

OPINION OF SENIOR COUNSEL

for

THE LAW SOCIETY OF SCOTLAND

Introduction

1. The Law Society of Scotland has sought my Opinion in light of Part 2 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013. I have been asked a series of questions concerning a proposed professional practice rule requiring solicitors providing criminal legal aid to collect any contribution collectable by the solicitor under the Act and prohibiting the solicitor from proceeding to trial if he or she has not collected the contribution. The questions and my answers to them are set out below.

The rule-making power of the Council

2. The Council has power, if it thinks fit, to make rules for regulating in respect of any matter the professional practice, conduct and discipline of solicitors and incorporated practices: Solicitors (Scotland) Act 1980, s. 34(1). When exercising that function, the Council must, so far as practicable, act in a way which is compatible with the regulatory objectives, and which it considers most appropriate with a view to meeting those objectives: Legal Services (Scotland) Act 2010, s. 119. The regulatory objectives are set out in section 1 of the 2010 Act, and are as follows:
 - (a) supporting: (i) the constitutional principle of the rule of law; and (ii) the interests of justice,
 - (b) protecting and promoting (i) the interests of consumers, and (ii) the public interest generally,
 - (c) promoting (i) access to justice, and (ii) competition in the provision of legal services,
 - (d) promoting an independent, strong, varied and effective legal profession,
 - (e) encouraging equal opportunities within the legal profession, and
 - (f) promoting and maintaining adherence to the professional principles.

The professional principles are the principles that persons providing legal services should –

- (a) support the proper administration of justice,
- (b) act with independence (in the interests of justice),
- (c) act with integrity,
- (d) act in the best interests of their clients and keep clients' affairs confidential,
- (e) maintain good standards of work,

- (f) in relation to court work, comply with such duties as are normally owed to the court,
 - (g) meet their obligations under any relevant professional rules, and
 - (h) act in conformity with professional ethics.
3. The making of rules under section 34 of the 1980 Act is a “regulatory function” which must be exercised by a regulatory committee on behalf of the Council: ss. 3B, 3F. This is to ensure that the Council’s regulatory functions are exercised independently of any other person or interest and properly in other respects: s. 3B(2). At least 50% of the members of the regulatory committee must be lay members and one of the lay members is to be the Convenor of the regulatory committee: s. 3C. Before rules are made under section 34, a draft must be sent to each member of the Society and submitted to a meeting of the Society. Any resolution passed at that meeting must be taken into account before the rule is made: s. 34(2). The rule shall not have effect unless the Lord President, after considering any relevant objection, has approved the rule: s. 34(3). The Lord President must, so far as practicable, when exercising this function, act in a way which is compatible with the regulatory objectives and he considers most appropriate with a view to meeting those objectives: Legal Services (Scotland) Act 2010, section 119.
4. Part 2 of the 2013 Act provides inter alia for the payment of contributions by accused persons in receipt of criminal legal aid. Section 25AC(3) of the Legal Aid (Scotland) Act 1986, inserted by section 20 of the 2013 Act, provides that the accused is liable to pay a contribution up to, but not in aggregate exceeding, such amount as may be prescribed by regulations. Except where regulations otherwise provide, then apart from in relation to the classes of case described in section 25AC(4)(a) (which include solemn proceedings, appeal proceedings and Supreme Court proceedings), “it is for the solicitor to collect any contribution payable”: section 25AC(4)(b). Essentially this will arise in summary criminal proceedings. A contribution collected by

the solicitor is to be treated as payment of a fee or outlay properly chargeable under section 33 of the 1986 Act: section 25AC(5). Section 25AD provides that, except so far as regulations may otherwise provide, any fees and outlays payable to the solicitor in respect of criminal legal aid are to be paid first out of any contribution payable by the person receiving the criminal legal aid, and only subsequently by the Board out of the Fund, following receipt by it of a claim submitted by the solicitor.

Question I: Would it be possible to establish a practice rule which ensures that solicitors are properly funded by requiring them to collect the summary contributions which have been assessed? Are there any legal or practical implications with the creation of such a rule?

5. Before such a rule could lawfully be made:
 - (a) the regulatory committee of the Council would have to conclude that in making such a rule it would be acting in a way compatible with the regulatory objectives and most appropriate with a view to meeting those objectives; and
 - (b) the Lord President would have to conclude that, in approving such a rule, he would be acting in a way compatible with the regulatory objectives and most appropriate with a view to meeting those objectives.
6. Assuming that there is material upon which the regulatory committee of the Council of the Law Society would be entitled to reach the required conclusion, the question of whether or not to do so would be a matter for the committee. Likewise, assuming that there is material upon which the Lord President would be entitled to reach the required

conclusion, the question of whether or not to do so would be a matter for him. For present purposes, I address the issue only from the point of view of the regulatory committee. If the regulatory committee decides that the rule should be made, it would be for the Lord President to consider whether or not it should be approved.

7. In order to provide a proper basis for determining whether or not the proposed rule would be compatible with the regulatory objectives and most appropriate with a view to meeting those objectives, it seems to me that the Society should carry out a careful analysis, identifying the purpose and rationale of the proposed rule, assessing all the likely effects of the rule, and addressing, in an objective and systematic fashion, the impacts (whether positive or negative) which the introduction of the proposed rule would have on the various regulatory objectives. It would only be in light of such an analysis that the regulatory committee could take a fully informed decision as to whether, in making the proposed rule, it would be acting in a manner compatible with the regulatory objectives and most appropriate with a view to meeting those objectives. If the regulatory committee were to make the proposed rule, such an analysis would also provide a platform for the submission of the rule to the Lord President for his approval.

8. Apart from the requirements of the 2010 Act, the proposed rule raises issues as to the applicability and effect of Article 101 TFEU and section 2 of the Competition Act 1998. I address those issues more fully in answer to Question III below. For the reasons which I set out there, it does not seem to me that the question of compliance with those provisions (assuming that they apply) need be addressed separately from compatibility with the regulatory objectives. But the regulatory committee should recognise that the proposed rule would restrict competition between solicitors inasmuch as it would, in effect, preclude solicitors from competing for business by waiving the right to collect the contribution which the client would otherwise be required to pay. It

would also – by, in effect, requiring a solicitor to collect the contributions before trial – preclude solicitors at least to that extent from competing in relation to the terms upon which they collect the contribution. The regulatory committee – and, in due course, the Lord President – would need to be satisfied that the purpose and effects of the rule are such as to justify any such restrictive effect.

9. The practical implications of the proposed rule are likely to be more apparent to members of the Law Society experienced in dealing with summary criminal legal aid than they are to me. The most obvious practical implications are those which arise from the requirement, implicit in the proposed rule, that a solicitor who has not collected the contribution for which the accused is liable withdraw from acting. It seems to me that, in deciding whether or not the proposed rule is compatible with the regulatory objectives the regulatory committee must address seriously and with a degree of rigour these practical consequences. The effect of the proposed rule would be to prevent a solicitor, who is willing to continue to represent a client accused of a crime even though the client has not paid the contributions specified in the legislation, from doing so. On the face of it, this would be liable to have an adverse effect on the interests of justice, as they affect that individual accused. It might also, particularly if the solicitor is compelled by the proposed rule to withdraw from acting late in the day, result in adverse impacts on the administration of justice, if diets require to be adjourned, or, indeed, if accused persons routinely end up representing themselves.

10. It will be appreciated that the proposed rule differs from the professional position which ordinarily applies where a client does not pay his solicitor's fees. In such circumstances, the solicitor is, ordinarily, entitled to withdraw from acting, but is not obliged to do so. A solicitor may properly continue to act pro bono and, in particular, may choose to continue to represent a client at trial (or at any other hearing) in the expectation or hope that payment will in due course be

forthcoming. Indeed, there may be some circumstances where a solicitor could legitimately be the subject of criticism for a very late withdrawal from acting on the basis that he has not managed to collect (or the client has not be paid) the solicitor's fees. The proposed rule innovates on the ordinary rule by, in effect, compelling a solicitor to withdraw from acting, if he has not collected the contribution for which the accused is liable by virtue of the provisions of the 2013 Act.

11. It will be for the regulatory committee, following a full analysis of the implications of the proposed rule for the regulatory objectives, to decide whether or not it is a rule which should be made in pursuance of the statutory obligations on the regulatory committee. It may, though, be useful if I offer some observations on the reasons which have been identified in the material provided to me as possible reasons for the proposed rule.

12. It has been suggested that the proposed rule is required to secure consistency with Article 9 of the Society's Code of Conduct for Criminal Work. Article 9 states: "No payments in money or kind should be made to an accused person, a member of the accused person's family or potential witnesses." It seems to me that a decision by a solicitor to waive or abandon the right which the solicitor would otherwise have to collect a contribution may be regarded as tantamount to the discharge of a liability which the accused would otherwise owe to the solicitor. This might reasonably be regarded as no different from a payment in kind. Whether that is a good reason is a matter for the regulatory committee, as is the question of whether or not, even if it is a good reason, it justifies the proposed rule notwithstanding any other potential impacts on the regulatory objectives. But it does seem to me that the regulatory committee would be entitled to take the view that the proposed rule – or, perhaps, a variant of the proposed rule – pursued the same purposes as Article 9.

13. I suggest that this line of reasoning might justify a variant of the proposed rule, rather than the rule as formulated in Question II, for the following reasons. It is not for me to tell the Council what the underlying purpose or rationale of Article 9 is, but I surmise that this might include the view that it is not professionally acceptable for a solicitor to secure clients by means of inducements where the work is likely to be funded, or funded largely, by the public purse through legal aid. It may be that it might also be a rule framed to protect solicitors from the possibility of being put under illicit pressure to provide such inducements. If these are the underlying reasons for Article 9, then the regulatory committee would, it seems to me, be entitled to take the view that the same reasoning would apply where a solicitor offered to waive the required contributions as a marketing tool. Such a solicitor would, in effect, be “buying up” clients on criminal legal aid – effectively the right to charge the Fund for the balance of the fees and outlays incurred on behalf of the client. But the same rationale would not, it seems to me, apply to a solicitor who does not waive the right to collect the contribution in return for the instruction, but who is prepared to work on the basis of a payment plan which would result in the contribution not being paid (in full) at the date of trial. An intermediate case is the solicitor who has accepted instructions on the basis that the contribution will be paid but who, on an individual basis, is prepared to continue to act even though it becomes apparent that the client will not or may not meet the contributions. The question of whether the underlying purpose of Article 9 would also apply to such a case seems to me to be much less obvious – and it is evident that in relation to such a case there are other regulatory objectives which may need to be taken into account in deciding whether a rule would be justified, namely those concerned with the interests of justice, and, indeed, the administration of justice.

14. It has been suggested that for a solicitor to waive the contribution would be contrary to the Society’s existing rule against fee-sharing. It seems to me that the regulatory committee would have to consider whether or not, and to what extent, the mischief against which that rule

is directed (which, as I understand it, is principally the payment of commissions to third parties in return for the introduction of work) would justify the proposed rule or some variation of it. In the ordinary case, a decision by a solicitor to waive all or part of the fee which would otherwise be payable by the client would not, it seems to me, engage the rule. The specialty here is that the fee for criminal legal aid is determined in accordance with the relevant regulations and the accused has a statutory liability. The fee is, in terms of the legislation, to be met, in the first instance, from the contribution by the accused. The contention that a solicitor who waives the contribution in effect to “buy up” the business is engaged in activity at least analogous to that which is struck at by the rule against fee-sharing, seems to me to be an intelligible one. On the other hand, it does not seem to me that that rule would strike at a solicitor who chooses to continue to act for a client notwithstanding that the contribution has not (yet) been paid (in full). If that is right, then while this rationale might be capable of justifying a rule against solicitors waiving the contribution in return for the instruction, it is much more difficult to see how it would justify a rule which would require the solicitor to have collected the contributions in advance of trial, with a consequent obligation to withdraw from acting if he should have been unable to do so.

15. It has also been suggested that the proposed rule may be justified in the interests of maintaining access to justice on the following train of reasoning. It is suggested that if solicitors were to continue to act without collecting contributions, the Government would make misinformed assumptions about the affordability of contributions which could lead to misinformed decisions about contribution rates and clients' ability to pay, which could, in the long run, undermine access to justice. I doubt whether this justification would be a safe one in the present context. The contention seems to be that solicitors must be compelled to collect contributions in advance of trial, and to withdraw from acting if the contributions are not paid, in order to demonstrate to the Government the difficulties which clients have in paying

contributions and solicitors have in collecting them. It may be, of course, that the point will be made, in any event, because solicitors will withdraw from acting for clients who do not pay contributions, but it is open to question whether it would be a good basis for preventing a solicitor from choosing – perhaps for very honourable professional reasons – to continue to represent an accused person notwithstanding that the contribution or the full contribution has not been paid. If there is a concern that the Government may be misled, the answer would, it might be thought, be the collection of reliable information from solicitors about the extent to which contributions remain unpaid and the reasons why that is the case.

16. I would not wish to exclude the possibility that the routine waiver by solicitors of contributions might have long-term effects of a systemic nature bearing on the regulatory objectives. But it seems to me that to support a rule such as that proposed, such effects would have to be based on some serious analysis – quite possibly analysis by an appropriately qualified expert. Let me illustrate the point. The fees and outlays which solicitors are permitted to recover in respect of criminal legal aid have presumably been fixed at a level which provides a reasonable but not excessive remuneration for the work involved (including a reasonable but not excessive profit margin). A firm of solicitors which routinely chose not to collect the contributions would thereby routinely receive less than the figure which has been identified as a reasonable remuneration for the work involved. It is possible that, if certain firms adopted the practice of not collecting contributions, the long term effect would be that they would drive other firms out of the market, thereby reducing competition and choice. If the work is truly uneconomic on that basis, such firms might themselves go to the wall. But this is speculative. There are other possibilities. One is that some firms may be able to operate at levels of efficiency such as to make the work pay without collecting the contributions. Another is that some firms may choose to cross-subsidise this work from other more remunerative work for a variety of reasons. I offer these thoughts not

by way of a concluded view – but to illustrate that, if systemic effects are to be relied upon, the analysis of those effects would require to have a degree of rigour such as, ultimately, to be supportable in the event of any challenge.

17. It has been suggested that, in circumstances where the legislature has decided that a certain contribution is affordable, it is not for individual solicitors to take a different view by deciding not to collect contributions. That also, it seems to me, begs the question of whether or not it is professionally legitimate for solicitors to choose not to collect a contribution in the context of the criminal legal aid system. A decision by a solicitor not to collect the contribution might be taken, not because he considers the contribution to be unaffordable, but because the effort of recovering it is not, for him, economic. And a solicitor might take the view that his client will pay, but requires longer to do so – and that meanwhile he is willing to represent the accused at trial.

18. That is not to say that the purposes and assumptions underlying the legislation may not be relevant. The regulatory committee might, for example, be entitled to consider that one of the purposes of requiring an accused person to make a contribution to the cost of his defence is to secure that, in making decisions about the case, the accused takes into account cost implications, as a privately paying client would. It may be that if solicitors routinely waived the right to recover contributions, this would undermine this purpose of the legislation.

19. The following further reasons which have been suggested do not seem to me to be good ones.

(a) It has been said that it would be unfair for some clients to have the benefit of having their contributions waived, while others would not. This, it seems to me, begs the question of whether the rule is justified or not. If it would be compatible with professional propriety for a solicitor to choose to act without collecting the statutory

contribution, then it does not seem to me that there would be any relevant unfairness.

(b) It is said that it would be unfair that a client in receipt of civil legal aid would have legal aid withdrawn if he or she did not meet the contributions (which are collected by SLAB) while a client facing a summary charge could continue to receive criminal legal aid without paying the contributions. I am not convinced that the comparison is relevant. I am told that legal aid will not be withdrawn from a client in receipt of criminal legal aid for solemn or appeal proceedings who fails to pay the contributions (which, in those cases, are collected by SLAB). If that is correct, why, it might be asked, should the client in receipt of criminal legal aid for summary proceedings, in effect, have legal aid withdrawn because the solicitor has not collected (or has been unable to collect) the contributions?

(c) It is said that the proposed rule is necessary to protect solicitors from potential criticism in the event that the solicitor withdraws from acting because contributions have not been paid. It does not seem to me that this consideration would begin to justify compelling the solicitor from withdrawing from acting. It would suffice to have a rule, consistent with the ordinary position where fees have not been paid, that a solicitor is entitled to withdraw from acting if the statutory contributions have not been paid, together with such guidance as may be thought appropriate as to the circumstances in which withdrawal is and is not considered acceptable.

Question II: If it is possible to establish such a rule we would suggest the following wording: “where a client is assessed as being liable to pay a contribution a solicitor is required to collect the contribution and should not proceed to trial without having collected the contribution”. There might need to be a timescale involved so that the solicitor is aware when he or she would be required to withdraw from acting. Does

Counsel have any comments on the suggested wording or suggestions in relation to timescales?

20. The wording of the rule would need to follow the analysis. So, if the regulatory committee were to take the view that a rule framed in these absolute terms was compatible with the regulatory objectives and was the most appropriate way of pursuing the regulatory objectives, the wording suggested might be appropriate. On the other hand, if the regulatory committee were to take the view that, while a rule prohibiting the routine waiver of contributions as a marketing tool was justified (along the lines of Article 9), it would not be justified to prohibit a solicitor in an individual case from continuing to represent an accused at trial although the (full) contribution had not (yet) been paid, the rule would plainly require to be modified. It will be apparent from the discussion above that it seems to me that the proposed rule would catch various different types of conduct, not all of which may engage the same regulatory objectives (or the regulatory objectives to the same extent). In particular, it seems to me that a waiver in advance of contributions by a solicitor in return for the business is quite different from a decision by a solicitor that he is prepared to accept a payment plan which would involve him in going to trial before the full contributions had been paid.

21. I agree that if an absolute rule were to be introduced, the regulatory committee might well need to consider supplementary rules as to the point in time by which contributions had to be collected and a decision made as to whether or not the solicitor would continue to act. The regulatory committee would properly be entitled to take into account – and, indeed, probably should take into account, the interests of accused persons in having reasonable notice if they are in fact to be unrepresented at trial, and the general interests of the administration of justice, in avoiding diets being discharged except where necessary.

Question III: could such a practice rule be considered a restraint on trade? Could there be any competition law issues arising out of the establishment of such a rule?

22. I have referred above to Article 101 TFEU and section 2 of the Competition Act 1998. Article 101 TFEU strikes at agreements between undertakings, decisions by associations of undertakings or concerted practices which: (a) may affect trade between Member States of the EU; and (b) have as their object or effect the prevention, restriction or distortion of competition. Section 2 of the 1998 Act strikes at agreements between undertakings, decisions by associations of undertakings or concerted practices which: (a) may affect trade within the United Kingdom, and (b) have as their object or effect the prevention, restriction or distortion of competition with the UK.

23. The Law Society of Scotland is an association of undertakings for the purposes of these provisions: *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577. Nevertheless, it does not follow that professional practice rules fall to be regarded as decisions of an association of undertakings for the purposes of Article 101 TFEU and section 2 of the 1998 Act. Firstly, the Law Society may only adopt such rules by reference to the public interest criteria specified in section 1 of the Act: cp *Wouters*, para. 62. Secondly, any such rule requires the approval of the Lord President. In deciding whether or not to approve such rules, the Lord President is himself required to apply the regulatory objectives. It may be said that, by virtue of the involvement of the Lord President, the making of such a rule is not exclusively a matter for the Law Society, but is ultimately a matter for the State, acting through the Lord President: cf, *Wouters*, para. 61.

24. But even if a professional practice rule does fall to be treated as a decision of an association of undertakings to which, in principle, Article

101 TFEU and section 2 of the 1998 Act apply, a professional practice rule which promotes the regulatory objectives and which does not have an effect restrictive of competition going beyond that inherent in the pursuit of those objectives would not be prohibited by Article 101 TFEU or section 2 of the 1998 Act: *Wouters*, paras. 97-110. The regulatory committee of the Council and the Lord President would each have to be satisfied in that regard. On the assumption that they were properly so satisfied, and that the position in that regard could, if necessary, be demonstrated, a decision properly made that the proposed rule was compatible with the regulatory objectives should also be compatible with Article 101 TFEU and section 2 of the 1998 Act. So, for example, if the regulatory committee was satisfied, on good grounds, that it was not professionally acceptable for a solicitor in effect to “buy” the right to the business (and accordingly to that part of the fees which would be borne by the Fund) by waiving the contributions, a rule which struck at that activity would not, in my view, be incompatible with Article 101 TFEU and section 2 of the 1998 Act.

Question IV: It is our view that a practice rule could take two forms. The first would allow the solicitor to continue acting for a client where the contribution or part of that contribution which has not been paid is minimal (for example under £20). The second form of rule would be absolute and would not allow the solicitor to continue acting for the client unless the full contribution amount had been paid to the solicitor. Does Counsel have any comments on either form of rule and which form of rule does Counsel think would most adequately protect solicitors and clients?

25. These are not, in my view, the only two possible forms of rule. I have already suggested above that there may be a difference between a prohibition on solicitors routinely waiving all right to collect contributions as a marketing tool, and a solicitor who on an individual basis is prepared to continue to act for a client who has not (yet) paid the (full)

contribution, and there are other, intermediate, permutations. The question of what form of rule is compatible with the regulatory objectives and is most appropriate with a view to meeting those objectives is a matter for the regulatory committee (and, subsequently, for the Lord President).

Question V: The assessment periods will not be linked to the actual payment periods. Therefore, would it be necessary to link any practice rule to assessment periods (i.e. where a client is assessed as having to pay £22 per week for 20 weeks would the practice rule have to stipulate that he or she would only have had to pay £220 after a 10 week period even though the payment periods are separate?)

26. There is, so far as I can identify, no legal requirement for linking payment to assessment periods. But in considering whether or not the proposed rule or some variant of it is justified, the regulatory committee should, in my view, have regard to the structure of the legislation. The legislation, as the Law Society observes, presupposes that the statutory contributions are affordable. But the approach to the calculation of the contribution (by way of an assessment period to which contribution rates are applied) has been adopted, I imagine, on the view that only the contribution rate is affordable in each week.

27. This, it seems to me, does present a potential difficulty in the way of any absolute rule which would prohibit a solicitor from representing an accused at trial if the full contribution has not been collected. In effect, the Society would be requiring its members to insist that the full contribution be paid by a certain date before trial even if the assessment period is longer (I assume that, since we are concerned with summary cases, this is a practically conceivable situation). On the basis that the contribution rate is at the level of what is affordable per week, the consequence would be practically inevitably a failure to pay in time, and, on the basis of the proposed rule, withdrawal from acting.

28. This consideration does take me back to the point about competition. No doubt some solicitors would take the view that they are not prepared to go to trial without collecting the full contribution in advance. But others might be willing to go to trial on the basis of instalment payments extending after the trial date. If there are solicitors who are willing to act on the latter basis, is there a good reason why they should be prevented from doing so, and why – if there were such solicitors – accused persons should not be free to instruct such solicitors? There may be a good reason, but this is a consideration which the regulatory committee would, in my view, have to apply its mind to.

Question VI: Would there be any ECHR implications on suspending the legal aid certificate until the contribution has been paid? Could the suspension of the certificate be used to prohibit abuse of transfers of legal aid so that there should not be an incoming solicitor until the portion of the contribution has been paid to the outgoing solicitor?

29. I am not entirely clear what is envisaged by this question. I do not understand there to be an intention that the legal aid certificate would be suspended if contributions were not paid. Indeed, I have been told that the Board does not, in criminal matters, intend to suspend the certificate in the event of non-payment of contributions. It seems unlikely, then, that the Board would suspend the certificate in the event of a transfer of agency simply because the outgoing solicitor has not yet received the appropriate proportion of the contribution. I would be happy to give this further consideration if that assumption is wrong.

30. Leaving aside the question of suspension of the legal aid certificate, it seems to me that transfers of agency raise potentially at least two different questions: (i) Which solicitor is entitled to collect the contribution or are both entitled to collect the relevant proportion? (ii) If a solicitor has collected a greater proportion than his entitlement,

should he be obliged to account for the balance to the other solicitor? If these issues are not dealt with in statutory regulations, then it seems to me that the Society could (and probably should) address these issues in professional practice rules.

Question VII: Does Counsel have anything else to add?

31. I have nothing to add.

THE OPINION OF

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11 April 2013