

Acting pro bono?

Seek pro bono costs



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Download quick guides at www.ATJF.org.uk

Questions? costs@ATJF.org.uk

Thank you! The Foundation distributes the funds to support agencies and projects that give free legal help to those in need.

THE
ACCESS
TO JUSTICE
FOUNDATION

Charity no. 1126147



OUTLINE

What are pro bono costs?

- Pro bono costs are like ordinary legal costs, but where a party had free legal representation. The County Court, High Court and Court of Appeal Civil Division can award pro bono costs broadly where they would award normal costs. Pro bono costs can also be included in settlement agreements.
- Pro bono costs reflect the financial value of the free legal help provided - the amount is based on what a paying client would recover. The costs cover any period when free representation was provided and even if only one of the lawyers acted for free (i.e. normal costs can also be sought for the fee-paid work).
- The losing party is required to pay the costs to the prescribed charity, the Access to Justice Foundation. The Foundation then distributes the funds to agencies and projects to support the provision of free legal help to those in need.

Why were they introduced?

- Before October 2008, the indemnity principle meant a party represented by pro bono lawyers could not obtain costs against the other side. The better resourced party therefore had an unfair advantage of litigating without normal costs risks. The introduction of pro bono costs aimed to help level the playing field for pro bono assisted parties, by preventing the losing party escaping an order for costs. In the process, a new form of funding would be created to support the provision of free legal help to those in need.

What is The Access to Justice Foundation?

- The Access to Justice Foundation is the “prescribed charity” that receives pro bono costs under Section 194 of the Legal Services Act 2007. It was established by the Law Society, Bar Council, ILEX and Advice Services Alliance to receive and distribute additional financial resources to support free legal assistance to those in need.
- Taking a strategic view, the Foundation distributes the money to Regional Legal Support Trusts, to the national pro bono organisations, and to strategic projects. The Regional Legal Support Trusts will in turn distribute to local advice agencies and law centres.

The Foundation is the prescribed charity by order of the Lord Chancellor: The Legal Services Act 2007 (Prescribed Charity) Order 2008 (S.I. 2008 No. 2680) www.legislation.gov.uk/uksi/2008/2680/made

What legislation applies?

- Section 194 of the Legal Services Act 2007 (annexed to this document or see <http://www.legislation.gov.uk/ukpga/2007/29/section/194>)

What Civil Procedure Rules apply?

- In particular see CPR 44.3C and the Costs Practice Direction (both annexed to this document, or see http://www.justice.gov.uk/civil/procrules_fin/menus/rules.htm)
- In addition, CPR 44.3C(5) effectively provides that the normal costs provisions in CPR parts 43 to 48 apply to pro bono costs.

The CPR amendments for pro bono costs were introduced by:

- Civil Procedure (Amendment) Rules 2008. SI 2008 No 2178 (L 10) www.legislation.gov.uk/uksi/2008/2178/made

- Practice Direction Amendments 47th Update:

www.justice.gov.uk/civil/procrules_fin/pdf/preview/PD_making_document_47th_update.pdf



CORRESPONDENCE & SETTLEMENT

Engagement / client care letters

- To help inform pro bono clients and ensure awareness amongst lawyers, law firms may wish to include reference to pro bono costs in their client care or engagement letters. The following paragraph might be included where the letter refers to the firm acting without charge, or where advice is given about adverse costs risks.

Pursuant to Section 194 of the Legal Services Act 2007 and Civil Procedure Rule 44.3C, in the event you are successful in this matter or any of its stages, we will seek to recover “pro bono costs” from your opponent. This is a sum of money that represents how much the legal representation would have cost if we had charged for our services, and can be ordered by the court or be included in a settlement agreement. When pro bono costs are obtained the legislation requires such costs be paid to the prescribed charity, the Access to Justice Foundation, which supports the provision of free help to yet more people.

Correspondence and negotiation

- In correspondence and negotiation with the other side, pro bono lawyers should consider highlighting the ability to obtain costs if their pro bono client is successful. This may help settle the case, given the costs risk upon the other side.
- This is a tactical use of pro bono costs, as there is no general obligation to inform another party of an intention to seek pro bono costs in due course; in the same way that there is no general requirement to disclose that representation is being provided pro bono. However, at the appropriate time just like normal costs the other side and the court will need to be informed of the amount of pro bono costs that will be sought (see litigation section below).

Settlement agreements and agreed orders

- Pro bono costs can be included in settlement agreements, and agreed orders. This is just like normal legal costs are often included in settlements, except here the costs cover the free representation and under the legislation are payable to the Foundation.
- The suggested wording for settlement agreements and agreed orders is:
The [party] shall pay costs for pro bono representation to The Access to Justice Foundation (PO Box 64162, London WC1A 9AN), in the amount of £_____.
- When pro bono costs are agreed, please ensure the Foundation is notified (costs@ATJF.org.uk) and the other party makes payment to the Foundation (for payment details see page 6 below). The Foundation will then send a receipt in the normal way.
- If the pro bono party is the claimant and accepts a Part 36 offer, CPR 44.12(1A) provides that a pro bono costs order can then be sought from the court (see deemed costs on page 4) or agreed with the other side.



LITIGATION

From issue of claim form

- Once a claim has been issued, pro bono costs should be used just like normal costs, with particular note of the following.

What about costs estimates?

- Costs estimates apply to pro bono costs. Therefore where the other party and court would usually be informed of estimates of normal costs, they should be informed of the estimated pro bono costs. See paragraph 6.2 of the Costs Practice Direction (annexed to this document).

Should I produce a statement/bill of costs?

- Yes. In advance of the hearing, the pro bono lawyer must file with the court and serve on the other parties a statement of costs showing what free work was done and how much it would have cost at normal rates. See paragraph 10A.2 of the Costs Practice Direction (annexed to this document). This follows the normal rule in paragraph 13.5(2) of the Costs Practice Direction and aims to help the court use summary assessment. Court form N260 should be used, although it should be noted the indemnity principle declaration on the final page is not applicable.
- Any bill of costs prepared for pro bono costs must not include a claim for VAT (paragraph 5.21 Costs Practice Direction).
- Where the receiving party had pro bono representation for only part of the proceedings, the bill must be divided into different parts to distinguish between the pro bono costs and the normal costs for fee paid work (paragraph 4.2 Costs Practice Direction).

If a costs order would normally be deemed to be made?

- CPR 44.12(1A) provides that if a costs order is deemed in favour of a pro bono party, they may apply for an order for pro bono costs.
- The right of costs arises (unless a court orders otherwise) under:
 - CPR 3.7 - defendant's right to costs where claim struck out for non-payment of fees.
 - CPR 36.10(1) and (2) - claimant's entitlement to costs where a Part 36 offer is accepted.
 - CPR 38.6 - defendant's right to costs where claimant discontinues.
- In partly discontinued proceedings, CPR 38.8(2) allows a court to stay the remainder of the proceedings until the claimant pays the pro bono costs that were ordered.



AT COURT

How and when are costs sought?

- The procedure for seeking an order for pro bono costs is the same as seeking a normal costs order. The advocate asks the judge at the same point in time. Alternatively, the order for pro bono costs can be agreed between the parties.
- Therefore at the successful conclusion of an application, trial or appeal, the pro bono lawyer should ask the judge to order pro bono costs against the losing party, pursuant to Section 194 of the Legal Services Act 2007 and CPR 44.3C.

Which courts may order pro bono costs?

- Pro bono costs may be ordered by a "civil court", which is defined by Section 194(10) as any county court, the High Court or the civil division of the Court of Appeal.

Who seeks the costs?

- The pro bono represented party, assisted by their pro bono lawyers, seeks the order.
- Note however the order must provide for payment to The Access to Justice Foundation (CPR 44.3C(3)).

What are the criteria for ordering pro bono costs?

- See Section 194 and CPR 44.3C (reproduced at the end of this document).
- In deciding whether to make an order, and on what terms, the court must have regard to what order it would have made if the party applying for the order had not been represented pro bono (Section 194(4)).

How much can the court award?

- The amount is based on what a paying client would recover.
- CPR 44.3C(2) sets out how the court may determine the amount. The court may order payment by the losing party of a sum equivalent to all or part of the legal costs that would have been ordered to the winning party (had the representation not been free). This cannot be a greater amount than would have been determined under a normal costs order.

How is the amount assessed?

- The amount of pro bono costs may be decided by summary or detailed assessment, as with ordinary costs (CPR 44.3C(2) and 47.5).
- However, if Part 45 fixed costs would normally have applied for this case, the amount is determined by reference to what fixed costs would have been payable.
- Paragraph 10A of the Costs Practice Direction provides that the general rule contained in paragraph 13.2 applies to pro bono cases, namely that the court should make a summary assessment of the costs unless there is good reason not to do so.

What representation is covered?

- Pro bono costs may cover any part of the proceedings where the party had legal representation which was provided, all or in part, free of charge.
- An order may be made even if one of the party's legal representatives (for example, counsel) was not acting free of charge.
- If a party had a mixture of pro bono and paid representation, the court will need to make two orders, a pro bono costs order for the free representation, and a normal costs order for the fee-paid representation.
- Pro bono costs may not, however, be ordered against a party who was at all times represented pro bono, or under LSC (legal aid) funding (Section 194(5)).

How do I draft an order for pro bono costs?

- CPR rule 44.3C(3) requires that the order specify that the payment by the paying party must be made to the prescribed charity, The Access to Justice Foundation.
- The order for pro bono costs is made within the main court order, just like any normal costs order.
- The suggested wording for the order is:

The [party] must pay costs for pro bono representation to The Access to Justice Foundation (PO Box 64162, London WC1A 9AN), [summarily assessed at £_____] [or] [to be assessed on the standard / indemnity basis if not agreed].

What if my case may have further stages ahead?

- If the matter will involve a number of hearings where some may be won and some lost, note that normal costs cannot be set off against pro bono costs as they lack the necessary mutuality and payments are not returnable by the Foundation.
- In such situations courts could be asked to reserve costs with liberty to apply, perhaps with a note on the court file to indicate the order which would have been made but for this issue. The court conducting the final hearing can then make a single order, one way or the other, which reflects the justice of the case overall including the interlocutory successes and failures.

What if the pro bono party loses?

- Where a pro bono party loses, pro bono costs cannot normally be sought against the winning party. This follows the usual rule in civil cases that it is the winning party that obtains costs against the losing party.
- The pro bono costs regime does not affect the risk of adverse costs against a pro bono party. Therefore it continues to be important for legal representatives to advise pro bono clients of the risk of costs being ordered against them if they lose.



AFTER COSTS ORDERED (OR AGREED)

Do I need to notify the Foundation?

- Pro bono lawyer: tell us you've secured pro bono costs (email: costs@ATJF.org.uk).
- CPR 44.3C(4) requires the pro bono party to send a copy of the order to The Access to Justice Foundation within 7 days of receipt. Please post to The Access to Justice Foundation, PO Box 64162, London WC1A 9AN or email a scanned copy to costs@ATJF.org.uk.

How should payment be made?

- The losing party ordered to pay pro bono costs must pay The Access to Justice Foundation, either by:
 - Cheque payable to "The Access to Justice Foundation", sent to PO Box 64162, London WC1A 9AN; or
 - Bank transfer to account number 00018272, sort code 40-52-40, account name "The Access to Justice Foundation".
- The general rule is the party must pay within 14 days of the order.
- The Foundation will send the parties a receipt confirming payment.

What happens if detailed assessment is ordered?

- In the event the pro bono costs are not summarily assessed, CPR Part 47 provides for detailed assessment.
- If the winning party is represented pro bono during detailed assessment proceedings, they may not recover normal costs for those proceedings but may seek additional pro bono costs for the extra pro bono representation (CPR 47.18(1A)).
- During detailed assessment proceedings of a pro bono costs sum, where any form of certificate of costs is made, amended or set aside, the party obtaining the order must send a

copy of that certificate/order to The Access to Justice Foundation. See CPR 47.11(4) obtaining default costs certificate; 47.12(5) default costs certificate set aside or varied; 47.15(4) interim costs certificate issued or varied; 47.16(6) interim costs certificate.

Enforcement if costs not paid

- Pro bono costs orders can be enforced just like normal costs orders (e.g. using a charging order).
- The winning party can enforce the costs in their own name. This may be appropriate if they need to enforce the main judgment debt, so at the same time could recover the costs for the Foundation. Please inform Foundation of such proceedings (costs@ATJF.org.uk).
- Alternatively, the Foundation will enforce unpaid costs orders where appropriate. However, the Foundation does not become involved in individual cases or litigation until a costs order is made.

Can I negotiate/settle that costs will not be pursued?

- Before a court has made an order for pro bono costs, it is open for the pro bono lawyer and their party to decide not to seek pro bono costs if it would facilitate settlement with the other side. Wherever possible however, the Foundation encourages pro bono costs to be agreed and included in settlements.
- Once the court has ordered pro bono costs for a specified amount to be paid forthwith, it is difficult for the pro bono party to use these costs as a bargaining chip. The costs order stands unless appealed and a court cannot set them off against any future normal costs going against the pro bono party (hence why in this guidance we suggest costs be reserved until the final hearing).
- However, if pro bono costs have been ordered but they do not fall to be determined or assessed until the conclusion of the case, the pro bono party has the flexibility to use them as bargaining chip. The overriding issue is that the Foundation welcomes when the pro bono costs regime allows a pro bono assisted party to achieve access to justice through a proper settlement. A pro bono party could therefore agree that the costs would not proceed to detailed assessment.

Can I express a preference for distribution of the costs?

- Those associated with a successful pro bono costs order, such as the pro bono lawyers, may express a preference as to the distribution of the pro bono costs sum by The Access to Justice Foundation.
- The Foundation will have regard to any such preferences, but in order to maintain a strategic approach, is not bound by them. For further information see the Foundation's Distribution Principles at www.atjf.org.uk/funds-out/principles/
- Preferences may be communicated to the Foundation by any convenient method. You may email costs@ATJF.org.uk or write to *The Access to Justice Foundation, PO Box 64162, London WC1A 9AN.*

Further help / contact information

- The Foundation may be contacted by email at costs@ATJF.org.uk.
- In addition, solicitors or advice agencies involved in pro bono matters may contact LawWorks www.lawworks.org.uk 020 7092 3940.
- Barristers may contact the Bar Pro Bono Unit www.barprobono.org.uk 020 7092 3960.
- Media and press enquiries please telephone 020 7320 5902.



Text of Section 194, Legal Services Act 2007

194 Payments in respect of pro bono representation

- (1) This section applies to proceedings in a civil court in which—
- (a) a party to the proceedings (“P”) is or was represented by a legal representative (“R”), and
 - (b) R’s representation of P is or was provided free of charge, in whole or in part.
- (2) This section applies to such proceedings even if P is or was also represented by a legal representative not acting free of charge.
- (3) The court may order any person to make a payment to the prescribed charity in respect of R’s representation of P (or, if only part of R’s representation of P was provided free of charge, in respect of that part).
- (4) In considering whether to make such an order and the terms of such an order, the court must have regard to—
- (a) whether, had R’s representation of P not been provided free of charge, it would have ordered the person to make a payment to P in respect of the costs payable to R by P in respect of that representation, and
 - (b) if it would, what the terms of the order would have been.
- (5) The court may not make an order under subsection (3) against a person represented in the proceedings if the person’s representation was at all times within subsection (6).
- (6) Representation is within this subsection if it is—
- (a) provided by a legal representative acting free of charge, or
 - (b) funded by the Legal Services Commission as part of the Community Legal Service.
- (7) Rules of court may make further provision as to the making of orders under subsection (3), and may in particular—
- (a) provide that such orders may not be made in civil proceedings of a description specified in the rules;
 - (b) make provision about the procedure to be followed in relation to such orders;
 - (c) specify matters (in addition to those mentioned in subsection (4)) to which the court must have regard in deciding whether to make such an order, and the terms of any order.
- (8) “The prescribed charity” means the charity prescribed by order made by the Lord Chancellor.
- (9) An order under subsection (8) may only prescribe a charity which—
- (a) is registered in accordance with section 3A of the Charities Act 1993 (c. 10), and
 - (b) provides financial support to persons who provide, or organise or facilitate the provision of, legal advice or assistance (by way of representation or otherwise) which is free of charge.
- (10) In this section—
- “legal representative”, in relation to a party to proceedings, means a person exercising a right of audience or conducting litigation on the party’s behalf;
- “civil court” means the civil division of the Court of Appeal, the High Court, or any county court;
- “free of charge” means otherwise than for or in expectation of fee, gain or reward.
- (11) The court may not make an order under subsection (3) in respect of representation if (or to the extent that) it is provided before this section comes into force.



Text of CPR 44.3C

Orders in respect of pro bono representation

44.3C

- (1) In this rule, 'the 2007 Act' means the Legal Services Act 2007.
- (2) Where the court makes an order under section 194(3) of the 2007 Act –
 - (a) the court may order the payment to the prescribed charity of a sum no greater than the costs specified in Part 45 to which the party with pro bono representation would have been entitled in accordance with that Part and in respect of that representation had it not been provided free of charge; or
 - (b) where Part 45 does not apply, the court may determine the amount of the payment (other than a sum equivalent to fixed costs) to be made by the paying party to the prescribed charity by –
 - (i) making a summary assessment; or
 - (ii) making an order for detailed assessment,
of a sum equivalent to all or part of the costs the paying party would have been ordered to pay to the party with pro bono representation in respect of that representation had it not been provided free of charge.
- (3) Where the court makes an order under section 194(3) of the 2007 Act, the order must specify that the payment by the paying party must be made to the prescribed charity.
- (4) The receiving party must send a copy of the order to the prescribed charity within 7 days of receipt of the order.
- (5) Where the court considers making or makes an order under section 194(3) of the 2007 Act, Parts 43 to 48 apply, where appropriate, with the following modifications –
 - (a) references to 'costs orders', 'orders about costs' or 'orders for the payment of costs' are to be read, unless otherwise stated, as if they refer to an order under section 194(3);
 - (b) references to 'costs' are to be read, as if they referred to a sum equivalent to the costs that would have been claimed by, incurred by or awarded to the party with pro bono representation in respect of that representation had it not been provided free of charge; and
 - (c) references to 'receiving party' are to be read, as meaning a party who has pro bono representation and who would have been entitled to be paid costs in respect of that representation had it not been provided free of charge.



Costs Practice Direction (selection)

Section 4 Form and contents of bills of costs

4.2

Where it is necessary or convenient to do so, a bill of costs may be divided into two or more parts, each part containing sections (2), (3) and (4) above. Circumstances in which it will be necessary or convenient to divide a bill into parts include:

.....

(1A) Where the receiving party had pro bono representation for part of the proceedings and an order under section 194(3) of the Legal Services Act 2007 has been made, the bill must be divided into different parts so as to distinguish between:

- (a) the sum equivalent to the costs claimed for work done by the legal representative acting free of charge; and
- (b) the costs claimed for work done by the legal representative not acting free of charge.

Payment pursuant to an order under section 194(3) of the Legal Services Act 2007

5.21

Where an order is made under section 194(3) of the Legal Services Act 2007 any bill presented for agreement or assessment pursuant to that order must not include a claim for VAT.

Section 6 Estimates of Costs

6.2

(1) In this Section an 'estimate of costs' means –

.....

- (b) in proceedings where the party has pro bono representation and intends, if successful in the proceedings, to seek an order under section 194(3) of the Legal Services Act 2007, an estimate of the sum equivalent to –
 - (i) the base costs (including disbursements) that the party would have already incurred had the legal representation provided to that party not been free of charge; and
 - (ii) the base costs (including disbursements) that the party would incur if the legal representation to be provided to that party were not free of charge.
- ('Base costs' are defined in paragraph 2.2 of this Practice Direction.)

Section 10A Orders in Respect of Pro Bono Representation: Rule 44.3C

10A.1

Rule 44.3C(2) sets out how the court may determine the amount of payment when making an order under section 194(3) of the Legal Services Act 2007. Paragraph 13.2 of this Practice Direction provides that the general rule is that the court will make a summary assessment of costs in the circumstances outlined in that paragraph unless there is good reason not to do so. This will apply to rule 44.3C(2)(b) with the modification that the summary assessment of the costs is to be read as meaning the summary assessment of the sum equivalent to the costs that would have been claimed by the party with pro bono representation in respect of that representation had it not been provided free of charge.

10A.2

Where an order under section 194(3) of the Legal Services Act 2007 is sought, to assist the court in making a summary assessment of the amount payable to the prescribed charity, the party who has pro bono representation must prepare, file and serve in accordance with paragraph 13.5(2) a written statement of the sum equivalent to the costs that party would have claimed for that legal representation had it not been provided free of charge.