

Rights of Audience



High Court of Justiciary, Edinburgh, Scotland

The Lord Justice Clerk has highlighted problems over rights of audience and the role of solicitor advocates and has suggested that the time has come for a review of the overall working of the system.

Lord Gill said situations where solicitor advocates accepted instructions from their own firms without advising clients of the availability of counsel and self-certified themselves as seniors could be against the interests of justice.

The Lord Justice-Clerk, sitting with Lords Osborne and Nimmo Smith, was issuing a judgment in the Court of Criminal Appeal in the case of Alexander Woodside who was convicted of murder.

Lord Gill said the court was not concerned with the policy considerations that lay behind the introduction of solicitor advocates nearly 20 years ago but it was right that it should comment where weaknesses in the operation of the system might put the interests of justice at risk.

At the time of the trial the solicitor and solicitor advocates involved had been bound by Code of Conduct Rules which stated that where a solicitor was advising a client about a case which might require a court appearance he should inform his client of the respective advantages and disadvantages of instructing a solicitor advocate and counsel.

On the question of seniority Lord Gill stated: 'When senior and junior counsel are instructed in a defence their roles and responsibilities are clear-cut and well understood.'

'The concept of seniority is in my view conducive to the due administration of justice. It does not apply in the case of solicitor advocates.'

'In the 1992 Code the terms "senior solicitor advocate" and "junior solicitor advocate" were not defined. When two solicitor advocates conduct a defence together the leading solicitor advocate

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is not necessarily senior to the other in terms of admission as a solicitor or admission as a solicitor advocate, or for that matter in terms of experience and skill.'

'... [In] practice there is no concept of seniority other than for the purpose of charging fees.'

'The undisputed evidence in this appeal is that when two solicitor advocates appear together, the nominal leader, whether or not he is senior to his colleague in any respect and regardless of his experience, is paid as if he were a Queen's Counsel.'

'Such a solicitor advocate may have little experience and may be ineligible for silk. That rule creates an incentive that may not be in the interests of justice.'

Lord Gill concluded that the Code of Conduct concerning advice to the client about the option of instructing counsel had been disregarded in this case. The obvious weakness of that part of the Code was that while it imposed a professional obligation it provided no practical safeguard against its being ignored.'

The case also highlighted a more serious problem, Lord Gill added. It arose from the fact that a solicitor advocate could accept instructions from his own firm.

'It is difficult to see how a solicitor who has rights of audience, or whose partner or employee has such rights, can give his client disinterested advice on the question of representation. There may be an incentive for him not to advise the client of the option of instructing counsel or a solicitor advocate from outside his firm in circumstances where either of these options might be in the client's best interest.'

On the question of self-certification of competence, Lord Gill pointed out that to attain the rank and dignity of Queen's Counsel members of the Bar or solicitor advocates had to demonstrate the length and range of their experience and the quality of their skills and judgment.

The Dean of Faculty supervised the representation of accused persons in the High Court by members of Faculty to ensure that serious and difficult defences were not put in the hands of inexperienced counsel.

'With solicitor advocates, however, the position seems to be one of unmonitored self-certification,' added Lord Gill.

'From the standpoint of the administration of justice the idea that any solicitor advocate can accept instructions, perhaps from his own employee, as leader in a serious trial regardless of his experience and skill is a matter for concern.'

'The 2002 rules provide no safeguard to protect the accused in such a case from being defended by an inexperienced solicitor advocate whose reach exceeds his grasp.'

'This case has highlighted problems of rights of audience that seem not to be unique to this case. I think it would be opportune if there were to be a review of the working of the system overall.'

Lord Nimmo Smith pointed out that Article 6 of the European Convention on Human Rights provided everyone charged with a criminal offence with certain minimum rights - including the right to defend himself through legal assistance of his own choosing.

'Any such choice, to be effective, must be fully informed and based on objective advice directed to the best interests of the accused, not those of his legal advisers and must demonstrably be so.' 