Counsel of Their Choice

A discussion between the Faculty of Advocates and the Law Society

A great deal of mutual misunderstanding and, on occasion, active unpleasantness arises between advocates and solicitors in cases where the solicitor believes that a particular advocate will be available to appear in a particular court on a particular day but finds in the event—and sometimes at a very late stage—that the advocate in question is not to be available. Solicitors find it difficult to explain such situations to their clients and a variety of remedies have been proposed and discussed between the Faculty and the Law Society—most recently at an informal meeting between the office-bearers of both bodies, and at a formal meeting of the joint Committee.

This article arises out of those meetings. It has been written by one of the Faculty office-bearers, but it is not, and is not intended to be, an 'official' Faculty pronouncement. Nor does its publication in the *Journal* imply that the Law Society or its office-bearers agree with the views expressed, although the writer has been greatly assisted by their comments upon it in draft. The purpose of the article is simply to explain some aspects of the problem which do not appear to be widely known, or at least understood, and to suggest that the remedy is more likely to lie in a greater degree of communication between advocate and solicitor than in a single cut-and-dried solution or rule of practice. It is hoped, too, that the arricle may stimulate those who do not participate in discussions at an 'official' level to put forward new ideas, either by contributing to discussion in the *Journal* or by writing to the Secretary of the Law Society or the Clerk of Faculty.

It must be admitted at the outset that advocates have in the past, deliberately or unwittingly, been guilty of plain discourtesy in their dealings with solicitors. But the converse is also true. Although solicitors may not know it, many an advocate has lost the opportunity of taking a well-paid case in order to keep himself available for a case where he believed that he had a duty to the solicitor or the client, only to find that the latter case had been settled at the last minute, without reference to him. Leaving aside such instances, there is no doubt that a practical problem exists.

In order to understand the advocate's side of the matter, it is necessary to bear in mind that, in terms of cash paid for hours worked, court appearances are, and always have been, better paid than drafting work. Except for those who have substantial 'chamber practices' dealing with trusts, companies and so on, advocates in general need to be in court in order to earn a reasonable living. This is not a bad thing because it is partly through his experience in court that the advocate acquires the skills which make his services worth having. But it remains a fact that, under present arrangements, the total remuneration of an advocate for a particular case may well be more than doubled if the case goes to a two-day hearing rather than being settled a week before. In the case of Senior Counsel, the difference in terms of fees between a case which settles and a case which fights is even greater, although Senior may have made a substantial contribution towards achieving a settlement advantageous to the client.

It is also necessary to bear in mind that, with the best will in the world, an advocate can be in only one place at a time. He must exercise some degree of choice in deciding which cases he will take and which he will return. The more his services are in demand, the more often must he make such decisions, and solicitors who are disappointed should remember that, if they had not been disappointed, someone else would have been.

An advocate's engagements

It may help solicitors outside Edinburgh to understand the problem from the advocate's point of view if they know in more detail how an advocate's engagements are arranged. Each advocate has a court diary which, during term time, is kept in his box in Parliament House and, during vacation, is usually kept by his clerk. Any solicitor can come up to Parliament House, look at an advocate's diary and write into it a prospective engagement for the advocate concerned—an appearance in court in or out of Edinburgh, a consultation, or whatever. Similarly, a solicitor outside Edinburgh can telephone or write to the advocate's clerk and arrange for such an entry to be made. There is no limit to the number of entries which may be made for a particular day.

The first entries, in point of time, which appear in the diaries are entries relating to Court of Session proofs and jury trials, which are fixed many months in advance. The current practice is that, at regular intervals during Session, the Principal Clerk publishes a list of cases for which diets of proof or jury trial will be fixed by him at a specified time. At this time Edinburgh agents, or their PH Clerks, go to the Principal Clerk's room armed with the advocates' diaries and, by a process which bears some resemblance to a game of Happy Families, attempt to fix diets which do not involve 'double-banking' in the relevant diaries. The advocates concerned take no part whatever in these proceedings and are not, and do not expect to be, consulted.

The result is, in the case of a busy advocate, that a glance at his diary for a period of at least six months ahead would convey the impression that he will, during that period, be fully occupied on every court day during the Court of Session

terms—sometimes in two or three courts at once. But in reality, if such an advocate were to treat these entries as representing anything in the nature of a promise of future employment, he would find himself unemployed in court for at least half the time. Actions are constantly being settled and diets being discharged for one reason or another, frequently without reference to the advocate concerned. Proofs and jury trials sometimes take longer than expected and, although the judges are aware that other arrangements may be interfered with and try to help, the interests of the litigants and of the public often require that the case should proceed, either immediately or at an early date. Appeals and debates have to be heard and it seems to be impracticable to fix these diets as far in advance as diets of proof and jury trials.

The situation is further complicated by House of Lords appeals, public inquiries, hearings before tribunals, Sheriff Court hearings and so on. The dates for these hearings are generally arranged at much shorter notice and the hearings are frequently of unpredictable duration.

Diary entries cannot therefore be more than an indication to the advocate as to what his future commitments are *likely* to be on a particular day.

Letters and telephone calls intimating the fixing of diets outside the Court of Session cannot, and should not, guarantee the availability of counsel any more than diary entries made by Edinburgh agents.

It is sometimes thought that acceptance by counsel of a retainer or of a letter of instruction guarantees his appearance. This is not so. The sole function of a retainer is to ensure that counsel does not accept instructions from a party with a contrary interest, and its effect is therefore a purely negative one. (The 'Rules as to Retaining Fees' are set out in Section A of the *Parliament House Book* and Section F of the *Scottish Law Directory*.) Although it has been stated that the rules are to be revised, it has been found easier to make this statement than to accomplish a satisfactory revisal!

Similarly, the rule is that a letter of instruction only binds counsel to appear if it is accompanied by payment of a 'reasonable fee'. What is a 'reasonable fee' for a binding commitment of future availability is so uncertain that this method of securing the appearance of counsel has virtually fallen into desuetude.

The solicitors' point of view

From the solicitors' point of view, the motives which influence a solicitor in his choice of counsel, and his readiness to accept a change of counsel, vary from solicitor to solicitor and from case to case. Some solicitors have very marked preferences and dislikes. Others, within limits and depending on the case, do not mind very much which counsel is involved provided the work gets done. Some solicitors are prepared to wait until the last moment before changing counsel in the hope that counsel of their choice will be available. Others prefer to change at an earlier stage so that the new counsel has time to become thoroughly familiar with the case and, perhaps, meet the client.

It is probably fair to say that some solicitors and clients greatly overestimate the importance of being represented in court by counsel of their choice. Counsel are, in general, more accustomed than solicitors to being brought into cases at short notice and, by the time a case reaches the stage of a court hearing, the issues are usually sufficiently focused and the preparations sufficiently far advanced for counsel to be able to get to grips with the case in a comparatively short time. The range of choice of suitable counsel is generally wider than some solicitors and clients appear to think, and Lord Reid has expressed the view publicly that the most 'fashionable' counsel are not necessarily and in all circumstances the best.

The really objectionable situations from the solicitors' point of view appear to be these:

1 *The situation where no one has told the solicitor that counsel of his choice cannot appear and he is faced at the doors of the courts with an advocate whom he does not know and perhaps does not even know by name.* This may often be the result of thoughtlessness or carelessness on the part of counsel or his clerk, and if so is inexcusable, but it is sometimes unavoidable—particularly in the Court of Session Motion Roll and Undefended Divorce Rolls. As has already been said, counsel cannot be in two places at once and if he is detained in Lord A's Motion Roll, he may be physically incapable of appearing in Divorce No 3 or 4 before Lord B. It may not be his fault that he has been detained before Lord A, and it may not have been foreseeable that he would be. Equally, the witnesses for Divorces 1 and 2 before Lord B may not have turned up and all the divorces in the Roll are called twenty minutes earlier than expected. No amount of efficient organisation can completely eliminate this sort of situation.

2 *The situation where the case is one involving the client in a particularly personal way, or the client is particularly nervous, and counsel has met the client and discussed the case with him at consultation.* In such cases, the client has come to look upon counsel as *his* counsel. He finds it difficult to tell his story all over again to a new face and perhaps, because he feels that he has been deserted by someone he had learned to trust, he feels unable to give his trust anew to someone else. The fact that, for practical reasons, the change may have been inevitable does not make it any easier for the solicitor to explain it to his client.

3 *The situation where the case is particularly complex and counsel has acquired much of his background knowledge from discussions at consultation rather than from reading papers.* It may be impossible to marshal all this background information in written form for new counsel to read or, even if it is theoretically possible, it may be physically impossible to do so. In such cases, the solicitor may feel that the new counsel will never be able to deal with the case as well as counsel originally instructed and, even if this feeling is unjustified, it may have an adverse effect on the relationship of trust and confidence which has to exist between solicitor and counsel in a heavy case.

4 *The situation where the client or, in the case of the Edinburgh agent, his 'country' correspondent, either does not or will not understand that a change of counsel is inevitable.* Some large corporations and companies believe that they have an absolute right to be represented by counsel of their choice, no matter what inconvenience may be caused to other people. Similarly, some country correspondents simply decline to believe that the availability of a particular counsel is often beyond the control of the Edinburgh agent.

Possible solutions

Leaving aside the last situation where the only solution appears to be patience under affliction, it is worth examining

the various solutions which have been suggested and considering how far they would go towards solving the problem in practice.

(*i*) It has been suggested that a fee should be payable for every entry in counsel's diaries, so that entries are not made unless it is reasonably certain that the case will go on. Apart from creating a new source of revenue for the Bar, this solution has little to commend it. It would frustrate the diet-fixing system in the Court of Session which works reasonably well on the whole. It would involve additional expense for the client, which would have to be fairly considerable if a diary entry were to constitute a binding commitment to appear. No counsel would be prepared to enter into such a commitment without being consulted, so the diaries could no longer be accessible to solicitors or even completely under the control of the advocates' clerks. (One of the advantages of the existing system is that it enables the clerks and Edinburgh agents to tell at a glance whether counsel is *likely* to be available on a particular date weeks or months ahead.) Worst of all, a system of payment for diary entries *could* not in practice create binding commitments. Engagements would still clash through cases taking longer than expected or appeals, etc, being fixed after diary entries had been made.

(*ii*) It has been suggested that there ought to be rules as to the priority to be given to engagements of particular types, and it may be suggested that such rules would solve some of the practical problems involved in a system of payment for diary entries. There is already a generally understood convention that Inner House work takes precedence over Outer House work, and a House of Lords Appeal over Court of Session work. But even this is only a convention, and it is thought that a set of rigid rules would only make things worse. What, for instance, should be the respective priorities of a public inquiry and an Inner House appeal? Some public inquiries relate to matters of major national importance and may involve weeks of preliminary consultation and preparation. Others relate to minor planning applications which, although important to the individual client, do not require anything like the same degree of preparation and can be passed to other counsel without prejudice to the interests of the client. The same is true, *mutatis mutandis*, of Inner House appeals. To have a set of rules which, to be effective, would have to be rigid, could create grave prejudice to the interests of clients, and one would still come up against the problem of hearings overrunning their expected duration and of some diets being fixed earlier than others.

(*iii*) Another suggestion is that the system of fixing diets in the Court of Session should be altered, so that a firm date for the hearing is fixed only when it is clear that the case will go on. This could be fortified by imposition of a sanction in respect of expenses if a case were settled after a firm date for the hearing had been fixed. While such an arrangement might alleviate the problem by removing, or at least reducing the impact of, one of its causes, it could never completely solve it. Moreover, it is a solution which the profession cannot adopt on its own initiative.

(*iv*) Another possible solution is to alter the ' weighting ' of the fees payable to counsel for preparatory work and the fees payable for court appearances. If preparatory work were relatively better paid, counsel would be less concerned to keep themselves continuously employed in court and might be prepared more readily to accept binding commitments to appear. The alteration in ' weighting ' would not necessarily involve paying higher fees, item-by-item, for preparatory work. It could, to some extent at least, be achieved by an adaptation of the English ' brief fee ' system, where counsel is assured of a substantial fee whether the case goes to a court hearing or not; or alternatively, by wider use of ' block fees ', where counsel is paid a single lump sum for his work on the case and account can be taken of the ultimate value of his services to the client, even if the true value of those services lies in achieving an advantageous settlement. But, here again, the profession must beware of increasing the cost to the client (or his opponent) simply to solve a problem of internal organisation.

It is suggested that the most practical and immediate solution lies in a greater degree of mutual co-operation and understanding between advocates and solicitors. An advocate does not necessarily know that his instructing solicitor or his client attaches importance to his being available for a court hearing unless the solicitor tells him. A solicitor does not necessarily know what an advocate's other commitments are unless the advocate tells him. Advocates are not, in general, so remote, conceited or unapproachable that they are incapable of being told whether importance is or is not attached to their personal availability. And solicitors are not, in general, so unreasonable as to object to a change of counsel provided that they are warned in sufficient time (the sufficiency of the time depending on the circumstances of the case). Admittedly, no amount of co-operation or understanding will help where the other party is inconsiderate or determined to be unreasonable. But we are apt, as a nation, to pride ourselves on our common sense and we could do worse than use it rather than rely on each other's powers of telepathy.

Lastly, it is suggested that, by and large, the initiative in this matter should lie with the solicitor. An advocate does not control the progress of a case; he does not have control of the papers; he is not in touch with the client; and a name in a diary may mean nothing to him, particularly if he has never seen the papers or has not seen them for a long time. The solicitor has these advantages and, after all, it is he or his client, rather than the advocate, who is most affected by the problem of counsel's non-availability. Therefore, it is suggested that solicitors might more often than they do tell counsel or his clerk directly when importance is attached to personal availability and, if necessary, indicate how long before the hearing they wish to be advised of a possible conflict of commitments.

For example, some busy Court of Session agents tell the advocates' clerks whom they are prepared to accept as alternative counsel when counsel of their choice is not available. This enables the clerks to rearrange work at short notice without reference back to the solicitor. Similarly, where a solicitor knows that counsel of his choice is involved in a long inquiry, he sometimes asks to be kept advised of its progress so that he knows from day to day or week to week what the situation is. There are many other examples of standing or *ad hoc* arrangements and there is no particular reason why all advocates, advocates' clerks or solicitors should have to work in the same way.

In the meanwhile, it is hoped that the Faculty and the Law Society can, with the help of comments provoked by this article, work together to develop some of the other ideas which have been suggested.