



**SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW**

**Report on Taxation – dated 9<sup>th</sup> October 2015**

**By**

**K. Carter, Auditor of Court**

**From**

**Taxation Diet at Glasgow**

**held 14<sup>th</sup> April, 2015**

**On**

**Fees dispute between Messrs Thompson & Brown Solicitors, Glasgow**

**and Scottish Legal Aid Board (SLAB)**

**In Legal Aid Advice and Assistance Cases of**

**LG & Others of**

- (1) [REDACTED] - No. AA4282685214
- (2) [REDACTED] - No. C8814754308 (later withdrawn from taxation)
- (3) [REDACTED] - No. AA4251754214
- (4) [REDACTED] No. – No. 4178999414; and
- (5) [REDACTED] - No. 4338644114

**This being a reference to the Auditor in terms of Regulation 18(4) of The Advice and Assistance (Scotland) Regulations 1996, (referred to in this Note as AASR1996), to decide the matter of fees payable for precognitions in all above cases.**

**Act. [REDACTED] (DH), Solicitor for SLAB**

**Alt. Michael Thompson (MT), Solicitor of Messrs Thompson & Brown (T&B), Glasgow.**

**Decision**

I support Thompson & Brown's submissions and therefore make no abatements to any of Thompson & Brown's Accounts in any of the cases which were discussed at the taxation diet of 14 April 2015 as listed on page 1 of this report. I find S.L.A.B. liable to Thompson & Brown for the taxation fees totalling £240 including VAT.

## **General Comments relating to Decision**

1. Although prior to the Diet there had been some other issues beyond precognitions in dispute in these Accounts, it was agreed by both parties at the Diet to restrict the issue for discussion to precognitions only.
2. I wish to record here that my decision in these cases is in accord with a decision by a colleague auditor of the sheriffdom of South Strathclyde, Dumfries & Galloway (SSDG) at Lanark dated 23 March 2015 in the advice and assistance account No. AAL/3913874913 the case of guardianship application for HC in respect of Adult X. That decision related to a similar if not identical issue regarding precognitions and in particular a lack of communication by S.L.A.B. relating to procedural and staff changes within S.L.A.B. relating to their analysis and abatement of fees allowable for precognitions. In his report of 23/3/15, the SSDG auditor also supported the solicitor's submissions.
3. This report and the SSDG report of 23/3/15 raise a common issue perceived by both auditors on a possible lack of clarity within the existing S.L.A.B. precognitions information for solicitors detailed in paragraphs 6 - 26 to 6 - 29 of their published guidance, which might benefit from some revision or clarification particularly regarding the length of and what constitutes essential material in precognitions for the various categories of legal aid. The current Guidance is of a global nature and does not appear to distinguish between these.

## **Thompson Brown's submissions by Mr Michael Thompson (MT)**

4. MT's written submissions (via e-mail) included an observation that S.L.A.B.'s assessors may be unqualified (legally) and that those decision-makers are arbitrarily abating his firm's legally qualified staff's precognitions which had been taken by them with a view to evidence potentially being led on their content. He also raised what he considers to be the important issue of double standards (described by MT as a two-tier system) being applied by S.L.A.B. when processing and assessing fees for precognitions. MT said that precognitions are meant to be a useful summary to ultimately lead evidence upon and if information is lacking (e.g. to draft a writ), how could that witness's information be later led in evidence? He thought that as this was the expected and acceptable level of precognitions information for civil legal aid applications as opposed to A&A applications, then there exists a S.L.A.B. Two-tier standard for non-court related precognitions and a court standard, which was neither clear nor fair. MT continued that there seemed to have been a fairly recent "sea-change" in how S.L.A.B. had been deciding upon appropriate fee- levels for precognitions and abating

them sometimes quite substantially. He asked how can solicitors deal with that change without knowing (a) about any change in S.L.A.B. procedures and standards in assessing precognition fees and (b) what precisely is being abated and dis-allowed from precognitions, i.e. which words and phrases were being abated to justify the lower fees? He gave examples of S.L.A.B. formerly (until recently) refusing to deal with applications due to insufficient information in supporting statements (and perhaps in precognitions) having been provided and compared that to the recent S.L.A.B. change in approach which seemed to be going the opposite way by virtue of their harsh approach of refusing to allow precognitions due to far too much information. He considered that there were mixed messages emanating from S.L.A.B.'s fee assessors and they were effectively creating that two-tier system for deciding on precognitions fees which was fundamentally unfair. He emphasised that all the information in T & B's precognitions are exactly what he as a qualified solicitor would expect to "ask in court".

MT also thought it was unfair that S.L.A.B. would not enter into any dialogue with T & B (for example in the case of S Stewart) about what parts of their precognition they were abating and also it was unfair that if this was not explained then how do T&B know what information is deemed as irrelevant. He submitted that the auditor, in the absence of any explanation by S.L.A.B., should apply the rule of fairness and restore the full precognition fee in that case (using it as an example of the principle being discussed at the diet).

MT further submitted that it was not appropriate for [REDACTED] (DH ) on behalf of S.L.A.B. to substitute his opinion on what the appropriate abatements should be from the precognitions at issue here for all the decisions made by S.L.A.B.'s original assessors who first dealt with them. He said it was the function of the auditor to decide if the first S.L.A.B. decisions were fair. MT again questioned the S.L.A.B. decision-makers' rationale and submitted that the auditor today is looking afresh at what is reasonable, otherwise why are we proceeding with the taxation diet today at all?

MT referred to the Elder case, questioning S.L.A.B.'s decision to abate that precognition on the basis that medical evidence was irrelevant. He was emphatic, that this was plainly wrong given that in any appeal to a sheriff principal his firm had to demonstrate why the sheriff had been wrong. He submitted that DH/S.L.A.B.'s position regarding seeking only minimal information in precognitions such as this one would or could lead to almost automatic refusals by S.L.A.B. in such cases. He again emphasised that this was fundamentally unfair and he could not understand why it was not deemed reasonable for his firm to ask what parts

of precognitions were being ruled out or deemed irrelevant therefore reducing the overall word count of his firm's precognitions and thus their fee.

MT then referred to S.L.A.B.'s guidance at paragraph 6.28 and the description of "What is a precognition" quoting from the manual of The Law of Evidence in Scotland, W. J. Lewis (1925) page 172: "*A written statement of the matters which witnesses are expected to give as evidence on oath when in the witness box, and is as a guide generally essential for the proper leading of the evidence at the diet of inquiry...*"; given that definition in their own guidance he didn't see why certain essential potential evidence information in T&B's precognitions were not deemed to fall squarely into allowable material.

MT returned to the point of inconsistency in S.L.A.B.'s handling of precognition fee assessments as not being at all helpful to solicitors firms and that S.L.A.B. themselves have been giving contradictory information to solicitors on what is and what is not acceptable in relation to precognitions content for advice and assistance cases. He also emphasised that if there had been general changes in procedures and standards in how such matters are to be adjudicated upon by S.L.A.B. assessors then it was important that all solicitors should have been informed of those changes but not in an *ad hoc* and case by case manner, as is now happening regularly.

MT's final, and in my view important submission, was that although S.L.A.B. precognitions arise across the full spectrum of legal aid accounts there is no distinction in their guidance covering precognitions within paragraphs 6.26 to 6.29 between any or all of these legal aid procedures. The fact that the four cases discussed here today relate to advice and assistance accounts, i.e. non-court matters, when prepared in accordance with S.L.A.B.'s own guidance, does not mean that these should be analysed and restricted on a more severe basis than any other precognitions for court procedure in legal aid accounts. He said that the "double standards" which had been only quite recently evident in his firm's experience was simply not fair nor was it correct in terms of S.L.A.B.'s own guidance.

#### **(DH) - S.L.A.B.'s Submissions**

5. DH firstly agreed that "the auditor" referred to in AAS Regs 1996 at Para 18 (4), can be any auditor in Scotland for the purposes of dealing with advice and assistance taxations. This was a preliminary matter which had been raised by emails just prior to the diet relating to "jurisdiction" of Glasgow Auditor dealing with some of T&B's A&A taxations for today's taxation of cases which were not all for Glasgow Court. He also referred to S.L.A.B.'s fees

for the precognitions in question here and confirmed that a 250 word sheet in precognitions was paid at £25.50 per sheet.

DH then sought to put into context the subject of today's taxation diets and said that a statutory statement of any case should be set out when applying for civil legal aid and that should be supported by a precognition by the client or often by someone else. The statutory statement should provide just the "bare bones" of the case but the accompanying precognition would go beyond and supplement that with information that could lead to evidence being led. He agreed that these four advice and assistance accounts had precognitions which did contain substantive evidence, but that was not the purpose of this type of precognition at this A&A stage of the process. His position was that this category of precognitions should show only briefly and concisely what the matter/case is about. In these four cases all S.L.A.B. needed was what was reasonable at this A&A initial procedural stage. If and when matters did progress and moved to applying for civil legal aid, then no doubt further precognition(s) would be required providing information after more statements had been taken. Importantly, none of the four cases for today's taxation were (at this point in proceedings) at that stage of court-related civil legal aid.

DH went into some detail of the four cases at taxation analysing some but not all of the precognitions being taxed, giving his view of what was appropriate and relevant at that stage in all four cases.

DH was thorough and detailed in his submissions and references to S.L.A.B. regulations. In our discussions DH was quite frank and was open to sharing some of the background to the approach taken by S.L.A.B. when assessing various types of fees. He informed me that there had indeed been a change of methods within SLAB (around November 2013 is my recollection from his submissions). That change meant that precognitions had since then been scrutinised by a discrete and small number of SLAB's assessors who from then "specialised" in that area of fee-assessments and this had brought about a change in the methods of scrutiny of these, resulting in more stringent application of abatements. In summary, he indicated that there was far too much information in these precognitions for this stage of procedure. We discussed the copies of 2 other case precognition samples produced by DH at the diet, i.e. what he considered to be appropriate examples of precognitions for advice and assistance accounts. These were discussed not only at the diet but in subsequent e-mailed written submissions after the date of the diet, which submissions I have also taken into account as part of the whole taxation exercise.

DH reminded me of the important and overarching principles to be applied by any auditor of court in deciding cases such as this which are detailed in regulation 17(1)(a) of the AAS Regulations 1996. *“Fees and outlays allowable to the solicitor...in respect of advice or assistance shall, and shall only, be fees for work actually, necessarily and reasonably done in connection with the matter upon which advice and assistance was given, due regard been had to economy,...etc...”* To support that he sought to give me some points of reference (and comparators) relating to other firms’ precognitions in similar circumstances and provided some percentage statistical information relating to Thompson & Brown’s applications of S.L.A.B. accounts as DH put it, “when set against the profession generally”. I have opted not to include that last point of information in my decision-making process which in my opinion should be governed by what is fair and reasonable in all the circumstances of the Accounts and matters to be decided by me in this taxation exercise. My interpretation of the phrase fair and reasonable means that this applies to both (or sometimes all) parties.

6. That fair and reasonable approach brings me to the conclusion that on balance I support Thompson & Brown’s submissions which I believe outweigh those of S.L.A.B. on this occasion.

### **Auditors Notes**

7. As Appendices to this report I have added what I think is relevant material. At Annex 1 is the full report by the auditor of SSDG at Lanark dated 23 March 2015 in the case of HC etc. Annex 2 is a copy of S.L.A.B.’s own guidance on precognitions at paragraphs 6.26 to 6.29 inclusive.
8. At the outset of the Glasgow taxation diet on 14/4/15, it was agreed by all parties to reduce the cases to be discussed from five to four with the case of Patricia Docherty being withdrawn from the taxation process for reasons which were dealt with by preliminary emails prior to the taxation diet.
9. From the outset of the diet it emerged quite clearly that there were two distinct but important issues to be decided: (a) interpretation and application of S.L.A.B.’s guidance on precognitions paragraphs 6.26 – 6.29; and (b) the number of pages of relevant material in the precognitions in the cases discussed (now reduced to 4) at this taxation diet. The precognitions fee per sheet of 250 words is £25.50p.

10. During and after the taxation diet by way of email exchanges with parties, it was confirmed that there is no separate guidance for the content of precognitions relating to advice and assistance cases as distinct from other categories of legal aid applications. The information I received from S.L.A.B. themselves included the following:

*“Our policy is whenever possible to allow solicitors access to the same guidance which S.L.A.B. officers use for assessment so that the profession can at least understand our approach even if they won’t always necessarily agree with that.”*

11. It is also worth highlighting, in my view, that S.L.A.B. have not taken any issue in these 4 accounts disputes, as I understand it, in terms of their own guidance at paragraph 6.29 (was the precognition necessary?), i.e. they have not raised any objection to the taking of these precognitions, only objections to the length of all of them.
12. S.L.A.B.’s guidance at paragraph 6.27, states: *“You should attach a copy of the precognition, where it exceeds 2 pages to the account when claiming...”* My own interpretation of that phrase is that it could be construed that there is an inference there that anything beyond 2 pages is likely to attract more close scrutiny by the S.L.A.B. fee assessors and solicitors might therefor expect that longer precognitions may be subject to abatement. The S.L.A.B. sample precognitions produced by DH at the Glasgow taxation diet as examples of what he considered to be “good or model examples” of precognitions for A&A cases and also to the auditor at Lanark in his 23 March 2015 taxation diet were all of around 2 pages. This supports my view that it could be construed that a 2 page precognition (with a fee of £51) is S.L.A.B.’s aspirational benchmark for all precognitions. However, this has never to my knowledge to this date been directly communicated to SLAB’s “customer-base”, i.e. all solicitors throughout Scotland, nor to the Law Society I assume, as no mention of this was made in submissions either oral or written.
13. Whilst there could be scope for me to go through all four accounts precognitions and in particular analysing their detail and then possibly reduce some of them by a page or two here and there, I do not think that the *minutiae* of such an exercise is as important as (i) the principal objections by Thompson & Brown regarding the guidelines relating to precognitions and the interpretation and application thereof; and (ii) the “sea change” brought about by S.L.A.B.’s internal procedural changes which apparently meant that staffing allocations changed around November 2013 whereby, as I understand it, a small number of staff, maybe even at times just one individual, are involved in the decision-making process in fee assessments in relation to all precognitions. The fact that this “sea change” or one might say

“moving the goal-posts” has never been intimated to solicitors generally does not seem fair to me and I therefore have opted to allow all of the Thompson & Brown precognitions as presented on the basis of overall fairness and due to the lack of notice given of the SLAB changes.

14. In the context of the details DH went into relating to the 4 cases and the A&A stage these four were at, it is feasible that I could agree with the thrust of his submissions by analysing the *minutiae* of all precognitions in all four cases and perhaps deleting a page or two here or there, but when set against the backdrop in these taxations, i.e. in my view the far more important issue which in relation to MT’s submissions, that the point of today’s taxations was not for DH to persuade the auditor of his (DH’s) view of what was relevant and thus substitute DH’s view for that of the first S.L.A.B. assessor. I agree with MT that there is a fundamental issue to decide upon in these taxations as opposed to looking at the *minutiae* of the precognitions being discussed.
15. I therefor await with interest any developments or information from S.L.A.B , as to if, and when, any revised guidance or intimation of changes relating to allowable fees for precognitions emanates from them which might clarify the issue of precognition fees.

K Carter  
Auditor of Court, Glasgow and Strathkelvin.  
Report issued on 9 October 2015.

**Annex A & B see below/**



**APPENDICES TO GLASGOW AUDITORS REPORT BY K CARTER**

**DATED 9 OCTOBER 2015**

IN

Thompson Brown (5 cases listed in report)

V

SLAB

**Annexe "A" – Report dated 23/3/2015, by Auditor of SSDG from Taxation at Lanark Sheriff Court in case of Guardianship Application by HC for adult xx.**

Sheriffdom of South Strathclyde Dumfries and Galloway at Lanark

Taxation of Advice & Assistance Account AAL/3913874913

Guardianship Application for *HC in respect of Adult: XX*

**Lanark 23 March 2015**

I tax the expenses submitted to the Scottish Legal Aid Board by J Quinn & Co. Solicitors, Motherwell at the sum of £301.70 and the Auditor of Court's fees of £60.00.

J Hamilton

Depute Auditor of Court, Lanark

The diet of taxation was held on 13 January 2015 and continued to 11 February 2015. At both diets, Mr Quinn appeared for Quinn & Co. Solicitors Ltd. and [REDACTED] Solicitor, appeared on behalf of the Scottish Legal Aid Board.

This was taxation was brought in terms of the Legal aid and advice and assistance under the Legal Aid (Scotland) Act 1986.

Advice and Assistance (including assistance by way of representation).

Advice and Assistance (Scotland) (Consolidation and Amendment) Regulations 1996, Regulation 18(4).

There was only one issue in dispute which related to the entry dated 31 May 2013 relating to the preparation of a precognition of the client HC. The fee sought for this work was £89.25.

Mr Quinn explained that after submitting the account for payment, SLAB had advised him that it was not necessary to submit a 5 page precognition and this could have be done in 3 pages. SLAB were now proposing to pay £51.00 instead of the £89.25 sought.

Mr Quinn went on to advise that prior to November 2013, this had not been their approach and they now appeared to be unilaterally abating this fee. He referred to a letter received from SLAB

dated 11 August 2014 which explained their decision. Mr Quinn went on to explain the on-line process when submitting the account.

██████████ briefly explained the purpose of submitting the Advice and Assistance account. This was to provide SLAB with sufficient information to support the application for legal aid in raising proceedings for a guardianship order. ██████████ went on to explain that it was the level of information contained in the precognition which was the important factor and not simply the wordage. ██████████ then went on to indicate what he considered to be the relevant information contained in the precognition. Mr Quinn then explained why he felt the information contained in the precognition was appropriate and relevant.

Mr Quinn advised that precognitions submitted in respect of other applications, there had been inconsistencies by SLAB when issuing their decision. In one case, legal aid had been refused on the basis that a precognition which contained 1191 words had been rejected because it provided insufficient information. He was of the view that it was necessary “to cover all the bases” to ensure that you have all the necessary information. Mr Quinn indicated that the application had subsequently been granted.

The diet was adjourned to 11 February 2015 to allow Mr Quinn to provide further information to support his argument that the content of the precognition should be accepted in full.

At the continued diet, Mr Quinn submitted further precognitions in other proceedings and Mr Haggarty also provided copies of 3 precognitions submitted by other solicitors in current applications which were all considerably less in wordage than those presented by Mr Quinn. Further submissions were then made by both parties with regard to the additional precognitions provided.

Mr Quinn submitted that the precognition of HC had been drafted on 27 June 2013. In his view, these were the types of statements looked for and paid by SLAB at that time and were never abated. ██████████ advised that around November 2013 there had been a change in the personnel dealing with the precognitions. These were now dealt by a single member of staff which would provide a more consistent approach and conceded that Mr Quinn may well have received full payment up until that time but SLAB wouldn't routinely pay out what was asked for. I have therefore allowed the full precognition fee sought at £89.25.

### **Auditor's Decision**

Having perused the copy precognitions provided by ██████████ it is evident that the level of information they require to grant legal aid can be provided in less sheets than those normally submitted by Mr Quinn.

In my view, the fact that SLAB employed a single staff member to deal with these matters is an important factor. Whilst this approach would provide more consistency, it would appear that no communication was taken to advise agents of this change. Nor indeed was there any evidence to indicate that agents or at least Mr Quinn was made aware of what was actually required in the precognitions. If Mr Quinn had in the past, received full payment for precognitions, then it would seem unfair for him not to continue to receive such payments until he was made aware of the requirements.

## Annexe “B” - SLAB guidance in relation to precognitions

Also to be found at [www.slab.org.uk](http://www.slab.org.uk) by scrolling to left hand margin and choosing the options > the Civil Handbook > Part V Advice & assistance Accounts > Chapter 6 Fees > section 6.26 – 6.29 which covers the issue of precognitions.

### 6.26 Precognitions

As shown at paragraph 6.8, in connection with the initial meeting with the client, the Table of Fees for advice and assistance provides for an inclusive fee "for taking and drawing precognitions". This subsumes not only framing the precognition but the time charged for taking it. There is no framing charge under advice and assistance.

The ABWOR Table of Fees has no equivalent omnibus fee, the charge being a combination of a time charge (under paragraph 1A) and a framing charge (under paragraph 1C).

### 6.27 When is a precognition properly chargeable?

You should attach a copy of the precognition, where it exceeds two pages, to the account when claiming for taking and drawing a precognition.

Two matters need to be addressed:

- Firstly, the document must be a precognition, not just a file note. (See paragraph 6.28, "What is a precognition?")
- Secondly, to be a reasonable charge, it must have been necessary to take a precognition. (See paragraph 6.29 "Was the precognition necessary?")

These matters are dealt with in turn.

### 6.28 What is a precognition?

A precognition has been defined as (click below):

- Glossary of legal terms and Latin maxims.  
*A preliminary written statement of the evidence which a witness may be expected to give. It is usually paraphrased after interview with the witness and prepared in the first person. It is not signed, and is not binding.*
- Manual of the Law of Evidence in Scotland, W.J. Lewis [1925] page 172  
*A written statement of the matters which witnesses are expected to give as evidence on oath when in the witness box, and is as a guide generally essential for the proper leading of the evidence at the diet of enquiry.*
- I.D. MacPhail, Sheriff Court Practice, 2nd Edition, page 473  
*A written statement in intelligible form of the matters which a witness is prepared to give in evidence in the witness box.*
- J A Beatons, Green & Son, 1982.

*A preliminary examination of a person who may be required to give evidence in a criminal trial or a civil proof. The purpose of obtaining a precognition is to acknowledge in advance of the trial or proof of the evidence the witness will be able to give about facts which are*

*likely to emerge as relevant in which it will require to be proved. The likely evidence is set out in a document, also called a "precognition". Scots law terms and expressions,.*

Although the definitions vary in emphasis, it is clear that a precognition is a statement taken to discover what evidence a witness will give in court or before a tribunal hearing.

We will only pay for the precognition or the part of the precognition relevant to the person's own account of events, restricted to the salient facts. Any information you add, not given by that person, will not be allowed - for example, the legal position, the consequences for your client or your client's remedies. The precognition should only contain matters based on the facts within the person's own knowledge, which are likely to or could be used for giving evidence should the matter proceed to litigation. We will only allow those precognitions, or parts of precognitions, where it is clear that the information in that person's account of events has been used or would have been used in evidence at a court or tribunal hearing.

Matters we will abate - and which should not be framed - include

- a lengthy narration or restatement of information on a form or an initiating document;
- details of the client's personal and financial circumstances;
- entries reflecting discussions between the solicitor and the client, perhaps providing further information at a later meeting, which are more correctly considered as file notes covered by the time charge.
- information on case law or comments which have clearly not been made by the client;
- irrelevant or extraneous information.

## **6.29 Was the precognition necessary?**

You should only take a precognition where it is necessary - that is, when it is likely that the matter will proceed to litigation, not where it is simply a matter which is capable of proceeding to litigation. We will not pay for framing a precognition when it turns out to have been unnecessary.

For example, if a client seeks advice on interdict and you send a letter to resolve matters and no further action is required, you do not need to take a statement at the first meeting. If the client needs to apply for legal aid, you can take a statement then. You will need recent information to apply for legal aid for interdict, and could not use a precognition of an old incident. You do not, therefore, need to take a statement of each and every incident.

Taking a routine precognition from a client, containing little information which advances the case and sometimes simply reflecting instructions from the client on various matters which are more properly dealt with by a file note, is not chargeable.

On occasion you may need to include a brief note about the client's financial circumstances where that information is relevant to a tribunal hearing and may be led in evidence. However, you should not unnecessarily extend the financial information already provided in the advice and assistance form unless or until a hearing is fixed.

Even when it is necessary to frame a precognition, some precognitions contain far more detail than the evidence the client or witness will have to give in the witness box. We will not allow a charge for a precognition to the extent that it contains:

- detailed information about the client's financial circumstances, benefits and other extraneous matters; and/or
- a verbatim account of a meeting.

You are paid a time charge for taking such detail and it remains on your file for further use. It need not form part of a precognition for which a separate framing charge is payable in appropriate circumstances.

Where a precognition is unnecessary or excessively lengthy, we will either abate the charge or reduce the number of sheets.

Dear Mr Carter

Thank you for your email message.

A link to the SLAB guidance in relation to precognitions can be found at [www.slab.org.uk](http://www.slab.org.uk) and scrolling to the left hand margin and choosing the options > the Civil Handbook > Part V Advice & assistance Accounts > Chapter 6 Fees > section 6.26 Precognitions. The link below will take you directly to “Fees” section of that guidance where you can scroll to sections 6.26-6.29 which covers the issue of precognitions

<http://www.slab.org.uk/handbooks/Civil%20handbook/wwhelp/wwhimpl/js/html/wwhelp.htm#href=Part%20V%20AA%20acs/v%206%20The%20account%20fees.html>

A copy of that text is included below for your assistance however the guidance is better viewed by accessing the link above as that will allow you the opportunity, if you so wish, to all SLAB advice and assistance accounts guidance.

## **6.26 Precognitions**

As shown at [paragraph 6.8](#), in connection with the initial meeting with the client, the Table of Fees for advice and assistance provides for an inclusive fee “for taking and drawing precognitions”. This subsumes not only framing the precognition but the time charged for taking it. There is no framing charge under advice and assistance.

The ABWOR Table of Fees has no equivalent omnibus fee, the charge being a combination of a time charge (under paragraph 1A) and a framing charge (under paragraph 1C).

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You should attach a copy of the precognition, where it exceeds two pages, to the account when claiming for taking and drawing a precognition.

Two matters need to be addressed:

Firstly, the document must be a precognition, not just a file note. (See paragraph 6.28, “What is a precognition?”.)

Secondly, to be a reasonable charge, it must have been necessary to take a precognition. (See paragraph 6.29 “Was the precognition necessary?”)

These matters are dealt with in turn.

## **6.28 What is a precognition?**

A precognition has been defined as (click below):

•*Glossary of legal terms and Latin maxims.*

**A preliminary written statement of the evidence which a witness may be expected to give. It is usually paraphrased after interview with the witness and prepared in the first person. It is not signed, and is not binding.**

•*Manual of the Law of Evidence in Scotland, W.J. Lewis [1925] page 172*

**A written statement of the matters which witnesses are expected to give as evidence on oath when in the witness box, and is as a guide generally essential for the proper leading of the evidence at the diet of enquiry.**

•*I.D. MacPhail, Sheriff Court Practice, 2nd Edition, page 473*

**A written statement in intelligible form of the matters which a witness is prepared to give in evidence in the witness box.**

•*J A Beatons, Green & Son, 1982.*

**A preliminary examination of a person who may be required to give evidence in a criminal trial or a civil proof. The purpose of obtaining a precognition is to acknowledge in advance of the trial or proof of the evidence the witness will be able to give about facts which are likely to emerge as relevant in which it will require to be proved. The likely evidence is set out in a document, also called a “precognition”. *Scots law terms and expressions.***

Although the definitions vary in emphasis, it is clear that a precognition is a statement taken to discover what evidence a witness will give in court or before a tribunal hearing.

We will only pay for the precognition or the part of the precognition relevant to the person’s own account of events, restricted to the salient facts. Any information you add, not given by that person, will not be allowed – for example, the legal position, the consequences for your client or your client’s remedies. The precognition should only contain matters based on the facts within the person’s own knowledge, which are likely to or could be used for giving evidence should the matter proceed to litigation. We will only allow those precognitions, or parts of precognitions, where it is clear that the information in that person’s account of events has been used or would have been used in evidence at a court or tribunal hearing.

Matters we will abate – and which should not be framed – include

- a lengthy narration or restatement of information on a form or an initiating document;
- details of the client’s personal and financial circumstances;  
entries reflecting discussions between the solicitor and the client, perhaps providing further information at
- a later meeting, which are more correctly considered as file notes covered by the time charge.
- information on case law or comments which have clearly not been made by the client;
- irrelevant or extraneous information.

## **6.29 Was the precognition necessary?**

You should only take a precognition where it is necessary – that is, when it is likely that the matter will proceed to litigation, not where it is simply a matter which is capable of proceeding to litigation. We will not pay for framing a precognition when it turns out to have been unnecessary.

For example, if a client seeks advice on interdict and you send a letter to resolve matters and no further action is required, you do not need to take a statement at the first meeting. If the client needs to apply for legal aid, you can take a statement then. You will need recent information to apply for legal aid for interdict,

and could not use a precognition of an old incident. You do not, therefore, need to take a statement of each and every incident.

Taking a routine precognition from a client, containing little information which advances the case and sometimes simply reflecting instructions from the client on various matters which are more properly dealt with by a file note, is not chargeable.

On occasion you may need to include a brief note about the client's financial circumstances where that information is relevant to a tribunal hearing and may be led in evidence. However, you should not unnecessarily extend the financial information already provided in the advice and assistance form unless or until a hearing is fixed.

Even when it is necessary to frame a precognition, some precognitions contain far more detail than the evidence the client or witness will have to give in the witness box, We will not allow a charge for a precognition to the extent that it contains:

- detailed information about the client's financial circumstances, benefits and other extraneous matters;
- and/or
- a verbatim account of a meeting.

You are paid a time charge for taking such detail and it remains on your file for further use. It need not form part of a precognition for which a separate framing charge is payable in appropriate circumstances.

Where a precognition is unnecessary or excessively lengthy, we will either abate the charge or reduce the number of sheets.

If you require any further information please do not hesitate to contact me.

Yours sincerely

[Redacted signature]

[Redacted block]

Good afternoon all ,

Thank you to Mr Thompson and [Redacted] for your submissions at the Diet today.

I will issue a written decision in due course, in relation to the precognitions issue relating to the 4 cases of :- [Redacted]

For information of others , after hearing brief submissions on the issue of the taxation numbered (2) on the list of 5 for today (i.e. the case of [Redacted] ) I did not consider that I could competently proceed to a full taxation in that case and accordingly the written decision /Report will apply only to the 4 other cases of [Redacted]

[Redacted] , please provide me with an electronic copy of a full copy of all of SLAB's Guidance or a link to that ? ( I was referred to Paragraphs 6-26 to 6-29 ) of that Guidance today ,but I'd like to look at ALL of that Guidance before issuing my decision(s) / Report.



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