

DT

[REDACTED] v PF (Criminal appeal v sentence)

Diet of Taxation: 28 May 2018 @ 12:15pm

Auditor of Court of Session

For Solicitors: [REDACTED] Faculty Appeals Unit

For SLAB: [REDACTED]

Agents had charged the equivalent of a 9 sheet document (£54) which effectively consisted of a letter to the Clerk of Justiciary making an application to the second sift. Its content, almost exclusively, consisted of counsel's opinion, lifted *verbatim*, and incorporated into the body of the letter.

The 'letter' was restricted to a one page letter to reflect the element not lifted from the opinion.

Following submissions by both parties, the Auditor ruled that he preferred the Board's arguments and ruled in its favour, observing that it was "*inappropriate to pay for cutting and pasting from counsel's opinion*".

AUDITOR OF THE COURT OF SESSION
PARLIAMENT HOUSE, EDINBURGH EH1 1RQ
DOCUMENT EXCHANGE 549304 EDINBURGH 36

0131 240 6789

Fax: 0131 220 0137

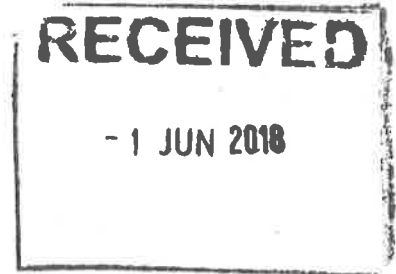
email maildesk@auditorcos.org.uk www.auditorcos.org.uk

Your Ref: 7919963617

Date 31 May 2018

Ref. 70685

SCOTTISH LEGAL AID BOARD
DX 555250 EDINBURGH 30




CRIMINAL ACCOUNT

Fee Fund Dues £15.00

Payable within 14 days of the date of this account. Payment can be made by BACS Sort Code 80 12 80 Account No. 06008856 or cheque made payable to The Auditor of the Court of Session.

The Auditor Kenneth M Cumming W.S
Principal Clerk Mrs Sheila Muir

ACCOUNT OF EXPENSES
incurred by

THE SCOTTISH LEGAL AID
BOARD

to

FACULTY CRIMINAL
APPEALS SERVICE
EDINBURGH

instructed by

LAWSON COULL
DUNCAN, SOLICITORS,
DUNDEE

in causa


APPELLANT

against

PROCURATOR FISCAL
RESPONDENT

LA Ref: 7919963617

2017 Aug	15	Perusing documentation received from instructing agents: Complaint, Schedule, Summary of Evidence, Note of Appeal, Sheriff's Report – total 10 pages – engaged 10.15-10.20 – time engaged 5 minutes	5	25
		Writing Clerk of Justiciary advising that we have been instructed as Edinburgh agents in this appeal, requesting that they intimate on us all future documentation	2	40
Sep	4	Writing instructing agents attaching the decision of the first sift, leave has been refused at this stage and an appeal to the second sift will require to be lodged by 18 th September, enquiring whether this is the direction to be pursued	6	00
		Writing Craig Findlater, Advocate requesting that he accept instruction in this appeal which has been refused at first sift, an appeal to the second sift is due by 18 th September, confirming legal aid is in place and attaching papers	6	00
		Writing Advocate's Clerk requesting that he mark the deadline in Counsel's diary	2	40
Sep	19	Framing Appeal to the Second Sift – 2121 words – 9 sheets	54	00
		Writing Crown Office Appeals Unit enclosing a copy of our Appeal to the Second Sift	2	40
		Attendance at Justiciary Office lodging Appeal to the Second Sift	2	40
Oct	11	Writing instructing agents attaching the decision of the second sift, leave has been granted on a restricted basis and an appeal hearing has been assigned for 22 nd November, Written Submissions are required for 8 th November, requesting that full legal aid be applied for now, the restriction can be challenged by way of s187(8) of the 1995 Act, that would require a supportive opinion from Counsel, the deadline for that is 24 th October, enquiring whether that is the route to be pursued – 195 words – 2 pages	12	00
		Writing Craig Findlater, Advocate in similar terms	2	40
48	00			
Carried Forward £			95	25




		Brought Forward	£	95	25
2017					
Oct	11	Writing Advocate's Clerk requesting that he mark the dates in Counsel's diary		2	40
Oct	16	Framing 187(8) Appeal – 1935 words – 8 sheets		48	00
		Writing Crown Office Appeals Unit enclosing copy 187(8) Appeal		2	40
		Attendance at Justiciary Office lodging 187(8) Appeal		2	40
Oct	20	Writing instructing agents advising that there will be a 187(8) hearing on the restriction of leave calling on 8 th November		2	40
		Writing Craig Findlater, Advocate in similar terms		2	40
		Writing Advocate's Clerk requesting that he mark the date in Counsel's diary		2	40
		Writing instructing agents advising that the appeal hearing assigned for 22 nd November has been moved to 6 th December, accordingly Written Submissions require to be lodged by 22 nd November		6	00
		Writing Craig Findlater, Advocate in similar terms		2	40
		Writing Advocate's Clerk requesting that he amend Counsel's diary		2	40
Nov	8	Writing instructing agents advising that when the 187(8) hearing called today, counsel was successful in arguing that the restriction should be lifted, the matter will call on 6 th December before three Sheriffs, Counsel will not be available for that hearing and so a replacement will be required, enquiring whether a list is required, confirming Written Submissions require to be lodged by 22 nd November and that the Crown's letter is inaccurate – 256 words – 3 pages		18	00
Nov	10	Writing instructing agents attaching the interlocutor from the 187(8) hearing, providing a list of available Counsel and our thoughts on these – 144 words – 2 pages		12	00
		Carried Forward	£	198	45



Carried Forward £

198 45

	90 00	Brought Forward	£	198 45
2017				
Nov	13	Writing Wendy Hay, Advocate requesting that she accept instruction in this appeal which has a hearing calling on 6 th December, written submissions are due by 22 nd November and full legal aid is in place, providing information and papers – 185 words – 2 pages		12 00
		Writing Craig Findlater, Advocate in similar terms		2 40
Nov	22	Writing Clerk of Justiciary enclosing principal Case & Argument inclusive of authority and two copies		2 40
		Writing Crown Office Appeals Unit enclosing Written Submissions		2 40
		Writing instructing agents enclosing Written Submissions		2 40
		Attendance at Justiciary Office lodging Written Submissions		2 40
Nov	24	Writing instructing agents enclosing the Crown Case & Argument		2 40
		Writing Wendy Hay, Advocate in similar terms		2 40
Dec	6	Writing instructing agents attaching the interlocutor from today's appeal hearing, we shall now close our file		6 00
	90 00			233 25
	18 00	Add VAT @ 20.0% on 233.25		46 65
		Add Outlays		
	108 00		£	279 90
		<i>has Taxed off</i>		108 00
				<u>£ 171 90</u>
		EDINBURGH. 31 May 2018. The Auditor taxes this account at the sum of ONE HUNDRED AND SEVENTY ONE POUNDS AND NINETY PENCE (£171.90).		
				
		AUDITOR OF THE COURT OF SESSION		



LARN
7919963617

Applicant
[REDACTED]

Nominated Solicitor
MR GEORGE C DONNELLY

Firm

Firm name LAWSON COULL & DUNCAN
 SOLICITORS (07781)
Branch Address 136/138 NETHERGATE
 DUNDEE
Postcode DD1 4PA
LP LP31 DUNDEE

Last Offer Date: 11/01/2018

Negotiations

#	Date of Work	Work Item	Lodged	Paid/Offered	Accept Offer	Negotiations (SLAB in blue)
14.	19/09/2017	Framing Documents (Non-Formal) Number of sheets? : 1000 Number of words : 2121 Description of the document framed including word count : Framing Appeal to the Second Sift (9 sheets)	£54.00	£8.00	Review reason	• Please forward copy for assessment. Restrict entry to 1 sheet at this time.
21.	16/10/2017	Framing Documents (Non-Formal) Number of sheets? : 1000 Number of words : 1936 Description of the document framed including word count : Framing 187 (8) Appeal (8 sheets)	£48.00	£6.00	Review reason	• Please forward copy for assessment. Restrict entry to 1 sheet at this time.
Totals			£102.00	£12.00		

Close Print

AUDITOR, COURT OF SESSION

POINTS OF OBJECTION

by

THE SCOTTISH LEGAL AID BOARD

to the

ACCOUNT ON BEHALF OF MESSRS LAWSON COULL & DUNCAN, SOLICITORS

relating to the case of

 -v- PF

Date of Taxation: 28 May 2018 @ 12:15 pm

Type of case: Criminal - Appeal -v- Sentence

1. Nature of the case

The appellant pled guilty to a contravention of section 4(1) of the Road Traffic Act 1988, committed while on bail. The sheriff imposed a nine month restriction of liberty order (ROLO) which was reduced to six months as a consequence of the timing of the plea. An eighteen month driving disqualification was also imposed but not discounted due to the restriction applied to the ROLO.

The solicitors took instructions shortly after sentence on 1 August 2017 in respect of a possible appeal and, under the special urgency (Regulation 15) cover in place from 2 August 2017, framed and lodged a Note of Appeal on the same date. They proceeded formally to instruct Edinburgh agents (Faculty Appeals Unit) on 11 August 2017.

Following the decision of the first sift confirming leave to appeal had been refused, counsel (Craig Findlater, Advocate) was instructed on 4 September 2017.

The decision of the second sift was to grant leave to appeal on a restricted basis on 11 October 2017 and a full grant of legal aid was consequently authorised at that time.

2. Fees allowable to solicitors

Regulation 11(1)(a) of the Criminal Legal Aid (Scotland)(Fees) Regulations 1989 (the criminal fees regulations) makes the following provision for the taxation of fees and outlays:

11.(1) If any question of dispute arises between the Board and the solicitor or counsel as to the amount of fees or outlays allowable to the solicitor, or as to the amount of fees allowable to counsel, from the Fund in respect of legal aid in criminal proceedings in –

(ba) the Sheriff Appeal Court, the matter shall be referred for taxation to the auditor of the Sheriff Appeal Court; ...”

The criminal fees regulations prescribe fees payable to solicitors:

“7. (1) Subject to the provisions of regulations 4, 5, 6 and 9, 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. The fees allowed shall be calculated in accordance with Schedule 1.”

Part 1 of Schedule 1 of the criminal fees regulations prescribes a fee of £6.00 (summary procedure) for:

2(b) - framing and drawing necessary papers other than those referred to in paragraph 3(c)

2(e) - letters, including instructions to counsel, per page (or part thereof), subject to paragraph 3(b).

Paragraph 3(b) of Schedule 1 prescribes a fee of £2.40 (summary procedure) for:

short formal letters, letters of acknowledgement, letters each having a similar nature, intimations and letters confirming telephone calls;

Paragraph 3(c) of Schedule 1 prescribes a fee of £2.40 (summary procedure) for:

framing formal papers, including inventories and title pages, per sheet (or part thereof);

Paragraph 8 ('Interpretation') of the Notes on operation of Schedule 1 provides the following:

a "sheet" shall consist of 250 words or numbers; and

a "page" shall consist of 125 words or numbers.

It should be noted that notwithstanding the entry in dispute is a *letter* to the Clerk of Justiciary, it has been charged by the agent on the basis of '*framing and drawing necessary papers*' and '*per sheet*' i.e. £6.00 per 250 words.

3. Nature of dispute:

The solicitor applied for and was granted special urgency cover under Regulation 15 on 2 August 2017 and legal aid in respect of an appeal against sentence was granted on 11 October 2017.

The solicitor's account was received for consideration on 21 December 2017. The claim against the Fund totaled £682.16 (inclusive of VAT) and an offer of payment totaling £574.16 (inclusive of VAT) was made 11 January 2018.

The abatements applied related to framing charges presented in respect of letters sent 19 September and 16 October 2017.

The letter of 19 September 2017 was to the Clerk of Justiciary and was in respect of lodging an appeal to the second sift, following the earlier refusal at the first sift, and was charged at £54.00 i.e. 9 sheets.

The letter of 16 October 2017 was also to the Clerk of Justiciary and was in respect of an appeal under section 187(8) of the Criminal Procedure (Scotland) Act 1995 and was charged at £48.00 i.e. 8 pages.

Both letters were abated on the basis that they essentially disclosed, *verbatim*, the same content that was provided by counsel in his Opinions of 18 September 2017 and 16 October 2017, fee'd for in his fee note of 9 November 2017 and which was paid in full by the Board 10 November 2017. An allowance of £6.00, the equivalent of a 1 page letter, was offered for each entry as reasonable remuneration for that content which was not lifted directly from counsel's opinions.

Correspondence was entered into firstly with the nominated solicitor and then directly with the Faculty Appeals Unit (FAU). The position adopted by the Board was not accepted by the agent for the FAU (Mr. Cohen) but ultimately the adjustment applied

to the letter of 16 October 2017 was accepted on the basis that counsel would have been in a position to have signed the Opinion prior to the expiry of the deadline. Accordingly it is only the letter of 19 September 2017 that remains in dispute:

Agent's Position

The agent's email of 19 January 2018 stated, *inter alia*, the following:

"If we do not incorporate the content of counsel's Opinion, the court will not accept said Opinion in support of an appeal to the second sift without it separately being signed.

The recent guidance of the court was that an Opinion of counsel can only be signed by said counsel, and not another counsel on his behalf. This therefore has become an accepted work-around, as counsel is not always available within the timeframes to sign their own work and the court do not yet accept electronic signatures. I take the time and effort to frame the letter, check the grammar and accuracy of counsel's Opinion, amend and edit where necessary and prepare the introduction and ending to it. An element of original thought is involved, for all that I find that a marginal issue".

The guidance referred to by the agents is Practice Note 1 of 2015 (copy attached).

The agent's position appears to be that, given time constraint issues that may feature, it is not always possible for a hard copy of counsel's Opinion, complete with 'wet signature' to be lodged timeously. The 'work around' is to present the same opinion in letter format.

Board's Position

The Board's view is that, regardless of the requirements of the Court and the 'work around' that agents may adopt due to time constraints, we believe the issue is simply whether the disputed fee for framing claimed falls to be considered as "*...reasonable remuneration for work actually and reasonably done...due regard being had to economy*". Our position is that none of these tests have been met.

The fee being charged is for "*...framing and drawing necessary papers...*". The Board's position is that it is a matter of convention that '*framing and drawing*' requires an element of original thought in that the author actually creates, composes and develops the written work in question.

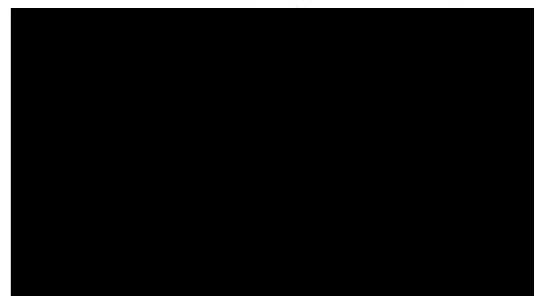
Our view on the definition of framing does not appear to be disputed by the agent, who states in his email of 4 February 2018 the following:

"I would accept that the vast majority of each second sift letter is not developed or created, and thus is not original thought, or at least not mine. However, it cannot be said that no element of the letter is not original thought, and that that is not actually created and developed. Therefore, for me, the definition taken from convention is satisfied".

In this case the framing and drawing is clearly attributable to counsel, and for which counsel has been paid the prescribed fee of £75. The material and substantive element of the letter in dispute has not actually been *framed* by the agent. Rather, the work undertaken has simply been an exercise in lifting (or 'cutting and pasting') the content from Counsel's Opinion, provided electronically, and incorporating that *verbatim* into the style of a letter. Accordingly we would contend that the work involved in framing and drawing the substantive element of the letter sent has not *actually* been done by the solicitor.

Further, as stated above, counsel has charged and been paid for his Opinion at the prescribed fee of £75. Counsel's fee note was received directly by the Board 9 November 2017 and paid in full shortly thereafter. As a consequence of the agent seeking payment of the same opinion, albeit in letter form, the Board is effectively being asked to pay for the same work twice. It is also worth bearing in mind that, to adopt the agent's approach, the lengthier the Opinion prepared by counsel the greater the fee that is subsequently sought by the agent for the letter sent incorporating that Opinion. It is reasonable to suggest that lengthier Opinions may be produced as a consequence of more complex and involved matters whereby counsel necessarily spends more time in preparation than perhaps would be spent in more straightforward matters. Even for those more complex and lengthier Opinions, counsel who has applied his/her mind and applied their legal expertise in composing the opinion could be paid no more than the prescribed fee of £75 for an Opinion on sentence. In all the circumstances, it is our view that the fee charged and the approach adopted by the agent generally does not constitute a *reasonable* charge against the Fund or reflect "*due regard being had to economy*".

IN RESPECT WHEREOF



SCOTTISH Legal Aid Board
Thistle House
91 Haymarket Terrace
EDINBURGH
EH12 5HE

Appendix:

1. Practice Note 1 of 2015
2. Counsel's opinion of 18 September 2017
3. Letter to Clerk of Justiciary 19 September 2017
4. Counsel's fee note of 9 November 2017