

AUDITOR OF THE COURT OF SESSION
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15 July 2011.....

Date and Tax Point

VAT Reg. No.: 938 9082 77

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SCOTTISH LEGAL AID BOARD
LP 2 EDINBURGH 7

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DISPUTE



| | |
|------------------------------|---------|
| The Auditor's Fee herein is | £412.00 |
| VAT thereon @ 20% | £82.40 |
| Posts & Incidents (incl VAT) | £0.00 |
| | <hr/> |
| | £494.40 |

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Auditor Of The Court Of Session

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

AUDITOR, COURT OF SESSION

POINTS OF OBJECTION

for

THE SCOTTISH LEGAL AID BOARD

in the case of


SL/9338814409

regarding the fees of

HARDING & CO, SOLICITORS

Case Background

The account lodged for taxation relates to solemn proceedings arising from a charge of attempted rape. The solicitor was at all times providing criminal legal aid and the reasonable fees incurred by the solicitor are payable from the Fund in terms of the Legal Aid (Scotland) Act 1986 and the relevant regulations.

Nature of Dispute

It is understood that the items in dispute are as follows:

- 30 August 2010 (page 9 of account): block fee for client in custody £304; and
- 14 September 2010 (page 9 of account): block fee for deferred sentence £114.

The circumstances in which these claims have been rejected are explained below.

The relevant regulations

This is the first diet of taxation to arise from the Criminal Legal Aid (Scotland) (Fees) Amendment (No.2) Regulations 2010 [S.S.I. 2010 No. 212]. These regulations amended the previous Schedule 1 (fees of solicitors) by

- prescribing detailed Notes on the operation of Schedule 1;
- splitting up the previous Schedule 1 by prescribing a new Part I (detailed fees) and Part II (inclusive fees for solemn first instance proceedings);
- slightly amending the new Part I as regards the detailed fees arrangements; and
- introducing, for the first time, inclusive fees for solemn first instance proceedings.

A copy of Schedule 1, as amended, is attached for ease of reference.

The terms of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 remain largely unchanged. In particular, regulation 7(1) continues to state,

“(1) Subject to the provisions of regulation 4, 5, 6 and 9, a solicitor shall be allowed such amount of fees and 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”.

The provisions for submission of accounts (regulation 9) and taxation of fees and outlays (regulation 11) remain unchanged.

The effect of the new Part II of the Table of Fees is to introduce what can be referred to as a "hybrid" Table of Fees which result in the solicitor providing criminal legal aid charging for work partly by way of inclusive (block) fees and partly by way of detailed charges.

Note 1(1) provides that in relation to solemn criminal proceedings the fee for -

- (a) all work falling within a block of work prescribed in Part II of the Table of Fees is the fee specified in the relevant column of that Part;
- (b) any items of work that does not fall within a block of work prescribed in Part II of the Table of Fees is to be calculated in accordance with Part I of the Table of Fees.

The default position in respect of the new scheme is that, unless otherwise provided, all work falling within a block of work as prescribed can only be charged as a block fee. Otherwise, where any item of work does not fall within a block of work so prescribed, can the solicitor revert to detailed fees.

Note 1(5), without prejudice to the generality of sub-paragraph (1) sets out items of work which *do not fall within* any block of work prescribed in Part II of the Table of Fees.

This includes, importantly, all work in respect of time spent waiting in court or conducting, or attending court. Representation in court is always a matter of detailed feeing.

Fees claimed & offers made

As indicated, two issues arise in this taxation and will be dealt with separately.

The charging of the prison block

The inclusive fee at Part II, paragraph 3 (the prison block) is payable in the following circumstances,

"3. The fee for arranging and attending all meetings, including consultations, in prison with the client after full committal for trial up to the conclusion of the case". The correct fee in the circumstances of this case is the fee set out in column B, £304.

The starting point, in the process, for charging this fee is "after full committal for trial". The reason for this is that the higher fee prescribed at paragraph 1(b) (the petition fee) anticipates the likelihood of a prison visit between the client being committed for further examination and, usually about a week later, being fully committed.

The end point is the point in dispute. It is the Board's contention that the reference to "the conclusion of the case" for the purpose of this particular inclusive fee relates to the point at which the accused person is convicted. The principle being that there should be no overlap between the respective inclusive fees.

In addition, paragraph 1(5)(h) on the Notes on the operation of Schedule 1 is designed to specifically allow for "post conviction work, except for the work described in paragraph 5 of Part 2 of the Table of Fees" to be charged on a detailed basis. By definition only work which falls outwith the Inclusive Fee in paragraph 5 of Part 2 can be charged, in addition.

It is understood that in this case the nominated solicitor attended a meeting with the client in prison, the client having previously been at liberty up until conviction, between the date of conviction and the date of sentencing. The solicitor believes that the terms of

paragraph 3 are sufficiently wide to include this one attendance as initiating and justifying the claim. The Board's view is that the Schedule and the respective Tables of Fees have to be read as a whole and in the context of the other fees prescribed. Paragraph 5 draws a line at the stage of conviction, prescribing a fee (£152 in this case) for all work undertaken after the date of conviction. This would include the attendance with the client in prison. Paragraph 5 states

"5. The fee for all work in connection with post-conviction discussions and advice *that*, including advising and giving an opinion on the prospects of any appeal".

The Board believes that it is clear from the terms of Part II of the Table of Fees, reading paragraphs 3 and 5 together, that the attendance with the client in prison is part of the post-conviction work and cannot be charged separately by reference either to a detailed fee or, in this case, another block.

Claim for preparation fee: paragraph 4(b)

Part II, paragraph 4 of the Tables of Fees states

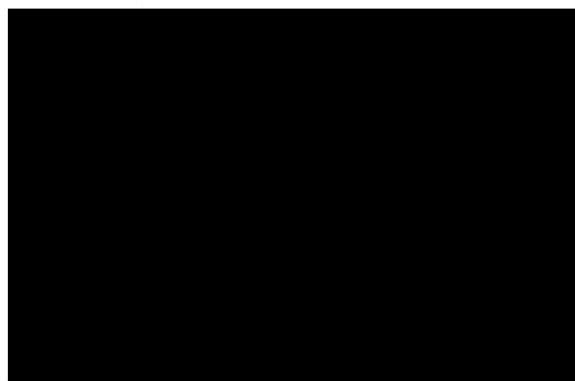
"4. The fee for preparation, including citing and settling with witnesses, perusing evidence and preparing lines of enquiry and submissions but excluding relative consultations, in respect of -

- (a) the first day of trial;
- (b) a subsequent day of trial or diet of deferred sentence".

Reference is also made to the Notes on the operation of Schedule 1 and, in particular, note 3(k) to (m) which set out the circumstances in which the fees prescribed by paragraph 4 are chargeable.

In properly interpreting the scope of these fees, we believe that context is everything. The inclusive fee prescribed by paragraph 4 clearly relates to the circumstances surrounding the preparation for trial and the ancillary/supplementary fee prescribed by 4(b) (and the alternative set within) must be read in this context.

The Board believes that the way in which it has implemented the new Table of Fees is entirely consistent with the lengthy discussions with the Law Society and the Profession, the costings undertaken from time-to-time (shared with the Law Society, available to the profession on its website and the regulations).



Solicitor
Scottish Legal Aid Board
44 Drumsheugh Gardens
Edinburgh
Solicitor for the Scottish Legal Aid Board

7 July 2011

HARDING & COMPANY

FILE NO: CO6142

22 NOV 2010

LEGAL AID ACCOUNT REF: 9338814409

24082-73
PCA
10/11/2/11



2009

| | |
|--|---------|
| Sep-11 Solicitor attendance at court in Livingston for first calling of case (C. Dewar) | |
| Consultation with client prior to court outwith waiting Eng 30mins | |
| Waiting 2.00 - 4.45 | £139.37 |
| Eng in court 4.45 - 4.55 | £19.00 |
| Consultation after court re outcome Eng 15mins | |
| Travel 70 miles | £28.00 |
| Travel 2hrs 20mins | £114.03 |
| BLOCK FEE HIGH COURT BAIL APPEAL | £57.00 |
| Sep-14 Telephone call HMP Saughton to book visit | £2.88 |
| Sep-15 Telephone call Lothian & Borders police re Part 1 of Viper ID parade | £2.88 |
| Further telephone call police re Part 1 Viper parade | £2.88 |
| Attending client in custody HMP Saughton discuss High court bail appeal and take instructions re circumstances and application for bail and advising re Part 1 ID parade Eng 1hr | |
| Travel 98 miles | £39.20 |
| Travel 3hrs | £152.04 |
| Sep-16 Further telephone call Lothian & Borders police re new time of ID parade | £2.88 |
| Sep-18 Solicitor attendance at court for full committal (C. Dewar) | |
| Consultation with client prior to court outwith waiting Eng 30mins | |
| Waiting 2.00 - 2.40 | £25.34 |
| Eng in court 2.40 - 2.45 | £19.00 |

2010

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| Sep-18 Consultation after court re outcome Eng 15mins | |
| Travel 70 miles | £28.00 |
| Travel 2hrs 20mins | £120.70 |
| BLOCK FEE | £209.00 |
| Sep-21 Writing PF re disclosure and our involvement | £7.20 |
| Writing client re letter of engagement and further procedures 2 pages | £14.40 |
| Writing Edin agent re High court bail application | no charge |
| Sep-30 Perusal of interlocutor | £12.67 |
| Oct-06 Telephone call [REDACTED] to confirm details of potential defence witness | £2.88 |
| Oct-12 Writing client advising as to Part 2 and requirement to discuss outcome | £7.20 |
| Telephone call client re outcome of Part 2 of ID parade and discuss implications Eng 5mins | £7.20 |
| Oct-21 Writing PF office re disclosure | £2.88 |
| Nov-11 Writing PF re above | £2.88 |
| Nov-25 Writing PF re disclosure in case | £2.88 |
| Dec-09 Writing PF Livingston re disclosure | £2.88 |
| Writing client advising re current status in case | £2.88 |
| Dec-23 Writing PF re disclosure | £2.88 |
| 2010 | |
| Jan-11 Writing PF re disclosure in case | £2.88 |
| Jan-26 Writing PF re above | £2.88 |
| Feb-10 Telephone call PF Livingston being advised that all papers are with PF in Edinburgh re this case and will need to contact them as case is marked to call in the High Court Eng 4mins | £2.88 |
| Telephone call PF Edinburgh beings advised case marked as High Court case and will check re disclosure and call back | £2.88 |
| Feb-16 Telephone call PF Edinburgh being advised that disclosure still not received and will call back to advise re problems | £2.88 |

2010

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| Apr-29 | Telephone call PF office discuss outstanding details requested in case advises complainer does not have a bank book or payments re people had sex with also advise still trying to get CCTV in right format and also speaking to Crown office re info requested re previous case Eng 10mins | £12.67 |
| May-14 | Writing client re info received and request contact office to make an appointment | £7.20 |
| May-18 | Telephone call witness [REDACTED] make arrangements to take precognition | £2.88 |
| | Telephone call [REDACTED] left message to call back to arrange precognition | £2.88 |
| | Telephone call client to arrange consultation | £2.88 |
| May-20 | Telephone call [REDACTED] to make arrangements for precognition | £2.88 |
| | Attending client take details statement re incident re instruction of counsel Eng 1hr | £50.68 |
| | 8 sheets | £20.00 |
| May-26 | Attendance (QU) upon witness [REDACTED] taking precognition Eng 40mins | £38.01 |
| | Travel 36 miles | £14.40 |
| | Travel 1hr 30mins | £76.02 |
| | 4 Sheets | £10.00 |
| | Attendance (QU) upon witness [REDACTED] taking precognition Eng 45mins | £38.01 |
| | Travel 32 miles | £12.80 |
| | Travel 1hr 10mins | £63.35 |
| | 6 sheets | £15.00 |
| Jun-11 | Telephone call counsel to arrange consultation with client | £2.88 |
| | Telephone call client to advise that received indictment in case | £2.88 |
| | Perusal of prec of [REDACTED] Eng 5mins | £12.67 |
| Jun-14 | Writing counsel re further info received and further details re case | £7.20 |

2010

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| Jun-14 | Writing client re above and advise will discuss at the consultation with counsel | £7.20 |
| Jun-17 | Telephone call PF Edinburgh to advise not yet received and advise contact high court | £2.88 |
| | Telephone call High Court being advised our copy has been served upon PF Livingston and contact them | £2.88 |
| | Telephone call PF Livingston re indictment and being put on hold and being advised that need to contact PF Edinburgh agent re copy of same Eng 10mins | £7.20 |
| Jun-21 | Further telephone call PF Edin being advised our copy would be sent in post | £2.88 |
| | Uplift additional disclosure | £2.88 |
| | Perusal of further disclosure | £12.67 |
| Jun-22 | Writing client re above and advise will discuss at consult with counsel | £7.20 |
| | Writing counsel re disclosure | £7.20 |
| Jun-28 | Telephone call PF office re indictment no one available request call back | £2.88 |
| | Perusal of indictment | £12.67 |
| | Telephone call PF Edinburgh being advised productions sent to PF in Glasgow | £2.88 |
| | Attending client and counsel re all additional info received and precognitions received and discuss ID Parade discuss injuries suffered by the complainer in case discuss possible special defence in case and what evidence complainer give and how come across in court as a vulnerable witness and take instructions Eng 1hr 20mins | £76.02 |
| Jun-30 | Writing counsel enclosing indictment received and productions in case | £7.20 |
| | Perusal of productions disclosed Eng 1hr 30mins | £76.02 |
| Jul-01 | Telephone call PF office High Court re label productions will check and call back | £2.88 |
| Jul-02 | Telephone call PF office left message re missing statements and request same | £2.88 |
| Jul-06 | Telephone call PF office being advised further productions are ready for collection | £2.88 |

2010

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| Jul-06 | Writing client re locus inspection and his involvement | £7.20 |
| Jul-08 | Writing client re court and further procedures | £7.20 |
| | Perusal of re additional disclosures Eng 20mins | £25.34 |
| Jul-08 | Attendance at locus of alleged incident with counsel and client conduct locus inspection and discuss with counsel re CCTV footage and complainer require to be examined by psychiatrist Eng 1hr 5mins | £50.68 |
| | Travel 66 miles | £26.40 |
| | Travel 2hrs 20mins | £126.70 |
| Jul-09 | Perusal of Section 67 notice | £12.67 |
| | Telephone call counsel he advise he will print off photos but require list of defence productions and discuss same Eng 5mins | £7.20 |
| Jul-12 | Writing precognition agent re further witness | £7.20 |
| | Writing police witness re precognition and request their co-operation | £7.20 |
| | Writing clerk of High court re defence productions | £7.20 |
| | Writing Crown office re above | £2.88 |
| | Writing PF re above | £2.88 |
| | Writing counsel re above | £2.88 |
| | Framing above | £7.20 |
| | Perusal of Special defence of consent and form 9A | £12.67 |
| Jul-14 | Attendance at court for Preliminary hearing in High Court in Edinburgh (C. Dewar) | |
| | Consultation with client prior to court outwith waiting with counsel Eng 15mins | £12.67 |
| | Waiting 10.00 - 11.55 | £101.36 |
| | Eng in court 11.55 - 12.25 | £25.34 |
| | Consultation after court 12.25 - 12.40 | £12.67 |
| | Travel 98 miles | £39.20 |
| | Travel 3hrs | £152.04 |

2010

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| Jul-27 | Telephone call [REDACTED] Crown prec officer re still trying to obtain statements from the witnesses in the case and discuss and receive info re witnesses Eng 10mins | £7.20 |
| Jul-28 | Telephone call [REDACTED] prec officer request disclose documentary productions, video's and statements in respect of Section 67 notice | £2.88 |
| Jul-28 | Telephone call prec officer re disclosure ready for collection from PF office in Edin | £2.88 |
| Jul-29 | Attendance at PF office in Edin to collect disclosure including CCTV evidence in case Eng 10mins | £12.67 |
| | Travel 98 miles | £39.20 |
| | Travel 3hrs | £152.04 |
| | Perusal of DVD x 5 and other disclosure in case Eng 2hrs 30mins | £126.70 |
| Aug-02 | Telephone call client to arrange time and date for consult with counsel | £2.88 |
| | Telephone call counsel re above | £2.88 |
| Aug-04 | Telephone call PF Edin re still info in case missing from Section 67 notice and being advised that second Section 67 notice to be served and discuss Eng 5mins | £7.20 |
| Aug-05 | Writing counsel enclosing re statements received from PF | £7.20 |
| | Writing client re court and further procedures | £7.20 |
| Aug-06 | Telephone call client father re court appearance and options available Eng 5mins | £7.20 |
| | Perusal of Section 67 notice | £12.67 |
| | Telephone call client re court appearance and his comments re possible change in plea and discuss | £2.88 |
| Aug-09 | Perusal of vulnerable witness application | £12.67 |
| Aug-11 | Attendance at High Court in Edinburgh for case calling (C. Dewar) | |
| | Consultation with client prior to court outwith waiting Eng 15mins | £12.67 |
| | Waiting 10.00 - 10.50 | £50.68 |
| | Eng in court 10.50 - 11.20 | £25.34 |
| | Consultation with client after court re outcome 11.20 - 11.35 | £12.67 |

2010

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| Aug-11 | Travel 98 miles | £39.20 |
| | Travel 3hrs | £152.04 |
| Aug-12 | Perusal of productions in custody case Eng 30mins | £25.34 |
| Aug-24 | Telephone call client father request visit son re deferred sentence and wishes to obtain character witness reference Eng 5mins | £7.20 |
| Aug-27 | Telephone call HMP Saughton to book visit | £2.88 |
| Aug-30 | Attending client in custody HMP Saughton confirm that he wishes character reference in case and advise not yet spoken with social work and importance of co-operating with reports Eng 35mins | |
| | Travel 98 miles | £39.20 |
| | Travel 3hrs | £152.04 |

3041.00

BLOCK FEE FOR CLIENT IN CUSTODY £304.00

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| Sep-13 | Telephone call HMP Saughton to book visit | £2.88 |
| | Telephone call counsel re time and date of visit to prison to see client, request contact High court to see if report available | £2.88 |
| | Telephone call High court being advised report not yet available | £2.88 |
| | Telephone call counsel advise re above | £2.88 |

Sep-14 Attending client in custody HMP Saughton with counsel re preparation of reports and interviewed twice by social worker and discuss options re sentence in case and possible extended sentence Eng 55mins

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| | Travel 98 miles | £39.20 |
| | Travel 3hrs | £152.04 |

114.00

BLOCK FEE FOR DEFERRED SENTENCE £114.00

Sep-15 Attendance at court for Deferred Sentence, High court in Edinburgh (C. Dewar)

Consultation with client prior to court outwith waiting Eng 15mins £12.67

Waiting 10.00 - 10.30 £25.34

Eng in court 10.30 - 11.05 £38.01

448.00

418.00 2010

Sep-15 Consultation after court re outcome 11.05 - 11.20

no charge

Travel 98 miles

£39.20

Travel 3hrs

£152.04

Sep-28 Telephone call HMP Saughton to book visit

£2.88

Sep-29 Attending client in HMP Saughton discuss sentence imposed and obligations in terms of sex offenders register and prospects of an appeal, instruct does not want to appeal and prospects for parole Eng 20mins

Travel 98 miles

£39.20

Sep-29 Travel 3hrs

£152.04

BLOCK FEE FOR APPEAL ADVICE

£152.00

Oct-15 Writing client re copy of reports as requested

£7.20

Photocopying 230 copies

£20.70

Outlay

£30.00

Outlay

£30.00

Outlay Edin agents

£95.39

Outlay counsel D. Brookens

£5,453.70

418.00

5964.9

4689.66

TOTAL

5964.70

10654.56

10654.36

Add: Attendance at diet

50.68

10705.04

Less: Taxed off

418.00

10287.04

Add: Auditor's fee (inc VAT)

494.10

10781.14

