



Scottish Legal  
Aid Board

Guidelines on the  
Application of the  
Criminal Quality  
Assurance Scheme

October 2023

The Scottish Legal Aid Board

[www.slab.org.uk](http://www.slab.org.uk)

## CONTENTS

INTRODUCTION .....	3
SUMMARY CRIMINAL CRITERIA .....	8
SOLEMN CRIMINAL CRITERIA .....	19
CRIMINAL APPEALS CRITERIA .....	28

## INTRODUCTION

1. The purpose of a Criminal Quality Assurance (CQA) review is to examine the quality of the work carried out on behalf of the client, based on the evidence in the file. The file is assessed against the peer review criteria. Where relevant, you should apply all criteria to the file being reviewed. However, not all criteria will apply to every file.
2. The criminal quality assurance reviews commenced in February 2012. However, the scheme was publicised to the profession in June 2010. Work carried out prior to that earlier date is assessed but cannot contribute to a fail mark in relation to any criterion.
3. A routine review will consist of eight files, with at least one file for the three main areas, summary, solemn and appeals. The make-up of the eight files will be based on the case profile of the solicitor and firm being reviewed.

### Standard of reasonable competence

4. The standard applied is that of the reasonable competence to be expected of a solicitor of ordinary skills. Although sometimes described as the *Hunter v Hanley*<sup>1</sup> test for professional negligence, it is more commonly encountered as the IPS standard (inadequate professional services)<sup>2</sup> for the purposes of complaints. When considering the advice given or actions taken during a case, there will be circumstances in which solicitors applying their professional judgement might legitimately make differing interpretations. Where you, as the reviewer, would take a different view from that shown on the file, you should not “second-guess” the professional judgement of the acting solicitor. You should only call into question the judgement of the solicitor being reviewed where, in your opinion, no reasonable solicitor would have conducted the case in the way demonstrated by the contents of the file.

### Files and marking

5. For the CQA scheme, because of the case timescales involved, reviewers will normally use dead files for the first stage reviews. Live files could still be used at any second stage or extended reviews required.

<sup>1</sup> 1955 S C 200

<sup>2</sup> Legal Profession and Legal Aid (Scotland) Act 2007 s. 46 “professional services which are in any respect not of the quality which could reasonably be expected of a competent solicitor”

6. You assess the file against each of the criteria, marking each criteria as:
  - 1 = below requirements
  - 2 = meets requirements
  - 3 = exceeds requirements
7. In addition to the three-point scale, two other marks are available for particular criteria:
  - C Cannot assess/not enough information
  - N/A Not applicable
8. You should use mark “C” where you cannot assess against the criterion because of lack of information on the file. Where a criterion does not apply to the file, it is marked N/A. You then score the file overall based on a five-point scale (with 1 indicating very poor performance and 5 excellent performance). A score of 3 or more is a pass.
9. The marks are not “totted up” in a rigid way - the reviewer is using skill, training and judgement to assess whether the file fails. If a file attracts three scores of 1, or three scores of C, it is likely to fail overall. However, in exceptional cases, where the file demonstrates a serious failing - for example, a missed court date or deadline, or incorrect charging of the client - the file may fail on a single criterion. The outcome of the case may also be a factor in the overall review.
10. The overall marks for the files reviewed are then used to give the solicitor an overall score, between 1 (very poor) and 5 (excellent).
  1. non-performance
  2. fails to meet standard requirements
  3. competent
  4. very good
  5. excellent
11. The normal threshold for passing the review should be six passed files out of the eight files reviewed. However, you should also take into account the complexity of the files reviewed, and the nature of any individual failures. In general
  - failing up to two files in a group of eight is unlikely to result in an

overall fail mark, unless any of the files are particularly bad failures and the other files are borderline

- where more than two files are failed, the overall mark is likely to be a fail unless the fails are marginal and the passes are strong ones.
- this can be changed pro rata, depending on how many files are available for review.

12. You must give reasons if departing from this rule of thumb.

The scores of the individual files should be recorded electronically, using the appropriate report form and the Peer Review Summary report form on the Board's CAMS system. On these electronic forms, you also record the overall score of the review, comment on overall positive findings from the files reviewed, and identify any overall areas of concern. We have produced separate guidelines covering the electronic reporting of the reviews.

13. Where a solicitor has previously been routinely reviewed, you will be provided with a copy of the previous findings. You should mark the current review first, assign an overall mark then look at the findings provided to see if there were any issues that needed to be addressed. You should then provide comments on this at Section 6 of the overall summary form. We call this box Annex A.

### Poor professional performance

14. It is important that reviewers apply the same standards throughout the country, from reviews of solicitors practising in the busiest city courts to those practising in quiet rural courts. Where you find poor professional performance, you should deal with it as follows:

• Inadequate professional standards	Mark the file appropriately.
• Negligence	You must fail the case, and inform the Criminal QA Co-ordinator and CQA Committee. The Committee will then inform the solicitor, although it will not directly inform the client.
• Conduct	If you identify improper conduct, you must fail the case, and must tell the CQA Co-ordinator and CQA Committee who will also inform the Law Society of Scotland.
• Fraud/legal aid abuse	You must fail the case, and tell the CQA Co-ordinator and the CQA Committee.

15. Reviewers also have the duty to report to the CQA Committee on issues under the Proceeds of Crime Act and the committee must inform

the Serious Organised Crime Agency. We will not report back to the solicitor in these cases.

### Interpretation of the peer review criteria

16. The criteria are organised chronologically to try to ensure proper consideration is given to key aspects of the case. Several criteria relate to whether the solicitor gave “accurate and appropriate” advice, or carried out “appropriate” actions. In considering whether advice is accurate, you should consider whether it is factually and legally acceptable, bearing in mind the IPS standard (or the test in *Hunter v Hanley*). In considering whether advice or action is appropriate, you must take into account the circumstances of the case, the level of information available to the solicitor, and ethical, practical, tactical and legal considerations. In other words, you should put yourself in the position of the solicitor at the time, taking into account the information that was available to them and that professional opinions as to what is appropriate may differ.
17. It is not for the peer reviewers to tell solicitors how to maintain their files. Most of the files you see should be well maintained, with good quality record-keeping, legible file notes and good chronological organisation. However, some files may not be so easy to follow. It is not a requirement of peer review that file notes are typed. Nevertheless, if you cannot read a file note, the evidence it contains is not available to you and there is a risk of a fail or a “cannot assess” mark on one or more criteria. Solicitors with poor handwriting should consider at least recording the main points in a typed file note.
18. File notes need not be lengthy. In most cases, the handwritten note made at a meeting with the client will contain all the information the reviewer needs. The solicitor may need to add a note of the advice given to the client, the instructions taken, and the actions agreed. These can be recorded briefly, after the event, depending on the complexity of the matter in hand.
19. Notes of meetings with clients should cover all salient points and reflect the content of the meeting. Solicitors should make a more detailed file note, comprising more than the client’s personal details and a few lines of scribbled notes, of longer meetings.
20. The Board requires solicitors to hold copies of legal aid applications on file, including the online mandates. This will help the peer reviewer.
21. Solicitors should record important telephone calls in the file. If they do not, gaps in the information in the file may hamper the review of the file and result in some criteria being failed.

## Peer Reviewer Assessment where a full routine review cannot be carried out

22. A full review consists of between 6 and 8 files. Anything less than will need to be supported by a Solicitor Assessment Form. Where there are no files at all to be available for review, the review will consist of the Assessment Form only. Where there are a number of files available, but less than 6, the review will consist of both files and an Assessment Form.
23. The letter sent out to the reviewer in all types of routine review, whether full, part or assessment only, will give full details of how the reviewer should carry out the review. In all cases where a solicitor has supplied an assessment form, whether there are files under review or not, the reviewer will complete an Assessment Report, giving recommendations based on the information provided by the solicitor.

## Peer reviewers' communication

24. As in the civil quality assurance scheme, all communication with the solicitor under review will be with the CQA Committee, through the QA co-ordinator, not the reviewer. Clearly, there will be contact between the reviewer and solicitor at any extended or final reviews held on site, where two reviewers are used. However, whilst the solicitor will know the identity of the peer reviewer, it is not appropriate for direct communication to take place after the review. Comments from the reviewers go firstly to the CQA Committee for decision and then back to the firm's compliance manager.
25. Reviewers cannot review firms in the area in which they themselves practise, or the files of any local correspondents whom they may have acted for in the past, or any firms where they may have been employed previously. Each reviewer is responsible for informing the CQA Committee of any perceived conflicts of interest in respect of any solicitor they are invited to review.

## Intimation of the result of the peer reviews

26. The peer reviewer's recommendation to pass or fail the review will be considered by the Criminal Quality Assurance Committee who will take the final decision on the review. In intimating the decision to the solicitor who was the subject of the review, a copy of the Peer Review summary form will be sent out to the solicitor along with any further comments on the review that the Committee feels ought to be brought to the attention of the solicitor.
27. At this stage, there is no facility for the solicitor to make oral representations to the Committee. Should the review advance to the later stages and reach a final review, the solicitor will have the opportunity to raise any comments or concerns at these later stages in the process.

## SUMMARY CRIMINAL CRITERIA

### Client contact at a Police Station (where this takes place)

1. Has an appropriate record been kept of any advice given to the client in the police station?

*Where possible, has the solicitor made an appropriate record of all that took place at any interview in line with the Law Society's advice and information on police interviews?*

2. Was appropriate advice given to the client?

Where possible this should include advice on:

- The nature of the alleged offence;
- Any evidence that has been disclosed;
- The content and status of any earlier statement the client may have made;
- The right to silence;
- Where appropriate, to provide police with details of any line of defence, as per Section 261 z a of the Criminal procedure (Scotland) Act 1995;
- Whether appropriate advice was given and steps taken, if the client was a child or a vulnerable person.

In considering whether the advice given at the Police Station was appropriate, you must consider whether it was factually and legally acceptable, bearing in mind the IPS standard and that in *Hunter v Hanley*.

In considering whether advice or action was appropriate, you must take into account the circumstances in which advice was given at the Police Station, the level of information available to the solicitor, and ethical, practical, tactical and legal considerations. In other words, you should put yourself in the position of the solicitor at the time, taking into account the information that was available to them and that professional opinions as to what is appropriate may differ.

3. Did the solicitor deal effectively with any police interview and any necessary post interview issues?
4. If the client wished to challenge any Investigative liberation or Undertaking bail conditions, or any applications for Post Charge Questioning, did the solicitor give appropriate advice and take the appropriate steps?
- 5.



## Client contact at initial interview stage whether in custody or in an office

6. How effective were the solicitor's initial fact and information gathering skills, including identifying any additional information required and taking steps necessary to obtain it?
7. Was it appropriate for the solicitor to give appropriate advice about the defence case including whether it is stateable and whether an early plea should be considered? If so, was this done correctly?

The "initial" phase is not just the first meeting with the client, but includes action taken at an early stage including:

- establishing the nature of the work required
- assessing the stateability of the case and advising the client on that
- gathering necessary information from the client
- giving initial advice both on the case and on legal aid
- any early contact with the Crown to discuss early resolution of the case
- taking any necessary urgent steps and
- taking instructions for and recording agreed actions.

The file should show the solicitor noted reasonably detailed relevant information at an early stage, though not necessarily at the first interview with the client. This will usually be an initial hand-written or typed file note, and must be legible. Some information may be in other documents, such as those produced by the client, or a letter to the client or another person confirming the nature of the matter. It may also form part of a legal aid application.

These criteria are testing the quality of the solicitor's approach to work. To provide an efficient service to the client, the solicitor should identify at an early stage what information is available and how to obtain any missing information. The information the solicitor gets should be enough to enable them to give appropriate advice.

There should be evidence that the solicitor has given the client accurate and appropriate advice on the matter to be dealt with, the legal basis (in general terms) and the prospects of success. This relies on their having obtained sufficient information from the client under criterion 5.

In considering whether advice is accurate, you must consider whether it is factually and legally acceptable, bearing in mind the IPS standard and that in *Hunter v Hanley*. In considering whether advice or action is appropriate, you must take into account the circumstances of the case, the level of information available to the solicitor, and ethical, practical,

tactical and legal considerations. In other words, you should put yourself in the position of the solicitor at the time, taking into account the information that was available to them and that professional opinions as to what is appropriate may differ.

### Application for bail

8. Was the question of bail properly addressed?

In addressing this, consider:

- Were any special bail conditions explained?
- Was any review or appeal properly addressed?

9. How would you rate the quality of instruction to counsel/other agents relating to bail?

### Preliminary plea

10. Was any competent preliminary plea taken?

If the client pleads guilty, a warrant is obtained, the case is deserted, or a not guilty plea is accepted, go to the Outcome stage at question 13.

### Crown disclosure

11. Did the solicitor examine the disclosure package carefully and was this discussed appropriately with the client?

Consideration should also be given to any contact with the Crown, prior to the intermediate diet. If none took place, should it have done so?

### New Summary Criminal Case Management Pilots

In September 2022, new Summary Case Management pilots started in three sheriff courts, in Dundee, Hamilton, and Paisley. The pilots seek to reduce the number of unnecessary hearings at summary level, by facilitating early disclosure of evidence and early judicial case management.

Key evidence can be released to the defence prior to or at the first calling in all domestic abuse cases. Specified disclosure material can be requested where it is considered that such early disclosure may make a material difference to a plea or the early resolution of issues in all non-domestic abuse cases.

In order to minimise the burden on defence agents, the defence no longer need to lodge written records in the pilot courts. These are replaced by judicial case management notes.

The disclosable evidence can only be made available to the defence once the Crown is in receipt of a letter of engagement. Defence agents are expected to submit letters of engagement to the Crown immediately upon receiving instructions to represent an accused.

## Legal Aid Changes

Legal aid changes were also made to support the pilots. Changes were made to the Advice and Assistance and ABWOR regulations to make the Summary fixed fee available to solicitors in cases which could be resolved at the early stages without a court appearance. Cases resolved in this way could not previously be covered by the fixed fees.

These changes now allow for the summary sheriff court fixed fee of £572 to be paid under Advice and Assistance or ABWOR, where cases are resolved prior to the first court appearance once the complaint has been issued, or where the PF has decided to prosecute the case, and the solicitor has confirmed they are acting in the case, before the complaint is formally issued. The authorised expenditure limit for these cases is set at £600. The fixed fee can be paid under Advice and Assistance where cases are resolved prior to the proceedings commencing, or under ABWOR if the proceedings have commenced and the case is resolved prior to the first court appearance.

If the case then proceeds to court, then ABWOR remains in place for the entire case, unless a plea of Not Guilty is tendered at any stage, when an application for summary criminal legal aid will be needed to cover the trial add on fees.

While the new early disclosure arrangements will be concentrated in the three pilot court areas, these changes apply to all cases across the country, so solicitors in other areas will also benefit from being able to claim the fixed fees in cases which can be resolved at these early stages.

## Notional Trial Diets in the Pilot Courts

The different financial eligibility tests for Criminal ABWOR (Keycard) and Summary Criminal (Undue Hardship) mean that there will be some clients who would not qualify for ABWOR (or would qualify with a contribution), but would qualify for Summary Criminal Legal Aid, which has no client contributions.

Most clients are not affected by this, but in the pilot courts, where the defence indicate that the client does not qualify for ABWOR, a plea of not guilty can be tendered, but rather than set an intermediate diet and trial

diet, a Notional Trial Diet will be fixed in 2 weeks' time for domestic cases and after 4 weeks for non domestic cases.

Witnesses will not be cited at this stage, but this allows an application for summary criminal legal aid to be submitted to SLAB. At the Notional Trial Diet, the case will initially follow the same process as a case which has been continued without plea.

This process can also be followed in custody cases, where there might be issues with a nominated solicitor meeting the criteria for Appointed Solicitor ABWOR.

### Dealing With These Cases in the Peer Reviews

The pilots started in September 2022, but full agreement on participation in the pilots was not reached with the Faculties in the three areas until January 2023. The things we should hope to see on a Case Management file would be:

- Notes of instruction and s196.
- Swift letter of engagement prior to cwp hearing.
- Consideration of any disclosure/cctv.
- Letter explaining that in pilot and reporting outcomes.
- ABWOR application or LAG if not eligible for ABWOR.

The Practice Note 2 sets out the way that the pilots are operating and has a Pro Forma that Sheriffs will look to address.

### Pre-trial/intermediate diet

12. Were special defences and defence witnesses and productions considered and, if appropriate, lodged timeously?
13. Were any child or vulnerable witnesses cited? If so, did the solicitor consider special measures/witness support and notices in line with the May 2017 Practice Note?

If the client pleads guilty, a warrant is obtained, the case is deserted, or a not guilty plea is accepted, go to question 15.

### Preparation for the conduct of the trial

14. Did the solicitor give the client correct and appropriate advice regarding the defence case including whether a plea should be considered?
15. How would you rate the level and adequacy of preparation for trial? In addressing this, consider

whether the solicitor:

- identified the need for experts, other reports or counsel;
- correctly identified the expertise needed;
- applied for sanction in accordance with the guidance in the Criminal Legal Assistance Handbook;
- if sanction was granted, instructed and obtained the appropriate experts, counsel or reports.

There should be enough evidence to show that the level of preparation was appropriate to the nature of the case. This might be letters of instruction to local agents, or file notes showing research or a line of argument. The client could be seriously prejudiced if insufficient preparation has been carried out, and as a result an adverse decision is made in court.

### Outcome stage

16. Was the outcome broadly within the range of expectation (significantly worse, significantly better, within range)?
17. How well did the solicitor handle advising the client about sentence both before and after any criminal justice social work report?
18. How effectively was the outcome communicated to the client?
19. Did the solicitor give appropriate consideration to appealing against conviction/sentence?

When the outcome is well within the range that would have been expected and no appeal would be appropriate, but nothing appears on the file, score this as a “2” rather than a “C”.

20. Was an adequate explanation given to the client on sentence implications such as registration on the Sex Offenders Register, community payback orders, restriction of liberty orders etc?

### Application for criminal legal assistance (where appropriate)

21. Did the solicitor apply for criminal legal assistance (advice and assistance, ABWOR, summary criminal legal aid) in a timely and appropriate manner?

In addressing this, consider:

- Was the application properly submitted with adequate supporting

information?

- Did the solicitor see any verification of the client's financial circumstances in A&A and ABWOR cases? If not, did they take reasonable steps to seek verification?
- Did the solicitor adequately apply the interests of justice test in ABWOR cases, where this was appropriate?
- If the solicitor gave ABWOR under the appointed solicitor provisions did they adequately meet all the tests?
- Following a not guilty plea, was the application for summary criminal legal aid submitted to the Board within 14 days? If not, was there an adequate explanation for this?

22. Was the Legal Aid Online declaration (mandate) form correctly completed?

The legal aid online declaration or mandate forms should be fully completed in line with the guidance issued by SLAB on 3 March 2016. Individual files should fail if there is:

- a blank, signed mandate
- a completed, unsigned mandate - by both applicant and solicitor.

Where the mandate is present, is signed by the applicant and solicitor, but it is incomplete, the peer reviewer should use their discretion. The material pieces of information for advice and assistance and legal aid are whether the client is identified, the subject matter is identified and the advice and assistance form shows sufficient information to assess eligibility and the assessment has been properly made and recorded.

The peer reviewer should use their discretion in assessing whether the mandate is sufficiently complete for a proper assessment and advice and assistance grant to have been made. If there is not, the peer reviewer may decide that the individual criterion has failed for that file. If the mandate is so incomplete as to have no real connection between the applicant's signature and the information contained, then the peer reviewer can decide to fail the file.

When solicitors are selected for peer review, they should ensure that the legal aid mandates are present on the files. Where there is no mandate present, the peer reviewer should use their discretion, and may fail the individual criterion but not the file where there is an isolated incident. However, where it appears that the solicitor has no mandates, then the solicitor may fail the review.

Where there is a part-complete declaration form, but financial details are available elsewhere in the file and there is evidence of assessment, you can use your discretion in assessing the criteria.

## Declarations in Files Worked on During the Covid 19 Pandemic.

### *Applicants' Signatures*

SLAB issued guidance on 16 March 2020 in relation to Applicants' signatures on Declaration forms. This advised that applicants did not need to sign the declarations and reflected the increasing health concerns at the time over meetings with clients face to face and sharing pens. This covered the applicants' signatures only; there was no change to the approach for solicitors' signatures.

The guidance was updated on 4 August 2023. Solicitors must always get clients to sign the declaration form when you are seeing them face to face.

### *Where it is not possible to get the declaration signed by the client*

However, if the client is not present or there are other reasons why they cannot sign the form the solicitor must provide this information for SLAB to consider. This can be noted on the online system. On the Advice and Assistance/ABWOR system, the reason - *"Client not present and agrees with the declaration terms"* should be used. *"Other"* should be used for all other reasons, with a full explanation given of the circumstances for us to consider.

For all other Legal Aid Applications, the system requires a date to be entered when the applicant signed the form. Where it has not been possible to get the client to sign the declaration, the date entered here can also be the date of the remote consultation. You can add a brief explanation about the circumstances elsewhere in the application, for example in the "additional financial information box".

### *Solicitors' Signatures*

Different declaration form practices developed amongst solicitors and firms during the pandemic period, due to the need to operate in a different way, without access to offices and without meeting clients in person. Some confusion appears to have arisen for some solicitors who thought that our notification that the declarations did not need to be signed by applicants meant that they did not need to sign them too.

The following is acceptable for the signing of the declarations by solicitors during the pandemic from March 2020:

- Paper declaration forms signed by the solicitor and client.
- Paper declaration forms signed only by the solicitor and the 'Covid' reason used instead of the client's signature.

- Printed copies of the online application with a wet signature by the solicitor and the 'Covid' reason used instead of the client's signature or with the client's signature.
- Printed copies of the online application containing the name of the solicitor in the signature box, but without a wet signature by the solicitor and the 'Covid' reason used instead of the client's signature.

Use of the term 'online application' covers: A&A/ABWOR declarations (printable summary) or the copy of the application submitted in Legal Aid Online.

### *Transfer of agency (where appropriate)*

23. Where there has been a transfer of agency, did the solicitor follow the appropriate procedures in accordance with the Criminal Legal Assistance Handbook and Law Society guidelines?

In addressing this, consider:

- Did they send SLAB sufficient information to satisfy the good reason test?
- Did they send a copy of the transfer form to the first solicitor, in line with SLAB's procedures?
- If the solicitor was the first solicitor, did they respond appropriately after receiving the transfer mandate and the transfer was granted?
- Was the Legal Aid Online transfer declaration (mandate) form correctly completed?

### *Equalities and diversity*

24. Has the solicitor taken all reasonable steps to address any issues relating to age, disability, gender, race, religion or belief and sexual orientation, which arose in the course of the case?

It was noted during the equality impact assessment on the CQA Scheme that the Board does not have any way of ensuring that criminal solicitors are not discriminatory in their work. The CQA Committee agreed that the introduction of the CQA Scheme would help to ensure an adequate standard of work by criminal solicitors, and help satisfy us that cases are properly taken on and that the client has not been disadvantaged because of any of the above characteristics.

Therefore, in addressing this, you should consider:

- language difficulties



- access difficulties
- cultural issues.

### Overall mark for the file

*Having considered the specific aspects of the case set out in these criteria, you should award an overall mark to the case, according to the following scale:*

1. non-performance
2. fails to meet standard requirements
3. competent
4. very good
5. excellent

In determining this overall score, consider:

- How effective were the solicitor's fact and information gathering skills?
- Did they give the client correct and appropriate advice including advice on the availability of and eligibility for advice and assistance, ABWOR and legal aid?
- Where a plea was possible, is there evidence of their having given the client accurate and appropriate advice on the terms of the offer or proposal, its reasonableness and the consequences for the client of accepting or rejecting it?
- Has the solicitor maintained sufficient records of advice given and action taken during the case?

Having considered each of the individual criteria, including those applicable throughout the case, you should:

- give an additional mark for the file as a whole
- list the reasons for any "1" scores and whether there are sufficient "C" scores to cause concern
- record any elements of good practice found
- provide comments on the case
- focusing on any criteria for which a score of 1 is provided

- explaining why a “fail” score has been given and
- suggesting areas for improvement and ways in which these might be achieved.

These comments will give the firm or solicitor involved an initial indication of any particular issues they need to address.

You should also note where there is evidence of excellent performance.

Record the scores for the individual files on the appropriate report form and the Peer Review Summary report form. On this form, you should also record the overall score of the review, comment on overall positive findings from the files reviewed, and identify any overall areas of concern. We hope scores and comments will be recorded electronically wherever possible.

We will tell the individual solicitor and the firm’s compliance partner the results of the review.

## SOLEMN CRIMINAL CRITERIA

### Client contact at a Police Station (where this takes place)

1. Has an appropriate record been kept of any advice given to the client in the police station?

Where possible, and practical, has the solicitor made an appropriate record of what took place at any interview in line with the Law Society's advice and information on police interviews?

2. Was appropriate advice given to the client?

Where possible this should include advice on:

- The nature of the alleged offence
- Any evidence that has been disclosed
- The content and status of any earlier statement the client may have made
- The right to silence
- Where appropriate, to provide police with details of any line of defence, as per Section 261 z a of the Criminal procedure (Scotland) Act 1995
- Whether appropriate advice was given and steps taken, if the client was a child or a vulnerable person.

In considering whether the advice given at the Police Station was accurate, you must consider whether it was factually and legally acceptable, bearing in mind the IPS standard and that in *Hunter v Hanley*.

In considering whether advice or action was appropriate, you must take into account the circumstances in which advice was given at the Police Station, the level of information available to the solicitor, and ethical, practical, tactical and legal considerations. In other words, you should put yourself in the position of the solicitor at the time, taking into account the information that was available to them and that professional opinions as to what is appropriate may differ.

3. Did the solicitor deal effectively with any police interview and any necessary post interview issues?
4. If the client wished to challenge any Investigative liberation or Undertaking bail conditions, or any applications for Post Charge Questioning, did the solicitor give appropriate advice and take the appropriate steps?

### Client contact at initial interview stage whether in custody or in an office

5. How effective were the solicitor's initial fact and information gathering

skills, including identifying any additional information required and taking steps necessary to obtain it?

This should also include consideration of any advice given to the client during a police interview at a police station, where appropriate.

The “initial” phase is not just the first meeting with the client, but includes action taken at an early stage including:

- establishing the nature of the work required
- assessing the stateability of the case and advising the client on that
- gathering necessary information from the client
- giving initial advice both on the case and on legal aid
- taking any necessary urgent steps and
- taking instructions for and recording agreed actions.

The file should show the solicitor noted reasonably detailed relevant information at an early stage, though not necessarily at the first interview with the client. This will usually be an initial hand-written or typed file note, and must be legible. Some information may be in other documents, such as those produced by the client, or a letter to the client or another person confirming the nature of the matter. It may also form part of a legal aid application.

These criteria are testing the quality of the solicitor’s approach to work. To provide an efficient service to the client, the solicitor should identify at an early stage what information is available and how to obtain any missing information. The information the solicitor gets should be enough to enable them to give appropriate advice.

There should be evidence that the solicitor has given the client accurate and appropriate advice on the matter to be dealt with, the legal basis (in general terms) and the prospects of success. This relies on their having obtained sufficient information from the client under criterion 5.

In considering whether advice is accurate, you must consider whether it is factually and legally acceptable, bearing in mind the IPS standard and that in *Hunter v Hanley*. In considering whether advice or action is appropriate, you must take into account the circumstances of the case, the level of information available to the solicitor, and ethical, practical, tactical and legal considerations. In other words, you should put yourself in the position of the solicitor at the time, taking into account the information that was available to them and that professional opinions as to what is appropriate may differ.

## Application for bail

6. Was the question of bail properly addressed? In addressing this, consider:
  - Were any special bail conditions explained?
  - Was any appeal properly addressed?
  - Did the case fall under the exceptional category? If so, did the solicitor tell the client that bail was likely to be refused?
7. How would you rate the quality of instruction to counsel and other agents relating to bail?

## Preparation

8. Where appropriate, did the solicitor agree relevant issues through timeous communication and negotiation with the Crown, including consideration of whether a plea should be made and were the managed communications and preliminary hearings conducted effectively?
9. Where a guilty plea is to be tendered, did the solicitor take reasonable steps to accelerate the diet and plead?
10. Where appropriate, did the solicitor tell the client they had the right to be represented by counsel or a solicitor advocate of their choice?

## Crown disclosure

11. Did the solicitor examine the disclosure package carefully and was this discussed appropriately with the client?

*This should also include whether subsequent steps were taken as appropriate after disclosure was discussed with the client.*

## Post-service of indictment

12. Did the solicitor check that all relevant copy productions had been received, and if not, ordered?
13. Were special defences, a defence statement, defence witnesses and productions considered and, if appropriate, lodged timeously?
14. Were any child or vulnerable witnesses cited? If so, did the solicitor consider special measures/witness support and notices in line with the

May 2017 Practice Note?

15. Did the solicitor communicate and consult with the client?
16. Where appropriate was there proper preparation for the first diet/preliminary hearing including considering agreement of evidence?
17. Where appropriate, has the solicitor informed the client as to the outcome and implications of all hearings?

#### Pre-trial

18. Was the overall precognition/preparation of the case sufficient, timely and appropriate including obtaining sanction in accordance with the guidance in the Criminal Legal Assistance Handbook?

You should use your own judgment and experience to assess whether an expert or counsel is needed. You should use your own knowledge to assess whether the solicitor is seeking the correct expertise. You do not have to note on the file that an expert report is not necessary.

Solicitors should recognise when they need expert assistance to present a case, and instruct the correct type of expert. This avoids unnecessary expense. They should timeously apply for sanction or increases in authorised expenditure to cover the cost of expert reports or counsel.

If the client pleads guilty or a warrant is obtained, go to question 20.

#### Preparation for the conduct of the trial/section 76 indictment

19. How would you rate the level and adequacy of preparation for trial? In addressing this, consider whether the solicitor:
  - identified the need for experts, other reports or counsel;
  - correctly identified the expertise needed;
  - applied for sanction in accordance with the guidance in the Criminal Legal Assistance Handbook;
  - if sanction was granted, instructed and obtained the appropriate experts, counsel or reports.
  - dealt with any Written Record appropriately;
  - dealt with any Deferred Sentences appropriately.

There should be enough evidence to show the level of preparation was appropriate to the nature of the case. This might be letters of instruction to local agents, or file notes showing research or a line of argument. The client could be seriously prejudiced if insufficient preparation has been carried out, and as a result an adverse decision is made in court.

### Outcome stage

20. Was the outcome broadly within the range of expectation (significantly worse, significantly better, within range)?
21. How effectively was the outcome communicated to the client?
22. Did the solicitor give appropriate consideration to appealing against conviction/sentence?

*When the outcome is well within the range that would have been expected and no appeal would be appropriate, but nothing appears on the file, score this as a “2” rather than a “C”.*

### Application for criminal legal aid (where appropriate)

23. Did the solicitor apply for criminal legal aid in a timely and appropriate manner?
24. Was the Legal Aid Online declaration (mandate) form correctly completed?

The legal aid online declaration or mandate forms should be fully completed in line with the guidance issued by SLAB on 3 March 2016. Individual files should fail if there is:

- a blank, signed mandate
- 
- a completed, unsigned mandate - by both applicant and solicitor.

Where the mandate is present, is signed by the applicant and solicitor, but it is incomplete, the peer reviewer should use their discretion. The material pieces of information for advice and assistance and legal aid are whether the client is identified, the subject matter is identified and the advice and assistance form shows sufficient information to assess eligibility and the assessment has been properly made and recorded.

The peer reviewer should use their discretion in assessing whether the mandate is sufficiently complete for a proper assessment and advice and assistance grant to have been made. If there is not, the peer reviewer may decide that the individual criterion has failed for that file. If the mandate is so incomplete as to have no real connection between the applicant's signature and the information contained, then the peer reviewer can decide to fail the file.

When solicitors are selected for peer review, they should ensure that the legal aid mandates are present on the files. Where there is no mandate present, the peer reviewer should use their discretion, and may fail the individual criterion but not the file where there is an isolated incident. However, where it appears that the solicitor has no mandates, then the solicitor may fail the review.

Where there is a part-complete declaration form, but financial details are available elsewhere in the file and there is evidence of assessment, you can use your discretion in assessing the criteria.

## **Declarations in Files Worked on During the Covid 19 Pandemic.**

### ***Applicants' Signatures***

SLAB issued guidance on 16 March 2020 in relation to Applicants' signatures on Declaration forms. This advised that applicants did not need to sign the declarations and reflected the increasing health concerns at the time over meetings with clients face to face and sharing pens. This covered the applicants' signatures only; there was no change to the approach for solicitors' signatures.

The guidance was updated on 4 August 2023. Solicitors must always get clients to sign the declaration form when you are seeing them face to face.

### ***Where it is not possible to get the declaration signed by the client***

However, if the client is not present or there are other reasons why they cannot sign the form the solicitor must provide this information for SLAB to consider. This can be noted on the online system. On the Advice and Assistance/ABWOR system, the reason - "*Client not present and agrees with the declaration terms*" should be used. "*Other*" should be used for all other reasons, with a full explanation given of the circumstances for us to consider.

For all other Legal Aid Applications, the system requires a date to be entered when the applicant signed the form. Where it has not been possible to get the client to sign the declaration, the date entered here can also be the date of the remote consultation. You can add a brief explanation about the circumstances elsewhere in the application, in the "additional financial information box".

### ***Solicitors' Signatures***

Different declaration form practices developed amongst solicitors and firms during the pandemic period, due to the need to operate in a different way, without access to offices and without meeting clients



in person. Some confusion appears to have arisen for some solicitors who thought that our notification that the declarations did not need to be signed by applicants meant that they did not need to sign them too.

The following is acceptable for the signing of the declarations by solicitors during the pandemic from March 2020:

- Paper declaration forms signed by the solicitor and client.
- Paper declaration forms signed only by the solicitor and the 'Covid' reason used instead of the client's signature.
- Printed copies of the online application with a wet signature by the solicitor and the 'Covid' reason used instead of the client's signature or with the client's signature.
- Printed copies of the online application containing the name of the solicitor in the signature box, but without a wet signature by the solicitor and the 'Covid' reason used instead of the client's signature.

Use of the term 'online application' covers: A&A/ABWOR declarations (printable summary) or the copy of the application submitted in Legal Aid Online.

### Transfer of agency (where appropriate)

25. Where there has been a transfer of agency, did the solicitor follow the appropriate procedures in accordance with the Criminal Legal Assistance Handbook and Law Society guidelines?

In addressing this, consider:

- Did they send SLAB sufficient information to satisfy the good reason test?
- Did they send a copy of the transfer form to the first solicitor, in line with SLAB's procedures?
- If the solicitor was the first solicitor, did they respond appropriately after receiving the transfer mandate and the transfer was granted?
- Was the Legal Aid Online transfer declaration (mandate) form correctly completed?

### Equalities and diversity

26. Has the solicitor taken all reasonable steps to address any issues relating to age, disability, race, gender, religion or belief and sexual orientation which arose in the course of the case?

It was noted during the equality impact assessment on the CQA Scheme that the Board does not have any way of ensuring that criminal solicitors are not discriminatory in their work.

The CQA Committee agreed that the introduction of the CQA Scheme would help to ensure an adequate standard of work by criminal solicitors, and help satisfy us that cases are properly taken on and that the client has not been disadvantaged because of any of the above characteristics.

Therefore, in addressing this, you should consider:

- language difficulties
- access difficulties
- cultural issues.

### Overall mark for the file

Having considered the specific aspects of the case set out in the preceding criteria, you should award an overall mark to the case as a whole, according to the following scale:

1. non-performance
2. fails to meet standard requirements
3. competent
4. very good
5. excellent

In determining this overall score, consider:

- How effective were the solicitor's fact and information gathering skills?
- Did they give the client correct and appropriate advice including advice on the availability of and eligibility for advice and assistance, and legal aid?
- Where a plea was possible, is there evidence of their having given the client accurate and appropriate advice on the terms of the offer or proposal, its reasonableness and the consequences for the client of accepting or rejecting it.
- Has the solicitor maintained sufficient records of advice given and action taken during the case?

Having considered each of the individual criteria, including those applicable throughout the case, you should:

- give an additional mark for the file as a whole
- list the reasons for any “1” scores and whether there are sufficient “C” scores to cause concern
- record any elements of good practice found
- provide comments on the case
- focusing on any criteria for which a score of 1 is provided
- explaining why a “fail” score has been given and
- suggesting areas for improvement and ways in which these might be achieved.

These comments will give the firm or solicitor involved an initial indication any particular issues they need to address.

You should also note where there is evidence of excellent performance.

Record the scores for the individual files on the appropriate report form and the Peer Review Summary report form. On this form, you should also record the overall score of the review, comment on overall positive findings from the files reviewed, and identify any overall areas of concern. We hope scores and comments will be recorded electronically wherever possible.

We will tell the individual solicitor and the firm’s compliance partner the results of the review.

# CRIMINAL APPEALS CRITERIA

## Taking instructions on appeal

- 1) How effective were the solicitor's initial fact and information gathering skills, including identifying the issues and any additional information required and taking steps necessary to obtain it?
- 2) Did the solicitor give the client accurate and appropriate advice about the appeal, including whether it is stateable and what the procedure would be?
- 3) Did the solicitor give appropriate instructions to counsel, solicitor advocate and Edinburgh agents?

The "initial" phase is not just the first meeting with the client, but includes action taken at an early stage including:

- establishing the nature of the work required
- assessing the stateability of the case and advising the client on that
- gathering necessary information from the client
- giving initial advice both on the case and on legal aid
- taking any necessary urgent steps and
- taking instructions for and recording agreed actions.

The file should show the solicitor noted reasonably detailed relevant information at an early stage, though not necessarily at the first interview with the client. This will usually be an initial hand-written or typed file note, and must be legible. Some information may be in other documents, such as those produced by the client, or a letter to the client or another person confirming the nature of the matter. It may also form part of a legal aid application.

These criteria are testing the quality of the solicitor's approach to work. To provide an efficient service to the client, the solicitor should identify at an early stage what information is available and how to obtain any missing information. The information the solicitor gets should be enough to enable them to give appropriate advice.

There should be evidence that the solicitor has given the client accurate and appropriate advice on the matter to be dealt with, the legal basis (in general terms) and the prospects of success. This relies on their having obtained sufficient information from the client under criterion 5.

In considering whether advice is accurate, you must consider whether it is factually and legally acceptable, bearing in mind the IPS standard and that in *Hunter v Hanley*. In considering whether advice or action is

appropriate, you must take into account the circumstances of the case, the level of information available to the solicitor, and ethical, practical, tactical and legal considerations. In other words, you should put yourself in the position of the solicitor at the time, taking into account the information that was available to them and that professional opinions as to what is appropriate may differ.

### Preparation and drafting

- 4) If the solicitor prepared the grounds of appeal, how would you rate the clarity and effectiveness of the appeal as drafted?

In addressing this, consider:

- Did the appeal contain a full statement of the grounds of appeal?
- Did the appeal contain grounds in relation to both conviction and sentence as appropriate?
- Did the appeal contain a crave for interim liberation as appropriate, or any other interim crave?

### Application for *bail ad interim* (if in custody)

- 5) Was the question of *bail ad interim* properly addressed? How would you rate the quality of instruction to counsel, solicitor advocate and other agents if there was a bail appeal?

In addressing this, consider:

- Did the solicitor use the correct format of application, a crave to the main appeal or separate petition?
- In a summary case, did the solicitor properly address any appeal against refusal of bail ad interim?

### Consideration of leave to appeal (where appropriate)

- 6) Did the solicitor comply with statutory time limits for lodging?
- 7) If the solicitor did not comply with statutory time limits did they apply for extension in terms of the Act of Adjournment?
- 8) Did the solicitor properly consider the terms of the judge /sheriff's report?
- 9) In the case of appeal by way of application for stated case, did the solicitor properly consider adjustments to the draft stated case (both their own and those for the Crown)?
- 10) If either party proposed adjustments did the solicitor prepare for and conduct the hearing on adjustments adequately?

- 11) Has the solicitor informed the client of the outcome and implications of hearings?

#### Sift process (where appropriate)

- 12) Where leave to appeal was refused at the first sift, did the solicitor take appropriate steps to advance the appeal?
- 13) Were additional grounds of appeal and/or further information given to the sift judges as appropriate?

#### Preparation and conduct of the appeal if leave to appeal granted

- 14) How would you rate the level and adequacy of preparation for the appeal? In addressing this, consider whether the solicitor has:
- instructed counsel/solicitor advocate in good time
  - fully instructed counsel/solicitor advocate
  - given the Clerk of Justiciary the name of counsel conducting the appeal and the likely duration of the appeal
  - followed the correct procedures for appeals being heard in the Sheriff Appeal Court?
  - in an appeal by way of stated case, has the solicitor uplifted the process and had prints made and lodged timeously?
  - where the client is on bail, told the client the date of the appeal hearing
  - arrange for a consultation for the client with counsel/solicitor advocate before the appeal?

There should be enough evidence to show the level of preparation was appropriate to the nature of the case. This might be letters of instruction to local agents, or file notes showing research or a line of argument. The client could be seriously prejudiced if insufficient preparation has been carried out, and as a result an adverse decision is made in court.

#### Appeal outcome stage

- 15) Was the outcome broadly within the range of expectation (significantly worse, significantly better, within range)?

- 16) How effectively was the outcome communicated to the client?
- 17) Did the solicitor give due consideration to any further appeal such as the Supreme Court or the Scottish Criminal Case Review Commission, where appropriate?

When the outcome is well within the range that would have been expected and no appeal would be appropriate, but nothing appears on the file, score this as a “2” rather than a “C”.

#### Application for criminal legal aid (where appropriate)

- 18) Did the solicitor apply for criminal legal aid in a timely and appropriate manner? In addressing this, consider:
  - Was the application properly submitted with any adequate supporting information that was available at that stage?
  - Were the applications for special urgency cover under regulation 15 and for full legal aid submitted at the right times?
  - Was any application for special urgency cover under regulation 15 appropriate?
  - If an Online client declaration form was required where there was no legal aid at first instance, was this completed and signed correctly?

Was the Legal Aid Online transfer declaration (mandate) form correctly completed? The legal aid online declaration or mandate forms should be fully completed in line with the guidance issued by SLAB on 3 March 2016. Individual files should fail if there is:

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The peer reviewer should use their discretion in assessing whether the mandate is sufficiently complete for a proper assessment and advice and assistance grant to have been made. If there is not, the peer reviewer may decide that the individual criterion has failed for that file. If the mandate is so incomplete as to have no real connection between the

applicant's signature and the information contained, then the peer reviewer can decide to fail the file.

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You should also note where there is evidence of excellent performance.

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We will tell the individual solicitor and the firm’s compliance partner the results of the review.