

CRIMINAL ACCOUNTS

ASSESSMENT MANUAL

**[SOLEMN CASES AND NON FIXED PAYMENT
SUMMARY CASES]**



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1. INTRODUCTION

In March 1998 the Board published the Criminal Legal Aid Fees and Taxation Guidelines, a copy of which was sent to every legal firm in Scotland. The following advice was given to solicitors undertaking criminal work under the heading “Standard of Taxation”.

A solicitor acting in proceedings in which his client was granted criminal legal aid shall be paid for work actually and reasonably done, outlays and travel and waiting time actually and reasonably undertaken or incurred, due regard being had to economy. The Board will objectively assess whether work carried out by the solicitor was necessary to further the defence and, if so, was carried out in the most efficient and cost effective manner consistent with the proper conduct of the case. The words “due regard being had to economy” are a clear injunction to the solicitor to actively address the question of cost at every stage of the proceedings and where incurring outlays to obtain competitive estimates as appropriate. The standard is equivalent to the civil standard of “agent and client, third party paying” the third party in legal aid cases being the Legal Aid Fund. On this basis, the Board will only allow such expenses as “a prudent man of business, without special instructions from his client, would incur in the knowledge that his account would be taxed”¹. This is a higher standard of taxation than between agent and client. The most significant consequence, for practical purposes, is that it is not enough that a solicitor carries out an item of work, even with the specific instructions of his client. Work must be necessary to advance the case. The onus is always on the solicitor to establish that work is actually and reasonably done and to this end the solicitor should be in a position to support all entries with file notes, vouch all expenditure and be in a position to justify all costs when submitting an account to the Board.

The principle is important. ‘Agent and client, third party (Fund) paying’ is different from ‘agent and client, client paying’, as can be seen from the cases referred to below which are in the library and copies of which are available in the Department. It is the standard of taxation which was used, in former times, when the husband was liable for his wife’s divorce expenses where she was not possessed of a separate estate. The application of this standard of taxation meant that lengthy and/or numerous meetings, weighty correspondence etc, would be cut back by the Auditor who would apply an objective view as to what work was necessarily and properly done (albeit more generous than a ‘party/party’ standard) to advance the litigation. The wife might demand more meetings than were strictly required to advance matters or require to be ‘chased up’ from time to time, but these were not costs for which the husband would be liable. Solicitors should be aware of the duty to advance the case quickly and efficiently, exercising proper client control, and that if they do not do so that certain elements of work may not be paid for. Indeed, this is the basis of the reference to the ‘prudent man of business’. It does not mean what the prudent lawyer would do in advancing a case but, rather, what the prudent man of business would do on the basis that a failure to exercise tight control of the running of the case will lead to elements simply not being paid, having been taxed off by the Auditor on the basis of the standard of taxation applicable.

It is easy to state (above) that the Board will “objectively assess whether work carried out by the solicitor was necessary...”. It is more difficult to carry out this important function in practice, and to do so accurately and consistently. The purpose of the Manual is to assist you, in what is a very important function, to achieve this aim. A copy of this Manual has been sent to every legal firm in Scotland, so solicitors will know your instructions prior to incurring the costs and preparing their accounts.

¹Hood -v- Gordon (1896) 23R.675 per Lord McLaren at P.676

Also: *Park -v- Colvilles Limited (1960) S.C.143 per Lord Patrick at P.153 also 1960 S.L.T.200*

“The situation is entirely different from one where the client, not being legally aided, is free to authorise expenses on as generous a scale as he likes, he reimbursing his agent for all he has authorised. Under the legal aid scheme, the assumption is that the solicitor is paid, not by his client, but out of the Legal Aid Fund. The cost of the legal aid, as the preamble to the Act sets out, is to be defrayed wholly or partly out of monies provided by Parliament.”

“The common instances of such a taxation [agent and client third party paying] are where parties to a multiplepointing are allowed expenses as between agent and client out of the Fund in medio, or where parties to a special case are allowed such expenses out of the trust estate. In these instances, the parties controlling the Fund or trust estate have had no voice in controlling the scale on which the expenses were incurred. It would be unfair to saddle them with expenses, save such as would have been incurred by a prudent man of business.

If, however, the taxation is between agent and client, client paying, the client ought to pay for all expenses which it was within the mandate of the agents, expressed or implied, to incur. As it was put in the Rules of Court of 1934, the client must pay ‘those expenses which are necessary and proper as well as those authorised by him’.

In the present case, I have no hesitation in deciding that the proper scale of taxation is as between agent and client, third party paying. That is the truth of the situation under the legal aid scheme. In the majority of cases it is not the client who will pay. It is a third party, the Law Society, as administrators of the Legal Aid Fund. Moreover, the whole assumption of the scheme is that the client is not free to authorise expenditure on any scale he chooses, but such would be the assumption underlying a taxation as between agent and client, client paying.”
[Lord Patrick]

H.M.A. -v- Daniel Gray S.C.C.R.1992.883

“Finally, [it was] submitted that the Auditor had applied a subjective test [the solicitor’s in this context] in judging the actings of the solicitor. This was wrong: he should have asked whether a prudent man of business would have incurred the outlay in question, which was an objective test... I agree..., therefore, that the Auditor has failed to apply an objective test to the determination of this issue and that accordingly his decision cannot stand”. [Sheriff Stoddart]

Maclaren on Expenses in the Supreme and Sheriff Courts of Scotland (1912)

“Taxation between agent and client varies according to whether the Account of Expenses is charged (1) against the agent’s own client, or (2) against the opposite side [third party in this context]... In the latter case the mode of taxation, while not so generous as that in the former case is yet not quite so rigorous as the taxation between party and party.” - [Page 509]

“In taxing the account of an agent against the third party on the basis of agent and client the fact that the agent had done work for his own client and may be a good charge against the latter does not conclude the matter on the question with the third party, as many items may be modified or taxed off, though not to so great an extent as in a taxation between party and party”. - [Page 511]

2. THE ASSESSMENT PROCESS

The taxation guidelines are important as a statement of the Board's broad policy and practice, and are referred to throughout this Manual, but are of limited use in the detailed scrutiny of an account. Assessing or "taxing" an account involves the examination of each entry to establish whether it is necessary and, if necessary, whether the charge is appropriate. This involves an assessment of the entry itself and an awareness of the context in which it appears in the account. The Board has been performing this function for many years and has developed a particular expertise through its knowledge of the Regulations, its day to day practice and attendance at taxations before the Auditor. The Board is the only body in Scotland regularly called upon to assess an account drawn on an agent and client third party (or Fund) paying basis. The guidance contained in these pages should provide you with the knowledge which, together with your own judgement and experience and the willingness to ask colleagues and your Team Leader when you are uncertain about a point, should lead to accuracy and a consistency of approach by experienced and less experienced staff alike.

Any changes to the content of this Manual can only take effect if it has gone through the Change Control Procedure and been the subject of prior intimation to the Profession.

Abatements

The Regulations provide that "a solicitor shall be allowed such amount of fees as shall be determined to be reasonable remuneration.....". This may involve increasing the fee where the solicitor has, for example, understated the fee or mileage allowance. More commonly, this will involve abating the account either by deleting the entry altogether or restricting the charge. There are three categories of abatement. Firstly, there will be items in an account which are simply bad charges. These are dealt with in section 4 and relate to charges which are contrary to the Act or Regulations. There is no discretion applied when dealing with such items, which must be abated. Secondly, there are items which run contrary to universally established practice following taxations before the Auditor over the years. These are to be found in section 5. They do not have the absolute authority of the Act and Regulations but have been accepted practice both by the Law Society when it administered legal aid prior to 1987 and by the Board since. Such entries should be abated, but there are some exceptions noted in this section. Thirdly, and this probably applies to the majority of abatements, there are entries in an account to which you will have to apply your discretion – your own judgement – in line with Board practice as detailed in the following pages, as to whether they are reasonable in the particular case and carried out with due regard to economy. If you are satisfied from the information that you have before you, that the entries are reasonable and you are quite clear in your mind why, then there will be no problem. If you have any doubt, you should ask your Team Leader.

If, having applied your discretion, you are of the view that an item in the account is not a proper charge or is over charged it must be marked as abated, no matter how small. You should then apply the current value for money guidelines to establish whether the abatements, in total, fall within the range of abatements which would not be economic to challenge. The level will vary from time to time. Bad charges must be abated.

This.../

This document is designed to give you greater confidence in assessing accounts but it is by no means exhaustive. Various taxation issues are dealt with in the following sections and will be added to in response to any issues raised by you in the course of applying the guidelines in practice. The document tries to explain the issues, the type of charge that would be appropriate and reasons why a charge may not, to assist in any negotiations you will have with solicitors in the course of adjusting the account. A number of examples have been provided and reasons, in a standardised form, are listed at the end of this document.

Relevant sections of Act and Regulations

Legal Aid (Scotland) Act 1986 ss 21 – 25AA [Part IV] (The “Act”)

The Criminal Legal Aid (Scotland) Regulations 1996 (The “Regulations”)

The Criminal Legal Aid (Scotland) (Fees) Regulations 1989 (The “Fees Regulations”)

Principal Taxation Decisions referred to:

PF -v- Thomas Gerard Delaney [Hamilton, 22 November 1976] (corroborative precognitions).

PF (Glasgow) -v- William Welsh [Mr McDougall, Glasgow, 7 October 1983] (insufficient narrative).

HMA -v- Charlotte Allan [Auditor of the Court of Session, 30 March 1998] (outlay must be vouched).

PF (Ayr) -v- Thomas Green [C. Cockburn, Ayr, 16 December 1998] (“prosecution” commences with service of petition).

PF (Stirling) -v- Stewart Lafferty [G. McKeand, Stirling, 10 January 2000] (“lunch” for local agents).

3. MINIMUM REQUIREMENTS FOR CRIMINAL ACCOUNTS

The minimum requirements for criminal accounts are a *detailed narrative*, sufficient to determine the reasonableness of the work. Mr McDougall, Auditor of Court, Glasgow made the following observations in an Auditor's report in *PF (Glasgow) -v- William Welsh* issued on 7 October 1983 regarding narrative in an account. He said "I would have to say that agents who elect to charge a detailed account oblige themselves to provide details of sufficient clarity that would make sense to anyone reading the narrative(s) in respect of any given charge, the more so in Third Party Paying accounts of this nature where the recipient has no personal knowledge of the case or its progress". He continued, "The composing of narratives should have the effect of focussing the mind of the presenter of the account and the result should be the removal of doubt in the mind of the recipient. The propriety of the charges is oft times resolved in pursuance of this exercise".

The narrative should: -

- *Specify the status of the person carrying out the work* e.g. unqualified/qualified
- *Set out entries in strict chronological order.* This includes all entries in respect of the taking of precognitions and the individual mileage incurred in respect of each entry. The practice of a separate sheet or sheets containing these entries, quite separate from the account should be discouraged as should the "totting up" of all mileage, entered only in the green synopsis form as a total. This practice causes difficulty in adjusting the mileage relating to an individual entry which has been altered on assessment.

It also includes all court attendances. If solicitors only wish to enter details of this once, it should be in the account itself and not on the green synopsis form (which may shortly be changed to exclude reference to court time).

Also:-

- *All entries should be fee'd.* This may sound strange but there was a practice amongst certain firms whereby the account was lodged containing only narratives to which the Board would ascribe a fee.
- *All accounts should be typed.* Most accounts are typed and solicitors should be encouraged to present accounts in this format. In the meantime, a clear legible hand-written account should not be returned to the solicitor.

You should *ensure outlays are separate from fees.* Outlays are invariably entered in a separate inner column in an account. In addition:-

- *All outlays must be properly vouched.* (The primary responsibility for the validity and accuracy of an outlay rests with the solicitor. In the event that an outlay relating, for example, to a witness's loss of earnings is found to be fraudulent, payment of these expenses cannot be paid to the solicitor. You cannot knowingly make payments from public funds in respect of a claim established to be fraudulent. Solicitors do tend to be careful in dealing with these matters and frequently have some personal knowledge of the claimants.)

- Witness expenses which include loss of wages must be vouched *on proper headed note paper from employers or by the use of the firm or company stamp on the document (often the citation itself)*.
- Where expert or professional witness expenses are claimed *full details of the work done must be provided*. It is not sufficient that an expert simply states something to the effect of “Fee in respect of all work carried out”, followed by a global fee. The fee note should contain details of the work done, the time engaged and the expert’s hourly charge out rate, together with any outlays incurred. Where applicable solicitors should be encouraged to attach a *copy of the letter from the Board granting sanction* which saves time and increases the throughput of accounts, to everyone’s advantage.

Supporting documentation should be provided as narrated on the Criminal Account Synopsis form and the form should be fully completed *together with the declaration*.

The *precognition of the accused* is helpful in many ways in adjusting accounts and solicitors should be encouraged to lodge the precognition together with the other supporting papers as it can assist the person dealing with an account to better understand the circumstances of the case. There are some types of cases in which the solicitor does not wish to provide the accused’s precognition.

Solicitors should be encouraged in your dealings with them to *submit all papers in support of all entries in the same order as the work carried out*. This applies particularly to precognitions. Anyone who has assessed a large solemn account containing perhaps hundreds of precognitions will know the reason for this! Having to find a precognition (to confirm its length) from various boxes as and when it features in an entry can add hours or days to the assessment of such an account, to no-one’s advantage. Presumably the individual who compiled the account has already performed this task.

The following are some observations in respect of particular types of entry:-

Court appearances

- The narrative should clearly specify all court diets taking place together with an explanation as to the reason for any diet having been continued. It is important that solicitors specify the nature of the diet e.g. intermediate diet, trial diet, continued trial diet, appearance on warrant, deferred sentence etc, or part of a diet e.g. call over as it can become very confusing as to what stage the case has reached in a lengthy and protracted account, especially where the accused has failed to appear at some stage and a warrant has been granted.
- The narrative should clearly state the name of the individual who attended court together with the specific times noted.
- Waiting time should be charged correctly and properly attributable to that case only. Any gaps, time wise, in an account should be explained as waiting time is attributable to the next case calling. Failure to do so can lead to the Fund subsidising non legal aid work carried out during these periods; duplication of payment where such work is carried out under other forms of legal aid or advice and assistance; or, the attendances being charged at the full minimum fee (exclusive of waiting time) and the various blocks of waiting time being added up and charged to the last case calling. Accordingly this is an important and necessary check in all accounts.

- Where the court is considering several matters at the same hearing, this should be made clear on the account and all accounts should be submitted together, cross referenced to provide full disclosure to the Board. Cases where no legal aid is in force or cases where cover is provided by ABWOR should also be included. With the advent of fixed payments this task is perhaps not so onerous as it is relatively unlikely that a number of solemn cases, even mixed with ABWOR or the 'rump' of summary cases still covered by time and line accounting, will call at the same time. Fixed payment cases still have to be identified (see later at page 25).

Agreement of evidence

- Where charges are being made for work in connection with attempts to agree evidence, support should be provided in the form of a Joint Minute, relevant correspondence etc.

Locus visits

- A locus visit is not usually necessary or appropriate. Accordingly, it follows that the narrative should contain a detailed explanation of the need for the visit to the locus. A lengthy visit or more than one visit requires a more detailed explanation to justify the additional charges.

Prison visits

- The narrative should contain details of the reason for the visit to prison and the work carried out. Details should also be provided of any other cases dealt with at the same time and entries should be properly apportioned amongst all cases i.e. those covered by criminal legal aid (including fixed payments), advice and assistance or non legally aided. [Legal aid should not subsidise and, effectively, pay for non-legally aided work].

Precognition work

- Entries relating to precognition work should contain a full breakdown of time spent seeing each witness to include any travel, waiting time and time spent taking the statement. This should be included in the body of the account in chronological order and should not be on a separate sheet.
- Where such attendance is abortive the entry or previous entries should give full details as to what firm arrangements were in place prior to the visit. A brief explanation relating to the circumstances of the individual case should be given as to the reason why it was not possible to take the precognition. This will normally consist of the statement that the witness was not present, had forgotten, had been called away or was refusing to give a precognition. Some explanation as to why the witness was not there should be given if payment for this attendance is being sought.
- Where qualified time has been expended in the taking of a precognition there should be a detailed explanation as to the reason why it was considered necessary either in the individual narratives or in an introductory paragraph at the top of the first page of the account.

- Solicitors should be encouraged to use the word count facility in precognitions as the counting of words is a time consuming exercise. The person framing the account is presumed to have satisfied himself as to the number of words and the charge made. In the event that you become aware that the account is overcharged in that the number of words contained in the precognition does not justify the charge made, this should be raised with the solicitor. There may be circumstances (e.g. repeated disparity between the length of the precognition and the claim) in which this matter should be referred to the Manager of Accounts Assessment and become a matter for Compliance and Audit.

[Note: A precognition is often referred to as a 'statement']

4. BAD CHARGES

There is no element of discretion to be applied in dealing with entries in an account which fall within this category. The entries require to be abated. The following is a list of bad charges with the relevant authority attached.

BAD CHARGE

AUTHORITY UNDER STATUTE OR REGULATION

Pre legal aid

[Legal Aid (Scotland) Act 1986 ss 22, 23 and 24].

No work carried out before the effective date of a certificate can be paid for unless it is covered by the availability of automatic criminal legal aid. Solicitors from time to time carry out work prematurely or carry out work under a certificate which are ‘distinct proceedings’, requiring a fresh application (see Taxation Guidelines page 2). These are three examples:-

Section 22(1)(b) provides for automatic availability of criminal legal aid where the ‘case is being prosecuted under solemn procedure...’. The case has not been “prosecuted” under solemn procedure until service of the Petition. There is no cover under automatic legal aid for any prior attendance on a client in police custody. Any cover must be under advice and assistance prior to the first calling in court. The only exception to this is where the charge is murder, attempted murder or culpable homicide where the solicitor is effectively appearing by proxy for the duty solicitor [Criminal Legal Aid (Scotland) Regulations 1996, regulation 5(1)]. This will not necessarily be known to the solicitor at the time, of course, and solicitors seeing clients in custody should always give advice and assistance at first instance. This would also affect a solicitor who has travelled some distance the day before the Petition hearings, cover only being effective from the day of the proceedings.

Where automatic cover is available under section 22(1)(d) it should only be used for carrying out urgent work. Cover ceases as soon as the application for criminal legal aid is refused notwithstanding that the solicitor has not yet received intimation of such refusal. That is the date that his ‘application has been determined by the Board’ in terms of the section. (This point is made in the Taxation Guidelines at page 2).

Another example of this is a time charge under a summary criminal certificate for ‘completing a legal aid application form’. By definition, there can be no legal aid in place when completing the application form for legal aid.

No sanction in place:
Counsel
Expert
Unusual work

[Criminal Legal Aid (Scotland) Regulations. Reg 14].
Some work can only be carried out with the prior sanction of the Board. Until such time as sanction has been granted the work cannot be paid for. In the case of counsel and experts retrospective sanction can be considered in certain circumstances. [Reg 14(2)]. In the case of work of an unusual nature or likely to involve unusually large expenditure retrospective sanction is not available in terms of the regulations.

Matter not within
scope of certificate

Legal Aid (Scotland) Act 1986 s21.
Criminal Legal Aid (Scotland) Regulations. Reg 4

Distinct proceedings

Regulation 4 prescribes proceedings which are, for the purposes of criminal legal aid, distinct proceedings and require a separate legal aid certificate. Accordingly, matters such as appeals to the High Court of Justiciary against conviction, sentence, other disposal or acquittal or Petitions to the *Nobile Officium* of the High Court of Justiciary cannot be paid for under the original criminal legal aid certificate. Work in connection with procedural appeals, not falling within these categories, can be charged under the original criminal legal aid certificate.

The following work is not distinct proceedings and is covered by whatever criminal certificate is in force:-

- Applications for bail or review of bail, or appeals in respect of bail.
- Proceedings following a remit for sentence to the High Court of Justiciary under section 195 of the 1995 Act (counsel may be involved in the proceedings for the first time).
- Proceedings following a remit from the High Court of Justiciary to an inferior court in accordance with section 185 of the 1995 Act.
- Proceedings up to and including the first hearing of the complaint where a charge is reduced from solemn to summary proceedings and, if a plea of guilty is tendered, thereafter to the conclusion of the case.

All this work can properly be carried out under an existing certificate.

Separate matters

Also, it does happen that solicitors in the course of a criminal case may well enter into correspondence or discussion as regards a civil matter or seek to claim for quite extraordinary work e.g. a recent example where a solicitor called at his client's house (in custody on a murder charge) on a regular basis over a period of months to feed the client's pets. Less exotic examples include advice on divorce, tenancy matters perhaps due to the client being in custody, debt recovery etc. None of these matters relate to the progress of the criminal proceedings and advice and assistance should be given.

The starting point is the definition of criminal legal aid contained in section 21(4) of the Legal Aid (Scotland) Act 1986 which defines criminal legal aid as 'representation... by a solicitor and, where appropriate, by counsel...' and which shall 'include all such assistance as is usually given by a solicitor or counsel in the steps preliminary to or incidental to criminal proceedings'. Accordingly matters perhaps associated with the criminal charge might fall within the scope of the certificate.

Other matters normally held not to be covered include:

- arrestment of a bank account
- recovery of productions, clothing etc (generally, it is also not considered appropriate for the solicitor to deal with this rather than the client)
- problems arising in connection with prison discipline, conditions etc.

You may come across an isolated entry of little value where the subject matter is considered to be sufficiently incidental to the criminal proceedings to allow the charge.

Wrong rate of charge

Criminal Legal Aid (Scotland)(Fees) Regulations. Schedule 1. The rates of charge are clearly stated and it would be *ultra vires* to pay at any other rate.

Over charging e.g. number of sheets/pages

Criminal Legal Aid (Scotland)(Fees) Regulations. Schedule 1. Equally, there would be no authority to make payment for documentation which did not exist or which was overstated. This would also cover the situation where, for example, the same item has been charged twice e.g. a block preparation fee entered, in error, at different stages of the account.

Payment where no “work actually (and reasonably) done”

Criminal Legal Aid (Scotland)(Fees) Regulations. Reg 7.
The standard of taxation laid down by Regulation 7 of the Fees Regulations provides that a solicitor shall be allowed such amount of fees as shall be determined to be reasonable remuneration for work actually and reasonably done... due regard being had to economy. The civil standard of taxation is laid down in the equivalent Fees Regulations Reg 4 which provides that a solicitor shall be allowed “such fees and outlays as are reasonable for conducting the proceedings in a proper manner, as between solicitor and client, third party paying”. There is no reference to actual work in the civil regulations. This is a difference between civil and criminal fees. If there is no work, there is no payment.

No outlay incurred

Criminal Legal Aid (Scotland)(Fees) Regulations. Reg 8.
This may seem obvious. However, in the preparation of the documentation relating to stated cases, outlays have been claimed by some firms on the basis that work was done – at some expense – by outside printers at standard rates whereas the work has actually been done in-house. There has been a fairly recent taxation on this issue in which the Board was successful on this point.

Calculation of court time

Criminal Legal Aid (Scotland)(Fees) Regulations. Schedule 1.
Schedule 1 indicates that the half-hour minimum block of time for advocacy includes waiting time, at a lower rate. Waiting time is allowable, ‘provided that any time is additional to the total time charged for under paragraph 1 above’. (See Taxation Guidelines pages 15 to 20).

Any attempt to charge waiting time quite separately from the minimum block for advocacy where it clearly falls within the 30 minutes must be abated.

Signing charge

There is no equivalent to the charge contained in Schedule 3 of the Civil Fees Regulations for ‘certifying or signing a document’ in the Criminal Fees Regulations.

5. TAXATION DECISIONS

The Board relies on and has applied decisions of the Auditor from taxations argued by the Board and by the Law Society of Scotland which was responsible for administering legal aid before it. All the following practices were applied by the Law Society before the Legal Aid (Scotland) Act 1986 which created the Scottish Legal Aid Board.

Corroborating statement The solicitor is entitled to a minimum time charge but no charge for framing the statement is allowed.

Acknowledgement Held to be an unnecessary expense. Acknowledgements are not necessary for the advancement of the case and in the Board's dealings with Scottish Court Service, Crown Office and Police it has been made clear by these organisations that they do not require nor wish to be inundated with acknowledgements in their day to day business.

Perusal of report in addition to separate charge for preparation The preparation charge of 30 minutes for a deferred sentence includes perusal of all reports obtained (see Taxation Guidelines page 31). This practice has been applied and universally accepted for many years.

Reminder letter This falls into the same sort of category as acknowledgements. It is not chargeable on an agent and client, third party paying basis. [The Board has discussed this matter with interested parties in the preparation of these guidelines and it has been drawn to its attention the potential costs incurred through non-attendance of the accused. The courts have also, apparently, made enquiry of solicitors from time to time, as to what steps have been taken to remind a client of an appearance. Accordingly, as a matter of concession, where cases are continued for a period of four weeks or more, you can allow a formal letter reminding the client of the appearance immediately before the appearance, where the solicitor has considered this to be appropriate.

A formal letter to the Police or Procurator Fiscal by way of a reminder is also allowable where clearly necessary in the context of the account.]

Letter to call This, again, falls into the same category as acknowledgements and reminders, unless progressing the case. This is dealt with in greater detail in this Manual at page 26 and is perfectly in order as a chargeable item where something has clearly taken place since the last contact with the client, requiring the client's further instructions.

Framing file notes

A solicitor is entitled to a time charge for the meeting during which the notes are taken. Unless a precognition requires to be drafted (see later), it is unnecessary to frame the notes taken at the meeting and any charge for framing should be abated. A file note is simply the contemporaneous recording of a chargeable item such as a meeting or telephone call and is included within the charge for that item. A file note is not a separately chargeable item (either as a framing charge or as a time charge) in addition to or as part of the claim for the interview or telephone call.

6. INDIVIDUAL TAXATION ISSUES

COURT ATTENDANCES

Minimum Fee

(Taxation Guidelines – pages 8/9)

A solicitor is entitled to a minimum of half an hour when conducting a trial in court or conducting another hearing. This, however, includes waiting time due to the terms of paragraph 2 of Schedule 1 which allows for quarter hour blocks for waiting, ‘provided that any time is additional to the total time charged for under paragraph 1’. They cannot be treated separately. In the event that the same matter is continued until later on in the day, the solicitor will, thereafter, only be entitled to be paid for each quarter hour as this is ‘subsequent to the first half hour spent in so conducting a trial or other hearing’.

Paragraph 2 deals with all time other than advocacy and, so, includes meeting client, travel etc. The way this works, in practice, is dealt with in the next section under the heading ‘Conjoining’.

Conjoining

(Taxation Guidelines – pages 15/17)

The solicitor can only be paid for the total time involved and is not allowed to round up each separate element to the nearest ¼ hour. As some of the work may be in the main part of the account with the remainder on the back of the account synopsis form, staff must look at both before working out the total time.

E.g.	Travel to Court	9.15 am to 9.45 am
	Meeting Client	9.45 am to 10.00 am
	Waiting	10.00 am to 10.10 am
	Court	10.10 am to 10.15 am
	Travel to Court	10.15 am to 10.55 am

Total Time Involved 1 hr 40 mins, i.e. 1¾ hrs can be paid for.

The court attendance (advocacy) must be looked at first, as the Fees Regulations allow a minimum of ½ hr. In this example the court time of 5 minutes would be rounded up to ½ hour and chargeable at £27.40. The remaining 1 hour 10 minutes is then calculated at the rate of £10.55 per ¼ hr, which gives a figure of £52.75.

Travel

(Taxation Guidelines – page 18)

Where a solicitor attends at a non-local court for several cases the above calculation is not possible and travel time should be apportioned by the number of cases dealt with.

E.g.	Travel to and from Court	$1\frac{1}{2} \text{ hr} \div 6 \text{ cases} = \frac{1}{4} \text{ hr each}$
	Waiting time	10.00 am to 10.15 am
	Court	10.15 am to 11.00 am

The total time allowed in this example is $1\frac{1}{4}$ hrs only (one hour conjoined waiting time and court time with the addition of the one quarter hour travel attributable to this case). Other cases covered by a criminal legal aid certificate would be dealt with in the same way i.e. conjoining waiting and court time together with the one quarter hour (in this case) attributable to each appearance. (Sometimes a solicitor will be asked by a colleague to 'cover' a case calling in the court in which he is sitting. This case should not feature in the account and, if it does it should not be taken into any account in your calculations. If, on the other hand, the solicitor is attending court on an agency basis to deal with this matter i.e. he has been instructed to appear and will charge for the appearance then it is, of course, an appearance which must be taken into account.)

On the other hand, the other five cases might relate to non legally aided clients; custody cases where the duty rates apply; or ABWOR cases, where the block applies. Travel should be apportioned against all these cases and also fixed payment cases.

Any mileage charge should also be apportioned by the number of cases dealt with.

Gaps in Waiting Time

(Taxation Guidelines – pages 18/20)

Waiting time must be allocated to the next case that calls. Where a gap appears and no explanation can be given as to what occurred, then the solicitor must be asked to explain why the gap occurred. There may be any number of reasons, but if another case called during that period then the waiting time prior to the gap should have been applied to that case.

E.g.	Waiting (10.00 am to 10.10 am) Case (a)
	GAP
	Waiting (10.20 am to 10.35 am) Case (b)
	Court (10.35 am to 11.15 am)

If gap turns out to be Case (a) and is on behalf of a non legally aided client then legal aid cannot pay for that time:

If Case (a) is a custody case and the same solicitor is the duty agent then the rates applicable for the duty scheme have already paid for that time.

If Case (a) is an ABWOR case, then the block fee covers any necessary waiting. Payment will be made under a separate account.

If Case (a) is a fixed payment then the waiting time is already included in the fixed payments and cannot be solely attributed to a time and line account.

Lunch

(Taxation.../

(Taxation Guidelines – page 18)

Any time spent by a solicitor in eating lunch is the solicitor's own time and is not chargeable to the Fund. (See later at page 37 for a fuller discussion on payment during a lunch adjournment). Otherwise, it is for the solicitor to identify and explain any necessary work carried out during the whole or part of that period. If work is done during lunch then non-advocacy rates apply, i.e. £10.55 per quarter hour.

e.g.	Waiting	10.00 am to 1.00 pm
	Meeting PF	1.00 pm to 1.10 pm
	Meeting client	1.10 pm to 1.20 pm
	Lunch	1.20 pm to 2.00 pm
	Court	2.00 pm to 2.10 pm (negotiated plea accepted)

Local Agents

(Taxation Guidelines – pages 22/24)

The final paragraph of regulation 7(2) of the Criminal Fees Regulations states, 'provided that it would not have been more economical to use a local solicitor unless it was reasonable in the interests of the client that the nominated solicitor or a solicitor assisting the nominated solicitor in terms of regulation 4(3) should attend personally'. Local agents should be used for distant court attendances unless the nominated solicitor can satisfy you that it was reasonable in the interests of the client that he or a solicitor assisting required to attend to the matter personally. *The onus is on the solicitor in every case to satisfy the test laid down by the Regulation.*

Various matters should be taken into account in forming a view: the distance involved; the nature and purpose of the hearing, and/or what could be achieved in furthering the case by personal attendance e.g. whether negotiations took place at the court which could not have been carried out earlier in a more economical manner i.e. by 'phone or letter; the nature, gravity and complexity of the proceedings; the availability of local agents. If the solicitor was dealing with a number of other cases on the same day e.g. conducting a trial, thereby diluting the travel costs, the personal attendance may not be an issue in the particular account. A number of attendances, none of them justified, may not be enough to justify the attendance(s).

E.g. **Intermediate Diet** - In normal circumstances there seems to be no reason why a local agent, properly instructed, cannot deal with an intermediate diet. An explanation should be available from the solicitor in the event that he has himself conducted the intermediate diet.

Trial - This would normally be conducted by the nominated solicitor or a solicitor assisting the nominated solicitor (i.e. perhaps the person actually dealing with the case in the nominated solicitor's firm). If the solicitor who is dealing with the matter chooses not to conduct the trial then a solicitor local to the court is in every bit as good a position to deal with a trial rather than, say, a solicitor in another firm local to the nominated solicitor. In such a case there would not appear to be any justification for incurring the additional travel costs. The Board is unaware of any sheriff court which does not have a competent local Bar. A broad statement that.../

that the local solicitors are 'not up to it' (as is often stated) is not, of itself, sufficient to justify the attendance of the nominated solicitor.

Adjourned Diet – In addition to any other factors, if it is known to the nominated solicitor that a diet is to be adjourned then a local agent should certainly be used as this is an entirely formal matter.

Deferred Sentence – Whether a local agent should be used depends on the various factors outlined above. If you are satisfied that a custodial sentence is likely then the attendance of the nominated solicitor or a solicitor assisting the nominated solicitor would be justified. The likelihood of imprisonment depends on a number of indicators e.g.

- the nature of the conviction,
- previous convictions (which should be made available to you) indicating a number of previous convictions for analogous matters where the sentences have been increasingly severe,
- where the last previous conviction for an analogous offence resulted in a community service order (which is the last stage before imprisonment),
- if the accused has been further convicted between the date of the deferral and the deferred sentence the date of the commission of the offence giving rise to that conviction is important i.e. before or after the date when sentence was deferred. If before the date of deferral, it is not normally relevant but is very relevant if after.

Common Disposal

(Taxation Guidelines – pages 20/21)

Common disposal is the term used where the court is dealing with several cases for the same client at the same time. You must ensure that you have all the relevant information before you in order that you can deal with the question of common disposal properly in the circumstances of the particular case. Common disposal usually arises in the context of a number of deferred sentences set for the same day e.g.

E.g.	Preparation	£21.10
	Waiting	£21.10
	Court	£27.40
	Meeting Client	£10.55
	Travel	£21.10
	Letter	£ 6.00
	Total	<u>£107.25</u>

The entries relating to waiting, meeting client, travel and the letter should all be apportioned equally by the number of cases involved i.e. if four cases, each claim in this example should be for £14.69. The variable elements are preparation and the payment for the conduct of the hearing(s). Depending on the number of cases and the circumstances surrounding them, there may.../

may well be a case for reducing the level of PREPARATION (the £21.10 relates to 30 minutes which includes reading the Social Enquiry report). The most likely outcome, all things being equal, would be to allow one case at £21.10 and a quarter hour for each of the other cases.

As regards the CONDUCT OF THE CASE it is a matter for your discretion and for negotiation as to how many minimum fees are allowed. As a rule of thumb, it is in order to allow three minimum fees after which the overriding taxation standard of reasonable remuneration for work actually and reasonably done comes into play, leading to an overall global settlement at less than £27.40 times the number of cases (see later at page 24).

Continued Diets

(Taxation Guidelines – page 12)

When assessing an account where there are more than two diets of the same nature, most commonly intermediate diets, (but others could fall into this category), the question arises as to why this happened. In particular, was the P.F., the client or solicitor at fault? If it is not clear from the narrative in the account then this information should be requested from the solicitor. If it turns out the solicitor has been at fault and the matter would have concluded at an earlier diet then any additional work caused by the solicitor's error should be abated. There are, of course, many reasons for having to attend additional diets: witnesses failing to attend, unexpected information obtained, Crown not in a position to proceed, illness of client or jurors, lack of court time etc.

On the face of it, the account may show that the solicitor substantially delayed commencing the work or at least in progressing it. In such cases not only the attendance at the continued intermediate diet may be questioned but also other work necessitated by the initial delay e.g. hurriedly taking police statements. This is not common, but can happen.

Failure to Appear

Where a client has failed on a number of occasions to attend at any diet, or a number of diets, and there is no clear reason provided as to why this has happened, questions may require to be asked of the solicitor why he continued to act for the client. Other questions can arise as to whether the solicitor was acting without instructions in certain circumstances. The situation may be such that it could be said that the solicitor should have withdrawn from acting and asked the Board (in summary cases) to terminate legal aid. The solicitor should certainly provide details as to the reasons why the accused person failed to appear on each occasion to allow you to form a view.

These matters would be difficult to raise with solicitors and it is suggested that where this arises in an account, and full information has been ingathered, the whole account be passed to your Team Leader and, in turn, to Legal Services Department.

Call over

(Taxation Guidelines – page 17)

It is common in sheriff courts to 'call over' cases set down for trial at the beginning of the day, in order to discover which are going ahead. There then usually follows an adjournment to allow witnesses.../

witnesses to be released or marshalled for court, to bring up productions, negotiate pleas etc. The call over, in the event that there is further procedure in connection with that case later on in the day is entirely informal and unminuted, and does not form part of the trial. It is an administrative device whereby the solicitor will simply confirm that the client is adhering to his plea of not guilty and is proceeding to trial. If the client is pleading guilty then the matter will normally be disposed of at that time and the appearance will attract the minimum advocacy fee.

The Board practice as stated in Board Taxation Guidelines (and the practice of the Law Society before it) is that 'attendance at a call over will be treated as non advocacy work unless a substantive motion has been made to the court in which case the solicitor may claim payment at advocacy rates'. This is on the basis that the brief formal procedure does not constitute 'conduct of a trial or other hearing' as specified in paragraph 1 of Schedule 1 to the Criminal Fees Regulations.

Plea of Guilty at Trial Diet

(Taxation Guidelines – page 13)

The purpose of the intermediate diet in summary procedure and the first diet in solemn proceedings before a sheriff and jury is to reduce the burden on the judicial system by allowing pleas of guilty to be dealt with prior to the date set down for trial, avoiding the need for the attendance of witnesses and the many other related expenses.

In a situation where the accused tenders a late plea of guilty at the trial diet, you should be fully advised in the narrative as to the circumstances in which this took place. The solicitor should narrate in the entry in the account claiming fees and outlays in respect of an attendance at a trial diet, the reason why a plea of guilty was not made at the intermediate diet and what event took place between the two diets such as to justify the late plea.

It may be clear from the account that further information was received between the dates of the intermediate and trial diets. There may well be a good reason for the plea being left to the trial diet. You should be aware of the terms of the Criminal Procedure (Scotland) Act 1995, section 196 which permits a court to take into account the stage in the proceedings at which the offender indicates his intention to plead guilty and the ability of the court to discount any sentence on conviction. It is presumed that a solicitor will have advised his client of the court's discretion in this matter, will have taken the client's instructions, and that where the client does not plead at the Intermediate Diet there is a reason for it.

COMMON DISPOSAL

(Taxation Guidelines – page 20)

Common disposal is the term used where the court is dealing with several cases for the same client at the same time. The position which has been adopted by the Board, on what it considers to be a proper interpretation of Schedule 1, paragraph 1(a) is that the minimum advocacy fee (£27.40) should be apportioned equally between or amongst the various cases dealt with at the same time. The thinking behind this is that the fee prescribed is ‘any time up to the first half hour spent by a solicitor conducting a trial in court or conducting another hearing’. It has always been considered that the whole point in deferring sentence in a number of cases to the same date was to have them all dealt with at one hearing rather than at a number of hearings spread over days or weeks. Accordingly, there being one ‘hearing’ the appropriate fee was the £27.40, which had to be apportioned as stated.

An alternative view is that the solicitor is entitled to the minimum advocacy fee in respect of each case. This is argued on the basis that regulation 7 of the Criminal Fees Regulations states that a solicitor shall be allowed such amount of fees as shall be determined to be ‘reasonable remuneration’ for work actually and reasonably done. The same regulation goes on to state ‘the fees allowed shall be at the rate provided in paragraphs 1 to 5 of Schedule 1’. The argument runs that this leads to the minimum advocacy fee being applied in all cases.

These are diverse views. The fact that the fees allowed “shall be at the rate provided in Schedule 1” does not assist. Schedule 1 is silent on the whole matter of apportionment, and does not specifically provide for the situation where a number of cases call at the same time or, for example, where the same time is spent on travel (which is never disputed). It simply sets rates for individual items of work. In the absence of any definition of ‘hearing’ in this context i.e. whether the court has fixed a hearing at which a number of cases are dealt with or it is a hearing of each case, it is clearly a matter according to circumstances which would, ultimately, require to be the subject of the Auditor’s determination in the event of a dispute. It has to be remembered that the fees prescribed by Schedule 1 are not fixed payments and in a situation like this the total sum payable is always subject to the general standard of what work was “actually and reasonably done...”.

The Board, as always, has to take into account the circumstances of each set of claims including the number of cases dealt with at the same time and the nature of the cases. This issue was brought into sharp focus some years ago when a number of cases, possibly numbering 24 in all, were dealt with at the same time. They all related to the same type of charge i.e. prostitution. The Board takes the view that when appearing for a client and addressing the court on broadly the same factual and financial circumstances with a view to a common disposal, dealing with the one Social Enquiry Report and normally addressing the court once on the nature of a course of offending that a reasonable overall fee should be established. So what is a reasonable overall fee?

To assist in dealing with these situations without protracted disputes, the current rule of thumb approach is to allow up to and including three cases calling at the same time at the one hearing without any particular input from the solicitor as to the matters dealt with in this section. Thereafter it is entirely a matter for adjustment with the solicitor according to the circumstances of the situation.

Information

It is essential in all cases before a proper view can be arrived at that you have full information as to all the cases which were dealt with at the common disposal. No argument has been put forward to date that the travelling time, waiting time, attendance with client before and after the hearing, the letter to the client advising as to the outcome and indeed the conduct of the hearing after the first thirty minutes should not be apportioned. All these charges require to be apportioned amongst the number of cases dealt with at the hearing.

You should remember that different rules apply to fixed payments. Fixed payments are just that – a fixed payment to which the solicitor is entitled simply as a result of carrying out the procedure in respect of each “summary proceeding” (this also applies to other hearings such as bail appeals). Accordingly, if the solicitor appeared at one hearing in respect of five matters, two of which were covered by fixed payments, the solicitor is entitled to the appropriate fees in respect of each of the fixed payments and it is only the three other matters which we need to look at from the point of view of possible apportionment.

In these circumstances, of course, in applying the above rule of thumb, you would be allowing the other three attendances at the full rate without further comment. The ancillary matters, however, i.e. travel, waiting, attendance with client would all be apportioned by five as there is a basic principle that the *solicitor cannot simply allocate all such time to cases assessed on a time and line basis*.

DEFENCE POST MORTEM – ATTENDANCE OF SOLICITOR

(Taxation Guidelines – page 38)

There is no obvious reason why a solicitor should require to attend a post mortem. The former practice, as understood by the Board, was to pass a detailed letter of instruction and copy of any Crown report to the defence pathologist. Any issues of which the defence pathologist should be aware can be contained within this letter.

There may be a reason for such a charge in the individual circumstances of particular proceedings, but a case for payment would have to be forwarded by the solicitor either in the narrative in the account or in a covering letter.

“LETTERS TO CALL”

Reference has already been made to the Auditor’s report [7 October 1983, A. McDougall]. Auditors have frequently commented on lack of detail in solicitor’s accounts by Mr McDougall expressed himself with particular clarity.

The taxation followed a wide spread practice at the time simply to state in the narrative, ‘Writing client to call’. The Auditor commented as follows.

“As a narrative, ‘writing client to call’ is, in my view, carrying out brevity to the extreme and is not helpful, neither does it require a lengthy explanatory narrative to be concise and clear. Sufficient detail would effectively be self-regulating and avoid the necessity of exchanges of letters with little cost effectiveness on both sides.

It is perhaps easier to say that such a charge is not a proper charge. As a result of the necessary monitoring of the client’s file it is a common feature to find agents writing to the client ‘to call’ nothing having occurred to advance the case since last communicating with the client. This type of charge I do not consider proper”.

General application

The Auditor’s comments do not apply, of course, simply to letters containing an identical narrative to that forming the basis of this particular taxation. It applies equally to all letters where the narrative does not indicate the point of nor the need for the letter in question. Other examples of ‘writing client to call’ could be, ‘writing client’ or ‘writing client, advising further’ etc. Equally, more detailed narrative (on the face of it) may not be enough to justify an entry e.g. ‘advising of up to date progress/further enquiries’ etc where there are no entries suggesting that further progress has been made or enquiries carried out since the last contact with the client.

The Auditor’s final word on the subject was as follows:- *“I think it is well understood that the phrase ‘writing client to call’ is a form of shorthand entry but it should also be understood that it will invariably call for further explanation if it has to be treated seriously”.*

For the avoidance of doubt where the narrative clearly states the purpose of the letter or it is equally clear from the context of the account e.g. the need for a meeting, the entry will be perfectly in order. In general terms, there should be no need to anticipate the meeting by going into any detail as to what has happened giving rise to the meeting. That will be the subject of the meeting for which a time charge will be available.

Meetings

Vague and unspecific narrative is not confined to letters. The narrative relating to a meeting can often be completely lacking in detail giving rise to ‘the necessity of exchanges of letters with little cost effectiveness on both sides’, as the Auditor said. Narratives such as ‘taking instructions and advising’; ‘further discussing case’ etc are, generally, unhelpful. It may be clear from the context of the account that there were matters to discuss but, equally, you may find yourself in the position of asking: ‘taking instructions and advising...’ on what? Equally, as in letters, a meeting where the narrative states that the solicitor was ‘advising the client as to further progress’, where there is no indication that any progress has been made since the last letter or meeting is, again, unhelpful and will probably deserve to be abated. (See page 39).

These concerns become all the more relevant the longer the meeting or the later on letters and meetings feature in the proceedings. *On the basis that all preparatory work has been carried out by the time of the trial diet, further lengthy correspondence, meetings and prison visits with insufficient detail provided to justify them, are all entries which require careful consideration.*

LETTERS

(Taxation Guidelines, page 40)

FORMAL “Short letters of a formal nature, intimations and letters confirming telephone calls.”	CORRECT FEE
<ul style="list-style-type: none"> • Request for list of witnesses <p>Should be short, and formal i.e. little thought, legal expertise or specialised knowledge required</p>	£2.40
<ul style="list-style-type: none"> • Requests for police statements <p>As above.</p>	£2.40
<ul style="list-style-type: none"> • Request for police precognition facilities (where necessary) <p>As above.</p>	£2.40
<ul style="list-style-type: none"> • Enclosing papers or cheques <p>As above.</p>	£2.40
<ul style="list-style-type: none"> • Requesting copy complaint, production etc from Sheriff Clerk <p>As above.</p>	£2.40
<ul style="list-style-type: none"> • Informing PF or defence witnesses of diet <p>As above. [Also, this is, in terms of the regulation, an ‘intimation’. The regulation, of course, refers to ‘short letters of a formal nature, <u>intimations</u> and letters confirming telephone calls’.]</p>	£2.40
<ul style="list-style-type: none"> • Requesting names and addresses of defence witnesses <p>As above.</p>	£2.40
<ul style="list-style-type: none"> • Requesting client to call to discuss fresh information <p>As above.</p>	£2.40

FORMAL	CORRECT FEE
<p>• Instructing precognition agent (further letters)</p> <p>Following the initial letter instructing a precognition agent (see non-formal letters), a further formal letter can be allowed instructing defence precognitions, if details not available at time Crown witnesses list available, or further Crown witnesses in response to an additional list provided by the Crown. No other correspondence with precognition agent is chargeable. (See Note 1 at end of list of formal letters).</p>	£2.40
<p>• Other confirmatory letters</p> <p>(Taxation Guidelines, page 41)</p> <p>Confirmatory letters will only be allowed in the following circumstances:</p> <ol style="list-style-type: none"> 1. <i>Putting on record the date, time and place of next court attendance.</i> 2. <i>The client was in a distraught state of mind.</i> 3. <i>The subject matter was too complex for memory.</i> 4. <i>The client did not accept the advice given.</i> <p>Historically, the Board has considered £2.40 the appropriate payment for confirmatory letters. This is because such letters are usually of a formal nature. A letter putting on record the date, time and place of the next court attendance is an “intimation” and intimations, as such, are specifically referred to in the regulation as being payable at the short letter rate.</p> <p>Also, the formal letter covers “letter confirming telephone calls”. (It is reasonable, therefore, that other brief matters requiring confirmation attract the £2.40 charge.)</p> <p>However, it can be seen that the Board does allow a confirmatory letter in respect of another three categories of case some of which, it is reasonable to presume, would require some thought and certainly a lengthier letter than that envisaged by the formal rate. Accordingly, it is in order to pay for such a letter at the £6.00 rate where matters.../</p>	£2.40
	£2.40
	£6.00

matters other than the simple advice as to the date, time and place of the next court attendance are reasonably raised in a letter or where the letter relates to the other three categories. As usual, the letter should be succinct and efficiently framed. (See Note 2 below)	
<ul style="list-style-type: none">• Similar letters <p>In cases where one principal letter is drafted and a number of copies are then sent out, the first letter is allowed at the full rate and the other letters at the non-formal rate. The classic example of this is the letter to proposed witnesses.</p>	£2.40
<ul style="list-style-type: none">• Reminder letter to client <p>By concession where diet fixed four weeks or more in advance (if claimed).</p>	£2.40
<ul style="list-style-type: none">• Reminder letter to PF/Police etc <p>Where justified by imminent hearing.</p>	£2.40

Note 1: Some precognition agents are employed by solicitors in-house. On the other hand other precognition agents are private firms employed by solicitors. The solicitor will receive the precognition agent's invoice but will charge a fee for the work at unqualified rates. Accordingly, apart from the initial letter of instruction and the further letters referred to in this section at the formal rate, no other 'phone calls, letters or meetings in connection with liaising with a precognition agent are allowable charges.

Note 2: Any other letter which contains information which was covered or should have been covered at a meeting with the client (other than the above) should be abated as duplication.

NON-FORMAL “Letter, including instruction of counsel – per page...”	CORRECT FEE
<ul style="list-style-type: none"> • Request for witness to provide precognitions. <p>A one page letter should be sufficient.</p>	£6.00
<ul style="list-style-type: none"> • Precognition Agent <p>First letter of instruction to precognition agent.</p>	£6.00
<ul style="list-style-type: none"> • Citation of witnesses by solicitor. <p>This is the fee allowable for each witness cited. (The letter enclosing the citation is covered by this fee.)</p>	£6.00
<ul style="list-style-type: none"> • Letters to counsel, expert witnesses – pre sanction <p>Length of letter will depend on circumstances of case. Letters of instruction are clearly premature until sanction is granted but a letter, say, obtaining estimates of costs pre-sanction would be chargeable (see “Similar Letters” if obtaining competitive quotes).</p>	£6.00
<ul style="list-style-type: none"> • Instructing counsel, experts and local agents. <p>Length of letter will depend on circumstances of case. More than one page allowable if justified or clearly reasonable from its terms. (Taxation Guidelines, Page 39)</p>	£6.00
<ul style="list-style-type: none"> • Seeking Sanction, Writing to Client <p>Length of letter will depend on circumstances of case. More than one page allowable if justified or clearly reasonable from its terms.</p>	£6.00
<ul style="list-style-type: none"> • Seeking Sanction, Writing to Board <p>Length of letter will depend on circumstances of case. (The charge for the letter includes the completion of the sanction form).</p>	£6.00
<ul style="list-style-type: none"> • First letter to client <p>The circumstances in which solicitors are instructed and take the initial instructions from client vary from case to case. In some situations the solicitor will have dealt with the client under advice and assistance. In others the solicitor may have met the client for the first time at court.</p>	£6.00

<p>In most cases, however, there is what might be referred to as a 'first letter' where the solicitor writes to the client briefly advising the client as to the current position, whatever that may be, and that he will contact him further/advising him of the next step. As usual, this letter should be efficiently drawn avoiding lengthy duplication of advice already given to the client and for which a time charge has probably already been made against the Board. It is also possible that lengthy advice has already been given the client under advice and assistance.</p>	
<p>• Last letter to client</p> <p>Another letter which is fairly standard in a typical criminal case is a final letter to the client advising the client as to the outcome. Generally speaking, there is little reason why this should be lengthy. The solicitor will probably have seen the client after the disposal and the purpose of the letter is simply to advise the client as to the actual sentence. A finding of not guilty should, presumably, result in an even shorter letter!</p>	<p>£6.00</p>

Length of Letter

Where a letter is charged at more than one page, the additional charge must be justified by the contents of the narrative in the account. Letters should be concise, efficiently framed and written in plain English. Letters should not contain duplication of advice already given except in the circumstances referred to under 'other confirmatory letters', above.

1. A letter to a precognition agent enclosing a list of witnesses and to prospective witnesses being asked to provide precognitions is appropriately chargeable at £6.00. A one page letter should be sufficient.
2. The prescribed fee is for a citation which covers the cost of the letter enclosing same.

MISCELLANEOUS NON-CHARGEABLE LETTERS

	CORRECT FEE
<ul style="list-style-type: none"> • Letters as a result of error by solicitor or his staff. <p>Fund not liable for extra work as a result of such an error.</p>	N/A
<ul style="list-style-type: none"> • Letters in connection with separate and distinct proceedings. <p>Fresh legal aid appropriate. (See section 4 Bad Charges, "Matter not within scope of certificate").</p>	N/A
<ul style="list-style-type: none"> • Letters of instruction to counsel, experts etc. pre sanction or outwith sanction granted (or notification of unusual expenditure). <p>Must await authorisation prior to undertaking such work.</p>	N/A
<ul style="list-style-type: none"> • Paying Sheriff Officers <p>Letter of instruction covers payment (See Taxation Guidelines, Page 39)</p>	N/A
<ul style="list-style-type: none"> • Submitting Accounts <p>Board entitled to free accounting</p>	N/A
<ul style="list-style-type: none"> • Reminder letter to client <p>Onus on client to remain in contact with Agent. (Not a third party charge.) By concession, where diet fixed four weeks or more in advance (if claimed).</p>	N/A £2.40
<ul style="list-style-type: none"> • Confirming to client legal aid granted. <p>Not necessary. Client informed by SLAB direct.</p>	N/A
<ul style="list-style-type: none"> • Recording matters discussed at meeting. <p>For exceptions see "Other confirmatory letters" under list of formal letters.</p>	N/A
<ul style="list-style-type: none"> • Acknowledgement <p>Does not advance case. Not necessary. Not a third party charge.</p>	N/A

MISCELLANEOUS	CORRECT FEE
<ul style="list-style-type: none"> • Letters enclosing applications for legal aid. <p>Including applications where applicant has automatic criminal legal aid under:</p> <ul style="list-style-type: none"> • Section 22(1)(d). The Act is quite specific. Cover is provided from when the applicant has ‘made an application to the Board...’. • Section 24(6) cover is provided from when the applicant has ‘applied for criminal legal aid...’. 	N/A
<ul style="list-style-type: none"> • To family and friends updating or regarding progress. <p>Legal aid is granted to represent the assisted person, not to advise or update other persons.</p> <p>Will allow in circumstances where client is under age or is mentally impaired. Also, will allow in circumstances where for some reason the client is not available and the letter is an <u>alternative</u> to writing the client direct <u>and</u> advances the case.</p>	N/A
<ul style="list-style-type: none"> • To family and friends that do not forward the case, i.e. regarding money problems, personal matters, cigarettes etc. <p>Again legal aid is granted to represent the assisted person and advance that individual’s case. The Board will not pay for letters arranging for personal belongings, cigarettes, razors etc to be passed to clients. (The Law Society of Scotland’s Code of Conduct for criminal work states that a business card and legal documents should be the only items given by a solicitor to a person in custody).</p> <p>NOTE: ‘Phone calls to and meetings with family and friends are subject to the same restrictions as the above two examples.</p>	N/A

LOCUS VISITS

(Taxation Guidelines – page 38)

A locus visit is not necessary in all cases and should be relatively rare in summary cases. Indeed, generally speaking, there are a large number of cases where a locus visit would be completely unnecessary e.g. fraud, education cases, failure to appear and a whole range of road traffic cases (indeed other cases) where the identity of the accused is not in doubt nor the circumstances leading to his or her arrest. Therefore, the need to visit the locus should always be the subject of a detailed explanation by the solicitor in the narrative. More than one locus visit should be extremely rare unless additional evidence or something new has been brought to light.

Whether the justification is already provided with the account or has to be requested from the solicitor any supporting documentation should take the form of photos, sketches, file notes etc.

Is it necessary

A good example of when a locus visit is appropriate is where it would not have been possible for a witness to have seen what occurred because his view would have been blocked by a wall or trees. It might not be possible to see someone at a shop door from a flat above because of a protruding shop sign. If the offence took place at night the street lighting might not allow clear identification. It might be a confused situation involving a fight or breach of the peace where identification and eye witness evidence as to what happened is material. A feature of a case in which a locus visit can be allowed is that the accused disagrees with the evidence of the Crown witnesses e.g. someone else carried out the offence; it was not possible to identify the accused in the particular circumstances; someone's story can simply not be true because of some feature of the locus.

A locus visit is usually carried out for fairly practical reasons and a solicitor should be able to explain, fairly easily, what was hoped to be gained by the exercise. Equally, there are some fairly practical reasons why a locus visit might appear to be unjustified. A locus cannot stay the same. Different cars and other vehicles can alter the scene substantially. In general, you would expect a background situation where there is a dispute as to the facts and that, in some way, the dispute can be resolved, in whole or in part, by examining the scene of the crime. These are the factors the solicitor requires to address before undertaking the work and on which you require to be satisfied.

When should it be carried out

Locus visits are usually carried out after the Crown witnesses have been precognosed. There may, exceptionally, be a reason why a locus visit is carried out at the very outset. Presumably this would proceed on the basis of specific instructions from a client and, in such a situation, the client's precognition may be useful. As long as there is only one locus visit then whether it is carried out earlier or later is not a significant issue as long as you are satisfied as to whether it was necessary.

If the locus visit is necessary the costs incurred are subject to normal scrutiny. Where the locus is some distance from the solicitor's office, the solicitor should try and arrange his business to fit the locus visit in with another attendance in the area. It would be relatively unusual for the solicitor to spend more than half an hour at the scene and most locus visits would be considerably shorter. Travel to and from the scene is, of course, extra.

LUNCH

Local court

(Taxation Guidelines – page 18)

The question of payment over lunch continues to generate discussion. At a taxation in Stirling, the Auditor held that where the solicitor is in his local court and can reasonably be expected to go back to his office during the lunch recess then one hour should be abated. It was also accepted by the Auditor, as a general statement, that it is not reasonable for a solicitor to be paid whilst actually “partaking of lunch”. The taxation only took place in the context of the local court and the Board is not seeking to expand its application, as regards a solicitor’s ability to return to his office, to other situations.

Other courts

There are, of course, situations where although the solicitor is in his local court, it is not possible because of the time and distance constraints to return to his office. This may arise where a solicitor would require to travel to another town or to return to the outlying areas of cities or large towns. The situation is not black and white. Different things happen on different days. It is not always a question of one hour or nothing. But most solicitors think that it is, and have not tended to maintain a careful note of any work actually done. Also, there was a question raised in the Auditor’s note, following an argument led by the Board, as to whether there was, in fact, statutory provision for the payment of ‘waiting time’ during the lunch adjournment. Regulation 7(1) and (2) of the Criminal Fees Regulations provide that a solicitor should be allowed ‘such amount of fees as shall be determined to be reasonable remuneration for **work actually and reasonably done**, and travel and **waiting time actually and reasonably undertaken and incurred**’. In determining the fees... there shall be taken into account time necessarily ‘spent at the court on any day in waiting for the case... to be heard, where such time has not been occupied in waiting for, or conducting another case’. Is the solicitor ‘waiting’, as such, where he or she knows that they will not be required until a set time. It is long accepted practice that a solicitor is not paid for waiting time prior to 10am on the basis that the solicitor does not require to be attending at court any earlier, as the court will not start any earlier. Taking all these matters into account, we are presently taking a broad view to assist in disposing of the remainder of time and line accounts and to avoid time consuming disputes on these points, and a concession will be made in all accounts (other than local courts covered by the Auditor’s decision) by allowing half an hour.

In a non-local court, where the option to return to his office is not open to the solicitor, he would still presumably have lunch and again, taking into account the above considerations, half an hour will be allowed in all these cases.

No bar on work actually done

It should be made clear in your dealings with solicitors that there is no bar on the Board paying solicitors for work actually and reasonably done during the lunch period as such. If work is actually carried out then this should be clearly stated in the account and is subject to assessment, the.../

the same as any other entry. The solicitor, particularly in High Court and Sheriff and Jury cases, may have to work through his lunch. In such cases it is not at all unreasonable to allow the solicitor to claim for work done during the lunch period providing the work is detailed and chargeable. Reviewing papers is not chargeable as it is covered by preparation already claimed. Again details of work actually undertaken during the lunch recess is required.

Extract from PF (Stirling) -v- Stewart Lafferty

Because of the absence of information in this particular case, I find myself in the position of considering what is, in effect, a hypothetical question. I do not know when, or even if, the Court adjourned for lunch on 1 October 1998 and I do not know what (the solicitor) did during the lunch adjournment, which parties to the taxation are agreed took place. What I am certain of is that if (the solicitor) had done other remunerative work in relation to any other case during the period of time in question, then the fee claimed would not have appeared in this account.

Assuming that the Court did adjourn for lunch and that (the solicitor), having no other work to do in relation to this case or any other, proceeded to partake of lunch, I am of the view that he would not be entitled to claim the Scottish Legal Aid Board for “waiting time” during that lunch adjournment. There is no statutory provision for the payment of such a fee.

*Regulations 7(1) and (2) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, provide that solicitors should be allowed “such amount of fees as shall be determined to be reasonable remuneration for work actually and reasonably done, and travel and **waiting time actually and reasonably undertaken or incurred**”, including time “spent at the Court on any day in waiting for the case... to be heard, where such time has not been occupied in waiting for, or conducting another case”. Had the Court sat on through lunch, Mr Angus would undoubtedly have been entitled to remuneration. But it is reasonable to expect that on most days of the week the Court will rise for lunch at some time. In these circumstances local solicitors could reasonably be expected to go back to their offices to do deskwork if they wished or more realistically to have lunch. It is my understanding that Health and Safety Regulations and more recently the European Working Time Directive, require that workers have a lunch time break entitlement.*

Looking to the Law Society Fees for Conveyancing and General Business, Chapter 9 and the Sheriff Court Table of Fees, Chapters II and III as applied by that Chapter, I am also of the view that an auditor would not allow a private client to be charged at either the “advocacy” or “waiting time” rates for the time involved in the lunch adjournment, in circumstances where a solicitor could reasonably be expected to return to his place of business to do other remunerative work, or alternatively, to take lunch in the normal course of events. It is therefore equitable in my view that the same standard should apply where the Scottish Legal Aid Board is meeting the cost of the litigation. Different circumstances might well apply where the solicitor involved is not a local agent.

MEETINGS WITH CLIENT

(Taxation Guidelines – pages 28/29)

Meetings with the client should only take place if the purpose of the meeting is to advance the case or if some material change or development has occurred. [A solicitor may have to be reminded that payment is made not on an agent and client basis, but on an agent and client, third party paying basis, i.e. on an objective basis: was a meeting strictly necessary, especially where it was at the instance of the client].

A case will usually proceed with a meeting with the client taking instructions. In most summary cases a meeting with the client will be necessary once the solicitor has ingathered the statements, prior to the intermediate diet. This should be for the purpose of establishing whether a plea of guilty should be tendered, pleas negotiated with the crown, evidence agreed or whether they should continue to trial.

Meetings should generally only take place when some material development has occurred or the case in some way can be advanced. However, there may be instances when a simple telephone call or letter will suffice. One example would be if the client has changed address and simply requires to pass this information on. However, even in this situation it may be necessary for the solicitor to have a face to face meeting with the client. If, for example, the client is on bail then it may be reasonable for the solicitor to advise him of the implications this change in circumstances has on his bail conditions.

The point here is that there will, in any number of situations, be a reasonable need to meet with the client but the onus is always on the solicitor to say what the meeting was for. Entries such as ‘meeting with client’, ‘advising of current situation’ or ‘receiving information’ fall into the same category as ‘letters to call’ (see above page 26) in the absence of detail as to what information was imparted or received. It may be obvious from the context of the account what the meeting was for e.g. following on receipt of Crown precognitions or immediately preceding a letter to PF agreeing evidence, allowing you to deal with the entry despite any lack of clarity on the part of the solicitor.

Attendance with client in custody after conclusion of case

At the conclusion of the case the client should be seen immediately after the court appearance to conclude matters and, perhaps, discuss the possibility of an appeal. Thereafter one would not expect to see another meeting with the client. In a situation where the client is taken to prison right after the court appearance and the solicitor does not have the opportunity to meet with him then it may be reasonable for the solicitor to attend on the client in custody at a later date. However, this should be a fairly unusual situation and again the responsibility is on the solicitor to provide the appropriate justification. The longer the solicitor delays seeing the client in these circumstances, the less likely it is that the attendance is necessary for these reasons. (There is a time limit on the marking of an appeal which is usually seven days from the final determination of the proceedings). Another reason for attending with the client in custody would be complexity of discussions in respect of a possible appeal or where a substantial custodial sentence has been imposed and the client is, perhaps, not in the best position to discuss the position immediately after sentence.

PRECOGNITIONS – CLIENT/WITNESSES

(Taxation Guidelines – pages 29/30)

Schedule 1 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, paragraph 3(b) provides a charge of £6 for “framing and drawing precognitions... - per sheet (or part thereof)”. A precognition is...:-

- ‘A preliminary written statement of the evidence which a witness may be expected to give. It is usually paraphrased after interview with the witness and prepared in the first person. It is not signed, and is not binding.’ (Glossary of Legal Terms and Latin maxims)
- ‘A written statement of the matters which witnesses are expected to give as evidence on oath when in the witness box, and is a guide generally essential for the proper leading of the evidence at the diet of enquiry.’ (Manual of the Law of Evidence in Scotland, W. J. Lewis [1925] page 172).
- ‘A written statement in intelligible form of the matters which a witness is prepared to give in evidence in the witness box.’ (I. D. MacPhail, Sheriff Court Practice, 2nd Edition, page 473).

Some precognitions contain far more detail than the evidence which the client or witness will give in the witness box. In particular, some precognitions contain detailed information regarding the client’s financial circumstances, benefits and other extraneous matters. The solicitor has clearly been paid a time charge for taking such detail and it remains on the solicitor’s file for further use. However, it should not form part of a precognition in respect of which a framing charge is payable and where this occurs the length of the precognition may be cut back with a resultant reduction of the sheetage.

The client’s version of events should be taken at an early stage and should give as full an account as possible. This may have been done under A & A although the precognition will probably be with the criminal papers. Some solicitors prefer to take the initial statement once the solicitor is in possession of most, if not all, of the witness statements.

A precognition should not and need not be taken each and every time the client is seen and a distinction should be made between a file note which is not chargeable (being covered by the time charge for the meeting) and a precognition.

It may be reasonable, depending on circumstances, for a further precognition to be taken, if, for example, there has been a material or significant development which requires the client’s comments to be put on record. This should be apparent from the narrative of the account, and the supplementary precognition (which, together with the precognition, should be produced) or, otherwise, justified by the solicitor.

In short, there is no point in framing a “supplementary precognition” simply indicating all the areas where the client disagrees with the witnesses. Disagreement can almost be expected and the point, of course, is that the client’s version remains unchanged. On the other hand, the witness’ precognitions may have opened up a whole new area which had not been dealt with initially and on which the client’s version must be noted and ultimately led in evidence.../

evidence, e.g. there had been previous thefts from an office; there was another witness who left the scene of the crime; the item stolen was unique and could not have come from anywhere else, requiring a brief supplementary statement on fresh evidence which will require to be led from the client in evidence.

The need for a supplementary precognition is the exception, not the rule.

File Notes

A file note should note the nature and duration of the work and form a record of the business discussed. It must indicate the name and status of the person performing the item of work. Accurate file notes are an essential record of the work carried out and the only basis for the preparation of the account. The Board is entitled to a free accounting. You do not require sight of a file as a matter of course but prior to payment of an account parts of the file may be sought and, in the event that you become aware that there is no contemporaneous file note prepared by the person who carried out the work you cannot make payment in respect of any such item, and may seek to recover sums previously paid on the assumption that such a record existed. Work which is not supported by a file note can be challenged before the Auditor.

PRECOGNITIONS – CORROBORATION ONLY

From time to time solicitors ask why we do not allow a framing charge for corroborating police precognitions. There is also a belief that we do not allow the time charge. This is wrong. The attendance taking the precognition is always allowed as it is appreciated that the solicitor will not know that the precognition is simply corroborative until the interview. In the vast majority of these situations, the precognitions which are produced simply read “I can corroborate the statement of Constable X and can identify the accused”. As this is not a precognition, the framing charge is disallowed. If there is more than simple corroboration, a framing charge will be considered.

This matter was taxed in Hamilton in the case of *PF –v- Thomas Gerald Delaney* [22 November 1976]. The auditor supported the Law Society’s view and the relevant comments from the Auditor’s report have been noted below for information.

“The extended precognition of Angus Jackson reads “I can corroborate the statement of Constable Green to ‘A’ in the margin”. The extended precognition of David Wilson reads “I can corroborate in full the statement of Constable Graham. I can identify the accused”. Mr Russell submitted that at least half-fees should be allowed and Mr Wood (for the Law Society) argued that in this situation time charges only should be allowed.

There is no dispute between parties that a time charge was included in the account for interviewing Angus Jackson and David Wilson, the two police witnesses. The dispute was in connection with the additional charges for the drawing and extending of the thirteen words in Wilson’s precognition and fifteen words in Jackson’s precognition.

Mr Russell was unable to produce the notes taken at the interviews with the police constables from which he says he drew the precognitions. I would have expected in the interests of economy that it might not have been necessary to draw and extend the twenty-eight words if the original notes were available.

In the circumstances, I have disallowed the charges for drawing and extending these two precognitions on the basis that due regard should be paid to economy when the work is done and in the knowledge that the solicitor had received a time charge when he attended on the witnesses at which time he must surely have written almost as many words as are shown on the typewritten precognitions. Even if the solicitor wished a typewritten copy, the time involved must have been minimal.”

PRECOGNITIONS - TAKING

(Taxation Guidelines – pages 34/37)

The work involved in obtaining statements normally accounts for a substantial percentage of any account. While this work will usually be undertaken by an enquiry/precognition agent, the solicitor is entitled to be paid the fee for an unqualified agent as opposed to any outlay he has incurred. **Therefore it is the solicitor's responsibility to justify all work undertaken and to ensure that every effort is made to minimise costs.**

- It should be relatively rare for a qualified person to undertake precognition work. It is within the Board's knowledge that the vast majority of precognitions in both summary and solemn cases are taken by precognition agents at unqualified rates. This is universally the case even in the most serious, high profile High Court cases, and has been the situation for many years. Adequate justification must be provided if precognitions are taken by a qualified person. The case may involve charges of a sensitive nature e.g. an offence against a child where it is better the solicitor interview the child or young witness rather than a precognition agent. (Note: The PF in Glasgow has a scheme whereby precognitions can be provided to avoid multiple precognosing of young children which may be available elsewhere). Alternatively, the subject matter of the precognition, say, in a fraud or computer related case might be very technical and quite crucial to the proper handling of the case. Even in these cases, however, the witnesses giving formal evidence in the case could still be precognosed by unqualified personnel.
- Arrangements are in place to provide copies of police statements to the defence without the need to precognose. A formal approach, therefore, must be made by the solicitor to obtain copies of police statements in every summary case. The account should disclose that the solicitor requested police statements promptly and should have waited until at least four weeks before the intermediate diet before proceeding to incur the added expense of precognosing police witnesses. Where this expense is incurred, a letter from the police, or other vouching, must be produced with the account to show that the statements were not available. Satisfaction on this point is a necessary prerequisite to allowing any subsequent police precognition costs, which can be substantial, charged on the account.
- Local agents should be used when witnesses live some distance away from the town or place where the solicitor has a place of business. Significant travel costs should be abated where the solicitor has failed to use local agents and there is no justification for this failure. (This is dealt with in more detail at page 46).
- An opportunity should be given to the witness to give a statement over the 'phone where possible, especially in cases where the witness is giving formal evidence or speaking to straightforward matters. Some witnesses, acting in a professional capacity e.g. bank clerks may simply be speaking to general banking procedures. [One famous account featured an entry where the precognition officer travelled the length of Scotland to attend on a bank employee in Dunfermline who explained what a credit card was and how it worked. It was conceded that a preliminary enquiry by 'phone would have revealed the nature of the witnesses evidence. Indeed there was probably a relevant leaflet in the bank].

There are, of course, potential difficulties with this as some witnesses are reluctant to give information over the 'phone as they may be unsure who they are talking to. (On the other hand, a letter should have been sent by the solicitor by this stage advising of his or her interest on behalf of the accused and indicating that a named agent will be contacting the witnesses). Also, some organisations refuse to give information due to the Data Protection Act. For these reasons, and the situations where solicitors correctly wish direct contact to be made with at least material witnesses, the situation where a statement can be taken over the 'phone must be the exception and cannot be stated to be the norm. Most solicitors and responsible precognition agents will seek to obtain formal evidence by this means and you should encourage other solicitors in your dealings with them to adopt a similar pragmatic approach.

- All work should be planned and carried out efficiently. When witnesses live in the same area, arrangements should be made to see the witnesses on the same day, one after another, if possible, thereby saving time and money. *A situation where an agent is returning to the same area on a regular basis to see individuals should certainly be avoided and could be symptomatic of a quite inadequate system of taking the statements. Where this happens the entries in the account should be challenged and significant abatements might well be appropriate.*

Local Agents

When should local agents be employed? The answer to this question depends on the circumstances of the particular case. *When a solicitor receives the list of Crown witnesses he should at that stage consider the most efficient and cost effective way of taking the precognitions.* When you identify an account where significant travel costs have been incurred you should consider a number of factors such as the geography, the spread of witnesses, the availability of precognition agents and the reasonableness of the mileage and time involved. Perhaps the best way to tackle this issue is to use examples of when the use of a local agent may be indicated. (These are just examples to “put some skin on the bones” of the issue and do not detract from the general principal).

Other cities and principal towns

Clearly a solicitor in Glasgow is able to employ precognition agents in Stirling, Edinburgh, Perth, Dundee, Inverness or beyond - and should do so. Similarly solicitors elsewhere in Scotland should, on the same basis, use local precognition agents for work in and around the other principal towns or cities in the further parts of the country from where the solicitor is based. Where “out of town” work is taken on due enquiry can be readily made of a solicitor’s local agents as to a reliable local precognition agent in the area. But there may be further decisions to make. For example, we would obviously require the use of a local agent where there are witnesses in the north of Scotland and the solicitor is in the central belt. However, the nearest agent may still be some distance away (and may have to be a solicitor) and therefore the mileage and overall costs incurred could still be substantial. The overall cost is still likely to be less, however, and a saving more likely to be made if the agent is starting from a point nearer to the area in which the witnesses live. The solicitor should have done the arithmetic at the commencement of a case which raises these issues as he would have done had he been discussing costs with a private client who would not be giving a solicitor a “blank cheque” to precognose witnesses.

“Middle ground”

When witnesses do not live locally but are not located as far away as another principal town or city elsewhere in Scotland, it may still be more economical to use a more local precognition agent. Again this depends on the distances involved and the actual time and mileage which has actually been incurred. It may also depend on the spread of the witnesses e.g. they may all be in the same area or some of them may be local to the solicitor and others further away. It is all a matter of individual circumstances.

The following is some broad guidance but subject to the qualifications following it:-

[Column A represents the location of the solicitor

Column B represents what might be described as an area of influence where a precognition agent local to the solicitor can generally be used.

Column C represents areas (relative to the solicitor’s location) where:

- *the solicitor should really be considering employing precognition agents more local to the witnesses.*
- *where most of the witnesses live in and beyond these areas, the solicitor should employ local agents.*

A	B	C
Glasgow	Hamilton, Motherwell,	Greenock, Kilmarnock,
	Paisley, Kirkintilloch,	Falkirk
	Clydebank, Dumbarton	
Edinburgh	Musselburgh, Dalkeith,	North Berwick, Dunbar,
	Penicuik, Livingston,	Peebles, Dunfermline
	Haddington	
Aberdeen	Stonehaven, Inverurie, Royal	Peterhead, Fraserburgh, Elgin,
	Deeside, Old Meldrum,	Montrose
	Cruden Bay	
Dundee	St Andrews, Forfar,	Arbroath, Glenrothes, Perth,
	Blairgowrie, Kinross	Dunfermline
Perth	Dunkeld, Crieff, Kinross,	Pitlochrie, Stirling, Forfar,
	Blairgowrie	Dundee

These are broad guidelines only. It is simply not possible to draw clear lines on a map and to do so would be unrealistic. The application of these broad guidelines depends on the circumstances surrounding the individual case and on a number of other factors:-

Spread of Witnesses

Example 1: most of the witnesses may be in the immediate area of Dundee and the precognition agent.../

agent may be able to precognose, say two witnesses in the Perth area whilst undertaking other work. In these circumstances, you would not simply apply the above table. On the other hand, all the witnesses may be in the area of Perth and beyond in which case it would not be reasonable to have a Dundee precognition agent travel the 44 mile round trip to Perth simply to start off in the same position as a Perth precognition agent would, without any travel.

Example 2:- the witnesses may all be in the area between, say, Dunfermline and the Forth Bridge. An Edinburgh precognition agent might manage to take all their statements during the course of one day with only one return trip to the area. This would probably be perfectly in order. On the other hand the witnesses may be spread out around and beyond Dunfermline – in Cowdenbeath, Kinross, Alloa etc, in which case it would seem sensible to instruct a local Dunfermline precognition agent who is already in that immediate area without having to travel there in the first place. Accordingly the table is a guide and not a command.

Availability of Precognition Agents

The availability of precognition agents must also be taken into consideration. Need an Edinburgh or Dundee based solicitor use his own precognition agent when there are agents readily available in Dunfermline or Kirkcaldy. On the other hand, there may not be the same availability of local precognition agents outwith the central belt. Solicitors should be aware of precognition agents in and around other towns in their region and where undertaking work further afield should contact local agents to obtain details of reliable precognition agents in the area. The Board is not in a position to dictate to solicitors whom they should use but is in a position to abate any account where unnecessary time and travel costs have been incurred by failing to use a precognition agent who is clearly in a position to precognose the witnesses most efficiently given their geographical location.

Exercise of discretion in applying the above table

It is at your discretion whether you allow the costs of a precognition agent from, say, Glasgow in the above table to precognose witnesses in the Greenock area. If, as stated before, the work is done quickly and efficiently there may be little difference in the end result between the solicitor using his own precognition agent and a local precognition agent. However, in the event that the precognition agent is unable to precognose all the witnesses and requires to return to the area on one or more occasions, additional, unnecessary costs will have been incurred in this process. Although it may well be that these difficulties were unforeseen, the solicitor has taken the risk in employing his own precognition agent with all that entails i.e. the additional time and cost of travel and the solicitor should be aware that this risk is being accepted by him in choosing not to use a local agent. The choice is for the solicitor in the knowledge of the Board's practice and approach to these matters.

There may be more leeway in a large solemn case where there are a number of Crown witnesses spread over an area in the general location of the solicitor's place of business. Taking the Glasgow example it may well be appropriate to use one precognition agent to precognose a number of witnesses in Glasgow, Lanarkshire, Renfrewshire etc. However, (using the same example) if there is a 'pocket' of witnesses in and around Edinburgh, the Borders, Perth etc then the appropriate course of action would be to delegate that particular element of the precognition work to a local precognition agent, having approached local solicitors to obtain details if necessary.

It is difficult to generalise this issue and so you must satisfy yourself that you are happy with the circumstances of the particular case, the steps taken and the justification provided to support these steps, and where you are not satisfied, to put the question to the solicitor. The solicitor should have a ready answer as the solicitor should have considered the different options in the particular case and their respective costs prior to instructing the work. *The solicitor may have approached the matter in a different way, but if you consider it got the job done efficiently and the overall cost was reasonable then the entry(ies) should be allowed.* Again, it comes down to applying a common sense approach in the particular case and using your own discretion. Where you are satisfied that the costs incurred are significantly greater than would otherwise have been incurred, the usual approach is to abate some of the travel costs in reaching the area and to substitute nominal travel costs which would have been incurred on the basis that the work had been carried out by a local agent.

Own Precognition agents

Some solicitors insist that only their own precognition agents are capable of carrying out this work and that they cannot be expected to use other precognition agents in other parts of the country. The Board takes the view that reputable solicitors throughout the country use local precognition agents and that if they can carry out the work properly for these agents then they are in exactly the same position to carry out the same work for other agents. Solicitors need only contact local solicitors to be advised of reputable and reliable precognition agents to carry out precognition work.

If in doubt, ask your colleagues or your supervisor for their thoughts.

Abortive Attendances

This is a difficult area given that some witnesses are not anxious to provide a statement. The question for the agent must be where to draw the line and seek information from the Fiscal either in the form of a statement or, at least, an indication as to the nature of the witness' evidence. It is for this reason that good practice is important in setting about this task, and identifying during the process those witnesses who are important and, quite separately, those who are simply not prepared to give a statement. *Wherever possible firm appointments should be made with witnesses prior to obtaining a statement.* The usual practice is that the solicitor (or agent) will send a letter to each of the witnesses at the start of the case advising the witness of his or her interest and that the solicitor or a named representative will contact the witness with a view to taking a statement. This will also identify the agent and make it easier to obtain a statement. Thereafter the precognition or enquiry agent should contact the witness (by telephone if the witness has one) with a view to making a *firm appointment* to ensure that any subsequent attendance is not speculative – a 'cold call' – or taking a statement where the evidence is formal and circumstances permit.

If the agent attends at the appointment and the witness is not there he should leave a card advising the witness that he kept the appointment and requiring the witness *to contact him at his office*. The agent is entitled to be paid for this visit. This is what should be done but, of course, you will sometimes not know from the account whether a card in these terms has been left. A further letter or 'phone call may be in order in the event that the witness does not contact the agent in response to the case. If the witness responds to any of these approaches, this should be made clear in the account. It is in solicitors interests that they make clear, whenever possible, where a firm appointment has been made to interview a witness.

When following up such a witness and in the absence of any indication that a further firm appointment has been made, the agent should not incur significant expense in carrying out further speculative, abortive visits, on the off chance that the witness will be there. Within reason, a brief time charge might be allowable where the agent is in the district precognosing other witnesses and calls on the witness. This would be the exception.

In the event that it is *clear that a further appointment was made* and the precognition agent attended in good faith then this should be allowable. It is all a question of degree, however, and if an account discloses a large number of speculative visits to the same witness or, indeed, a number of witnesses, significant abatements to the time and travel costs should be made. You should approach each account on its own merits concentrating on the procedures adopted by the solicitors or their agents indicating, at least, that every care was taken to secure a firm appointment and keep it. Too stylised an approach should be avoided. Some would advocate a general principle that two visits to each witness should be allowed in all cases. In some accounts, the proper procedures having been followed, this may be a consequence. In others it may be clear that the work has not been carried out with due care and with due regard to economy and entries will then fall to be abated.

A third abortive visit – and beyond – should be abated. Subject to a second attempt, the solicitor *should approach the Crown* to obtain a note of the witness' evidence.

- If the account in which you are working features significant cost arising from repeated abortive visits then it is clear that the whole basis on which the exercise has been carried out is not consistent with what should be done and the additional costs should be significantly abated.
- Clearly if the entries on the account indicate that a witness has actually expressed a desire not to give a precognition then any further attempts to obtain such a precognition should be abated.
- It is apparent from a number of accounts that some precognition agents, by appointment, attend at a witness' work. When they get there they are told that the witness is too busy. It is unlikely that most places of work would allow such visits and any entries, where the visit has been abortive, should be challenged.

Defence Precognitions

The solicitor may require to take a precognition from individuals whose names have been provided by the client and who are likely to support his case. Clearly, if there is a difficulty in obtaining a precognition from such witnesses, the option is not open to the solicitor to contact the Fiscal. On the other hand, the client himself can be useful in chasing up such individuals who are often friends or colleagues of the accused. One would expect the solicitor to advise the client of any difficulties before expending time and money on abortive visits to see if he can assist.

A different situation relates to a witness whom the client is seeking to impeach (i.e. blame) for committing the offence. A solicitor will clearly wish to take a precognition from such an individual but it also has to be said that the individual will probably have no particular inclination to give such a precognition and repeated visits against such a background would be subject to challenge.

It is not considered to be proper practice for an accused's solicitor to seek to precognose a co-accused as a matter of course and a co-accused cannot be forced to give a precognition on oath (I. D. MacPhail, Evidence [1987] S24.09A)

PREPARATION

(Taxation Guidelines – pages 30/32)

Summary cases

Preparation in summary cases is paid in a block relating to the conduct of the whole case.

Intermediate Diets

No preparation should be allowed except where a plea is made. In these circumstances, a charge for one hour's preparation would be considered reasonable. Otherwise, preparation is dealt with, according to circumstances, at the conclusion of the proceedings.

[Sometimes the court provides a pro forma questionnaire for solicitors to complete. This appears to be included within the preparation charge but can be allowed under paragraph 4(d) of Schedule 1 as 'revising papers... where revisal ordered by court – per five sheets (or part thereof)' at a rate of £2.40.]

Trial

Although it is appreciated that each case should reflect the actual level of preparation undertaken, the convention is to allow a maximum of two hours. If more than this is claimed details of the specific preparation undertaken should be obtained and queried where considered appropriate.

Continued Trial Diets

A charge of ½ hour prior to a continued trial is acceptable where some time, i.e. weeks/months has elapsed between the dates.

Deferred Sentences

If a ½ hour is claimed, this is deemed to cover perusal of all reports obtained. If there are no reports a charge of 15 minutes should be allowed. In a case featuring a number of continued deferred sentences, 15 minutes should be allowed where there is no clear indication of any other work requiring to be carried out other than the perusal of reports. Sentence may be deferred so often and for such short periods that in some cases a preparation fee may no longer be considered to be appropriate.

Solemn cases

Preparation in solemn cases is paid according to circumstances and is a matter of negotiation.

Two hours is normally charged and paid but there is more scope for exceptional cases and exceptionally lengthy cases under solemn procedure. An increased fee for preparation may be justified according to the length, complexity or difficulty of the proceedings. A 'standard' fee per night and/or per morning of a lengthy case should not be allowed without specific reference to what work was actually being carried out.

First Diet

No preparation should be allowed except where a plea is made. In these circumstances, a charge for one hours' preparation would be considered to be reasonable.

PRISON VISITS

(Taxation Guidelines – pages 24/28)

General

Multiple attendances with clients in prison have been a source of concern over the years. Seeing the client in prison will, of course, be necessary to take initial instructions when the client is in custody, if the solicitor has not had sufficient opportunity to do so when the client was in court. Further attendance may well be required to take further instructions with regard to progressing the case e.g. taking further instructions having precognosed Crown or defence witnesses, or with regard to some ancillary matters such as a bail appeal. Otherwise, what have become known as ‘comfort visits’ or entries accompanied by reference to ‘noting additional details and instructions’ or ‘discussing up to date position’ are not sufficient to justify payment without further detailed explanation.

There should certainly be a brief explanation where the prison visit follows close on a recent attendance at court where the solicitor had the opportunity of discussing matters with the client at court and did not take it or, alternatively, the solicitor has actually charged for a meeting with the client at that time and there has been no apparent progress in the case between that meeting and the subsequent prison visit. All outstanding matters should, of course, be dealt with at the same time and if there is a subsequent prison visit immediately after an earlier one, the solicitor should distinguish between what was discussed at the respective meetings in order to justify the second one.

Apportionment

Where a number of clients are seen at the same time, travelling and waiting time and travelling expenses must be apportioned amongst all the clients seen including non legally aided clients or clients seen under advice and assistance.

- Travelling time (including mileage) should be apportioned amongst all the clients seen including, nominally, against non legally aided clients, i.e. where three clients are seen, one private, only two thirds of costs are chargeable to legal aid.
- Waiting time should be apportioned equally amongst all the clients seen.
- The solicitor is entitled to charge for the time spent with each client (subject to the next paragraph).

The solicitor should, of course, keep a careful note of all the times involved and the clients seen on each occasion.

Visiting one client on a number of separate matters

A solicitor is entitled to charge in quarter hour time blocks in terms of paragraph 2(a) of the Criminal Fees Regulations, Schedule 1 for attendance with a client in prison just as if he had seen the client in his office.

Accordingly..../

Accordingly, the solicitor is entitled to round up the actual time spent with a client in respect of each matter to the nearest quarter hour minimum fee. The actual time spent on travelling, waiting and time spent discussing each case must also be clearly stated in the accounts together with the apportionment calculations.

The exception to rounding up the time involved in each case to the nearest minimum quarter hour is when dealing with several cases to be involved in a common disposal e.g. a deferred sentence to be heard shortly after the prison visit. The time engaged should be apportioned equally in each case and not individually rounded up to the nearest quarter hour e.g. 40 minutes spent discussing four cases, £7.91 (i.e. £31.65 ÷ 4) should be charged in each account and not the minimum of £10.55 for a quarter hour in each case as would be the situation where the solicitor was dealing with a number of separate cases.

Travel to a distant prison

Visits to a prison in a distant jurisdiction should be undertaken by local agents. Solicitors are aware of the Board practice in this matter and where such a visit is undertaken there should be a clear narrative not only as to the purpose of the visit but why it could not have been carried out by a solicitor local to the prison.

SANCTION FOR THE EMPLOYMENT OF COUNSEL

(Taxation Guidelines – pages 46/47)

The prior approval of the Board is required where the proceedings are in the High Court and are not proceedings relating to a prosecution or conviction for murder, for the employment of senior counsel alone, of senior counsel with junior counsel, or of more than one junior counsel. The prior approval of the Board is required, where the proceedings are in the sheriff court or the district court, for the employment of counsel. The Board may grant approval retrospectively where it considers that the employment would have been approved by it and that there was “special reason” why prior approval was not requested. *The Board cannot consider retrospective sanction where sanction has previously been requested and refused.*

Unsanctioned counsel

In terms of the Legal Aid (Scotland) Act 1986, section 32, no solicitor or counsel other than the solicitor or counsel providing legal aid shall advise or act for an assisted person in connection with the proceedings. In the event that a trial or hearing is conducted by unsanctioned counsel, there is no basis for remunerating counsel. Equally, there is no basis in terms of the Act or regulations for remunerating the solicitor concerned for accompanying counsel, preparation, travelling expenses, waiting time or any other claim in respect of the trial or hearing which the solicitor has not conducted.

SANCTION FOR UNUSUAL EXPENDITURE

(Taxation Guidelines – pages 50/51

Legal Aid Handbook, Sections 20.5.1 and 20.5.2 @ pages A124/125)

The prior approval of the Board is required where it is proposed to carry out work which is of an unusual nature or which is likely to involve unusually large expenditure. This provision is contained within the Criminal Legal Aid (Scotland) Regulations 1996, regulation 14(1). *Although regulation 14(2) provides the Board with the discretion to allow retrospective approval for the employment of counsel or expert witnesses, it does not allow the Board to grant sanction retrospectively for work of an unusual nature or likely to involve unusually large expenditure and any work which you are satisfied falls within this category must be abated.* You should check with a Team Leader or Legal Services in a case where you form this conclusion and the solicitor disagrees with your decision as to whether the work fell within this class of case.

Regulation 14(1)(d) is not, in general, concerned with the nature of the case itself. There is, therefore, no need for prior approval just because the solicitor is acting in a relatively unusual case e.g. murder or a serious fraud case. What the regulation is concerned with is the way the case is conducted, that is, the work that is done. The requirement for sanction gives the Board the front end control it requires in dealing with work of an unusual nature or likely to involve unusually large expenditure which the Board, as third party, will require to pay for. It is, in some ways, a restriction on the “mandate of the agents” referred to by Lord Patrick in *Park -v- Colvilles Ltd* [see page 5, third paragraph]. The proposed work may well be necessary, indeed essential, but the Board is entitled to form its own view as to the need for the work (as against any alternative course of action) and, equally importantly, the way in which the work will be carried out and the resultant costs. The Board has, in the past, saved significant sums of money in cases where it has insisted that a solicitor obtain competitive estimates, or discussed the way in which precognitions be taken outwith Scotland. In a situation where a solicitor is considering a precognition under oath, the advice is normally to seek to obtain a copy of the statement from the Procurator Fiscal and thereafter form a view as to whether the procedure is necessary. Work may be unusual even though there is a standard procedure in terms of an Act or Regulations. For the avoidance of doubt the Board, from its unique position in dealing with accounts relating to most of the criminal proceedings taking place in Scotland has compiled the following list which it knows to be unusual and which has been drawn to the attention of the Profession.

The following is a non-exhaustive list of examples where prior approval should be sought:-

- instructing an interpreter or translator;
- all work in connection with a precognition under oath (including the initial petition);
- keeping a watching brief on another case;
- all work in connection with the recovery of documents by way of a commission and diligence;
- all work in connection with the production or recovery of documents;
- having shorthand notes extended;
- undertaking travel to consult with a client (the client should travel to the solicitor and not the other way round);

- taking precognitions outwith Scotland [except solicitors in Dumfries and Galloway or the Borders who require to precognose a witness across the border in England (area of Carlisle or north of Newcastle), where normal rules apply: see “Precognitions – Taking”];
- all work in the nature of carrying out investigations, tracing so far unidentified witnesses to an incident, reconstructions of the crime etc;
- inspecting a distant locus;
- copying of documentation to client;
- copying large volumes of papers;
- perusing substantial documentation;
- obtaining affidavits in connection with the proceedings;
- instructing counsel to consult with an expert witnesses outwith Edinburgh in circumstances likely to cause increased expense i.e. does not apply where counsel at court or already on other necessary business in the area; or
- use of two solicitors to conduct proceedings or any part of them.

Extract from Venter -v- Scottish Legal Aid Board

Held (1) that where prior approval of the board was required prior to unusually large expenditure being incurred the question was whether that could be justified as a charge on the legal aid fund (p 153C); (2) that the board had to consider, first, whether there was any other reasonable alternative but to incur the expenditure and, secondly, if there was, whether the step proposed should be approved in preference to the available alternatives (p 153D); (3) that there was a duty on the applicant to explain the basis of the request, and the board could call for such information as it might require (p 153E); (4) that in all legally aided cases where the court was to be asked to authorise a course of action for which the prior approval of the board was required, the proper procedure was for the approval to be sought before an application was made to the court: a refusal would not necessarily be conclusive although the court had no jurisdiction to order the board to grant prior approval (p154D-F); (5) that the cost of the previous commission, and what private litigants could reasonably be expected to do in similar circumstances, were both factors to which the board was entitled to have regard (p 155D and 156A-B); (6) that the taking of evidence on interrogatories was an available alternative and, the petitioner’s solicitors having failed to provide any reasoned explanation of why this would not be satisfactory, the board was entitled to take the view that it had not been shown that it was essential for the evidence to be taken on open commission: its silence on the effects of the board’s decision did not indicate a failure to consider the requirements and achievements of justice (p 155F-H and K-L); (7) that in the whole circumstances the decision of the board could not be said to have been unreasonable or perverse (p 156B-E).

SANCTION FOR EMPLOYMENT OF AN EXPERT WITNESS

(Taxation Guidelines – pages 47/49)

The prior approval of the Board is required for the employment of any expert witness in criminal cases. As in the case of sanction for counsel, the Board may grant approval retrospectively.

Witnesses who are not "experts"

- GP's and hospital doctors speaking on the treatment of the individual.
- Medical consultants where speaking to treatment he has given to the assisted person (not consulted specially for the purposes of an opinion in connection with a court action)
- Photographers

Reference should be made to the Criminal Taxation Guidelines for further information.

SUPPORT STAFF CHARGES/ADMINISTRATION

Fee earners are those members of staff in an office who perform legal work *directly attributable and chargeable* to a specific client as opposed to staff members such as typists, receptionists, clerks, juniors and cashiers who perform general work which cannot be charged directly to any specific client and whose cost is recovered as a general overhead.

A solicitor is clearly a fee earner and it is the fees paid to the solicitor which enables the solicitor to pay for the overheads of a firm including staff such as typists, receptionists and cashiers.

Accordingly certain work which is occasionally charged for in an account should be abated if it was, or was capable of being carried out by support staff. Entries which fall into this category would include the following:-

- A telephone call to directory enquiries
- Taking messages to the effect that the solicitor is not available
- Drawing cheques
- Establishing costs as regards hotel/travel/car hire on behalf of a solicitor or making travel arrangements

This is all incidental work which, if not actually carried out by support staff, is work which is appropriately carried out by support staff and not directly chargeable to the client. *It would not be appropriately carried out by a solicitor or delegated by a solicitor to another fee earner.* Some work such as a telephone call to ascertain if a client is in a particular prison is work which the Board would pay for if done by the solicitor, and can be paid at unqualified rates if done by unqualified staff (there is no point in continuing a matter to find out who incurred this same charge i.e. £2.40). As can establishing the relative costs and expertise of expert witnesses which is done by a solicitor or delegated to and carried out by an unqualified person.

Other work which is of an incidental, background nature would be 'phoning the Board for advice: solicitors are presumed to be aware of the legal aid regulations under which they are acting. Whilst staff are pleased to assist, the Board does not expect to be billed for it. The exception would be telephoning the Board following an error by the Board (but not in account issues) which would attract the appropriate charge where the nominated solicitor requires to investigate the error and ensure that it is amended.

It is difficult to be too prescriptive in these matters. You may have to deal with other similar entries which are not dealt with here. Basically, work which would not normally be carried out by a solicitor and charged directly to a private client cannot be charged to the Board as third party paying.

TRANSCRIBING TAPES

Following discussion with the Profession, we have decided to review our approach to dealing with tapes provided to the defence by the Crown. In all cases where it is considered necessary to listen to a taped interview in the interests of a client, a time charge will be allowed for listening to the tape. The length of the tape is, of course, a good indication of the appropriate time charge! Thereafter an appropriate charge will be allowed for perusing the transcript to the extent justified by the content and nature of the tape.

No charge can be allowed for typing out the transcript as this is not work carried out by a fee earner and falls within the area of general work. Nor can a framing charge be made as there is no original thought or input by the solicitor to the material being typed.

In solemn cases, where the transcript is provided, a charge will be allowed for perusal as well as listening to the tape on the same basis as above. It is presumed that the tape and transcript can be considered together and paid as one time charge. In the event of separate charges being made. You should require an explanation justifying the additional charge.

7. SUBMISSION OF ACCOUNTS

(Taxation Guidelines – page 45)

Time limits

Submission of accounts of expenses

The Criminal Legal Aid (Scotland) (Fees) Regulations 1989, Regulation 9 provides that accounts prepared in respect of fees and outlays allowable to solicitors shall be submitted to the Board not later than six months after the date of conclusion of the proceedings in respect of which that legal aid was granted. The ‘conclusion of the proceedings’ would be the last court date e.g. final diet of deferred sentence.

Regulation 9(2) provides that the Board may accept accounts submitted in respect of fees and outlays later than the six months referred to in paragraph (1) if it considers that there is a special reason for late submission. Examples of possible “special reasons” are:-

- (i) lengthy incapacity or death of the nominated solicitor
- (ii) fire or other accidental damage to the solicitor’s premises
- (iii) the work in the proceedings in the court of first instance becomes a matter of appeal and the solicitor cannot release his file for accounting purposes
- (iv) where proceedings deserted *pro loco et tempore* and fresh proceedings brought within 6 months of the desertion the account for the original proceedings to be submitted within 6 months after conclusion of the fresh proceedings. Where no fresh proceedings account to be submitted within 12 months of desertion.

The Board would be unlikely to accept as a “special reason” (a) ignorance of the regulations (b) forgetfulness (c) lack of staff etc.

Submission of accounts under the follow-up duty scheme

The Board will only accept accounts under the follow up duty scheme when the case has finished.

Warrants

(Taxation Guidelines – pages 45/46)

For practical reasons, some years ago we introduced a practice of rejecting accounts where warrants had only just been issued. There was inevitable double handling of accounts in the event that the client got back in touch or was apprehended, requiring further representation. For this reason we suggested that by allowing a period of three months to elapse after the warrant had been issued, the Board could be satisfied that the proceedings were effectively at an end.

The introduction of fixed payments in summary criminal legal aid cases has reduced the problem to the extent that supporting papers do not need to be returned, but has not entirely eliminated the problem of multiple handling. Assessment and payment authorisation is still required more than once.../

once. Unfortunately the fixed payment regime has also created a different problem. Where there is a transfer of solicitor in a fixed payment case the Board requires to prorate the fee element of the account equally between the number of solicitors who have represented the accused. Our records indicate that when the accused is apprehended there are occasions where a transfer of agency is taking place and if the Board was to allow for the submission of the account immediately a warrant was issued, this would inevitably create a situation where the original acting solicitors would be overpaid, creating additional administration for both the Board and the solicitors in recovering the overpaid sums.

In recognising the cashflow problems practitioners can face, but also taking into account the normal practice of contacting a client to advise that a warrant has been granted and seek instructions, the Board has relaxed the time limit on submission of accounts to one month from the date of granting of the warrant in all criminal cases including fixed payment cases.

You can now accept an account on this basis. This is a departure from the Taxation Guidelines.

Deferred sentences

(Taxation Guidelines – page 45)

The background to not accepting accounts where sentences have been deferred for a period of less than six months is similar to warrants and is, essentially, for similar practical reasons. The practice of the courts has increasingly been to defer sentences for shorter periods resulting in several appearances which, in turn, meant that we were receiving, in some cases, up to four or more supplementary accounts. This had a significant impact on resources due to multiple handling of cases.

The present practice whereby we will not consider an account where sentence has been deferred for less than six months will continue in the meantime.

[We are considering this particular matter in greater detail, and are prepared to review this practice in approximately six months time when we will be in a better position to determine the impact on current resources. We feel it is important to maintain our 30-day commitment in criminal cases and improve our turnaround on civil and advice and assistance cases. In addition, we also wish to work on delivering better response times in the handling of mail.]