

Note re S20 HSWA 1974 and Solicitors' conflicts

Background

1. Section 20 gives various powers to HSE inspectors for the “purpose of carrying into effect any of the relevant statutory provisions”.
2. Sub-paragraph 20 (2) (j) provides as follows:

“(j) To require any person whom he has reasonable cause to believe to be able to give any information relevant to any examination or investigation under paragraph (d) above to answer (in the absence of persons other than a person nominated by him to be present and any person whom the Inspector may allow to be present) such questions as the Inspector thinks fit to ask and to sign a declaration of truth of his answers;
3. Section 20(7) is also material and provides as follows:

“No answer given by a person in pursuance of a requirement imposed under sub-section (2)(j) above shall be admissible in evidence against that person or the husband or wife of that person in any proceedings”.
4. Section 53(1) provides that “*the relevant statutory provisions*” referred to in Section 20(1) means provisions of part 1 of the 1974 Act and of any Health & Safety Regulations.
5. At paragraph 32 of his judgment in the case of **R v South Western Magistrates Court ex parte London Borough of Wandsworth** Scott-Baker LJ said that sub-section (2) “*viewed as a whole, contains wide powers and is obviously intended to contain wide powers. (see especially (2)(m))*”. Further, he said that “*there is no power to require an individual to be interviewed under caution, or indeed interviewed at all, and that the responses given to a request made under (2)(j) cannot be used in criminal or civil proceedings. Their purpose is only for investigation*”.

Can the company's solicitor be “nominated representative” at a s20(2)(j) interview of an employee?

6. There are many potential difficulties in the company solicitor attending as the nominated representative for an employee's interview. These are set out in the letter from the HSE and the Law Society's proposed guidance.
7. There are, however, some good reasons why the company solicitor should be present at the interview of an employee:
 - (a) If the same solicitor is present at all interviews he is likely to be in a better position to assist and advise the company and the individuals. The appointment of different solicitors for different individuals may lead to different strategies and positions being adopted by different potential Defendants which could be exploited by the prosecuting authority.
 - (b) An individual who attends by his own solicitor may give the impression of being concerned or having something to hide. He may bring an investigation upon himself by this course.
 - (c) Quite often the relevant information concerning an incident or accident will be vested in a few employees and the employer will not have any other information. Similarly certain employees may not have access to information held by the employer. A common solicitor can bridge these gaps in knowledge.
 - (d) The information provided by the employees under 20(2)(j) can't be used against them and, therefore, the employee should not be inhibited in answering the questions.
 - (e) Separate representation may substantially increase costs, particularly if a number of employees are interviewed. Further, the cost of an individual's representation may not be met by an employer or insurers.
8. In the absence, therefore, of an actual conflict there should be no absolute prohibition on the company solicitor attending the employee's interview.

9. If a potential conflict exists there may be good reason to have separate representation. The question of representation will need to be carefully considered in these circumstances. However, if the employer and employee are advised of the potential conflict and the risks (including the risk that the solicitor may not be able to act for either if the conflict does actualise) and choose the same solicitor because of the perceived advantages, this should not be prohibited.
10. If there is no risk of conflict then there is no reason why the company solicitor should not be present at the interview of an employee.

Advice given

11. The letter from the HSE dated 10th November correctly states that:

“Any solicitor representing a suspect employer should consider his or her professional position carefully before seeking to advise a witness.”
12. However, the advice from the Law Society goes further. Having set out the **potential** difficulties of the same solicitor advising the company and its employee, the Guidance makes reference to principle 15.01 (*“where there is a conflict or a significant risk of a conflict...”*) and concludes *“that risk would arise”* in this situation. It is more accurate to say that such a risk *might* arise.
13. Similarly, the Guidance says that it is not enough to advise the company and the employee of the difficulties because note 2 to 15.01 provides that *“even if an actual conflict of interest exists and is disclosed to the client and the client consents to the solicitor acting, the solicitor must not accept the instructions.”* However, this guidance confuses the situation where an actual conflict exists and the situation where there is a potential conflict. In the latter situation, why can the same solicitor not act for both if he has advised them of the difficulties?

14. Finally, the Guidance concludes by saying that: “...if it is absolutely clear that there is no conflict or the potential for conflict, **and** the entire responsibility for the accident clearly rests with a third party outside the company, then there would be no difficulty in the company solicitor representing both parties.” (emphasis added). This, again, puts it too high. Why is the additional requirement necessary if there is no actual or potential conflict?

Counsel’s opinion

15. Notwithstanding the above, is there any advantage in obtaining Counsel’s opinion?

There is no reason why the Law Society should not give guidance to its members, indeed every reason why it should. The difficulty is that its proposed wording goes further than is appropriate. In fact it seems to go further than the HSE’s suggestion.

16. This problem may be best addressed by correspondence and representations to the Ethics Committee. These representations could be supported by testimonies from solicitors, employers and employees in similar situations attesting to the advantages of single solicitor representation.

PP

5/12/04