

The Recorder

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Contents

- Code of Practice
- New Board Members
- Contributions - more time to play
- Guidelines on sanctions
- Forms update
- Fees and Taxation Guidelines

Code of Practice update

Applications deadline

The Code of Practice for solicitors undertaking criminal legal assistance work was published on 1 April, and all firms who intend to carry out criminal work should have a copy of the Code and the relevant application forms.

We are accepting applications for inclusion on the Criminal Legal Assistance Register, and all applications should be with the Board by 31 July to ensure that they will be considered by 1 October when the Code takes effect.

If you would like further information or advice about the Code and registration, contact one of our Compliance Auditors on 0131 226 7061, ext. 215 or 333.

Extra roadshows

We will be holding additional roadshows on the Code of Practice in Hamilton and Dumfries. The Hamilton event will take place on 2 June in court no.2 at Hamilton Sheriff Court between 4.30pm and 6.30pm. The roadshow in Dumfries on 15 June will be part of a seminar for local solicitors entitled Registration for Criminal Practitioners and will be held in the Dumfries Hotel. The seminar runs from 2pm to 5pm, with the section specifically on the Code of Practice from 2pm to 4pm. A buffet lunch will be served from 1pm to 2pm, at a cost of £5.00, and anyone who wants to attend the seminar should contact Graeme Yeoman at Stirling and Gilmour in Clydesdale.

We are also planning a roadshow via video link to the Highlands and Islands communities. We will use video link facilities in local colleges and anyone who would like to take part should contact Kath Cannon at the Board on 0131 226 7061 ext. 387. This event is planned for early to mid June and further details will be available through local faculties.

Time recording

At the roadshows many solicitors have asked about the Code's requirement for adequate time recording. As a result we have developed three sample time sheets which would meet the Code standards and which can be adapted to suit different sizes and types of practice.

These time sheets have been created on Excel and can be used on most Windows-based PCs. Each spreadsheet also includes explanatory notes on how to adapt it to suit your own firm. We would recommend that you read the notes carefully before using the timesheets.

If you would like a copy of the disc containing the time sheets, contact our Communications

Office on ext. 426.

Agents

It will of course be obvious that if a firm uses an agent, that agent must comply with the Code and be registered. This includes agents who never act as the nominated solicitor in a legally aided case and are therefore not included on the Board's mailing list of legal aid practitioners.

Any agents who have not already done so should obtain a copy of the Code and the necessary application forms from the Board's Criminal Legal Assistance Registration Unit (CLARU) at the number on the front page.

Lawyers join the Board

The Secretary of State announced the appointment of three new Board Members - Brian Adair, Derek O'Carroll and Malcolm Thomson, QC. All three took up their posts on 1 April and will serve for an initial four years. They succeed Bob Livingstone, Colin McEachran and Sheila Campbell. Existing Board Members Kay Blair and Sandy Wylie, QC have both been re-appointed to the Board for a further four years.



Brian Adair is a senior partner of Adairs, Solicitors in Dumbarton. He is a Governor of the High School of Glasgow and has been a temporary sheriff since 1995.

Derek O'Carroll is the principal solicitor at Govan Law Centre in Glasgow and is Secretary to the Scottish Association of Law Centres.



Malcolm Thomson, QC specialises in civil law and has been a non-executive director of W Green's Law Publishers since 1976. He has also been the Chairman of an NHS Tribunal and a Trustee of the National Library of Scotland since 1995.

Contributions - more time to pay

The opportunity to pay their contributions over a longer period than the existing ten months would be welcomed by many applicants for civil legal aid. From 1 June 1998 we shall be carrying out a pilot scheme to assess whether this would be viable.

The scope of the pilot

The pilot scheme will involve only the first 400 offers of legal aid made on or after 1 June which are subject to a contribution of £500 or more. Contributions will be payable in monthly instalments on the following scale

- | | |
|---------------------------|----------------|
| • less than £500 | 10 instalments |
| • between £500 and £1,199 | 15 instalments |
| • £1,200 and over | 20 instalments |

Changes in circumstances

If the circumstances of someone within the pilot scheme change so that their contribution increases from between £500 and £1,199 to £1,200 or more, the number of instalments will be raised from 15 to 20.

Someone paying 15 or 20 instalments whose contribution is reduced may continue to pay the revised contribution over the same period, even if the total contribution falls below the £500 threshold.

Application of the threshold

We will not exercise any discretion in applying these thresholds. The pilot scheme will apply only to the first 400 offers of legal aid issued on or after 1 June 1998, where a contribution of £500 or more is payable. We will not extend the scheme to any case where an offer is issued just before the implementation date or after the first 400 cases. The limits of £500 and £1,200 will be strictly applied.

If you would like more information about how the pilot scheme will operate for individual cases, please contact Martyn Strachan in the Civil Applications Division.

Guidelines on sanctions

These guidelines are intended to clarify how we deal with applications for authority to employ counsel or expert witnesses or for work of an unusual nature or likely to involve unusually large expenditure. They describe how an application should be made and what information should be provided in support of it. They also draw attention to some of the factors taken into account in considering whether sanction should be given. It is hoped that the guidelines will result in quicker processing times and will also mean that sanctions will not be subject to inappropriate conditions or cost restrictions.

Authority for guidelines

These guidelines are based on the provisions of the Legal Aid (Scotland) Act 1986 and on the regulations made under that Act. In framing them we have also had regard to judicial opinions in a number of reported cases, e.g. *A.B.-v-Scottish Legal Aid Board* 1991 SCLR 702 (in considering whether to sanction the employment of senior counsel the factors to be taken into account and the weight to be attached to them are entirely matters for the Board); *HMA-v-Gray* 1992 SCCR 883 (obligation on solicitor to obtain comparative estimates for work); and *Venter-v-Scottish Legal Aid Board* 1993 SLT 147 (need for prior Board approval where a motion for an open commission is to be enrolled).

Ambit of guidelines

These guidelines apply to all legal aid types (i.e. civil legal aid, criminal legal aid, legal aid for children needing protection or supervision, and legal aid for contempt of court). The guidelines may also be of some assistance when seeking increased authorised expenditure under advice and assistance for the employment of counsel or an expert.

Method of application

The form SANC/APP must be used in all cases. Use of this form makes it likely that the Board will receive all the basic information and papers needed for a prompt decision, and should avoid the need for a continuation letter. Where sanction is sought as a matter of urgency, the form SANC/APP may be faxed to the Board. In a case of exceptional urgency, application may be made by telephone, promptly followed by submission of a form SANC/APP.

Stage at which application should be made

Application should be made as soon as possible and not left until a proof or other hearing is imminent. In the case of an expert witness, however, the making of a request for sanction should be delayed until it is clear that a specific expertise will be required to advance the case and that a particular expert is available to provide the necessary evidence.

Please remember that, where an increase in authorised expenditure under advice and assistance has been given for a report from an expert, who is to be a witness in the proceedings, an application for sanction should be made once civil legal aid has been granted.

Where the court is to be asked to authorise a course of action which is of an unusual nature or is likely to involve unusually large expenditure, an application for Board approval must be submitted before the court is asked to order the course of action concerned.

Sanction for counsel

Where counsel is requested for any case where a solicitor has the right to appear, we will require to be satisfied that the case is outwith the ordinary capability of a solicitor undertaking cases of that type in the court concerned. An application for sanction should address any special circumstances tending to show a need for counsel, whether these relate to the individual solicitor acting or to the type of case, the issues involved, the parties and witnesses, the importance, novelty or complexity of the case, etc. Sanction for counsel is unlikely to be given merely to accommodate the solicitor's holiday arrangements or where he has taken on more work than he can handle.

Any request for senior counsel will require to show either that the case is of a type where the court would normally expect the party to be represented by senior or that there are exceptional factors pointing to a clear need for the experience and authority of senior. Such factors may relate to the possible consequences for the party or others likely to be affected by any ruling, the gravity of the case, the value of the claim, the complexity of the law applicable, the absence of previous authority or the existence of adverse authority, the difficult nature of the evidence including expert evidence, etc.

The likelihood of an appeal being taken would not necessarily justify sanction for junior counsel in the sheriff court or senior counsel in the Outer House. Any request for sanction for junior counsel to conduct an appeal before the Sheriff Principal or for senior counsel before the Inner House would, of course, be considered on its merits.

A request for junior counsel, whether to support senior or assist leading junior, should fully address the circumstances in which junior is considered necessary. If it is considered that junior is needed because of the volume of papers in the case, there should be an explanation as to why the solicitor cannot be expected to provide any necessary assistance.

In a solemn criminal case in which sanction is sought at the petition stage, we may consider this premature, since the case may eventually proceed as a summary complaint. Any special circumstances justifying the use of counsel at this early stage should be fully explained.

Where counsel may be employed either without our approval or in terms of any approval given, the nominated solicitor may proceed to employ a solicitor-advocate in place of counsel. A solicitor-advocate cannot be employed as such in any court other than the House of Lords, Court of Session or High Court of Justiciary.

Identification of expertise

Care should be taken to identify an expert who is skilled in the specific field in relation to which the expert evidence is required. This is particularly important in medical negligence cases. In all reparation cases, attention should be paid to whether the expert is concerned

with issues relating to liability, causation or quantum. (For further details on the use of experts in reparation cases see our Guidelines on Reparation Cases booklet).

Selection of expert

In choosing an expert regard should be had to his appropriateness for the particular case in question. For example, if the case is fairly routine and unexceptional, there would have to be a very convincing argument for us to authorise the "foremost expert in his field in Europe", if his or her charges were in excess of what would be charged by other experts having sufficient skill to deal with the case.

It will normally be more expensive to employ an expert witness who is based at some distance from the court, compared with an expert in the vicinity of the court. Before authorising the use of a "distant" expert, we must be satisfied that no comparable witness is available in the vicinity of the court. We would normally expect to be provided with estimates of costs from comparable experts and, if the expert proposed is to charge more than any other, a full explanation should be provided.

Regard must also be had to the fact that the cost of using the expert will be met out of public funds. We must be satisfied that it is reasonable in all the circumstances of the case to sanction the expenditure likely to be incurred through the employment of the expert. We will normally expect the assisted person's solicitor to apply the test of whether a litigant in a privately funded case would be likely to incur the cost of employing the witness.

Unusual, or unusually expensive, work

Where the work involves obtaining an order of the court (e.g. for an open commission), the Board's approval should be obtained before the court is asked to consider the matter. The application to the Board should address, in detail, why the work is believed to be essential and should show that you have considered all reasonable alternatives, having due regard to economy and to what a privately funded litigant might reasonably be expected to do in similar circumstances. Full costings should be provided both for the course of action proposed and for possible alternative courses of action.

Extent of authority sought

We do, of course, need to know what exactly it is we are being asked to consider. At the stage of applying for sanction, it may not be necessary to seek, or appropriate for us to give, an open ended sanction. A stage by stage approach may be desirable. In the case of counsel, please make it clear whether counsel is required only for a note, or for a consultation, or to conduct a debate, proof or other hearing. In the case of an expert, please make it clear whether sanction is sought only for a report from the expert and whether this will be based on an examination of papers and records or will involve an examination of the client or a site inspection etc. Please say whether authority is sought to consult with the expert or for the expert to attend court to give evidence.

Breakdown of costs

When applying for sanction of an expert or for work of an unusual nature or likely to involve unusually large expenditure, a full breakdown of the costs likely to be incurred should be provided. There should be a clear statement of what fees are proposed to be charged, including fees for reports, attendance at court and travel time, with a statement of the basis of charge, e.g. an hourly or daily rate. Any outlays likely to be incurred should be specified on an individual basis. Travel costs should include a note of the form of travel to be used. Subsistence and overnight accommodation charges should also be specified. The need for unusual work should be fully explained. If we grant sanction, we may impose a condition that costs may not exceed a specified amount or that specified work may not be carried out.

Supporting papers

If proceedings have already been commenced when sanction is sought, a copy of the initial writ or summons, defences or record should accompany the application for sanction, and attention should be drawn to averments relevant to the application. If a supplementary report is needed, the previous report or reports should be submitted. If other expert reports have already been obtained and have a bearing on the need for further expert opinion, copies of these other reports should be submitted. When lengthy documents are submitted (notes of evidence, judgements, reports, excerpts from textbooks, etc.), relevant passages should be highlighted in some way.

Cases where liability is admitted

In cases where there is a formal admission of liability, it is often argued that sanctions should be automatically granted because the Legal Aid Fund will not suffer any loss at the end of the day. There can be no question of an automatic grant, but an admission of liability will be a factor taken into account. If we are satisfied that damages of at least £10,000 are likely to be recovered, against which any potential loss to the Fund can be clawed back, we will put less emphasis on cost effectiveness. Of course, each case will be considered on its own merits.

Reparation cases

The employment of all expert witnesses must be approved by the Board. However, as a matter of practice, we will grant sanction for the employment of one medical expert and one non-medical expert in a personal injury case without further enquiry where it is made clear that the request for sanction relates to the first or only witness in either category to be employed.

Approval of expert subject to cost limit

When we approve the employment of an expert witness for, or including, a report or other specific work, we will normally impose a limit on the cost to be incurred. Unless a lower or higher amount is shown to be appropriate, we will limit the cost to the sum of £250 exclusive of VAT and reasonable travelling expenses, if appropriate. The solicitor must make the expert fully aware of the limit set by the Board and should point out that, if the cost of the work is going to exceed the limit, an approach will have to be made to the Board for an increased limit to allow the work to continue. Where any limit is not drawn to the expert's attention, we will pay only up to the amount fixed and the solicitor may be personally liable to the expert for any extra costs. (Where an expert has been told a limit has been set on the cost of his work but that limit has been unavoidably exceeded due to circumstances outwith the expert's control, it may still be possible for us to meet the expert's reasonable costs if we are satisfied that it would be appropriate to do so.)

Review of refusal of sanction

There is no statutory provision for an application to the Board to review the refusal of a request for sanction, but we will normally be prepared to re-consider such a refusal, if satisfied there is good reason to do so.

Retrospective approval

We may approve the employment of counsel or expert witnesses retrospectively where we consider that the employment would have been approved and that there was special reason why prior approval was not applied for. (Mere oversight is not normally regarded as amounting to a special reason for not obtaining prior approval.) Please note, however, that we have no power to grant retrospective approval for work of an unusual nature or likely to involve unusually large expenditure.

Forms update

Templates

Since the Board issued electronic templates for legal aid forms just over a year ago, many of the forms have been amended and we are now in the process of updating the templates. We hope to be able to produce the templates in a format which will allow them to be used on any Windows-based system.

In the meantime, solicitors can continue to use the existing templates with the exception of the CIV/SU2 form and the forms relating to applications by or on behalf of children. These forms have been substantially amended since the templates were issued and we will not accept applications using these templates.

We hope to have the new templates within the next few months and we will notify all firms when they are available. If you have any further questions about the templates, please contact our Communications Office on ext. 342.

Notice to opponent in civil cases

We have updated the notice to opponent in a legal aid application (CIV/ INTDOC) to make it easier to use. The new form is now double-sided so the applicant's statement detailing the nature of the case and their involvement in it should be attached to the form when it is sent to the Board.

This new form is now available from our printers George Stewart and Co. Ltd., instead of from the Board. You can contact Stewarts on: telephone 0131 659 6010 or fax 0131 652 1348.

New Criminal Fees and Taxation Guidelines

The Board published updated Criminal Fees and Taxation Guidelines in March and a complimentary copy was sent to all solicitors' firms in Scotland. Additional copies are available at a cost of £2.00 from George Stewart and Co. Ltd. Cheques, made payable to George Stewart and Co. Ltd., should be sent to the company at Meadowbank Works, 67 Marionville Road, Edinburgh EH7 6AJ. (Telephone - 0131 659 6010)

These Guidelines take effect immediately and supersede the section on criminal cases in the Legal Aid Fees and Taxation Guidelines published in 1994. However the 1994 Guidelines are still relevant for guidance on advice and assistance and civil cases. Copies of the 1994 Guidelines are available at a cost of £2.75 from Ritchies of Edinburgh, 163 Bonnington Road, Edinburgh EH6 5RE. (Telephone - 0131