

The Faculty of Advocates Criminal Appeal Service

Frequently Asked Questions

Introduction

Members may be aware that Faculty Services Limited, the service company for the Faculty of Advocates, has established the Faculty of Advocates Criminal Appeal Service to provide a direct link to solicitors requiring the services of Advocates in criminal appeals (including bail appeals) before the High Court of Justiciary.

The service commenced on 6 January 2014 and enables solicitors to manage some aspects of their cases before the Appeal Court without an Edinburgh office or correspondent.

This is a new Service. It has generated a number of queries from our members. The Society was not consulted during the planning or implementation process of the new Service. The Society has since liaised with the Faculty and with Marsh in order to respond to member queries.

This document addresses a number of frequently asked questions which have been identified. In the event that you have further questions or concern please direct these to coralriddell@lawscot.org.uk.

How does the service work?

The service operates with a roster of counsel. The service will operate the roster in the same way that the clerks operate the ordinary arrangements for the selection of Advocates for any work. The Faculty has stated specifically that the intention is to expand the range of members of the bar available to carry out this type of work. To date approximately 150 advocates have signed up for the roster.

Can a solicitor instruct Counsel of their choice?

The solicitor retains the right to choose the Advocate. The roster is only applicable if the solicitor has expressed no preference. Instructing solicitors are entitled to select a particular counsel for any particular appeal whether or not that counsel is on the roster.

Will Faculty Services Limited instruct Solicitor Advocates if that is requested?

Faculty Services Limited has confirmed that instructing solicitors may use the Service with a Solicitor Advocate in the same way as they may use the Service with an Advocate. However, please note that Faculty Services Limited has not included Solicitor Advocates on

its roster so, where no preference regarding counsel has been expressed by the instructing solicitor, the default position will be to use an Advocate. Faculty Services Limited has also advised that it will be monitoring the use of Solicitor Advocates because the service was primarily set up to facilitate the use of Advocates.

What is the Service offering?

It is understood that the Service can be used to assist with communications with Judiciary and the Crown Office Appeals Unit as well as carry out certain administrative tasks in the conduct of Appeals cases and first instance hearings. The Service will be led by an experienced paralegal.

Will Faculty Services Limited be providing criminal legal assistance?

Faculty Services Limited will NOT be providing criminal legal assistance. Section 25A of the Legal Aid (Scotland) Act 1986 outlines that it is a requirement that only registered solicitors can provide criminal legal assistance. Faculty Services Limited will be providing the solicitor with the opportunity to outsource certain administrative tasks in the conduct of Appeals cases and first instance hearings.

What are the administrative activities that the Faculty Services Limited paralegal can carry out and what administrative work is restricted to the solicitor?

As noted above, Faculty Services Limited is proceeding on the basis that there are certain administrative tasks that it can do in the conduct of cases. If work requires to be carried out by a solicitor then Faculty Services Limited should not be carrying it out. If there is any doubt about a particular matter the Society would encourage solicitors to carry out the work themselves.

How Does Payment Operate?

Faculty Services Limited has advised that the payment arrangements between an instructing solicitor and Faculty Services Limited will be dealt with as a contract for services.

Will using the Service affect payments from SLAB?

In rendering this service the paralegal acts as the agent of the instructing solicitor and the instructing solicitor will be entitled to fee SLAB as normal for the work that is done. The Faculty has advised that they have discussed this aspect with SLAB and that SLAB is content with these arrangements.

Am I in breach of my professional obligations in relation to fee-sharing if I use the new Service?

Faculty Services Limited has advised that the new Service operates in an administrative capacity. It operates as an “on-the-ground-in-Edinburgh” service to deal with administrative matters which do not require to be dealt with by a solicitor. The prohibition on solicitors in relation to sharing fees with non-regulated persons (i.e. non solicitors) (Rule D2) is in relation to sharing fees or profits generated from legal services. In the event that payments are for administrative services and not for providing legal services there is no breach of Rule D2.

In terms of the Society’s professional rules and obligations and compliance with SLAB rules and regulations, who will be held professionally responsible if something goes wrong?

Faculty Services Limited is not a registered Criminal Legal Assistance (CLA) firm. The Faculty Services Limited employees are not registered CLA solicitors. As such, SLAB has no power to review the work carried out by the paralegal employed by the Service.

The instructing solicitor is responsible for all work being carried out by Faculty Services Limited, in terms of compliance with SLAB regulations and code. The Society is reviewing what this is likely to mean for the solicitor in relation to SLAB compliance checks and quality assurance measures (for example, whether there are implications in relation to time recording).

Ordinarily, where a solicitor instructs another solicitor at a CLA registered firm the second solicitor will be professionally responsible, in terms of service and conduct, for the work carried out. That is NOT the position where Faculty Services Limited is instructed. The paralegal is not a registered solicitor and does not hold a Law Society practising certificate. In these cases, professional responsibility for the work carried out will remain with the original solicitor and NOT with Faculty Services Limited.

Is there a Complaint Mechanism?

The Faculty has advised that there is no specific complaint or regulatory mechanism by which a client or solicitor can complain in the event that the Faculty Services Limited paralegal does not perform or in the event they are dissatisfied with the service. If a complaint arising from the paralegal’s work is made to the Scottish Legal Complaints Commission the solicitor will be responsible as he or she is deemed to be supervising the paralegal.

Is there a service agreement?

As noted above, we understand that a service agreement is being drafted. Faculty Services limited has agreed to give the Society the opportunity to contribute to its development.

Does the Service impact on my PI or insurance liabilities?

The service operates as an outsourcing model. That means that liability for the work, even that which has been “outsourced”, remains with the original instructing solicitor. The paralegal is not supervised by a solicitor and no solicitors operate within the new Service. Liability for the work and the action remains with the instructing solicitor.

Marsh offers the following advice in relation to outsourcing and highlights key questions to address when outsourcing this and similar work:

If the practice is proposing to provide outsourced services to other law firms or other businesses, do the services fall within the scope of the practice’s PII cover?

If the practice is outsourcing to another business/law firm, are you satisfied with the PII cover of the other business/law firm? Points that ought to be considered include:

1. *Limit of Indemnity:*
 - *adequacy of limit*
 - *is cover on an ‘any one claim’ or ‘each and every claim’ basis or ‘aggregate’?*
2. *Scope of cover: Does the policy cover (with no unusual/onerous policy conditions or exclusions) –*
 - *the outsourced activities?*
 - *those undertaking the outsourced activities?*
 - *contractual liability?*
 - *Loss of/damage to client documents?*
 - *fraud, including dishonesty of partners and employees?*

If the outsourced provider is a solicitor, there will be greater certainty as regards the terms and conditions of the compulsory (Master Policy) part of the provider's cover e.g. as regards the level of cover and continuing ‘run-off’ cover in the event the solicitor practice ceases. However, Top-Up cover is in a different position and its terms and conditions ought to be checked.

In documenting the terms of the appointment of an outsourced provider, consideration ought to be given to contractual commitment:

- *to maintain Professional Indemnity Insurance (at a level not less than £x) for a specified period (including a period beyond the expiry/termination of the appointment)*
- *to evidence the cover*

If your practice has fidelity guarantee or crime insurance, the policy may be subject to conditions regarding the competency, financial stability and honesty of an outsource service provider. It may be necessary to have the insurers endorse the practice's cover to the effect that the outsourced arrangement is acceptable to them. This will almost certainly be relevant if the outsourcing relates to cashroom services but it needs to be considered whatever the services being outsourced.

If aspects of client work are being outsourced, risk management points to be considered include:

- *who is responsible for communication with/taking instructions from the client?*
- *who is responsible for diarying/complying with critical dates?*

Is the Society's outsourcing guidance relevant here?

All outsourcing providers should be made aware of the Standards of Service and required to comply with them. All outsourced providers must be made aware of the terms of the master policy and current certificate of insurance. For further information please see the Society's Guidance related to Outsourcing.