



Comments by the Law Society of Scotland Civil Legal Aid Team on the Revised Draft Code of Practice for Children's Legal Assistance

- 1 The document refers to the "Compliance Partner". The Law Society of Scotland Practice Rules 2011 now refer exclusively to "Manager" rather than "Partner" and using the same terminology and definition would be more consistent and would avoid having to define the meaning of "Partner" in the code. Paragraph 2.3.3.3 is an example of the confusion which can arise – the wording here manages to include both firms and companies in the definition of partner, and this needs amendment even if the use of the word "partner" is retained.
- 2 The code in places sets out what is required of solicitors by their own professional codes of standards and conduct, and requirements of the Regulator the Law Society of Scotland, without acknowledgement that these are already requirements for solicitors. This makes the code read as if such requirements are new or additional to their professional obligations, or at least a member of the public reading it might think so. We question whether this is necessary at all.

Paragraph 2.2.2 is an addition to the previous draft. Whilst there can be no objection to what is set out here, the fact is that it is a statement of a professional requirement which is regulated by the Law Society of Scotland. A solicitor who did not hold a practising certificate can't practice at all, nor can he/she grant any form of legal assistance, and it is for the Law society to regulate any restrictions. It would be very odd if a firm employed solicitors to carry out children's legal assistance, who don't have practising certificates. It seems unnecessary for this to be stated in a code of practice. Has this sort of thing been found to be a problem in the past?

Similarly, paragraphs 3.1 and 3.2 only re-state what is already required of solicitors but reads as if the code is the only thing requiring independence, honesty etc.

It would be preferable if there were simply a general statement that all solicitors are officers of the court and are regulated by the Law Society of Scotland which sets out standards of service and conduct, and which has Rules and Guidance with which all solicitors must comply. No person may act as a solicitor unless they possess a current practising certificate which does not restrict them from carrying out the type of work which they undertake. Then the terms of this code of practice would be clearly additional to all other professional requirements and obligations.

- 3 As we have indicated in the past, the frequent unqualified use of the word "ensure" presents a difficulty. For example, how is a solicitor (compliance partner) to "ensure" that other solicitors are complying with the code (para 2.3.3.4). This has been added since the previous draft and occurs inappropriately in other places. Surely the compliance partner can only be responsible for having procedures in place requiring other solicitors to comply with the code and for internally monitoring compliance? We are of the view that the phrase "take all reasonable steps to ensure that" or "ensure that the firm has in place policies and procedures designed to ensure that" would be preferable and more realistic. Similar wording at para 2.2.2 raises the same issues.

Similarly in para 5.6.3 – it is hard to see how a solicitor can "ensure" that work done by a solicitor outwith the firm has complied with the code. A solicitor can "take reasonable steps to ensure" this, and of course will retain (not "maintain") responsibility for the work.

The requirement to “ensure” appears at several points throughout the document, and should be reworded in the manner suggested in the above examples.

- 4 We welcome the increase in the periods allowed for various intimations to the Board (for example paragraphs 2.1.2, 2.3.3.1, 2.3.3.4). However the sentence which states “Identification in advance of the special reason will prevent this period being extended indefinitely and as such a special reason request must be made at the outset of the period” is nonsensical. Suppose the compliance manager is taken suddenly and seriously ill 10 working days into the period allowed. The other partners are unlikely to have at the forefront of their minds the question of notifying the Board of another solicitor having left the firm a couple of weeks previously. But at that point it would be too late for them to seek an extension of the period allowed.

It would be preferable to change this so that, say, only one extension of the period will be permitted. This would allow a maximum of 8 weeks for notifications to be made. Any solicitor joining the firm and wishing to carry out children’s legal assistance work would be aware that they would have to register anyway, and probably well within this timescale.

- 5 We consider that the requirement at para 2.2.3.1 for a solicitor to certify at the time of application that they comply with the code should be changed to certify that the solicitor will follow the code once registered. The code is very far reaching, and does not strictly speaking apply at the date of registration.

We also consider that the requirement at para 2.2.4.4 for a solicitor to have a working knowledge and familiarity with all documents specified at para 5.7 is very high, and should be reconsidered.

- 6 We consider that there will be a problem for solicitors who do locum work. They may not have formally set themselves up as a sole practitioner firm, registered as such with the Law Society. In that event the firm for which they are working will require to register them before any children’ legal aid work can be carried out. The nature of locum work is often that assistance is required urgently for some reason such as illness. It is unfortunate that locums can’t register themselves and maintain their registration outside any specific firm.

- 7 We welcome the changes which have been made to the CPD requirements, including the incorporation of wider learning methods, allowance for preparation time, and the removal of the requirement to keep a written record. These requirements now mirror more closely the Law Society’s own CPD regime, and are more appropriate. However, no guidance is provided on what factors the Board will consider in deciding whether a course has relevance to the provision of children’s legal assistance, and there remains a risk that solicitors may in good faith pay for and attend courses without knowing whether the Board will accept them as relevant.

The requirement for a solicitor to carry out five hours CPD in the 12 months prior to registration remains quite onerous. We would recommend the extension of the time period allowed to two years prior to registration, or within one year of registration, to allow for the limited availability of relevant courses.

In paragraph 2.2.5.1 there is no time limit on the Board’s ability to require demonstration of compliance with the CPD requirement – this could cause problems if a request is to go back several years. It would be helpful if the words “in relation to the current and previous practice years” were inserted after the words “at any time thereafter” in the final sentence.

- 8 We re-iterate our objection to the concept in paragraph 2.3.3.2 that the Board can object to the selection by a firm of its own compliance partner. This is a management decision for a firm to take. There is no requirement in the code, nor should there be, that the compliance partner personally practices in the field of children’s legal assistance. It is a management position with management responsibilities and we see no good reason for the inclusion of this provision.

If our objection is rejected, then at the very least there should be an indication of the factors which the Board will take into account in considering the nomination of a compliance partner.

- 9 In para 2.3.3.4 there is reference to the “written record” of courses attended, but the requirement for the record to be in writing has been removed from para 2.2.5.1 – whilst this is covered in the footnote, it would be more consistent for the word “written” simply to be deleted.

- 10 Reference to “persistent unnecessary requests for employment of Counsel” at para 3.5.1 is unnecessary. We believe that the making of a request for Counsel demonstrates that a solicitor must consider it necessary. The meaning of this sentence should be clarified, or the wording should be deleted.

- 11 In relation to para 3.6.1, we are still of the view as indicated previously, that the production of documentation should be restricted to “relevant” documentation, and that a reasonable period of notice of any such request should be specified, especially in relation to a visit to premises.

- 12 We continue to be concerned about the unqualified requirement in para 3.9.1 to “obtain” police statements and the Reporter. The only exception mentioned is where personal precognition can be justified. This completely ignores the fact that the police seldom make statements available to solicitors, and the Reporter more often than not does not have precognitions. The words “where available” should be inserted after the words “Reporter Administration” in this paragraph.

The requirement to justify citing witnesses and to have “taken reasonable steps to ascertain what their evidence is” will occasionally not be possible. Rarely, given restrictive time constraints and the various witnesses who may need to be cited, solicitors may be unable to meet this requirement, and this situation should be taken into account within the code.

- 13 At para 3.10.1, and throughout the code, it is specified that accounts must be in electronic format. This is not currently the case, and we suggest amending the wording to require accounts “to be in such format as the Board may prescribe”. It is unclear why this requirement does not apply to solicitors employed by the Board.

- 14 We consider the requirement to pay outlays within 10 working days may still be problematic. For example, if a solicitor is on holiday for two weeks, the timescale may still be too short. We recommend a provision allowing for the excuse of non payment in circumstances that might have to be justified at a later date.

- 15 Paragraph 3.11 has been added to the previous draft. The point made in the first paragraph is already covered in Board guidance, but there is no objection to it. It should be noted however that the Law Society of Scotland does not specify how long files are to be retained but only issues guidance on this point. In any event, this is covered in para 5.3.1. There are further provisions in relation to mandates in para 4.4.4. Para 3.11 appears to be unnecessary.

- 16 Part Four relates to quality assurance and we presume that its provisions will be considered by the Quality Assurance Committee of the Society on which the Board is represented. However, we have noted a number of concerns with the current wording and format. Firstly the requirement in para 4.1.1 to produce whatever information the Board considers necessary should be qualified by inserting the word “reasonably” before “considers necessary”. Secondly, in para 4.2.2 point 10 appears to be more appropriately placed as a sub paragraph of point five. Point 11 should recognise the role of professional discretion on the part of a solicitor making these decisions. In point 12, the word “possible” should be changed to “necessary”. Similarly, in point 13, the words “and practicable” should be inserted after the word “economical”. Regarding point 14, the unqualified requirement to provide representation at a children’s hearing or court hearing as a duty is not consistent with the lack of provision of children’s legal assistance for the majority of such hearings.

We would welcome the opportunity to meet with the Board to discuss our concerns with this section of the draft code.

- 17 Paragraph 4.3 as a whole contains material which is effectively guidance rather than a code of practice as such. Paragraph 1.4 sets out at the outset that firms and solicitors will operate in accordance with the relevant legislation “*and any guidance issued by the Board together with any rules and guidance as required by the Law Society of Scotland*”. This is pretty comprehensive in making compliance with the Board’s guidance essential for registration, but it repeated in several other places. In fact, we believe that it would be more appropriate for the document to state that solicitors will “have regard to” the guidance, as the current wording would cause the document to become binding, rather than guidance, a point which applies not only here, but throughout the document.

Examples of matters which would be more appropriate in guidance are the requirement to apply online (there won’t be any other option soon), timeously (though in children’s cases there is very often short notice), for information to be complete etc.

The incorporation of such detail into a code of practice makes it unnecessarily lengthy and repetitious, and detracts from the impact of its fundamental requirement to comply with the guidance which is elsewhere.

- 18 We welcome the removal of the requirement for detailed chronological time recording in children’s legal assistance cases. In many such cases, time at court is spent going between the parties and the Reporter negotiating, often very soon after instructions have been received on the same day.

We consider in para 5.2.1 that the requirement to note the client’s name, and the start and finish times, on each paper relating to the case is excessive. Papers in a file should be assumed to relate to that client, and similarly that the solicitor dealing with it is the solicitor in charge of the file. Although a requirement to record start and finish times replicates the situation for criminal cases, given that much of the work is actually done out of court this is unduly onerous in the context of children’s work.

It would be helpful if the requirement in para 5.2.1 that file notes correspond in length and detail to the time spent were qualified by the words “having regard to the circumstances at the time”.

We are also concerned to confirm that the Board will pay solicitors for recording the outcome and what was explained to the client about further action.

- 19 The requirement in para 5.3.1 to record the whereabouts of files if removed from the office is unrealistic. This will regularly happen in normal situations such as when a solicitor may take a file to court or home.

It seems inconsistent to encourage electronic dealings but require that electronic files be made available in paper format.

- 20 Minor comments – (i) In para 5.1 the word “effectively” is superfluous and should be deleted. (ii) In para 5.3.1 “practice” should be “practicable”. This para requires a file to be marked for closure when the work has been completed – surely this should instead be when payment has been received? (iii) In paras 3.7.2 and 3.8.2, the word “fully” before “justified” is superfluous and should be removed. The costs are either justified or not. (iv) In para 4.3.1 the word “timeous” should be deleted as it is unclear and unnecessary. (v) In para 5.7.1, the word “pertinent” requires clarification – pertinent to what? The phrase “a working knowledge and familiarity of” should read “a working knowledge of and familiarity with”. However, as previously noted, we feel this is a very high standard to impose. (vi) Para 5.8.2 – unclear- should “by” be “about” or “in respect of”? (vii) We welcome the removal of the requirement in para 3.10.1 to pay all witness expenses prior to submission of the account. This change makes the word “other” in para 3.10.2 superfluous.

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