

**THE THOMSON REVIEW**

**RESPONSE TO PRELIMINARY REPORT JANUARY 2010  
BY THE SOCIETY OF SOLICITOR ADVOCATES**

**Background to the Review**

In February 2009 the opinions of the judges in the High Court of Justiciary in the case of Alexander Woodside v Her Majesty's Advocate [2009] HCJAC 19 were issued.

The following issues were raised in the opinions:

- (1) Compliance with Rule 3 of the Code of Conduct (Scotland) Rules 1992.
- (2) Solicitor advocate instructed by employee; relevance of the Code of Conduct.
- (3) Senior advocate's absence from trial
- (4) Seniority
- (5) Mixed doubles.
- (6) The "assumptions underlying section 24 of the 1990 Act"

In May 2009 it was announced that a review of rights of audience was to be carried out. The Government said that the review would operate within the broad principles which have informed the approach to the Legal Profession Bill – in other words it would be assumed that

- Both advocates and solicitor advocates will retain rights of audience

- Advocates and solicitor advocates should in general have an equality of standing before the court, and operate under similar standards of conduct
- There should be fair competition between solicitor advocates and advocates
- The proper administration of justice should be a paramount consideration.

Within that framework, the review would consider what issues may arise from the differing relationships which solicitor advocates and advocates may have to the court, clients and instructing solicitors, and whether any changes to the framework of legislation and rules are desirable to ensure the interests of justice and the public are protected.

Mr Ben Thomson was appointed to conduct the review. He announced that he wanted to examine the following areas of focus:

1. the training, qualification, accreditation and regulation of Solicitor Advocates and Advocates;
2. exploring and comparing the complaints procedures for each of Solicitor Advocates and Advocates, not just against each other but also on a wider comparative basis;
3. issues concerning the management of conflicts of interest again for each of Solicitor Advocates and for Advocates

The preliminary report of the Thomson Review was published on Monday 18 January 2010. If implemented it will mean widespread changes to the way in which rights of audience in the Supreme Courts are exercised.

The objective which Mr Thomson sets in the Review is: “to have standard qualifications, codes of conduct, monitoring and complaints procedures, whilst maintaining separate business models.”

## **The Recommendations**

## 1. Training and Qualification

The Review proposes that those who plead in the Supreme Courts should have the same qualification.

The Society prefers the uniform title of “counsel” to the proposed expression “pleader”

The Society of Solicitor Advocates (“SSA”) supports the Review’s proposals in relation to introducing this qualification. As the Review notes training and qualification can be separated to the extent that each branch may choose to retain its own route to qualification via its own training programme but the SSA does agree that the same qualification at the end of that process can only be to the benefit of standards in the Supreme Courts.

We note the Review’s comments about senior pleaders.

The rules of seniority in the Faculty of Advocates relate to the time served by its members and are strictly adhered to in their lives and practice. A junior member cannot lead a more senior member. No such rules apply to solicitor advocates. Solicitor advocates may be instructed as senior or junior as the instructing solicitors consider appropriate provided they ensure that their clients are competently and appropriately represented. Any solicitor advocate acting as senior has to accept that the role carries certain responsibilities. The SSA does not accept that only those accredited as Senior pleaders once a universal standard has been adopted should appear as lead counsel. It is perfectly normal for a junior advocate or solicitor advocate to be instructed to act as leader with another advocate or solicitor advocate. In the Woodside appeal itself the appellant was represented by two advocates, both of whom were juniors but one of whom was instructed to lead.

Where solicitor advocates have appeared either with other solicitor advocates or with members of Faculty we are unaware of there being any confusion about responsibilities. Where a solicitor advocate junior-ed to a Faculty QC he put forward his views about what should be done but in the end he did what he was told. Is it any more complicated than that? If, on the other hand the Faculty QC asked the junior solicitor advocate to

conduct the examination or cross examination of a particular witness would this be untoward? There are other examples of a junior member of Faculty appearing as junior to a solicitor advocate. No issue has arisen as to the responsibilities in any of these examples. The important thing is for the court to be clear in each case who the leader is.

The previous system of “self-certification” as senior in criminal cases for legal aid remuneration has been brought to an end. The immediate end to the practice called for by the Review has therefore been implemented. The Council of the Law Society (“the Society”) has recommended 15 solicitor advocates for remuneration as seniors for legal aid purposes. The Review states that it is not clear what process was followed in order to establish that these individuals are suitably able to appear as leading counsel in a criminal trial. The process adopted was as follows.

A committee chaired by Sheriff Principal Bowen and including a Council member, the President of the Society of Solicitor Advocates, a solicitor advocate QC and a lay member considered written applications detailing the applicant’s experience in exercising rights of audience over the previous two years. References were also asked for and were taken up by the Committee where appropriate.

This is no longer an issue in our view.

## **2. Maintenance of Status as Pleader/QC**

The SSA also supports the second recommendation about maintenance of status as a pleader or a QC. This is reflected in the system recently introduced by the Society for the accreditation of solicitor advocates as seniors for legal aid purposes. Those proposals require a re-accreditation to take place every 5 years. This mirrors the Society’s policy in relation to all specialist accreditation which it operates. We believe that 5 years is the appropriate time frame for review. Three years would be a very short period. We believe maintenance of status will also be beneficial to standards in the Supreme Courts.

Generally solicitor advocates are awarded extended rights of audience only in respect of either civil or criminal courts. The practice of many members of the Faculty of Advocates (“the Faculty”) is now specialist in nature too so that the question of maintenance of status as a pleader will be in one or other discipline for the majority of them also. In a five year period many will have exercised their rights in one discipline only. Those from either branch of the profession who wish to plead in both courts should be required to take two qualifications and to be re-accredited in respect of each. A blanket accreditation across the disciplines is no longer appropriate.

Re-accreditation should be in the hands of the Society and Faculty with judicial input to that process by way of references either sought or volunteered in relation to individual candidates. The judiciary should not have responsibility for the exercise.

### **3. Resources**

The SSA support the Review’s proposal that there should not be public funding of any of the training needed in order to prepare for the pleader examination. The current system works well.

### **4. Common Code of Conduct and Standards**

A common code of conduct is desirable. The Review has undertaken an extremely helpful exercise in making a direct comparison between the codes for advocates and solicitor advocates. The excellent commentary on this comparative exercise highlights the lack of differences between the two. On that basis there does not seem to be any great difficulty about this proposal. As the Review identifies, the Society and the Faculty subscribe to the same principles of independence, trust, personal integrity and confidentiality. This is not surprising since both the Society and the Faculty subscribe to the principles espoused by the Code of Conduct of the Conseil des Barreaux de la Communauté Européenne (CCBE) which contain precisely these principles.

### **5. Complaints Process**

The Society support's the Law Society of Scotland's view, at Paragraph 4 of its February 2010 Response to the draft Thomson Report, that conduct complaints should continue to be dealt with by the professional bodies, while the Scottish Legal Complaints Commission should continue to act as the gateway body for service complaints.

It is also suggested that the Society of Solicitor Advocates should establish a process whereby a senior solicitor advocate is nominated as a "Dean " equivalent to deal with informal complaints. The SSA supports this proposal.

## 6. The Rule 3 Issue

The SSA does not support the retention of Rule 3 in its current form.

The Review gives no explanation or commentary about why the view is taken that: "we see no reason why this specific obligation should not continue in place."

Rule 3 of the Solicitors (Scotland) (Supreme Courts) Practice Rules 2003 is in three parts.

Firstly, it imposes a duty on a solicitor when a situation arises "**which may require appearance**" in one of the higher courts to advise the client that rights of audience in the courts are restricted to solicitor advocates and advocates.

Secondly it requires the solicitor to give advice about the advantages and disadvantages of instructing appearance by one or other, which advice "**shall cover**"

- (a) The gravity and complexity of the case
- (b) The nature of practice, including specialisation, and experience of the solicitor advocate
- (c) The likely cost of instructing the one or the other

Thirdly, it requires the solicitor to give advice that the decision whether a solicitor advocate or an advocate should be instructed is entirely that of the client.

Failure to observe the rule may be treated as professional misconduct.

The SSA believes the current Rule 3 places an unnecessary additional burden on solicitors.

In terms of the Code of Conduct for Scottish Solicitors 2002 clients have the benefit of the following protections:

1. Independence – the duty of solicitors not to allow their independence to be impaired
2. The interest of the client – the duty of solicitors not to permit their own interests to influence their actions
3. Professional service – the duties to provide an adequate service, to act only where competent to do so, and to exercise an appropriate level of skill
4. Professional fees – the duty to charge fairly and reasonably
5. Trust and personal integrity – the duty to act honestly at all times.

These provisions are sufficient to ensure that the instructing solicitor instructs a solicitor advocate or advocate of appropriate skill, specialisation and experience to the task and who, whether solicitor advocate or advocate, will charge an appropriate and reasonable fee.

Compliance with Rule 3 creates the following problems:

**1. Evidence of compliance**

The Rule gives no guidance about how the performance of the duty is to be evidenced. One or two judges have asked to see solicitors' files for this

purpose. This is not a matter for judges to scrutinise. It is a matter of professional conduct regulated by the Society. Evidencing the discussions which the Rule envisages should take place **every time** an appearance is required is a very heavy burden indeed to place on solicitors.

## **2 Prediction of costs**

It is not possible in any case, whether criminal or civil, to predict at the outset of each case all of the court appearances which will actually be required. It is therefore not possible to predict what level of experience or expertise, and therefore what likely cost, will be required on every occasion. Solicitors are bound to give their clients advice about likely charges but this is not the same as being in a position to provide advice about the charges of unspecified advocates to carry out an undetermined appearance at an indeterminate time in the future. Alternatively if the exercise has to be gone through separately each time the case calls before the court, when some appearances may be routine and others more complex, the time spent in gathering information and in taking the client's specific instructions would be completely disproportionate to any necessary protection of the client's interest.

If the solicitor takes it upon himself to enquire about cost how many alternatives is the solicitor supposed to investigate and discuss with his client? Is it acceptable to give cost comparisons between one solicitor advocate and one advocate or should more than one stable be offered in the comparison? Should full fee quotes be obtained and discussed ?

## **3 Extent of comparison**

Given that there are a large number of solicitor advocates and advocates, how many of both are supposed to be compared in terms of cost and quality? What level of detail should be offered about relative experience? Should full CVs be referred to?

The Rule only requires the nature of practice, including specialisation, and experience of the solicitor advocate to be commented upon. Are the advocate's

practice, experience and specialisation assumed? If it is sufficient to advise the client that an advocate of similar experience and specialist knowledge as a solicitor advocate would cost about the same, what purpose does the rule serve?

Why should the solicitor be required to make comparisons between the two alternatives for every single appearance on the motion roll? Why does the requirement apply to appearances only? A solicitor can obtain an opinion from anyone he likes but cannot instruct an appearance without offering detailed comparisons between competitors.

No guidance is offered on any of these issues.

#### **4 Potential for breach**

There is an assumption in the discussion about Rule 3 that it is the Faculty which misses out if there is no Rule 3 requirement. In fact many solicitors in the civil field may be committing professional misconduct by not offering clients the choice of solicitor advocate.

The knee-jerk reaction that a member of Faculty must be employed is particularly widespread in the public sector and with in-house solicitors but is still common in firms too.

Solicitors in firms or organisations (such as public bodies) who routinely instruct advocates without even considering the possibility of instructing a solicitor advocate are just as much in breach of the rules as any solicitor who instructs a solicitor advocate without giving his or her client the requisite advice.

## **5 Purpose of the comparison**

Given that the main aim of the Review is to promote standard qualifications, codes of conduct, monitoring and complaints procedures, whilst maintaining separate business models the need for the comparative exercise required in part 2 of the Rule is wholly unclear.

### **5.1 Separate business models**

Volume 12 of the Stair Memorial Encyclopaedia contains a section devoted to the legal profession. The section on the modern Faculty of Advocates was written by Lord Davidson and Lord Rodger, two eminent former Deans of Faculty. At paragraph 1318 under the heading “Independence” it states “The nature of the advocate’s office makes it clear that in the performance of his duty he must be entirely independent,” (a quotation from Lord President Inglis in *Batchelor v Pattison and Mackersy* 1876 3 R 914 at page 918), “The foregoing principle, together with the element of *delectus personae* in the choice of counsel, prevents advocates from entering into partnership with one another or with any other person in connection with their practice in the United Kingdom.” That statement is unsupported by reference to any authority.

At paragraph 1321 under the heading “Other occupations” it states

“There is no ruling of the Faculty or of the Dean regulating the extent to which a practising advocate may engage in any activity, whether paid or unpaid, in the capacity of employee, partner, company director or self-employed person (except that he may not be, or be in partnership with or employed by, a solicitor).”

The only material difference therefore between the codes of solicitors and advocates is the absence in the former of a bar against business relationships with fellow professionals.

The origins of this bar are obscure. However, this bar and the related alleged distinctions between the basis of the client/advocate and client/solicitor relationships, as set down in the case of Batchelor, appear to lie at the heart of the statements of the judges in Woodside.

They also lie at the heart of the Faculty's response to the Government's consultation on the Legal Services (Scotland) Bill.

The Faculty has persuaded the Government that it is not necessary to require Faculty to permit its members to form partnerships or participate in alternative business structures.

Discussion about the merits of that position is not for this paper. However, if at the end of the day the only difference between the two branches of the profession ends up being the fact that each has a different business model then it may fairly be asked if the alleged distinction between the lawyer/client relationships involving advocates and solicitors can be sustained. If not, any justification for the comparative exercise required by Part 2 of Rule 3 disappears.

The difference in business structures between the Faculty of Advocates and solicitor advocates who practice in law firms has no bearing on the central question of competence before the court. *Woodside* perceives dangers where the defence in a serious trial is in the hands of two lawyers who are governed by separate codes of conduct and subject to separate disciplinary jurisdictions. However, as the Review identifies, the Society and the Faculty subscribe to the same principles of independence, trust, personal integrity and confidentiality. We do not believe that the commitment of solicitor advocates to those fundamental principles is any different to that of members of Faculty. It is certainly unaffected by business models.

The SSA is utterly unconvinced that the distinction made by Lord President Inglis in 1876 is a valid basis upon which the means of representation before the courts

is regulated in the 21<sup>st</sup> century. The maintenance of a fictional distinction, as to the relationship subsisting between one type of lawyer and the client, as compared to the relationship between another type of lawyer and the client which relationship is somehow is the cornerstone for the administration of justice, is a fantasy. Either that or Scotland is apparently the only country in the world that has a proper legal system.

As the Dean of Faculty discussed in his evidence to the Justice Committee on the Legal Services Bill another feature of the difference in business models is that members of Faculty are not generally instructed directly. According to the Dean they would not wish to be. He said in evidence: “Why should the general public not have direct access to advocates? That simply could not happen under the existing model. Let us take, for example, a criminal case. If someone has been charged on indictment, they go to a solicitor. If, in due course, they need to be represented in court, that solicitor may instruct counsel. If, however, the person who is charged with an offence goes directly to counsel, counsel is not equipped to make the inquiries and undertake the preparation that is always essential in such a case. Counsel is not in a position to go out and take statements or liaise with police officers—that is not our business model. We simply cannot function in that way; we are a referral bar.”

The Faculty has suggested that Rule 3 is required to protect them because solicitors are the conduit for instructions to Faculty. However as we see from the above, not being instructed directly is a choice not a principle of independence. Having made that choice Faculty should not be afforded the luxury of a further protection as well. Also, we should not forget that the Faculty has awarded direct access bodies the status of being able to instruct an advocate directly.

Advocates do therefore receive direct instruction from legal professionals, other professionals, public authorities and a wide range of other individuals and bodies. The list of direct access bodies available on Faculty's website includes English and EU lawyers, PLCs, FSA regulated organisations, trade unions, the Medical

Defence Union, several accountancy bodies, insurers, trade mark attorneys, pensions specialists and other professionals like architects.

The SSA believes that where a member of Faculty accepts direct instruction he should comply with parts 1 and 3 of Rule 3. This would mean that a common standard was applied.

The SSA believes that Part 2 of Rule 3 is unnecessary in order to protect clients, places an unduly onerous burden on solicitors and should be revoked.

## **5.2 Instruction by employee**

We note the Review's proposals about instruction of solicitor advocates by their own firm. We are pleased to note that this practice should be allowed to continue but disappointed that the Review felt it necessary to specify that this should be in the context of full observance of Rule 3 by the solicitor

In our view the full Rule 3 requirements are no more relevant in the "in-house" situation than generally. In assisting a client to choose between the two types of representation it is suggested in Part 2 of Rule 3 that we are obliged to draw to the client's attention competitors whom we would not naturally recommend. It is suggested that without the Part 2 restrictions we cannot recommend ourselves or one of our firm's solicitor advocates as that advice would not be perceived as objective.

The instructing solicitor must offer the client a competent pleader. Why should he not be entitled to offer the services of his partner, his boss or his employee without reference to the competition? Why should he be required to offer the services of a solicitor advocate from another practice where his own practice does not include any?

One would not expect when hiring the services of an accountant in say KPMG to be told that before he could accept your instructions he had to explain to you in

detail the comparison between his level of experience and his cost compared to that offered by his competitor in PWC.

### 5.3 The competent pleader

Our duty is to act only where we are competent to do so. We do not accept that the Rules of Conduct for Solicitor Advocates provide no safeguard to protect clients from inexperienced solicitor advocates whose reach exceeds their grasp. The Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008 are designed to ensure that an instructing solicitor instructs a solicitor advocate or advocate of appropriate skill, specialisation and experience to the task. The provisions of Rule 3 are duplicative and unnecessary. The duty to ensure competent representation provides clients with the same protection.

In support of our position that competence is the only standard to which we should have to comply and that in itself provides the client with suitable protection we note the opinion of the High Court delivered by Lord Wheatley in the case of McAllister v HMA [2009] HCJAC 107. The appeal was in relation to a refusal of a devolution minute by the sheriff. The devolution minute proceeded on the basis that the accused's Article 6 right to a fair trial had been breached by the Legal Aid Board's refusal of sanction for representation by junior counsel. The accused was left with the services of a solicitor which he claimed meant that there was inequality of arms.

In his opinion Lord Wheatley notes that the test is set out by Lord Hamilton in the Transco case [Transco plc v HMA 2003 SDC (J) 29;2004 SLT 995;2004 SCCR 553]. An infringement of the appellant's right to a fair trial had to be inevitable at this stage before the minute would be granted. Lord Wheatley found that "on no possible view could the appropriate test be satisfied in the present case." He found the inequality of arms argument to be unsound where "individual solicitors will represent each of the appellants." He makes reference to Taylor v City of

Westminster Magistrates Court [2009] EWHC 1498 and the judgment of Cranston J at para 28: “ As the jurisprudence makes explicit, Art.6 does not require a state to write a blank cheque for the type of legal assistance to be provided. In essence, the jurisprudence establishes that in this type of case as long as the defendant is represented by a lawyer who is competent to put the case there is no breach of the equality of arms principle -- -- -- What must be done is to ensure that a party has someone who can ensure that a defendant’s case is properly and adequately advanced before the court. The convention jurisprudence is not prescriptive as to the procedure by which this is to be done or how it is to be effected in practice.” The appeal was refused.

Our argument is wholly supported by the High Court’s position here. If the lawyer representing the client is competent which branch of the profession he comes from is irrelevant. Direct comparisons between the two branches are therefore unnecessary.

### **Conclusion on Rule 3**

The SSA notes the Solicitors (Scotland)(Standards of Conduct) Practice Rules 2008 and in particular the duties of independence, to act in the interests of their clients, to avoid acting where a conflict of interest arises, and to act only where competent to do so.

The SSA also notes the Rules of Conduct for Solicitor Advocates 2002 and in particular the rules relating to the acceptance of instructions.

The SSA affirms

1. The duty of solicitors to advise their clients on appropriate representation before all courts. This will include advising clients that in a situation where appearance in one of the higher courts is required rights of audience are restricted to solicitor advocates and advocates.

2. The duty of solicitors to ensure that the decision whether a solicitor advocate or an advocate should be instructed is entirely that of the client.
3. The duty of solicitors to ensure competent representation of their clients in court.
4. The duty of both solicitors and solicitor advocates to act on behalf of clients independently, in particular of their own interests or the interests of their colleagues.
5. The right of solicitor advocates to accept instructions to represent clients in all courts from solicitors with whom the solicitor advocates are in a business relationship.
6. The duty of solicitors to instruct such representation in court, including such combination of representation, as is appropriate to the circumstances of the case.

The requirement in Rule 3 to discuss the advantages and disadvantages of using either solicitor advocate or advocate should be repealed. The operation of that part of the Rule is uncertain due to lack of specification as to evidence of compliance, the difficulty in predicting cost and the lack of guidance as to the extent of the comparison to be made. The purpose of the comparison is unclear. Its retention is unsupported by reasoned argument in the Review. It also does not seem to sit well with the Review's aim to encourage standardisation between the two branches of the profession. Finally the potential for breach presents a high risk of professional misconduct for all solicitors.

### **Advocate's absences from trial**

The SSA's view is that no advocate with primary responsibility for the conduct of any case whether civil or criminal should be absent for any part of the case in Court. The issue is, however, of particular importance in criminal cases. It is virtually impossible for an advocate, who has been absent from trial, properly to comment in his speech to the jury upon the evidence he has not heard or observed as it was being given.

We believe this the practice is not uncommon amongst members of Faculty. We believe it should be firmly stamped upon, regardless of who is involved. The Review should make a recommendation in this regard instead of simply noting that the practice was met with general disapproval from those with whom they consulted.

### **Use of common term**

The SSA supports the Review's desire to have a common term to denote those who exercise rights of audience in the Supreme Courts. However, we would propose the use of the term "Counsel" rather than the term "pleader". It is common practice for Judges to refer to both solicitor advocates and advocates as Counsel during the conduct of a case and in opinions. The description of parties as either solicitor advocate or advocate might appear in the headnote but the common use of the term Counsel should be adopted thereafter. The solicitor advocate QCs are described as Senior Counsel. We believe that, given current practice, all Court users including the judiciary would find the use of the term Counsel acceptable.

### **Court dress**

The current differences in Court dress have never been an issue for Scottish solicitor advocates but we can see merit in the suggestion that a common form of dress should be adopted, on the basis of equality of arms. We understand that this change has already been introduced in England and Wales. In the Scottish Commercial Court, interlocutory hearings and case management work are now normally conducted in business attire.

Edinburgh 16<sup>th</sup> February 2010