



law n. rule or body of rules
in a community and
prohibiting certain activities
social system or branch of
legal profession; colloq
courts, judicial remedy
invariable sequence betw
conditions and phenom
abiding obedient to the
court court of law; Law Co

Codes of Conduct

Code of Conduct for Scottish Solicitors
and Code of Conduct for Criminal Work

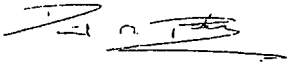
President's Foreword

Following circulation of the updated Code of Conduct in January 2000, there have been some further modest amendments to the Code. In particular I would draw your attention to the revised wording of Article 5(e) on information to be given to clients. The Council have also completed the revival of the Code of Conduct for Criminal Work which was published on the Society's website in October (www.lawsoc.org.uk).

The Council feel that it is now appropriate to re-print both Codes of Conduct in full so that Members have the most up-to-date version readily available.

As stated in its Introduction the Code is a statement of the basic principles which form the foundation of the Solicitor Profession. It is different from the detailed Practice Rules which are binding on solicitors and which have the force of subordinate legislation. The two Codes are statements of good practice. Solicitors should exercise professional judgement in the circumstances of each case. In the event of a complaint being made, a departure from the standards set in the Codes would have to be justified by reference to exceptional circumstances in the particular case.

I commend the two Codes to you in their revised form.

A handwritten signature in black ink, appearing to read 'David Preston', with a horizontal line underneath.

David Preston

The President

June 2002

Code of Conduct

Introduction

In common with lawyers in most parts of the world, solicitors in Scotland have always been expected, by the general public and by their professional colleagues and others, to observe certain standards of professional conduct. The standards are required in order to establish the essential relationship of trust between lawyer and client, between lawyer and court, and between lawyer and other members of the legal profession.

All solicitors in Scotland require to be members of the Law Society of Scotland and for many years specific practice rules have been promulgated by the Society as a self-regulatory organisation for solicitors. Some of these rules have been included in Acts of Parliament and the Society's authority for promulgating additional practice rules comes from Parliament itself and the rules are subject to the consent of the Lord President of the Court of Session. These rules are binding upon solicitors. They stem from and have the force of statutory authority.

The Law of Scotland was and is founded upon principles which have the same validity and authority as Acts of Parliament. In the same way, in addition to the written rules governing solicitors in Scotland, there are other commonly accepted standards of conduct which solicitors are expected to meet.

The CCBE (Conseil des Barreaux de la Communauté Européenne), comprising representatives of all the governing bodies of lawyers in the European Community, adopted in 1988 a Code of Conduct for lawyers within the community which governs conduct of lawyers in relation to activities crossing over from one country to another.

In addition, the CCBE Code is to be taken into account in all revisions of national rules with a view to the progressive harmonisation of codes and regulations governing lawyers within the European Community.

All the standards of professional conduct, whether contained in Acts of Parliament or in practice rules (written or unwritten) which are binding upon solicitors in Scotland are based upon certain values and principles which form the foundation of the profession and reflect the legal, moral and professional obligations of the solicitor to:

1. the clients;
2. the courts and other authorities before whom a lawyer pleads his client's cause or acts on his behalf;
3. the public; and
4. the legal profession in general and each fellow member of it in particular.

Should any solicitor transgress any of these rules, then such transgression may give rise to disciplinary proceedings and amount to professional misconduct or some lesser finding.

The following Code contains a statement of the basic values and principles which form the foundation of the solicitor profession. It is not intended to be an

exhaustive list of all the detailed practice rules and detailed obligations of solicitors, but it is the foundation for those rules and may be referred to for guidance in assessing whether or not a solicitor's conduct meets the standard required of a member of the profession.

Code of Conduct for Solicitors holding Practising Certificates issued by the Law Society of Scotland

a. The function of the lawyer in society

In a society founded on respect for the rule of law lawyers fulfil a special role. Their duties do not begin and end with the faithful performance of what they are instructed to do so far as the law permits. Lawyers must serve the interests of justice as well as those whose rights and liberties they are trusted to assert and defend and it is their duty not only to plead their clients' cause but also to be their adviser.

The function of lawyers therefore imposes on them a variety of legal and moral obligations (sometimes appearing to be in conflict with each other) towards:

1. the clients;
2. the courts and other authorities before whom the lawyers plead their clients' cause or act on their behalf;
3. the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society.
4. the legal profession in general and each fellow member of it in particular.

b. The nature of rules of professional conduct

Rules of professional conduct are designed to ensure the proper performance by the lawyer of a function which is recognised as essential in all civilised societies. The failure of the lawyer to observe these rules must in the last resort result in a disciplinary sanction. The willing acceptance of those rules and of the need for disciplinary sanction ensures the highest possible standards.

The particular rules of all the Bar Associations and Law Societies in the European Community are based on identical values and in most cases demonstrate a common foundation which is also reflected in Bar Associations and Law Societies throughout the world.

THE CODE

1. Independence

Independence is essential to the function of solicitors in their relationships with all parties and it is the duty of all solicitors that they do not allow their independence to be impaired irrespective of whether or not the matter in which they are acting involves litigation.

Independence means that solicitors must not allow themselves to be restricted in their acting on behalf of or in giving advice to their clients, nor must they allow themselves to be influenced by motives inconsistent with the principles of this Code. For example, solicitors must not compromise their professional standards in order to promote their own interests or the interests of parties other than their clients. Advice must not be given simply to ingratiate solicitors with their clients, courts or third parties. Non-independent advice may be worse than useless in that it may actively encourage someone to undertake a course of action which is not in his or her best interests.

When representing clients in court solicitors appear as agents and speak for their clients, but this does not mean that they are permitted to put forward statements or arguments which they know to be untruthful or misleading. Similarly, in relation to other services solicitors, although acting as agents, must remain independent for their advice and actings to be of value.

2. The interests of the client

Solicitors must always act in the best interests of their clients subject to preserving their independence as solicitors and to the due observance of the law, professional practice rules and the principles of good professional conduct. Solicitors must not permit their own personal interests or those of the legal profession in general to influence their actings on behalf of clients; further, their actings must be free of all political considerations.

Solicitors in advising clients must not allow their advice to be influenced by the fact that a particular course of action would result in the solicitor being able to charge a higher fee. Solicitors are not permitted to buy or pay for business introductions, although commission may be paid to a fellow lawyer.

Solicitors should not allow themselves to be persuaded by clients to pursue matters or courses of action which the solicitors consider not to be in the clients' interests. It may be appropriate for solicitors to refuse to act where clients are not prepared to follow the advice given.

Where solicitors are consulted about matters in which they have a personal or a financial interest the position should be made clear to the clients and where appropriate solicitors should insist that the clients consult other solicitors. For example, neither a solicitor, nor a partner of that solicitor, is generally permitted to prepare a will for a client where the solicitor is to receive a significant legacy or share of the estate.

Solicitors are the agents of their clients and as such are not permitted to conceal any profit deriving from their actings for clients and must make known to their clients the source of any commission so arising.

3. Conflict

Solicitors (including firms of solicitors) shall not act for two or more clients in matters where there is a conflict of interest between the clients or for any client where there is a conflict between the interest of the client and that of the solicitor or the solicitor's firm.

In considering whether or not to accept instructions from more than one party and where there is potential for a conflict arising at a later date, solicitors must have regard to any possible risk of breaches of confidentiality and impairment of independence. If, having decided to proceed, a conflict should later arise solicitors must not continue to act for all the parties and in most cases they will require to withdraw from acting for all of the parties. There may, however, be certain circumstances which would result in a significant disadvantage to one party were the solicitor not to continue to act for that party and there is no danger of any breach of confidentiality in relation to the other party. In these very special cases, the solicitor may continue to act for one party.

Solicitors must accept instructions only from clients or recognised agents authorised to give instructions on behalf of the clients; for example, persons authorised by a power of attorney or another lawyer. Where a solicitor is requested to act for more than one party in respect of the same matter, the solicitor must be reasonably satisfied that there is no apparent conflict among the interests of all the parties and that each party is indeed authorising the solicitor to act.

4. Confidentiality

The observance of client confidentiality is a fundamental duty of solicitors.

This duty applies not only to the solicitors but also to their partners and staff, and the obligation is not terminated by the passage of time. This principle is so important that it is recognised by the courts as being essential to the administration of justice and to the relationship of trust which must exist between solicitor and client. Only in special circumstances may a court require a solicitor to break the obligation of confidentiality.

5. Provision of a professional service

Solicitors must provide adequate professional services.

Solicitors are under a professional obligation to provide adequate professional services to their clients. An adequate professional service requires the legal knowledge, skill, thoroughness and preparation necessary to the matter in hand. Solicitors should not accept instructions unless they can adequately discharge these. This means that as well as being liable for damages assessable by a court of law for any act of negligence in dealing with a client's affairs, a solicitor may face sanctions by the Law Society in respect of a service to a client which is held to be an inadequate professional service.

(a) *Solicitors must act on the basis of their clients' proper instructions or on the instructions of another solicitor who acts for the client.*

Solicitors act as the agents of the clients and must have the authority of the clients for their actions.

A client may withdraw authority at any time by giving due notification to the solicitor. However, such withdrawal cannot act retrospectively.

Solicitors require to discuss with and advise their clients on the objectives of the work carried out on behalf of the clients and the means by which the objectives are to be pursued. Acceptance of instructions from clients does not constitute an endorsement or approval of the clients' political, social or moral views, activities or motivations. With the agreement of the client a solicitor may restrict the objectives and the steps to be taken consistent with the provision of an adequate professional service. A solicitor may not accept an improper instruction; for example, to assist a client in a matter which the solicitor knows to be criminal or fraudulent, but a solicitor may advise on the legal consequences of any proposed course of conduct or assist a client in determining the validity, scope or application of the law.

Solicitors are free to refuse to undertake instructions, but once acting should withdraw from a case or transaction only for good cause and where possible in such a manner that the clients' interests are not adversely affected. This obligation will not, however, prevent solicitors from exercising their rights at law to recover their justified fees and outlays incurred on behalf of their clients.

(b) *A solicitor shall act only in those matters where the solicitor is competent to do so.*

Where a solicitor considers that the service to a client would be inadequate owing to the solicitor's lack of knowledge or experience it would be improper for the solicitor to accept instructions and agree to act.

(c) *Solicitors shall accept instructions only where the matter can be carried out with due expedition and solicitors shall maintain appropriate systems in order to ensure that the matter is dealt with effectively.*

Where a solicitor considers, for example, that the service to a client would be inadequate, owing to pressure of work or the like so that the matter would not be dealt with within a reasonable period of time, it would be improper for the solicitor to accept instructions and agree to act.

(d) *Solicitors are required to exercise the level of skill appropriate to the matter.* In deciding whether or not to accept instructions from a client, and in the carrying out of those instructions, a solicitor must have regard to the nature and complexity of the matter in hand and apply to the work the appropriate level of professional skills.

(e) *Solicitors shall communicate effectively with their clients and others.*

Solicitors shall provide to their clients in writing at the earliest practical opportunity information in relation to:

1. The work to be carried out by the solicitor;
2. The fees and outgoings to be charged by the solicitor or basis upon which such fees and outgoings are to be charged, such as the hourly rate to be charged. If the basis is Legal Advice and Assistance or Legal Aid, the contribution payable (if any) and the consequences of preserving or recovering property should be referred to as should a legally aided client's liability for the expenses of his/her opponent;

3. The identity of the person or persons by whom the work will be carried out;
4. The identity of the person to whom the client should refer in the event of there being any dissatisfaction in relation to the work;

unless in exceptional circumstances it is considered inappropriate to do so. Clients who provide a regular flow of instruction of the same type of business and subject matter should receive such a communication whenever the terms previously communicated are amended.

Solicitors are required to try to ensure that their communications with their clients and others on behalf of their clients are effective. This includes providing clients with relevant information regarding the matter in hand and the actions taken on their behalf.

Solicitors should advise their clients of any significant development in relation to their case or transaction and explain matters to the extent reasonably necessary to permit informed decisions by clients regarding the instructions which require to be given by them. Information should be clear and comprehensive and where necessary or appropriate confirmed in writing. In particular solicitors should advise clients in writing when it becomes known that the cost of work will materially exceed any estimate that has been given and should also advise the client when the limit of the original estimate provided is being approached. The duty to communicate effectively extends to include the obligation on solicitors to account to their clients in respect of all relevant monies passing through the solicitor's hands.

(f) *Solicitors shall not act, nor shall they cease to act for clients summarily or without just cause, in a manner which would prejudice the course of justice.*

Where the matter in issue involves the courts or otherwise involves the administration of justice, a solicitor must have regard to the course of justice in considering whether or not to cease acting on behalf of a client. The solicitor may not simply and suddenly decide that it would no longer be appropriate to act for the client.

(g) *Solicitors shall comply with the specific rules issued from time to time by the Law Society of Scotland.*

Subject to the consent of the Lord President of the Court of Session the Law Society is empowered to issue specific practice rules regarding the conduct of solicitors and other matters affecting the affairs of clients. All solicitors must comply with these rules.

6. Professional fees

The fees charged by solicitors shall be fair and reasonable in all the circumstances.

Factors to be considered in relation to the reasonableness of the fee include:

- (a) the importance of the matter to the client;
- (b) the amount or value of any money, property or transaction involved;

- (c) the complexity of the matter or the difficulty or novelty of the question raised;
- (d) the skill, labour, specialised knowledge and responsibility involved on the part of the solicitor;
- (e) the time expended;
- (f) the length, number and importance of any documents or other papers prepared or perused; and
- (g) the place where and the circumstances in which the services or any part thereof are rendered and the degree of urgency involved.

7. Trust and personal integrity

Solicitors must act honestly at all times and in such a way as to put their personal integrity beyond question.

Solicitors' actions and personal behaviour must be consistent with the need for mutual trust and confidence among clients, the courts, the public and fellow lawyers. For example, solicitors must observe the Accounts Rules which govern the manner in which clients' funds may be held by solicitors and which are designed to ensure that clients' monies are safeguarded. Solicitors who are dishonest in a matter not directly affecting their clients are nonetheless guilty of professional misconduct.

8. Relations with the courts

Solicitors must never knowingly give false or misleading information to the court and must maintain due respect and courtesy towards the court while honourably pursuing the interests of their clients.

For example, it would be improper for a solicitor to put forward on behalf of a client a statement of events or a legal argument which the solicitor knew to be false or misleading. Accordingly, if a client requests a solicitor to put forward a false story the solicitor must refuse to do so.

In the course of investigation a solicitor must not do or say anything which could affect evidence or induce a witness, a party to an action, or an accused person to do otherwise than give in evidence a truthful and honest statement of that person's recollections.

9. Relations between lawyers

Solicitors shall not knowingly mislead colleagues or where they have given their word go back on it.

A solicitor must act with fellow solicitors in a manner consistent with persons having mutual trust and confidence in each other.

It is in the public interest and for the benefit of clients and the administration of justice that there be a corporate professional spirit based upon relationships of trust and co-operation between solicitors. For example, the settlement of property transactions in Scotland is facilitated by the underlying trust between solicitors. A

specific example of this is the payment of the price by a cheque drawn by the purchaser's solicitor on a joint stock bank in favour of the seller's solicitor. Were the purchaser's solicitor to instruct the bank to stop payment of the cheque such action could amount to professional misconduct.

It is not permissible for a solicitor to communicate about any item of business with a person whom the solicitor knows to be represented by another solicitor. A solicitor in such circumstances must always communicate with the solicitor acting for that person and not go behind the solicitor's back.

The rules governing the advertising of solicitors' services take into account the need to maintain mutual trust and confidence, while permitting solicitors to market their services effectively and to compete with one another.

10. Civic professionalism

Solicitors have a duty not only to act as guardians of national liberties, but also to seek improvements in the law and the legal system.

It is the striving by solicitors for improvement both in general terms and in relation to the individual needs of a particular client that prevents the law and legal services "from degenerating into a trade or mere mechanical act" (Lord Cooper, Selected Papers, Edinburgh 1957, p. 77). Many solicitors fulfil this obligation through working on the many committees of the Law Society of Scotland, including those not only commenting and advising on proposed legislative changes and areas of law reform but also recommending and promoting new ideas for reform. Others are involved at the highest level with other reforming bodies and many seek public appointment, both locally and at a national level.

This duty extends beyond the issues of freedom and liberty, through the entire system of law, to the day-to-day legal services provided by solicitors.

11. Discrimination

Solicitors must not discriminate on grounds of race, sex, sexual orientation, religion or disability in their professional dealings with clients, employees or other lawyers.

Legislation already provides that it is unlawful to discriminate against individuals either directly or indirectly in respect of their race, sex or marital status. However, solicitors should be prepared to observe not only the letter but also the spirit of the anti-discrimination legislation in dealings with clients, employees and others. In particular, solicitors should ensure that within their own firms, there is no discrimination in employment policy and that opportunities for promotion and advancement are open on an equal basis to all employees. In addition, solicitors should give active consideration to opportunities for the disabled.

Code of Conduct for Criminal Work

The following Code contains a statement of good practice for those solicitors conducting criminal work. It does not have the status of a Practice Rule but may be referred to for guidance in assessing whether a solicitor's conduct meets the standard required of a member of the profession.

1. Seeking Business

A solicitor shall seek or accept only those instructions which emanate from the client properly given and should not accept instructions given as a result of an inducement or subject to any improper constraint or condition.

GUIDANCE NOTE

This Statement of good practice is a reminder that a solicitor is an officer of the court and as such has obligations and duties to the Court. It is a reminder that a solicitor should always act properly when dealing with criminal law work.

It is essential that a solicitor should at all times remain independent of the client and that the solicitor should be free to give appropriate legal advice. Accordingly no instructions should be accepted in circumstances where it could be alleged that inducements have been offered in exchange for instructions. No instructions should be accepted in circumstances where those instructions are subject for whatever reason to restrictions or constraints which compromise the solicitors freedom to give appropriate independent legal advice. It follows that a client should not be considered as a "friend" and that the solicitor must always remain "at arm's length" from the client. This will ensure that both the client and the court can be confident that the advice tendered by the solicitor is impartial and independent.

A solicitor should accept instructions only from the client directly and not from a third party on behalf of the client. There may be circumstances in which a solicitor is asked by the family or a friend of the accused person to visit the accused in custody. It is the duty of every solicitor to check with the police station to ascertain if the person in custody has requested another solicitor or the duty solicitor. If the person in custody has indeed requested the services of another solicitor or the duty solicitor, then the solicitor contacted by the family or friend may not visit the police station.

Moreover, instructions must come directly from the person detained and not by virtue of the police arranging for a specific solicitor to be contacted who is unknown to and has not been requested by the accused.

Any instructions given as a result of an inducement by a third party on the solicitor's behalf must not be accepted. A solicitor will be deemed to be strictly liable for the actions of third parties who contact potential clients and any third party who contacts potential clients shall be deemed to have acted on the instructions of the solicitor whether or not the solicitor is instructed as a result of the third party's approach. If the client's co-accused is instructing a solicitor contact must be made through that solicitor. All reasonable steps must be taken to ascertain the identity of the co-accused's solicitor.

Solicitors are reminded of the terms of Section 31 of Legal Aid (Scotland) Act 1986. Any contract of agency between a solicitor and a client which is based upon any inducement may be illegal and may be subject to action in the criminal or civil courts. Such contracts may also form the basis of a complaint of professional misconduct and may lead to disqualification in terms of Section 31.

2. Conflict of Interest

A solicitor should not accept instructions from more than one accused in the same matter.

GUIDANCE NOTE

This Statement reflects the awareness which solicitors have always had of the obvious potential conflict of interest that will arise when instructions are accepted from more than one accused person in the same case, even though that conflict may not arise and the defence is common to all accused. Nevertheless, solicitors should not place themselves in the position whereby they may obtain information confidential to the defence of one accused which at the same time may be detrimental to the defence of another.

Accordingly when it becomes apparent to the solicitor that he has received instructions from two or more parties in the same case a solicitor may accept instructions from one of the accused and any others must be told immediately that separate representation must be sought.

Solicitors are also reminded that great care must be taken in situations where one of the solicitor's clients gives evidence against another client of that solicitor. The client, who is acting as a witness, is entitled to have his confidentiality respected as against the interests of the accused. In some situations, such as where the accused is incriminating or attacking the character of the client, who is a witness, there will be a conflict of interest and the solicitor should not act.

A solicitor should not apply for a Legal Aid Certificate for more than one accused person in any matter. However, a duty solicitor should responsibly carry out his duties under the Legal Aid scheme and be aware of the terms of this statement.

A solicitor may suggest that an accused seeks representation from a particular solicitor but that alternative solicitor must be based within the same jurisdiction as the accused. However the choice of a solicitor always lies with the accused person and a solicitor must always ask an accused if he wishes a particular solicitor to be instructed before a recommendation can be made.

3. Preparation and Conduct of Criminal Cases

A solicitor is under a duty to prepare and conduct criminal cases by carrying out work which is actually and reasonably necessary and having due regard to economy.

GUIDANCE NOTE

It is essential at each stage of the conduct of a criminal case that the necessary preparation is undertaken timeously. It is essential that a solicitor should use his

best endeavours to discover all relevant information and evidence relating both to the Crown case and any substantive case for the defence.

The solicitor must remember that his primary duties are to the client and the court and ensure that the case is properly prepared and there is no prejudice to the client.

Every solicitor should carry out these duties in a responsible and professional manner. With these duties uppermost in mind, the solicitor must not view criminal cases only as a means of financial enrichment.

For the purposes of cases which are legally aided, this statement is declaratory of Regulation 7(1) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989. Regulation 7(1) states that “subject to the provisions of Regulations 4, 5, 6 and 9 and paragraph (2) of this Regulation, a solicitor shall 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, due regard being had to economy”.

When requested, files and information should be provided to the Scottish Legal Aid Board.

Abuse of the Legal Aid system may be fraudulent and may be considered as professional misconduct and may lead to disqualification under Section 31 of the Legal Aid (Scotland) Act 1986.

Any complaints can be dealt with in terms of Section 31 of the Legal Aid (Scotland) Act 1986.

4. Identification of Solicitors

A solicitor who seeks access to any party who is in custody should have in his possession a form of identification provided by the Law Society of Scotland and should exhibit this upon request.

GUIDANCE NOTE

This Statement is designed to prohibit unqualified employees or individuals from attending meetings with persons in custody. It will ensure not only that impersonation of solicitors or trainees is made more difficult but also that only those persons qualified to provide independent legal advice are granted access. Acceptable forms of confirmation of identity include the production of a valid identification card issued by the Law Society of Scotland; of a valid CCBE card provided by the Law Society of Scotland or of a valid and current practising certificate together with a form of visual identification.

5. Custody Visits

Only a solicitor or trainee solicitor who has been instructed to do so may visit the client in custody.

GUIDANCE NOTE

This Statement restricts access to a person in custody in a police office, prison and cell area.

There are occasions when a solicitor has taken instructions from the family or friend of an accused and has then visited a person in custody. It is the duty of every solicitor to check with the police station to ascertain if the person in custody has requested another solicitor or duty solicitor. If the person in custody has indeed requested the services of another solicitor or the duty solicitor, then the solicitor contacted by the family or friend may not visit the police station.

Moreover, instructions must come directly from the person detained and not by virtue of the police arranging for a specific solicitor to be contacted who is unknown to and has not been requested by the accused.

6. Property to Persons in Custody

A business card and legal documents should be the only items given by a solicitor to a person in custody.

GUIDANCE NOTE

It has become apparent that certain solicitors have attended to the so called “needs” of their clients in custody by providing them with cigarettes, newspapers, meals, access to the solicitor’s mobile phone and money. Actings of this sort may be a contravention of Section 41(1) of the Prisons (Scotland) Act 1989 which forbids certain forms of donation. In addition, this statement shall include the giving to family or friends of the person in custody any items for onward transmission.

7. Legal Aid Mandates

All legal aid mandates requesting the transfer of papers and legal aid relating to a criminal matter shall be completed and executed by the assisted person in the form agreed by the Scottish Legal Aid Board and the Law Society of Scotland.

GUIDANCE NOTE

The matter is governed by the Criminal Legal Aid (Scotland) Regulations 1996, paragraph 17(3), which states “where an assisted person desires that a solicitor, other than the solicitor presently nominated by him shall act for him, he shall apply to the Board for authority to nominate another specified solicitor to act for him and shall inform the Board of the reason for his application; and the Board, if it is satisfied that there is good reason for the application, may grant the application”.

It seems clear from a plain construction of this Regulation that changes of agency where the client is legally aided in a criminal case can only take place if the Board gives the client authority to nominate another specified solicitor. Until the Board gives its authority the client cannot instruct another solicitor unless he wishes to do so without the benefit of legal aid, which fact should be notified to the Board.

Therefore the chronology of transfers of agency in criminal cases should be (1) the client approaches his proposed new solicitor to ascertain if he is willing to act; (2) client applies to Board for authority to transfer the agency; (3) Board grants authority; (4) client instructs new solicitor; (5) new solicitor serves mandate on previous solicitor.

The Board's authority to transfer must ante-date any mandate.

The Statement would solve many issues including inducements to transfer agency and "mandate wars". Adoption of this interpretation would of course mean that legally aided clients and fee paying clients will not be treated precisely equally. However, that objection has to be seen in the light of the need to comply with the Regulations which effectively impose a statutory suspensive condition on any mandate and the requirement that solicitors will require to inform a transferring client that instructions cannot be accepted until the Regulations are complied with.

Any complaints about conduct under this section can be dealt with in terms of section 31 of the Legal Aid (Scotland) Act 1986.

8. Consultation with clients at liberty

A solicitor should not consult with a client, who is at liberty unless the consultation takes place in (1) the solicitor's office; (2) a court; (3) a hospital; or (4) the locus; a solicitor may exceptionally attend the house of a client who is unable to attend the solicitor's office due to illness.

GUIDANCE NOTE

The solicitor should not visit a client within his home unless it is impossible for the client to attend the offices of the solicitor through ill health.

A solicitor leaves himself open to various allegations and indeed risks if he should attend at the home of a client. All solicitors should be aware that there is a risk. For example a solicitor could be within a house which contains drugs or stolen goods.

It will not always be possible to consult with an accused within a solicitor's own office. However, such consultations should take place within a similar office environment, such as the interview rooms within a Court building. However, it is accepted that there will be occasions when it is not possible or appropriate to interview a client within an office environment, for example when the client is in hospital. The onus is on a solicitor to justify an interview at any other place if called upon to do so. The geography and rural nature of Scotland will be taken into account.

9. Expenses

No payments in money or kind should be made to an accused person, a member of the accused person's family or potential witnesses.

GUIDANCE NOTE

The only payments which a solicitor is entitled to make to an accused person, to members of his family or to witnesses are the legitimate expenses paid to witnesses who were cited to appear at Court on behalf of the defence. It is appropriate for a solicitor to advance travel vouchers to a witness who shall be travelling a significant distance.

Any payment of expenses made by a solicitor should be properly recorded and vouched.

10. Defence Witnesses

Only those witnesses relevant to a case should be cited to attend court.

GUIDANCE NOTE

Ideally, a witness should be interviewed before citation. A solicitor must take all reasonable steps to obtain directly from a witness the potential evidence in a case. It is accepted that this is not always possible and indeed a solicitor could leave himself open to criticism and complaint if he should not cite a witness when he has been specifically instructed to do so by an accused person. Nevertheless, a solicitor must at all times be in a position to justify the citation of all witnesses in a case.

Defence witnesses should be cited sufficiently far in advance of the Trial Diet to give them adequate warning of the requirement to attend court. Where possible, witnesses should be cited prior to the Intermediate Diet in order to ascertain at that stage whether there is any difficulty about the defence witnesses attendance at court for the Trial Diet. Common courtesy demands that defence witnesses should be given adequate notice of their requirement to attend court as witnesses.

In providing a citation, a solicitor should advise the witness of their right to claim legitimate expenses. These include travelling to and from Court. Neither witnesses nor indeed an accused person should be transported to Court by a solicitor.

In recent times it has been suggested that some persons with no involvement in a case have been cited to attend court only to provide these persons with expenses. Additionally, it has been asserted that parties have been brought to Court from custody, who have no relevance whatsoever to the case but who are cited simply to allow them to meet other prisoners at Court. Such actions cannot be tolerated.

Solicitors should make a point of speaking to defence witnesses at court in order, as a matter of courtesy, to advise them of the court procedure and the likely timetabling for the case in respect of which they have been cited.

Solicitors should advise their clients that they as professional persons ultimately take the decision as to which defence witnesses require to be cited. Solicitors are the judges of whether or not a particular witness's evidence is relevant. In addition, solicitors should ensure that legitimate expenses claimed by defence witnesses are paid promptly. Witnesses of course require to be advised that any claim for expenses require to be properly vouched.

A solicitor should keep a contemporaneous record of his actings and financial dealings in terms of this Code and provide this if so requested by the Law Society of Scotland.

11. Sensitive material and the client

11.1 A solicitor should not show a client sensitive material related to his case at all, other than in circumstances where the solicitor is present and it is possible to exercise adequate supervision to prevent the client retaining possession of the material or making a copy of it.

11.2 A solicitor should not give a client for retention by him, even on a temporary basis, copies of witness precognitions; witness statements; productions or like

documents relating to his case, unless there are exceptional circumstances justifying such a course in a particular case. If the solicitor believes that such exceptional circumstances exist he should, when giving the items to the client, explain that the items must be retained securely by the client; must be kept confidential; must not be shown to others, let alone released to others; must not be copied and must be returned to the solicitor by a fixed date, which must be as soon as possible having regard to the circumstances justifying giving the items to the client in the first place.

11.3 “Sensitive material” for the purposes of Article 11.1 above includes:—

- (a) a precognition or statement of a victim of a sexual offence;*
- (b) a photograph or pseudo photograph of any such victim or a deceased victim;*
- (c) a medical or other report or statement relating to the physical condition of any such victim or a deceased victim;*
- (d) any document, other than a document served on the client by the Crown or by a co-accused, containing the addresses or telephone numbers of witnesses or their relative/friends or information from which their addresses and telephone numbers could be deduced.*

GUIDANCE NOTE

From time to time the Society has been asked to give its views of the practice of giving to accused persons copies of the precognitions or statements of witnesses and of other documents associated with the accused’s case.

In the vast majority of criminal cases the accused is in receipt of Legal Aid and it has been judicially declared that the accused has no proprietary claim on the case papers. These belong to the solicitor. Where solicitors have sought to justify the practice of giving copies of precognitions and other documents to an accused, they have usually done so by seeking to rely on the duty which a solicitor has to communicate information to a client and thereafter to take instructions in respect of that information.

The view of the Society is that a solicitor should not give copies of precognitions/statements or documents to an accused, unless there are exceptional circumstances justifying a departure from this general practice. Exceptional circumstances might include a case of particular length or complexity, necessitating giving the accused copies of documents to allow the formulation of a response. Even in this situation, the solicitor should only allow the client limited controlled access on the clear understanding that the client must keep the documents confidential and as to how long they may be kept.

In the view of the Society, under no circumstances should a client ever be given possession of sensitive documents such as precognitions and statements of victims in sexual cases, medical or post mortem reports, explicit photographs, or any documents which might disclose the private address or telephone numbers of witnesses.

There are unfortunate and worrying examples of problems which can arise if the guidelines are not observed: e.g. copies of witness statements could be circulated in the public domain, leading to witnesses being intimidated; the

statements of victims of sexual crimes could be used as a form of pornography within prison; and extract from a firearms register complete with addresses and types of weapon has been circulated in a prison.

In addition, those solicitors who observe best practice find themselves coming under pressure from clients who indicate that instructions will be withdrawn if they are not provided with copy precognitions.

12. Retention of Papers

12.1 In general terms, the solicitor should be aware of the general guidelines on retention and destruction of papers as issued from time to time by the Law Society of Scotland.

12.2 In murder cases and other cases involving life imprisonment, the papers should be retained indefinitely.

12.3 In other Solemn and in any Summary case, the papers should be retained for 3 years.

As a general rule, a solicitor might regard it as good practice in every case to retain indefinitely a copy of the Complaint or Indictment and a copy of the Legal Aid Certificate.

GUIDANCE NOTE

Another issue associated with case papers is the question of the length of time such papers should be retained once a case has been concluded and how such papers should ultimately be destroyed if at all.

The options for retention are —

- (1) indefinitely;
- (2) destruction after a fixed period;
- (3) destruction at the discretion of the solicitor; or
- (4) a combination of the above, depending on the nature of the case and the likelihood or risk that reference to the original case papers will be necessary.

The Society is conscious of the consequences of recommending retention of too many papers for too long, having regard to the difficulties of office storage and the expense of “off-site” storage. On the other hand, certain types of cases involve offences of such gravity, complexity or high public profile, that the possibility of issues arising in future years is a real one. Solicitors should be aware of the existence of the Scottish Criminal Cases Review Commission and for the need to retain files where solicitors believe that there is a possibility that it will be of future importance to the client. Other offences may have sentence implications in the short to mid-term: e.g. petitions for restoration of a driving licence after disqualification; reimposing the unexpired portion of a sentence after re-offending. Solemn cases might be expected to throw up more difficulties than Summary. In legally aided cases, solicitors are reminded that in terms of the Code of Practice in relation to Criminal Legal Assistance, issued by the Scottish Legal Aid Board, records shall be maintained and accessible for a period 3 years from the date of payment of the relevant account by the Board.

Destruction of case papers

Solicitors should note that when case papers are being destroyed, it is vital that this is done in a comprehensive, secure and confidential way. If the solicitor does not destroy the papers personally, then they should be destroyed by a suitably qualified commercial firm.

13. Precognition of Witnesses

When carrying out precognition of witnesses, whether personally, through directly employed staff, or through external precognition agents, the nominated solicitor or instructing solicitor has responsibility for the manner in which contact is made with the witnesses and the manner in which the witnesses are actually precognosed. In particular, it is the duty of the solicitor to ensure that any matters associated with the witness of which he is aware which would affect the taking of the precognition or the mode of contact, such as age, disability or other vulnerable status, are taken into account by him and communicated to any precognition agent.

GUIDANCE NOTE

When precognosing witnesses, a solicitor has responsibility to ensure that this is done in a way which is as sympathetic as possible to the needs of the witness. A solicitor does not discharge this responsibility simply by passing to a precognition agent a copy of the list of witnesses and asking the precognition agent to commence precognosing them. Where a solicitor is aware of information about witnesses which would affect the way in which they ought to be contacted or the way in which they should be precognosed, such as that they are children, that they are disabled in some way or anything else, the solicitor has a duty to ensure that the precognition agent is equipped with enough information about the case to carry out the precognition work properly. A solicitor who fails to ensure that the precognition agent is aware of such sensitive information which is known to the solicitor does not thereafter avoid responsibility for distress or inconvenience etc. which is caused to the witness by a failure to observe the particular characteristics of the witness.

Every witness should be contacted in writing by the solicitor in advance with effective information about the process of precognition. This should include information about to whom to complain, if things are perceived to go wrong. There should be no “cold calling”.

Notice should be given as to who will take the precognition and due regard should be had to the venue and timing for the convenience of the witness.

It should be pointed out that the witness may have a friend or supporter present, provided that person is not also a witness in the case under investigation.

Care should be taken with vulnerable witnesses or witnesses who might be subjected to intimidation. The nature of the charge should be considered and it might be appropriate to precognosce the reporting officer with a view to obtaining information about witnesses prior to precognosing them.

It may be that in certain cases the gender of the precognition taker should be considered. Crimes of indecency may, at least as far as victims are concerned, be better precognosed by precognoscers of the same sex.

Prior to the taking of the precognition, the witness should be able to satisfy himself that the precognition taker is who he says he is. Those instructed by solicitors to obtain precognitions should carry identification and a letter of authority from the instructing solicitor.

In cases involving more than one accused, there will obviously be separate and different interests but liaison between solicitors can very often result in a witness only having to undergo one session rather than a number of separate sessions. Where possible, multiple precognitions of civilian witnesses by each accused should be avoided unless this is absolutely essential in the interests of justice and of the accused.

The witness should be given a copy of these guidelines.

Other Rules of Professional Conduct

A solicitor should at all times comply with good professional practice and the ethics of the solicitors' profession as set out in practice rules, other codes of conduct and textbooks on professional ethics.

GUIDANCE NOTE

The essence of professional ethics is such that it cannot be codified. Many texts provide guidance on the professional behaviour expected of solicitors. Solicitors have a duty to inform themselves of these texts and to approach their work in a manner consistent with the principles of good ethical practice. A solicitor acting outwith the terms of this Code may be called upon to justify his conduct.



The Law Society of Scotland

The Law Society of Scotland
26 Drumsheugh Gardens
Edinburgh EH3 7YR

Telephone: 0131 226 7411

Facsimile: 0131 225 2934

Email: lawscot@lawscot.org.uk

Website: <http://www.lawscot.org.uk>