 42, there is to be inserted into the 1990 Act, after Section 27 (2), a provision imposing these duties on every person who exercises before any court a right of audience granted by an authorised body. Identical duties are to be imposed on every person who exercises in relation to proceedings in any court a right to conduct litigation granted by an authorised body.[18] It is also provided that these duties "shall override any obligation

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[16] Section 28 of the 1999 Act. See also *The Conditional Fee Regulations 2000* (SI 2000/692)

[17] (2000) *Access to Justice Act: The Funding Code* (HMSO).

[18] In the notes for guidance published with the draft Access to Justice Bill by the LCD, the LCD stated that this provision will give statutory force to the existing professional rules. These make it clear that the first duties of advocates and litigators are their duties to the court, to act in the interests of justice and to comply with their professional body's rules of conduct. These duties override any other obligation whether to a client, to an employer or to anyone else. The LCD also stated that the duties will apply notwithstanding any contractual or

which the person may have (otherwise than under the criminal law) if it is inconsistent with them".

2.33. In *Hodgson -v- Imperial Tobacco* [1998] 1 WLR 1056 CA, Lord Woolf MR made some useful observations about the general nature of ethical duties in CFA cases:

> "[E]xcept that a CFA enables solicitors and counsel to enter into an agreement which they would not otherwise be able to make, the existence of a CFA does not alter the relationship between the legal adviser and his client. The solicitor or counsel still owes to the client exactly the same duties that he would owe to the client if he had not entered into a CFA. A solicitor or counsel acting under a CFA remains under the same duty to his client to disregard his own interests in giving advice to the client and in performing his other responsibilities on behalf of the client. This extends to advising the client of what are the consequences to the client of the client entering into a CFA. The lawyer still owes the same duties to the court....
>
> ...the fact that there is a CFA cannot justify the legal adviser coming to any additional or collateral arrangement which would not be permissible if there was not a CFA...The lawyer, as long as he puts aside any consideration of his own interests, is entitled to advise the client about commencing, continuing or compromising proceedings, but the decision must be that of the client and not of the lawyer. The lawyer has however the right, if the need should arise, to cease to act for a client under a CFA in the same way as a lawyer can cease to act in the event of there being a conventional retainer.
>
> There is no reason why the circumstances in which a lawyer, acting under a CFA, can be made personally liable for the costs of a party other than his client should differ from those in which a lawyer who is not acting under a CFA would be so liable .....The existence of a CFA should make a legal adviser's position as a matter of law no worse, so far as being ordered to pay costs is concerned, than it would be if there was no CFA. What we intend to make clear is that lawyers acting under CFAs are at no more risk of paying costs personally than they would be if they were not so acting. In addition whether or not CFAs are properly the subject to professional privilege, they are not normally required to be disclosed".

2.34. The position of solicitors under the Law Society's Code and Practice Rules and that of barristers under the Bar Council's Code of Conduct are considered

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other relationship with the client or employer. The note ends: "The purpose of this clause is to protect the independence of all advocates and litigators."

in some detail in Chapters 3 and 4 below. Here it suffices to note that both solicitors and barristers are entitled under their professional rules to enter into CFAs as permitted under statue or by common law, and that the fact that a CFA has been entered into will have to be disclosed.

Human Rights Law

2.35. As well as the common law and statutory frameworks for CFAs, the Human Rights Act 1998 ("HRA 1998") has incorporated the European Convention on Human Rights ("ECHR") into domestic law from 2 October 2000. Of principal interest are the protections in Article 6(1) of the ECHR:

> "In determination of his civil rights and obligations, or of any criminal charge against him, everyone is entitled to fair and public hearing within a reasonable time by an independent and impartial tribunal established law."

2.36. The application of the ECHR to CFAs and other access to justice issues are the subject of a detailed Appendix II (see pages 119-140 below) written by Ben Emmerson QC.

2.37. ECHR rights, including the right of access to a court, have to be interpreted in a way that makes them "practical and effective".[19] In a civil context, limitations on the rights of access to the court must pursue a legitimate aim and be proportionate to the aim that they pursue.[20] Article 6 arguments concerning the funding of legal representation have generally focused on whether legal aid should be available to enable effective access, rather than on the role of alternative methods of funding.

2.38. There is no reason in principle why a CFA should be incapable of satisfying the requirements of Article 6(1), provided that the litigant can secure the services of a lawyer willing to undertake the case on those terms. It is conceivable that where no such lawyer can be found (e.g. because a case is risky or expensive to investigate), there may be a breach of Article 6 despite

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[19] *Airey v Ireland* 2 EHRR 305, paragraph 24.

[20] *Ashingdane v UK* [1985] 7 EHRR 528

the theoretical availability of CFAs as delivering effective access.[21] It has also been argued that the bar on criminal claims being conducted under CFAs is unlawful, because it prevents effective access for tenants bringing housing disrepair cases or statutory nuisance cases under the Environmental Protection Act 1990.[22]

2.39. These concerns are not directly relevant to the ethical issues considered in this Report. A second aspect of ECHR jurisprudence, more relevant to the ethical issues in this Report, is the "equality of arms" principle.[23] Rather than requiring absolute equality, ECHR jurisprudence requires equality of arms so as to afford an individual "a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent."[24]

2.40. The impact of ECHR law on the ethical issues is difficult to predict. However it is conceivable that there may need to be some match between ethical rules and Article 6 in two ways:

2.40.1. To the extent that ethical rules inhibit the taking of cases under CFAs, such restrictions must be for legitimate reasons and the restrictions must be proportionate. Wider inhibition would risk a breach of Article 6 and the HRA 1998.

2.40.2. To the extent that ethical problems affecting litigation under a CFA inhibit effective access, or render the process so unbalanced that a litigant does not have equality of arms, then Article 6 might impact on how CFAs can lawfully operate. For example, the restrictions placed on lawyers by insurers, or the recovery from the

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[21] See, for example, Rt. Hon. Sir Robert Walker LJ, *Opinion: The Impact of European Standards on the Right to a fair trial in Civil Proceedings in United Kingdom Domestic Law* [1999] EHRLR 4, at pp. 9-10.

[22] See Law Society Gazette, 14/07/99, "Access to Justice Bill could breach ECHR".

[23] See *Neumeister v Austria* 1 EHRR 91 at paragraph 22; *Delcourt v Belgium* 1 EHRR 355; *Borgers v Belgium* 15 EHRR 92 and *Bendenoun v France* 18 EHRR 54.

[24] See, for example, *Kaufman v Belgium* 50 DR 98 at 115

unsuccessful party of large fee uplifts might breach Article 6, though in the absence of any relevant case-law this can be no more than speculation.

The Context for CFAs: Responses of Clients, Lawyers and Insurers to CFAs

2.41. Understanding ethical issues relevant to CFAs requires some understanding of the responses of clients, lawyers and insurers to success-fee based arrangements.

Lessons from Abroad in Relation to CFAs

2.42. Contingency fees have been permissible in the USA for many years, but are controversial, especially in relation to personal injury litigation. There has been considerable lobbying and counter-lobbying for federal and state legislation to "reform" tort law. Furthermore, there is a deep division in the USA between the lawyers who regularly act for plaintiffs and those who regularly act for defendants in personal injury cases. Whilst this adds heat to the debate, much of the American discussion of contingency fees needs to be treated with care.[25] Across Europe there is now a trend towards greater permissibility of conditional and contingency fee agreements.

2.43. It is in the USA that the literature is most developed. The main grounds of attack on contingency fees in the USA are that:

2.43.1. Contingency fee lawyers have exploited the jury and costs system to bring unmeritorious cases by filing claims which defendants cannot afford to defend and are compelled to compromise.

2.43.2. Contingency fee lawyers have exploited clients by charging standard contingency fees (typically 25% and upwards) regardless of the difficulty of the case, and whether the client might be better

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[25] For a balanced account, see Michael Horowitz (1995) *Making Ethics Real, Making Ethics Work: A Proposal For Contingency Fee Reform* (1995) 44 Emory Law Journal 173.

off under an alternative fee arrangement.[26] (Caps are laid down in federal and some state laws, but these tend to lead to the maxima provided for becoming the standard rate.)

2.43.3. Juries, knowing of the fees plaintiffs have to pay their lawyers, have inflated damages awards (inter alia) so as to ensure that plaintiffs are no worse off after paying their lawyers,[27] and consequently American businesses and motorists are labouring under excessive indemnity insurance costs imposed by the tort system.[28]

2.43.4. Risk aversion amongst lawyers can lead to lawyers not taking on cases or under-settling as the lawyer's gains from proceeding in a case become increasingly marginal to the effort put in by the lawyer.[29]

2.43.5. Contingency fees create a conflict of interest between lawyer and client which is not inhibited by professional ethics or reputation.[30]

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[26] Lester Brickman *Contingent Fees without Contingencies: Hamlet without the Prince of Denmark* (1989) 37 UCLA Law Review 29, 48-49.

[27] John G. Fleming *The Contingent Fee and Its Effect on American Tort Law* (London, Butterworths, 1988).

[28] For two sides of the debate, see M. Galanter (1986) *The day after the Litigation Explosion* (1986) 46 Maryland LR 3, and R.L. Nelson *Ideology, Scholarship and Sociological Change: Lesson from Galanter and the 'Litigation Crisis'* (1988) Law and Society Rev. 677. In 1986 the Rand Corporation's Institute for Civil Justice, based in California, produced a Report no. R-3391-ICJ entitled "Costs and Compensation paid in Tort Litigation". The aim in this Report was to assess how much the current system of compensating people for injury cost, and how much of the money spent ultimately reached the pockets of the injured parties. The Report covered the whole of the USA. The overall conclusions were summarised in this paragraph:

> "This report presents the overall annual costs of the tort litigation systems in 1985, the components of those costs, and the compensation awarded. It shows that about 37 percent of the costs of resolving such lawsuits was spent on the legal fees and expenses of both sides. Another 15 percent was attributable to the value of the time that plaintiffs and defendants spent on litigation and that insurers spent on processing underlying claims. A scant 2 percent was used to defray the costs of the courts. Thus when all these transaction costs were paid, plaintiffs retained about 46 percent of every dollar spent to compensate them for their injuries."

[29] T. Thomason (1991) *Are Attorneys paid what they're worth? Contingent Fees and the Settlement Process* (1991) 20 Journal of Legal Studies 187. Thomason tested a theoretical model on over 35,000 workers compensation board claims.

[30] Thomason (1991), *op.cit.*, p.222. Interestingly, the fee-arrangements which Thomason studies are not 'pure' contingency fee arrangements: they include regulated contingent fees, and a mixed contingent fee and hourly rate approach which may be close to a conditional fee type model.

2.44. The contrary school of thought points out (inter alia) that: [31]

2.44.1. Contingency fees enable plaintiffs to transfer to their lawyers the risk of wasted legal fees should the suit fail, and the large sums recovered by lawyers in the event of success act as a kind of insurance premium for bearing the risk of defeat.

2.44.2. As a result, the plaintiff's bargaining position in settlement negotiation is significantly improved.

2.44.3. It is argued that (contrary to para. 2.43.4) contingency fees provide an incentive for lawyers to maximize recovery on behalf of their clients.

2.44.4. Access to justice is thus provided for those who would otherwise lack access.

2.45. Whilst there are significant lessons to be learnt from American problems with contingency fees, it is important to emphasise some of the differences from the approach being adopted in England and Wales.

The Position in England and Wales

2.46. The main difference between the success-fee based arrangements permitted in England and Wales and in other jurisdictions (the USA in particular) is that contingency fees are barred to English lawyers, except under non-contentious business arrangements (see paragraph 2.9.3 above). Even where the damages claimed are large, success fees are related directly to the basic costs of the lawyer for that case, and cannot normally exceed a doubling (100%) of those costs. On the other hand when the damages claimed are small relative to the potential legal costs, a doubling of the costs could result in an unacceptably high proportion of the damages being eaten up in costs. But a voluntary cap of total fees is desirable in cases where the success fee is not recovered.

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[31] Luban *Speculating on Justice: The Ethics and Jurisprudence of Contingency Fees,* in Sampford and Parker (eds), *Legal Ethics and Legal Practice: Contemporary Issues* (Clarendon, Oxford, 1995) at pp.108-11, and DRF O'Dair *Legal Ethics and Legal Aid - the Great Divorce,* 53 Current Legal Problems 1999.

However, under the CFA Regulations, success fees should normally be recovered from an opponent, thus protecting the damages awarded.

2.47. The economic incentives provided by CFAs are different from those provided by contingency fees. Unlike contingency fees, CFAs may not assist lawyers in building up 'war chests' on the back of big cases, from which to fund the rest of their caseload. CFAs may also be less open to extreme examples of exploitation. The intensity of the ethical concerns associated with contingency fees may thus be lower with CFAs.

2.48. Another point is that, in contrast to the USA, in England and Wales the losing party ordinarily pays the winning party's costs. This has meant that, even where clients are able to pursue a case under a CFA, they face a substantial risk of having to pay the opponent's legal costs. Whilst even expensive cases have been run without the protection of insurance, for most clients insurance has to be regarded as a necessity.[32] A further complication is that until now the losing party could not be ordered to pay more in costs than the winning party is contractually obliged to pay their solicitor: this is sometimes referred to as "the Indemnity Principle" in the assessment of payable costs. Pursuant to section 31 of the 1999 Act the government now proposes to do away with the Indemnity Principle by a change in the Civil Practice Rules: see the Government's response of September 2000 following consultation on Collective Conditional Fees.

2.49. The concern about unmeritorious and inflated claims is less applicable in England and Wales, partly because of the above two points, and partly because of the absence of jury trial. Further, insurers will perform a gate-keeping role by vetting cases and ensuring that solicitors' firms have high success rates for

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[32] A recent case taken against tobacco companies by two firms of solicitors was withdrawn, with one of those firms reported as losing £2.5 million. The clients were not made subject to a costs order for the defendants' costs (estimated to be £7 million) on the basis that both firms agreed not to pursue those defendants for ten years or to pursue any smoking-related claims for five years (1999) 2 Litigation Funding 7). Settlement on these terms was forced on the claimants because they could not bear the risks of a costs order in the absence of insurance. A barrister could not enter into any such agreement because of the "cab-rank rule" which applied to barristers, but not to solicitors. The Law Society advised that this agreement was not contrary to Solicitors' Practice Rule 1 and the Court approved the agreement. As the cab-rank rule will not apply to CFA-funded cases, a barrister could now enter into such an agreement: see paragraph 4.4.3 below.

the cases that they take under insured CFAs. This may significantly reduce the number of weak or unmeritorious claims but may also exclude many valid ones.

2.50. Section 58(6) of the 1990 Act (as substituted by section 27(1) of the 1999 Act) and section 29 of the 1999 Act provide for defendants to be made liable for uplifts and insurance premiums payable by successful claimants. This will bring about a shifting of the uplifted fee from plaintiff to defendant (analogous to that carried out de facto in the USA by juries) which may increase overcharging of fees (and insurance premiums). The relative lack of sophistication of CFA-funded claimants (as compared with corporate clients) gives ground for concern that the overcharging alleged in the USA might be a problem in England and Wales also. If overcharging does occur, however, defendants can be expected to challenge uplifts on the final assessment of costs as a result of the provisions of the new s.58(6) (see para. 2.76.5).

2.51. Another important point is that CFAs are a comparatively recent addition to most solicitor firms' ranges of fee-arrangements, and to insurers' portfolios. CFAs have only been permissible since 1995. CFAs are a new approach, dependent on a new insurance market. The learning curve of the profession and insurers was steepened by the indications that legal aid would be removed from cases in which a CFA is permissible which were first given in the autumn of 1997, and which are now being worked through under the 1999 Act and the Legal Aid Board's Funding Code. The emergence of an insurance market, with its commercial imperatives, will govern the availability of CFAs, and also will affect the behaviour of lawyers. These commercial pressures will present a significant ethical challenge to the professions. In particular, the need for lawyers to manage risk may mean that the American concern about under-settling becomes a significant concern also under the English system. There is no mechanism under the 1999 Act to deal with the problem of under-settling (the court would have a role in assessing the level of settlements only where the litigant is a minor or under a disability). The economic incentives of CFAs present a significant ethical challenge to lawyers for that reason also.

Economic Incentives

2.52. It is important to consider what economic incentives are offered to solicitors and barristers by CFA-funded litigation, whether generally or in particular cases, and to identify those features of CFA-funded litigation which create an incentive for lawyers to breach their ethical duties either to the client or to the court. This is important, not least because:

2.52.1. Whilst many lawyers will act ethically regardless of the incentives on offer, some will not.

2.52.2. The ethically aware lawyer can benefit from an understanding of the temptations offered by the CFA system.

2.52.3. Those charged with regulating the professions will need to make rules of conduct in order to mitigate incentives for unethical behaviour which would otherwise be created by the use of CFAs.

2.52.4. In certain circumstances, CFAs can lead to perverse incentives whereby a CFA acts as a barrier to settlement or even causes it to be more in the client's interests to lose, than to win narrowly. More pervasively, the incentives are likely to lead towards undersettling.

2.53. All fee arrangements (and not only CFAs) create financial pressures on lawyers that may also lead to situations of conflict. Hourly-paid lawyers may be tempted to "churn" in order to inflate their client's bills; and the desire to retain the custom of substantial clients may tempt an hourly-paid lawyer to breach a duty owed to the court.

2.54. Consequently, it is not enough to establish that undesirable incentives are capable of arising under CFA-funded litigation. Some assessment of their prevalence and significance must be made in comparison with alternative fee arrangements, and weighed against the potential benefits offered by CFAs as a means of ensuring access to justice.

2.55. The incentives generated by CFAs will vary according to the facts of cases and the circumstances of lawyers and their clients (including their attitudes to

risk). The economic incentives of CFAs can be 'double-edged', and as a result difficult to evaluate. At one level, by giving a lawyer a financial interest in the case, a CFA may concentrate the lawyer's mind on the question of whether to proceed in his own and the client's interests. Where a lawyer hesitates over whether to settle because fees are at risk, then it may not be in the client's interests to proceed. If the lawyer is happy to go ahead and risk not being paid, this may be one indication (to the client and the court) that the case is worthy of a hearing.

2.56. However, CFAs may also create significant adverse incentives. Consider the case where, just before trial (when most of the preparatory work has been done), the defendant makes a low offer. At that point

2.56.1. The claimant's interest may lie in rejecting the offer (not least if he is insured against the defendant's costs if he loses); but

2.56.2. The lawyer's interest on the other hand may lie in accepting the offer (so that the lawyer is sure that their fees and uplift will be paid); and

2.56.3. The insurer's interest may also lie in accepting the offer (so that it does not have to pay if the claimant loses).

2.57. A problem here is that under a conditional (as opposed to a contingency) fee arrangement, the lawyer's recovery is not strictly dependent on how much the client receives from settlement, although the operation of a voluntary cap on the uplift related to the size of damages would establish some link. The lawyer "wins" and receives an uplift from settlement based on the work done, and because all the preparatory work has been done may not gain much from going to trial. Likewise the insurer avoids paying out (and in a sense "wins") whenever the claimant settles, regardless of the fairness or size of the settlement. This is a real problem because the vast majority of civil actions, particularly personal injury cases, do in fact settle (well over 90%). This is one example of a situation in which a CFA will create either an actual conflict, or at the least a significant risk of a conflict, between the client's, the lawyer's and the insurer's different interests.

2.58. Economic analysis of the incentive effects of different costs rules provides support for a concern that economic incentives will lead to under-settling.[33] In particular, it is predicted that where a party is risk averse, they will settle sooner and accept smaller settlements than a party who is less risk averse. Risk-aversion is crucial: not only clients, but also lawyers and insurers, are likely to show risk-aversion. This may lead to lawyers doing less work where risk is greater; although this is to some extent balanced because CFAs involve incentives for quantity of work as well as quality.[34]

The Insurance Market for CFAs

2.59. The market for CFAs in England and Wales is strongly dependent on the existence of "After the Event Insurance" (AEI).[35] Clients who are advised to bring claims under CFAs can take out insurance cover against the risk of being ordered to pay their opponents' costs. Sometimes this cover extends to their own disbursements (experts' fees and so on). This generally leaves only their own solicitors' fees not covered, a risk which is borne by their solicitors under the CFAs.

2.60. At least seventeen insurers now offer relevant insurance. Two started providing AEI in connection with CFAs in 1995, one in 1996, one in 1997, five in 1998.[36] The rest entered the market more recently. This is a new market and one where the insurers are, by their own admission, still finding their way and assessing the commercial viability of the market. The products vary in terms of the cover that they provide (the financial limits on the level of cover, the types of cost which are covered and the types of case that they cover). Some schemes are confined to certain types of litigation. The largest scheme

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[33] Thomason, op.cit. See also G Bevan, P Fenn and N Rickman (1999) *Contracting for Legal Services with Different Costs Rules* (LCD Research Series, London).

[34] Lawyers are paid only if they win, and what they are paid is related to how many hours they have spent on the case. See, for example, Bevan (1999) *et al.*, p. 21.

[35] After the Event Insurance is to be contrasted with insurance policies for legal expenses which precede the knowledge of a legal claim, for example, as part of holiday insurance or property insurance cover.

[36] These descriptions of insurance providers are largely taken from (1999) 1 Litigation Funding, pp. 12-13. See also, P. O'Mahoney *et al.*, (1999) Conditional Fees: Law and Practice (Sweet and Maxwell London).

(Accident Line Protect) covers CFA litigation only in personal injury (medical negligence is under review). Premiums vary considerably, with some schemes having fixed rates for predictable cases (such as road traffic accidents), and other premiums being based on a variable percentage of the sum insured, up to 40% of the potential costs liability (often for medical negligence cases). Application fees may also be charged to pay the expense of the insurers assessing whether a claim should be insured.

2.61. There are two main types of AEI policy in use with CFAs. Policies are either:

2.61.1. individually underwritten, or

2.61.2. issued under delegated authority.

2.62. Under delegated authority schemes the insurers assess a solicitor's firm and, if the firm becomes a member of the insurer's scheme, whenever the firm takes a case under a CFA, cover is automatic. Firms are usually required to sign exclusivity agreements whereby they are not permitted to send cases to other insurers. They must insure all their CFA, speculative and non-contentious contingency fee cases with the insurer.

2.63. Individually underwritten policies are issued on a case by case basis. Firms make an application on their client's behalf and sometimes pay an application fee themselves. The insurance companies then assess the merits of the application (often in-house) before deciding whether to grant cover and on what terms.

2.64. It is possible to get AEI without the benefit of a CFA. Indeed at least one company generally declines to work with CFAs and has launched a delegated authority AEI scheme which includes own-solicitors' costs.

2.65. Recent figures suggest that the best estimate for the number of personal injury cases started under CFAs by about the middle of 1999 was roughly 60,000.[37]

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[37] See (1999) 1 Litigation Funding pp. 12-13. These figures are tentative. Some insurers keep the number of policies issued confidential.

By November 2000 Accident Line Protect had issued over 80,000 policies. Figures for other areas of litigation are not known.

2.66. AEI schemes bring with them a number of costs which must generally be borne up-front by the client, or by the solicitor's firm. For the largest scheme, this includes the cost of the premium: £300 for a fast-track road traffic accident claim providing £15,000 of cover, £650 for fast-track accident at work claims providing £25,000 of cover (at November 2000). There is usually an application based system for other claims such as medical negligence, where the fee is set by the insurer. An application fee may be payable. Barristers' fees and solicitors' disbursements may also be payable in the course of the case and before the case is completed. There is the related issue of the firm's work in progress being a greater burden under a CFA scheme than it was under the old Legal Aid Board's payment-on-account system. All of these costs and expenses impact on the clients', lawyers' and insurers' attitudes to CFA-funded litigation. Conversely, the potential for higher hourly rates and uplifts might increase the profitability of such work. But the impact of the Woolf reforms of civil procedure, designed to reduce unnecessary legal costs and make them more proportionate to the size of damages awarded, may reduce the impact of this potential increased profitability.

2.67. Another factor, in relation to the insurance market, is the attitude of insurers to risk and their assessment of the prospects of success of claims. Delegated authority schemes are generally based on the insurers' assessment of solicitor firms by reference to a number of factors, including the volume of their CFA caseload, their quality systems and procedures, and especially their record of success in the claims they pursue on behalf of clients, a record which is required to show a very high proportion of successes. Delegated authority schemes are generally regarded as preferable to individually underwritten policies on the basis that they are less bureaucratic for firms.

2.68. Information on this monitoring of solicitor firms by insurers is anecdotal, and mostly comes from solicitors' firms rather than insurers. Insurers are reportedly keen to prevent solicitors excluding from CFAs their easy cases, which some firms have funded on a speculative fee basis, without the need for

a CFA or an insurance premium. This raises obvious ethical issues: is it in a client's best interests to enter into a CFA even where the case is almost certain to succeed on liability, and is subject only to the issue as to the amount of damages? How should the solicitor's firm, tied by an exclusivity agreement to one insurer, advise the client of alternatives to the firm's own insurer's schemes? Some insurer's requirements might also conceivably act as a bar to or a restriction on effective access under Article 6 of the ECHR.

2.69. As already stated, insurers expect high success rates (about 95% is the figure usually quoted), and are prepared to strike firms off their solicitor panels if the lower limit is not achieved. One firm has claimed that it undershot its success rate by just 0.3% and was removed from the panel for a period as a result. This might lead to the exclusion of, or higher levels of insurance costs for, firms doing even moderately entrepreneurial, risk-taking or cutting edge work. Not surprisingly, insurers put their own commercial interests first in their approach to risk assessment, excluding the more difficult cases with higher risks and costs, and including the easy cases which, from the client's point of view, may not need insurance.

2.70. The need for insurers to adopt a strictly commercial approach can be illustrated in this way. Assume that a solicitor takes on a number of cases each with a 100% fee uplift, that similar expense is incurred by the solicitor in each case, and that the average cost of each case, won or lost, is the same. The solicitor needs to win 50% of the cases to break even (ignoring the cap on success fees at 25% of the moneys recovered). But insurers are generally charging premiums which are only a small fraction of their potential liability (especially in relation to personal injury claims). So insurers need success rates not of 50%, but much higher at 95%, or not much less. That is also why the combination of the solicitor's and the insurer's interests will result in most cases taken on CFAs having high chances of success, though in a proportion of cases the lay client may not need a CFA, except perhaps at a low fee uplift.

Solicitor Firms' Likely Response to CFAs and the Reduction of Legal Aid

2.71. Predicting the behaviour of firms under the new civil justice procedures with significantly different costs rules, and with comparatively little knowledge about the financial structures of most law firms, is extremely difficult.[38] The two studies referred to in footnote 38 and other studies provide some indication of the commercial pressures which will impact on lawyer-client-insurer relations. These studies, whilst being aimed at an understanding of which kinds of cases would be taken on under a CFA scheme, also indicate some of the broad categories of cases where economic pressures and ethical difficulties are most likely to bite. In particular, problems are more likely to occur in smaller solicitors' firms and in firms which have weaker finances.

2.72. Another report provides helpful insight into current handling of CFAs.[39] This is concerned with *the attitudes* of solicitor firms to CFAs. It is suggested that there is considerable variability in the existence and quality of risk assessment in firms.[40] Few firms set or monitored performance targets: 82% had not set a minimum success rate, and less than 50% monitored performance against projections of costs, damages and success fees.[41] Only 4% of the respondents had a limit on their total exposure under CFAs.[42] The quality and variability of risk assessments (in so far as made properly or at all) raise concerns about the competence of solicitor firms to assess cases for CFA funding and thus to act in their client's best interests. Similarly, the failure to monitor the size of a

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[38] In two studies this has been attempted. One was commissioned by the Law Society: J Shapland et al (1998), *Affording Civil Litigation* (Law Society, London). The other was commissioned by the Lord Chancellor's Department: KPMG (1998) *Conditional Fees Business Case*. Both Shapland *et al* and KPMG acknowledge the difficulty of the task and the methodological limitations. They focus particularly on the viability of expecting law firms to bear the working capital and other costs associated with servicing CFAs for clients who would formerly have had legal aid, including expecting solicitor firms to pay insurance premiums for their clients. As with Bevan et al (above), they generally focus on rationing effects which are of general interest, but not directly relevant to the ethical concerns considered in this Report.

[39] BDO Stoy Hayward (1999), *Conditional Fee Arrangements, A survey compiled by BDO Stoy Hayward* (February 1999).

[40] BDO (1999), *op.cit.*, p.4.

[41] BDO (1999), *op.cit.*, p. 8.

[42] BDO (1999), *op.cit.*, p. 8.

firm's exposure to risk may prompt the sort of financial crises in firms which can lead to ethical problems.

The Lawyer-Client Relationship

2.73. Recent research on clients' experiences of using CFAs has provided some evidence of difficulties in the relationship between clients and solicitors.[43] The researchers looked at the experiences of forty clients from firms who agreed to cooperate with the research.[44] This study indicated that:

2.73.1. Clients had little or no previous knowledge about CFAs or about civil litigation generally. They also often engaged their solicitor at a time when they were suffering from significant physical and psychological problems caused by their accidents. This may have made it more difficult for them to absorb information and take considered decisions about their case (and the CFA).

2.73.2. Clients rarely shop around for solicitors or try to negotiate lower success fees. In general, clients did not realise that success fees could vary.

2.73.3. There were some concerns that clients had not been fully aware of the costs that they would have to pay to proceed under a CFA in terms of AEI premiums and disbursements. There was also a concern that the term "no win, no fee" could encourage an impression that there were no costs to pay, and there were advertisements being used which were, or were potentially, misleading.[45]

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[43] Stella Yarrow and Pamela Abrams (1999), *Nothing to Lose? Clients' Experiences of Using Conditional Fees (Summary)*, (University of Westminster, London).

[44] It is possible, given that participation was contingent on the agreement of the solicitor firms, that the clients involved were clients of firms who were more confident in their approach to conditional fees.

[45] See page 4, Yarrow and Abrams (1999), *op. cit.* "The Advertising Standards Authority stipulates that advertisements should make clear the need to pay for insurance. Some solicitors interviewed did add terms such as "subject to an indemnity insurance premium", or "some charges may be payable". Not all advertisements carry such qualifications and they may be in small print or placed unobtrusively. Amongst both solicitors and clients, some thought that the "no win, no fee" phrase could mislead."

2.73.4. Clients had serious gaps in their knowledge and understanding of the operation of CFAs. There appeared to be particular problems about how the success fee is calculated. There was a number of reasons for this lack of understanding. These included the apparent complexity of the CFA scheme, the use of difficult legal language in oral and written explanations, and the failure by some solicitors to comply with all the requirements as to providing information to clients.

2.73.5. The researchers concluded that the requirements relating to the provision of information to clients were insufficiently precise and allowed considerable variation in solicitor approaches to explaining CFAs to clients. Whilst to an extent CFAs meant that clients did not worry about costs liabilities in relation to their claims, there was a concern that clients sometimes had inaccurate perceptions of their financial liabilities, and also that they did not always appreciate that the solicitor would not be paid if the case was lost. It was felt this made it harder for them to make informed decisions about, for example, settling their cases.

Regulation of CFAs by Secondary Legislation

2.74. In February 2000 the LCD spelled out the Government's conclusions as to the regulation of CFAs by secondary legislation following consultation on an LCD Paper "Conditional Fees: Sharing the Risks of Litigation" issued in September 1999. We refer to this February 2000 document as "the LCD Conclusions". Regulations came into force on 1 April, 2000 (the Conditional Fee Agreements Regulations 2000, SI 2000/692: "the Regulations"). These deal with some of the LCD Conclusions. Rules of court have been introduced so as to implement the remainder of the LCD Conclusions: The Civil Procedure (Amendment No. 3) Rules 2000. There is also a Practice Direction about costs which covers CFAs.

2.75. In its introduction to the LCD Conclusions, the LCD expressed strong optimism as to the successful use of CFAs, but in our view without adequate

recognition of the problems, particularly those of conflict between lawyers' interests and their duties to the court and to their clients.

2.76. The relevant Conclusions of the LCD as carried into effect in the Regulations and the CPR, can be summarised in this way:

2.76.1. The element of the uplift which represents the risk which the lawyer is taking of not being paid or of having to pay disbursements (if the case is lost) should be recoverable from the losing party. Other elements, such as the cost of borrowing, should not be recoverable and must be specified separately in any CFA agreement (the Regulations, Reg. 3(b)).

2.76.2. The opposing party should be notified (either when the claim is notified or within 7 days of entering into a CFA) that the claim is funded by a CFA which includes an uplift and/or insurance premium. (CPR rule 43.2 and Practice Direction, Section 19). The LCD Conclusions state that notice should be simply of those facts, and notice of the details of the CFA should not be required to be given. The Practice Direction requires that the date of the CFA and the identity of the claim(s) to which it relates must be provided to the court and other parties. This does not require the disclosure of the level of uplift or the level of insurance premium. Conversely, the parties are required to give cost estimates, e.g. at the allocation and listing stages, and these *are* expected to include uplift and insurance premiums (although they will not need to be specifically identified). Notice of a speculative fee arrangement, i.e. without an uplift or insurance premium, should not be required. Failure to notify should, at the court's discretion on final assessment of costs, be capable of resulting in part or all of the uplift not being recovered.

2.76.3. Written reasons for setting the uplift at a specific level will have to be provided to the client by the solicitor, and the reasons provided will have to distinguish between the elements of the uplift relating

to the risk that the solicitor is not paid all or any of his fees and disbursements, and the element relating to the fact that the solicitor has himself to meet other costs (the cost of borrowing, etc). Barristers acting on a CFA basis will not be required to provide such reasons to the client (this is in our view wrong, and we comment further on this in Chapter 4). However, under the Regulations, the CFA itself must merely "briefly specify the reasons for setting the percentage increase at the level stated in the agreement" (Reg. (3)(a)). A brief statement of such reasons may prove not to be of much use to the client. When the liability for any uplift falls to be assessed the parties will be expected to file a copy of the risk assessment (Practice Direction, Section 14.18).

2.76.4. The court will have to be notified when the claim form is issued or (when a defendant is represented under a CFA) when the defendant's first document is filed (Practice Direction, Section 19.3) that there is funding by a CFA which includes uplift and/or insurance premium(s).

2.76.5. On the final assessment of costs the losing party will be able to see the solicitor's written reasons in order to dispute the level of uplift. The losing party will be entitled to dispute these costs on the basis that the level of uplift was unreasonable given what the solicitor knew or ought reasonably to have known when the CFA was entered into. If the challenge by the losing party succeeds, the solicitor will not be entitled to recover the resulting shortfall in the uplift from the client unless the solicitor applies to the court justifying the higher level of uplift to be recovered from the client. This procedure does not apply to elements of uplift which are not in any event recoverable from the opponent (e.g. the cost of borrowing; see above).

2.76.6. Uplifts are to be recoverable only at the final assessment of costs, and only for claims in respect of which the first CFA for that claim is signed after 1st April 2000.

2.76.7. Provision is made for assessment and recovery of costs in cases which settle before action. At the time of writing, defendant insurers are disputing the recoverability of insurance premiums incurred in cases settling before action.

2.76.8. The opposing party will have to be notified that insurance has been taken out, on notice of the claim or within 7 days of entering into the policy. The claimant must disclose the name of the insurer, the date of the policy and the claim or claims which are covered (i.e. all parties' costs, other parties' costs and own disbursements, other parties' costs only, etc. (Practice Direction, Section 19.4). As with the uplift, failure to notify may result in non-recovery of all or part of the premium.

2.76.9. Solicitors, before entering into a CFA, will have to explore with the client whether suitable alternative methods of funding litigation are available, and whether the client's liability for their own and the opposing party's costs can be insured. If they advise the client to take out insurance, they must give this advice orally and in writing, giving reasons for recommending insurance, for recommending a particular product, and indicating "whether (the lawyer) has an interest in doing so." (Reg.4(2)(e) and 4(s)).

2.76.10. An oral explanation of a CFA will have to be given, in addition to any written explanation. The statutory requirements for written explanation are confined to the reasons for the uplift (see paragraph 2.76.3 above) and the giving of advice on insurance (paragraph 2.76.9); but the solicitors' Code of Conduct goes further (see below paragraph 3.2 and onwards).

2.76.11. The maximum uplift will be one of 100% of costs. LCD proposals that there would be no such limit in cases in the Commercial Court, the Admiralty Court and the Technology and Construction Court have, for the time being at least, been put on hold.

2.76.12. Provision will be made for membership organisations (such as Trades Unions) to recover suitable amounts to cover their risk when they act for their members in legal proceedings under section 30 of the 1999 Act.

Summary

2.77. We consider that the proposed requirements, subject to the point mentioned in paragraph 2.76.3 will be sensible. However, these requirements will not of themselves provide adequate protection to lay clients against all of the potentially serious conflicts of interest and duty which will inevitably arise. We turn to these concerns in Chapters 3 and 4.

2.78. Risk aversion will have a major impact on the types of cases which are taken on, and the progress of cases when they are taken on, under CFAs. That is an important effect of CFAs. But in this report we focus on challenges to professional ethical duties. There are significant risks of conflicts of interests between lawyers and clients as a result of CFA arrangements, and these conflicts are likely to be intensified and added to as a result of the insurer-lawyer relationship and the commercial pressures which the relationship will create.

2.79. A number of ethical issues arise about the impact of CFA schemes on the quality of lawyers' casework, on the level of settlements, and on the role of lawyers in relation to their clients and the courts. Regulation of these issues by the professions (or the courts) will present significant difficulties.

2.80. It is not immediately apparent how the regulators will be able to deal successfully with the gaps and tensions in a system in which commercialisation of risk assessment and service provision is accepted. The incentives at work on lawyers are complex and will require deeper investigation as the insurance market develops and settles down.[46] The ability to regulate successfully may well be significantly affected by the willingness

[46] The LCD has commissioned some research in this area.

(or otherwise) of insurers to monitor and publish data on their claims experience. A structural concern may also develop: insurers will be acting as the gatekeepers for claims to be made, for the most part, against defendants who are themselves insured for their legal costs and liabilities. The incentive on the insurance industry to reduce litigation will be balanced only by the incentive to underwrite AEI. No such balance applies to the incentive to minimise the levels of damages paid on settlement.

2.81. These are difficult issues. In the 1999 Act Parliament seeks to deal with these issues through a statement of the primacy of the advocate's and the litigator's duties, first, to the court and, secondly, to the lay client. In this Report we examine what that might mean, and whether that approach goes far enough.

CHAPTER 3

3. Solicitors and Conditional Fees

3.1. In this chapter we consider the ethical implications of CFAs in the context of the solicitors' profession. Later chapters deal with barristers and judges.

Solicitors: Ethical Rules, Guidance and Standard Documents

3.2. The Law Society's Guide to the Professional Conduct of Solicitors 1999 contains Rules and Principles of Professional Conduct as well as some specific guidance on CFAs (see paras. 14.03-14.05 at pages 278-279, annexes 14B and 14C at pages 292-295, and annexe 14F at pages 303-307). The Law Society has also issued a revised form of CFA agreement for personal injury cases which it recommends that solicitors use, as well as a check list for solicitors to use when completing the agreement with clients.

3.3. The Solicitors' Practice Rules contain a number of requirements relevant to the use of CFAs. In particular:

3.3.1. Practice Rule 1 (the basic principles of solicitors' ethics) requires a solicitor not to do anything which compromises or impairs (or is likely to compromise or impair):

- The solicitor's independence or integrity
- A person's freedom to instruct a solicitor of his or her choice
- The solicitor's duty to act in the best interest of the client
- The good repute of the solicitor or the solicitor's profession
- The solicitor's proper standard of work
- The solicitor's duty to the court.

3.3.2. Reference is made in the Guide to the fact that the civil justice reforms impact on solicitors' duties. In particular, it is stated that the

duties owed under Rule 1C (client's best interest) are tempered by the reforms, e.g. cases should be pursued only in a way which is proportionate to the likely benefit; the court need not allow every point to be pursued; and some procedural tactics will no longer be permitted.

3.3.3. Practice Rule 2 permits solicitors to publicise their practices subject to the Solicitors' Publicity Code. Under the Publicity Code, solicitors may claim to be specialists where they can justify that claim on the basis of their experience, competence and/or level of knowledge, membership of a Law Society Panel or any additional qualification held. Of particular relevance to CFAs is the requirement that no publicity may refer to solicitors' success rates (page 230 of the Guide). Any publicity as to charges or the basis of charging must be clearly expressed, including any circumstances in which the charges may be increased or the basis altered; and there must also be clarity about whether disbursements and VAT are included (page 231 of the Guide). Publicity may state that a particular service of a solicitor is free of charge, but this must not be conditional on, amongst other things, a solicitor receiving any commission or benefit in connection with that or any other matter.

3.3.4. Practice Rule 8 (contingency fees) prohibits the solicitor from entering into an arrangement to receive a contingency fee in respect of contentious proceedings save one permitted under statute or by the Common Law. This rule does not apply to proceedings in any country other than England and Wales where (in that country) a local lawyer would be permitted to receive a contingency fee in respect of those proceedings.

3.3.5. Practice Rule 15 (cost information and client care) requires a solicitor to give information about costs and other matters and to operate a complaints handling procedure in accordance with the Solicitors' Costs Information and Client Care Code. In particular it requires a solicitor to consider "whether the client's liability for

another party's costs may be covered by pre-purchased insurance and, if not, whether it would be advisable for the client's liability for another party's costs to be covered by after the event insurance (including in every case where a conditional fee or contingency fee arrangement is proposed)" (paragraph 4j(iii), p. 269 of the Guide). Breach of the Client Care Code can lead to a finding that the solicitor has provided Inadequate Professional Services ("IPS")[47] or, in serious or persistent cases, a finding of professional misconduct (page 305 of the Guide). The requirements in relation to costs information are discussed below.

3.4. In addition to the Solicitors' Practice Rules, the Law Society's Guide to Professional Conduct of Solicitors contains other relevant Principles and Guidance as follows:

3.4.1. Principle 11.01 (Solicitors Independence and Clients' Freedom of Choice) states (page 222 of the Guide):

> "It is fundamental to the relationship which exists between solicitors and clients that solicitors should be able to give impartial and frank advice to the client, free from any external adverse pressures or interest which would destroy or weaken the solicitor's professional independence, the fiduciary relationship with the client or the client's freedom of choice."

3.4.2. The notes to this Principle state that the solicitor must satisfy him or herself that the client's freedom of choice has not been restricted by improper influence from either the solicitor or from a third party. This would include improper influence from an insurer.

3.4.3. Under Principle 12 a solicitor is generally free to decide whether or not to accept instructions from any particular client. Solicitors are therefore not subject to the "cab rank rule" (see Chapter 4 below in relation to barristers). Solicitors must refuse to act, or stop acting,

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[47] This is the term in the Solicitors Act 1974 (as amended) which the Law Society and the OSS use in deciding complaints of poor service from lay complainants. Where a finding of IPS is made, it is possible to compensate the client up to £5,000 for any loss and/or to make any appropriate reductions in a solicitor's costs.

where to act would lead them to breach the principles of professional conduct (Principle 12.02). They should also refuse to act where the client cannot be represented with competence or diligence (Principle 12.03).

3.4.4. Under Principle 12.12, a solicitor must not terminate his or her retainer with a client except for good reason and upon reasonable notice.

3.5. Principle 14.05 contains additional guidance in relation to CFAs (pages 279 and onwards of the Guide) which emphasises a number of conduct issues in relation to CFAs. In particular:

3.5.1. The Client Care code requires solicitors to give clients detailed advance information on costs so that clients receive *all the information needed to understand and to make informed decisions as to agreement on costs.*

3.5.2. The solicitor must not take advantage of the client (under Principle 12.09) on account of the client's inexperience, ill health, want of education or other factors. In particular, in considering "whether a conditional fee arrangement would be appropriate in the circumstances in any particular case, a solicitor should take care to ensure that his or her own financial interests are not placed above the general interest of the client."

3.5.3. In relation to not taking unfair advantage, the Guidance explains that "it is important that all options available to a client for financing the proceedings should be explained and discussed, including the availability of legal aid".

3.5.4. The Guidance also states that "care must be taken to ensure that the terms are fair and reasonable in the circumstances. Any attempt to take unfair advantage of a client by overcharging for work to be done raises an issue of conduct for the solicitor quite apart from the

remedies available to the client in relation to taxation" (see pages 305-306 of the Guide and Principle 14.12 at pages 282-283).

3.6. The notes with Principle 14.12 state that:

> "It is a question of fact in each case whether the charge is so excessive as to amount to culpable overcharging.
>
> "If an agreement between solicitor and client is found to be wholly unreasonable as to the amount of fees charged or to be charged, disciplinary actions could be taken against the solicitor on the grounds that the solicitor had taken unfair advantage of a client."

3.7. Costs officers are required to bring to the attention of the Law Society bills reduced to less than one half of the sum billed.

3.8. The Guidance on CFAs states that the client must fully understand the nature and extent of his or her risk in relation to costs including the costs of his or her opponent, in accordance with paragraph 5(b) and (c) of the Client Care Code (page 306 of the Guide).

3.9. The Guidance states that solicitors may wish to consider providing a cap on the uplift for the benefit of the client, in order to limit the possibility of the client suffering a financial loss even when successful in the proceedings. The statutory instrument governing CFAs (the 2000 Regulations) requires that the agreement states whether or not such a cap applies. The Law Society's model agreement no longer contains such a cap, on the (not entirely correct) assumption that recoverability of success fees and insurance premiums renders the cap redundant. The need for a cap is considered below.

3.10. In relation to solicitors' risk, the Guidance states in paragraph 17 (page 306):

> "Solicitors may well not wish to apply the same uplift to all cases, or to all elements within an individual case. The principles applicable on [assessment] in relation to the uplift relate the risk to the individual case. In considering what uplift to stipulate in any particular case, solicitors will wish to take into account the degree of risk of the case being lost and the cost of funding the litigation over a period of time ... The financial risk assumed by the solicitor may be a factor in deciding on the appropriate uplift, but in determining this the solicitor 'must not take unfair advantage of the client by overcharging for work to be done', 'should discuss with the client whether the likely outcome in a

matter will justify the expense involved' ... and 'must not abuse his or her position to exploit a client by taking advantage of a client's inexperience [or] ... want of ... business experience'."

3.11. In relation to the settlement of claims, paragraph 18 of the Guidance states:

> "Solicitors should always consider their overriding duty to act in the best interests of the client in achieving a suitable settlement *for the client* irrespective of the Solicitor's own interest in receiving early payment of costs in accordance with the agreement".

3.12. In relation to publicity, paragraph 19 of the Guidance states that the Publicity Code restricts advertising that a service is 'free' of charge where the conditions that are attached to that service effectively mean that the client will be required to make some payment in respect of the service. Similarly, paragraph 20 states "Advertisements which purport to offer solicitors services on the basis that the client is, for example, able to litigate 'at no financial risk' would be misleading". The Guidance side-steps the issue whether it is proper to describe CFAs as 'no win no fee' agreements.

Standard Contract

3.13. In addition to the Law Society's Guide, the Law Society has also promulgated a standard CFA which they recommend that solicitors use: See M. Napier and F. Bawdon (1995) *Conditional Fees: A Survival Guide* (The Law Society, London) p. 162 onwards. A new agreement especially for personal injury cases has also been promulgated by the Law Society.

3.14. Having discussed the Practice Rules, Principles and Guidance given by the Law Society on this topic, we turn to consider specific ethical problems associated with CFAs, to examine the application of the Law Society's approach as well as its recommended standard documentation, and to point out areas of continuing concern.

Setting up a CFA

3.15. In setting up the CFA, solicitors are faced with three main decisions that raise ethical implications: (1) setting the uplift; (2) setting a cap on that uplift; and (3) dealing with the need for insurance.

Advising on the Terms of a CFA and Setting the Uplift

3.16. The generally received wisdom that uplifts ought to be linked to the risk involved in the particular case is challenged by some practitioners of CFAs, who (before the 2000 Regulations which came into force in April 2000) habitually charged an uplift of 100% usually with a cap on the uplift of 25% damages. This was done on the basis that it is easier for the client to understand if a 25% cap is observed, with other conditions.[1]

3.17. The first issue this raises is whether, in the absence of a cap, it is ethical to adopt a blanket policy of charging an uplift of 100% on all CFAs. This was reportedly a common practice prior to introduction of the 1999 Act regime. Whilst it is to be hoped that the 1999 Act will reduce the likelihood of such blanket approaches, the potential for such problems to occur remains, hence the discussion here remains valid. Such a blanket policy would be particularly problematic where cases have high prospects of success. It is our view that it is not ethical to adopt this practice for the following reasons:

3.17.1. It is generally possible for solicitors to identify cases that have very high, or near-certain, prospects of success on liability (we call such cases 'near certainties') e.g. many cases involving claims for passengers in road traffic accidents.

3.17.2. The conceptual basis of CFA uplifts is the need for an uplift to reflect the risk to the firm of taking such cases. Near certainties bear little or no risk on liability, though they carry some risk as to the amount of damages recoverable.

3.17.3. Even where uplifts are recoverable from the other side, it remains a possibility that the opponent will be unable to pay the whole or any part of any uplift. In those circumstances the solicitor would have to seek to recover such fees from the client's damages. As a result, a maximum uplift of 100% on the solicitor's fees for near certainties

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[1] Such other conditions were that the solicitor absorbed any shortfall between actual and recovered costs; VAT was not added into the 25%; and special damages also were not included in the 25%. See, K Underwood (1998) *No win, No fee, No worries* (CLT Professional Publishing Ltd), pp. 30-52.

risks taking unfair advantage of the client, as the client will be charged more than is justified taking into account the risks on their case.

3.17.4. Equally there is a public interest in ensuring uplifts which are proportionate to the risks: where uplifts are ultimately paid by insurers, the costs of excessive uplifts are passed on to the general population through insurance costs. The possibility of challenge after the event through a disputed assessment of costs will provide some protection against excessive uplifts, though as we indicate below there is some evidence that this may not always be sufficient protection.

3.18. It would not be right to conclude that, even with 'near certainties', no uplift is justified. Even these cases may carry some risk of failure on liability; solicitors may be carrying the cost of funding the client's insurance; and, there is always some risk involved in the assessment of damages and the actual recovery of all the damages ordered. So it is not overcharging to have some uplift in such cases. Similarly, the cost of borrowing may justify some uplift.

3.19. In deciding on the level of uplift, assessment of risk is vital. Erroneous assessment of risk may lead to a higher level of uplift than is appropriate, to the potential detriment of the client, and if uplifts were generally at too high levels that would affect society generally, not least through increased insurance premiums. Hence it is important that solicitors should be trained to make accurate assessments of risk. Research referred to above in Chapter 2 (see paras. 2.71-2.72) indicates that risk assessments are variable in quality and competence.

3.20. **We therefore recommend that compulsory training in risk assessment is included within the CPD schemes for all solicitors (and barristers) undertaking CFA work.**

CFAs and the Cap

3.21. Prior to recoverability of success fees under the Act, the Law Society recommended (but did not require) a cap on the permitted uplift. Whilst up to 100% of costs could be claimed in addition to the basic costs of the solicitor, the Law Society recommended that the uplift should not exceed 25% of the damages awarded. Research evidence suggests that this recommendation was widely followed.

3.22. The importance of the cap is diminished now because the normal expectation is that uplifts and insurance premiums will be paid for by the claimant's opponent and their damages will thus be protected. There remain situations where a cap could and should apply. In particular there remain a number of areas where the client may remain liable for significant elements of costs. As a result, we have these concerns:

3.22.1. Without a cap on total costs, it is unclear what is to happen if on the final assessment the solicitor's costs are reduced by the costs officer. The losing party will pay basic costs (as reduced) plus the uplift (as reduced). But the client will remain liable to the solicitor for:

(1) The difference between (a) the finally assessed basic costs (on a party and party basis) and (b) the actual basic costs (on a solicitor and client basis subject always to the client's own right to challenge the actual basic costs); and

(2) The difference between (a) the uplift as an uplift on the assessed basic costs and (b) the uplift as an uplift on the actual basic costs (assuming that (b) does not exceed any cap). (It is arguable that this will be subject to the restriction imposed by the Regulations: see paragraph. 2.76.5 above, see also the Practice Direction and CPR 44.16).

(3) Any part of the uplift which does not relate to risks on the case (e.g. the cost of borrowing) and which is therefore not recoverable from the opponent. The method of calculating the cost of borrowing does not have to be broken down (even to

the extent of explaining what interest rates are being paid). There is the potential for this element of costs significantly to erode a client's damages.

3.22.2. An example may help to illustrate these points. Let us say that a solicitor agrees with the client to enter into a CFA on the basis of an uplift of 50%. The solicitor gives the reason for the uplift as being 40% representing the risk inherent on the case and 10% as the cost of borrowing. At the end of the case, there is a settlement whereby the client is to be paid £5,000 in damages with costs to be agreed or assessed between the parties. The solicitor's basic costs are £3,000. After some negotiation, the client's opponents agree to pay £2,000 in basic costs and an uplift of 40% representing the risk on the case (but not the cost of borrowing). The solicitor seeks to recover the £1,000 outstanding in basic costs from the client on a solicitor and own client basis. The uplift is charged at 50% of basic costs (£3,000). As the total uplift would be £1,500 in these circumstances the uplift is capped at 25% of damages (£1,250). The resulting payment to the client is £3,550 (or 71% of damages). The following table illustrates the position:

(1) Paid by Opponent

Damages	£5,000
Basic Costs	£2,000
Agreed Uplift	£800
Total	£7,800

(2) Received by Claimant

		£5,000
Less		
- Rest of Basic Costs		£1,000
- Rest of Uplift		
Total Uplift	£1,500	
Uplift after cap of 25%	£1,250	
Paid by opponent	£800	
		£450
Claimant receives		£3,550
		= 71% of damages

(3) Received by Claimant's Solicitor re fees

From opponent	£2,800
From client	£1,450
	£4,250

3.22.3. So the claimant's solicitor receives materially more than their client. If there were no cap on the uplift the client would receive £3,300 (or 66% of damages) and the solicitor would receive £4,500. This shows not only that a cap is still needed, but also that small claims may result in clients receiving less than their solicitors.

3.22.4. Unless the basic costs are assessed down as between the solicitor and his client, or the solicitor agrees at the end of the day to take only the amount paid by the losing party, the damages recovered by the winning party may be reduced by payment of the amount of the

differences in para. 3.22.2 (1), (2) and (3) above. This is naturally subject to the terms of any insurance the solicitor may have obtained for the client. In the absence of effective insurance there is nothing in the Law Society's forms of agreement which would prevent a solicitor requiring his client to pay those differences: on the contrary clause 4 of the CFA for use in personal injury cases would expressly entitle the solicitor to payment of those differences.

3.22.5. Further, disbursements (insofar as not recovered from the opposing party or covered by AEI) would also have to be paid by the client.

3.22.6. The cap previously recommended related only to the damages as awarded, and not to the damages recovered. In cases in which the damages awarded and/or the costs awarded are not recovered in full, the client may find that they are liable for their solicitor's (and barrister's fees) plus any uplift in any event. It is therefore essential that (1) the client's liability to their lawyers for fees and uplifts arises only in relation to damages recovered (and not merely awarded), and (2) any cap similarly is related to the damages actually recovered. In cases where a 'win' does not mean damages recovered, it must be made absolutely clear to the client what risks are entailed. This is a matter dealt with more fully below.

3.22.7. These are points of significance. In the USA, if a claimant agrees to pay his lawyer a contingency fee of 25% of the damages recovered, the claimant knows that they will keep 75% of the damages. Under the English system a claimant will not know what proportion of the damages awarded can be kept. If the costs prove to be larger, and the damages awarded or agreed prove to be smaller, than expected, the claimant may justifiably consider that the situation is unfair and that they have been misled. As a result there needs to be a cap on costs payable by the client (out of their damages) set by reference to a proportion of their damages. In the past the cap has usually related only to the uplift. But taking the uplift and the basic costs together, even if the uplift is capped, the total costs may be wholly out of

proportion to the recovered damages or debt. In our view the cap should apply to the total costs (basic plus uplift) and not merely to the uplift. Fees of barristers should be included within such a cap. If the barrister's fees were to be outside the cap, the damages recovered would be further eaten up in payment of those fees because the total cap would become 35% not 25% if barristers adopted the Bar Council's recommendation of a 10% cap.

3.23. The main argument against having a compulsory cap on all costs, or at least on the uplift, in all cases is that this would inhibit the availability of CFAs in higher risk and more costly cases, as well as cases which involve small sums of damages but raise real questions of principle. The compulsory cap might prevent effective access to justice in such cases. **That is why we recognise that there may be cases involving exceptional factors in which a higher cap would be appropriate. We recommend that a firm cap of the total costs payable by the client at a particular percentage of the damages recovered should be applied compulsorily to all but the most exceptional cases, once the Indemnity Principle (para. 2.48 above) has been abolished. The solicitor should provide a written certificate of exceptional reasons to the client at the commencement of the agreement, and also when deducting costs from the client's damages. It would be sensible if such certificates were in a prescribed form that can be readily understood by the clients. The higher cap would need to be specifically agreed by the client and would be subject to approval by the Court at the end of the case. This recommendation assumes the abolition of the Indemnity Principle, so that losing parties can be ordered to pay in costs more than the winning parties are contractually obliged to pay their solicitors.**

Advising on the CFA – the Need for Insurance

3.24. There is concern about how solicitors should advise clients (especially clients with 'near certainties') on insurance and insurance costs. This is a particular issue under delegated insurance schemes, where solicitors' ethical obligations may conflict with their contractual obligations to the insurer. These points are

discussed below (under 'Ethics and Insurance Companies') in paragraphs 3.86 *et seq*.

Costs Issues

3.25. The Law Society's Rule 15 generally requires the solicitor to give the client the best possible information about costs. This poses a significant set of issues for lawyers. It also involves giving complex information to clients. The following cost issues are of concern to clients.

Advice on Liability for Costs Upfront

3.26. It is possible that the client will be required to pay upfront (either at the outset of the case or at any rate before its completion) a number of costs, which could include:

3.26.1. An AEI application fee (for some individually underwritten policies only);

3.26.2. An AEI premium;

3.26.3. Disbursements (e.g. medical and other experts' reports, site inspections, police reports, etc.);

3.26.4. Court fees; and

3.26.5. Barrister's fees (though these are likely to be agreed to be paid at the end of the case).

3.27. Research evidence suggests that solicitors often do not provide information on these costs in a form which clients clearly understand. In part, this is due to the complexity and uncertainty of such costs. There is a strong argument for greater standardisation of the requirements; for example, indicating that the solicitor should give estimates against each item and provide a total estimate based on those items. This will provide the client with a range of likely expenditure and increase the likelihood that they understand, and have given informed consent to incur, such costs.

3.28. **We recommend that pro forma documents are developed in a format that can be readily understood by clients so as to facilitate the itemisation of potential upfront costs, and are required under Practice Rule 15. Failure to use such pro forma documents should be prima facie evidence of Inadequate Professional Services (IPS).**

Advice on Liability for Costs in the Event that the Client Loses Part of the Claim, or the Claim Cannot be Successfully Enforced (in Whole or in Part)

3.29. A particularly difficult issue for clients to understand is what happens when they lose their case in part and so have a larger liability for costs than they would expect, or where their award of damages is not paid (in whole or in part) by the losing party.

3.30. This is partly related to the definition of what constitutes a 'success' under a CFA. Under the 1999 Act, a CFA is defined as:

> "an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable *only in specified circumstances*; and (b) a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, *in specified circumstances*, above the amount which would be payable if it were not payable only *in specified circumstances*" (emphasis added). See section 58(2) of the 1990 Act as amended by Section 27(1) of the 1999 Act.

3.31. The 1990 and 1999 Acts leave open what constitute 'specified circumstances'. One reason for this is that it opens up the possibility of applying CFAs to defendants, which may not involve the defendant recovering money, but in which they may wish to define success in some other way.

3.32. Under the Law Society's standard CFA, the 'specified circumstances' are defined as a 'win', which is further defined as: "The case is finally decided in your favour, whether by a court decision or an agreement to pay you damages" (See Napier and Bawdon (1995) *op. cit.*, p. 168). The standard agreement for personal injury cases defines a win in similar terms. 'Finally decided' is determined by the failure of an appeal by the opponent (or the effluxion of time limits to appeal) **not by the payment of any damages awarded.**

3.33. It is on 'winning' the case that, under the Law Society's standard CFA, clients are obliged to pay the solicitors' basic costs, uplift and any disbursements. This occurs prior to the payment of any damages and so prior to the client having actually 'won' any hard cash. As a result, where the damages (and any costs) are not paid, the client remains liable for the solicitor's costs, uplift and disbursements. It is also likely that the insurance policy protecting them would not pay out as the case has technically been won, and the insurer is not usually liable for the solicitor- own client costs in such circumstances.

3.34. This raises two issues. The first is that, if it is acceptable that in this situation the client should have to pay these costs, the importance of advising the client clearly and early on this topic is increased. This adds to the complexity of the advice, and research suggests that clients have significant difficulty in understanding such advice.

3.35. The second issue is whether it is reasonable for such a term to be part of a standard CFA and capable of being enforced against a client. The usual raison d'être behind instructing a solicitor under a CFA is that the client cannot afford to instruct the solicitor on an hourly basis. In circumstances where the client has a judgment in his favour but none of the damages are paid (and assuming no dramatic improvement in the client's fortunes), then the client is still probably not in a position to pay the solicitor's basic costs, let alone any uplift. A clause requiring such payment contradicts the reason for the entry into the CFA. Similarly, where there is an under-recovery of costs or damages, the client's liability for any shortfall could cause them significant difficulties.

3.36. **Accordingly we recommend that normally, in CFAs aimed wholly or mainly at recovering damages for the client, 'success' should be defined in terms of damages recovered rather than damages awarded, and that any cap should be measured against damages recovered rather than damages awarded. It should be open to solicitors to derogate from this approach where they can demonstrate fully informed consent from the client and circumstances which make such derogation reasonable. A process of written certification that can be readily understood by clients should also be required.**

Incentives to Maximise Fees ("Churning")

3.37. Whereas in the USA there is concern that contingency fees are not an incentive to lawyers to work hard on their clients' cases (because the less time spent, the higher may be the potential net return to the lawyer), CFAs may provide an incentive for lawyers to maximise fees, because each fee earned may be increased by a percentage as high as 100% of basic (hourly) costs. In effect each hour could count double.

3.38. This will provide some incentive to increase the quantity of work done and may accentuate the ethical problems although the risk of losing the case will reduce incentives to increase the time spent on cases. There has already been, before the introduction of CFAs, some evidence of a few lawyers engaging in the practice which we will call "churning", by which we mean that the lawyers devote excessive time to a case, resulting in fees out of line with what is reasonably required to fight the case effectively. There is, however, a lack of evidence on how wide-ranging this practice is.

3.39. The introduction of CFAs could lead to more lawyers engaging in this practice. Since the fees under CFAs will be multiplied by an uplift factor, which may result in the fees being doubled, "churning" would be more significant. Some "churning" is simply dishonest. Most occurs, not through any dishonesty, but because the persons concerned are available and prepared to do the work, and are under pressure to bill as many hours as possible. "Churning" would be most likely to occur in cases which are "near certainties". It will be well worthwhile for the lawyer to maximise fees in such cases.

3.40. Given the likely liability of the unsuccessful opponent for such fees, the potential for scrutiny at the final assessment of costs should provide some degree of restraint, although it requires a strong and well-informed costs officer or judge to limit the work done and the fees paid to an appropriate level. Costs assessment to date has not always been successful in protecting against this problem in civil actions. Defendants' lawyers who have charged their clients similar fees are not likely to challenge claimants' lawyers' fees strongly.

3.41. There is no simple way to prevent "churning". There will always be a range of differing views as to what is an appropriate volume of work to be done on a case, and what may appear to be excessive work may be done because of a genuine but mistaken view as to the way in which a case should be run.

3.42. If there were to be serious churning, that should become apparent when the losing defendant has the claimant's costs assessed, and the information obtained could subsequently be used in disciplinary proceedings.

Liability for Unrecovered Costs – Some Specific Difficulties

3.43. In circumstances where an unsuccessful defendant chooses to challenge the level of uplift at the final assessment, an open issue is the liability for the cost of the assessment. Solicitors who have agreed an uplift with their client which is subsequently challenged by an opponent and reduced by the court might seek to recover the costs of any such challenge from the client (by recouping it from the client's damages). This would shift some of the economic risk (in setting too high an uplift) on to the client and their opponent rather than on the person best placed to assess the merits of the uplift (the client's solicitor).

3.44. **We recommend that it be made a requirement of a valid CFA that where the level of uplift is challenged by a losing defendant and reduced, the costs of that successful challenge, if ordered to be paid by the claimant, should be paid by the claimant's solicitor or deducted from his fees. The same point applies to CFAs with barristers.**

Interim Payments

3.45. Under the Law Society's standard CFA for personal injury cases it is open to the solicitor to use interim damage payments to fund disbursements in the future or those already paid by the solicitor. Interim damage payments are generally awarded by the court where there is an immediate or pressing need for payment to be made to the client and where specific conditions relating to the client are met (CPR Part 25). There is a danger that the court might award interim payments for the client's specific needs which are then used instead by the solicitor to meet disbursements.

3.46. **We recommend that the use of interim payments under CFAs is subjected to research.** It may be found that it is necessary to require that, in circumstances where any payment of interim damages is made which is to be used for current or future disbursements, then the solicitor in question be required to disclose to the court prior to the court's decision on interim damages, whether or not any or part of the interim payment would be used for such expenditure. **We also recommend that the Civil Procedure Rules should be amended to make clear that it is permissible for interim payments to cover such litigation costs, provided that the court has been duly informed that the interim damages will be used for this purpose.**

Ethical problems during the conduct of the case

Decisions on Settlement and Trial

3.47. In non-CFA funded litigation, every time an offer to settle is made or a payment made into court, lawyers face a potential conflict of interest. They can accept an offer, conclude the case and get paid, or push on to get more for the client and risk not getting paid for some time. The possibility of a CPR Part 36 offer (a claimant's offer to settle) introduces a new element. Under the change, rather than having to wait for the defendant to make an offer, which is then accepted or rejected, the claimant can make the first move by suggesting a figure they are prepared to accept. A lawyer, with one eye on the firm's bank balance, would be able to take an important initiative towards accelerating a case to a "successful" conclusion.

3.48. However, though all legal work, especially litigation, carries this conflict problem, CFAs are at the more serious end of the conflict of interest spectrum. In a CFA-funded case, the potential for conflicts of interest is greater because the lawyer risks not just getting paid *less* if the case is unsuccessful, but getting *nothing at all.* The stakes are higher. Lawyers on a CFA could, therefore, feel tempted to look more favourably on a fairly low offer to settle (rather than taking a case to trial and risking getting nothing) than would be the case were they assured of some kind of payment whatever the outcome.

3.49. Where CFAs bring the economic interests of clients and their lawyers into alignment, this pressure for success bolsters the duty to the client. Where, however, those economic interests are not in alignment, the interests of lawyer and client come into conflict. This is particularly likely where the potential extra gain to the lawyer (in terms of extra costs plus uplift) from continuing to fight the case is not large relative to the risk of proceeding and gaining nothing, but the gain for the client from continuing may be large relative to the risks involved (in terms of damages). Especially when the fees a lawyer will receive are restricted by a cap based on a proportion of the damages awarded, the lawyer may have weaker incentives to proceed than the client. Research evidence suggests these are not merely theoretical concerns (see Chapter 2).

3.50. Not infrequently there will be a direct conflict in this respect between the interests of the client and those of their lawyers. The obligations of the lawyers to the client require them to subordinate their interests entirely to the interests of the client, but the danger that this will not happen is substantial. There will also be the allied danger that settlement or continuance will be decided entirely by the lawyers, and the client will end up having little say in this decision.

3.51. The Law Society's Guidance requires that:

> "In advising clients on matters of settlement ... ..Solicitors should always consider their overriding duty to act in the best interests of the client in achieving a suitable settlement *for the client* irrespective of the solicitor's own interest in receiving early payment of costs in accordance with the agreement." (Guide p. 306, Paragraph 18).

3.52. We are concerned that such general exhortation is not adequate. But we also consider that there is no effective remedy for these conflict of interest dangers, which are inherent in any system making use of CFAs. The decision in individual cases whether or not to settle is often one on which the client and each of the lawyers involved may differ to some degree. It would usually be difficult to make out a case in negligence against a solicitor or barrister advising on this kind of decision (but note that the court immunity upheld in *Rondel -v- Worsley* [1969] 1 AC 191 HL (E) and subsequent cases has now gone: *Arthur J S Hall & Co -v- Simons* [2000] 3WLR 543; [2000] 3 All ER

673 HL(E)). To show that the lawyer's advice has been predominantly in his own, and not the client's, interest would usually be even more difficult. Similarly, those involved in professional conduct proceedings would be likely to find such issues hard to determine. In reality, therefore, there is no clearly effective way in which this aspect of a lawyer's duties to his client can be ensured.

3.53. **We recommend that when settlement offers are received, the advice of the solicitor to the client should be required to be summarised in writing. If it is not possible to do this at the time the offer is received, it should be done as soon afterwards as is practicable. If later the client wishes to complain about this advice, it will at least be in a form which the lawyers (and clients) cannot challenge subsequently.**

Duties to the Court

3.54. CFAs put lawyers in the position of having a direct financial interest in the outcome of their cases. However strong the professional ethical Code of Conduct, it is clear that that the introduction of this "direct financial interest in the outcome" through CFAs carries the risk that solicitors and barristers will have a stronger temptation to conduct cases in a manner contrary to the interests of justice and contrary to their duties to the court: for example, by ensuring that the evidence of witnesses of fact, including the party for whom they act, is fitted to the documents so as to support that party's case; or by ensuring, under the new Civil Procedure Rules providing for limited disclosure of documents, that documents adverse to the party's case are not disclosed.

3.55. This misconduct is naturally possible even without CFAs, and the volume of professional conduct complaints suggests that standards of conduct may need to be raised anyway. However, the introduction of CFAs, with the lawyer's personal financial interest in the outcome, provides for the first time direct financial incentives to lawyers to inhibit damaging disclosure and evidence.

3.56. Such incentives are not confined to the partners or the firm. It is common for Assistant Solicitors to have costs targets based on bills paid. These targets are

often central to their salary and promotion prospects within the firm. Where assistants and associates are judged on costs targets and target billings, there may be a significant pressure for individual solicitors to ensure that their cases (or cases on which they are working) succeed; their jobs and promotion may depend upon it.

3.57. Possible responses to this problem include:

3.57.1. Greater vigilance and judicial activism. (There is also an argument that CFAs coupled with judicial vigilance could lead to a resolution of disputes based even more firmly on evidence than advocates' arguments: see, for example, Peter Kunzlik, *Conditional Fees – the Ethical and Organisational Impact on the Bar* [1999] MLR 850).

3.57.2. The solicitor being required to satisfy him or herself by enquiry of the client that proper disclosure has been made at each stage of disclosure of documents, and to certify accordingly to the court. Under CPR Part 31.10, a party is already required to make a disclosure statement certifying that he or she understands the duty to disclose documents, and certifying that to the best of his/her knowledge she/he has carried out that duty.

3.57.3. Insofar as a solicitor has been involved in the preparation of witness statements or experts' reports, the solicitor could be required to certify to the court that he/she is satisfied that the statement or report accurately represents the evidence of the witness or expert. This should apply in all cases, and not only those conducted under CFAs.

3.58. **We recommend only that solicitors be required by rules of court to give the certificates indicated in paragraph 3.57.3 above.**

Expert Evidence

3.59. Unless an expert is willing to defer payment or insurers are willing to pay, expert fees can represent a significant barrier to successful CFAs.

3.60. Under the CPR Part 35.3(1) it is the duty of an expert to help the court on the matters within the expert's expertise. Under CPR Part 35.3(2), this duty overrides any obligation to the person from whom he has received instructions or by whom he has been paid. The Academy of Experts, Code of Practice, paragraph 2 states that "an Expert who is retained or employed in any action, suit or other contentious proceeding shall not enter into any arrangement to receive a contingency fee in respect of that proceeding." We understand that "contingency fee" in this context is intended to cover also CFAs and speculative fee arrangements. The LCD has published a Draft Code of Guidance for Experts under the Civil Procedure Rules 1999 which would forbid contingent, speculative or conditional fee payments to experts. Our understanding is that this code of guidance will be voluntary. Solicitors are in any event forbidden to pay witnesses on a speculative, contingency or conditional fee basis (paragraph 21.11, The Guide to the Professional Conduct of Solicitors, p.378, 1999 ed.).

3.61. Judges are greatly dependent on the evidence of experts for the determination of many issues within civil litigation. It is vital that any potential taint to their evidence be removed, or at least, understood by the court before reaching any judgment.

3.62. **We recommend that it be made a rule of court that no expert or any other witnesses giving evidence are permitted to be paid on a speculative, contingent or conditional fee basis. A code of guidance will not suffice.**

Withdrawal from CFAs

Withdrawals by a Solicitor Firm

3.63. Under the Law Society's standard CFA, the solicitor is free to end a CFA where the client does not meet his responsibilities under the CFA. Under the standard Agreement for personal injury cases, failure to meet these responsibilities includes: failing to give instructions that allow the solicitors to do their work properly; asking the solicitor to work in an improper or unreasonable way; deliberately misleading the solicitor; failure to cooperate with the solicitor; failure to go to a medical or expert examination or court

hearing; and failure to pay an insurance premium (Napier and Bawdon (1995) *op. cit.*, p 165). A solicitor would also be able to terminate the agreement where professional conduct issues (such as conflicts of interest) arose.

3.64. If the agreement is lawfully ended, the solicitor then has the right to decide whether the client must pay the basic costs and disbursements immediately or whether to wait to seek those costs, disbursements *and any uplift* should the client subsequently go on to win the case (see Napier and Bawdon (1995) *op. cit.*, p 70).

3.65. The solicitor can also end the agreement:

3.65.1. Where the solicitor believes that a client is unlikely to win but the client disagrees with that assessment. Under the standard CFA for personal injury cases, the client is obliged to pay only the disbursements in those circumstances.

3.65.2. Where the client rejects the solicitor's advice to accept a settlement with the opponent. If this happens, the client is obliged to pay the solicitor's basic costs and disbursements and any uplift should they subsequently go on to win the case (unless the amount of damages awarded or agreed subsequently is at least 20% more than the offer the solicitor previously advised the client to accept).

3.66. As a result, the solicitor's firm is in a strong position in terms of being able to terminate the agreement and then look to their client for payment of costs (assuming that the client can pay). This underlines the solicitor's ability to put pressure on a client to accept a settlement, possibly (as has been considered above) in circumstances where the interests of the solicitor and the client conflict.

Withdrawal from CFAs – by the Client

3.67. In theory, the client can end a CFA at any time. Should they wish to do this, under the Law Society's model agreement for personal injury cases, the solicitor can:

3.67.1. Insist on being paid immediately, forgoing any right to a uplift should the case subsequently be successful (if the client acts in person or goes to another firm of solicitors); or

3.67.2. Agree to wait for payment until the end of the case when (if the case is successful) the solicitor will be paid his basic fees plus any uplift (but nothing if the case is unsuccessful).

3.68. As a result, the client can be placed under considerable pressure not to withdraw from a CFA simply by being made aware of the position as to costs. This is an area where the insurance contract may need regulation. The position is exacerbated by the client's risk as to the other side's costs as this quotation from a CFA client illustrates:

> "He said, "Don't worry, you'll get your costs back". He said, "It's too late, you can't turn back now" ... I said "Why?" He said, "Because of my fees, if you stop now, the insurance doesn't cover that" (Client 36 in Yarrow and Abrams (1999), *op. cit.*).

3.69. There is a number of possible approaches to this problem. One would be to prohibit the solicitor from seeking costs against the client, where (i) the client withdraws from the CFA or (ii) where the solicitor terminates the agreement, until the end of the case. It could be argued that prohibiting the seeking of costs where clients withdraw would mean that solicitors would more carefully ensure informed consent to proceed under a CFA at the start of the case and carefully maintain that consent throughout the case. Conversely, this could lead to significant increases in the economic risk to solicitors of proceeding under a CFA and some potential for sharp practice by clients. In relation to CFAs which are terminated by the solicitor, similar arguments about economic risk to the solicitor firm apply. It can be strongly argued that the client should not be protected in circumstances where their behaviour has led to the termination of the agreement. **On balance, therefore, we would not recommend any intervention to prohibit recovery of costs against the client.**

3.70. **We recommend, however, that on any occasion when a solicitor terminates the agreement with the client, the solicitor be obliged to provide clear advice in writing explaining the reasons for and consequences of the termination, and that when a client terminates the CFA, the solicitor be obliged to write explaining the consequences of the termination. If a client has a legitimate complaint, the client can lodge it with the firm and ultimately with the Office for the Supervision of Solicitors, which can investigate the appropriateness of the termination as an issue of conduct and/or IPS, although we are aware that there can be considerable difficulties for clients in pursuing such complaints.**

Uninsured Clients

3.71. There will inevitably be some CFA cases where AEI is not available. These cases bring their own potential ethical problems. An uninsured plaintiff risks having to pay the other side's costs if the case is lost. Clearly it would be unethical for a lawyer to act for a client in this situation without being sure that the client was fully aware of what was at stake. An issue that remains is whether the corollary of this is that, if a lawyer has done everything possible to ensure that a client understands the risks, a case can proceed, however high the chances of losing and however disastrous such an eventuality would be for the client. In theory, clients paying by the hour would be just as much at risk if the case were lost. But CFA funded clients may be at greater risk than hourly rate paying clients. Clients who are obliged to pay some of their own money in lawyers' fees at the outset, may concentrate their minds more fully on what the financial implications really would be if they lost. The danger with CFAs is that, where it is not costing clients anything, they may be more keen to carry on and risk everything than they otherwise might be.

Client's Freedom to Instruct

3.72. In the tobacco case referred to in paragraph 2.48 above, footnote 32, the defendants agreed not to enforce costs orders against the claimants on condition that the solicitor firms acting for the claimants agreed not to pursue those defendants for ten years and not to pursue any smoking-related claims

for five years. The giving of such undertakings was approved by the Law Society.

3.73. The advantages and disadvantages, from an ethical perspective, of allowing such undertakings to be given include:

3.73.1. The undertakings protect the immediate clients of the lawyers in question from costs orders. They therefore accord with the lawyers' immediate ethical duty to their clients.

3.73.2. The undertakings arguably build on the implied undertaking in all civil litigation to make use of the opposing party's documents only for the purposes of the instant case and not for other purposes.

3.73.3. They could be regarded as anti-competitive and restricting consumer choice, i.e. restricting the ability of future clients to instruct the lawyer of their own choice, and could as a result breach the Law Society's Practice Rule 1 (part 1 of the Guide, cited in paragraph 3.3.1 above). Indeed the notes to Practice Rule 1, in paragraph 7(b) include this passage (at page 3):

> "It would, for example, be wrong for solicitor X, acting for a defendant in litigation, to offer a settlement which included a provision that the claimant's solicitor Y refrain from acting for other claimants against the defendant in other, future matters. Equally, it would be wrong for solicitor Y to accept any such restriction."

3.73.4. Where the pool of solicitor firms prepared to take on these kinds of cases is small, such undertakings would deplete their number further. This could materially restrict the ability of clients to obtain effective access to justice and might in some circumstances contravene Article 6 of the ECHR (see Chapter 2).

3.74. The barristers involved in the case were unable to give any such undertakings, by reason of the "cab rank rule". If any of the advocates had been solicitors,

rather than barristers, they too would probably have been requested to sign. Barristers acting in CFA-funded cases can now be asked to give and can give such undertakings, because the cab-rank rule does not apply to CFAs: paragraph 4.4.3 below.

3.75. If such undertakings were to proliferate, then there could be serious Article 6 concerns and a significant risk that the insurers of defendants would be able to impose quite severe restrictions on access to justice. On the other hand, there are principled concerns against providing blanket protection to clients who have either chosen not to insure or are unable to afford insurance. There might be nothing to stop a successful defendant from asking the lawyer of each claimant against whom the defendant successfully concludes a case to give an undertaking to prevent such lawyers taking further CFA claims against that particular defendant, unless the Law Society's Practice Rule 1 and the notes we have quoted in paragraph 3.73.3 above were properly enforced.

3.76. **We recommend that it be a requirement that any undertaking which does, or is likely to, impair the future ability of members of the public to gain access to a particular solicitor, or solicitors generally, under a CFA, be submitted to the court for the court's approval at the cost of the party seeking the undertaking, and that any rules of court governing such applications should emphasise the potential detrimental effect on access to justice and the court's obligations under Article 6 of the ECHR.**

CFAs and Advertising

3.77. CFAs are reported to be advertised frequently as "no win, no fee" arrangements, sometimes with a rider as to the possibility of incurring an insurance premium: see Yarrow and Abrams (1999), *op. cit.* As has been noted above, there are many occasions where costs may have to be paid by claimants themselves. Where these costs do not fall precisely within the definition of a "fee", or where the agreement defines a "win" more broadly than a client would, there is a significant risk that advertising in relation to CFAs can be misleading, can inhibit the extent to which clients are able to

give informed consent, and consequently can lead to significant ethical concerns for the solicitors' profession.

3.78. Conversely, there is a risk that prescribing the advertising of CFAs too closely could inhibit the ability of the solicitors' profession to compete with other providers of such services (e.g. claims assessors) who are regulated by other regulators of advertising, including the Advertising Standards Authority. As a result, specific regulation by the profession could have the effect of worsening the position of the clients rather than improving it. Regulation of the advertising of fee agreements may therefore need to be wider ranging than the legal professions and also based on further research, which we consider should be undertaken to build on the work of Yarrow and Abrams. A particular concern is that existing regulation of advertising by solicitors (by the Law Society) and other providers (e.g. by the Advertising Standards Authority) is not rigorously enforced.

Ethics and Information – Coping with Overload

3.79. CFAs are inherently complex. Several of these complexities are as a result of the desire, as expressed in the Law Society's forms of CFA, to protect the solicitor's position on costs against their client. Some of these complexities can be reduced by prohibiting or restricting certain practices (e.g. defining "win" more straightforwardly as outlined above). However, in any event, a solicitor seeking to explain a CFA faces a considerable difficulty in ensuring that the client understands advice about CFAs. The Law Society has produced a standard check list for use with its model CFA in explaining the CFA to the client. There are other ways of seeking to ensure that the client more fully understands the agreement. It is important that any standard attempts to encourage better client communication are well researched and based on the views of clients gained directly through research rather than guesswork.

3.80. The LCD's Regulations will require solicitors to give both oral and written explanations of CFAs to their clients. One additional step would be to require that the client be given a "period of contemplation" between being given the explanations and signing the CFA. During such a period of contemplation the

client would be able to think further about the draft CFA, and to consider what further questions (if any) the client would wish to ask of the solicitor before signing. Recent research shows that clients who approach solicitors for help, particularly in personal injury cases, are not infrequently in some confusion about their physical or psychological condition and need time to be able to give informed consent to the terms of the CFA. It may be objected that in the past there has not been any requirement for a period of contemplation in relation to contracts between solicitors and their individual clients, and that CFAs are not sufficiently different in kind from ordinary solicitor-client agreements to justify the imposition of such a requirement. The answer to this objection is that CFAs are different in kind as appears from the considerable efforts made by both legal professions to draft standard forms of CFA which are sufficiently clear and fair to clients while protecting the lawyers' interests. The standard forms of CFA are not easy for a non-lawyer to understand, even with the benefit of a lawyer's written and oral explanation. Time for reflection is desirable before the client is bound by a CFA. This is particularly important as the effect of insurance and termination rules can mean the client is in reality locked into a case in a way that is not true of other forms of funding. It is appropriate to provide for a contemplation period similar to that required under the consumer credit legislation (which already apply to some insurance/disbursement funding arrangements available to CFA clients).

3.81. **We recommend that consideration be given to requiring a compulsory "period of contemplation" between the explanation of the draft CFA and the client being asked to sign. Such period should be 7 days, except in cases of urgency, e.g. where the limitation period is about to expire. The benefit of such a period could be strengthened by lending the client a video explaining the ins and outs of CFAs. We recommend that such educative material is produced by the Community Legal Service.**

Financial Position of Firms and Ethical Problems

3.82. Ethical risks will be sharpened in the case of solicitor firms in a less than comfortable financial position. This has led to suggestions that:

3.82.1. Only solicitor firms on a steady financial footing should undertake CFAs.

3.82.2. Solicitor firms should never look on CFAs as a potential way of digging themselves out of an existing financial hole (but quite the opposite); and

3.82.3. Solicitor firms should constantly monitor their financial exposure to CFAs and take steps accordingly if they find they are becoming over committed.

3.83. As was noted in Chapter 2, solicitor firms' monitoring of risk and exposure appears to be, at best, patchy.

3.84. These are crucial issues for firms to be aware of, and issues which they should be encouraged to address with better practice management procedures. We do not believe it is practical or desirable to try to regulate on this issue specifically, although recommendations as regards records and monitoring of uplifts and recoveries would assist in achieving better management. Nevertheless, lawyers should not be complacent. Solicitors and barristers need to be constantly alert to their motives in taking decisions relating to cases, and to police their own behaviour. If challenged, a firm which could demonstrate that its finances were solid would be in a far better position to justify any borderline decision than one whose finances were shakier. It is unrealistic to imagine that a practice rule could be drafted to cover every eventuality – the range of situations is simply too diverse. A system of licensing firms in the conduct of CFAs, which involved an assessment of financial fitness, is conceivable but (at this stage in the development of CFAs) disproportionate. We are not, therefore, in favour of any regulatory change in this area.

Ethics and Insurance Companies

3.85. Another significant area of ethical concern over CFAs, and an area which has been little explored so far, is in relation to after the event insurance (AEI), an essential component in CFAs, which protects clients from having to pay the

other side's costs if they lose. The interests of the AEI insurer may conflict directly with the interests of the insured client.

3.86. The AEI scheme endorsed by the Law Society, Accident Line Protect ("ALP"), is a delegated authority scheme. ALP accounts for the majority of AEI policies written to date. In the case of ALP, membership was open to all the 1,700 firms on the Law Society's Accident Line scheme although this is no longer the case.

3.87. Some insurers run smaller delegated authority schemes, with smaller panels of member firms and more stringent entry criteria. In such schemes, firms are individually assessed by the insurer before being accepted on to its scheme. They are assessed on volume of business, quality of systems and experience in the field.

3.88. Under a delegated authority scheme, AEI cover is automatic once participating firms have decided to take a case on CFA terms. The rationale is that the insurer backs the solicitor firm's judgment; if the firm has assessed a case and decided it will risk its own money on taking the case on CFA terms, the insurer is automatically prepared to do the same. Both stand to lose out if the firm gets it wrong.

3.89. In a delegated authority scheme, the insurer's quality control is at the level of the firm rather than at the level of the individual case. Only selected firms which meet particular entry criteria are allowed to take part. For the scheme to work, the insurer needs to know that the firm's judgment (about whether to take a case on CFA terms) is likely to be sound and its subsequent handling of the case will be of suitably high quality.

3.90. In a delegated authority scheme, participating firms are in an ongoing contractual arrangement with the insurer. A key term of the contract is that all the CFA and speculative fee cases done by member firms must be covered by that relevant insurer. This is to ensure that the participating insurers are able to spread the risk among weaker and stronger cases, and they hope to avoid the risk of adverse selection of cases by the participating firms.

3.91. It is important to emphasise the significance of adverse selection to the insurance market. It comes about when the client group is skewed in some way towards those with the less strong claims, as would happen if solicitor firms could opt just to insure what they saw as their weaker CFA cases. Adverse selection leads to greater than expected claims which in turn leads to the insurer increasing premiums to compensate for the higher payouts. The higher the premium, the greater the incentive for firms to be selective in the cases they insure, which leads to even greater adverse selection. Insurers rightly insist that once this vicious circle gains momentum, the insurance product is doomed.

3.92. Concerns about adverse selection led to the insurers of one of the main schemes suspending the membership of thirty solicitors' firms and emphasising that "anti-selection" practices would not be tolerated. These concerns included: failing to insure every CFA case (that is, weeding out the strongest cases and doing them without insurance, on the basis that the cases were bound to succeed and so to insure the cases would be a waste of the clients' money); doing the strongest cases on a speculative fee basis (see Chapter 2); or using non-contentious business agreements (see Chapter 2) for the strongest cases, and only switching to a CFA with insurance if the matter unexpectedly failed to settle before an action had to be brought. The insurer's letter to firms makes clear their concerns.

> "When the facility was introduced in 1995 the concept of any case being handled on a 'No Win No Fee' format was understood to mean that it would be conducted under a CFA, itself being in line with the Law Society's model CFA. It was never envisaged, nor is it now, that other forms of intermediate agreements such as Non Contentious Business Agreements (NCBA) would form part of the process. It is not permissible for NCBAs to be used initially, then for the case to be switched to a CFA-based format, coupled with "Protect". Such actions constitute adverse selection. [Solicitor] Practices found to be in conflict with the User Manual or with the spirit of the Facility – especially through use of NCBAs and later switching – may well find that they face exclusion, and so lose access to the benefits of this insurance cover. You are reminded that ALL ELIGIBLE CASES handled on a 'No Win No Fee' format under a CFA MUST BE INSURED AND A PREMIUM PROMPTLY PAID, UNDER 'PROTECT'."

3.93. Under the Law Society's Practice Rule 15 and the Solicitors' Costs Information and Client Care Code, although solicitors do not have to give best advice on which insurance product is better (or worse) than another, they do have to explain to clients the range of available funding options, and they are also obliged to discuss *whether* it is advisable for the client to take out AEI. In circumstances where it is not in the financial interest of the client to take out AEI (because a case is a "near certainty") but the firm is obliged to insure all CFA cases under their delegated AEI scheme, there is a conflict between the client's interests and the insurers' contractual insistence on exclusivity vis à vis the solicitor firm.

3.94. Before considering whether and how this conflict should be addressed, it should be emphasised that delegated authority schemes have advantages for solicitor firms and clients:

3.94.1. Cover is instant and automatic. Firms are free to ensure that cases will be insured without having to ask for approval from the insurer. For the client, there is no need to wait for a third party to assess a case before knowing whether or not insurance will be available or finding out what the premium will be.

3.94.2. Delegated schemes are cheaper to administer and easier for the client to understand. AEI application forms can be long, complicated documents asking questions which may be time-consuming or difficult to answer, and often application fees have to be paid. The costs of this have to be borne by the firm or, possibly, the client. There is no application fee under delegated authority schemes, but premiums can be more expensive.

3.95. These two advantages are gained at the cost of fettering the ability of solicitors to offer what is in the best interests of their individual clients. This raises the question whether it is reasonable for the interests of the individual client to be subsumed into the interests of the wider group. There is, to some extent, a precedent for the interests of the individual taking second place to the general interests in litigation; in multi-party actions, participants are generally asked to

undertake at the outset that they will settle when it is in the interests of the group to settle. There are, however, differences between the multi-party action and CFA scenarios.

3.96. Insurers and some solicitors argue that it is proper for participating firms to be restricted in the kinds of no win, no fee arrangements they can make, and to be compelled to take out insurance for their clients in every case, because this is for the greater good. By making sure that insurers get a good spread of weak and strong cases, they are ensuring the survival of the scheme (with its advantages and disadvantages, outlined above). Without this kind of compulsion, delegated authority schemes would not be viable and would fall away – to the disadvantage of clients of participating firms generally. The only alternative would be individually underwritten cover, which might be less affordable for clients, and which might be unavailable if insurers turned down a particular case. However, our understanding is that premiums under the Accident Line Protect Scheme are often significantly higher than comparable products on the open market. As a result, from the perspective of clients, the benefits of such delegated schemes appear questionable. This is a particular concern where it is the Law Society's endorsed scheme which is more expensive. Whilst it is possible that the differences between insurance scheme premiums may reduce over time, the issue of cost, taken together with the requirement that all of a firm's cases must be operated under a delegated scheme, pose major problems of conflict of interest.

3.97. In our view, there are two potential responses to this problem:

3.97.1. At the moment, clients do not appear to be shopping around for the best deals in relation to CFAs. However, if material were to be made available which was specifically targeted at clients (perhaps through the Community Legal Service), it might be possible to take steps to encourage clients to look around by encouraging an awareness of the variability in insurance premiums, and the desirability of approaching more than one solicitor for a view of their potential CFA.

3.97.2. The second response is to require solicitors to give advice on whether insurance is necessary and in the client's interests.

Obligations to Give Advice on Insurance

3.98. There is currently no requirement to give an explicit warning to clients that they are being asked to agree to something (taking out insurance) which is costing them money which in their solicitor's opinion (because of the strength of their claim) they do not need. The 2000 Regulations (Reg. 4(2)(e) and 4(5)) require solicitors to provide oral and written advice on why insurance is necessary and why they are recommending a particular policy. They are also required to state orally and in writing whether they have an interest in such insurance although the extent and nature of this obligation is unclear. If it is accepted that this is a concern, a further issue is how explicitly this should be made known to the clients concerned. This issue is further clouded by the fact that, however useful their products may be in increasing access to justice, AEI insurers are not a public service but, necessarily, commercial organisations. They will continue to offer delegated authority AEI so long as they believe it will be a profitable exercise. Therefore, the argument for saying that everyone should take out AEI (on a delegated authority scheme), because this ensures greater access to justice all around, also means that insurers are more likely to make money out of this area. It is only a partial solution to require solicitors to obtain informed consent from clients.

3.99. One way forward might be for firms participating in delegated authority schemes to make a broad disclaimer to all CFA clients at the outset (before the case itself has been assessed). This could be along these lines:

> "We are members of [xx scheme]. This means that we can guarantee you instant after the event insurance [AEI] for your CFA case. However, one of the conditions of being a member of this scheme is that clients have to take out AEI insurance and pay the appropriate premium in every CFA case we take on. This is to ensure the overall survival of the scheme. Another firm may be prepared to act on CFA without insurance or they may be able to arrange other insurance (which may be cheaper). If you are in doubt, you should consider seeing another firm of solicitors to see what they will offer you."

3.100. We are in little doubt that this approach would be hard for the delegated authority AEI insurers and solicitors to swallow. They would have concerns that such a disclaimer would lead to some adverse selection even if in a fairly diluted form, because in a perfect world with well-informed clients making wholly rational decisions those who did not want AEI (who would tend to be those with "near certainty" cases) would drift away from delegated authority firms. The pool of cases from which the insurers were drawing their business would therefore still end up slightly skewed towards clients with less strong cases.

3.101. This problem is somewhat eased to the extent that the insurance premium is recoverable from the unsuccessful opponent. Clients who are confident that they will get back the money they spend on insurance at the end of the case may be more prepared to pay for a premium they considered they did not need (always supposing the client could raise the money in the first place). Some firms will be prepared to pay premiums themselves on their clients' behalf in all or some cases if they know that the money is by way of a loan until the end of the case. In some cases the premium may become payable only at the end of the case. However, it is not clear whether the insurance premium will be recoverable in every case. We give one example. AEI insurers are insisting cover is taken out as early as possible in a case (to avoid the risk of adverse selection). If defendants then immediately concede liability and offer to pay damages, they may be able to argue that they should not have to pay the premium as AEI cover was unnecessary because they never had any intention of fighting the case. Defendant insurers have indicated they will fight the payment of premiums in such circumstances on the basis that, prior to the issue of proceedings, there is no insurable risk. There is also the problem that some premiums are so high that they are unlikely to be fully recoverable from the defendant in any event. If a substantial part of the premium is irrecoverable, then it will have to be deducted from any damages which are recovered.

3.102. Another potential ethical dilemma arising from membership of a delegated authority scheme is that it may fetter firms' discretion to act for particular

clients. Firms known for ground-breaking work almost inevitably lose more cases than firms following better trodden paths. This dilemma is worsened because the insurers are not sufficiently explicit about what level of claims they are prepared to accept, to enable firms to adjust their behavior accordingly (e.g. by turning down cases). Insurers state that the success-failure rate is only one factor. Others include administration of the scheme within its rules, the number of claims and their costs, as well as the frequency of loss.

3.103. The solicitor-insurer relationship presents crucial ethical difficulties. The Regulations seek to deal with this through requiring solicitors to give reasons for suggesting any particular method of financing a case (e.g. insurance) and any (self-)interest in doing so. **We recommend that it is made clear in the Law Society's Practice Rules that a solicitor's duty to their client under Practice Rule 1 puts the solicitor in a situation of conflict with their client if the solicitor is aware that the insurance is unnecessary or unnecessarily expensive.**

A Broader Conflict

3.104. Another fundamental concern is that, as a result of the pivotal role of insurance in CFAs, insurance companies will occupy a gate-keeping position in the civil justice system. This is of concern for three main reasons.

3.104.1. The first is that insurance companies in their own interests must naturally devote their attention to purely commercial evaluations of risk. Whilst this is essential to the commercial viability of a privately funded CFA scheme, it is an approach which will tend to limit CFAs to claims with high chances of success, and may also lead to the exclusion of particular types of solicitor firm (particularly those who do "cutting edge" type of work).

3.104.2. A second, related problem, is the unregulated role of insurers in litigation. Insurers are able to insist upon the communication of offers of settlement to them and to take a view that those offers should be accepted. Such an intervention would be taken on purely

commercial grounds (understandably) and also in a way which is unregulated.

3.104.3. A third, more fundamental concern is that AEI insurance companies, where they or associated companies have an interest in the subject of litigation (either specifically on a particular case or more generally because they also insure defendants), may have a direct interest (for example) in seeking to minimise the level of damages. This could lead to a fundamental conflict of interest. An EC Directive has already sought to regulate this point (Council Directive 87/344/EEC of 22 June 1987).

3.105. We have not been able to investigate in detail the role of insurers in relation to CFAs. However, given that a significant potential conflict of interest lies at the heart of what is now to be a major part of our civil justice system, it is an area which requires further scrutiny.

3.106. **The role and conduct of insurance companies in the litigation process are a new and under-explored phenomenon. We recommend that they should be subjected to research and independent scrutiny, with a view to imposing regulation if that proves to be necessary in the interests of clients.**

Monitoring and Auditing Approaches

3.107. We have considered the difficulty of dealing with certain ethical problems, especially under-settling and approaches to uplifts. To evaluate this, the following information would need to be considered: (1) the nature of the dispute; (2) the nature of the injury; (3) the level of uplift; (4) the level of the cap as a percentage of damages recovered; (5) details of any AEI policy including the basic terms and premium paid; (6) the outcome of the case including the level of damages recovered; and, (7) the costs paid by whom and to whom.

3.108. Through the routine recording and analysis of such data, it would be easier to evaluate the overall pattern of CFAs throughout the country. One of the

reasons why this should be considered is the paucity of information provided by insurance companies and the difficulty that researchers would face in scrutinising CFAs without a central record of such information being available. Researchers would otherwise continue to be reliant on the goodwill of solicitor firms and AEI insurers to participate in the provision of information.

3.109. Such a record of information could be maintained by the Law Society or by some other body (e.g. the Legal Services Commission) as part of their wider concern to monitor the operation of CFAs, either for all CFAs or for a significant and representative sample.

3.110. It would also be sensible to supplement the powers of any body holding the record of such information to require firms submitting information also to provide, if requested, any files in relation to CFAs to the body for inspection. It would be possible to inform the client at the outset (and provide in regulations) for the client's details to be made available, under duties as to confidentiality, to the monitoring body for the purposes of investigation and research. The statutory regulations could provide for client confidentiality to be waived in such circumstances to the necessary extent. The position of such clients would not be dissimilar to the position of legal aid clients.

3.111. While the costs of administering such an approach would not be de minimis, the cost when compared with the costs of and proceeds from litigation would be relatively small. There would be an opportunity for continued monitoring of CFAs in a broader and more rigorous way than is possible via professional rules of conduct and client complaints. It would also provide an important resource to enable proper empirical and detailed evaluations of CFAs to be undertaken. Furthermore, such a database would have to be managed electronically, and solicitor firms would be able to log on to such anonymised information and have access to the general database as a way of measuring their own progress and monitoring it against national benchmarks. It could also assist in financial management. **We recommend the creation of such a CFA database which could be of benefit to the monitoring of what will in future be a major part of the civil justice system.** But we recognise that this

proposal would need a much more detailed evaluation before it could be put into effect.

3.112. **Finally, we make some recommendations which in our judgement should be implemented straight away by the Law Society:**

3.112.1. **It should be considered to be professional misconduct for solicitors to apply a standard or blanket uplift (whether of 100% or any lesser figure). The uplift on basic cost should always be founded on the assessment of risk in the particular case, and on the likelihood of the level of uplift being accepted on the final assessment of costs.**

3.112.2. **There should be a cap (whether at 25% or some other figure) on the total fees recoverable from the client, and not merely on the uplift, unless there are exceptional circumstances.**

3.112.3. **Within the Law Society's Continuing Professional Development scheme, training in risk assessment should be compulsory for those involved in CFA cases.**

Summary in Relation to Solicitors

3.113. CFAs bring the certainty of increased conflicts of interest between solicitor and client. Solicitors need to be made more aware of the potential conflicts, and to be better equipped to avoid such conflict.

3.114. The role of AEI insurance has not yet been adequately considered. The solicitor profession, its representatives and the insurance industry need to be more open and more willing to discuss the issues we have raised. It is also important for the debate to be fully informed.

3.115. The conflicts highlighted in this Report are likely to increase. The delegated authority AEI schemes are for personal injury cases. The high success rates in this area mean that the insurers can remain relatively hands off. If similar schemes are to emerge in other, less predictable areas of litigation, the insurers will necessarily want a greater say in the running of individual cases, and of

practices at solicitor firms as a whole. The solicitor's profession (and society generally) need to examine how much influence and control by insurers they can properly accept in the interests of clients and in the interests of more affordable, more straightforward insurance cover.

3.116. Similarly, there are concerns about the complexity and balance in CFA contracts as currently structured. We have tried to outline these concerns, and to suggest some ways forward in terms of regulation which appropriately protect the consumer and do not represent disproportionate burdens on solicitors' practices.

CHAPTER 4

4. Barristers and Conditional Fees

4.1. The Bar Council issued in July 1999 a book entitled "Conditional Fee Guidance" to guide barristers when wishing to enter into a CFA. This is not the last word of guidance for the Bar. But for the purposes of this Chapter of our Report we are indebted to the Bar Council's Guidance for some of the insights which it provides.

4.2. The starting point is with the Bar's professional duties in relation to (1) the public interest as represented by the courts, (2) the profession itself, and (3) the interests of the lay client. The overriding nature of the duties to the courts and the profession has long been established under the Bar's Code of Conduct (in this Chapter "the Code") – see paragraph 202 of the Code for example, and has now been placed on a statutory footing (see Section 27(2A) of the 1990 Act as added by section 42(1) of the 1999 Act).

4.3. It is convenient here to summarise the main duties imposed by the Code on barristers. Similar duties, with some exceptions, are imposed on solicitors as advocates and the duties imposed on solicitors as litigators are also on similar lines.

4.4. The duties to the courts and the profession include:

4.4.1. The duty to be independent in conduct and professional standing: Code, paras. 102 and 201.

4.4.2. The duty to act only as consultants instructed by authorised litigators and other approved professionals: Code, paragraph 102.

4.4.3. The "cab-rank" duty, under which, with exceptions, a barrister is required to represent any client who wishes to engage the barrister: Code, paras. 102, 209 and 501-504. This duty does **not** apply to CFAs, and a barrister cannot be compelled to take a case under a CFA: Code, paragraph 502(b).

4.4.4. The duty not to engage in conduct, whether in the course of the profession or otherwise, which is (i) dishonest or otherwise discreditable; (ii) prejudicial to the administration of justice; (iii) likely to diminish public confidence in the legal profession or the administration of justice; (iv) likely otherwise to bring the legal profession into disrepute: Code, paragraph 201. This is the negative aspect; the positive aspect is in Code, paragraph 202.

4.4.5. The overriding duty to the court to ensure in the public interest that the proper and efficient administration of justice is achieved, to assist the court in the administration of justice, and not to deceive or knowingly or recklessly mislead the court: Code, paragraph 202.

4.4.6. The duty (i) not to permit absolute independence, integrity and freedom from external pressures to be compromised, (ii) not to do anything in such circumstances as may lead to any inference that this independence may be compromised; and (iii) not to compromise professional standards in order to please the client, the court or a third party: Code, paragraph 205.

4.4.7. The duty not to enter into partnership with another barrister or into any form of association with a non-barrister: Code, paragraph 207.

4.4.8. The duty to take all reasonable and practicable steps to avoid unnecessary expense or waste of the court's time: Code, paragraph 601.

4.4.9. The duty not to devise facts which assist the client's case and not to draft litigation documents which contain any unsupported statements of fact, any contention which the barrister does not consider to be properly arguable, or any allegation of fraud without clear instructions and on the basis of reasonably credible material which as it stands establishes a *prima facie* case of fraud: Code, paragraph 606.

4.4.10. The duty not to pressurise a witness to provide other than a truthful account of the witness' evidence, and not to rehearse, practise or coach a witness in relation to such evidence: Code, paragraph 607.

4.4.11. The duty to cite all relevant court decisions and legislative provisions whether or not favourable to the client's case: Code, paragraph 610(c).

4.5. The duties to the lay client include:

4.5.1. The duty to promote and protect fearlessly, and by all proper and lawful means, the lay client's best interests and to do so without regard to the barrister's own interest or to any consequences to the barrister or to any other person (including his instructing solicitor or other members of Chambers): Code, paragraph 203(a).

4.5.2. The duty to act towards the lay client in good faith: Code, paragraph 203(c).

4.5.3. The "cab-rank" duty: see paragraph 4.4.3 above.

4.5.4. The duty not to accept briefs or instructions if to do so would cause the barrister to be professionally embarrassed, and for this purpose a barrister will be professionally embarrassed in a number of specified circumstances, including (see Code, paragraph 501):

(a) lack of sufficient experience or competence or of adequate time and opportunity to prepare;

(b) where there is, or appears to be, some conflict or a significant risk of some conflict either between the interests of the barrister and some other person (e.g. the lay client) or between the interests of any one or more clients;

(c) where there is a risk of breach of confidence or where the knowledge the barrister has already of the affairs of client A would give an undue advantage to new client B.

4.5.5. As we indicate below, the conflict between the barrister's and the lay client's interests, inherent in any CFA, presents threshold ethical problems which are fundamental and serious.

4.5.6. The duty to withdraw (i) if continuing to act would cause the barrister to be professionally embarrassed; (ii) if, having agreed to act for more than one client, there is or appears to be a conflict or significant risk of conflict between their interests or a risk of a breach of confidence, and the clients do not all consent to the barrister continuing to act; (iii) if the client refuses to authorise the barrister to make some disclosure to the court which the duty to the court requires the barrister to make; (iv) if, having come to know of the existence of a document which should have been but has not been disclosed on discovery, the client fails forthwith to disclose it; (v) if the barrister, having received a document belonging to a party not the client by some means other than the normal and proper channels, and having read it before realising that it ought not to have been read but ought to have been returned unread, the barrister would thereby be professionally embarrassed, provided that the barrister may withdraw only if this can be done without jeopardising the client's interests: Code, paragraph 506, subject to paras. 507 and 508.

4.6. There is also the specific provision concerning CFAs in paragraph 309 of the Code (which is subject to paras. 205 and 207). This permits a barrister in independent practice to charge for any work undertaken by the barrister (whether or not it involves an appearance in court) on any basis or by any method the barrister thinks fit provided that such basis or method is:

4.6.1. Permitted by law; and

4.6.2. Does not involve the payment of a wage or salary.

4.7. This means that CFAs (and speculative fee arrangements) are permitted, in relation to all types of proceedings where CFAs are permitted by law, but that contingency fee arrangements are not permitted. Under the statutory framework CFAs with a fee uplift of up to 100% will be permitted, and will

therefore be able to be undertaken by barristers. There is no recommended "cap" by reference to a percentage of the lay client's recovery, except that in personal injury cases a cap of 10% of damages awarded is recommended.

4.8. The Bar Council's Conditional Fee Guidance mentioned above contains both "Ethical Guidance" and "Practical Guidance" in Parts 1 and 2. The main points in the Ethical Guidance (other than statements of the law and references to the Code) are the following:

4.8.1. Barristers may enter into standing agreements with each other or within Chambers in relation to CFA work (such agreements would include arrangements for monitoring of proposed CFAs and for replacing barristers who become unavailable e.g. through illness or through previous actions overrunning their expected length), or barristers may prefer not to enter into any such agreements and to work on a one-off basis agreed for each CFA (paragraph 4).

4.8.2. The Bar Council is considering whether any form of fee or profit sharing arrangement is or should be permitted under the Code. If any such arrangement is or will be permitted, it is unlikely that a barrister who has such an arrangement with another barrister could appear in front of that other barrister (sitting as part-time judge, or arbitrator, or in a similar capacity) or could appear against that other barrister in any proceeding to which the fee or profit sharing arrangement applied (paragraph 4).

4.8.3. The Bar Council is considering the ethics of arrangements between barristers by which they agree to accept each other's return CFA briefs or instructions, and whether, if they have any such arrangements, they are precluded from appearing in front of one of them or appearing against one of them in any proceedings to which the arrangement applied (paragraph 4).

4.8.4. In any event an arrangement of one of the types referred to in 4.8.1-3 above might create such a conflict of interest or an appearance of such a conflict, so as to prevent the barristers concerned appearing in

front of one of them sitting in a judicial capacity or appearing against each other in any proceeding to which the arrangement applied (paragraph 4): see in this respect *R v Bow Street Magistrate ex parte Pinochet* (No.2) [2000] 1 AC 119 HL and *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451; [2000] 1 All ER 65 CA.

4.8.5. If a barrister monitors cases sent to another barrister in a chambers in order to decide whether or not the cases should be accepted on a CFA basis, the monitor could not represent the opposing party or sit in a judicial capacity in any such case (paragraph 5).

4.8.6. A barrister acting under a CFA must give impartial advice to the lay client and take all reasonable steps to declare to the lay client any actual or apparent conflict of interest between the barrister and the lay client (paragraph 8). **Conflicts of interest between the solicitor and the lay client are not covered in paragraph 8 of the Ethical Guidance, though they need to be covered in suitable terms. Problems raised for barristers when they become aware of such conflicts are considered below.**

4.8.7. During the currency of a CFA the barrister should use best endeavours to ensure that:

(a) the barrister's advice is communicated and fully explained to the lay client;

(b) any settlement offer is communicated to the lay client forthwith;

(c) the consequences of particular clauses in the solicitor/lay client CFA and in the barrister/solicitor CFA are explained to the lay client as and when they become relevant, particularly after a settlement offer has been made and in respect of the financial consequences of the offer being made, including any increase in the offer, the costs consequences, and the "success fees" which are or may become payable (paragraph 9).

4.8.8. A barrister acting under a CFA, when advising on settlement, must have in mind the Code, paragraph 203(a) (see paragraph 4.5.1 above), and the barrister's duty must be to advise as to the best course of action from the lay client's view only (paragraph 10).

4.8.9. Difficulties will arise when there is disagreement about the wisdom of continuing the case or accepting the offer, either between the lawyers and the lay client, or between solicitor and barrister, or amongst the barristers. Careful consideration must be given to the lay client's interests, and every effort must be made to avoid unfairly depriving the lay client of representation in the proceedings. The terms of the CFA may permit a barrister to withdraw if misled about the true nature of the evidence, or if the lay client is refusing to accept firm advice as to the future: this is governed by the Code, paras. 506, 507 and 508, which override any inconsistent provisions in a CFA or the absence of any provision for withdrawal in a CFA (paras. 11 and 12).

4.9. No ethical guidance is given in relation to the impact of the lay client's insurance on the client's potential liability for the opposing party's costs, or of the barrister's own insurance of the barrister's fees (except in respect of disclosure to the barrister's insurer of advice given to the lay client).

4.10. The "Practical Guidance" contains much sensible advice of a practical nature, which is not of any direct relevance to this Report. The points which seem to be most material are these:

4.10.1. Attention is drawn in paragraph 4.8 of the Practical Guidance to the ability of the lay client to have both fees and the level of fee uplift assessed by the court under Civil Procedure Rules Part 48.9 (as under the earlier Rules of the Supreme Court) and reduced if the court concludes that the fees or the percentage of the uplift are excessive, in the case of the uplift "having regard to all relevant factors as they reasonably appeared to the solicitor or [barrister] when the CFA was entered into".

4.10.2. "Standard" CFA success fees or part fees are not acceptable: CFA fee uplifts must always be calculated having regard to the risk in the individual case (paragraph 4.10 of the Practical Guidance).

4.10.3. When deciding whether to enter into a CFA the barrister will normally want to see a copy of the CFA between the solicitor and the lay client and "the Law Society's Conditions" as they apply to the claim ("the Law Society's Conditions" are part of the Law Society's standard CFA), and to know whether the lay client has sufficient insurance in place, and if not, why not (paragraph 17.4 of the Practical Guidance). As with the "Ethical Guidance", no guidance is given in relation to conflicts between insurers' interests and those of lay clients.

Conflicts

4.11. The first and threshold ethical problem is that entry into a CFA puts a barrister in a position vis à vis the lay client in which there is an inherent and unavoidable potential conflict between the barrister's interests and those of the lay client. This is because barristers will have a substantial personal financial interest in the result of litigation and therefore in its conduct. This is not to say that barristers have no personal interest in litigation in the absence of CFAs. Since litigation is the prime source of their income, they have a personal interest in being successful on behalf of their clients. But they do not have a personal financial interest in the outcome in the sense that payment and the amount of their fees does not depend on success (or failure). The barristers' interest lies in presenting their clients' cases to the best of their ability. If their clients lose, however, they are still entitled to be paid the same fees. **But CFAs will put barristers in a position of having a direct financial interest in the outcome of their cases. However strong the professional ethical Code of Conduct, it is clear that the introduction of this "direct financial interest in the outcome" through CFAs carries the risks of lower standards.**

4.12. One of us has put the problem starkly by saying that "truth will be the victim". By this it is meant that barristers (like solicitors) under CFAs will have a much stronger incentive to conduct cases so as to win them, for example:

4.12.1. By ensuring that the evidence of witnesses of fact, including the party for whom they act, is fitted to the documents by coaching and other assistance so as to support that party's case.

4.12.2. By ensuring, under the new Civil Procedure Rules providing for limited disclosure of documents, that documents adverse to the party's case are not disclosed.

4.13. This misconduct is possible even without CFAs, but the introduction of CFAs with the barristers' personal financial interest in the outcome will provide for the first time substantial financial incentives to barristers to lower their standards so as to win cases.

4.14. As already described in relation to solicitors, there will not infrequently be circumstances where settlement is considered, and where the interests of barristers in achieving or not achieving a settlement may diverge from those of their clients, and perhaps also from the interests of their instructing solicitors. The experience in the USA in this connection has already been described in Chapter 2.

4.15. These problems must not be overstated. All professional and ethical codes can be broken by the professionals subject to the codes; and the maintenance of high standards depends on training before and during practice, vigilance to detect misconduct, and most important, an ethos of good conduct backed by encouragement at every level, especially by the Judges. But it is right that CFAs and the lawyer's personal financial interest in the outcome will raise more serious ethical problems than have previously arisen.

4.16. The Government and Parliament having decided that CFAs are to be lawful and permissible to be entered into by barristers, the fundamental potential conflict of interest which entry into CFAs involves has to be accepted. In our view there cannot be any sufficient remedy to prevent this fundamental

conflict of interest. The most that can be done by those bodies which oversee the standards of the Bar (the Bar Council and the four Inns of Court) is to provide as much protection against preference being given to barristers' interests rather than the interests of their clients, as can realistically be achieved.

4.17. The ethical problems will arise first at the stage when the client wishes to engage the barrister through a solicitor or other authorised litigator. In many cases the solicitor will already have agreed a CFA with the client, i.e. the solicitor will have given the client his assessment of the chances of success, advised the client to enter into a CFA, and agreed with the client the terms of the CFA. The solicitor will then come to the barrister asking the barrister also to enter into a CFA. At that stage the barrister will be faced with a dilemma: has the client been advised properly whether or not the CFA and its terms are appropriate? Should the barrister insist on finding this out, and if necessary giving the client advice about the CFA which may be contrary to the advice given by the solicitor, perhaps because by the time the matter reaches the barrister, more of the circumstances are known and a more precise analysis of the chances of success can be made? Or should the barrister simply assume that proper advice has been given, and enter into a CFA or not according to the barrister's own assessment of the lay client's interests at that time? If the barrister were to advise the client on the terms of the solicitor/client CFA already made, he would naturally have to look at that CFA in the light of the circumstances known or reasonably able to be known at the time when the CFA was made, and not with the benefit of hindsight in the light of circumstances which have subsequently become known.

4.18. We consider that a barrister should not be required to inquire into the terms of an existing CFA between the instructing solicitor and the client, whether when the barrister is asked to enter into a CFA also, or otherwise. To impose such a burden would be unduly onerous, and would be liable to create undue tensions between the solicitor and the barrister to the detriment of the client. There will, however, frequently be instances in which the barrister will become aware of the terms of the solicitor/client CFA, not least because of the

practicalities of civil procedure under the CPR and the 2000 Regulations (paragraph 2.73 above). The barrister may sometimes form the view that the terms of the solicitor/client CFA were not in the best interests of the client at the time when such CFA was entered into. What then should the barrister do? The position is made more complex because CFA uplifts and insurance premiums are recoverable from the defendant, and any excessive uplift or premium can be challenged by the defendant on the final assessment of costs. It could therefore be argued that the barrister can safely leave the CFA terms to be challenged by the defendant.

4.19. The most appropriate analogy is with cases in which a barrister forms the conclusion that the client has a potential claim in negligence or otherwise against the instructing solicitor. In those circumstances the barrister is under a duty to the client to advise the client accordingly. Similarly, if the barrister concludes that in agreeing the terms of a CFA with the client the solicitor has been in breach of a duty owed by the solicitor to the client, the barrister is under a duty to advise the client. We emphasise, however, any such conclusion would have to be based on the facts known or reasonably able to be known to the solicitor at the time when the CFA was entered into, and without the benefit of hindsight. The cases in which a barrister has to advise the client that the solicitor has been negligent are rare, and it is to be expected that such cases involving the terms of CFAs will also be rare.

4.20. **We recommend that, whenever a barrister enters into a CFA, the barrister should be required to provide both oral and written reasons to the client for the setting of the level of uplift in the CFA: see paragraph 2.76.3 above.**

4.21. This is a point of particular importance in relation to personal injury cases, because legal aid has effectively ceased to be available (except for some medical negligence and high cost personal injury claims and personal injury cases which are not founded in negligence), and because cases of kinds previously paid for by the client will also be dealt with under CFAs instead. Above all, in a relatively high proportion of personal injury cases, the odds on success in establishing liability are high, and the only real dispute is as to the

amount of damages, so it will be difficult to justify more than a fairly small uplift. It would be easy for the Bar (and solicitors) to slide into a habit of taking all personal injury cases on CFAs with perhaps a rather high "standard" level of fee uplift. There is anecdotal evidence available to the chairman that there have been barristers and chambers taking such cases on a fairly regular basis with fee uplifts of either 75% and 100%. Even allowing for the delays in payment and the risks inherent in all damages claims, however certain in terms of liability, it is not ethically acceptable for a barrister to engage in such a practice, and such a practice would be inconsistent with the Bar's Practical Guidance: see paragraph 4.10.2 above.

4.22. There are two solutions to this problem through the courts' power to assess costs. First, the client has the right to have his solicitor's and barrister's fees assessed by the court. This is a right which is too often not appreciated by the client, and which should be made known to the lay client at the outset, as part of the CFA package (Regulation 4.2(b)). It is also a right which it is expensive to pursue. The court's fees and parties' costs of costs assessments are relatively high. Success in costs assessments depends usually on good legal representation, as in all court proceedings, and such representation would probably depend on the making of another CFA in circumstances in which few solicitors or barristers would be prepared to enter into a CFA. This is not a practical solution in most cases.

4.23. The second solution arises from the statutory change (by section 58A(6) of the 1990 Act added by section 27(1) of the 1999 Act) enabling fee uplifts to be recovered by the successful claimant from the losing defendant if the claimant obtains an order for payment of his costs by the defendant. A claimant protected by such an order will have little interest in challenging his own lawyers' fee uplifts, except to the extent that the uplift is not recoverable from the defendant. Claimants may have to pay part of an uplift, for example, because they fail to defeat higher payments into court or CPR Part 36 offers to settle, and in any event that part of the uplift which relates to the cost of borrowing and the like. Many claimants need better protection than merely the after-the-event right to costs assessment.

4.24. There is also the problem, if a claimant recovers from the unsuccessful party none or only part of the uplift, whether the claimant will still be liable to pay the whole uplift to the claimant's solicitor and/or barrister, though the 2000 Regulations (paragraph 2.76.5 above) will alleviate this problem.

4.25. **We recommend that, whatever the terms of any CFA, the barrister (and the solicitor) should not be entitled to a greater fee plus uplift (if any) than the amount actually received from the opposing party. This goes somewhat further than the Regulations (see paragraph 2.76.5). The possibility of derogating from this position should be reserved to exceptional circumstances and certified to the client in writing both at the commencement of the CFA and also when costs are deducted from the damages received.**

4.26. The Bar will need to devise some means of achieving moderation in fee uplifts by barristers, so as to avoid the kinds of problems with excessively disadvantageous contingency fee arrangements which are seen too often in the USA: see Chapter 2 above at paragraph 2.43. It would probably not be practicable to lay down maximum uplifts in specified types of circumstances. In any event, as practice in the USA has shown, maxima may simply become the standard basis, to the greater disadvantage of the lay client. We fear that the 100% limit (or any higher limit which might be substituted) in England and Wales is liable to become a standard uplift. There is some evidence from the Bar that this is starting to occur in personal injury work. We return to the question of remedies later.

4.27. The Bar has laid down no "cap" on the fee uplifts agreed by barristers, except a recommended cap of 10% of damages awarded in personal injury cases. This may well have been because in most cases the barrister's fees represent a much smaller proportion of the client's total costs than the solicitors' fees. **We recommend that the legal professions together should ensure that there is an overall cap on the total of barristers' and solicitors' fees, including but not limited to the uplifts, of not more than a specified percentage of moneys recovered. This should be reviewed after a period of perhaps 5 years, to see whether the limit needs to be changed. If this step is not**

taken by the legal professions, the position of lay clients in England and Wales will potentially be worse than it would be if they had been able to enter into contingency fee arrangements (e.g. at 25% of the damages recovered).

Insurance

4.28. We have touched on the implications of AEI (After the Event Insurance) in Chapter 2 at paragraphs 2.59 et seq. It is reasonably clear that the need for a CFA-funded claimant to seek insurance against possible liability for the defendant's costs, and the AEI insurers' need to take a strictly commercial approach to the provision of AEI, will have two consequences. First, many cases now brought with the benefit of legal aid will no longer be brought because AEI will not be available to support CFAs for those cases. This consequence, though regrettable, is not directly relevant to our Report. Secondly, AEI will be made available to support cases funded by CFAs which are sufficiently certain of success to justify being brought either without CFAs at all, or at least with a CFAs at a low fee uplift, but which are in fact funded by CFAs at a high rate of fee uplift. This is part of the broader problem of control, needed to ensure that excessive rates of uplift are not imposed on lay clients, and on the general public through insurance premiums.

4.29. Our approach to these problems has already been set out in paragraph 4.18 et seq. above. We need only emphasise again that the barrister's advice to the client should be required to be given both orally and in writing.

The Cab-Rank Duty

4.30. The "cab-rank" duty for barristers will not apply to clients with whom a CFA is to be entered into, and barristers will be free to decide whether or not to enter into a CFA with any particular potential client. This will be a serious loss of an important duty owed by barristers, a loss to clients with unpopular causes or an unsavoury reputation, and a loss to barristers of the essential protection against being tarred with the client's reputation. **We recommend that the Bar should consider whether the circumstances in which a barrister can refuse to enter into a CFA can be defined with reasonable**

precision, so as to avoid some of the consequences of the loss of a strict "cab-rank" duty.

Conduct of Cases

4.31. Moving next to the conduct of a case by a barrister who has entered into a CFA, we have indicated the dangers of material documents being withheld from disclosure, and of witnesses' evidence (and experts' reports) being put into a form unduly favourable to the party's case. We consider these dangers are not insubstantial, particularly because court procedures are becoming more and more dependent on written evidence, written expert reports and written submissions, which can readily be adjusted to make the case more winnable, rather than on oral evidence and oral submissions which are less amenable to such adjustment. It is not easy to devise professional rules which will go far to reduce these dangers, but the Bar should consider whether further steps can be taken to achieve this.

Decisions as to Settlement or Going to Trial

4.32. We turn to the potential conflict between the barrister's interest and that of the client as regards the final outcome of the case, by settlement or by judgment (or arbitration award). We have given in paragraph 2.43 above illustrations of the ways in which, in the USA, lawyers acting on a contingency fee basis may put their interests before the interests of their clients, either by going for too early and too small a settlement, or by going all the way to judgment though a reasonable settlement acceptable to the client was available at an earlier stage. The position in England and Wales will be different, (1) because the extra fees will be an uplift on the fees otherwise payable, and not a straight percentage of the moneys recovered; (2) because losers have usually to pay winners' costs, and the costs of winning claimants to be paid by losing defendants will include the element of costs uplift and the costs of insurance against losing insofar as upheld by the court on an assessment of costs, and (3) because the system of payments into court and CPR Part 36 offers to settle makes the decisions whether or not to settle at a particular stage (or to take out a payment into court) more complex for English lawyers.

4.33. In many ways the incentives in England and Wales are more strongly towards under-settling because most of the work will have been done and most of the fees earned before the trial starts. The barrister may want to be certain of the fees and the uplift by means of a settlement, even if the level of settlement is too low for the client. In our view there may be not infrequently a conflict in this respect between the interests of the client and those of the barrister (and the solicitor). The obligations to the client of the barrister and the solicitor require them to subordinate their interests entirely to the interests of the client. But there is a danger that this will not happen. There will also be the allied danger that settlement or continuance of the action will be decided entirely by the lawyers, and the client will end up having little say in this decision.

4.34. The decision in individual cases whether or not to settle is often one on which the client and each of the lawyers involved differ to some degree. It is usually difficult to make out a case in negligence against a barrister advising on this decision, though the court immunity upheld in *Rondel -v- Worsley* [1969] I AC HL (E) and subsequent cases has been removed by the House of Lords in *Arthur J S Hall & Co -v- Simons et al* [2000] 3 WLR 543; [2000] 3 All ER 673. To show that the barrister's advice has been predominantly in his own, and not the client's, interest would usually be even more difficult. In reality, therefore, there is likely to be no effective way in which this aspect of CFAs can be policed so that an ethical performance of a lawyer's duties to his client can be ensured.

4.35. The problem is one which has exercised lawyers, judges and critics throughout the post-1945 period in the USA, and no solution has been found. It may be in a barrister's (or solicitor's) interest to maximise the amount of work done early in a case (a process made easier by the Woolf reforms which are shifting more expenditure on litigation upfront) with a view to reasonably early settlement when an optimum amount of fees has been earned. Or it may be in a barrister's (or solicitor's) interest, when a settlement offer is received shortly before trial, to advise against settlement at that stage and to offset the risk of low or no recovery at trial by incurring the maximum fees in the course of the

trial. Or for tax reasons the barrister (or solicitor) may prefer resolution in a subsequent tax year.

4.36. **We recommend that the advice of the barrister concerning settlement should be required to be summarised in writing. If it is not possible to do this at the time the offer is received, it should be done as soon afterwards as is practicable.** If later the client wishes to complain about this advice, it will at least be in a form which the lawyers cannot challenge subsequently.

4.37. **However, we also recommend that there should be written into the Bar's Code of Conduct stronger provisions requiring barristers always to act in accordance with their client's interest, and not the personal interests of the barristers. These provisions should be carefully drafted so that they can be used as the basis for charges of professional misconduct if evidence that they have not been complied with is forthcoming.**

Specific Problems for Barristers

4.38. Certain specific problems arise from the way in which the Bar is organised in Chambers and from the part-time activities as judges, as arbitrators and in disciplinary matters in which barristers engage. These are touched on in the Bar Council's Ethical Guidance already referred to. For example:

4.38.1. If barristers in a chambers enter into a fee or profit sharing arrangement in respect of their CFAs, then they could not appear against each other in a civil action or an arbitration.

4.38.2. If barristers in a Chambers enter into such an arrangement, then they could not appear before one of their number sitting as a part-time judge in a civil action, or as an arbitrator.

4.38.3. If barristers in a Chambers agree to accept each other's return CFA briefs or instructions, it seems to us that they could not appear against each other in a civil action or an arbitration, or before one of their number sitting as a judge or arbitrator.

4.38.4. If a barrister is appointed by Chambers to monitor CFA briefs or instructions so as to be able to decide whether they should be accepted on a CFA basis, the monitoring barrister could not appear on the other side in any case in which he had examined the brief or instructions, or sit as a judge or arbitrator in that case.

4.39. **We recommend that each of these problems should be covered by specific provisions in the Bar's Code of Conduct, and not be left merely to the Ethical Guidance provided by the Bar Council.**

Withdrawal from CFAs

4.40. The circumstances in which barristers may withdraw from CFAs once accepted and acted on should be specified both in the Bar's Code of Conduct and in the CFA itself. There will be circumstances in which withdrawal will be justified, for example in the circumstances set out in paragraph 506 of the Code (paragraph 4.5.6 above). The barrister may also have been misled about the evidence supporting the client's claim, or the client or the solicitor may refuse to accept the barrister's advice as to the future conduct of the case in circumstances in which that refusal is unreasonable.

4.41. **We recommend that in each of these cases the Code of Conduct should deal with the right to withdraw and the way in which withdrawal is to be made. Within the limits of what is laid down in the Code, each CFA should provide appropriately for withdrawal, and where appropriate for part payment for work already done.**

Training

4.42. Barristers need to be trained in all aspects of CFA work as described in this Chapter, including risk assessment.

Conclusions in Relation to Barristers

4.43. The introduction of CFAs is leading the Bar and its lay clients into waters uncharted in England and Wales, but well-charted in the USA, subject to all the differences between "conditional fees" and "contingency fees". The

ethical problems arising from the conflict between the barrister's self-interest – a personal financial interest in the outcome of his CFA cases, and his duties to the client, to the profession and to the court, are relatively new in this jurisdiction and potentially daunting. The opportunities for ethical misconduct will be increased. Unless the provisions proposed in this Report are introduced into the Bar's Code of Conduct, in our view there will be inadequate restraint on the ability of barristers to misuse CFAs. Even if those and other appropriate provisions are included in the Code, there will still be greater scope for undiscovered misconduct than there was before CFAs were introduced. The aim must be to ensure that, as far as possible, relevant advice by a barrister to his CFA client is summarised in writing so that it can be challenged either at the time or later. But, however much is written down, there will be scope for the misuse of CFAs. Unless the Bar and the courts are vigilant, standards of honesty and careful hard work may decline. We emphasise the duty of judges to ensure that, if proper standards are not maintained before them, an appropriate report is made to the Bar Council and to the barrister's Inn of Court: see also Chapter 5.

CHAPTER 5

5. The Judges and Conditional Fees

5.1. The civil justice system rests on two inter-linked foundations:

5.1.1. The character of most civil litigation remains essentially adversarial. It is for the parties to decide what issues are to be tried and what evidence is to be adduced before the court. The role of the judge is to adjudicate on the dispute which they bring before the court on the evidence which they adduce. There are certain established exceptions where the court is enabled to take a more inquisitorial role, and, for example, call witnesses, but these are very limited. Recent developments (and most particularly the Woolf reforms) have given the court a more active trial management role in the field of procedure. But the parties and their legal advisers remain the masters in deciding the substantive issues and the witnesses to be called, and whether there is to be a settlement, and (if so) what should be its terms. If one of the parties is subject to a disability, the court must approve any settlement, but in deciding whether to do so, the court places the greatest weight on the advice given to the parties by their legal advisers.

5.1.2. Legal representatives owe co-existent duties both to the court and to their client, with the duty to the court being always paramount. The duty to the client is single-mindedly to advance the lawful interests of the client. This embraces making the best of the client's case and giving the client the lawyer's best and disinterested advice – and allowing no personal interest to play any part in either. The duty to the court embraces: (a) not misleading the court on any issue of fact. The judge usually cannot call a witness and is not expected to cross-examine a witness. His findings of fact depend upon what he is told and he proceeds on the

basis that he is not being misled; and (b) bringing to the court's attention any relevant statutory provision or authority, whatever its impact on the client or the lawyer. Judges do not for the most part have research assistants; they are sometimes required to decide issues in areas of law unfamiliar to them; and (because of time constraints imposed by the rigours of the Court list) they have limited time for research. The judges again mostly proceed on the basis that they are fully informed on the law by the advocates appearing for the parties.

5.2. Even in the absence of CFAs or similar arrangements all lawyers may be presumed to have an interest in their clients' success in litigation or in negotiating a satisfactory settlement. Success of itself may promote further work for the successful and satisfied client or for others. But this interest is not one of financial reward depending on the successful outcome.

5.3. It is one of the lawyer's duties to the client that the lawyer will not do more work than is appropriate for successful conduct of a case, simply in order to earn more money. Such "churning" by a lawyer would always be a breach of the duty owed to the client, as we have already indicated.

5.4. The novelty created by the introduction of CFAs is that they have given rise to a direct and major financial interest on the part of lawyers in the **outcome** of litigation (not just the process of arriving at an outcome), and the likelihood that there may be a conflict between that new interest of lawyers, and the duties owed to the Court and the client and the client's interests. In the case of barristers there are also the new features that they are instructed by solicitors with this direct financial interest in the outcome, that the clients are likely to have taken out AEI insurance, and that the barristers may be the subject of pressure (actual or presumed) from the solicitors to ensure a successful outcome by good means or bad, and that the solicitors are likely to be the subject of commercial pressure from the insurers.

5.5. Before the advent of CFAs the standards of barristers and solicitors have generally been such that in most civil cases most practitioners have fulfilled

their duties to the court and to their clients. But standards have inevitably varied, and the judges have always been aware that high standards may not always be achieved. An efficient and successful process of handling a case in court depends to a considerable extent on the degree of trust which the judge can place in the barristers and/or solicitors involved in the action before the judge. Without a sufficient degree of such trust civil cases have to proceed more slowly and laboriously.

5.6. The advent of CFAs is bound to affect the degree of trust which judges can place in barristers and solicitors acting under CFAs and/or with the benefit of AEI insurance. The 2000 Regulations (paragraph 2.76 above) will ensure that the judges know whether there is a CFA and whether there is insurance.

5.7. It is almost inevitable that in such cases judges will need to have in mind the financial interest in the outcome of the barrister and the solicitor (which may be substantial) and the possibility that this financial interest may (consciously or otherwise) colour their approach to their client's cases, their conduct of the cases and (most sensitive of all) their advice on settlement. The judges could not allow themselves to be blind to the effect that this financial interest may have on the lawyers' conduct.

5.8. The "chilling" effect for the judge in civil litigation, if both sides are dominated by insurers, and all the lawyers on both sides are looking to a successful outcome to secure payment of their fees (and a particularly large payment), will be significant. It might be argued that the adversarial system would remedy this effect, with each side determined to test fully the evidence and submissions from the other side. But this argument would not take account of the excesses of aggressive conduct which can be seen in such cases, or the effect of both sides trying, in effect, to bamboozle the judge. In such cases the judge (or the arbitrator) has to take a more managerial and investigative role, to satisfy him or herself that the evidence is genuinely that of the witnesses, that the experts are giving genuinely independent expert evidence, and that the submissions of fact and law are soundly based. This makes trial of such civil actions slower, more expensive and more exacting for the judge (or arbitrator).

5.9. There is, in our view, a clear risk of a decline in the standards of the legal professions as CFAs and speculative fee arrangements become more commonly used.

5.10. There are these practical steps which can be taken to avoid or palliate these consequences.

5.10.1. As indicated earlier in this Report, the codes of conduct and similar requirements of professional conduct need to be tightened and elaborated, on the lines there indicated, by the professional bodies, the Bar Council and the Inns of Court for the Bar, and the Law Society for solicitors.

5.10.2. However strong codes of conduct are made, what matters more are (1) the training of the profession, (2) the ethos within which the professionals work, and (3) an effective disciplinary system. We take these in turn.

5.10.3. Each profession needs to go on with extending the training of their members in their specialist fields, the Bar in advocacy and the solicitors in the conduct of litigation. This training needs to extend from (1) the specialist pre-entry course (the LPC and the BVC); through (2) the courses available during the pupillage and training contract stages, from the Inns of Court and the Circuits for pupil barristers, and from providers approved by the Law Society for trainees before admission as solicitors (the Professional Skills Course), and (3) the courses available during early years in practice as a barrister or solicitor, from the Inns of Court, the Circuits and the specialist Bar associations for barristers, and from approved providers for solicitors; to (4) the continuing training throughout their careers which is already required of all solicitors, and will be required of all barristers by 2004. We emphasise each of these stages, not only because at each stage there is some excellent training already being made available, but also because of the need to ensure that all lawyers are able to take part in and make good use

of realistic training at each stage. Each profession will need to do more to educate and train its entrants and members specifically in the ethical use of CFAs. Assessments, examinations and tests should include questions directed to ethical issues, including ethical issues arising from the use of CFAs and speculative fee arrangements.

5.10.4. Each profession needs to make the best use of its own institutions to create a collective ethos of good ethical standards in legal practice. This may seem pretentious to some. But the activities in the USA of the rapidly growing number of local American Inns of Court (building on the pattern of the Inns of Court of England and Wales, Northern Ireland and the Republic of Ireland) demonstrate their recognition of the need to build such a collective ethos and the practical way in which the American legal professions can seek to achieve this. Similarly, the National Institute of Trial Advocacy (NITA) plays a vital role in raising standards in the courtroom. At the Bar of England and Wales the Inns of Court, the Circuits and the specialist Bar associations do much in similar ways to create this collective ethos. For solicitors, the Law Society, local law societies and specialist associations of solicitors, as well as the larger firms themselves, have a harder task in a more numerous profession to achieve a similar ethos. Each profession could do more to bring **all** its members within such a collective ethos.

5.10.5. For those lawyers who fail to maintain sufficiently high standards, an effective disciplinary system is essential. Each profession could do more to speed up its disciplinary processes, so that by the conclusion of the process the breach of discipline is not so far in the past as to have become somewhat irrelevant.

5.10.6. The judges can play an effective role in helping to create the ethos we have referred to, and in ensuring that those lawyers who misconduct themselves are brought to book in the disciplinary process as swiftly as practicable. Advice to the young, best given

in private after a case is over, stopping bad conduct in court and in the course of civil actions, admonition either in private, or where necessary in public, reference to the appropriate disciplinary body; these are all steps which judges need to take more frequently, as part of the process of helping to raise standards. Judges' silence in the face of misconduct or poor conduct does more than most other factors to damage the ethos which each profession wishes to establish.

CHAPTER 6

6. Summary of Recommendations

6.1. Training in risk assessment should be included within the CPD scheme for all solicitors undertaking risk assessment in CFA work (Para. 3.20).

6.2. Whilst there may be cases involving exceptional factors in which a higher cap would be appropriate, we recommend a cap of the *total* costs payable by the client at a particular percentage of the damages recovered should be applied to all but the most exceptional cases. Exceptional cases should involve the provision by the solicitor of a written certificate in a prescribed form that can be readily understood by clients For practical reasons, this recommendation is conditional on the abolition of the Indemnity Principle (Para 3.23).

6.3. We recommend that pro forma documents are developed in a format that can readily be understood by clients to facilitate the itemisation of potential upfront costs, and are required under Practice Rule 15. Failure to use such pro forma documents should be prima facie evidence of Inadequate Professional Services (IPS) (para. 3.28).

6.4. We recommend that normally, in CFAs with solicitors (or barristers) aimed wholly or mainly at recovering damages for the client, 'success' should be defined in terms of damages recovered rather than damages awarded, and that any cap should be measured against damages recovered rather than damages awarded. It should be open to solicitors to derogate from this approach where they can demonstrate fully informed consent from the client and circumstances which make such derogation reasonable. A process of written certification that can be readily understood by clients should also be required. These rules would need to apply to success fees for solicitors and counsel (Para 3.36).

6.5. We recommend that it be made a requirement of a valid CFA with a solicitor (or barrister) that where the level of uplift is challenged by a losing defendant and reduced, the costs of that successful challenge, if ordered to be paid by the

claimant, should be paid by the claimant's solicitor (or barrister) or deducted from his fees (para. 3.44).

6.6. We recommend that the use of interim payments under CFAs is subjected to research (para. 3.46).

6.7. We also recommend that the Civil Procedure Rules should be amended to make clear that it is permissible for interim damages payments to cover litigation costs (such as disbursements), provided that the court has been duly informed that the interim damages will be used for this purpose (para. 3.46).

6.8. We recommend that when settlement offers are received, the advice of the solicitor to the client should be required to be summarised in writing. If it is not possible to do this at the time the offer is received, it should be done as soon afterwards as is practicable. If later the client wishes to complain about this advice, it will at least be in a form which the lawyers (and clients) cannot challenge subsequently (para. 3.53).

6.9. We recommend that in all cases solicitors be required by rules of court to give certificates that witness statements/experts' reports accurately represent the evidence of the witness/expert (para. 3.58).

6.10. We recommend that it be made a rule of court that no expert (or other witnesses) giving evidence is permitted to be paid on a speculative, contingent or conditional fee basis. A code of guidance will not suffice (para. 3.62).

6.11. On balance, we would not recommend any intervention to prohibit recovery of costs against the client terminating a retainer. We recommend, however, that on any occasion when a solicitor terminates the agreement with the client, the solicitor be obliged to provide clear advice in writing explaining the reasons for the termination, and that when a client terminates the CFA, the solicitor be obliged to write explaining the consequences of the termination. If a client has a legitimate complaint about termination, the client can lodge it with the firm and ultimately with the Office for the Supervision of Solicitors, which can investigate the appropriateness of the termination as an issue of conduct and/or Inadequate Professional Services, although we are aware that there can

be considerable difficulties for clients in pursuing such complaints. (para. 3.69 – 3.70).

6.12. We recommend that it be a requirement that any undertaking which does, or is likely to, impair the future ability of members of the public to gain access to a particular solicitor, or solicitors generally, under a CFA, be submitted to the court for the court's approval at the cost of the party seeking the undertaking, and that any rules of court governing such applications should emphasise the potential detrimental effect to access to justice and the court's obligations under Article 6 of the ECHR (para. 3.76).

6.13. We recommend that consideration be given to requiring a compulsory "period of contemplation" between the explanations of the draft CFA and the client being asked to sign. Such period should be 7 days (the period under consumer credit legislation), except in cases of urgency, e.g. where the limitation period is about to expire. The benefit of such a period could be strengthened by lending the client a video explaining the ins and outs of CFAs. We recommend that such educative material is produced by the Community Legal Service (para. 3.81).

6.14. We recommend that it is made clear in the Law Society's Practice Rules that the solicitors' duty to their client under Practice Rule 1 puts the solicitor in a situation of conflict with their client if the solicitors are aware that the insurance is unnecessary or unnecessarily expensive (para. 3.103).

6.15. The role and conduct of insurance companies in the litigation process is a new and under-explored phenomenon. We recommend that this is an area which is subject to research and independent scrutiny (para. 3.106).

6.16. We recommend the creation of a CFA database which could be of benefit to the monitoring of what will in future be a major part of the civil justice system. (para. 3.111).

6.17. Finally, we make some recommendations which in our judgement should be implemented straight away by the Law Society (para. 3.112):

6.17.1. It should be made professional misconduct for solicitors to apply a standard or blanket uplift (whether of 100% or any lesser figure). The uplift on normal fees should always be based on the assessment of risk in the particular case, and on the likelihood of the level of uplift being accepted on the final assessment of costs.

6.17.2. There should be a cap on the total fees payable by a client out of damages, and not merely on the uplift, unless there are exceptional circumstances.

6.17.3. Within the Law Society's Continuing Professional Development scheme, training in risk assessment should be compulsory for those involved in CFA cases.

6.18. Training in risk assessment should be included within the CPD scheme for all barristers undertaking risk assessment in CFA work (paras.3.20 and 4.42).

6.19. We recommend that, whenever a barrister enters into a CFA, the barrister should be required to provide oral and written reasons to the client for the setting of the level of uplift provided for in the CFA (para. 4.20).

6.20. We recommend that, whatever the terms of any CFA, the solicitor and the barrister (and the solicitor) should not be entitled to a greater fee plus uplift (if any) than the amount actually received from the opposing party. This goes slightly further than the Regulations (see para. 2.76.5). The possibility of derogating from this should be reserved to exceptional circumstances and certified to the client in writing at the commencement of the agreement and when costs are deducted from damages (para. 4.25).

6.21. We consider that the legal professions together should ensure that there is an overall cap on the total of barristers and solicitors' fees recoverable from the client, including but not limited to the uplifts, of not more than a specified percentage of moneys recovered. This should be reviewed after a period of perhaps 5 years, to see whether the limit needs to be changed (para. 4.27).

6.22. The Bar should consider whether the circumstances in which a barrister can refuse to enter into a CFA can be defined with reasonable precision, so as to avoid some of the consequences of the loss of a strict "cab-rank" duty (para. 4.30).

6.23. The Bar should consider whether professional rules can be made requiring barristers who are involved in the preparation of witness statements or experts' reports to certify that the statements or reports represent accurately the evidence of the witness or the expert (para.4.31).

6.24. We recommend that the advice of the barrister concerning settlement should be required to be summarised in writing. If it is not practicable to do this at the time the offer was received, it should be done as soon afterwards as is practicable (para. 4.36).

6.25. However, we also recommend that there should be written into the Bar's Code of Conduct stronger provisions requiring barristers always to act in accordance with their client's interest, and not the personal interests of the barristers. These provisions should be carefully drafted so that they can be used as the basis for charges of professional misconduct if evidence that they have not been complied with is forthcoming (para. 4.37).

6.26. We recommend that intra-chambers conflict problems should be covered by specific provisions in the Bar's Code of Conduct, and not be left merely to the Ethical Guidance provided by the Bar Council (para. 4.38-4.39).

6.27. We recommend that the Code of Conduct should deal with the right to withdraw and the way in which withdrawal is to be made. Within the limits of what is laid down in the Code, each CFA should provide appropriately for withdrawal, and for part payment for work already done (para. 4.41).

6.28. We recommend that the role of ethics in professional education and training be emphasised and strengthened for all lawyers. In particular, we consider it as essential that all advocates and litigators receive training in the ethics of CFAs; and this training should cover the ethical problems resulting from the

complex commercial relationships involved in the handling of CFAs. We also consider it as essential that such training take place not only at the LPC/BVC stage but also at further points in professional training during the Continuing Professional Development schemes of both professions (para. 5.10).

6.29. In para. 5.10 we have made further general recommendations in relation to the development of a collective ethos of good ethical standards in each profession, to the maintenance of effective and sufficiently speedy disciplinary systems, and to the role of the judiciary in helping to raise and maintain standards.

Appendix 1: Biographies of Working Party Members

Geoffrey Bindman is the Senior Partner of Bindman & Partners, Solicitors; Visiting Professor of Law, University College London; President, Discrimination Law Association.

Ben Emmerson QC, Matrix Chambers, called 1986, silk 2000 - Ben Emmerson specialises in European human rights law, with emphasis on criminal due process, privacy, freedom of expression and discrimination. He has litigated before the European Court of Human Rights, and his domestic practice includes political crime, public law, media law, extradition, and compensation claims for miscarriages of justice. He edits the European Human Rights Law Review and sections of Archbold and is author or editor of numerous books, including Human Rights Practice (Sweet and Maxwell).

Max Findlay is an independent legal writer and journalist. Originally a barrister, he has spent the last 20 years writing about, commenting on and explaining technical and political legal developments in the UK and abroad.

Matthias Kilian: Ass.jur.; Senior Research Fellow Institute of Employment And Business Law, Cologne, Germany (University of Cologne Law Faculty 1995; several research posts since 1995; qualified lawyer 1998), member of the Documentation Centre of The Law Of The Legal Profession In Europe, a joint research unit of the German Bar Association, the German Federal Bar and the Institute of The Law Of The Legal Profession, Cologne. Teaching: Business and Company Law. Publications: among others, works on trans-national legal practice, legal ethics, European law, procedure and ADR, family law and research into speculative funding since 1996.

Jennifer Levin is the Foundation Professor of Law, University of Wales Swansea, author (with Andrew Boon) of *The Ethics of the Legal Profession in England and Wales* (Hart Publishing 1999) and a member of the Law Society's Regulation Working Party.

The Honourable Mr Justice Lightman (Sir Gavin Lightman): Called to the Bar 1963. Appointed QC 1980. Appointed judge of the High Court 1994 assigned to the Chancery Division; also assigned to the Queen's Bench Division (Crown Office) 1996 and the Restrictive Practices Court 1997. Bencher of Lincoln's Inn since 1987.

David Mackie QC is a solicitor who has been Head of Litigation at Allen & Overy since 1988. He sits as a Recorder and as a Deputy High Court Judge.

Bill Montague is practising solicitor. He is partner in Dexter Montague & Partners, a community solicitors practice based in Reading that he co-founded in 1987 and where he heads the firm's civil department. He is a member of the Law Society Personal Injury Panel, a committee member and former chair of Legal Aid Practitioners Group

and a member of the Law Society Remuneration Working Party. As an author with a special interest in legal aid, he contributes to Legal Aid Practice Manual, The Litigation Practice and Greenslade on Costs.

Richard Moorhead: Senior Research Fellow, Solicitor, Institute of Advanced Legal Studies, University of London. Formerly assistant solicitor, Irwin Mitchell, Sheffield. Recent research includes: (2000) *Community Legal Services Pioneer Partnership Research Project* (LCD, London); (1999) *Willing Blindness? OSS Complaints Handling Procedures* (Law Society, London) with S. Rogers and A. Sherr. Currently completing research for the Legal Services Commission into the Block Contracting of Civil Advice and Assistance with a team based at the Institute of Advanced Legal Studies. Founding member, Law Society Stress Awareness and Pressure Management Working Party; Chair, Young Solicitors Group (1998/1999); Chair, Trainee Solicitors' Group (1994/1995).

Richard O'Dair is Senior Lecturer in the Faculty of Laws at University College London. He teaches on the LLB programme, one of the first undergraduate courses on Legal Ethics in this country. He was Visiting Research Fellow at the Keck Centre for the Study of Legal Ethics and the Legal Profession at Stanford University Law School in 1995-1996. He is currently working on a book on Legal Ethics to be published by Butterworths early in 2001.

Andrew Phillips was made a LibDem life peer in 1998. He has been a solicitor for 34 years and started his own firm, Bates, Wells & Braithwaite, London in 1970. The firm is particularly well known in the field of charity law. Andrew Phillips has wide experience of different types of organisation, and currently serves on the Boards of two commercial companies and several NGOs. He was Founder Chairman of the Citizenship Foundation, of the Legal Action Group and Founder President of the Solicitors' Pro Bono Group. He is a well known broadcaster and occasional author.

Professor Avrom Sherr is Woolf Professor of Legal Education at the Institute of Advanced Legal Studies, part of the School of Advanced Study of the University of London. Prior to this he was Professor of Law at Liverpool University and Director of the Centre for Business and Professional Law there. His PhD relates to the importance of experience in acquiring legal skills. He qualified as a commercial litigator solicitor with Coward Chance in 1994.

Professor Sherr's current and recent work includes the Contracting of Advice and Assistance Pilot for the Legal Aid Board in England and Wales; researching into the system of investigating and deciding professional conduct and professional service cases by the Office for the Supervision of Solicitors in England and Wales; a project under the European Union's Grotius programme on training lawyers in legal ethics; a project under the European Union's Falcone scheme relating to conduct issues for lawyers and accountants across the European Union. Professor Sherr was the major architect of competence assessment in the Legal Aid Franchising studies leading to Contracting and the new Community Legal Service, from 1989 onwards. Among his writings are "Client Care for Lawyers" (Second Edition Sweet and Maxwell, 1999), "Lawyers – The Quality Agenda" together with Moorhead and Paterson, 1994 HMSO and "Superheroes and Slaves: Images and Work of the Legal Professional", Current Legal Problems 1995. He was a member of the Lord Chancellor's Advisory Committee on Legal Education and conduct from 1997 to 1999.

Dr Hilary Sommerlad is a senior lecturer in law at Leeds Metropolitan University and a qualified solicitor. She has been writing and speaking on Legal Aid for many years and is currently funded under the Nuffield Foundation Access to Justice programme to carry out qualitative research into clients' and practitioners' experiences of legal services and justice, in the context of the introduction of contracting. Her most recent publication in this field is: *Legally Aided Clients and their Solicitors: qualitative perspectives on quality* (Law Society 1999).

Richard Southwell QC has practised at the independent Bar of England and Wales in commercial cases since 1961. He was for some years Chairman of the Bar Council's Professional Standards and Legal Services Committees. He sits part-time as a deputy High Court judge and recorder, and as a judge of the Courts of Appeal of Jersey and Guernsey. He will be Reader of the Inner Temple in 2001. He has written two books for the Bar.

Stella Yarrow has been since 1998 a Research Fellow at the School of Law, University of Westminster, where she is responsible for a programme of work into methods of funding civil litigation. She has carried out four studies of conditional fees. Two have been published as *The Price of Success: Lawyers, clients and conditional fees* (Policy Studies Institute, 1997) and (with Pamela Abrams) *Nothing to lose? Clients' experiences of conditional fees (summary report)* (University of Westminster, 1999). She is currently completing a follow-up study to *The Price of Success* and (with Pamela Abrams) a study of conditional fees and the Bar. She is also carrying out a study of legal expenses insurance.

APPENDIX II: HUMAN RIGHTS GUARANTEES

General principals

1. The binding provisions of international human rights law which are relevant to the funding of legal representation in the United Kingdom are to be found in Article 6 of the ECHR and Article 14 of the ICCPR. Article 6 of the ECHR provides, so far as relevant:

> (1) In the determination of his civil rights and obligations, or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...
>
> ...
>
> (2) Everyone charged with a criminal offence has the following minimum rights:
>
> c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

Article 14 of the ICCPR is in broadly similar terms.[1]

2. According to the jurisprudence of the European Court and Commission of Human Rights, the right to a fair trial has two central objectives. First, it aims to ensure "practical and effective"[2] access to courts[3] for the resolution of both criminal and civil disputes. In relation to criminal proceedings, this right is absolute and carries with it an automatic right to free legal representation

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[1] 14(I): "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law... 14(3) "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:...(d) To be tried in his presence and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."

[2] The ECHR "is intended to guarantee not rights that are theoretical and illusory, but rights that are practical and effective": *Marckx v Belgium* 2 EHRR 330 at para. 31; *Airey v Ireland* 2 EHRR 305 at para. 24; *Artico v Italy* 3 EHRR 1 at para. 33.

[3] *Golder v United Kingdom* 1 EHRR 524; *Ashingdane v United Kingdom* 7 EHRR 528; *Stran Oil Refineries v Greece* 19 EHRR 293.

where the interests of justice require this.[4] So far as civil proceedings are concerned, the exercise of the right to submit a dispute for resolution by a court may be made subject to conditions or limitations. However, any such condition must pursue a legitimate aim,[5] must be proportionate to the achievement of that aim,[6] and may not impair the very existence of the right or deprive it of its effectiveness.[7]

3. The second central objective of the right to a fair trial is to ensure observance of the "equality of arms" principle[8] in the determination of the dispute itself. The European Commission and Court of Human Rights have consistently held that the right to a fair trial requires that an individual must have "a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage *vis-à-vis* his opponent."[9] The principle of equality before the law clearly requires equal access to justice regardless of an individual's means. The effective availability of legal representation may, in certain circumstances, be fundamental to the question of whether a state's legal system satisfies the international guarantee of the right to a fair hearing.

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[4] See para. 11 *et seq.* below.

[5] The legitimate aim pursued need not necessarily correlate to one of the aims specified in the second paragraphs of Articles 8 to 11 of the ECHR 293.

[6] Proportionality involves "the search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights": *Sporrong and Lonroth v Sweden* 5 EHRR 35 at para. 69; *Soering v United Kingdom* 11 EHRR 439 at para. 89. See also *R v Oakes* [1986] 1 SCR 103 where the Supreme Court of Canada identified three components of a proportionality test; and *Elloy de Freitas v The Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands, and Housing* [1998] 4 BHRC 536 per Lord Clyde, where the privy Council adopted a similar test.

[7] *Lithgow v United Kingdom* 8 EHRR 329 para. 194; *Ashingdane v United Kingdom* 7 EHRR 528 at para. 57; *Fayed v United Kingdom* 18 EHRR 393 at para. 65.

[8] *Neumeister v Austria* 1 EHRR 91 at para. 22; *Delcourt v Belgium* 1 EHRR 355; *Borgers v Belgium* 15 EHRR 92 at paras. 26-28; *Bendenoun v France* 18 EHRR 54 at para. 52.

[9] See, for example *Kaufman v Belgium* 50 DR 98 at 115.

Entitlement to a legal aid/free legal representation

4. Although the general guarantees in Article 6 of the ECHR and Article 14 of the ICCPR apply both to civil and to criminal proceedings, it is necessary to distinguish between the two when considering the provision of free legal representation because both instruments expressly recognise a more extensive obligation to provide legal aid in criminal proceedings.[10]

Civil or criminal proceedings?

5. The distinction between civil and criminal proceedings is not always easy to draw. The ECHR adopts an "autonomous interpretation" of the terms "criminal charge" in Article 6(1) and "criminal offence" in Article 6(3). AS the Court has frequently pointed out, the Convention is concerned with the substance of an individual's position rather than its formal classification, and courts may therefore need to "look behind appearances and investigate the realities of the procedures in question."[11] Proceedings which are defined as civil under the national law of a contracting state may nevertheless fall to be categorised as criminal proceedings for the purposes of the ECHR, and thus attract an automatic right in Article 6(3)(c) to free legal representation where the interests of justice require it.

6. In *Engel v Netherlands*[12] the Court held that when considering whether proceedings are "criminal" for the purposes of Article 6, three criteria are to be

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[10] The right to legal aid in criminal proceedings is expressly guaranteed by Article 6(3)(c) ECHR and Article 14(3)(d) ICCPR. Moreover, the ECHR has observed, as a general principle, that "[t]he contracting states have a greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases": *Dombo Beheer BV v Netherlands* 18 EHRR 213 at para. 32.

[11] *Deweer v Belgium* 2 EHRR 439 at para. 44; *Adolf v Austria* 4 EHRR 315 at para. 30; *Welch v United Kingdom* 20 EHRR 247 at para. 27. Cf. *Huntley v Attorney General for Jamaica* [1995] 2 AC 1 at 12G-H, PC.

[12] 1 EHRR 647 at para. 82. See also *Ravnborg v Sweden*, Judgment 23rd March 1994, Series A/283-B paras 31-33; Ozturk v Germany 6 EHRR 409; *Lutz v Germany* 10 EHRR 182; *Garyfallou AFBE v Greece*, Judgment 24th September 1997; *Lauko v Slovakia*, Judgment 2nd September 1998.

applied, namely (a) the classification of the proceedings in domestic law, (b) the nature of the offence itself, and (c) the severity of the potential and actual penalty which the person concerned risks incurring. If the applicable domestic law classifies the proceedings as criminal, this will be decisive. But where domestic law classifies the proceedings as non-criminal in character (whether civil or administrative) the domestic classification will be no more than a "starting point".

7. The European Court of Human Rights (and – after the Human Rights Act 1998 is brought fully into force – the domestic courts) will conduct an independent assessment of the true nature of the proceedings, taking account in particular of the severity of the penalty which may be imposed. If a domestic court has power to impose imprisonment, this will generally be sufficient to define the proceedings as "criminal", unless the "nature, duration or manner of execution of the imprisonment" is not appreciably detrimental.[13] Even where the national court's powers are confined to the imposition of large financial penalties, this may be sufficient.[14]

8. Applying these criteria, the court has held that prison disciplinary proceedings constituted criminal proceedings for the purpose of Article 6(3), so that a defendant had the right to legal representation and legal aid.[15] More significantly, in *Benham v United Kingdom*[16] the Court held that commitment to prison for non-payment of the community charge, which was clearly defined as the enforcement of a civil obligation in domestic law, nevertheless constituted a "criminal" proceeding for the purposes of Article 6 and thus attracted a right to free legal representation.

9. There is of course a wide range of other proceedings which are currently defined as civil under United Kingdom domestic law, but which may fall to be

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[13] Ibid; See also *Demicoli v Malta* 14 EHRR 47 at para. 31.

[14] *Bendenoun v France* 18 EHRR 54.

[15] *Campbell and Fell v United Kingdom* 7 EHRR 165.

[16] 22 EHRR 293

categorised as "criminal" for the purposes of Article 6(3)(c). One of the clearest examples is contempt of court in civil proceedings, where the individual contemnor may ultimately be imprisoned.[17] Contempt proceeding may result in committal in the course of any civil dispute in which one of the parties is a natural person. Applying the *Engel* criteria, it seems virtually certain that such proceedings will attract the right to "criminal" legal aid once the Human Rights Act is brought fully into force. To this extent the right to free legal representation in Article 6(3)(c) may have a degree of application in many different types of civil proceedings. The Lord Chancellor's Department is currently reviewing the fair trial guarantees available in "quasi-criminal" proceedings of this kind, in an effort to ensure compliance with the Convention's requirements prior to the implementation of the 1998 Act.

Criminal legal aid: the scope of the state's obligation

10. The wording of the English text of Article 6(3)(c) appears to suggest that the right to free legal representation is an alternative to the right of an accused person to represent himself. This is not however how it has been interpreted by the Court. In *Pakelli v Germany*[18] the Court held that Article 6(3)(c) guarantees three related but independent rights to a person charged with a criminal offence: First, the right to defend himself in person; secondly, the right to defend himself through legal assistance of his own choosing; and thirdly, on certain conditions being met, the right to free legal assistance and representation:

> "Having regard to the object and purpose of this Article, which is designed to secure effective protection of the rights of the defence,...a person charged with a criminal offence who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing; if he does not have sufficient means to pay for such assistance, he is entitled under the

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[17] In *Harmon v United Kingdom* 38 DR 53 the Commission declared admissible a complaint that a finding of guilt in civil contempt proceedings amounted to a criminal conviction for the purposes of Article 7 ECHR. The case resulted in a friendly settlement.

[18] 6 EHRR 1 at para. 31

convention to be given it free when the interests of justice so require."

11. The obligation to provide free legal representation is thus subject to the means of the defendant and is confined to cases where the interests of justice require it. The "interests of justice" criterion will take account of the capacity of the individual defendant to represent himself, the complexity of the case, and the severity of the potential sentence.[19] Where the accused faces imprisonment this will usually be sufficient in itself to require the grant of free legal representation.[20]

12. Legal aid is not necessarily required where the factual and legal issues in the case are straightforward, and there is no requirement for expert cross-examination.[21] On the other hand, the Court has rejected the argument that a violation of Article 6(3)(c) will only arise where the absence of legal assistance can be shown to have actually prejudiced the accused.[22]

13. In practice, the European Court of Human Rights adopts a strict approach to the requirement to provide free legal assistance in criminal cases, which is illustrated by a series of cases against the United Kingdom. In *Granger v United Kingdom*,[23] a Scottish case, the Court held that a refusal of legal aid for the applicant's appeal against a conviction for perjury violated Article 6(3)(c) taken together with Article 6(1). Legal aid had been refused on the ground that the appeal was without substance and had no reasonable prospect of success. The Court however held that the interests of justice criterion had to be assessed in the light of all the circumstances of the case. The applicant was serving a five year prison sentence so that there was no doubt about the

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[19] *Granger v United Kingdom* 12 EHRR 469; *Quaranta v Switzerland* (1991) Series A/205.

[20] *Benham v United Kingdom* 22 EHRR 293 at para. 61; *Quaranta v Switzerland* (1991) Series A/205 at para. 33.

[21] *X v Norway Application* No. 8202/78 unreported.

[22] *Artico v Italy* 3 EHRR 1 at para. 34.

[23] 12 EHRR 469 at paras 42-48.

importance of what was at stake for him. The Court of Appeal had been addressed at length by the Solicitor General who appeared for the Crown. One of the issues which arose was of considerable complexity, but the applicant was not in a position to understand the prepared statement he read out, or the opposing arguments. Nor could he reply to those arguments of answer questions from the bench.

14. At first sight the Court's decision in *Granger* may appear to turn on the complexity of the issues which arose in the appeal. However, in *Boner v United Kingdom*[24] and *Maxwell v United Kingdom*[25] the Court unanimously found a violation of Article 6(3)(c) despite concluding that the legal issues were straightforward. Under Scottish law there was, at the time, no requirement for leave to appeal. But the decision as to whether legal aid should be granted lay with the Scottish Legal Aid Board which had to decide whether an applicant for legal aid had substantial grounds for appealing and whether it was in the interests of justice that he should be granted legal aid. The Board could therefore refuse legal aid on the ground that the appeal was unmeritorious. The European Court of Human Rights held that the interests of justice required free legal assistance. This was despite the fact that the legal issues in the case were not complex, no point of substance had arisen in the appeal, and prosecution counsel had not addressed the Court of Appeal. The Court held that in the absence of legal representation the applicants had been unable to address the court on the issues raised in the appeal and thus had been deprived of the opportunity to defend themselves effectively.

15. It is now quite clear that the requirement for effective legal representation will be mandatory not only in the higher courts but in all courts or tribunals where loss of liberty may be at stake. In *Benham v United Kingdom*,[26] the Court was called upon to determine whether the "interests of justice" criterion in Article 6(3)(c) was satisfied in Magistrates Court proceedings leading to

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[24] 19 EHRR 246

[25] 19 EHRR 97

[26] 22 EHRR 293 at para. 61-64.

imprisonment for non-payment of the community charge. Under the applicable regulations there was no right to full legal aid, but a debtor was entitled to Green Form advice and assistance and, in the discretion of the Magistrates Court, to representation under the ABWOR[27] scheme. The Government submitted that this level of provision was adequate in the circumstances. In the Government's submission, the proceedings were intended to be straightforward and amounted, in effect, to a means inquiry at which full legal representation was unnecessary. The Court disagreed:

> "Where deprivation of liberty is at stake, the interests of justice in principle call for legal representation. In this case B faced a maximum term of three months imprisonment...Furthermore, the law which the magistrates had to apply was not straightforward. The test for culpable negligence in particular was difficult to understand and operate, as was evidenced by the fact that, in the judgment of the Divisional Court, the magistrates' finding could not be supported on the evidence before them.

16. The Court went on to hold that the existing provision was inadequate since under Article 6(3)(c) the applicant was entitled to representation at the hearing *as of right*:

> "The Court has regard to the fact there were two types of legal aid provision available to B. Under the Green Form scheme he was entitled to up to two hours advice and assistance from a solicitor prior to the hearing, but the scheme did not cover legal representation in court. Under the ABWOR scheme the magistrates could, at their discretion, have appointed a solicitor to represent him, if one had happened to be in court. However, B was not entitled as of right to be represented...In view of the severity of the penalty risked by B, and the complexity of the applicable law, the Court considers that the interests of justice demanded that, in order to receive a fair hearing, B ought to have benefited from free legal representation during the proceedings before the magistrates."

17. Despite the Court's reference to the complexity of the domestic proceedings, it is clear that the decisive criterion in *Benham* was the seriousness of what was

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[27] Advice By Way Of Representation.

at stake for the applicant in terms of the potential penalty that the court could impose.[28] The approach of the UNHRC under Article 14 ICCPR appears to be broadly the same. In *OF v Norway*[29] the Committee held that a defendant who had been convicted of two minor motoring offences which could only lead to a small fine had not shown that the interests of justice in the particular case required the assignment of a defence lawyer at the state's expense.[30]

Civil legal aid

18. The right to free legal assistance in Article 6(3)(c) ECHR is expressly confined to "criminal" cases, according to the extended definition of that term.[31] Nevertheless, an entitlement to free legal representation in civil cases may, in certain circumstances, be implicit in the right of access to court, and the right to a fair hearing in Article 6(1). Whether this is so will depend upon what is at stake in the proceedings, the complexity of the relevant law and procedure, and the ability of the individual applicant to represent himself effectively.

19. The task of applying the convention jurisprudence to CFA's and *Thai Trading* agreements is complicated by the fact that the caselaw does not always distinguish clearly between a right to free legal representation in civil proceedings and a right to legal aid. The Court has however recognised that the two concepts are distinct and that an obligation to provide free legal representation cannot necessarily be equated with an obligation to establish a system of civil legal aid.[32] Even where Article 6(1) requires a right to legal representation in civil proceedings, this will not necessarily involve a right to

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[28] See the passage cited at para. 15 above.

[29] No. 158/1983; See Nowak *UN Covenant on Civil and Political Rights*, (Kluwer, 1993) p.260.

[30] By contrast the Committee has held that it is "axiomatic" that free legal representation should be provided where the defendant is at risk of the death penalty: *Robinson v Jamaica* No. 223/1987, and the cases cited at Nowak, p 260 n. 140.

[31] See paras. 5 to 9 above.

[32] The Free Representation Unit (FRU), for example, provides free legal assistance at tribunals, which clearly satisfies the requirements of Article 6, without the provision of payment for the advocate by the state.

legal aid for indigent litigants if the state has established an alternative means of providing free legal representation.[33]

20. The issue was first considered in detail in *Airey v Ireland*[34]. The applicant wished to petition for a decree of judicial separation in the Irish High Court, but had insufficient means to pay for legal representation. She complained that in view of her means, and the absence of legal aid for such proceedings, she faced an insurmountable obstacle to effective access to court. The Irish Government argued that her right of access was preserved since she could appear as a litigant in person. The Court rejected this submission, reiterating that:

> "The Convention is intended to guarantee not rights that are theoretical and illusory, but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial."

21. The Court concluded that the applicant would be at a significant disadvantage vis-à-vis her husband if he were represented by a lawyer and she were not. It was, in the court's view, unrealistic to suppose that in litigation of this nature the applicant could effectively conduct her own case, despite the assistance which the judge could be expected to afford to a litigant in person. The court had regard to the complexity of the procedure before the Irish Court, the nature of judicial separation proceedings, and the fact that marital disputes often entail an emotional involvement incompatible with the degree of objectivity required for advocacy in court. In short, the court considered it improbable that an individual in the applicant's position could effectively present their case in court.

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[33] See para. 28 *et seq.* below.

[34] 2 EHRR 305 at paras. 20-28.

22. The Irish Government accepted that Article 6(1) implied a right of access to court[35] but sought to argue that it was necessary to distinguish between the state's *negative* obligation (that is, an obligation to refrain from putting obstacles in the way of a litigant seeking to enforce his rights) and any *positive* obligation (that is, an obligation on the state to take active steps to promote access to court). The Government submitted that the only obstacle to effective access to court arose from Mrs. Airey's personal financial circumstances and not from any action taken by the state. The Court did not find this argument convincing. It considered that:

> "[F]ulfilment of a duty under the convention on occasion necessitates some positive action on the part of the State; in such circumstances the State cannot simply remain passive, and there is no room to distinguish between acts and omissions. The obligation to secure an effective right of access to the court falls into this category of duty."

23. The Court was, however, careful to emphasise that its finding of a violation of Article 6(1) on the facts of that case did not imply that the state must provide legal aid for every civil dispute. The judgment recognises in terms that the principles governing civil and criminal cases are different since the right to free legal representation for criminal defendants was expressly provided for in Article 6(3)(c). A right to free legal representation in civil proceedings would only arise where such representation was indispensable for effective access to court. After referring to Article 6(3)(c), the Court went on:

24. The decision in *Airey* thus makes it clear that whilst there is no general obligation on states to provide civil legal aid under the ECHR, a right to free representation may be required by Article 6(1) in particular circumstances if the applicant would otherwise be prevented from obtaining effective access to civil justice. Although Mrs. Airey put her complaint on the basis of a failure to provide legal aid, it is to be noted that the Court spoke in terms of a more broadly expressed duty on the state to provide for the assistance of a lawyer.

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[35] See *Golder v United Kingdom* (above).

25. In determining whether the *Airey* principle will be applied in a particular case, considerable importance will be attached to the rights which are at stake for the individual in the litigation. Litigation involving family separation[36] or parental rights[37] will generally[38] require legal representation. Where the parties have insufficient means to pay for representation privately, this will imply either a right to legal aid or some other effective arrangement for providing representation free of charge.

26. Similarly, the Commission and the Court have held that free legal representation must generally be available to an individual who is seeking to challenge the lawfulness of detention under Article 5(4). Even though the right in Article 6(3)(c) is not strictly applicable to such proceedings, the underlying rationale is the same. The importance attached to the right to personal liberty is such that legal representation is generally considered indispensable. In *Zamir v United Kingdom*[39] the Commission considered that it would have been unreasonable to expect a person detained with a view to deportation, to conduct *habeas corpus* proceedings without legal representation and legal aid, "in the light of the complexity of the procedures involved and [the applicant's] limited command of English." Likewise, in *Megyeri v Germany*[40] the Court held that a person detained in a psychiatric institution should receive legal assistance in connection with proceedings for his release, unless the circumstances are exceptional. Since Article 5(4) imposes an obligation the state to permit a challenge to the lawfulness of detention it follows that the state must provide representation free of charge if the individual does not have the means to pay a lawyer.

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[36] See the passage from *Munro v United Kingdom* 52 DR 158 quoted at para. 27 below.

[37] *Cf. MLB v SLJ* (1997) 3 BHRC 47, US Supreme Court.

[38] Note however, that in *Webb v United Kingdom* 22 DR 133 the Commission held that an appeal to the Crown Court in affiliation proceedings did not require legal aid within the *Airey* principles.

[39] 40 DR 42 at 60.

[40] 15 EHRR 584.

27. On the other hand the Commission has consistently refused to recognise a right to legal aid to bring[41] or defend[42] defamation proceedings, despite their potential complexity. In *Winer v United Kingdom*,[43] the Commission expressed the view that:

> "...given the limited financial resources of most civil legal aid schemes, it is not unreasonable to exclude certain categories of legal proceedings from this form of assistance. The fact that the English legal aid scheme excludes assistance in defamation proceedings has not been shown to be arbitrary."

In *Munro v United Kingdom*[44] the Commission observed that "the circumstances in which an entitlement to legal aid will be necessary to satisfy the requirements of Article 6(1) are circumscribed." Since the contracting states had deliberately omitted a right to civil legal aid from Article 6, the right to free representation enunciated in *Airey* could not be taken to be "comparable in its comprehensiveness" to Article 6(3)(c). So far as defamation proceedings were concerned, the Commission observed:

> "The general nature of a defamation action, being one protecting an individual's reputation, is clearly to be distinguished from an application for judicial separation, which regulates the legal relationship between two individuals and may have serious consequences for any children of the family. Defamation proceedings are, moreover, inherently risky and it is extremely difficult accurately to predict their outcome."

Conditional fee agreements/Thai trading agreements

28. It is important to recognise that the provision of civil legal aid is not the only means by which the state can secure access to justice, even in a case where

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[41] *Winer v United Kingdom* 48 DR 154; *Munro v United Kingdom* 52 DR 158.

[42] *Steele and Morris v United Kingdom*, unreported.

[43] 48 DR 154.

[44] 52 DR 158.

legal representation is considered indispensable. In *Airey* itself,[45] the Court pointed out that:

> "[W]hilst Article 6(1) guarantees to litigants an effective right of access to the courts for the determination of their " civil rights and obligations", it leaves to the State a free choice of the means to be used towards this end. The institution of a legal aid scheme...constitutes one of those means but there are others such as, for example, a simplification of procedure. In any event, it is not the Court's function to indicate, let alone dictate, which measures should be taken; all that the convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6(1)."

29. Relying on these words, the Commission has held that the means employed to secure effective access to court are in general within the state's margin of appreciation.[46] Whilst the grant of legal aid is one means of achieving this, there are a number of possible solutions. As the court acknowledged in *Airey*, one method might be to simplify the relevant procedure to the point where legal representation is no longer necessary. The tribunal procedure in England and Wales is an example of this approach, although it is open to question whether all tribunal proceedings can be effectively conducted without the assistance of a legally qualified representative. Another possible solution would be to provide a state legal service or a duty solicitor scheme which is funded centrally, or even to impose a requirement on the legal profession to provide legal representation *pro bono* in certain cases, as is the practice in the Channel Islands, and in a number of member states of the Council of Europe.[47]

30. There is no reason in principle why a CFA or a *Thai Trading* agreement should be incapable of satisfying the requirements of Article 6(1), providing the potential litigant can secure the services of a lawyer willing to undertake

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[45] At para. 26.

[46] *Winer v United Kingdom* 48 DR 154 at 171; *Munro v United Kingdom* 52 DR 158 at 164.

[47] *Van der Mussele v Belgium* 6 EHRR 163 at para. 39: A requirement on a lawyer to provide legal representation free of charge "constituted a means of securing for [his client] the benefit of Article 6(3)(c) of the Convention. To this extent it was founded on a conception of social solidarity and cannot be regarded as unreasonable."

the case on these terms. Although the legal assistance provided under such an agreement is not free of charge in the strict sense, the requirement for free representation exists only to the extent necessary to secure effective access to court. Moreover, if any insurance premium and the success fee are recoverable from the unsuccessful defendant then in straightforward cases with reasonable prospects of success the plaintiff should be able to obtain legal assistance without suffering excessive deduction from an award of damages.

31. There may however be individual cases in which such agreements will not be sufficient to meet the requirements of Article 6. This is most likely to arise in relation to a potential claim which is legally, evidentially or procedurally complex, or which is brought by or on behalf of a person who is unable to represent himself (perhaps because he is a minor, a prisoner or a mental patient, or perhaps simply because he lacks the intellectual resources to do it.) In such cases, legal representation may be considered indispensable to effective access to court.[48]

32. Serious issues may be expected to arise in such a case if the potential litigant is unable to secure the services of a lawyer under a CFA or similar agreement, either because the lawyers consulted. Consider that the merits of the claim are not sufficiently strong, or because the case is evidently complex and the lawyers approached are unable or unwilling to carry out the investigations necessary to establish whether the claim has a reasonable prospect of success.

33. As Lord Justice Robert Walker pointed our recently:[49]

> "The *Airey* case suggests that the complete absence of legal aid to enable a litigant to pursue a claim may constitute an infringement of Article 6, especially if the claim is complex and the would-be plaintiff is unable to act effectively as a litigant in person. A

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[48] In *Ian Stewart-Brady v United Kingdom* 90-A DR 45 the Commission considered that the absence of legal aid gave rise to a "potential problem of access to court", even in the context of proposed defamation proceedings, where the applicant was a mental patient who was unable to take proceedings for libel without legal representation.

[49] Robert Walker L.J., *The Impact of European Standards on the Right to a Fair Trial in Civil Proceedings in the United Kingdom Domestic Law* [1999] EHRLR 4. Lecture to the Lincoln's Inn European Law Conference 17th October 1998.

system of conditional fees might be regarded as an adequate substitute, but it is easy to imagine circumstances, especially involving an unusual and complex claim, in which there would be gaps in the system. If those gaps are not filled, in the last resort, by some residual recourse to legal aid, it will be a cause of real concern."

Merits of the claim

34. Where a lawyer refuses to act on the ground that the merits of the claim are weak there is no doubt that the resulting denial of access to court could, in principle, be compatible with Article 6(1). In *X v United Kingdom*[50] the Commission concluded that a refusal of legal aid on the ground that a potential claim had no reasonable prospect of success would not constitute a denial of access to court "unless it could be shown that the decision of the administrative authority was arbitrary." The Commission had regard in particular to the fact that the applicant was able to bring the action himself of seek assistance from another source.

35. In many cases however there will be considerable room for argument as to the merits of a potential claim. The introduction of CFA's inevitably carries with it the risk that lawyers may require unduly high prospects of success before they are prepared to invest resources in preparing a case. The Government's proposals assume that lawyers will never allow their personal exposure to financial risk to influence their judgment to the extent of refusing to act under a CFA for a client whose claim has reasonable prospects of success. If the proposals operate as they are intended to do, then this is unlikely to occur very often, Nevertheless, it must be recognised that there will be occasions when claims which, on an objective assessment, enjoy reasonable prospects of success may fail to attract the necessary legal representation. Such a situation undoubtedly has the potential to give rise to a violation of Article 6, particularly in a case where legal representation is legally required or "genuinely indispensable" and there is no alternative means of representation available.

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[50] 21 DR 95 at 101.

36. A further complication may arise in relation to claims for damages which invoke the Human Rights Act 1998 in connection with incompatible primary legislation, either as the sole cause of action or, more usually, as an argument ancillary to an existing common law or statutory claim. Section 3 of the Act requires courts and tribunals to read and give effect to primary legislation in a manner which is compatible with Convention rights so far as it is "possible" to do so. This may involve giving a meaning to a legislative provision which it would not ordinarily bear, or re-interpreting a section so as to give it meaning which is different from the interpretation previously put upon it by an appellate court.

37. In the event that a court considers it "possible" to adopt such a construction, it will then have the power under section 8 of the Act to grant such relief or remedy, within its powers, as it considers just appropriate, including an award of damages. In the event that the court considers that it is not "possible" to adopt a compatible construction it will, if it is a higher court, have power to grant a declaration of incompatibility under sections 4 and 5, but it will not have jurisdiction to afford a remedy to the litigant. The litigant will have succeeded in establishing a breach of the right concerned, but not in securing a remedy.

38. The interpretive obligation under section 3 requires a wholly new approach to statutory construction which may make it difficult for a legal adviser to predict whether the court will, in the end, have jurisdiction to grant a financial remedy. This uncertainty has the potential to act as a disincentive to lawyers to pursue viable claims under a CFA, and may also deter insurers.

The investigation of complex claim

39. Turning to the problems associated with funding the investigation of complex cases, there is an equally serious risk of denial of access to court if a potential litigant is unable to find a lawyer who is prepared to carry out the necessary preparatory work. A complex personal injury or medical negligence case may require a considerable investment of resources before a solicitor is in a position to make a reasoned assessment of the merits.

40. It is clear from *Golder* and *Airey* that the right of access to court in Article 6(1) applies before proceedings have been instituted; and it is equally clear from *X v United Kingdom*[51] that an assessment of the merits of a case must be fairly and conscientously carried out at this stage. The fact that a case is complex could never justify a denial of legal representation. Indeed, the greater the complexity, the more likely it is that legal representation will be found to be "indispensable".

Choice of Legal Representation

41. The introduction of block contracts will inevitably involve some reduction in the ability of a legally aided litigant to choose his representative. It is necessary to consider whether this reduction in choice is compatible with Article 6(3)(c) of the ECHR which guarantees to a criminal defendant the right to "legal assistance of his own choosing". The point turns to some extent on construction. The reference to choice of representation in Article 6(3)(c) may be taken to apply only to the second of the rights guaranteed (i.e. the right of an accused to defend himself through legal representation *of his own choosing*). Alternatively, a broad and purposive construction[52] is adopted, it may be taken to apply also to the third right (i.e. the right where the accused has insufficient means to pay for representation, to be provided with *it* free of charge). From a purely constructionist point of view, the question is whether the word *it* in Article 6(3)(c) refers to legal representation simpliciter or to legal representation of the defendant's own choosing.

42. For its part, the commission has consistently held that Article 6(3)(c) does not guarantee the right of an accused to choose a court-appointed lawyer,[53] and has applied this principle to legally aided defendants in the United Kingdom.[54] This can be seen as a pragmatic solution which takes account of the variation

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[51] See para. 34 above.

[52] See *Ministry of Home Affairs v Fisher* [1980] AC 319 at 328G-H; *Ministry of Transport v Noort* [1992] 3 NZLR 260 at 271, 276-278.

[53] *X v Germany* 6 DR 114.

[54] *X v United Kingdom* 5 EHRR 273.

in the systems established in the member states of the Council of Europe for the provision of free legal representation.

43. The same approach has been taken by the UNHRC:

> "Although persons availing themselves of legal representation provided by the State may often feel they would have been better represented by counsel of their own choosing, this is not a matter that constitutes a violation under Article 14(3)(d) by the State party."[55]

44. The European Court of Human Rights has not considered this point directly. However, in relation to defendants who have the means to instruct a lawyer privately, the Court has held that as a general rule the accused's choice of lawyer should be respected,[56] and that an appointment made against the wishes of the accused will be "incompatible with the notion of a fair trial...if it lacks relevant and sufficient justification."[57]

45. Once the Human Rights Act 1998 is brought fully into force the domestic courts will have to determine whether Article 6(3)(c) should be interpreted so as to afford a legally aided defendant a choice of legal representation. Section 2 of the Act requires the domestic courts to "have regard" to the caselaw of the Court and Commission, but not necessarily to follow it. This ensures that Convention jurisprudence will establish a floor[58] but not a ceiling for human rights protection in the United Kingdom, and will enable the courts to build a body of British human rights jurisprudence. Certainly, there are some national judges who may be uncomfortable with the idea that the standard of fairness afforded to a criminal defendant under Article 6 should be dependent upon whether he is represented under a legal aid order or is instructing his lawyer

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[55] *Pratt and Morgan v Jamaica* Doc. A/44/40 at 222.

[56] *Goddi v Italy* 6 EHRR 457.

[57] *Croissant v Germany* 16 EHRR 135.

[58] It is a floor below which national standards cannot fall since the United Kingdom will be answerable in Strasbourg if it does.

privately.

46. The approach of the Commission has been criticised, and a number of commentators have suggested that it may need to be reconsidered in the light of subsequent decisions of the Court.[59] The Convention is always to be interpreted in the light of present day conditions,[60] and the Court has emphasised that the requirements of fairness have undergone a "considerable evolution" in Convention jurisprudence, particularly as regards the importance attached to the appearance of fairness, and the increased sensitivity of the public to the fair administration of justice.[61]

47. In determining whether the block contracting proposals strike a fair balance between the rights of the defendant and the general interest of the community,[62] the issue of choice cannot be considered in isolation. Account must also be taken of the quality and effectiveness of the representation provided to a particular individual. The European Court of Human Rights has held that whilst the state is not generally responsible for shortcomings in the way a legal aid lawyer performs his duties, the authorities may nevertheless be obliged to intervene and appoint alternative counsel where the failure to provide effective representation is manifest or has been brought to their attention.[63]

48. Assuming that the representation afforded to a particular defendant under a bock contracting agreement is competent, it seems unlikely that the resulting restrictions on his choice of lawyer will conflict with Article 6. But if the defendant has a legitimate grievance about the standard of effectiveness of representation, the authorities may then come under a duty to appoint an

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[59] See for example Van Dijk and Van Hoof, *Theory and practice of the European Convention on Human Rights* (Kluwer).

[60] *Tyrer v United Kingdom* 2 EHRR 1 at para. 31; *Airey v Ireland* 2 EHRR 305 at para. 26.

[61] *Borgers v Belgiuim* 15 EHRR 92 at para. 24.

[62] *Sporrong and Lonroth v Sweden* 5 EHRR 35 at para. 69.

[63] *Artico v Italy* 3 EHRR 1; *Kamasinski v Austria* 13 EHRR 36 at para. 65.

alternative representative. Thus, whilst there may be no requirement to respect a defendant's preferences in general, there may well be a requirement to respond effectively to a defendant's specific grievances about the lawyer who has been assigned. This points to a requirement for effective oversight of the quality of legal services provided under block contracting arrangements, as well as a procedure for considering complaints from those represented and for appointing alternative representation where the complaint is found to be justified.

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