PEER REVIEW IN CRIMINAL LEGAL ASSISTANCE IN SCOTLAND ( June 2019)

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**Assessment protocol.**

1. All files are marked against a set ofcriteria and guidelines approved by the Criminal Quality Assurance Committee ( and its key partners – The Law Society and SLAB). The criteria are marked on a scale from 1 to 3 where 1 indicates “below acceptable standard”, 2 “acceptable” and 3 indicates “exceeding acceptable standard”. In practice 2 is a broader category than the other two. There are two further scores: “C” meaning “insufficient information on file to score against the criteria” and “N/A” meaning that in relation to this particular file this criterion is “Not applicable”.

2. There is a final Overall Mark criterion for the file which is marked on a 1-5 scale with 1 and 2 being below acceptability and 4 and 5 above the minimum acceptable standard. This reflects a Continuum of Quality in which 1 = Non-performance and 5= Excellence

EXCELLENCE

VERY GOOD

PASS

FAILS TO MEET REQUIRED STANDARDS

NON-PERFORMANCE[[1]](#footnote-1)

**5 Excellen**ce – Indicators include a full and appropriate recording of instructions; tailored communications, advice and work; full and correct advice; demonstration of in-depth knowledge and appreciation of wider context; excellent use of tactics and strategies; added value and pro-active approach

**4 Competence Plus** – Indicators include an appropriate recording of instructions; tailored advice and work; full and correct advice; progression of issues; use of tactics and strategy; added value and a pro-active approach.

**3 Threshold Competence** – Indicators include an appropriate recording of instructions; adequate but limited communications; adequate advice and work, possibly not extensive.

**2 Below Competence** – Work is below the standard which clients are reasonably entitled to expect from a solicitor. – Indicators include inaccurate recording of information; poor communication with clients; inadequate advice and work; some cases conducted without reasonable skill, care and diligence; sometimes inadequate timeliness of communication; lapses below required standard.

**1** **Non-Performance** – Substantially below the standard which clients are reasonably entitled to expect from a solicitor and there has been at least one major or complete failure to conduct work to this standard. – Indicators include information not being recorded; poor communication with clients; generally cases conducted without reasonable skill, care and diligence; often inadequate timeliness of communication; detrimental service to clients, or no meaningful service at all, or potential prejudice to clients.

3. This overall mark for the file is arrived at from the reviewer’s professional judgement as to the overall acceptability of the work done by solicitor/ firm in the case. The mark is NOT attained additively from the scores on the individual criteria, however there should be some relationship between the scores on the individual criteria and the overall mark for the file. A file that receives nothing but “2” for each criterion should not be classified as more than a “3” for the overall file unless the reviewer can claim that all the “2” marks for individual criteria are “High 2s”. A clear “4” seems to need at least two marks of “3” on the individual criteria, however this works both ways. If a file receives several “3”s on individual criteria and no “c”s or “1”s then it should normally get a 4.

4. For every criterion ( except the final “File ” one) on which a score of 1 is returned the reviewer will write or type notes at the end of the Scoring Sheet under the “Comments” heading, indicating why a score of “below acceptable standard” has been recorded for that criterion. ( In the case of the Final Overall Criterion for the File, notes should be provided if a score of 1 or 2 is recorded ).

5. Where a score of 3 is recorded (or 4 or 5 in the case of the Final Overall Criterion) the reviewer will have the option of indicating in the Comments section why the performance is considered to be particularly meritorious.

1. There will be occasions where it is unclear whether the appropriate score for a criterion is a 1 or a C. In these cases a C should be recorded but if there are a “significant” number of Cs recorded, this should be commented on adversely in the Comments section at the end of the Scoring Sheet. In order to enhance marker consistency guidance is set out below (question 1 ) as to the meaning to be given to “significant”.
2. For each file/case there will be a scoring sheet with marks and comments completed by the reviewer. The reviewer will have the option of adding a line at the end of the Comments section if a further amplification of the Overall Score is felt to be desirable. At the end of each set of cases the reviewer will type an overall assessment of the cases which he or she has reviewed on a separate Summary Report Form as well as a recommendation as to whether the solicitor should pass or not.
3. Where the Criminal Quality Assurance Committee (CQAC) considers that the solicitor should fail the routine file review (on the basis of the summary report forms) or takes the view that further files need to be looked at from the solicitor before reaching a conclusion as to whether the solicitor should pass or not, it will order that an extended review be carried out ( generally at the solicitor’s premises ). Extended reviews take two forms. Where the QAC forms the view that the defects suggested by the routine review are serious or critical and potentially harmful to the public they will order an immediate extended review to take place as soon as reasonably practicable. Alternatively, where the failings are marginal, systemic but non-critical, or administrative in nature: e.g. there is a lack of recorded advice, no terms of engagement letters, there are supervision issues, there are deficiencies in the way that A & A applications are recorded or there are incomplete forms) but do not pose a major risk to the public a “deferred extended” review will be organized within 6-9 months. This gives the solicitor an opportunity to rectify the problems identified in the routine review ”. During such a review the focus will be on files on which work has been done since the routine review. Whenever the extended review is done the solicitor will have the opportunity to lodge comments. Extended reviews are done at the expense of the CQAC and are conducted by a different reviewer(s) than those involved in the original routine review. Given the stress and tension which may be associated with extended reviews, two reviewers will be sent to on-site reviews. During such extended reviews the solicitors would have the opportunity to respond to any concerns raised in the routine review. Reviewers who feel able to, may discuss with the solicitor the issues of concern in the assessed files, and the review process in general, although in depth discussions will be avoided
4. Should the CQAC decide on the basis of the summary report forms that the solicitor also fails this extended inspection then, unless the failure is so dramatic as to require immediate intervention, the solicitor will move on to a final review. A final review will normally be carried out not less than six and not more than twelve months from the date of the solicitor being notified that a final review is to take place, at a date set by the CQAC. In the period before the final review, CQAC offers support and guidance from mentors to the solicitor and also, if necessary, to the firm to help them address the issues and problems arising from the routine and extended reviews. The Law Society keeps a list of volunteer, unpaid lawyers who have scored well in peer reviews and who are willing to act as mentors to lawyers who are going to final review.
5. The final review will be carried out at the premises of the solicitor and at the solicitor’s expense. Two or more reviewers, who have not already been involved in any other review for the solicitor in question, will carry out the review and while they can review any criminal legal assistance file, they will concentrate on files that have been worked on since the extended review, looking for signs of progress and steps taken to remedy deficiencies previously identified. The final review must be passed if the solicitor’s compliance certificate is to be retained.
6. CQAC will monitor the solicitor between the extended review and the final review and at any stage between the two reviews the CQAC may instruct a special review on site. Factors which might trigger a special review include : missing important procedural steps, never reporting without a reminder or frequent delays in informing clients of developments. The cost of a special review is met by CQAC.
7. The pass / fail decision in all cases will be taken by the CQAC on the basis of the reports received from the relevant reviewer(s). This because (a) CQAC sees the reports in all cases and is therefore in a better position to detect if reviewers are marking to inconsistent standards (b) should a solicitor who has been failed wish to challenge this in the courts, it is far better that CQAC should be the defender rather than the individual peer reviewer and (c) occasionally the review may contain errors or defamatory statements. In such situations the role of the CQAC is to detect the offending passage and to correct it.
8. There is also the option by the CQAC to instruct an Additional Routine Review as an alternative, where deemed appropriate, to an Extended Review. This will take the form of a routine review, where further files are forwarded to a reviewer for marking and will be not be conducted by the initial reviewer. This is likely to take place when the CQAC feel that the failing of the first routine review did not merit either a Deferred Extended or Full Extended Review. However, to date the QAC Committee has not used this option.
9. Where the reviewer detects examples of less than adequate competence within review files, these are likely to lead to a fail score on individual criteria or possibly in the overall mark for the case. However, the inadequate professional service need not be explicitly mentioned in the summary report form to the CQAC – not least because this would risk confusing the quality assurance role of peer review with professional discipline. Where the reviewer detects negligence the file must be failed and the negligence brought to the attention of the CQAC who will inform the solicitor, through the Compliance Partner. On the other hand, if the file reveals prima facie evidence of conduct covered by s.31 1986 Legal Aid Act (which includes professional misconduct - behaviour which the reviewer considers a competent and reputable solicitor would regard as “serious and reprehensible”) the reviewer shall report that matter to the CQAC who will inform the Law Society. If the reviewer detects fraud or an abuse of the legal aid fund this must be reported to the CQAC.
10. Where the reviewer detects a Money Laundering or Proceeds of Crime Act issue on a file, this must be reported by the reviewer to the CQAC Co-ordinator, and nothing said to any solicitor who has handled the file.

16. A series of incidental points have arisen :

*Question 1:* *What guidance can be given to reviewers as to when a case reveals too many “C” scores?*

It is suggested that reviewers should comment adversely at the end of each case marks sheet and, if necessary, on the Summary Report Form, at the number of “C” scores where: (a) the criterion is a “showstopper”- a single failure but one of such magnitude that the whole file should fail (b) it is not possible to tell what is happening in the case for significant periods of time because nothing is recorded on the file (c) the C scores are sufficient in number and area to indicate systematic problems in file management or (d) normally where there are 3 or more C scores in a case.[[2]](#footnote-2) As a rule of thumb if there are 3 or more “C” scores and the reviewer does not recommend that the file should fail, the reviewer should explain in some detail why he/she has exercised his/her professional judgment in that way.

*Question 2:* *What guidance can be given to reviewers as to when a case should fail overall?*

It is suggested that reviewers should give an overall fail mark to a case in respect of fails against individual criteria where: (a) the criterion is a “showstopper” (b) the “1” scores are sufficient in number and area to indicate systematic problems in case handling or (d) normally where there are 3 or more “1” scores in a case.

*Question 3:* *What is the required pass rate for every 8 cases reviewed for the solicitor?*

It would be unfair to require a solicitor to pass every case in order to gain an Overall pass, but overly generous to accept a pass rate of 50% of cases. Indeed, it is suggested that it would be unusual to pass a solicitor in overall terms where a bare majority of cases have been passed ( i.e. 5 out of 8 ) but equally it would be unusual ( but not impossible ) for a solicitor to fail where six out of eight cases have been passed. The normal threshold for passing the review should be six passed files out of the eight files reviewed. However, reviewers may also take into account the weight and complexity of the files reviewed, and the seriousness of any individual failures.

It should be noted that the reviewer can always over-ride these rules of thumb, on cause shown.

*Question 4: What level should the pass mark of acceptability be set at?*

The standard applied in civil cases is that of the reasonably competent solicitor of ordinary skills. The same standard will be applied in criminal cases. When considering the advice given or actions taken in the course of a case, there will be circumstances in which differing interpretations might legitimately be taken by solicitors applying their professional judgement: the reviewer should not attempt to second guess the acting solicitor. Professional judgement should only be called into question where, in the reviewer’s opinion, no reasonable solicitor would have conducted the case in the way demonstrated by the contents of the file.

In considering whether advice is *appropriate*, the reviewer should have regard to the circumstances of the case and the level of information available to the solicitor and take into account ethical, practical, tactical and legal considerations.

In considering whether advice is *accurate*, the reviewer should consider whether it is *factually* and *legally* acceptable, bearing in mind the test in negligence cases in the jurisdiction.

*Question 5:*  *Do all cases have equal weight?*

It is accepted that not all files should be counted as equal and that if a fail is in a short “diagnostic” file this will count for less than if it is in a large, complex, contested trial or appeal. Similarly, passes in such long and complex cases should be given greater weight than fails in much shorter cases. Nevertheless, if a solicitor systematically fails one type of case as against another, then this should be brought to the CQAC’s attention, since the expectation is that solicitors should be able to do both types of case.

*Question 6: Can reviewers record where other problems have arisen.*

It acceptable, and sometimes positively helpful for reviewers to record on the file report form where others in the system e.g. the prosecutor has failed to comply with what is required of them.

1. Taken from Paterson and Sherr [↑](#footnote-ref-1)
2. This number will depend in part on the completeness or otherwise of the file record keeping of lawyers in a particular jurisdiction. [↑](#footnote-ref-2)