

# **GUIDELINES ON SANCTION FOR EMPLOYMENT OF COUNSEL IN CRIMINAL APPLICATIONS**



## **THE SCOTTISH LEGAL AID BOARD**

### **EMPLOYMENT OF COUNSEL IN CRIMINAL APPLICATIONS**

#### **1. BACKGROUND**

This Guidance provides information on how to apply for sanction counsel in either solemn or summary cases being funded under legal aid.. We have identified factors which you should address when making an application to the Board.

In this Guidance you will also find information on:

- Automatic sanctioning of counsel
- The designation of duties between a solicitor and counsel
- How to have a Board decision reconsidered
- Retrospective applications for Sanction

#### **1.1 Before accepting instructions**

The Board's 'Code of Practice in Relation to Criminal Legal Assistance' makes clear that a firm or solicitor shall deploy the knowledge and experience necessary for each case which is taken on.

In deciding to accept instructions, a firm or solicitor should have appropriate resources available, including time and technical and administrative support, to ensure that proper attention can be given to each case.

The Law Society's Code of Conduct for Criminal Solicitors states:

*"...No instructions should be accepted in circumstances where those instructions are subject for whatever reason to restrictions or constraints which compromise the solicitor's freedom to give appropriate legal advice".*

Firms should therefore, at the outset and throughout the progress of the case, consider:

- Does the firm or solicitor have sufficient resources to undertake the preparation and presentation of the case?
- Is there a conflict of interest between the client or prospective client and either the solicitor, the solicitor's firm or an existing client?
- Does the firm currently act for, or, has the firm previously acted for, and holds relevant confidential information about, a complainer or other witness in this case?
- Will a member of the firm be called as a witness in the case (unless the evidence will be purely formal)?

It will not normally constitute a good reason for seeking to sanction the instruction of counsel that a firm or solicitor has accepted instructions and continued to act in a case knowing, or where it should have reasonably been anticipated, that the ability to conduct a case is subject to such restriction or constraints. Such a case should, normally, be passed to another firm or solicitor not subject to such a restriction or constraint.

## **1.2 The Criminal Legal Aid (Scotland) Regulations 1996**

Regulation 14 of the Criminal Legal Aid (Scotland) Regulations 1996 details the situations where the prior approval of the Board is required for the employment of senior and junior counsel. The Regulation does not lay down any criteria for approval.

When an application for the sanctioning of counsel is made to the Board, we will consider whether the whole facts and circumstances of the case are such that it can be said, in cases to appear in the Sheriff Court or Justice of the Peace Court, that:

*the matter is beyond the reasonable competence to be expected of a frequently instructed criminal solicitor of ordinary skills*

Or for High Court or Supreme Court cases, that:

*the matter is beyond the reasonable competence to be expected of a junior counsel of ordinary skills acting alone.*

## **1.3 Cases where sanction is required**

Sanction for the employment of junior counsel is automatic for cases which proceed before the Supreme Court or in the High Court. In such cases you need not apply to the Board for sanction to employ junior counsel.

Solicitors must apply to the Board for sanction:-

- where the proceedings are in the Supreme Court, for senior counsel alone or with junior counsel, or of more than one junior counsel;
- where proceedings are in the High Court (other than relating to a prosecution or conviction for murder) for senior counsel alone or with junior counsel, or for more than one junior counsel;
- where proceedings are in the sheriff court, whether under solemn or summary procedure, or in the Justice of the Peace court;

## **1.4 Cases where sanction is not required**

In a few circumstances, the Board's authority is not required:-

- for senior and junior counsel in proceedings relating to a prosecution for murder, or conviction for murder where the person is already receiving criminal legal aid;

- to employ one junior counsel only, in proceedings before the Judicial Committee of the Privy Council or in the High Court (whether at first instance or an appeal).

## **2. FACTORS IN SUPPORT OF THE USE OF COUNSEL**

### **2.1 Sheriff Court and JP Court cases**

Sanction for junior counsel to be employed in sheriff court and JP court cases will only be granted where it can be shown that exceptional circumstances exist. Solicitors will be capable of undertaking the vast majority of cases, including solemn cases.

When considering whether to sanction the employment of counsel, the Board will look at the whole facts and circumstances of the case. Each factor is looked at individually and cumulatively.

It is the solicitor's responsibility to provide the Board with sufficient information to enable us to weigh up any factors present. The existence of a factor or factors will not automatically trigger a grant of sanction. The factor(s) presented in support of the involvement of counsel should demonstrate that the issue is beyond the reasonable competence to be expected of a solicitor or junior counsel of ordinary skills as appropriate.

Factors to be considered include:-

- whether there is an exceptional difficulty, complexity or novelty involved in the case either in fact or in law. Full detail should be provided and, where appropriate, reference made to the particular terms of the indictment; case law (including citations); evidence; witnesses or such like;
- whether there is any exceptional speciality, difficulty or unusual circumstances for a case of this type involved in presenting the case or in examining or cross-examining specific witnesses. For the avoidance of doubt we do not consider the necessary use of an interpreter as exceptional circumstances;
- significant intellectual impairment of the accused which may affect their ability to understand and take part in the court proceedings; in these circumstances we need a detailed explanation as to why a solicitor would not be capable of examining the accused, especially in light of any measures put in place by the court by virtue of the Vulnerable Witness legislation to assist the accused;
- the likelihood of a young child or children or vulnerable adult giving evidence in the proceedings; in these circumstances we need a detailed explanation as to why a solicitor would not be capable of examining or cross-examining the child or vulnerable adult, especially in light of any measures put in place by the court by virtue of the Vulnerable Witness legislation to assist the child or vulnerable adult. Reference should be made to the likely terms and nature of the child or vulnerable adult's evidence and whether it is likely to the subject of detailed examination;
- the number, nature or significance of the productions involved in the case. A reference to the number or volume of the productions will not of itself be sufficient; information should be provided to demonstrate how the use of the productions will lead to added exceptional

difficulties or complexities in the preparation of the case or presentation of the accused's defence. In these circumstances solicitors should consider and compare the costs of counsel or an additional solicitor and show due regard is being had to economy.

## **2.2 Other considerations**

We will not, generally, consider the following to be factors in support of counsel:

- The likely length of the trial. We expect a solicitor who takes on work of this nature to be able to set aside the appropriate time to prepare and to conduct the case. A solicitor should consider the question of resources at the outset of a case when deciding to accept instructions and thereafter throughout the progress of a case;
- In a criminal case in the sheriff court, the severity of the likely sentence on its own will not be viewed as sufficient to justify the use of counsel. The length of anticipated sentence, which should be demonstrated by reference to case law as well as the facts and circumstances of the alleged offence and the offender, may have no reflection upon complexity or novelty when preparing for or presenting the trial. Similarly, where it is said that a remit may be made to the High Court for sentence, this is not in itself sufficient reason to sanction the employment of counsel at any early stage: junior counsel can be employed without the need for Board approval in the High Court;
- The need to lead evidence of an expert witness or witnesses, without reference to other salient circumstances;
- The need to take evidence via the use of an interpreter without reference to other salient circumstances;
- Cross-examination of police officers, psychiatrists, psychologists, nurses, doctors (including general practitioners) and such like, which is commonplace, and is not usually considered beyond the reasonable competence to be expected of a solicitor of ordinary skills;
- Counsel being available to another accused will not of itself mean we will grant counsel to each accused. The circumstances; level of involvement with the crime; and consequences of a conviction may vary and allow other requests to be distinguished;
- In general, parity of representation between the Crown and the defence will not, by itself, be sufficient basis for the employment of counsel. However, it may tend to show the importance placed on the matter by the Crown and will be considered in light of other information provided in support of the application for sanction for counsel;
- Where a case is likely to require cross-examination of another solicitor practising in the same locality, or of a procurator fiscal, or a sheriff, or a court official, a request should be given sympathetic consideration. However, you should address why you accepted instructions in this case and why it is not appropriate or possible for the case to be transferred to another firm or solicitor outwith the jurisdiction. You must show that the evidence which is to be adduced is not merely formal in nature.

Applications for sanction may refer to an individual solicitor's particular circumstances, and persuasive factors could include:

- If you cannot attend a diet personally because of personal, business or professional circumstances. The circumstances would need to be exceptional with no possibility of transferring the case to another solicitor or having it dealt with on an agency basis or by an adjournment. In that situation, you should tell us what other arrangements you have tried to put in place (such as transferring the case to another firm, or using an agency solicitor), and how the client may be prejudiced if counsel does not represent them in your absence. You must address what arrangements are to be put in place so that counsel, if sanctioned, can be appropriately instructed while attending court. If you have not made any attempt to make alternative arrangements to represent the accused then it is unlikely that we will grant sanction for counsel. Where the difficulty has arisen simply because of a clash of dates or the distant location of the court involved and the problem would have been known (or should have been readily anticipated) some time before the court hearing, we will not usually grant sanction; the Board is of the view that the tax-payer should not have to subsidise the inefficient management of a firm;
- If you cannot deal with a case because of sudden illness, or because a partner or key member of staff has died or become ill. In that situation, you should tell us what other arrangements you have tried to put in place (such as transferring the case to another firm, or using an agency solicitor), and how the client may be prejudiced if counsel does not represent them in your absence. You must address what arrangements are to be put in place so that counsel, if sanctioned, can be appropriately instructed while attending court;
- Solicitors taking instructions in this type of work will normally be frequently instructed criminal court practitioners able to prepare and conduct proceedings in all but cases outwith the reasonable competence to be expected of a solicitor of ordinary skills. However, the absence of an experienced local bar in smaller, rural courts may mean that solicitors sometimes need to take on a case involving matters in which they are not so experienced. In such circumstances, you might need counsel's help to run the case. The extent of counsel's involvement may vary from the provision of an opinion or drafting of a minute, to providing representation at trial. In more populated areas, where there is a wide range of solicitors' firms, we would not normally view lack of experience as a supportive factor;

### **2.3 Requests for Senior Counsel Acting Alone in the Sheriff Court**

Many of the factors already detailed would apply to the employment of senior counsel as well as junior counsel in the sheriff court. In situations where a request for senior counsel, acting alone, is being made, you should consider whether:-

- there are exceptional factors which show a need for the experience of senior counsel: these factors could relate to the consequences of the case for the individual or others likely to be affected by the decision and the gravity of the case;
- the law applicable to the case is particularly complex or there are issues to be raised which have not previously been raised before the court;

- a decision has previously been taken in a case with similar circumstances which does not support the case or there is difficult expert evidence to be led that requires the particular skills of senior counsel; cases in which previous case law may be distinguished or which will be pled before a full bench are examples of situations where senior counsel may be appropriate;
- in general, parity of representation between the Crown and the defence will not, by itself, be sufficient basis for the employment of counsel. However, it may tend to show the importance placed on the matter by the Crown and if the Crown allocates this case to senior counsel or a Law Officer this will be considered in light of other information provided in support of the application for sanction for counsel.

#### **2.4 Requests for Senior Counsel Acting Alone in the High Court**

In situations where a request for senior counsel, acting alone, is being made, you should consider whether:-

- there are exceptional factors which show a need for the experience of senior counsel: these factors could relate to the consequences of the case for the individual (particularly a substantial High Court custodial sentence) or others likely to be affected by the decision and the gravity of the case;
- the law applicable to the case is particularly complex or there are issues to be raised which have not previously been raised before the court;
- a decision has previously been taken in a case with similar circumstances which does not support the case or there is difficult expert evidence to be led that requires the particular skills of senior counsel; cases in which previous case law may be distinguished or which will be pled before a full bench are examples of situations where senior counsel may be appropriate;
- in general, parity of representation between the Crown and the defence will not, by itself, be sufficient basis for the employment of counsel. However, it may tend to show the importance placed on the matter by the Crown and if the Crown allocates this case to senior counsel or a Law Officer this will be considered in light of other information provided in support of the application for sanction for counsel.

#### **2.5 Senior and Junior Counsel in both Sheriff Court and High Court**

It may be appropriate to grant sanction for junior counsel to support senior in a case which is not only novel but also lengthy or involving substantial documentation. Where senior counsel is instructed and requests the assistance of a junior, the request should be accompanied by:

- sufficient information to identify the reasons why junior is needed;
- identify what their involvement would bring to the case and the particular areas of work they are required to undertake;
- address, with due regard being had to economy, how the preparation of the case is to be apportioned to avoid any unnecessary duplication or unreasonable claims against the Fund.

The sanction request should also address why the instructed solicitor cannot provide suitable support.

Where the volume of evidence in a High Court case renders a case complex, sanction for leading junior assisted by junior might be more appropriate than senior and junior. On the other hand, a novel or significant issue of law might indicate the need for senior counsel.

### **3. EXTENT OF COUNSEL'S INVOLVEMENT**

#### **3.1 General provisions**

You can ask for, and be granted, sanction to employ counsel for various purposes short of conducting the case; for example, simply for an opinion (with or without consultation); appearing at a preliminary diet; preparing a devolution minute and appearing at same.

Where you are asking for the limited use of counsel you should:

- give full reasons why this is reasonable and necessary;
- give a proper explanation of the background and, in particular, any complexity to show the issue is beyond the reasonable competence to be expected of a solicitor of ordinary skills;
- identify what exactly is the legal issue counsel is to consider;
- explain why this matter is so complex, novel or unusual that it appears to be outwith the reasonable competence to be expected of a solicitor of ordinary skills and needs counsel; and
- where appropriate, identify why the use of counsel may save court time or expense in the long run.

#### **3.2 The Use of Counsel's Opinion**

Where an opinion from counsel is sought, we must be satisfied that counsel's opinion is not premature and that enough information is available to enable counsel to give a meaningful opinion. You should address how counsel's opinion will materially assist the accused's case and, where appropriate, detail how counsel's opinion may support earlier resolution of the case. An Opinion from counsel should address, where appropriate;

- the prospects of success and/or benefits to the accused or the court, of undertaking a particular course of action or work;
- how court time may be saved; evidence agreed and such like by undertaking any particular line of work;
- that if any particular investigative work is proposed that it is reasonably anticipated that it will materially assist the accused's case.

#### **3.3 Consultations**

You must also make separate sanction requests for counsel to consult with an expert witness whether this is for:

- an expert witness already sanctioned for the applicant;
- an expert Crown witness;
- a proposed expert witness for the applicant not yet sanctioned.

Such sanction requests should include:

- a copy of any report written by the expert witness;
- detailed reasons why a consultation is needed and show you cannot simply get the information in a statement;
- a detailed breakdown of costs (to be inserted at Part F of the SANC/APP form – unusual work or work involving unusually large expenditure), including any travel costs and a suitably detailed note of the expert’s fees;
- details of any outlays, such as travel and accommodation, that counsel is likely to incur; and
- an explanation that the method and place of consultation is the most economical, taking into account the expert travelling from their place of business to consult with parties and the availability of video-conferencing, e-mail and telephone communication.

If you need counsel to consult with an expert witness we regard this as unusual work and accordingly you must apply for sanction for unusual work. We cannot grant retrospective sanction for unusual work and therefore you must make any sanction requests timeously.

Where sanction is granted for counsel to conduct the proceedings, this includes reasonable and necessary consultations with the client, necessary notes etc at the discretion of counsel subject only to the scrutiny of the Accounts Division at the conclusion of the proceedings. For the avoidance of doubt, we consider that a necessary note is where counsel provides a legal opinion or substantive note on the line of evidence which is clearly integral to the client's defence. It does not extend to those occasions where counsel is simply passing on basic instructions, e.g. "please precognosce witness 'x' or those that are essentially confirmatory in nature, particularly when following an earlier consultation or where counsel has provided a note in support of a sanction application to assist the solicitor.

### **3.4 Delegation of Duties**

A solicitor and counsel acting in proceedings in which an accused person has been granted criminal legal aid shall be paid for work actually and reasonably done, due regard being had to economy. The Board will assess whether work (including any travel and waiting time) carried out by the solicitor and counsel 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 and counsel to address fully the question of cost at every stage of the proceedings. All parties should establish as early as possible how the tasks might best be divided between members of the defence team ensuring maximum efficiency. Work must be necessary to advance the case. The onus is always on the solicitor and counsel to establish that work is actually and reasonably done and to avoid any unnecessary duplication and expense to the public purse. The instructing solicitor and counsel must be mindful

of the need to allocate responsibilities and relevant heads of work properly and in such a way to ensure the case is conducted with due regard being had to economy.

### **3.5 Restriction on Payment and Employment of Counsel**

Section 32 of the Legal Aid (Scotland) Act 1986 provides that where legal aid is in place the solicitor providing legal aid or counsel shall not take any other payment in respect of any advice given or anything done in connection with such proceedings during any period when legal aid was so available except for such payment as may be made, in accordance with this Act.

Section 32 of the Act also prohibits any solicitor or counsel other than the solicitor providing legal aid or counsel from advising or acting for an accused in connection with the proceedings.

The effect of this situation is that it is not possible for an assisted person to "top up" a grant of legal aid by paying privately for work not sanctioned, authorised or otherwise approved by the Board; or for counsel who are not specifically sanctioned by the Board.

## **4. PROCEDURE**

### **4.1 Information to be provided by the solicitor**

Requests for sanction to employ counsel must be made on the form SANC/APP, as soon as possible once the need for counsel has been identified. The solicitor should give us full reasons why employment of counsel is reasonable and necessary rather than a mere list of abstract factors, or a broad reference to the proceedings being complex, difficult or novel, including:

- a detailed explanation of the background to the case and any complex, novel or unusual issues; and
- details to show that the issue is beyond the reasonable competence to be expected of a solicitor or junior counsel of ordinary skills as appropriate.

A note by counsel in support of any application is not a proper charge against the Fund.

We have detailed some of the factors which you should address in support of counsel below.

Requests for sanction for counsel must be supported by:-

- a copy petition or where available, a copy of the indictment (including a list of witnesses and productions). If you do not provide a copy petition or indictment as appropriate, we cannot properly consider your sanction request and will continue your application for this to be provided. If you have previously provided us with a petition or indictment, please refer to this in your application;
- where appropriate, a schedule of previous convictions, complaint or note of appeal, medical report. The solicitor should highlight or otherwise identify relevant section(s) of the supporting information being relied on in the sanction request; and

- where case law is being relied upon, a full reference should be provided, together with sufficient detail as to why the case being relied upon is relevant to the particular circumstances of this case.

#### **4.2 Applications for Counsel prior to service of an indictment.**

When an accused person initially appears on petition it is not known if the case will ultimately proceed in the High Court or in the sheriff court, solemn or summary. The decision is ultimately one for Crown Office, taken after further investigation and consideration of the facts and circumstances of the accused's alleged criminality.

It may be, in light of further investigation and consideration by Crown Office, that some of the charges on the Petition are not found on the Indictment; sometimes 'lesser' charges are substituted. This may have an effect on the forum for prosecution selected by Crown Office.

Similarly, additional charges to those on the Petition can be found on the Indictment, or more 'serious' offences libelled. This may have an effect on the forum for prosecution selected by Crown Office.

Therefore because:

- the nature and extent of the charges against the accused is not known; and
- the forum where the case will call is not known;

the Board will only consider an application for counsel prior to the service of an indictment if exceptional circumstances exist which merit the early involvement of counsel to assist with the preparation of the case.

When counsel is put in place prior to the service of an indictment (junior or senior) this grant is conditional and is made on the express understanding that should it become known that the matter is proceeding in the sheriff court a fresh sanction application has to be made. Counsel will receive payment for all reasonable and necessary work carried out up until the reduction of the proceedings

Should the case ultimately be indicted in the High Court, there is no need to apply for sanction afresh.

#### **4.3 Applications for Counsel in the High Court**

In High Court cases we will grant automatic sanction for the employment of junior counsel. You need not apply to us to sanction the employment of junior counsel in a High Court case.

However, prior to the service of an Indictment and for the benefit of solicitors and counsel, the Board has in place an arrangement with Crown Office who report to us cases that they consider as 'potential High Court' cases. Once we receive such a letter from Crown Office, we will write to the nominated solicitor indicating that this case has been designated a 'potential High Court' case and automatic sanction for junior counsel is in place.

For the avoidance of doubt, automatic sanction will only be put in place when:

- an indictment has been served indicating the case is to be prosecuted in the High Court, or;
- we receive a letter from Crown Office confirming that the case has been marked as ‘potential High Court’.

In such cases you need not make a sanction application for the employment of junior counsel: as sanction is automatic, any requests from solicitors for junior counsel (acting alone) are unnecessary and will be returned to you as ‘Not Considered’, junior counsel being automatically in place.

Prior to the service of an Indictment or receipt at the Board of a letter indicating that the case is to be ‘potential High Court’ firms or solicitors may receive other correspondence from Crown Office or the local procurator fiscal’s office indicating that the case might be proceeding in the High Court. The Board will not treat this as confirmation that the case is to proceed in the High Court or has been designated as ‘potential High Court’.

The employment of counsel at this stage only covers work which is considered reasonable and necessary for counsel to do, such as providing an opinion; attending consultations; assisting in the preparation of the defence; establishing lines of enquiry; or negotiating a potential plea/section 76 diet and such like. This will not cover counsel being involved in work which is considered more appropriate for the solicitor to carry out.

However, it should be noted that whilst early preparation should be encouraged in certain circumstances, there is a limit on the amount of preparation for trial that should be considered necessary at such an early stage. Solicitors and Counsel should always be mindful that the case has not yet been indicted and that full preparation may be more appropriate post indictment.

When a case is designated by Crown Office as ‘potential High Court’ it can still be the case that the prosecution will ultimately take place in the Sheriff Court. Crown Office will write to us to confirm that this is the case; we will then write to you to tell you of this.

Therefore if you become aware by a letter from the Board (or from any other means) that the case is no longer being prosecuted in the High Court, the previous sanction for junior counsel:

- whether granted automatically by the Board, or
- after application by a solicitor;

is no longer in place. **If the continued use of counsel is considered necessary, a sanction application must be made to the Board**

If the Crown considers that the case should be prosecuted at sheriff and jury level, counsel will receive payment for all reasonable and necessary work carried out up until the reduction of the proceedings.

Where senior counsel is required at any stage, including prior to the service of the indictment, sanction will still need to be sought from the Board.

#### **4.4 The Role of Counsel in High Court Cases**

Where sanction is granted in a case for the employment of senior and junior counsel or alternatively for two junior counsel, this will cover all necessary consultations and the appearances at the trial.

Except for attendance at a Preliminary Hearing and unless otherwise specified, only one counsel's participation in other hearings will be covered. Where more than one counsel is sanctioned the decision as to the status of counsel who attends the hearing will be at the discretion of the most senior counsel, subject to the normal scrutiny of the Board's Accounts Assessment Department. If it is felt that attendance at these hearings by both counsel is required, then the reasons for this should be made clear to us in the sanction application.

#### **4.5 'Proceeds of Crime' in the High Court**

As a result of the conviction of an accused, the Crown may decide to raise criminal proceedings under the Proceeds of Crime Act. If such proceedings are to take place in the High Court, then automatic sanction for junior counsel is in place without the need for a sanction request to the Board.

However, and notwithstanding the level of sanction made available in the substantive case, should you wish to instruct an additional junior counsel or senior counsel, you must seek sanction in the normal manner.

#### **4.6 Applications for Counsel in the Sheriff Court**

Solicitors are reminded that if sanction for counsel has been put in place prior to the service of an Indictment, either as a result of:

- an application by a solicitor, or;
- the Board receiving a letter from Crown Office that the case is a 'potential High Court' case;

that such a grant is conditional and was made on the express understanding that should it become known that the matter is proceeding in the sheriff court a fresh sanction application has to be made.

Therefore, when it is known that the case is to proceed in sheriff court and solicitors wish to instruct counsel, **a separate application for counsel must be made**.

Solicitors should, therefore, be vigilant to ensure that an appropriate grant of sanction is in place before instructing counsel.

#### **4.7 The role of Counsel in Sheriff Court/ Justice of the Peace Court cases**

Where we grant sanction for counsel to conduct the trial in the Sheriff Court/JP court, you need further sanction for counsel to conduct any formal Procedural/Incidental hearings.

We do not consider it reasonable for counsel to conduct hearings which are routine, procedural or do not advance the case. Hearings we consider to be within the capabilities of the instructing solicitor include, and this is not an exhaustive list:

- Attendance at First Diets
- Hearings to consider specification of documents
- Applications for special measures and associated hearings
- Intermediate diets
- Adjournments where agreed.

If you need counsel to attend any of these hearings, you must apply for sanction. You must explain why you consider it reasonable and necessary for counsel to conduct the hearing in question.

When making such an application you must provide enough information to enable us to weigh up any factors present. Where Counsel's attendance at such a hearing is deemed necessary you should give:

- full reasons why employment of counsel is reasonable and necessary;
- a detailed explanation of the background and any complex, novel or unusual issues to be addressed at the hearing;
- details to show the matter is beyond the reasonable competence to be expected of a frequently instructed criminal solicitor of ordinary skills;
- a full, detailed explanation of the relevant circumstances, rather than a mere list of abstract factors, or a broad reference to the hearing being complex, difficult or novel.

#### **4.8 Proceeds of Crime in Sheriff Court**

As a result of the conviction of an accused, the Crown may decide to raise criminal proceedings under the Proceeds of Crime Act. If such proceedings are to take place in the sheriff court, and notwithstanding the level of sanction made available in the substantive case, should you wish to instruct junior counsel or senior counsel, you must seek sanction in the normal manner.

#### **5. Solicitor Advocates**

Regulation 2 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 defines a solicitor advocate as a solicitor, whether instructed by another solicitor or not, "*when and only when he is exercising his right of audience or acting in connection with the exercise of such a right ...*".

The Board cannot sanction the general use of a solicitor advocate for a case in the sheriff court given the terms of the Regulations.

However, consideration may be given to requests for sanction for unusual work or unusually large expenditure to cover the use of a solicitor advocate in a sheriff court case if their involvement is restricted to using their specialist skills for the specialised pleadings aspects of a case. If sanction is granted on this basis, the solicitor advocate can only be paid as a solicitor under the terms of Schedule 1. Having due regard to economy, you would have to address why it is reasonable and necessary to have both a solicitor and solicitor-advocate in court for these proceedings.

Where the proceedings are in the High Court and the Board has given approval for the employment of counsel (whether junior or senior), or where counsel may be employed without such approval, the

nominated solicitor may, without reference to the Board, employ a solicitor advocate in place of counsel. Because of the way the regulations have been framed, even where the nominated solicitor intends to instruct a solicitor advocate, any request to the Board should be for the employment of counsel rather than a solicitor advocate.

Should sanction for senior counsel be granted, then if a “senior solicitor advocate” is to be instructed, this should be a solicitor advocate qualified and registered as a senior solicitor advocate under the Law Society of Scotland’s accreditation process.

The onus is always on the solicitor and the instructed solicitor-advocate to establish that work is actually and reasonably done and to avoid any unnecessary duplication and expense to the public purse. The instructing solicitor and the solicitor-advocate must be mindful of the need to allocate responsibilities and relevant heads of work properly and in such a way to ensure the case is conducted with due regard being had to economy.

## **6. RECONSIDERATION OF OUR DECISIONS**

If you wish us to reconsider a Board decision regarding the involvement of counsel, then you should write to us requesting that we look at the decision again. You should write to us and:

- provide additional information and/or;
- address why you believe the decision made was incorrect;
- highlight if an urgent decision is required.

The case will be reconsidered by a different person at the Board.

If you do not provide any additional information or fail to address why the decision made was incorrect then it is unlikely that the decision will be changed.

## **7. RETROSPECTIVE GRANTS OF SANCTION FOR COUNSEL**

Where the Board approval is required, the solicitor must apply to us before counsel is employed. In terms of section 14(2) of the 1996 Regulations, we may sanction employment of counsel retrospectively if:

- we would have done so had prior approval been sought;
- but only if we consider there was ‘special reason’ why prior approval was not applied for.

We do not regard oversight as a special reason.

By way of example, if there has been a change of solicitor, it may be that counsel has been employed without sanction and that this may temporarily escape the notice of the incoming solicitor. Although best practice would be for an incoming solicitor to check that sanction had been granted for counsel and expert witnesses, we might consider this a special reason.

The provisions for retrospective authority do not apply where application for prior approval was made but was refused.