

# Chapter 2: Pre-action Conduct of Litigation

Outline	2.1	Introduction	2.8	Example checklist for initial interview with client in personal injury claim
	2.2	Financing litigation	2.9	Defendant's insurers and the Motor Insurers' Bureau
	2.3	Pre-action protocols	2.10	The claims process in road traffic accidents
	2.4	Personal injury protocol	2.11	Debt claims
	2.5	Selection of experts under the protocol	2.12	Summary
	2.6	Compliance with the protocol when limitation approaches		
	2.7	Failure to comply		



## Aims of this Chapter

This chapter will enable you to achieve the following learning outcomes from the ILEX syllabus:

- 2 Understand how civil actions are funded
- 3 Understand how to commence and defend actions in civil proceedings

## 2.1 Introduction

This chapter considers the steps to be taken prior to the issue of court proceedings. The tasks that a solicitor undertakes on behalf of the client at the outset are particularly important. There is a great deal of work to do, particularly in personal injury cases, before a claimant's solicitor can issue proceedings. If this initial work is not carried out thoroughly and instructions are not taken fully, at best the solicitor could suffer the embarrassment of having to keep referring back to the client for simple details and information. At worst, the solicitor may have obtained only half of the information required and, if proceedings are issued on this basis, they may be struck out. Remember also that the court will expect the parties, in accordance with the overriding objective, to act reasonably and, in general, to try and avoid the issue of proceedings. It would not be in accordance with the ethos of **CPR** to issue proceedings without pre-action work by both the claimant's and the defendant's solicitors.

It may seem odd, but at the beginning of an action it is important to remind the client that the likelihood of reaching trial is not very high. The vast majority of actions settle before trial, and letters to clients should never be expressed in terms of "when this matter goes to trial . . .". Trial is only ever a small possibility.

## 2.2 Financing litigation

How a case will be financed is of crucial importance, both to the firm (as the method may influence how much and how quickly the firm will be paid) and to the client. There are a number of alternative ways through which litigation may be financed.

Solicitors must discuss the issue of costs with their clients. They should give the client the best information possible about the likely overall costs and should explain the client's potential liability for his own costs and for those of the other parties (e.g. if the client were to lose the case the court may order him to pay the opponent's costs).

The usual rule is that the unsuccessful party in proceedings is ordered to pay the successful party's costs (r44.3(2)), but the court may make a different order. The other side's costs generally have to be paid out of the losing party's personal resources. It may be possible for the client to arrange "after the event" (ATE) insurance to cover the liability to pay the other side's costs.

### 2.2.1 Retainer

The traditional method, called a retainer, is for the client to pay the solicitor's costs of conducting the case at an agreed hourly rate. Charge-out rates are based on the salaries of the staff and fee earners working at the solicitor's office together with an element representing the firm's profits. A common approach is to fix a single hourly rate for each fee earner (or grade of fee earner) in the firm, taking these factors into account. In addition, the client will be expected to pay for disbursements. These are sums paid by the firm during the course of litigation in respect of experts' and counsel's fees, the cost of making copies of photographs and similar expenditure. A client care letter, which should include the funding arrangements and, if possible, an estimate of the future costs, should be sent to the client in the early stages after the firm is retained. It is normal to ask for a sum on account of costs at this stage and it is sensible to agree to periodical billing of the client (which avoids the client being taken by surprise by a large bill at the end of the case and also assists with the firm's cash flow).

There is a duty to keep the client informed about the level of costs incurred on his behalf.

The retainer should be run in accordance with the **Solicitors' Code of Conduct** (to be incorporated into the SRA's Handbook in October 2011), or it could affect the whole validity of the retainer (meaning the firm may not get paid at all).

### 2.2.2 Conditional fee agreements

The client and the solicitor's firm may agree to enter into a conditional fee agreement (CFA). The basic idea of these agreements is that the client will not have to pay anything to the firm acting for him (except disbursements in some cases) if the case is lost, but, if successful, the firm will be entitled to charge the client at the lawyer's usual rate plus a percentage mark up on this rate, known as the success fee. In many cases the client will take out an insurance policy (ATE insurance) to cover himself for the potential liability of paying the opponent's costs and his own disbursements if he were to lose the case. It is for this reason that CFAs are often referred to as "no win no fee" agreements.

The success fee will be a percentage of the costs otherwise chargeable to the client and should be related to the risks involved in the litigation. For cases involving personal injuries the percentage increase generally cannot exceed 100 per cent but, under **CPR Part 45**, there are specific provisions further limiting the percentage increase in certain road traffic and employers' liability cases.

A lawyer representing a client under a CFA should explain:

- the circumstances in which the client may be liable for his own costs and those of the opponent;

- the client's right to assessment of costs wherever the solicitor intends to seek payment of any or all of the costs from the client; and
- any interest a solicitor may have in recommending a particular policy or funding.

**s58 Courts and Legal Services Act 1990** states that a CFA must be in writing, not relate to criminal or family proceedings and the percentage of any success fee must be specified.

There are different types of speculative funding available, but these are not considered on this course. References to CFAs on this course relate to CFAs with a success fee, which is the most common type of arrangement, especially in personal injury cases. Contingency fees, where the solicitor takes a proportion of any damages awarded as the fee, are not currently permitted (but see **2.2.2.1**).

Under the **Access to Justice Act 1999 (AJA 1999)**, success fees and insurance policy premiums are recoverable from the losing party if the client wins the case.

**CPR** provide that the success fee and premium, called additional liabilities, will not be recoverable if a party has not provided the opponent with the required information. Form N251 (Notice of Funding of Case or Claim) must be filed with the claim form (claimant) or acknowledgment of service/defence (defendant) or at any later time if such an arrangement is entered into. All changes to the funding arrangement (e.g. if the CFA is terminated) must also be notified. There is no requirement to specify the amount of the success fee nor how it is to be calculated, until it is to be assessed by the courts. An example of Form N251 is shown as **Document 6** of the **Appendix**.

### 2.2.2.1 CFAs and the Jackson Report

As explained at **1.10**, the Jackson Report has proposed sweeping changes to the civil procedure process, particularly in relation to the use of CFAs. Although these recommendations are not currently law, you should be aware of them.

Lord Jackson proposes that a successful claimant should no longer be able to recover the cost of the success fee or the premium for the ATE insurance from the defendant. At the moment both are recoverable. In order to offset this detriment to the claimant, he also proposes that awards to successful claimants be increased, with a suggested increase of 10 per cent for general damages for pain, suffering and loss of amenity.

He also wishes to encourage the use of "before the event" insurance. Many insurance companies currently offer legal expenses insurance along with home insurance or driving insurance, but this is not routinely taken up by customers. Lord Jackson would like to move towards a system where people are insured for legal costs before the accidents actually happen.

More controversially, Lord Jackson has suggested the introduction of contingency fee agreements. This is where the solicitor takes a percentage of the claimant's damages. Contingency fee agreements are a common feature of the US legal system, but are not currently allowed in the UK.

The Government is currently consulting on these proposals. No changes are expected until Autumn 2012.

## 2.2.3 Public funding

Clients may alternatively be eligible for public funding. Civil legal aid is dispensed by the Legal Services Commission (LSC) through the Community Legal Service (CLS) fund. The services provided in this manner are known as funded services. Firms must hold a contract with the LSC in order to take on clients in publicly funded cases; consequently many firms no longer undertake any publicly funded work.

The scheme is fairly complex. Detailed reference manuals are produced on behalf of the LSC and firms will keep these in the office for reference. Essentially, there are different considerations according to whether the case is a debt or contract case or a personal injury case (the two main types of case studied on this course).

### 2.2.3.1 Debt and contract cases

In relation to debt or contract cases, eligible clients may receive advice and assistance by way of **legal help**. Legal help provides help and advice on how the law applies to a particular case and how to proceed, and can be spent on initial work on the case up to a limit. In order to benefit from the scheme the client must qualify under a financial eligibility test, administered by the solicitor in the office. In addition, there must be sufficient benefit to the client to justify the provision of legal help and it must be reasonable to provide funding. If the client qualifies, he will sign a legal help form.

Legal help does not cover taking court proceedings. If proceedings are necessary, eligible clients may receive CLS funding by way of **legal representation**. The correct application form and means form must be completed and submitted. There are standard forms, varying according to the type of funding sought.

**Help at court** allows representation by a solicitor for one particular hearing and so is more limited than **legal representation**.

The application is determined in accordance with a means test and a merits test. The merits test is based on the **funding code**; in general terms it will consider the three important areas listed below:

- whether the case might be better dealt with using another service, such as mediation;
- whether the case can be funded in any other way, such as through insurance or a CFA;
- whether the case justifies the spending of public money. This question includes consideration of whether a reasonable person of private means would fund the case. In money claims (e.g. debt cases) there are specified cost-benefit ratios and likely damages must exceed likely costs according to set percentages (which vary according to the estimated prospects of success). Applications will be refused where cases have been, or are likely to be, allocated to the small claims track. If a client (who must be an individual, not a firm or company) satisfies the means and merits tests, a certificate will be issued. Some clients may qualify, subject to the payment of contributions.

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Published in 2011 by:  
ILEX Tutorial College Ltd  
College House  
Manor Drive  
Kempston  
Bedford  
United Kingdom  
MK42 7AB

**British Library Cataloguing in Publication Data**

A catalogue record for this manual is available from the British Library.  
ISBN 978-1-84256-544-5