

Advantages and  
disadvantages  
conditional fee  
arrangements legal  
aid law essay



**ASSIGN  
BUSTER**

Conditional fee arrangements are widely used throughout various legal systems; they have been used in the UK since 1990 and were expanded to include non-family civil proceedings since 1998. Conditional fee arrangements are also referred to as “ No fee, no win” arrangements where parties bringing an action may make arrangements with a solicitor where the solicitor agrees to accept payment only on the strict condition that the action being brought on behalf of their client yields a successful result for their client. In some conditional fee arrangements the unsuccessful party may be required to pay the legal fees of their opponent.

Over the years there has been legislation and organizations which have instituted various approaches to govern conditional fee arrangements. In current practice these “ No fee, no win” arrangements include not only payment of solicitors fees but also other funds which may have been disbursed as a result of legal proceedings.

Solicitors may also require that their client pay what is called a “ success fee” or uplift, this serves as a sort of compensation paid to the solicitor for taking the risk of not getting paid if they do in fact lose the case. It should be noted that making success fees recoverable from the client has tremendously increased the burden of cost upon them, even though one could argue that it has also served to promote better access to justice. Conditional fee arrangements exist alongside legal aid as mechanisms to provide legal services for persons who would otherwise not be able to afford them. After the Event (ATE) insurance is an insurance policy obtained on behalf of the client by their lawyer usually taken out when a conditional fee arrangement is being contemplated.

<https://assignbuster.com/advantages-and-disadvantages-conditional-fee-arrangements-legal-aid-law-essay/>

The types of proceedings that may be covered by conditional fee agreements are outlined in The Conditional Fee Agreements Order 1995 and include personal injury, matters brought before the European court of Human Rights and insolvency matters.

Legal aid formed part of a major transformation in Britain and was set up after the Second World War by the Legal Aid and Advice Act 1949. It was recognized that the right to legal representation and equal access to it was of primary importance in forming the type of society that Britain desired. The legal aid scheme has seen major development and reform over the years and is still under a process of constant review. In 1999 the Access to Justice Act established the Legal Services Commission which created the Community Legal Service (CLS) to handle legal aid for civil litigation and the Criminal Defence Service (CDS) to handle legal aid for criminal matters. In civil matters legal aid is provided for giving legal advice, assistance in court where a solicitor may speak on behalf of a client in court with representing the client for the entire matter, resolution of family disputes and providing legal representation to name a few. Through the legal aid system the state provides equal access to necessary services under the law, driven primarily by increasing inability of persons generally to afford these services. The majority of those who benefit from the CLS are among the poorer members of society who are often socially excluded and dependent on various forms of social welfare. The legal service funding code remains as a guide used by the CLS to determining what cases will be funded by legal aid.

Much like the legal aid system, conditional fee arrangements attempt to lessen the gap between those who can afford quality legal services and <https://assignbuster.com/advantages-and-disadvantages-conditional-fee-arrangements-legal-aid-law-essay/>

those who actually get quality legal services. Conditional fee arrangements have been viewed as an important alternate means to funding civil litigation. Professor Richard Moorhead in his article "Conditional fee arrangements, legal aid and access to justice" highlights the role played by the Access to Justice Act 1999 and guidance from the Legal Services Commission in providing a framework under which conditional fee arrangements may work. The issue of advantages and disadvantages has to be looked at from both the standpoint of specific types of actions being brought where the parties require legal aid and what is outlined in legislation and guidelines from the Legal Services Commission. It was the opinion of British politician Geoff Hoon that "No-win no-fee conditional agreements will result in better access to justice. Access will be given to the many people who fall between those who are very rich or those who are so poor that they qualify for legal aid. In future, the question of whether one gets one's case to court will no longer depend on whether one can afford it, but on whether one's case is a strong one." This idea of better access of justice for those who can't afford it remains the overriding theme of conditional fee arrangements. Any positive or negative effects of conditional fee arrangements on legal aid must be analyzed against the backdrop of the goal which both systems seek to achieve.

In England and Wales the percentage of the population eligible for legal aid has decreased drastically over the last 15 years, conditional fee arrangements have since empowered persons ineligible for legal aid to bring legal actions. However, among the criticisms of conditional fee agreements is the troublesome issue of success fees paid to solicitors, before

amendments to The Conditional Fee Agreements Order 2010 solicitors were known to receive up to 100 percent success fees. Upon successful completion of the civil action this additional amount is paid over to the solicitor in lieu of the apparent risk taken by representing the litigant and the possibility of an unsuccessful resolution to the matter, therefore resulting in no compensation coming the way of the solicitor. This can be a disadvantage to litigants where at the conclusion of the legal action, success fees and other fees payable may in total constitute a substantial amount of those damages. Also solicitors tend to charge legal fees at hourly rates in an attempt to maximize fees payable to them (Kellar and another V Williams [2004] UKPC 30). All of this has influenced many solicitors to take on conditional fee arrangement cases and from a purely financial standpoint doing this could have a negative effect on the legal aid system as well. On one hand, where traditionally solicitors would make themselves available for legal aid the pool of solicitors available for selection as legal aid lawyers is decreasing. The nature of conditional fee arrangements though, is such that much of the financial risk of litigation is assumed by the lawyer and as such the number of speculative or unmeritorious claims can be reduced. Due to the potential profitability of conditional fee arrangements, providing of course that a successful outcome is gained in favour of the client entering into this arrangement, many solicitors and law firms choose to focus primarily on these types of claims. This is viewed as both a lucrative and risky route which many are willing to take instead of being paid significantly smaller tailored fixed fees if they were legal aid lawyers. The disadvantage to the legal aid stream here is that it will be flooded with matters which conditional fee arrangement lawyers would tend to shy away from since they

<https://assignbuster.com/advantages-and-disadvantages-conditional-fee-arrangements-legal-aid-law-essay/>

tend to pick cases which immediately appear more likely to be successful. Solicitors also attempt to determine beforehand what the duration of the case might be before deciding to take the case on a conditional fee arrangement basis. The longer the case will be is potentially the more expensive the process will be which is undesirable for all involved. In essence legal aid would be funding litigation that would appear from the outset to be either trivial or extremely time consuming, resulting in wasted time and resources which could have been put to more efficient use. However, subsection 1 of the merits, costs and damages section of the Legal Services Commission funding code states that " all applications for Legal Representation or Support Funding save for a limited range of family, judicial review or mental health cases, must demonstrate a minimum level of prospects of success before funding can be granted."

Another argument that could also be raised is that the more entrenched these conditional fee agreements become and the more willing independent law firms and solicitors are to implement these schemes could mean a major decrease of the burden currently being placed on the legal aid system to fund civil litigation. The more that parties choosing to bring personal injury matters before the courts opt to go the route of conditional fee agreements would mean fewer persons may require legal aid assistance. Since the removal of legal aid for personal injury cases in 2000 those resources which would have originally been allocated to fund personal injury cases can now be allocated to parties requiring assistance in criminal matters. Particularly in the area of appeals since appeals to the House of Lords (Supreme Court) especially tend to be considerably costly. Affordable funding for litigation is

an important goal for organizations providing legal aid and the existence of conditional fee arrangements appears to make that goal much more achievable. If the legislation governing conditional fee arrangements is expanded to include other areas of litigation this could have both a positive impact on attempts to make litigation more affordable. As the scope of conditional fee arrangements increases so too will the scope of the Community Legal Service change over time, providing more options for persons seeking legal recourse to have their litigation funded and potentially increasing the funding required for legal aid.