Submission from Advocate Timothy Hanson

Hanson Renouf
Advocates

Access to Justice Review
Chief Minister's Department
Cyril Le Marquand House
St Helier
Jersey
JE4 8QT

16th June, 2014

Dear Sir,

Re: Access to Justice Review

Introduction

I practised at the English bar as a barrister from 1989-2001 before returning to Jersey. I have remained a door tenant in my chambers in England and continue to hold a practising certificate. From 2001-2004 I worked as a senior associate at a large local law firm where I re-qualified as a Jersey advocate. In 2005 I started my own legal practice in Jersey as a sole practitioner, subsequently becoming Hanson Renouf and expanding over the following years. From 2012-2014 I was President of The Law Society of Jersey.

I believe that all these aspects of my career are helpful in expressing a balanced view on the legal aid system in Jersey with which my contribution is primarily focused.

Background

When I returned to Jersey and experienced my own difficulties with a defective car that I had purchased, I was dismayed at how difficult it was for a consumer to access Jersey law and was surprised at the incorrect legal guidance that was sometimes given to Jersey consumers, even from official channels. I spent an entire afternoon in the public library – not having commenced my new job- researching the local legal position on my defective car and having been used to (and advised upon) consumer protection in England, thought that it would not be too difficult. I recall meeting my wife afterwards and confessing that there was no main statute dealing with consumer protection; that there was a patchwork of cases where some of the law could be found, but that I had to look at the writings of the French jurist, Pothier from the 18th Century, who I did not think would have known much about second-hand motorcars. I confess that I felt annoyed that our Jersey law was so difficult to access (even to a lawyer) that I decided to highlight more publicly the disadvantage that most consumers laboured under.

In a letter to the JEP in 2001, I argued that the Island clearly found the time to pass laws on companies, trusts and the like but apparently found no time (or incentive) to implement consumer or employment protection or laws dealing with discrimination; all presumably considered to be less important. I questioned if this pointed to a distorted value system. It was given the headline "Immoral Inaction." An article in Business Life entitled "Legal Wonderland" described how difficult it was for a consumer to have much of a clue about how to access or understand Jersey sale of goods law. Further articles appeared in various publications including the Jersey Law Review on the topic, such that I eventually became retained by the Economic Development Committee to provide initial

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advice and drafting instructions for what eventually became the Supply of Goods and Services (Jersey) Law 2009 and associated regulations on unfair terms.

At the time of such initiatives, there was, in contrast, a reaction against legal drift towards English law detected in past local court judgments. Articles instead argued for Jersey to be "true to its roots" and to preserve its own "identity." I understand and agree with such desires but our customary law, technical legal French language and certain archaic practices all sit rather uneasily against competing modern notions such as access to justice and reducing costs which, in my view, are just as important, if not more important than a patriotic regard for local law. Indeed, while some of our court judgments were emphasizing that we need to look at local writers such as Poingdestre, or Le Geyt , or the French jurist Pothier - all from many centuries ago and expressed for the most part in French- so as to discover our Jersey contract law, the average member of the public had little chance to discern his of her rights without a lawyer, who also were not exactly finding it easy. When you then throw in the technical jargon contained in court procedural rules and various archaic practices - which sometimes seem to have been retained simply because of their Jersey symbolism– you finally arrive at a system where the average Jersey person is at a severe disadvantage. It is not difficult to understand why the general public might feel some dissatisfaction with the legal system and the lawyers that populate it.

Ironically, despite a Jersey lawyer's training, s/he still can have to navigate a difficult path owing to the confused nature of certain areas of Jersey law, being criticised on the one hand by the court for not looking at the old texts or for not having anticipated a more obscure avenue, and by the client on the other for the ultimate bill. Even when a case succeeds and an order for costs is made, there is the draining taxation (or assessment) of those costs with the often heard refrain that the lawyer should not have spent as long as they did; there was too much research or because a junior (and cheaper) lawyer was deployed for some tasks, there was therefore duplication: all going to reduce the costs ultimately recovered. As I argued in a Jersey Law Review article entitled "*No Legal System is an Island, Entire of Itself*" (2004) certain reforms also have to have the support of the judiciary and, if we are to avoid fragmented *ad hoc* reforms, there needs to be an overall vision and key procedural values to which we all subscribe.

In fairness, Jersey lawyers perhaps have not been as energetic as they could have been in reforming Jersey's law and procedures, but there also needs to be a clear vision from the top: the Bailiff/Deputy Bailiff, The Law Society and now the Chief Minister who has responsibility for the judicial system (there being no politician previously with clear and direct responsibility.) Representatives of the judiciary, legal profession and the States should be working together with regular meetings throughout the year rather than the more fragmented approach that has hitherto applied.

It is interesting, therefore, that in the current decade, access to Justice has become an issue that is now high on the list with the current Chief Minister and also with the judiciary who have initiated their own review. It is not necessarily clear what has caused this shift but it is development that has the potential to lead to much improvement if it is dealt with appropriately. With this in mind, there has to be a sound evidence base created with relevant statistics and information made available. The current public consultation in respect of the Chief Minister's Review and also that being chaired by the Deputy Bailiff, is something that ought to happen but can be no substitute for the wider evidence gathering that should take place. I am concerned that this is not currently

happening and rather fear that subjective views (perhaps because they appear "popular") may be given greater weight than they deserve. In addition, I am concerned that appropriate external consultants have not yet been identified to assist the process and who have experience of reforms in other jurisdictions.

In respect of legal aid, the expert panel has already received a document from The Law Society of Jersey that describes the legal aid system. The purpose of this paper is to highlight the essential flaw in the current legal aid system, namely, that the legal aid system depends upon a rota of lawyers or *Tour de Role* rather than an allocation of specific cases to lawyers who are experts in the field of law with which the case is concerned. There are other defects in the system, not least the unfair burden that is placed upon Jersey's lawyers, who routinely receive warning shots from all sorts of vantage points, whenever the issue reforming the legal aid system is raised. I do not think that this is helpful to a mature debate but it is not the primary focus of my contribution.

Historical Development

At the turn of the 20th Century, Jersey was not the busy offshore centre that it now is and there were only a handful of advocates practising. French was the main language; customary law predominated; there were no comparable court judgments as we now enjoy; non-legally qualified jurats were judges of not only fact but also law; the written procedures of the court were severely limited with nothing comparable to the Royal Court Rules (not introduced until the 1960s); women were not capable of becoming an advocate or therefore a judge; and the materials that could guide a litigant were limited, if virtually non-existent. Access to Justice (as we speak of the notion now) faced formidable obstacles at the turn of the 20th Century.

Nonetheless, a "legal aid" system did exist, with litigants who fell within the terms of the advocate's oath being able to choose an advocate from the handful that existed. Unfortunately, because the same advocate(s) tended to be chosen, a system was introduced in 1904 that ensured that legal aid cases were allocated to the advocate who was next on a rota or *Tour de Role*. That was considered by the lawyers to be a fairer system. Indeed, it is the system that has continued until the present day, more than a century later. It is obvious that the legal profession in Jersey merit enormous praise for the largely *pro bono* work that they do and which saves the States millions of pounds each year, but is it a good system in terms of ensuring quality of legal advice and representation?

The Problem of the Rota

In my view, a rota is fundamentally wrong in the 21st Century because it does not even aspire to match particular legal problems to specialist counsel. Specialist counsel not only are more likely to give better legal advice to a problem within their expertise but are more likely to guide the court appropriately and deal with disputes in a quicker, more efficient and less costly fashion.

It is true that the larger law firms in the Island have created legal aid departments where legal aid certificates (mostly comprised of criminal or family disputes) allocated to commercial lawyers in that firm, for example, are delegated and dealt with. Such staff are recruited and paid to deal with such work at the cost of the firm concerned rather

than by the States. Alternatively, a legal aid certificate can be outsourced to other lawyers and firms for a fee paid by the firm to whom the certificate was originally allocated. This tends to develop a specialism within those legal aid departments that deal with such work. Ignoring the dubious justification for lawyers having to fund a legal aid system themselves, not all practitioners may be inclined or willing to devote resources to deal with a legal aid case. Indeed, sole practitioners or smaller firms may have to take a rather invidious decision to tackle a legal aid case they are really not up to, or to pay out of their own pocket for someone else to deal with it. I deal with this "choice" in more detail later.

Even where firms have legal aid departments, it would not be surprising to find that such a department did not return a profit unless it made a point of doing the unwanted legal aid work of other firms for payment. In general, therefore, for lawyers aspiring to partnership in the larger firms, such a path is likely to be all the harder where the lawyer devotes a large proportion of time to unprofitable areas of work, which legal aid work can often be. Ambitious lawyers might be forgiven, therefore, for working more fertile areas of work away from legal aid.

In more recent times, there has been criticism made of the legal aid system by certain well known litigants before the Jersey courts but such criticisms have been rejected: see for example *Warren v AG* 2009 JLR 300 at para.104 where the Jersey Bar is described as "*more than competent*" to represent the defendant; *Syvret v AG & Others* [2011] JRC 060A where the allocated Jersey advocate *"fully complied with the defendant's article 6 rights.*" Indeed, at ceremonial occasions such as the *Assize d'Héritage*, the Bailiff or Deputy Bailiff will frequently express the Court's gratitude to the profession for the legal aid burden that it discharges. On other occasions, however, perhaps coincidentally where lawyers might recover some remuneration from the legal aid system, lawyers have been criticized: see *Flynn v Reid* –the judge describing his "*dismay*" and a suggested potential exploitation by lawyers of their clients- albeit a criticism rejected on appeal 2012 (2) JLR 226 at para.45, the Court of Appeal stating such "*criticism was not easy to understand.*" (See also *Re B (Separate Representation of Children)* 2010 JLR 387 where the same court overhauled a funded system that had developed for lawyers acting for children, albeit a system that had a working group already looking at its reform.)

In general terms, there have been grumblings at the efficacy of the Jersey legal aid system but no court or "official" criticism of the rota in particular. This raises the question as to whether the lack of such criticism means that the rota system works perfectly satisfactorily or that, for understandable reasons, there has been a disinclination to make this criticism of the legal aid system for fear of undermining it and potentially exposing the States of Jersey to the burden of funding an alternative system. There are also shades of grey perhaps between these alternatives.

There is the obvious potential for difficulty caused by lawyers being chosen according to a rota when not all lawyers are capable of dealing with any case that happens to be allocated to them. Notwithstanding, we should aspire for better and encourage specialism.

Actual evidence of problems in practice, however, can be hard to present, not only because the majority of legal aid cases are probably dealt with well, or at least competently, and by lawyers with appropriate expertise, but also for the simple reason

that it is not possible to state what might have happened on a given legal aid case had a specialist practitioner been assigned. Aggrieved convicted defendants quite often blame their predicament upon their trial counsel, for example, but when reviewing such cases for an appeal, alleged negligent conduct can be extremely difficult to substantiate; the reality being that advocacy is very much an art and perhaps the client in such cases is really suggesting that their case could have been presented more favourably, rather than it fell below what might be expected as competent.

The "evidence" that I provide to suggest that a rota is not consistently satisfactory consists of the obvious dangers to which I have referred but also specific instances of which I am aware. These are as follows:

- Aside from the main legal aid rota whereby clients are allocated, there exist a number of voluntary rotas for which lawyers can earn "credits" that mean in practice, that a legally aided case is not assigned to them or, more accurately, is deferred until all such credits are used up. One such rota relates to Police and Customs whereby an advocate is on call by telephone to give advice to persons detained by the police or customs, and in specific serious cases, attend in person. This is an onerous service provided by lawyers throughout the year, although not usually called upon after 11pm each night. More recently, criticism (communicated to lawyers in May, 2014) has been made by the police as to lawyers on this rota sometimes not having the requisite experience to advise clients, or delegating to another lawyer not on the rota who lacks such experience. Accordingly (and rightly so) the system is currently being reformed so that only "sufficiently experienced" practitioners perform such out of hours role and are placed on this telephone rota. This is entirely a responsible reaction to the concerns that have been raised. Ironically, however, while the "inexperienced" practitioners are removed from a purely advisory role out of hours, they remain on the legal aid rota to be allocated a certificate for defending the entire case of the person who has been detained. It may be said that this would not be allowed to happen, but there are instances where it has happened and others that will probably have come close to the line. (See below.) Further, if those practitioners are unaware of their limits on the telephone duty advocate scheme, it seems obvious that they might go on to do their best in "live" certificates allocated to them without appreciating their limitations.

- Other voluntary rotas, are similarly being tightened up because of the acceptance of the principle that not every lawyer can perform any legal aid case, just as much as any surgeon can not perform every operation on a human body (at least not successfully.) In February of this year, for example, it was recognised that not all lawyers can act for patients at a Mental Health Tribunal and so this rota has now been reformed to one of specialists only. It is worth setting out the circular to Jersey lawyers (which I endorse):

  This is a specialised area of law and it is clear that a detailed working and up to date knowledge of the relevant legislation and the tribunal process is a fundamental precursor to acting for patients. Concerns were raised at the meeting that some lawyers allocated these certificates on the Tour de Role, may not have any or any sufficient experience and/or training to effectively represent patients at Mental Health Tribunals. It was also noted that lawyers who do have some knowledge and expertise in this area may not have the opportunity to

ensure their knowledge is up to date and gather further experience as the legal aid certificates are currently diluted amongst all the lawyers on the Tour de Role.

To illustrate how unique Mental Health Law detentions are, it is perhaps worth mentioning that an application to an MHT is the patient's only chance in 12 months to secure their release or have restrictions relaxed. Importantly, there is no automatic right of appeal. It follows therefore that unless the fundamental concepts of this area of law are fully understood and applied there is a chance that patients will remain wrongly detained under the law.

The statistics show that there are between 12 - 20 such certificates issued per year. This is clearly a vital area of legal representation in the Island. We wish to ensure that people who are unable to look after their own interests have their rights appropriately protected.

There are provisions under the Legal Aid Guidelines to issue certificates to a lawyer who is not next on the Tour de Role in certain circumstances. Having thought about this carefully, we are proposing that lawyers who have sufficient experience in MHTs be invited to offer their services to act in such cases. Having identified lawyers with sufficient expertise, these lawyers will be kept on a mini rota and these legal aid certificates will be issued in accordance with that mini rota as opposed to the entire Tour de Role. This would go some way to ensuring that applicants are given a lawyer with appropriate levels of experience. It would also ensure that those lawyers who are appropriately experienced will get to build upon their expertise.

- As to the main rota, evidence is largely anecdotal. In the last year, a Jersey sole practitioner ("X") specialising in commercial law, was allocated to defend a very serious charge which X simply did not have the competence to deal with and further did not have the means to fund out of X's own pocket to another law firm. To avoid injustice to the client and indeed the lawyer, the matter had to be resolved by the certificate being rescinded and allocated to another firm. In effect, the rota broke down. Another commercial practitioner outsources his criminal cases (that s/he cannot realistically deal with) at an annual cost in excess of £60-70K per annum. A different commercial lawyer that I know, however, was allocated a public law children case where the removal of a child was being contemplated from the birth family, and the lawyer went on to deal with that case despite the complete lack of experience of that type of work. In yet another instance, a solicitor in England mentioned to me last year a particular legal aid case that was being dealt with by a local firm known not to have practical experience of the particular sphere of law and was reported not to have spotted an important point that the insurers thought would have been raised had the practitioner concerned have been a specialist in that sphere.

There are other instances to make the point that despite best endeavours and a responsible and professional approach, a rota system probably fails in a certain amount of cases and, where there is no proper funding in place, it also runs the risk of not attracting those talented lawyers who decide to explore other streams of work instead. While I am unable to point to any definite injustice resulting (the details of any individual case not being available or sensibly capable of analysis) the risk is

there. The appropriate reaction is to reform the system and encourage specialists or, in other words, ensure that there are "horses for courses."

Before moving on, I must mention two other important characteristics of our legal aid system: it's nature as a conditional fee agreement and also the relevance of the cab-rank rule.

Conditional Fee Nature

In very general terms, lawyers under our legal aid system do not get paid for their work unless the case falls within certain exceptions (more fully described in the report provided by The Law Society) or a costs order is successfully recovered, normally requiring the case first to be "won." In *AG v Michel & Gallichan* 2007 JLR 553 at para.30 the scheme was described as a "contingency fee scheme" although my own preference is to refer to it as a conditional fee agreement. It generally represents a form of "no win, no fee" agreement.

However, by virtue of the lawyer having a direct financial interest in the outcome of a legally aided case where funding is not provided (as opposed to being paid a fee win or lose) the dangers referred to in *Re Valetta Trust* 2012 JLR 1 must pose some concern as creating a tension between a lawyer's duty to the Court and "self-interest" in a case succeeding, or at least that perception. It is arguable whether or not the concerns expressed in this case are relevant when re-evaluating our legal aid scheme.

Cab-rank rule

In *Syvret v AG* & Others [2011] JRC 060A Commissioner Pitchers describes at para.25 the cab-rank rule as being applicable in Jersey legal aid cases. Very basically, this is the rule referred to in England whereby a barrister is obliged to accept a case within the field that he or she professes competence, in the courts that that barrister would normally attend and at the barrister's normal rates. In fact the cab-rank rule does *not* apply at all in Jersey in privately funded cases. Even in respect of legal aid matters it is not quite the same as in the UK, not least because an assigned lawyer can delegate/substitute another lawyer in their place but more particularly because even where a case is allocated outside the professed competence of a Jersey lawyer, the Jersey lawyer cannot actually claim professional embarrassment and decline to deal with the case. When becoming a sole practitioner, I received the enclosed letter to this effect (some months after my initial enquiry) which I respectfully suggest imposes an enormous burden upon a Jersey lawyer and wholly at odds with their colleagues in other jurisdictions. As a matter of principle, Jersey lawyers should not be expected to grapple with what should happen with a case that is beyond his/her expertise at the outset.

A Model to Consider

There are a number of useful models that could be considered and I have already expressed my preference for development of a Legal Aid Chambers where Jersey advocates could share facilities but be self-employed, while concentrating upon traditional legal aid streams of work. This would also allow such advocates to specialize and clients a choice in advocate provided enough lawyers opted to practise in such a way. Payment of running costs and for the work done could be by way of a partnership between the States and the legal fraternity, with the latter perhaps also agreeing to

assist outside such conventional work areas as required and at fixed lower rates. With the increasing number of Jersey advocates, and the limited number that can make it to partnership, a facility to be self-employed without risking the vagaries of the *current* legal aid system ought to be attractive. Quality control of such advocates can be maintained by setting out specific criteria to be eligible. In essence, such a proposal is a hybrid between a traditional set of barristers chambers in the UK with a Public Defender's Office.

Yours sincerely,

Advocate Timothy Hanson
Partner

Alan Binnington,
President of the Law Society.

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28th November, 2004

Dear Alan,

Re: Code of Conduct & Legal Aid

Further to our recent e-mail exchanges, I am now writing to you in your professional capacity as President of the Law Society, for the purpose of bringing about a change in the provisions to the Code of Conduct. This letter is written in my personal capacity and does not necessarily reflect the views of my current firm, Carey Olsen.

In our recent e-mail exchanges, I mentioned that from January next year, I shall be setting up as a sole practitioner. I raised a number of matters regarding the legal aid burden and specifically queried whether an advocate was required to undertake any legal aid matter allocated to him/her, irrespective of the type of work that that advocate was experienced in and notwithstanding the fact that that advocate was of the view that s/he was not competent to act in the area of law to which the legal aid certificate related. It was your view, and also that of the Bâtonnier, that as the legal aid system works upon a rota, an advocate would be required to attend to the allocated legal aid certificate. Whilst the issue is not one that I necessarily anticipate happening in my particular case, it seems to me that it is an issue that will probably arise for someone in the future. Indeed, it may already have arisen, and the advocate concerned has had to come to terms with his/her own professional conscience. In any event, it is such an important principle that, upon further reflection, I now feel obliged to approach the Law Society, more formally, to consider the point with a view to altering the current Code of Conduct.

In England, the Bar Code of Conduct expects a barrister to accept instructions (the "cab rank rule") save in particular circumstances. Paragraph 603 of this Code sets out a number of exceptions, but I only set out the first two:

603. A barrister must not accept any instructions if to do so would cause him to be professionally embarrassed and for this purpose a barrister will be professionally embarrassed:
(a) if he lacks sufficient experience or competence to handle the matter;
(b) if having regard to his other professional commitments he will be unable to do or will not have adequate time and opportunity to prepare that which he is required to do;

Hitherto, I had always believed that the matters enshrined in paragraph 603 would be covered by our own rules which provide by paragraph 2 as follows:

It is the duty of every member at all times to uphold the dignity and high ethical and technical standards of the legal profession, and to adhere to the terms of the oath sworn before the Royal Court. Where principles of practice conflict with the public interest in the proper and efficient administration of justice, the duty to the Court shall take precedence. A member has an overriding duty to the Court to ensure in the public interest that proper and efficient administration of justice is achieved. A member must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court.
Accordingly:
(1) A member must exercise independence of judgement and promote and protect the best interests of the client.
(2) A member shall not permit integrity or professional standards to be compromised at the instance of the client or any third party.

However, unless I have misunderstood our recent e-mail exchanges, in legal aid matters, an advocate is required to act, notwithstanding his/her belief that s/he would be "professionally embarrassed" to do so. For the reasons that appear below, I respectfully argue differently:

1) An advocate is an officer of the Court whose overriding duty is to the Court and to the administration of justice.
2) For an advocate to act for any litigant in the belief, or knowledge, that that advocate does not possess the necessary experience or competence, would be to breach this duty.
3) The Code of Conduct is clearly relevant in this respect but is not definitive, and so the Court can and would, in my respectful view, part company with any Code of Conduct that appeared to sanction a breach of this duty.
4) From the client's viewpoint, s/he would be denied a fair hearing in breach of the requirements existing at common law and, further, under the European Convention on Human Rights. (There is already case law in England upon this issue where Counsel has not discharged his responsibilities and the judgment or verdict has been set aside.)

Interestingly, in the recent judgment of Commissioner Page QC given in June, 2004 (*Takilla Ltd v OBD & Jenners*), some of the issues raised above were considered. In particular at paragraphs 22 and 23 of this judgment, the Court states:

The codes of conduct of the professional bodies can be a convenient point of reference in so far as they crystallise or otherwise embody principles of law or practice that a court would itself adopt in any event, or in so far as they reflect rulings of courts in particular cases (this being the way in which such codes and guides tend to grow): to that extent they can be a legitimate factor in the exercise of the court's discretion. It is not, however, for the court to enforce these codes and guides as such: Gevran Trading at 923 and 926.

The primary consideration in most cases where problems such as those presently under consideration arise (and confidential information is not in issue) is the duty that every advocate owes to the court, a duty that over-rides that owed to his own client: the judgment of the court in Geveran Trading gives, at 922, a number of illustrations of what this means in practice. Fundamental to the effective discharge of that duty in general is the need for the advocate to be independent as far as possible of any and all external interests and motives, whether financial, professional or personal. Both the Jersey Law Society Code of Conduct and the Bar Council Code of Conduct expressly reflect these ideas as basic tenets of practice, the purpose being to ensure that wherever professional advocates are employed the court can be reasonably confident that the case – whatever its ultimate merits – will be presented fairly and responsibly. Whenever circumstances arise that suggest that that independence may be open to question and that counsel's freedom to discharge his duty could be in jeopardy, other parties and the court itself will rightly be concerned.

Whilst I accept that the possibility of an advocate declining to act in an allocated legal aid matter for "professional embarrassment" will be unwelcome, I respectfully suggest that both the Code of Conduct and the Legal Aid system need to recognise this possibility. Of course, any objection by an advocate to acting in a particular case would need to be examined upon its merits, but I would venture the suggestion that the absence of experience in the area of law concerned, might constitute sufficient grounds.

I look forward to hearing from you and confirm that a copy of this letter has been sent to the Bâtonnier.

Yours sincerely,

Timothy Hanson

Advocate Julian Clyde-Smith
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Reference: JCS/KB/BATO001.2.0
Your reference: TVRH/SS/Clyde-Smith

15 March 2005

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Dear Advocate Hanson

Code of Conduct and Legal Aid

Your letter of the 28 November 2004 was passed to me by the Law Society with the view to my replying to you and I apologise for the delay. I have also of course, received your more recent letter of the 17 February 2005 with the Bar Council booklet. I have passed this on to Linda Williams who heads the sub-committee dealing with our codes of conduct as I am sure they will be issues there to be considered.

There is of course, a key distinction between a barrister and a Jersey advocate or solicitor in that the latter take a solemn oath before the Royal Court to assist "veuves, pauvres, orphélins et personnes indéfendues".

In 1904, the Law Society agreed to discharge its member's obligations under their oaths by creating a rota for those up to 15 years call to be administered by the Bâtonnier. The obligation under the oath of course, remains for all lawyers.

I have to accept that, although our code is silent on the matter, lawyers appointed under legal aid are under an obligation to be competent to deal with the cases referred to them, and to the

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extent that there is any tension between those two obligations, they are resolved in my opinion by those who practice in Jersey and who take the oath either:-

a) ensuring that they are competent to deal with the cases referred to them for a period of at least 15 years; or

b) have in place proper arrangements where they can delegate their obligations to someone who is so competent.

I need to elaborate on the above. I accept that today it is very difficult for a lawyer to be competent in every field of law. However, legal aid is, in general, granted to people who cannot afford lawyers to deal with the misfortunes that are common to humanity. Thus, the vast majority of legal aid certificates are issued in relation to criminal and matrimonial matters but also (in much smaller numbers) in relation to civil claims. In my opinion a lawyer on the rota has an obligation to be and remain competent in these areas or, as I say above, to delegate to someone who is.

There are some areas of law which Jersey lawyers are rarely asked to advise on, and in those cases the lawyer appointed would, in my view, be expected to research into and become competent. If it was highly technical (such as for example a patent dispute for which incidentally legal aid would be unlikely to be granted) then the legal aid fund would probably (and be encouraged by the Bâtonnier) to assist in the commissioning of specialist counsel's opinion. In very serious cases, it is not unusual for the Acting Bâtonnier to appoint a second lawyer to assist.

The Acting Bâtonnier always does his or her best to administer the rota in a way that is sensible and flexible and which supports those who shoulder the burden – in particular the small firms. Where a case is unusually long or complex, the Acting Bâtonnier does steer the certificate towards the larger firms and in general the larger firms are very helpful in co-operating in what is an informal "flexing" of the strict rota.

In all of this, there is a recognition that lawyers in Jersey are able to earn a good living (not I accept as much for some as the general public would like to believe) and that overall the legal aid burden imposed upon us through our oath is fair.

Yours sincerely

JULIAN CLYDE-SMITH

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