**Funding**

This element covers how clients can fund legal work.

**Introduction to funding**

Obtaining help with legal matters is generally expensive.

Over the course of your legal studies, you will gain an understanding of the services that solicitors provide in relation to contentious work (civil or criminal litigation) and non-contentious work (such as property and business transactions or assisting in the administration of a legal estate).

The costs associated with legal work do not stop there. Counsel's fees, land registry and Companies House charges, document production costs, travel expenses and experts may need to be paid for.

In litigation, a client will also be concerned about the possibility of being ordered to pay an opponent's costs.

How are these expenses to be paid for?

That is the subject of this element. You may find this element easier to understand if you already have an understanding of the distinction between solicitors' charges and disbursements, and of the basic concept of recoverable costs in litigation.

**Types of funding**

Various mechanisms have evolved in order to enable parties to fund legal work. Some are available for any type of legal work. Others relate to particular types of legal work. We will cover the types of funding set out below.

- Private funding

- Professional funding

- Before the event insurance

- Community Legal Service

- Conditional fee agreements

- Damages based agreements

- After the event insurance

- Third party funding

**Why is this important?**

A solicitor has a **duty to act in his/her client’s best interests**. As part of this, a solicitor is required to draw to a client’s attention any funding options that might be available, and to try to ensure the client ends up with the most appropriate one.

Solicitors are expected to conduct a reasonable and proportionate search to establish whether the client has any funding options, such as ‘before the event’ insurance, which might cover their legal costs, but they are not expected to embark on an exhaustive ‘treasure hunt’ for insurance policies which might include legal expenses cover (see below). The existence of BTE insurance should certainly be raised with a client at the outset of a case, when first obtaining instructions.

**Private funding**

A client may fund legal work through their own private resources.

Many individuals will not have enough money to do this for substantial work, but it is normal for residential conveyancing, or preparing a will (for example).

For many businesses, this is the normal way of funding the vast majority / all of the legal work they need.

This is a funding option for any type of legal work.

**Professional funding**

Legal work might be funded by a trade union or professional organisation. Some unions have their own legal representatives who will provide services to union members. Other unions have formed agreements with law firms for the law firms to provide legal services to their members.

Whilst this is in principle available for any sort of legal work, in practice it is most likely to occur in relation to civil or criminal litigation. For example, a union or professional organisation might fund the legal work involved in defending a professional in a claim for professional negligence, or in an employee bringing a claim against their employer.

**Before the event ('BTE') insurance**

Before the event (‘BTE’) insurance is taken out before the need for legal work arises. The insurance policy 'pays out' to cover the legal work in the event that it is needed. This could include disbursements, depending on the terms of the policy.

BTE insurance policies are often sold in conjunction with other insurance policies. For example, household insurance might include BTE insurance in relation to legal costs incurred in a dispute with a neighbour. Motor insurance might include BTE insurance in relation to legal costs incurred in a dispute following an accident. They often have a financial limit on the cover provided or may stipulate that they will meet only a stated proportion of the costs incurred. BTE premiums tend to be relatively low (often less than 1% of the insurance cover sought) because most policy holders will never have to call on this part of their policy.

Whilst BTE insurance could, in principle, fund any type of legal work, it most commonly relates to litigation.

BTE premiums are not generally recoverable from the other side should the policyholder be successful in the litigation.

**Community Legal Service ('CLS')**

CLS used to be known as Legal Aid.

It is the provision of public funds to assist in the procurement of legal services for those who could not otherwise afford it.

There are strict constraints on who is eligible. We will consider CLS funding for civil work first, and then consider criminal work.

When CLS funding is available, it might relate to providing help / advice, to providing help in relation to limited and specific court hearings / appearances or to actually representing the client in the proceedings generally (or to a combination of these).

**Eligibility for civil CLS funding**

What types of claim can attract civil CLS funding?

There are very few types of civil claim which attract CLS funding. The following represents a sensible way to consider eligibility:

Is the client an individual or a 'legal person' (like a company or LLP)?

Civil CLS funding is generally only available to individuals. It is very rare that it would be available to a company.

What types of claim is it?

Most eligible types of claim relate to particular types of children / family disputes, homelessness or domestic violence. The vast majority of civil legal work is not eligible for CLS funding.

What are the client's means?

If the client's income is too high AND/OR the client has too much capital (eg savings) then they will be ineligible.

What are the merits of the client's position?

If the client's position is insufficiently meritorious, then they will not receive CLS funded assistance

**Eligibility for criminal CLS funding**

The rules governing eligibility for criminal CLS funding are different. These are explained in an element dedicated to funding of criminal work.

**Conditional fee agreements (CFAs)**

A conditional fee agreement is one way of funding civil litigation. It is a type of ‘no win no fee’ agreement, which means that the solicitor will not get paid unless the case is successful. If the case is successful, the solicitor will be paid the normal fee (or 'basic fee') plus a success fee (also known as an 'uplift') of up to 100% on top of the normal fee – for example, the success fee might be an extra 25% on top of the normal fee.

Whilst the court will in many cases order an unsuccessful party to pay a successful party’s costs, such as solicitor’s fees and disbursements, the court will not allow a party to recover the success fee from an opponent, so in the case of a claimant, the success fee effectively comes out of the claimant’s damages.

In personal injury cases, the success fee the lawyer may charge must not exceed 25% of general damages for pain suffering and loss of amenity, and damages for pecuniary loss (other than future pecuniary loss). This is intended to protect the claimants’ damages in personal injury proceedings at first instance.

A CFA will only be lawful, and therefore enforceable, if it satisfies certain conditions, which are beyond the scope of this element.

Note that the CFA is a means of funding the solicitor’s costs. It does not provide an option for funding expert’s fees, court fees or other disbursements (counsel may agree to act on the basis of a CFA, but this is a separate arrangement to the solicitor’s CFA). The client will therefore need to put in place a separate funding arrangement for these.

**Example (this example does not consider disbursements)**

A claimant brings a personal injury claim. The claim is funded by a CFA, which provides for a 50% success fee / uplift.

The solicitor records billable time of £40,000 to bring the claim to trial.

Let's assume the client wins, and is awarded £300,000 at trial, of which £240,000 relates to future losses. The claimant has won, so it is liable to pay its solicitor the £40,000, plus a 50% uplift (£20,000). However, the success fee may not exceed 25% of the damages excluding damages for future loss. Damages here, excluding future losses, are £60,000, 25% of which is £15,000, so the success fee is capped at £15,000. So the claimant's solicitor is entitled to £40,000 plus £15,000 - £55,000.in total. If the court also awards the claimant's its costs, only the £40,000 can be sought from the other side, not the uplift. And the £40,000 will be assessed (see the elements relating to costs), meaning perhaps only £32,000 will be paid by the defendant. So the total recovered from the defendant is £332,000, of which £55,000 is paid to the solicitor, and £277,000 goes to the client.

**Damages based agreements (DBAs)**

A damages based agreement (‘DBA’) is another way of funding civil litigation, and another type of ‘no win no fee’ agreement – the solicitor will not get paid unless the case is successful. Under a DBA, if the case is successful, the solicitor will be paid a proportion of the damages awarded to their client by way of a remedy (rather than getting their charges plus a success fee, as in the case of a CFA). The maximum amount a lawyer can recover is capped at 25% of the damages (excluding damages for future care and loss) in personal injury cases, 35% of damages in employment tribunal cases and 50% of damages in all other cases. As with CFAs, the DBA will not cover disbursements or opponent's costs, and separate funding arrangements will be needed for these.

**Example (this example does not consider disbursements)**

A claimant brings a breach of contract claim seeking £120,000, under a DBA which provides for the solicitor to be paid £50% of the damages (the maximum permitted). The claimant is awarded £100,000 at trial, which counts as 'success' under the terms of the DBA. The solicitor is entitled to 50% of the damages - £50,000. Note that the client would be able to seek an order that the opponent pays its costs in the normal way, but the court would decide what is recoverable based on the time spent by the solicitor, and in all likelihood the opponent would not be ordered to pay the full £50,000.

**After the event insurance (ATE)**

ATE insurance policies are taken out in order to help the client cover the costs of litigation once a dispute has already arisen. It is one way of funding costs associated with civil litigation.

ATE insurance usually covers the client’s own disbursements and their opponent’s costs and disbursements in the event of losing their case. ATE insurance is often used in conjunction with a CFA or DBA: the CFA / DBA effectively covers the client’s own solicitor's costs, and the ATE covers the disbursements and opponent's costs.

Whether or not ATE insurance will be available will depend on the merits of the case and the level of cover required, ie whether a particular insurance company is willing to take on the risk and on what terms. It is a more expensive method of providing cover for legal costs than BTE insurance and ATE premiums can exceed 25% of the insurance cover sought.

This insurance policy premium is not recoverable from the other party (with the exception of clinical negligence expert reports).

**Third party funding**

Again, this relates to civil litigation. This occurs when independent litigation funding is provided by a third party to enable parties to bring their cases to court. Such funding is provided by (for example) banks, private equity firms or hedge funds. In the event that the claim succeeds, the funder receives their money back, plus an uplift.

The Association of Litigation Funders has created a code of conduct which its members agree to abide by (note that there is no requirement for a litigation funder to be a member of the Association of Litigation Funders). You can read about it at [www.associationoflitigationfunders.com](http://www.associationoflitigationfunders.com/). Key features of the code include:

- Promotional literature must be clear and not misleading.

- Funders must not to try to take control or conduct of the litigation away from the solicitors / barristers involved.

- Funders must make sure they have sufficient funds in place to meet their funding commitments.

In practice, whilst a growth area, third-party funding is currently generally limited to commercial cases of a high value, and it is not yet suitable for consumer cases, personal injury cases or claims that do not carry a sufficiently high level of damages.

**Ways of charging a client**

How a client pays a solicitor's charges (considered above) is a slightly different consideration to how a solicitor works out those charges in the first place.

**Hourly charging**

This is the traditional method of charging a client. The client pays for the amount of time the solicitor spends working on the matter.

**Fixed fees**

Alternatively, a solicitor and client might fix a fee for a particular item of work. This is more common for work like residential conveyancing, drafting a will, or representing a client in a very small dispute.

**Unbundled legal services**

The idea of ‘unbundled legal services’ is that a solicitor takes responsibility for a very specific task, such as simply preparing a bundle of documents for court or drafting a single document, rather than representing a client in a matter more generally. This helps keep costs down.

**Summary**

A solicitor has a duty to try to find the best funding option for a client.

Many clients will simply need to pay through their own private resource.

Sometimes, work might be funded by a trade union/professional organisation.

BTE insurance can cover legal expenses in the event that a dispute arises.

CLS (Government) is available on a means-tested basis for some criminal work and very limited categories of civil work.

CFAs, used in civil litigation, provide for a solicitor to be paid their normal fees plus an uplift in the event of success, and nothing in the event of 'failure'.

DBAs, used in civil litigation, provide for a solicitor to be paid a share of the damages in the event of success, and nothing in the event of 'failure'.

ATE insurance, purchased after a dispute arises, generally funds disbursements and liability for an opponent's costs.

Third party funders receive repayment and an 'uplift' in the event of success.