

SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

NOTE

by

JOINT AUDITOR

in Remit by

Messrs Mowat Dean & Co

in connection with the provision of Legal
Advice and Assistance under the Legal Aid
(Scotland) Act 1986


TJ; CB & KD

to



1. This taxation arose out of a dispute between the Scottish Legal Aid Board (the "Board") and Messrs Mowat Dean & Co., Solicitors, Edinburgh ("the Solicitors") in relation to fees claimed by the Solicitors for providing Legal Advice and Assistance under the Legal Aid (Scotland) Act 1986 to three clients, who are named above along with the Board's reference allocated to them. The remit came to me at the instance of the Solicitors, by virtue of Regulation 18 (4),¹ which provides that:

If the solicitor is dissatisfied with any assessment of fees and outlays by the Board ... he may require taxation of his account by the auditor; the auditor shall tax the fees and outlays allowable to the solicitor for the advice or assistance in accordance with regulation 17, and such taxation shall be conclusive of the fees and outlays so allowable.

2. At the taxation on 25th April 2000, the Solicitors were represented by the partner in charge of their Family Law Department, Mr Tom Ballantine. The Board were represented by one of their Solicitors, 

¹ Advice and Assistance (Scotland) (Consolidation and Amendment) Regulations 1996 (SI 1996 No 2447) as amended by the Advice and Assistance (Scotland) Amendment Regulations 1997 (SI 1997 No 726).

3. The relevant part of Regulation 17 reads:

Fees and outlays of solicitors

17 (1) ... fees and outlays allowable to the solicitor ... in respect of advice or assistance shall, and shall only, be -

(a) fees for work actually, necessarily and reasonably done in connection with the matter upon which advice and assistance was given, due regard being had to economy, calculated ... in accordance with the table of fees in Part II of Schedule 3; ...

Parties were agreed that this meant taxation on the scale of "Agent and Client, Third Party Paying". [REDACTED] referred me to a decision of the Sheriff at Paisley when presented with a Note of Objections to the Auditor's Report in Her Majesty's Advocate against Daniel Gray, 1992 S.C.C.R. 883, at 888. The test, he submitted on the basis of that judgment, was what a prudent man of business would have done in the knowledge that he was going to be remunerated in terms of Regulation 17. That decision is helpful, but it is not truly analogous because the issue in Gray was whether a solicitor had acted correctly in a crisis situation. The issue in this case is how the policy deliberately adopted by an experienced and senior solicitor, the head of the Family Law Team in his firm, following the Guidelines of his professional body, can be reconciled with the policy adopted equally deliberately by the Board and set out in their Guidelines. The position is even more acute because both parties wish to continue the policies which they have deliberately adopted, so it is not helpful for me simply to tax these three accounts at a particular figure, because that would leave the principle unresolved for future cases.

4. Although the whole account was before me in all three cases, parties were agreed that only two items needed to be addressed in two of the accounts, and the same two items plus a related one in the third account. These may be summarised as:

- (i). a letter setting out the terms of business, and
- (ii). a letter following the initial meeting with the client.

Both letters were, as a matter of policy, sent by the Solicitors to their clients shortly after the initial meeting, as soon as Legal Advice cover had been confirmed. The question is, who should bear the cost of them - the Board as a proper charge under the

Legal Advice and Assistance scheme or the Solicitors as one of the 'overheads' to be met out of the profits of their firm? Two principles conflict - which should prevail? On the one hand, the Solicitors work (and should work) under Guidelines provided by the Law Society of Scotland; if their files are scrutinised by the Ombudsman or by a Court in an issue of professional conduct, they could be criticised for not observing the Guidelines issued by their professional association. On the other hand, the Solicitors provide Legal Advice under Guidelines provided by the Board, and these Guidelines make it clear that the Board do not interpret Regulation 17 in a way that covers cost of these letters.

5. The relevant excerpts from the Law Society of Scotland's Guidelines on Terms of Business are (underlining is mine):

TERMS OF BUSINESS²

As soon as instructions are received from a client or when tendering for business, a Solicitor should issue a terms of business letter of engagement. The content of the letter will vary depending on the status of the recipient and the type of work which may be undertaken. The letter should be clear and unambiguous using straightforward language thus ensuring that the recipient will be in no doubt as to the meaning of the content.

...

The style of Terms of Business reproduced here has been drafted in such a way as to minimise the alterations that would be required to it and maximise the number of situations in which it can be used.

The intention is that it should be appended to a covering letter in which any minor alterations or variations can be specified or indeed specific attention can be drawn to important aspects.

This style would not be particularly suitable where Legal Aid was involved since this would involve additional clauses regarding, for example, recovery of fees and outlays from property or money recovered or preserved, as well as payment of contributions.

6. The relevant section of the Law Society of Scotland's Guidelines on Confirming Instructions are:

² Page 25.1 of the manual 'Better Client Care', revised August 1998.

[Handwritten signature]

TAKING INSTRUCTIONS³

CONFIRMING THE INSTRUCTIONS TAKEN

1. Following the initial interview, it is important to confirm in writing to the client the instructions given by the client: the advice given by you, if relevant to the particular situation: what action it has been decided should be taken in regard to these instructions and most importantly of all, to confirm the terms of business offered by the firm.
2. Terms of Business letters are being used more and more and are helpful in ensuring that there is no misunderstanding between solicitor and client. The Terms of Business letter should set forth clearly:-
 - (a) Who will be responsible within the firm for that particular client's business.
 - (b) The basis of fee charging for that business. A style is attached ...
 - (c) The frequency of requests for payment - particularly concerning outlays.
 - (d) The nomination of an alternative solicitor should you be on holiday, indisposed or unavailable and the nominated partner to receive any complaints.
 - (e) The letter should also explain the next steps to be taken and, if possible, an approximate timetable for each stage of the client's business.
 - (f) That fees, VAT and outlays are all separate costs and therefore have to be clearly defined and accounted for.
 - (g) That costs, fees and outlays are payable, whether or not success is achieved, unless agreement is reached to the contrary.
7. The relevant sections of the Board's Guidelines are:

THE SCOTTISH LEGAL AID BOARD - TAXATION GUIDELINES
Introduction⁴

These guidelines have been issued to aid the legal profession and those involved in charging legal accounts both in determining the appropriate fee and in adhering to the guidelines when submitting accounts of expenses.

The aim of the guidelines is twofold. Firstly, by ... making its practices in assessing accounts more widely known, the Board expects that a higher quality (i.e., more accurate) account will be submitted thereby reducing the level (and need) for abatements ...

These guidelines it should be noted are just that - guidelines. It is impossible to put out a booklet which covers every conceivable situation and, in the final analysis, individual circumstances will determine what is reasonable and necessary to the conduct of a case.

LETTERS RECORDING MATTERS DISCUSSED AT A MEETING/

³ Page 1.2 of the manual 'Better Client Care', revised August 1998.

⁴ Page 1 of Booklet.

LETTERS RECORDING MATTERS DISCUSSED AT A MEETING⁵

A letter sent to a client following a meeting confirming that the solicitor is going to act on the client's behalf or that he has taken or intends to take the course of action discussed and agreed at the meeting is essentially duplication of the advice given to the client at the meeting and the solicitor cannot in effect charge twice for the same matter. A charge will only be allowed where the letter, whilst confirmatory in some aspects also adds to views previously expressed or to information given.

As an exception to the general rule outlined above the Board will allow a charge for a purely confirmatory letter where the solicitor satisfies the Board that in his opinion the letter was necessary because, e.g.

- (1) the client was in a distraught state of mind
- (2) the subject matter was too complex for memory
- (3) the client did not accept the advice given
- (4) the matter may be subject to a time limit, date of hearing, penalty imposed.

8. Mr. Ballantine submitted that there is a significant difference between the two sets of Guidelines. The Law Society of Scotland's Guidelines were issued to the profession and it is for individual solicitors or firms to decide how to implement them in practice. A solicitor could be criticised if he disregarded them without good reason. The Board's Guidelines were prepared and issued by themselves, "to aid the legal profession and those involved in charging legal accounts ...". They set out how the Board understand the Regulations under which they operate. Mr. Ballantine submitted that an equally valid interpretation of Regulation 17 was for a prudent man of business, having due regard to economy and in the knowledge that he was to be remunerated from public funds, to complete an individual Terms of Business letter and also to craft a Confirmatory letter tailored to the situation of the client. He accepted that all of this could go into one letter, but still felt it was better to deal with the two aspects separately.
9. Against that background, Mr. Ballantine's firm holds styles of both letters on the Word Processing package on their computer. These are thoughtfully tailored by the solicitor who meets with the client, in some cases filling in blanks and in other cases selecting and adapting standard paragraphs. Mr Ballantine eloquently defended his policy, as

⁵ Pages C7 and C8 of Booklet.

being in the best interests of:

the client, who receives full confirmation, in an easy-to-digest form, of the issues on which the client will sooner or later have to make decisions,⁶

the solicitor, who has smoothed the way for future discussions by setting out his understanding of the law applicable to the client's situation and who, incidentally, had safeguarded his own position against later misrepresentation or criticism of the advice given, and

the Board, because setting out the issues clearly at this stage often leads to quicker disposal of the problem and so saves the Board money in the long term.

██████████ highlighted the issue by picking up the phrases used by Mr Ballantine and commented on them in turn, namely:

the client - both letters were objectionable, the first because it was not giving advice or assistance and the second because it was largely "confirmation" of what had been discussed, and the Board do not, as their Guidelines indicate, normally pay for the cost of a letter confirming advice which has already been given orally,

the solicitor's interest was irrelevant, because what was done was part of his own risk management and this should be done by a file-note, which was not a charge against the Fund, and

the Board were liable under the Legal Advice scheme only for the solicitor advising on the specific problem or problems which the client had raised at that time and not (as ██████████ described it) for sending the client "a treatise on the law".

⁶ In case this matter is taken further, I should, in fairness to Mr. Ballantyne's submission, set out in some detail why he felt so strongly about this point when writing to clients with matrimonial problems. I did take the following into account in coming to my decision, but he was anxious to emphasise his experience that clients often forget or misunderstand what was said at a meeting. A letter can, to quote his submission, "clear up misunderstandings, fill in gaps in recollection and give a foundation from which options can be considered by the client. In other types of cases (that is non-matrimonial), decisions to be made may be almost entirely legal in content. Guidance from the solicitor can be relatively clear cut on which option is the best one. Family actions are different in that there is a particularly complex interplay of concerns that can be emotional, practical and legal. Only the client knows how much weight he or she is prepared to give to each element. For that reason it is all the more important that the client has a proper written foundation from which to look at options."

10. Mr Ballantine accepted that the Board should not pay for the full cost of these two letters, even if (as he believes) they represent "best practice" and ultimately save public funds. He offered to restrict the actual charge in his Legal Advice accounts to £12 (two pages) for the Terms of Business letter and to £30 (five pages) for the Confirmatory letter, and to continue to restrict his charges to these figures in future cases. However, [REDACTED] remained opposed in principle to any charge for either letter.
 11. The issue for me is not whether the Terms of Business Letter and the Confirmatory Letter should be sent, because I have no doubt that Solicitors are following best practice in doing so. The question is where the cost of the letters falls. Mr. Shearer was emphatic that the cost did not fall on the Board. He repeated that neither letter was a proper charge under Regulation 17, because, as mentioned already, the first was not "in connection with the matter upon which advice and assistance was given" and the second was merely confirmatory. On the latter point, he argued that a prudent man of business would not, standing the Guidelines of the Board, expect to be remunerated in terms of Regulation 17 for a confirmatory letter. He said that Solicitors giving Legal Advice had been "put on notice" what would be paid for under Legal Advice and what would not. To that Mr. Ballantine responded that it was for an Auditor to interpret Regulation 17, which was, in his view, wider than the Board's own view expressed in their Guidelines. The Board's Guidelines were no more than their understanding of Regulation 17, and the remit to an Auditor enabled to Auditor to come to a different view of Regulation 17.
 12. When I indicated that I was minded to decide that a brief letter should be sent at the expense of the Legal Aid Fund, [REDACTED] advanced a secondary argument, namely that the information could be communicated by way of a leaflet, not a letter. He reminded me of a lecture which I had given in his presence at the University of Strathclyde in October 1994, at the end of which I had distributed styles of "two letters which we hand to clients who are contemplating an Agreement like this, the first if children are involved and the second if legal aid or legal advice is involved." He suggested that a leaflet could be handed to the client, covering everything which was in the letters to which the Board took exception.
- CB

13. Mr Ballantyne responded, in addition to the points already noted in paragraphs 8 and 9, that leaflets do not tailor the advice to the needs of the specific client, and that issues like joint-ownership of property must be tailored to the particular situation if they are to make sense to the client.
14. When two principles conflict, the higher principle must prevail. I am satisfied that in modern practice, a prudent solicitor, having due regard to economy and knowing that he will be remunerated on the scale of "Agent and Client, Third Party Paying", will normally write to a new client with some of the information suggested in both parts of the Law Society of Scotland's Guidelines (Terms of Business and Confirmatory Letter). However, when a Third Party is paying, every effort must be made to curtail the expense to the Third Party. The Law Society of Scotland's Guidelines quoted at paragraph 5 assume that the standard Terms of Business will normally be sent to a client as an appendix to a covering letter. My own practice until I retired in October 1997 was (as mentioned at the Seminar) to hand to the client at the interview one or more printed styles from a stock of styles covering different situations, but professional practice has moved on since then. I am not prepared to say that it is unreasonable for a Solicitor, acting within the terms of regulation 17, to send a short (one page) letter to most new clients, confirming the financial implications of the "advice given" and to include in it advice about the solicitor-client relationship through which the advice is being given. The Guidelines quoted in paragraph 5 go on to say that:

This style would not be particularly suitable where Legal Aid was involved since this would involve additional clauses regarding, for example, recovery of fees and outlays from property or money recovered or preserved, as well as payment of contributions.

Terms of Business Statements could be sent out with a one-page covering letter where the client has no Legal Aid contribution and where there is no question of "property recovered" - for example, if the only issue was "residence" or "contact". If "property recovered" was an issue at the stage of giving Legal Advice, a two-page letter might be justified, tailoring the implications to the specific situation of the client. Whether the advice exceeded 125 words is a question of fact in every situation. If a Solicitor believes that he has to go into such detail, the letter would need to be scrutinised by the Board to

see what it contained. [REDACTED] again made the point that the only fees payable under Regulation 17 are "in connection with the matter upon which advice and assistance was given". I accept that but I consider that nowadays this includes a brief Terms of Business letter setting out the basis on which the advice is being given.

15. The Confirmatory Letter falls, in my judgment, into the same category. On the one hand, it has been accepted in court practice over many years that a "letter confirming" a meeting or a telephone conversation is not chargeable, on the basis that the solicitor has charged for the meeting or the conversation and the letter is simply an aide-memoir. However, the Law Society of Scotland Guidelines now stress the importance of a letter following the initial interview. They do not suggest that a letter need be sent after every meeting, but they consider that the "prudent man of business" will now confirm in outline the points set out in their Guidelines. [REDACTED] again pointed out, and I accept, that charges under Regulation 17 must relate directly to the advice given. It may be helpful to the client, and indeed it may save money in the long term, to outline (where there is a house) occupancy rights, exclusion orders, sale or transfer, the implications of a title in joint names, second homes and division of household goods, but due regard must be had to economy. This means that the letter must be confined to the essentials and to the specific advice given. When the oral advice had covered only one issue, for example contact with a child, a one page letter should succinctly cover all that is needed at that stage. It would, in my judgment, be an unusual situation which justified more than a two-page confirmatory letter at the Legal Advice stage. There may be situations where a longer letter could be justified, but none of the three cases before me for taxation was, in my view, difficult or complex as Family Law matters go, and so while the principle which brought the parties to taxation can be decided, the wider question as to how much a Solicitor should be allowed to write to his client in a complex situation (assuming that letters are permissible at all) remains unresolved. I should stress that the whole of this Note has in mind the three cases before me, in particular, and Family Law practice in general, and any general comments which I make should not be applied outside the Family Law situation.

16. There is another factor in favour of allowing a Confirmatory letter, which was not canvassed before me but which occurs to me on reading the files again after the taxation. Although a Solicitor is entitled to issue a client with a Legal Advice Certificate, the form AA/APP has to be registered with the Board. In my experience, these forms were occasionally refused by the Board because the client had (without telling the Solicitor) already received advice on the same topic elsewhere. Also in my experience, which ended over two years ago, the Board sometimes corrected the contribution which the Solicitor had calculated. If these two events can still happen, it strengthens the argument for writing a brief letter to the client, not to confirm that the Board had accepted the application (which clearly could never be a charge against the Board), but to advise the client what steps the Solicitor will now take on behalf of the client. For example, the prudent Solicitor might have said that he or she would write to the estranged partner as soon as Legal Advice cover was confirmed. My own practice (which I see was followed in the [REDACTED] case before me, on 23rd July 1996) was to send the client a copy of the initial letter sent to the other party, with a brief comment. If (as appears from the files in this taxation) the Solicitors did not send their two Standard Letters until the Legal Advice position had been confirmed, it strengthens my view that a brief letter to the client at that stage is a proper charge against the Fund, even if it does little more than set out, for the reasons advanced by the Law Society of Scotland, what the solicitor is now going to do in terms of the instructions which he had, a few days earlier, accepted from the new client.

17. Turning, then, to the three specific cases, in the order in which they were presented to me:

[REDACTED] AA/079019871699

[REDACTED] consulted the Solicitors on 24th March 1999. The unmarried father of her infant child had left her two weeks previously and was pressing her to regularise the informal "contact" arrangements which had been taking place. The Solicitors put her onto Legal Advice that day on a nil contribution. As soon as cover was confirmed, they sent a Terms of Business letter. Helpful though it may have been to the client to have an outline of how both the Legal Advice and Legal Aid schemes work, there could never be

the complication in this case of "property recovered", there was no contribution to be collected, and it was not envisaged, at that stage, that the problem might later need Legal Aid to go to Court. (It never did.) In that situation, I have no doubt that the Board should pay for only a one-page Terms of Business letter. For the avoidance of doubt, I confirm that I equally have no doubt that the Board, for the reasons set out in paragraph 14 above, should meet the cost of a brief letter, confirming the solicitor-client relationship and how the "advice and assistance" was going to proceed, all as part of the Legal Advice given.

18. On the same day, the Solicitors wrote a Confirmatory letter. This was a full and helpful exposition of all the important issues regarding the rights and obligations of an unmarried father. Again, it anticipated how a Court might deal with a dispute between the parties if it ever got to Court. This clearly went beyond the immediate situation. As the client had come in only to be advised about how she should respond to her former partner's request to formalise the "contact" arrangements, it must come at the lower end of the pages allowed (I confirm that something should be allowed) and in this particular case I could not approve of more than a one-page letter.

19. [REDACTED] AA/07/8093995698

This client consulted the Solicitors on 23rd June 1998. Her husband had formed a new relationship and the client was seeking divorce and advice about the house, household goods, debts, etc. There were no children under the age of 16. The Board raised a query on the request for an increase in authorised expenditure so although the relevant forms had been submitted on the day after the first consultation, it was 8th July before the Solicitors knew that the requested Legal Advice cover was in place. They therefore wrote their two letters to the client on that day - a fortnight after the first meeting. Taking the Terms of Business letter first, it covered the essentials, namely the person dealing with the case and the client's financial responsibility (there was a contribution in this case). It covered in some detail the implications of "property recovered", which, on the facts narrated by the client, could not be an issue because the house was in name of the client and she had minimal assets - nothing, on the face of it, to bring her up to the exemption of £2,500. The letter went on discuss in detail the financing of Court action, which,

although it was likely if evidence of adultery could be obtained, was not the immediate issue on which the client was being advised. Again I cannot allow more than a one-page letter under this heading as a proper charge against the Board at this stage.

20. The Confirmatory letter covered the client's rights in the house and the household goods, other matrimonial assets, the right to aliment and division of property on divorce. It was, for example, helpful to record that the client had stated "there were no gifts or inheritances of any relevance". This is precisely the kind of statement which a client should reflect about, when receiving a Confirmatory letter, because it might jog the client's memory about some family situation which, under present family law, could become very significant. On the other hand, when the client had consulted the Solicitors about divorce on the ground of adultery, there was little obvious relevance in listing alternatives grounds. In my view, the Board should meet the cost of a two-page letter. I take on board [REDACTED] objection that a Solicitor who writes (as in this case) a fifteen page letter, should not expect either the Board or an Auditor to "deem" that two pages of it are a valid and relevant charge. I cannot speak for the Board, but Auditors routinely have to look at actual letters and decide how much of them to allow and how much to disallow. This fifteen page letter was not an abstract treatise of the law, as Mr [REDACTED] described some of these standard letters, but it was tailored by the solicitor concerned to the specific situation of the client. However, much of it went beyond Confirmation as envisaged by the Law Society of Scotland Guidelines, and my decision is that these could have been adequately covered in two pages. I therefore allow two pages for this letter.

21. [REDACTED] AA/07/6477997296

This client consulted the Solicitors on 19th July 1996. Having assessed that he was eligible for Legal Advice on a nil contribution and having received the appropriate acknowledgement from the Board, they wrote some letters (not in dispute) on 23rd July. On the same day they wrote to the solicitors for the client's wife, proposing a Separation Agreement in which the wife would be granted custody of the child, access details were given, the grounds of divorce were stated, the tenancy of the house was agreed and

financial details were given. A copy of this letter was, commendably, sent to the client. None of this work is challenged by the Board. However, when confirmation of increased authorised expenditure was received, the Solicitors sent out their two standard letters. The Terms of Business letter reviews the working of the Legal Advice and Assistance scheme, including an outline of the property position and the "property recovered" provisions, and goes on to discuss the consequences of later getting Legal Aid. As the client had no contribution, was not the tenant of the property and was not going to receive any financial benefit under the proposed Separation Agreement, much of this had no immediate relevance to his situation. I cannot justify more than one page for the Terms of Business letter in this case, but I confirm that a single page letter is, in my opinion, a good charge against the Fund.

22. As far as the Confirmatory letter is concerned, it opens by saying, "Following your meeting with Mr Leitch on 19 July 1996, he said that we would write to you giving a broad view of the law as it applies to your situation". The letter then covers household goods and other property, financial support on separation, custody and access and division of property on divorce. It continues, as do the other style letters, to set out the various grounds of divorce. Although there had not yet been a response from the wife's solicitors, the circumstances would, in my view, normally have justified a two-page letter to confirm the action which the Solicitors were going to take. However, the Solicitors had already sent to the client a copy of their initial letter to the wife's solicitors, and payment for that is not in issue. In these circumstances - which makes the laying down of principles almost impossible for an Auditor - one further page, advising the client on points of relevance to him which could not have been put into the letter going to the other side, is, in my view, all that the Board should pay for.
23. Objection was taken in this case to a further Confirmatory letter on 25th February 1997, while the negotiations to finalise the Separation Agreement were drawing to completion. This letter confirmed to the client the changes in the law affecting the child of the marriage, which had been introduced by the Children (Scotland) Act 1995. This letter followed a meeting with the client on the previous day. Again, it is a wide statement of

the law, covering residence and other matters which were not an issue in this case. I apply to this letter the same principles as to the original Confirmatory letter, and, in the particular circumstances of this case, even although agreement was drawing near, my view is that a short letter was justified, to confirm to the client the fundamentally different legal position which had been brought about by a change in the law. Since the position of the child was more or less agreed by that time, a one page letter is all that should be paid for from the Fund.

24. In all three cases, it can be argued that the two initial letters could have been run together. Mr Ballantine explained that it was in fact more economic in time, as well as clearer for the client, to produce them separately. If they were run together, the Terms of Business combined with the Confirmation of Advice would almost inevitably exceed one page, so I do not regard two pages in total, rising to three pages in total where there are financial implications, to be excessive in normal situations. Beyond that, it depends on the factual situation and, as mentioned, none of the three cases in issue in this taxation is beyond the "run of the mill".

25. EXPENSES.

Parties were agreed that I should not add any fee for their preparation and attendance at the taxation. As far as an audit fee is concerned, issues of principle rather than accounting were at stake, so if I set the audit fee at the minimum figure of £12 per case, that will give £36 (£12 x 3) plus Vat of £6.30, a total of £42.30, payable (parties were agreed) by the Board. I appreciate that Regulation 18(4) provides that this taxation "shall be conclusive of the fees and outlays so allowable", but in case either party wishes to take the issue further, I record that this Note was issued to parties on 31st May 2000.



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Joint Auditor, Edinburgh Sheriff Court

31st May 2000.