Civil Legal Assistance
Quality Assurance Scheme

PEER REVIEW MANUAL

(to follow the links below, please hold the CTRL key and click on the link)

Can also be accessed online via the Society's website www.lawscot.org.uk, following the links to Members Information, Legal Aid, Civil Quality Assurance.

Quality Assurance – Guidance on the Peer Review Process

Introduction

This guidance provides a lot of detail about providing civil legal assistance, the Quality Assurance Scheme and the peer review process. However, you can use it to access just the parts you want to read, by using the navigation links, some of which take you to another part of the guidance, and some of which take you to relevant information in PDF documents or on other sites

Background to the Quality Assurance Scheme

1.1. The reform of civil legal aid in 2003 included the creation of a quality assurance scheme involving the peer review of practitioners' civil legal aid files. With effect from 1st October 2003, it became necessary for firms wishing to provide civil legal assistance (i.e. civil advice and assistance or civil legal aid) to be registered with the Scottish Legal Aid Board. Initially, all firms providing civil legal assistance as at 1st October 2003, and applying to do so, were registered with the Board. Click here to see the current Civil Legal Assistance Register.

1.2. All registered firms are subject to the peer review process operated by the Law Society. The details of the scheme are set out in a Memorandum of Understanding between the Society and the Board.

1.3. The statutory basis for the quality assurance scheme is set out in Section C(3) of The Law Society of Scotland Practice Rules 2011.

How to Apply for a Compliance Certificate

1.4. New firms, or firms wishing to commence providing civil legal assistance, are required both to register with the Board and to obtain a compliance certificate from the Society. In order to register with the Board, the firm and the relevant practitioners must be registered on the Board's payment system and must provide the Board with evidence of compliance with the ten administrative requirements. The firm must then apply to the Society for a compliance certificate. Click here for information about registration with the Board and how to apply for a compliance certificate.

1.5. Until this process is complete, a firm is not entitled to provide any form of civil legal assistance. Applications for civil legal assistance will not be accepted by the Board, and no payments will be made for any work carried out prior to registration. Application for registration and a compliance certificate must therefore be made timeously, and in advance of commencing any civil legal assistance work.

The Practical Operation of the Quality Assurance Scheme

1.6. The issue of compliance certificates is dealt with by the Quality Assurance Committee (QAC) of the Law Society of Scotland, with the assistance of

the Quality Assurance Administrator, currently Hannah Sayers. The QAC comprises three solicitors appointed by the President of the Law Society, including the Convener, who is a member of Council; three lay members; and three employees of or members of the Scottish Legal Aid Board, of whom at least two must be solicitors. There is therefore a majority of solicitors on the QAC.

1.7. The Society has published a flowchart which illustrates the overall process in a simplified way. The full details of the process are contained in the Memorandum of Understanding and the Section C(3) of The Law Society of Scotland Practice Rules 2011.

1.8. In summary, the Scottish Legal Aid Board selects at random a percentage of the practitioners' files from (a) designated and (b) non-designated categories. The designated categories for advice and assistance and ABWOR are asylum (ASY), immigration (IMN), mental health (MEND), adults with incapacity (AISA),employment (EMP) and employment tribunal (ET). The designated categories for civil legal aid are asylum (ASY), immigration (IMN), judicial review (JR), and adults with incapacity (AISA). All other work types are non-designated categories. The current percentages, subject to review from time to time, are 10% of designated category files and 3% of non-designated category files.

1.9. For the purposes of peer review, all papers and information associated with a file must be produced, including any separate folders containing papers such as pleadings. If it is not the firm's practice to retain copies of standard letters on every file, e.g. terms of engagement letters, a copy should be sent for perusal by the reviewer. In the first instance the review involves sending the files by courier to the allocated peer reviewer. The files are returned by courier about a week later. The review can be carried out at the firm's premises if preferred, with the firm meeting the additional costs.

1.10. Files provided on disc will be required to be printed out by the firm so that a full paper file is available for review.

1.11. Note that it is the nominated solicitor who is reviewed, regardless of who has actually undertaken the work on the files.

1.12. Some files may be marked by two peer reviewers (double-marked). This is to check the consistency of the peer reviewers' marking, and not because there is any query about the work on the files.

1.13. The peer reviewer marks the files according to the peer review criteria (see below), and reports to the QAC. The peer reviewer makes a recommendation as to whether or not the firm should pass or fail the review. The decision is taken by the QAC.

The Peer Reviewers

1.14. All peer reviewers are solicitors who practice with civil legal assistance. They are asked to peer review in areas of practice where they have suitable experience.

1.15. The peer reviewers are recruited from time to time by the Society, and receive training. They meet regularly to discuss issues arising from peer review, and to receive feedback on the statistical outcomes of peer reviews. This helps to ensure consistency of marking (see below) which is important for the fairness of the process to all firms.

1.16. Consistency is also checked by double marking of a proportion of all files.

1.17. Reviewers are generally allocated to firms which are geographically remote from them. In the event of a potential conflict of interest, or if it is inappropriate for any reason for a particular reviewer to review a particular firm, then either the reviewer or the firm may request that the files be allocated to a different reviewer.

1.18. In the peer review process, the reviewers are using their training, skills, experience and judgement to assess each file they see. They are reaching an overall mark which represents a fair assessment of the quality of the work on the file. In order to do so, they use the published criteria.

1.19. The reviewer makes an overall assessment of the group of files per practitioner (nominated solicitor), and reports to the QAC with a summary of the outcome of the assessment.

The Peer Review Criteria

1.20. Peer reviewers are required to assess the quality of civil legal assistance work carried out on behalf of the client. Rule 4 of the Practice Rules requires all practitioners to comply with the guidelines published by the Society in providing civil legal assistance.

1.21. The criteria are published by the Society on its website. There is nothing secret about the criteria, and no other method of marking files is used. Of course, in selecting the appropriate mark for each criterion, the peer reviewer is using his or her own skill and professional judgment, as well as training, to assess whether the evidence on the file shows that the work done fulfils the criterion.

1.22. The purpose of this guidance is to demystify the peer review process, to provide information about the issues which peer reviewers frequently note arising during reviews, and to advise on practical steps which solicitors and firm can take to ensure that their files pass the peer review process.

1.23. The peer review criteria can be seen here, and guidance on specific criteria is given below.

General issues arising from peer review experience

A full cycle of peer review was completed between 2004 and 2007, the second cycle was completed in 2010 and the third cycle commenced in 2011. The third cycle will be carried out over a six year period compared to the first two cycles which were each carried out over a three year period. In the course of reviewing, reviewers have noted a number of areas where problems consistently arise, and some general advice is given here. More specific guidance on each criterion is given later.

"Is there evidence on the file?"

1.23.1. This is a phrase used in several of the criteria (see criteria 3, 8 and 12). The reviewer will read the entire file. She is looking for something on the file which points to whether the criterion has been fulfilled or not. This might come in a file note, a copy letter, an advice & assistance application or increase, a legal aid application, a statement or precognition, pleadings, or an account rendered to the Board. It is a positive quest to find evidence on the file – which does not have to be in any particular form. But the better organised and documented the file is, the more likely it is that the evidence will be on the file, the easier it will be to find, and the more likely that the criterion will be passed.

1.23.2. The review is of all files held by the firm pertaining to the same subject matter, whether under Advice & Assistance or Legal Aid. Solicitors should therefore ensure that all the relevant files and papers, including separate folders for pleadings etc, are sent to the reviewer. If there are separate files for Advice & Assistance and Legal Aid, both must be submitted.

1.23.3. If a file note is legibly written, it is more likely to provide the necessary evidence to convince the reviewer that the criteria have been met. If a copy of the terms of engagement letter is on the file, it is more likely both that this will evidence its existence (criterion 3(a)), and that it will evidence advice given on clawback and legal aid generally (criterion 2(c)). A note (not necessarily typewritten) showing arguments to be made at a Proof or other calling will evidence preparation for that hearing (criterion 8).

1.23.4. By contrast, if file notes are very brief, illegible or missing, it is more likely that the reviewer will conclude that there is insufficient evidence on the file to establish that a criterion has been met – even though in fact the criterion may have been fulfilled. If the reviewer can't find the evidence, then she can't give a pass mark on the criterion.

Advice, Instructions, Action

1.23.5. The reviewer is looking for particular information in relation to several criteria (see criteria 2, 6, 9, 11, 12 and 13, for example). At each stage there needs to be evidence of what advice has been given to the client, what instructions taken, and what action agreed with the client.

1.23.6. The solicitor should ensure that the client is properly identified at the outset, not only in order to comply with the Money Laundering Regulations, but also so that there is no doubt that instructions are being taken from, and advice given directly to, the client. Care should be taken that the correct client is admitted to civil legal assistance – especially where the client is vulnerable, young or elderly, and/or assisted by a friend or relative.

1.23.7. Several criteria ask whether the solicitor gave "accurate and appropriate" advice, or carried out "appropriate" actions. In considering whether advice is accurate, the reviewer considers whether it is factually and legally acceptable, bearing in mind the test in *Hunter v Hanley*. In considering whether advice or action is appropriate, the reviewer has regard to the circumstances of the case and the level of information available to the solicitor and takes into account ethical, practical, tactical and legal considerations. In other words the reviewer puts herself in the position of the solicitor at the time, with the information available to the solicitor, and takes account of the possibility that there may well be difference of professional opinion as to what is appropriate.

1.23.8. Reviewers sometimes find that initial file notes contain insufficient details of the important initial meeting. This may be because the solicitor is dealing with very familiar areas of work, and routinely gives particular advice in particular situations. But in order that the reviewer can be sure that correct advice has been given, it needs to be noted on the file.

1.23.9. Similarly, there needs to be a note of the instructions taken from the client, and the actions agreed with the client.

1.23.10. Another point at which advice given and instructions taken should be carefully documented is where there is an offer of settlement.

1.23.11. Such notes do not require to be very detailed and extensive. Neither is it a requirement that they are typewritten. But they do need to be legible and to contain sufficient information.

1.23.12. Firms should have a regular file checking procedure, which forms part of good risk management. The procedure should include a check that adequate notes are kept of the advice, instructions and agreed actions in each matter. This is no more than good risk management, and applies more widely than in relation to peer review.

Progressing the work

1.23.13. Reviewers are looking for evidence that there has been no unnecessary delay on the part of the solicitor in dealing with the work. This is needed for criteria 4 and 10. Solicitors should ensure that the file contains evidence of the reason for any delay, for example a note of an instruction from a client to put matters on hold for a time.

1.23.14. Evidence of a regular file checking procedure will be helpful. Sometimes it is obvious to the reviewer that the file has been overlooked until called for peer review, when suddenly action is taken! Solicitors should implement a file checking procedure for all their files, and document this on each file.

Recovery and Preservation of Property – "Clawback"

1.23.15. The criteria which are most commonly failed during reviews are those dealing with clawback (criteria 2(c), 9(a), 12, 13 and 14). Particularly at the initial stage, many solicitors do not put evidence on their files that advice and information has been given about the rules concerning property recovered and preserved. They may have given such advice during a meeting, but unless it is documented on the file in the form of a file note or letter, this criterion will be failed.

1.23.16. The guidance given to peer reviewers states that the provision to clients of the leaflets provided by the Scottish Legal Aid Board is not sufficient to satisfy this criterion. The clawback provisions, where relevant, must be drawn specifically to the attention of the client in the particular context of the matter in hand.

1.23.17. Failure to advise on clawback is the most common cause of complaint by clients to the Board, and is easily preventable by giving good advice in writing at the outset, and reinforcing this when there is an offer of settlement. This not only avoids complaints but assists with passing peer review.

1.23.18. Initial advice on clawback is best given in a good terms of engagement letter. This can be a letter in fairly standard terms.

The benefit of doing this is that it also fulfils criterion 3(a) at the same time.

1.23.19. Solicitors must remember that, even where advice has been given at the outset (criterion 2(c)), clients need to be reminded and advised in more detail about this at the time of potential settlement (criterion 12) and before a decision is made by the client to settle.

1.23.20. There is further guidance on clawback in Fees and Accounts.

Moving from Civil Legal Assistance to Private Feeing

1.23.21. It is never acceptable for a client to be invited to pay privately for any part of work which is otherwise covered by legal aid / advice & assistance. So, for example, if an expert report is required, the client must not be asked to pay privately for it if work is continuing under civil legal assistance. The client must not be asked to pay up-front for outlays where civil legal assistance is in place. The Board's reimbursement of outlays procedure must be used.

1.23.22. There is further useful guidance in Fees and Accounts.

1.23.23. An area which seems to cause particular difficulty for some solicitors is where the client, although eligible for civil legal assistance, is asked to consider proceeding on a private fee-paying basis. There are two situations in which this tends to occur:

- Sometimes the client, on applying for legal aid, is offered legal aid but with a high level of contribution. The client may be invited to continue on a private fee-paying basis in order to avoid having to pay the contribution. Solicitors need to be careful here. Firstly, the client should be advised that the solicitor can apply to the Board to have the amount of the contribution reduced to the likely cost of the work. Secondly, the client should be advised of the protections offered by the holding of a legal aid certificate, in terms of awards of expenses against the unsuccessful client and of waiver of court dues. Thirdly, the client should be advised of the rate the solicitor proposes to charge privately, especially where this is higher than the legal aid rates of charge. Solicitors must ensure that the file shows clearly that the client has been advised on these points before proceeding on a private fee-paying basis.

- Sometimes it becomes clear that the client will receive significant funds as a result of the work being carried out, there will be a recovery of property, and the solicitor will be paid from the recovery. For example, work may be undertaken in an

executry where unexpected funds come to light; or a separation and divorce is to be carried through where there is a substantial asset to be realised. If the client has been admitted to Advice & Assistance, then no privately charged work may be carried out until authorised expenditure is exhausted. At that point it is open to the solicitor to offer to continue on a private paying basis only. However, the file must show clearly that the client has been offered the option of seeking civil legal assistance from another solicitor, and fully advised as to the points mentioned above with regard to expenses and rates of charge.

Fees and Accounts

1.23.24. There is no obligation on firms to keep a copy of their civil legal assistance accounts on their files. However, the experience of the reviewers has been that the presence of a copy of the account on the file can be of considerable assistance in evidencing that certain criteria have been fulfilled.

1.23.25. It is important that the solicitor demonstrates knowledge of the rules relating concerning charging of fees when a recovery of money or property is made. It must be evident from the file how the work has been charged for, and who has paid those charges whether that be (i) the Scottish Legal Aid Board, (ii) the client out of the property or money recovered or preserved, or (iii) a third party such as an insurance company or opponent.

1.23.26. The clawback rules were significantly altered with effect from 1 April 2011. A summary of the new clawback rules can be found in the civil legal assistance update issued by SLAB on 18 March 2011. The implications of Regulation 16(3) can also be found in the Keycard published each year by the Board. These new provisions on clawback only apply to advice and assistance provided by or legal aid granted after the coming into force of the regulations on 1 April 2011. The new regulations remove the exemption from clawback of property recovered or preserved by virtue of (1) an order for the payment of a capital sum under Section 5 of the Divorce (Scotland) Act 1976; or an order for payment of a capital sum or transfer of property or an incidental order under Section 8 of the Family Law (Scotland) Act 1985 or any settlement arrived at to prevent or bring to an end proceedings in which such an order may be granted; (2) any payment of money in accordance with an order made by an employment tribunal or an employment appeal tribunal or under any settlement arrived at to prevent or bring to prevent or bring to an end proceedings in which such an order may be made; and (3) any dwelling recovered or preserved as a result of advice and assistance. Applications can still be made to the Board to

exempt the property recovered or preserved from the clawback rules if the particular circumstances are that payment of the account out of the property would cause grave hardships or distress. Examples are often seen by reviewers of solicitors not properly applying the legal aid rules when dealing with recovered money or property. Some examples are:

- Charging a client for work done prior to 1 April 2011 either on a private rate basis or on legal aid rates relative to employment tribunal proceedings. If an employment tribunal case concluded prior to 1 April 2011, the client is entitled to the full tribunal award and the solicitor should submit their account to the Scottish Legal Aid Board for payment. If the employment tribunal case concludes after 1 April 2011, the work done prior to that date is still exempt. The work carried out on and after 1 April 2011 would require to be charged at legal aid rates and the value inclusive of VAT deducted from the client's compensation award with the client being paid the balance (this may still mean that the solicitor has to submit an account to the Scottish Legal Aid Board for the work carried out prior to 1 April 2011). It is prohibited to charge the client at private fee paying rates where advice and assistance cover is in place for the work in question.

- Recovery made for a client as a result of an employment tribunal is exempt from clawback regulations. Solicitors have been seen to charge private fees, or fees calculated in accordance with advice & assistance rates out of the tribunal award and simply pay the client the balance. The client is entitled to receive the full amount of the tribunal award, and the solicitor is not entitled to any payment except that due in his advice and assistance / ABWOR account.

- In criminal injury compensation claims, the CICA will not generally pay anything towards legal expenses (though sometimes outlays may be paid). Therefore if the application is successful the client will be obliged to meet the solicitor's fees, VAT and possibly any outlays from the recovery made, subject to a hardship application being granted. The level of fees and outlays charged by the solicitors (excluding VAT) must not exceed the limit of authorised expenditure granted by the Legal Aid Board for that particular file. This will often mean that a solicitor's account in a CICA case must not exceed the £95 initial limit. Reviewers often find that solicitors try to agree a fee with a client during the case, and simply deduct that from the compensation award that is ultimately made. If the client has been granted advice & assistance in connection with the case such fee charging arrangements are prohibited.

Also, as in any case, if the client has been granted civil legal assistance in connection with a case it is prohibited for solicitors to charge contingency fees based on a percentage of the recovered compensation.

- In mortgage rights cases, the Board takes the view that the house has been put at issue in the proceedings because the creditor craves the court to grant warrant for possession of the house. If the client is successful in resisting the repossession, then the house is "property preserved" in terms of the regulations, the client retaining the title which the lender sought to have taken away. The value to be taken into account as property preserved is the net value of the house.

- In reparation cases, where the claim is successful, usually there will be some recovery of expenses from the opponents. If the recovered expenses are insufficient to cover the full legal bill the solicitor must either:

    - modify his charges to accept what has been recovered
    - or submit a hardship application if applicable
    - or charge the Legal Aid Fund the shortfall by preparing and submitting full advice & assistance and/or civil legal aid accounts. This would result in the client's compensation being reduced to cover the shortfall.

  If the recovered expenses from the opponent exceed the limit of authorised expenditure the client cannot be charged any shortfall from his or her compensation.

  Also, as in any case, if the client has been granted civil legal assistance in connection with a case it is prohibited for solicitors to charge contingency fees based on a percentage of the recovered compensation.

- A successful defence to an action for payment does not represent a recovery or preservation of property.

1.23.27. Where recovery or preservation of property has occurred, the solicitor is entitled to charge the client at legal aid / legal advice and assistance rates only, and up to the maximum of authorised expenditure. If the solicitor has done work, or incurred outlays, not covered by authorised expenditure or sanction, then the client cannot be charged for this, and the solicitor will be out of pocket. Serious failures to deal with charging issues correctly may result in a practitioner failing a review and may prompt a special review of the firm. The QAC may require a firm to reimburse improperly charged fees.

1.23.28. Where there has been a recovery or preservation of property, it is incumbent upon the practitioner to consider whether a hardship application in terms of Regulation 16(3) of the Advice & Assistance Regulations would have a reasonable prospect of success. If the reviewer considers that this is the case, she will expect to see evidence on the file that this has been done, or at least discussed with the client.

1.23.29. Reviewers find many files where no account has been rendered and the timebar means that none can be rendered. Whilst this will not result in the file failing at peer review, it can indicate a failure to review files regularly, which may impact on the mark for other criteria. Obviously, it also means that the solicitor is not being properly remunerated for work carried out. Time limits for submitting civil legal aid accounts has been shortened from 6 months to 4 months with effect from 1 April 2011 as per Regulation 8(1) of the Civil Legal Aid (Scotland) (Fees) Regulations 1989. This effects all accounts where the date of completion of the proceedings is on or after 1 April 2011 and will also apply to work done by Counsel.

File Maintenance and Organisation

1.23.30. It is not for the QAC to tell solicitors how to maintain their files. Most of the files seen are well maintained, with good quality record-keeping, legible file notes and well-organised, chronological organisation.

1.23.31. However, some files are not so easy to follow. It is not a requirement of peer review that file notes be typewritten. But if a peer reviewer cannot read a file note, then the evidence it contains is not available to the reviewer 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 typewritten file note.

1.23.32. 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. It may be necessary to add a note of the advice given to the client, the instructions taken, and the actions agreed. These can be recorded quite briefly, depending on the complexity of the matter in hand.

1.23.33. Notes of meetings with clients should roughly correspond, in length and detail, to the time recorded as having been spent with the client. A meeting lasting three-quarters of an hour should result in a file note comprising more than the client's personal details and a few lines of scribbled notes.

1.23.34. In relation to files where it was permitted to submit paper form legal aid applications it is a requirement of the Board that copies of those applications are held on file. However, since April 2011 all applications require to be made on line. For online applications, the Board does not generally require practitioners to print and retain in paper form on file any legal aid or advice and assistance application (including applications for increases in authorised expenditure) made online. This includes the "printable summary" which is available from the website. This need not be printed and placed on file, as it may be recovered and printed off at any time from the Board's website.

However, in order to peer review a file, it is necessary for there to be on the file a full record of applications made. Prior to peer review therefore, it will be necessary for the practitioner to check files selected for review and then print off and place with the file all the printable summaries for that matter – for advice and assistance applications, applications for each increase in authorised expenditure and legal aid applications made online.

Note that it is not sufficient for there to be on the file a part-completed or unsigned application form which may have formed the basis of an online application. There must be either a fully completed and signed application form, or a print of the printable online summary showing the data submitted to the Board. In addition, for advice and assistance, all practitioners are required to retain on file either:-

- a fully completed and signed mandate authorising an online application to be made; or
- a full copy of the signed application form(s) as submitted to the Board

For civil legal aid, a signed and dated online mandate must be retained on file, if practitioners wish to do any aspect of a case online. The special urgency financial section of the mandate is optional, so does not require to be completed in all cases.

If applications (whether online or on paper) have been accompanied by supporting documentation which has been produced and/or scanned but not printed or copied for the file, such supporting documents will also require to be printed off and placed with the file at the time of peer review.

1.23.35. Some solicitors do not make notes of telephone calls with clients. This can result in gaps in the information on the file, which may mean some criteria are failed.

1.23.36. The small minority of files which are not ordered chronologically, or comprise a mixed bundle of papers in no particular order, will be returned to the firm to be put in order before being peer reviewed. Files should not be provided in disc format and should be fully printed by the firm prior to being submitted for review.

How the Peer Reviewer Assesses the File

1.24. The purpose of the review is to examine the quality of the work carried out on behalf of the client and the Board, based on the evidence contained within the file. The file is assessed against the peer review criteria. Not all criteria are relevant to every file, but all relevant criteria are marked.

1.25. The quality assurance requirements came into force in October 2003, and work carried out prior to that date is assessed, but cannot contribute to a fail mark in relation to any criterion.

1.26. The standard applied is that of the reasonable competence to be expected of a solicitor of ordinary skills i.e. the familiar *Hunter v Hanley* test. 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. Where the reviewer would take a different view from that shown on the file, she will not "second-guess" the acting solicitor. The professional judgement of the solicitor being reviewed 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.

1.27. The reviewer assesses the file against each of the criteria, marking each one as 1 = below requirements; 2 = meets requirements; or 3 = exceeds requirements. The mark "C" is given where it is not possible to assess the criterion because of lack of information on the file. Where a criterion is not applicable to the file, it is marked N/A. The file is then given an overall score 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.

1.28. The marks are not "totted up" in a rigid way – the reviewer is using skill, training and judgement to assess whether or not the file fails. If a file attracts three scores of 1 or C, it is likely to fail overall. However, in exceptional cases, where the file demonstrates a serious failing, for example a missed triennium, or incorrect charging of the client, the file may fail on a single criterion.

1.29. The overall marks for the files reviewed are then used to give the practitioner an overall score, again between 1 (very poor) and 5 (excellent). A score of 3 or more is a pass. In general, a single failed file in a group of five is unlikely to result in an overall fail mark, unless it is a particularly bad fail and the other files are borderline. Equally, where a higher percentage

of files are failed the overall mark is likely to be a fail unless the fails are marginal and the passes are strong ones.

Guidance on Specific Criteria

1.30. Each of the criteria is listed here, and you can click on each one to see guidance which is specific to that criterion.

1.31. The criteria follow a broad chronology to ensure proper consideration is given to key aspects of the case. Criteria 9 to 13 are applied to the file as a whole.

1.32. Several criteria ask whether the solicitor gave "accurate and appropriate" advice, or carried out "appropriate" actions. In considering whether advice is accurate, the reviewer considers whether it is factually and legally acceptable, bearing in mind the test in *Hunter v Hanley*. In considering whether advice or action is appropriate, the reviewer has regard to the circumstances of the case and the level of information available to the solicitor and takes into account ethical, practical, tactical and legal considerations. In other words the reviewer puts herself in the position of the solicitor at the time, with the information available to the solicitor, and takes account of the possibility that there may well be difference of professional opinion as to what is appropriate.

1.33. Initial Work:

This includes the initial interview and subsequent work carried out at an early stage including establishing the nature of the work required, obtaining necessary information, giving initial advice both on the case and on legal aid, taking any urgent steps required, and recording the agreement as to what is to be done for the client.

The QAC has issued a suggested format for the information which is required to be included in a terms of engagement letter in relation to civil legal assistance. It is, however, for each firm to satisfy itself that the content of its terms of engagement letter complies with the Society's practice rule.

1. How effective were the solicitor's initial fact and information gathering skills, including the identification of any additional information required and the taking of steps necessary to obtain it?

2. Was the client given accurate and appropriate advice regarding
   a) the potential case, including whether it is stateable
   b) the client's eligibility for advice and assistance, especially if the client is not admitted

c) legal aid more generally, including the application of regulation 18 and advice and assistance, including possible clawback and the impact of legal aid on expenses

3. Is there evidence on file or in a letter to the client of

a) a terms of engagement letter, where applicable
b) a note of agreed actions
c) a request to the client for further information to be obtained from the client, where required
d) an assessment as to whether any urgent steps were required/appropriate

1.34. Continuing Work

4 Did the solicitor take appropriate steps to carry out further investigation to progress matters for the client within a reasonable timescale?

5. Did the solicitor communicate appropriately with others, and where appropriate, pursue settlement or agreement on relevant issues?

6. Did the solicitor give appropriate advice to the client, where relevant, on alternative options, such as litigation and mediation?

7. Has the solicitor
a) identified the need for appropriate experts, other reports or counsel
b) applied for sanction / increase(s) in authorised expenditure in accordance with the guidelines, and if granted, instructed / obtained the appropriate experts / Counsel / reports?

8. Is there evidence of adequate preparation for each diet, debate or proof, to include (as appropriate) the list of witnesses, productions and list of authorities as appropriate to the facts of the case?

1.35. Throughout the Case

9. After the initial meeting(s), did the solicitor
(a) make use of, and provide accurate and appropriate advice to the client on, legal aid and advice and assistance, in accordance with the relevant guidelines?
(b) give accurate and appropriate legal advice to the client?

10. Did the solicitor take steps identified/agreed with the client, within a reasonable timescale given the circumstances of the case?

11. Did the solicitor keep the client informed of progress / advised as to next steps / further procedure and provide accurate and appropriate advice, including following the receipt of substantive correspondence (including offers / proposals from the opponent?

12. Where an offer/proposal is made, is there evidence of accurate and appropriate advice having been given to the client on the terms of the offer/proposal, its reasonableness and the consequences for the client of acceptance/rejection, including the potential impact of expenses/clawback?

1.36. Conclusion of the Case

13. a) Has the solicitor taken appropriate steps to close the file and communicate that to the client?
b) Where judgement is issued, has the solicitor advised the client as to the judgement, including advice on expenses, property recovered and preserved, diligence on decree, prospects of appeal?

14. Has the account been submitted to SLAB in accordance with guidelines and necessary and appropriate steps been taken in relation to recovery of expenses / handling of property recovered and preserved?

The Process After Peer Review

1.37. When the peer reviewer has completed the review of 5 files per solicitor in the firm (known as a "routine review"), she completes a summary form, allocating an overall mark to the solicitor on a 1 to 5 scale. She then sends the individual file reports and the summary report to the QAC, which considers them and is responsible for deciding whether the firm should pass. If the reports are satisfactory the firm is notified, its compliance certificate is updated, and it will not be the subject of a further routine review until the next cycle. Minor issues arising will be drawn to the attention of the firm in writing by the QAC. The firm may be asked to identify the steps it intends to take to rectify any concerns, particularly if they relate to concerns which were identified in an earlier review cycle and still have not been dealt with. Such concerns are brought to the attention of the peer reviewer who is allocated to conduct the next review, so that a check can be made that they have been remedied.

1.38. If the QAC decides that the routine review report is not satisfactory, or if the results require clarification by the examination of a larger number and variety of files, an extended review will be carried out. Extended reviews are carried out by two peer reviewers who did not carry out the routine

review, acting together, at the firm's premises, at the expense of the Law Society. The reviewers use the same criteria, and can review any of the firm's civil legal assistance files.

1.39. In some cases it may be that the routine review identifies some concerns but that the firm could readily address these. The QAC may inform the firm of these concerns, and, instead of instructing an immediate extended review, may allow the firm some time to improve its level of compliance with the peer review criteria. A deferred extended review may then be carried out on-site after a period of several months. The QAC will expect to see some improvement in work carried out since the routine review.

1.40. If the outcome of an extended review is satisfactory the firm is notified, its compliance certificate is updated, and it will not be the subject of a further routine review until the next cycle. Minor issues arising will be drawn to the attention of the firm in writing by the QAC.

1.41. Where the QAC considers that the outcome of an extended review is unsatisfactory, the firm is informed in writing and may make written representations to the QAC for further consideration. If the QAC, having taken account of any written representations, decides that the firm has failed to meet the criteria, the firm's compliance record will be noted and the firm must then be subject to a final review in not less than six and not more than twelve months' time. The firm is required to apply for the final review within this timescale. In the period before the final review, support and guidance will be available to the firm to assist in addressing the issues and problems arising from the routine and extended reviews.

1.42. A final review is carried out by two peer reviewers (neither of whom was involved in the routine review or the extended review of the firm) at the premises of the firm and at its expense. They are likely to concentrate on files previously reviewed, or new files opened, since the extended review, looking for signs of progress and steps taken to remedy deficiencies previously identified.

1.43. The reviewers report to the QAC which decides whether or not the final review has been passed, taking into account any written representations which may be made.

1.44. In the event of failure either after an extended or final review a firm is entitled to appeal to the Court of Session within twenty-one days from the date of such a decision.

Special Reviews

1.45. The QAC may instruct a special review be carried out at any time. Such reviews are undertaken at the Law Society' expense at the firm's premises. Special reviews are usually undertaken where some concern has been

raised about the practice of a firm in relation to civil legal assistance. In such cases, the firm is not advised of the reason for the special review. The review is carried out on-site by two peer reviewers. All civil legal assistance files must be made available to them. The same criteria are used for the review, which will be of a wider selection of files and which may concentrate on files of a particular type or of a particular practitioner. The reviewers report to the QAC on their findings in the usual way and the QAC decides whether or not the review has been passed.

1.46. If a firm fails a special review it will be subject to further extended or final review and may be subject to further special review.

Outcomes of the Peer Review Process

1.47. The first cycle of peer reviews ran from 2003 – 2006. A total of 667 of the 694 firms registered to carry out civil legal assistance work in Scotland were reviewed. 171 firms (26%) were double-marked by two reviewers. Of the firms which had been considered by the QAC by the end of the cycle, 14% had been continued for comment by the firm under review following their routine review, 6% had been sent to extended review and only 2.7% to final review. Since a majority of those referred for a final review chose in the end to withdraw from the register ultimately almost no firms failed their final review. These figures reaffirm that the overall purpose of the Peer Review process is to enhance quality assurance over time and not concentrate the supply of providers

1.48. A total of 1,514 individual practitioners were reviewed, and 7,122 files in all. The vast majority of practitioners passed the review, with a fail rate of only 8.5% at the routine review stage. A higher proportion (14.2%) of practitioners received an above average mark for their files.

1.49. The second cycle of peer reviews ran from 2007-2009. A total of 602 of the 618 firms registered to carry out civil legal assistance work in Scotland in that period were reviewed. 188 firms (31%) were double-marked by the reviewers. Of the firms which had been considered by the QAC by the end of the second cycle, 31% had been continued for comment, 6% had been sent for an extended review and only 2% to final review. The increase in firms continued for comment was caused by QAC's concern to enhance standards of service delivery over time. The additional 17% were firms whose second routine review revealed similar faults to those in their first review.

1.50. In the second cycle1,995 individual practitioners were assessed and 9,197 files in all. As in the first cycle the vast majority of practitioners passed the review, with a nearly identical fail rate of 8.7% at the routine review stage. An even higher proportion (15.9%) of practitioners received a distinction mark for their files.

1.51. The reason for the significant proportion of double-marked files is to ensure consistency of marking and robustness of outcome. . The reviewers do not know which of the files presented to them are being double-marked. In over 85% of double-marked files, the two reviewers were in agreement as to whether the file should pass or not. As a further safeguard no reviewer will review a firm or practitioner at the stage of an extended or a final review who has taken part in the routine review of the practitioner and firm. Peer reviewers have regular meetings to discuss reviewing practice and outcomes. They are remarkably consistent with one another, and this is a reflection of the robust scoring system and the effective training they receive. .

1.52. What has emerged is that the overall quality of the service provided, and of the providers themselves is reassuringly high with less than 10% of files and providers failing even their routine reviews. Moreover, the errors that emerge from the files are usually failures in communication or in the application, or explanation to the client, of the legal aid scheme. Errors in advice on the law, professional negligence or professional misconduct are relatively uncommon.

1.53. The third cycle of reviews will extend over a six year period from 2011.

1.54. Professor Alan Paterson, on whose original research (with Professor Avrom Sherr) the Scottish Peer review model is based, is responsible for the training and monitoring of the reviewers. Further details as to the process and outcomes of the peer review schemes in Scotland and England can be found in Moorhead et al, *Quality and Cost,* The Stationary Office, 2001; Alan Paterson, "Peer Review and Quality Assurance",13 (2007) *Clinical Law Review* 757; and Avrom Sherr and Alan Paterson "Professional Competence, Peer Review and Quality Assurance in England and Wales and in Scotland" 45 (2008) *Alberta Law Review* 151.

1. How effective were the solicitor's initial fact and information gathering skills, including the identification of any additional information required and the taking of steps necessary to obtain it?

What are peer reviewers looking for?

Evidence on the file to show a reasonable level of detail of relevant information was noted at an early stage, though not necessarily at the first interview with the client. This will usually take the form of an initial file note, which may be hand-written or type-written, but must be legible. Some of the information may be recorded in other documents eg, documents produced by the client, or a letter to the client or another person confirming the nature of the matter.

The "initial" phase is not just the first meeting with the client, but includes meetings and action taken at an early stage. It is effectively the phase where the solicitor gathers information from the client, assesses the stateability of the case, advises the client on that, and takes instructions for agreed actions.

For example, in a divorce case, does the file show that necessary family and financial information has either been obtained, or the client or a third party has been asked to provide it? Is there mention of pensions? Have grounds for divorce been noted?

For example, in a reparation case, have the factual details of the incident been noted, details of witnesses noted the client's GP details obtained, if appropriate the client advised to obtain photographs of the location etc?

These are not exhaustive examples, but show the sort of things the peer reviewer is looking for. Essentially, the question is – has the solicitor obtained the information needed to get on with the work, and to give initial advice to the client?

Why does this matter?

The criterion is testing the quality of the solicitor's approach to new work, and that best use is made of the time spent at an initial meeting. In order 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 solicitor should be able to give correct advice on the information obtained.

The next review criterion (criterion 2) asks whether the client has been given accurate and appropriate advice – this can only be done if sufficient information has been gathered by the solicitor at this stage.

How can I check this on my files?

Look at your recording of initial meetings with clients. Are the file notes legible? Do they record all the relevant information you have obtained? Does the file note or the subsequent entries in the file (e.g. letters to client or third party) show that you are seeking out the necessary information?

How can my firm promote compliance with this criterion?

If you practice in a particular area or areas of law you could have standard templates for initial file notes, prompting the solicitor to enquire about and record relevant information. Of course, these are no use if no-one actually completes them!

Further guidance

See section 9.3 for guidance on the meaning of “accurate and appropriate” advice.

See section 7.1 for guidance on the meaning of “evidence on the file”

See section 7.2 for guidance on advice, instructions and action.

See section 7.3 for guidance on progressing the work

See section 7.4 for general guidance on advice on clawback.

See section 7.6 for general guidance on fees and accounts

See section 7.7 for general guidance on file maintenance and organisation

2 Was the client given accurate and appropriate advice regarding

a) the potential case, including whether it is stateable

b) the client's eligibility for advice and assistance, especially if the client is not admitted

c) legal aid more generally, including the application of regulation 18 and advice and assistance, including possible clawback and the impact of legal aid on expenses

What are peer reviewers looking for?

(a) Evidence showing that the client has been given accurate and appropriate advice as to the matter to be dealt with, the legal basis (in general terms) and the prospects of success. Clearly this relies on sufficient information having been obtained from the client under criterion 1.

In considering whether advice is accurate, the reviewer considers whether it is factually and legally acceptable, bearing in mind the test in *Hunter v Hanley*. In considering whether advice or action is appropriate, the reviewer has regard to the circumstances of the case and the level of information available to the solicitor and takes into account ethical, practical, tactical and legal considerations. In other words the reviewer puts herself in the position of the solicitor at the time, with the information available to the solicitor, and takes account of the possibility that there may well be difference of professional opinion as to what is appropriate.

For example, if a client has received a writ in an action for payment, and admits that the debt is due, then the file should show that he has been advised that there is no substantive defence, and advice given on a time to pay application

For example, if the client seeks divorce, there should be a note confirming that grounds for divorce exist.

(b) Evidence that a correct assessment has been made of the client's eligibility for advice and assistance. In older cases, prior to on-line submission, there must be a fully completed and signed application form. For online applications, the file must contain prints of all the printable summaries for that matter – for advice and assistance applications, applications for each increase in authorised expenditure and legal aid applications made online. In addition, there must be a fully completed and signed mandate authorising an online application to be made. It should be noted that since January 2011 any grants of advice and assistance, or applications for civil legal aid, where the applicant is a child, requires full declaration of not only the child's financial circumstances but also that of anyone who has an obligation to ailment that child (normally the parent or guardian with whom the child resides). This requires the solicitor to ingather full financial vouching of the financial position as declared on the advice and assistance or civil legal aid forms.

If applications (whether online or on paper) have been accompanied by supporting documentation, copies must be placed on the file.

(c) Evidence that general advice has been given about legal aid, where legal aid might be applied for. The advice should be relevant to the matter in hand. There is no need to advise on Regulation 18, for example, if there is no question of urgent work. Similarly if there is no possibility of any recovery of property, then there is no need for specific advice on clawback.

In all cases where legal aid is to be applied for, there will be a need for evidence that the client has been advised about how legal aid works, that a contribution will or might be payable, and the impact on expenses.

Where relevant, evidence is required that advice and information has been given about the rules concerning property recovered and preserved. All solicitors will provide the client with the Scottish Legal Aid Board booklet as part of the application process. However, the peer review guidelines state that this alone is not sufficient advice to the client on this point. The clawback provisions, where relevant, must be drawn specifically to the attention of the client in the particular context of the matter in hand.

Most solicitors will give such advice verbally at the initial meeting with a client. However, the peer review process requires there to be evidence documented on the file as to what the client has been advised. This might be in the form of a file note. Initial advice on clawback is best given in a good terms of engagement letter. This can be a letter in fairly standard terms. The benefit of doing this is that it provides the necessary evidence on the file and fulfils criterion 3(a) (evidence that a terms of engagement letter has been sent to the client) at the same time.

There were significant changes made on 1 April 2011 to Regulation 18 (Special Urgency Provisions). Reference is made to SLAB's mail shot dated 18 March 2011. Regulation 18(2) lists the type of work that can be undertaken as a matter of special urgency to protect an applicant's position without prior approval by the Board subject to notification to the Board of the fact that the work has been undertaken within 28 days of its commencement. Up to 1 April 2011 the work types included moving for interim orders for residence or interdict or interim orders under Section 11 of the 1995 Act including initiating or entering proceedings in which such orders may be sought; moving for or opposing a Motion for variation of an order relating to parental responsibilities or parental rights under Section 11 of the 1995 Act; and obtaining reports on residence orders or contact orders within the meaning of Section 11(2)(c) and (d) of the 1995 Act when the court so orders. From 1 April 2011 these emergency work types are no longer included in Regulation 18(2) and to do this work requires prior certification from the Board under SU4 (Regulations 18(1)(b)).

The wording of Regulation 18(1)(b) has also been altered to restrict the occasions when SU4 cover can be sought eg. It is no longer possible to seek SU4 cover where a legal aid application has already been refused or treated as abandoned or

where the Board on receipt of an SU4 application has sought further information from the applicant to justify it and the information has either not been forthcoming or the information supplied does not satisfy the Board that cover under Regulation 18(1)(b) should be granted. This contrasts with the pre 1 April 2011 situation where the only relevant factor was whether the special urgency justified the work being undertaken.

Why does this matter?

It is important that the client receives appropriate advice at the outset as to whether there is a legal basis for his position and the prospects of success.

The client's eligibility for advice and assistance should be properly assessed at the outset. If a client is not admitted to advice and assistance, and is later granted legal aid, the peer reviewer will check that the client was properly advised as to advice and assistance initially.

Failure to be advised on clawback is one of the most common causes of complaint by clients to the Board, and is easily preventable by giving good advice in writing at the outset, and reinforcing this when there is an offer of settlement. This not only avoids complaints but assists with passing peer review.

How can I check this on my files?

The necessary evidence may take the form of file notes, which may be hand-written or type-written, but must be legible. Such notes do not require to be very detailed and extensive. Neither is it a requirement that they are type-written. But they do need to be legible and to contain sufficient information. In particular, notes or letters must record the advice given to the client about the case.

However, in relation to this criterion, much of the necessary evidence will be provided by the presence on the file of a suitable terms of engagement letter.

How can my firm promote compliance with this criterion?

Remember to have a process which records the advice given to the client – it is easy to forget this when recording the information given by the client and other factual details.

Ensure that you use a terms of engagement letter in every case, and that the letter complies with Law Society guidance. In particular, check that it contains all the necessary advice and information about legal aid, including clawback and expenses.

Further guidance

See section 9.3 for guidance on the meaning of "accurate and appropriate" advice.

See guidance on terms of engagement letters

See section 7.1 for guidance on the meaning of “evidence on the file”

See section 7.2 for guidance on advice, instructions and action.

See section 7.4 for general guidance on advice on clawback.

See section 7.7 for general guidance on file maintenance and organisation

3 Is there evidence on file or in a letter to the client of

a) a terms of engagement letter, where applicable
b) a note of agreed actions
c) a request to the client for further information to be obtained from the client, where required
d) an assessment as to whether any urgent steps were required/appropriate

What are peer reviewers looking for?

(a) A copy of the terms of engagement letter sent to the client. The letter must comply with the Law Society's Rules and guidance. Some firms routinely send out a terms of engagement letter, but do not put a copy on the file. If this is the case, then a copy of the standard letter should be provided to the reviewer at review, and confirmation provided that such a letter is routinely used.

(b) A file note showing what the solicitor has agreed to do for the client. Sometimes this may be recorded in the terms of engagement or another letter to the client. In other cases it may be in a file note. Occasionally it can be deduced from the terms of correspondence with others.

(c) Where it is clear from the evidence on the file that further information is necessary, the reviewer will look for evidence that this has been considered and requested timeously

(d) If the circumstances and information on the file suggest that some urgent action is required, there should be evidence that the solicitor has considered this and taken appropriate action. For example, if advice is given on an interdict, there should be a note of whether proceedings are to be raised as a matter of urgency, and advice given on Regulation 18 procedure. The evidence required can be found in the client being asked to sign a Regulation 18 mandate, or proceedings actually being raised. If no urgent action is taken, in a situation where it might seem to be appropriate, it would be wise to record on the file why this has not been done.

There is no need for a record that urgent action has been considered, in circumstances where this would not be necessary. For example, if the client seeks a divorce on the grounds of separation and advises that it is likely to be undefended, then there is no need to record that urgent action is not necessary.

Why does this matter?

It is a requirement of Law Society rules that the client is provided with a terms of engagement letter, except in certain limited circumstances.

The client should be informed as to what work is to be undertaken, so that there is no misunderstanding, and also advised as to any financial contribution required.

The solicitor needs to obtain all necessary information from the client at an early stage, so that work can be progressed efficiently.

If urgent work is required, it is important that this is progressed

How can I check this on my files?

Check that there is a copy of the terms of engagement letter on each file. This is good practice since, in the event of a dispute with the client, you may need to check exactly what was included in the terms of engagement letter.

Check for file notes or correspondence recording what work is to be carried out for the client, and asking for any information which is required from the client.

Check for a note as to whether urgent work has been considered where appropriate, and actioned.

How can my firm promote compliance with this criterion?

Have a firm-wide policy of sending out a terms of engagement letter in every case, and check that the terms of the letter reflect the Law Society guidance. The work to be carried out for the client can be recorded in the terms of engagement letter.

Consider having template file notes for initial meetings with clients, with prompts for the solicitor to include a note of the agreed actions, whether any further information is required from the client, and a check as to whether there is any urgency.

It makes sense to ensure that you send out terms of engagement letters routinely – not to do so means a fail mark is inevitable on this criterion, and this may tip the balance between the whole file passing or failing at review.

Further guidance

See guidance on terms of engagement letters

See section 7.1 for guidance on the meaning of “evidence on the file”

See section 7.2 for guidance on advice, instructions and action.

See section 7.3 for guidance on progressing the work

See section 7.7 for general guidance on file maintenance and organisation

4 Did the solicitor take appropriate steps to carry out further investigation to progress matters for the client within a reasonable timescale?

What are peer reviewers looking for?

The reviewer will seek evidence that active steps have been taken to progress the work. The necessary evidence may take the form of copy correspondence or file notes, which may be hand-written or type-written, but must be legible. It is not a requirement that they are type-written. But they do need to be legible and to contain sufficient information.

There must be evidence that there has been no unnecessary delay on the part of the solicitor in dealing with the work. This will generally be seen from the chronological progress of the file. If there is delay on the part of the client, this should be clear from the file. If the client instructs the solicitor to delay in taking action, this should be recorded on the file.

If there is delay on the part of others, then it should be possible to tell from the correspondence or notes on the file that this has been followed up by the solicitor.

Why does this matter?

It is of benefit to the client that his work is carried out expeditiously. Of course, there are often delays in implementing work, but any delay should not be on the part of the solicitor being reviewed.

How can I check this on my files?

Check that all actions taken are recorded on the file. Not only does this provide evidence of how the work is being progressed, and the reason for any delay, but unless work is recorded on the file it is likely to be left out of the account rendered to the Board, resulting in loss to the firm.

Solicitors should ensure that the file contains evidence of the reason for any delay, for example a note of an instruction from a client to put matters on hold for a time.

Solicitors should ensure that they have a system for reminding them to check that a response has been received to correspondence sent out by them.

How can my firm promote compliance with this criterion?

Evidence of a regular file checking procedure will be helpful. Sometimes it is obvious to the reviewer that the file has been overlooked until called for peer review, when suddenly action is taken! Solicitors should implement a file checking procedure for all their files, and document this on each file.

A few firms do not use a chronological filing system on their files. This makes it difficult to work out whether work is being progressed, and the reason for any delay.

Further guidance

See section 7.3 for guidance on progressing the work

See section 7.7 for general guidance on file maintenance and organisation

5 Did the solicitor communicate appropriately with others, and where appropriate, pursue settlement or agreement on relevant issues?

What are peer reviewers looking for?

Evidence in the form of copy correspondence or other communication with relevant parties, showing

- active negotiation towards settlement, where this is possible,
- active progress being made on the matter,
- steps taken to identify the issues actually in dispute

For example, in a divorce matter, early steps should be taken to reach agreement on the nature and value of matrimonial property.

For example, in a reparation case, the claim should be intimated and enquiries made as to whether liability can be admitted; witnesses should be contacted; and medical reports obtained.

Why does this matter?

If it might be possible to resolve a matter by negotiation and agreement, it will be better for the client for this to be pursued effectively.

It is of benefit to the client for the work to be actively progressed. It is important to actively identify and attempt to resolve issues by negotiation, as this saves the client time and money. Where no agreement can be reached the client needs to be advised as to what further steps can be taken (see criterion 6).

How can I check this on my files?

Look at the correspondence with other parties on the file, and notes of telephone conversations or emails. Does this show that matters are being progressed? Do the letters show active negotiation? Has incoming correspondence been dealt with reasonably promptly and in a way which makes progress? Are there repeated reminder letters with no response?

How can my firm promote compliance with this criterion?

Firms should have in place a file-checking procedure so that files are regularly reviewed by another solicitor, and progress assessed.

Solicitors should use a diary system which brings matters to their attention regularly, rather than relying on receiving a response to correspondence.

Further guidance

See section 7.3 for guidance on progressing the work

6 Did the solicitor give appropriate advice to the client, where relevant, on alternative options, such as litigation and mediation?

What are peer reviewers looking for?

Where relevant. a letter or file note on the file, demonstrating that consideration has been given to whether it has become appropriate to move on from negotiation towards taking further action such as litigation. Mediation may also be an appropriate step to consider. The file should contain evidence that these further steps have been considered and appropriate advice given to the client, including cost implications.

The file should also record the instructions given by the client in relation to any further steps, for example that court action is to be commenced or delayed.

If the triennium or other timebar is approaching, the reviewer will look for some evidence that this has been noted, and that appropriate advice is given to the client. In particular, if the client decides not to commence court proceedings, it will be appropriate for there to be a letter to the client on the file, or a detailed file note, showing that the client has been advised of the timebar and the implications of not taking action in advance of it.

For example, in a divorce matter, if negotiations on the division of matrimonial property are stalled, the file should show the client being advised of the possibility of commencing divorce proceedings, and the pros and cons of this.

For example, in a child residence / contact matter, where there is disagreement on the level of contact, the file should show the client being advised as to whether or not court proceedings should commence, and the likelihood of a successful outcome.

For example, in a reparation case, where a potential defender refuses to engage in negotiation, or an insurance company fails to reply to correspondence, the file should show advice to the client on commencement of proceedings as a way of moving things on.

The mere presence of a copy legal aid application on a file will generally not be enough to show that the client has been given appropriate advice to commence proceedings. At each stage there needs to be evidence of what advice has been given to the client, what instructions taken, and what action agreed with the client. Similarly, there needs to be a note of the instructions taken from the client, and the actions agreed with the client.

Why does this matter?

If negotiation is not progressing the matter, or agreement cannot be reached, then it is necessary to advise the client about how to move things forward. Litigation is not an automatic next step – for various reasons it may not be appropriate, or the client may not wish to take this step when fully advised, or mediation or a joint meeting may be a better option.

The aim is to find the best method for the client of resolving the dispute.

How can I check this on my files?

Look at file notes and correspondence with the client, checking that the advice given to the client has been recorded on the file. At important stages, it is best for advice to be set out in writing in a letter. File notes should be legible and should record the advice given to the client and instructions taken from the client.

Solicitors should set themselves reasonable timescales for making progress with negotiations, failing which they should advise the client on other options.

How can my firm promote compliance with this criterion?

Firms should have in place a file-checking procedure so that files are regularly reviewed and progress assessed.

Solicitors should use a diary system which brings matters to their attention regularly, rather than relying on receiving a response to correspondence.

Firms should have a central diary of important time-limits, with a system for bringing these to the attention of solicitors in good time for action to be taken.

Further guidance

See section 9.3 for guidance on the meaning of “accurate and appropriate” advice.

See section 7.2 for guidance on advice, instructions and action.

See section 7.3 for guidance on progressing the work

7 Has the solicitor
a) identified the need for appropriate experts, other reports or counsel
b) applied for sanction / increase(s) in authorised expenditure in accordance with the guidelines, and if granted, instructed / obtained the appropriate experts / Counsel / reports?

What are peer reviewers looking for?

The reviewer will use her own judgment and experience to assess whether an expert or counsel might be required. She will use her own knowledge to assess whether the correct expertise is being sought.

It is not necessary to note on the file that an expert report is not required.

The evidence will mainly be in the form of communication with experts, obtaining estimates and copies of applications for sanction or increase in authorised expenditure.

Why does this matter?

Solicitors should recognise when expert assistance is needed to present a case, and should instruct the correct type of expert. This avoids unnecessary expense.

Solicitors should apply for sanction or increases in authorised expenditure to cover the cost of expert reports or counsel. On occasion, solicitors do not seek authorisation on the basis that they anticipate being paid by insurers at the end of the day. However, it is prudent to apply for the necessary cover even where it seems likely that a third party will be paying. If something goes wrong, and the expert report is not paid for by the insurers or by the Board, then the solicitor will not be able to charge the client privately for the cost of the report / counsel, and will suffer a loss.

How can I check this on my files?

Check that sanction / authorised expenditure has been obtained for expert reports or counsel, and that copies of these applications are held on the file.

How can my firm promote compliance with this criterion?

In complex cases, less experienced solicitors should be well supervised by senior solicitors. This will avoid lack of experience resulting in an expert in the wrong discipline being instructed, perhaps without sanction.

Further guidance

See section 7.1 for guidance on the meaning of “evidence on the file”

See section 7.2 for guidance on advice, instructions and action.

See section 7.3 for guidance on progressing the work

8 Is there evidence of adequate preparation for each diet, debate or proof, to include (as appropriate) the list of witnesses, productions and list of authorities as appropriate to the facts of the case?

What are peer reviewers looking for?

Sufficient evidence to assess that a reasonable level of preparation has been done, appropriate to the nature of the diet. This might be copies of the pleadings and other documents lodged in process, letters of instruction to local agents, or file notes showing research or a line of argument.

Why does this matter?

The client could be seriously prejudiced if insufficient preparation has been carried out, and as a result an adverse decision is made in court.

How can I check this on my files?

Check that steps are taken in good time to ascertain the identity and availability of witnesses, and that they have been cited.

Keep on the file or with the papers all handwritten notes made in preparation for diets. It is not so important that these notes (unlike file notes) are legible, as the reviewer will not need to examine the detail in them, but their presence on the file will show that the solicitor has prepared for the diet.

How can my firm promote compliance with this criterion?

Ensure that solicitors are allowed sufficient time to prepare for court diets.

Supervise the work of junior solicitors, to check that they are preparing properly at each stage of a case.

Ensure that when files are produced for peer review, they include all the papers in connection with the matter, especially where it is the firm's practice to keep a separate folder with loos papers and items of process.

Further guidance

See section 7.1 for guidance on the meaning of "evidence on the file"

See section 7.3 for guidance on progressing the work

See section 7.7 for general guidance on file maintenance and organisation

9 After the initial meeting(s), did the solicitor

(a) make use of, and provide accurate and appropriate advice to the client on, legal aid and advice and assistance, in accordance with the relevant guidelines?

(b) give accurate and appropriate legal advice to the client?

What are peer reviewers looking for?

(a) As a matter progresses, the client may need further advice on the use of advice and assistance, eg increases in authorised expenditure to cover further work. The reviewer will look for appropriate advice being given, and also for appropriate use of advice and assistance. Where appropriate the client should be advised as to the use of legal aid, and an application made.

The reviewer will expect to see either copies of paper applications for increases in authorised expenditure and/or legal aid, or all the printable summaries for that matter which have been made online. Where online applications have been made, a signed and dated online mandate must be retained on file. Supporting documentation must also be copied onto the file.

Where an application for legal aid is made, there should be evidence on the file of advice to the client about the legal aid scheme (if this has not been given at an earlier stage) including advice on Regulation 18, clawback, and the impact on expenses. The provision to clients of the leaflets provided by the Scottish Legal Aid Board is insufficient on its own to satisfy the requirement to advise on clawback. These provisions, where relevant, must be drawn specifically to the attention of the client in the particular context of the matter in hand.

If a client is assessed as liable to make a contribution to legal aid, the reviewer will expect to see some consideration being given to having the contribution reduced to the likely level of cost of the work, where this is appropriate.

Where legal aid is part-granted, the reviewer will look for the client being advised of this and consideration given to whether an application for review should be submitted.

When legal aid is granted, there should be evidence on the file that the client has been informed of this, and instructions taken to proceed.

If, after the issue of a legal aid certificate, the solicitor becomes aware of a change of financial circumstances of the client, this must be reported to the Board promptly.

(b) The reviewer looks for evidence showing that the client has been given accurate and appropriate advice about the matter. The reviewer uses her own experience to assess whether legal advice given is correct, relevant and appropriate.

In considering whether advice is accurate, the reviewer considers whether it is factually and legally acceptable, bearing in mind the test in *Hunter v Hanley*. In

considering whether advice or action is appropriate, the reviewer has regard to the circumstances of the case and the level of information available to the solicitor and takes into account ethical, practical, tactical and legal considerations. In other words the reviewer puts herself in the position of the solicitor at the time, with the information available to the solicitor, and takes account of the possibility that there may well be difference of professional opinion as to what is appropriate.

Why does this matter?

Appropriate use of civil legal assistance must be made where the client is eligible. Action should not be taken under a legal aid certificate except with the client's instructions, as this puts the client to expense if a contribution is or becomes payable.

Clients must be correctly advised as to the relevant law, the best means of progressing matters, and their potential liability in the event of their not succeeding in their case.

How can I check this on my files?

Check that copy letters and/or legible file notes are kept of important advice given to clients.

Check that copies are kept of all legal aid applications and applications for increases in authorised expenditure.

Check that the client has been informed when legal aid is granted, the level of any contribution which they require to pay, the need to declare a change in their financial circumstances in accordance with the legal aid rules (12 months from the date of the application for changes in income but changes in capital must be notified at any stage during the currency of the proceedings), and instructions taken about proceeding with a court action at that stage.

How can my firm promote compliance with this criterion?

Firms might have a standard letter to send to clients when legal aid is granted, advising what legal aid has been granted for, and seeking authorisation to proceed with the proposed court action.

Further guidance

See section 9.3 for guidance on the meaning of "accurate and appropriate" advice.

See section 7.2 for guidance on advice, instructions and action.

See section 7.4 for general guidance on advice on clawback.

See section 7.7 for general guidance on file maintenance and organisation.

10 Did the solicitor take steps identified/agreed with the client, within a reasonable timescale given the circumstances of the case?

What are peer reviewers looking for?

Evidence on the file that the solicitor does what he agrees to do for the client within a suitable timescale, depending on the nature of the work, and the circumstances of the case. This criterion is judged over the whole case. The reviewer uses her own professional judgement as to whether the timescale is reasonable. This will often depend on whether the client is giving proper and timeous instructions, and whether the opponent is responding to correspondence. The practitioner will not be blamed for delays caused by the client or by others.

If there is delay caused by others, the reviewer will look for a system of file checking to ensure that the file is not overlooked for substantial periods. The reviewer will also expect to see reminders being issued as appropriate.

Reviewers will particularly look for an awareness of any approaching timebar e.g. the personal injury triennium, or the 90-day time limit for Employment Tribunal applications. In circumstances where there is such urgency, this should be demonstrated by prompt and effective action being taken in good time.

Solicitors should ensure that the file contains a note of any change in instructions or agreed work, so that there is an indication why a particular action has not been taken when it might otherwise have been expected.

Solicitors should ensure that the file contains evidence of the reason for any delay, for example a note of an instruction from a client to put matters on hold for a time.

If progress is not being made then the reviewer will look for evidence of the client being advised of the reason for the delay and alternative action which may be taken.

Why does this matter?

It goes without saying that clients wish their work to be dealt with expeditiously and progressed satisfactorily, in accordance with their instructions.

It is particularly important that a client is not prejudiced by a time limit being missed.

Delay in progressing matters is one of the more common sources of complaint by clients. Good recording on the file will show the reason for any delays. A good file-checking and reviewing procedure will eliminate accidental overlooking of files. These will assist the solicitor to avoid and/or deal with any complaints.

Completing the work and rendering a fee to the Board means that the solicitor is paid sooner and cash flow improved.

How can I check this on my files?

Ensure that the work agreed with the client is noted on the file in accordance with criterion 3, and that any changes in instructions, especially instructions to postpone any work, are also noted.

Check that matters are not dragging on awaiting a response which is simply not going to arrive. If negotiation is not progressing the matter, or agreement cannot be reached, then it is necessary to advise the client about how to move things forward. See criterion 6.

How can my firm promote compliance with this criterion?

Have a system for recording important time limits, on the file but also centrally. Ensure that this is checked regularly and appropriate action taken.

Have a system for bringing files to the attention of the solicitor on a regular basis.

Don't rely on replies to correspondence coming in to act as a reminder. If no reply is received the file may be overlooked. Have a good diary system to bring files forward so that reminders can be issued if appropriate, or further instructions taken from the client.

Set reasonable timescales for progress to be made with negotiation, failing which take instructions from the client as to alternative steps.

Further guidance

See section 7.1 for guidance on the meaning of "evidence on the file"

See section 7.2 for guidance on advice, instructions and action.

See section 7.3 for guidance on progressing the work

See section 7.7 for general guidance on file maintenance and organisation

11 Did the solicitor keep the client informed of progress / advised as to next steps / further procedure and provide accurate and appropriate advice, including following the receipt of substantive correspondence (including offers / proposals) from the opponent?

What are peer reviewers looking for?

The reviewer will look for evidence on the file in the form of correspondence and file notes to show how the matter has been progressed in response to substantive correspondence. She will look for evidence that the client has been kept informed and consulted as appropriate. The reviewer uses her experience and professional judgement in assessing this criterion.

The reviewers will expect to see the client being advised on what steps can and should be taken at important stages. This criterion relates to ongoing negotiations in a case. In relation to advice on specific offers of settlement, see criterion 12.

In considering whether advice is accurate, the reviewer considers whether it is factually and legally acceptable, bearing in mind the test in *Hunter v Hanley*. In considering whether advice or action is appropriate, the reviewer has regard to the circumstances of the case and the level of information available to the solicitor and takes into account ethical, practical, tactical and legal considerations. In other words the reviewer puts herself in the position of the solicitor at the time, with the information available to the solicitor, and takes account of the possibility that there may well be difference of professional opinion as to what is appropriate.

If negotiations are not progressing, the reviewer will look for advice given to the client on alternatives courses of action – see criterion 6.

Why does this matter?

It is important for the client, that he or she is kept well informed of the progress of their work, and advised and consulted at each stage. The client is entitled to consider any proposals made, and is entitled to expect advice on whether or not any proposal is acceptable to any extent.

The objective is to get the best outcome for client in negotiations or litigation.

Involvement of the client in the course of negotiations helps to manage client expectations.

How can I check this on my files?

Check that all correspondence is kept or copied on the file and that legible or typewritten file notes are on the file for each phone call / meeting at which advice is given or instructions taken.

Check that instructions have been taken from the client at each important stage, and recorded on the file.

How can my firm promote compliance with this criterion?

Firms should have a regular file checking procedure, which forms part of good risk management. The procedure should include a check that adequate notes are kept of the advice, instructions and agreed actions in each matter. This is good risk management, and applies more widely than in relation to peer review.

Check that clients are kept regularly updated as to the progress of their work, and are consulted about any proposals for settlement.

Further guidance

See section 9.3 for guidance on the meaning of “accurate and appropriate” advice.

See section 7.2 for guidance on advice, instructions and action.

See section 7.3 for guidance on progressing the work

12 Where an offer/proposal is made, is there evidence of accurate and appropriate advice having been given to the client on the terms of the offer/proposal, its reasonableness and the consequences for the client of acceptance/rejection, including the potential impact of expenses/clawback?

What are peer reviewers looking for?

At this important stage, it is vital that advice, instructions, and agreed actions are recorded. Some solicitors prefer to deal with these issues in a meeting with the client. If so, a file note should be kept. It is not a requirement that file notes are typewritten. But they do need to be legible and to contain sufficient information to allow the reviewer to make the assessment.

In relation to acceptability of offers (whether made or received), the reviewer needs to see sufficient on file in letters, file notes etc to allow her see whether the terms of the offer (whether made or received) are reasonable and acceptable. As the reviewers uses her own experience and judgement, there is no need for detailed research to be shown on file, unless the matter is unusual or there are large sums involved. In such cases, the reviewer might expect to see some (possibly handwritten) notes of research or counsel's opinion. The solicitor can expect the reviewer to be competent in the type of work being reviewed.

The reviewer will need to see the client being advised as to whether the offer is acceptable, and on what basis. This would include specific advice at this stage on clawback (where relevant) and expenses. This should be in a letter or in a detailed file note of a meeting. Solicitors must remember that, even where advice has been given at the outset, clients need to be reminded and advised in more detail about this at the time of potential settlement and before a decision is made by the client to settle. The clawback provisions, where relevant, must be drawn specifically to the attention of the client in the particular context of the matter in hand. The client should be in no doubt whether legal expenses are to be deducted from any payment, or whether he will be liable for payment of expenses in addition to any settlement offered by him.

In considering whether advice is accurate, the reviewer considers whether it is factually and legally acceptable, bearing in mind the test in *Hunter v Hanley*. In considering whether advice or action is appropriate, the reviewer has regard to the circumstances of the case and the level of information available to the solicitor and takes into account ethical, practical, tactical and legal considerations. In other words the reviewer puts herself in the position of the solicitor at the time, with the information available to the solicitor, and takes account of the possibility that there may well be difference of professional opinion as to what is appropriate.

Why does this matter?

It helps to ensure the best possible outcome for the client.

At this stage, the client needs to know exactly what the outcome will mean – the client usually wants to know what he will receive by way of payment, or have to pay out.

How can I check this on my files?

Look for correspondence or meetings with the client at the time an offer is made or received. Meetings should be recorded by adequate file notes and letters should contain sufficient advice and information for the client to make a reasoned decision about any offer.

How can my firm promote compliance with this criterion?

Firms should have a regular file checking procedure, which forms part of good risk management. The procedure should include a check that adequate notes are kept of the advice, instructions and agreed actions in each matter.

Further guidance

See section 9.3 for guidance on the meaning of “accurate and appropriate” advice.

See section 7.1 for guidance on the meaning of “evidence on the file”

See section 7.2 for guidance on advice, instructions and action.

See section 7.4 for general guidance on advice on clawback.

13 (a) Has the solicitor taken appropriate steps to close the file and communicate that to the client?

(b) Where judgement is issued, has the solicitor advised the client as to the judgement, including advice on expenses, property recovered and preserved, diligence on decree, prospects of appeal?

What are peer reviewers looking for?

Evidence that the client knows the work is completed, or not progressing any further, and that no further action will be taken. Often this will be in the form of a letter to the client at conclusion of work.

If it is not clear-cut that the work is concluded then it is best practice to write to the client, warning that the file will be closed. This is particularly important if the file is being closed because the client has failed to give instructions.

Where judgement has been issued, a letter to the client is an important opportunity to give appropriate advice to the client about the effect of decree, about expenses, about enforcement of decree and about clawback.

Why does this matter?

It avoids the possibility of a misunderstanding with the client as to whether any further action is intended. For example, if a Minute of Agreement on separation is completed, the client should be aware whether or not the solicitor is proceeding with a divorce.

It ensures that the client know what is to happen at the conclusion of the case – for example what he will receive or have to pay. If judgement has been issued, a letter of advice informs the client about expense and enforcement of decree.

It is an opportunity to return to the client any documents (for example birth or marriage certificates, or insurance policies) which should not be retained.

It informs the client that civil legal assistance is concluded for that matter.

The solicitor can be paid!

How can I check this on my files?

Check there is a letter to the client, or file note recording the final communication with the client, on the file before closing.

How can my firm promote compliance with this criterion?

Have a file closing procedure to be followed in all cases. This should include a check that the client has been informed that the file is being closed, a check that all work which should have been done is completed, advice given about expenses and enforcement (where appropriate) and any documents returned to the client.

If it is not absolutely clear that the agreed work has been completed, or that instructions have been received to close the file, then a letter should be sent to the client advising that the file is being closed.

Further guidance

See section 7.1 for guidance on the meaning of “evidence on the file”

See section 7.3 for guidance on progressing the work

See section 7.7 for general guidance on file maintenance and organisation

14 Has the account been submitted to SLAB in accordance with guidelines and necessary and appropriate steps been taken in relation to recovery of expenses / handling of property recovered and preserved?

What are peer reviewers looking for?

The reviewer checks that an account has been prepared and submitted to the Board in accordance with the regulations. The reviewer is not checking the accuracy of the account.

There is no obligation on firms to keep a copy of their civil legal assistance accounts on their files. However, the presence of a copy of the account on the file can be of assistance to the peer reviewer. It is another resource within which to seek evidence that various criteria have been fulfilled. The presence of a copy account on or with the file can only assist the reviewer, and the content of the account may allow a pass to be awarded where there would otherwise be doubt as to whether a criterion has been fulfilled.

Reviewers will comment on aspects of work on a file which appear inconsistent with proper use of civil legal assistance eg excessive duration of meetings compared with the information acquired at them, or an excessive number of meetings.

A copy of the account synopsis will allow the reviewer to check that property recovered or preserved has been properly dealt with. Lack of a copy will result in a C mark.

Accounts should be rendered within the time limit allowed. Reviewers frequently review files where no account has been rendered and the timebar means that none can be rendered. Whilst this will not result in the file failing at peer review, it can indicate a failure to review files regularly, which may impact on the mark for other criteria.

It is important that the solicitor demonstrates knowledge of the rules concerning charging of fees when a recovery of money or property is made. It must be evident from the file how the work has been charged for, and who has paid those charges whether that be (i) the Scottish Legal Aid Board, (ii) the client out of the property or money recovered or preserved, or (iii) a third party such as an insurance company or opponent.

Examples of solicitors not properly applying the civil legal assistance rules when dealing with recovered money or property are set out in section 7.6.

Where property has been recovered or preserved, the reviewer will look for some evidence that a hardship application has been considered where this would have reasonable prospects of success.

Serious failures to deal with charging issues correctly may result in a practitioner failing a review and / or may prompt a special review. The Quality Assurance Committee may require a firm to reimburse improperly charged fees before a compliance certificate can be renewed.

Why does this matter?

The prompt rendering of correctly formulated accounts means that solicitors are paid sooner and receive full payment for their work. Solicitors are required to account to the Board for their use of civil legal assistance

The absence of a copy account and/or account synopsis on the file may mean that the reviewer is unable to mark this or another criterion. If there has been another unsatisfactory mark on the assessment, then such a fail may tip the overall mark for the file into a fail rather than a pass.

Property recovered or preserved, and the recovery of expenses, must be dealt with in accordance with the rules. Clients should have the benefit of a hardship application where this has a reasonable prospect of success.

How can I check this on my files?

Check that files contain a copy of the civil legal assistance account and the account synopsis.

Check that hardship applications are routinely considered, and a record kept on the file, where appropriate.

Check that clients are not charged privately for work which is covered by civil legal assistance, where there is a recovery of property.

How can my firm promote compliance with this criterion?

Have a file closing procedure which incorporates checking that the account has been rendered within the required timescale, and that a copy of the account and the account synopsis is kept on the file. If you do not wish to keep a copy of the account on the file, consider sending a copy with any file which is selected for peer review.

The file closing procedure should also check whether a hardship application would be appropriate where there has been a recovery of property.

Provide training to staff on the Board's rules in relation to property recovered and preserved, recovery of expenses, and the prohibition on private charging where civil legal assistance is used.

Further guidance

See section 9.3 for guidance on the meaning of "accurate and appropriate" advice.

See section 7.4 for general guidance on advice on clawback.

See section 7.6 for general guidance on fees and accounts

How to apply for a Compliance Certificate

Any new or existing firm wishing to begin providing civil legal assistance must apply

- to be placed on the Civil Legal Assistance Register by the Scottish Legal Aid Board; and
- to be issued with a Compliance Certificate by the Quality Assurance Committee of the Law Society of Scotland

Until this process is complete, a firm is not entitled to provide any form of civil legal assistance. Applications for civil legal assistance will not be accepted by the Board and no payments will be made for any work carried out prior to registration.

Firms should ensure that applications are made timeously, as registration can only be granted from the date requested. The QAC will consider the backdating of registration in exceptional circumstances only.

For information or assistance with registration, please contact Lynne Mitchell, Receipts & Payments Department, Scottish Legal Aid Board and/or Hannah Sayers, Quality Assurance Administrator, Law Society of Scotland.

The application process is described in more detail below.

Registration with the Scottish Legal Aid Board

Receipts and Payments Department

In order to register for the provision of civil legal assistance, the firm must already be active on the Board's payment system. The practitioners who intend undertaking this work must have an active link to the firm on the Board's payment system. If necessary the firm should contact the Board's Receipts and Payments department who will issue the necessary paperwork for completion. If the firm and practitioners are not showing as linked and active on the payments system, the Board will be unable to proceed with registration of the firm.

Audit and Compliance Department

In order to register, the firm must satisfy the Board's Audit & Compliance department that it will adhere to the ten administrative requirements, which are detailed in full at the end of this page. The firm is required to write to the Board with a request to appear on the Civil Legal Assistance Register, together with an outline of how the firm intends to adhere to the ten administrative requirements (usually in the form of written procedures for each). Upon receipt, these will be assessed by one of the Board's Compliance Auditors.

Once the Board is satisfied that the firm complies, it will notify the Quality Assurance Administrator at the Law Society of Scotland, and request that the firm be issued with a

compliance certificate. Until such a request is received from the Board, the QAC will not consider or grant a request for a compliance certificate.

Issue of Compliance Certificate by the Law Society of Scotland

On receipt of a request from the Board that a compliance certificate be issued to a firm, the Quality Assurance Administrator will check the information available for the firm and the practitioners who will be providing civil legal assistance, including for example, the outcomes of previous peer reviews, outstanding complaints etc. In most instances a compliance certificate will be issued immediately, but if there are any apparent difficulties, the application will be considered at the next meeting of the QAC. The QAC may request an interview with the practitioner(s) involved in order to satisfy itself that a certificate should be issued (in terms of rule 6(1)).

On issuing a ccompliance certificate the Administrator will write to the firm and also confirm to the Board that the firm can be placed on the Civil Register.

The ten administrative requirements are:

The firm is required to have procedures for:

- Opening and closing of a file for civil legal assistance, and monitoring its status.
- Recording work carried out for the client, and all material advice tendered to the client as the case proceeds.
- Ensuring that all solicitors providing civil legal assistance remain acquainted with the regulations.
- Ensuring that all documents and other paperwork submitted to the Board are in order.
- The control of incoming and outgoing mail.
- The periodic review of a sample of cases being conducted under the auspices of the civil legal assistance scheme.
- The review of the conduct of a sample of cases conducted under the civil legal assistance scheme at the conclusion of the case.
- Dealing with complaints from the client, the Law society or the Board arising from any civil legal assistance case.
- Submitting accounts to the Board and dealing with subsequent correspondence and queries, and recording receipt of payment.
- Ensuring that all members of the firm's administrative and support staff are aware of the firm's procedures and observing them.

Guidance on content of terms of engagement letter in relation to civil legal assistance

The required content of terms of engagement letters is set out in the Law Society of Scotland Practice Rules 2011 as amended.

In particular, every terms of engagement letter must include the following information:

- an outline of the work to be carried out on behalf of the client
- where civil legal assistance is being provided, details of the level of contribution required from the client and an indication of the factors which may affect any contribution which may be required from the client or any payment which may be required from property recovered or preserved
- the identity of the person or persons who will principally carry out the work on behalf of the client
- the identity of the person whom the client should contact if the client becomes concerned in any way with the manner in which the work is being carried out

There is certain further information which should be provided to a client who is in receipt of civil legal advice & assistance or civil legal aid. In general a terms of engagement letter, or other correspondence at the outset of the matter, should make clear to the client in understandable terms:

- The distinction between legal advice and assistance and legal aid.
- That, where applicable, clawback may apply
- That a hardship application may be made, but that this applies only to legal advice & assistance and not to legal aid.
- That legal aid covers only the applicant's legal expenses and not those of the opponent, but that having a legal aid certificate enables an application to be made for modification of liability.
- That in legal advice and assistance there is a requirement to obtain prior approval and authorised expenditure from the Scottish Legal Aid Board before work can be carried out.
- That in legal advice & assistance any contribution is payable to the solicitor
- That in legal aid the financial assessment is carried out by the Scottish Legal Aid Board and any contribution is payable to the Board.
- That in legal aid there is an obligation on the applicant to advise the Board immediately of any change in personal or financial circumstances after the application is submitted; and that that obligation continues for a period of a year after assessment has been made.
- That clawback may apply. It is not necessary to cover clawback in detail in cases where it cannot apply but, if applicable, it should be mentioned, if only briefly, at the outset. The letter should also indicate that there will be further discussion as the case progresses and particularly at the time any kind of settlement or court hearing to determine the case is approaching.

Clients should be provided with an explanation designed to fit the case being dealt with. There is no point in trying to explain the whole legal aid system in a standard letter. This will only result in confusion and misunderstanding. Ideally letters explaining civil legal assistance to a client should be tailored to deal only with what needs to be said for the individual case.

Sample clauses for terms of engagement letters

Below are presented selected clauses of three different terms of engagement letters which deal with civil legal assistance. However, you should note that these are simply examples, and these samples do not replace a careful consideration by each solicitor of what should be included in a terms of engagement letter for each individual case. These sample clauses do not represent formal guidance on the content of terms of engagement letters, and it is the responsibility of each firm to decide on the content of their terms of engagement letters and to ensure that they comply with the requirements of the Practice Rules.

1. Advice with an emphasis on legal advice and assistance

You have signed an application for Legal Advice & Assistance. This is a scheme administered by the Scottish Legal Aid Board which provides you with some initial legal help for advice, correspondence and negotiation, but not for court proceedings. You have been assessed as liable to pay a contribution of £{insert amount of contribution}. Please let us have payment of your contribution as soon as possible, in weekly instalments if you wish, but no later than four weeks from the date of this letter. You should note that we are not able to provide legal services to you without the continuing approval of the Scottish Legal Aid Board. This means that from time to time, we have to ask the Board to approve further work. This can sometimes cause delays in progressing your case but regrettably this is unavoidable.

Although your legal expenses will be met in the first instance by the Scottish Legal Aid Board, the regulations state that if you receive any money or property as a result of the work we do for you, this must be used to pay your legal expenses. Any surplus will be returned to you. In effect this means that you may have to pay your legal expenses yourself at the end of the day. We enclose a leaflet produced by the Scottish Legal Aid Board which provides information about these rules. It is important to bear these rules in mind when deciding how to proceed, and whether it is reasonable to incur further legal expense.

There are few concessions made to the clawback rules. Generally speaking the expenses of recovering payment of most state benefits, Child Support Agency payments, or maintenance for yourself or a child, are exempt from clawback when you receive Legal Advice & Assistance.

If you are in receipt of Legal Advice & Assistance, and the operation of clawback would cause you serious financial hardship or distress then we can ask the Legal Aid Board to meet your bill and if they consider that clawback would cause serious financial hardship or distress, they may agree to meet the bill. Please note that in these circumstances, we

must retain sufficient from the money received to cover our costs in the event that our bill is not met by the Legal Aid Board, and to refund it if the bill is met. There is no guarantee that this request will be granted by the Board.

If your case proceeds to a stage where court proceedings are contemplated, then we must apply on your behalf for Civil Legal Aid. This is a separate and quite different form of legal help and the rules of eligibility are different.

If you are in receipt of Legal Aid, and you receive any money in connection with your case (whether or not your case actually goes into court), then the money must be retained (this does not include any money received for maintenance). Even if you would prefer to settle your bill yourself, this cannot be done. The Board will then check our account and once it has been paid, the money will be released to you after deducting what they have paid to us. This can sometimes cause substantial delays in your receiving money due to you, but regrettably this is unavoidable because of the Legal Aid rules. Please note that the concessions mentioned above apply only to Legal Advice & Assistance, and NOT to Legal Aid. If what you receive is not money but property, and you do not have free cash to pay what is due by way of fees and outlays, the Board will take a security (mortgage) over the property, and when it is sold you will have to pay them what is due with interest. The rate of interest can be very high, and you may wish to consider borrowing to pay the bill instead.

We appreciate that all this is fairly complicated but it is important that before we start work for you, you fully understand what the position is in relation to the work and your Legal Aid cover. If there is anything in our letter which you have difficulty following, the solicitor dealing with your work will be happy to discuss it with you on request.

2. Additional information where an application for legal aid is anticipated

An application for civil legal aid requires to be supported by evidence to show that you have a case to argue as well as financial information from you, your spouse or partner and, if appropriate, your employer. You may be required to pay a contribution directly to the Scottish Legal Aid Board. You will be asked in advance if you are willing to pay the assessed contribution, usually by twenty monthly instalments. If work requires to be carried out on an emergency basis you will be asked to sign a mandate agreeing to pay the contribution which may ultimately be assessed by the Board, before work is carried out on your behalf.

In the event of a change in your financial circumstances or those of your spouse or partner you are required immediately to notify the Legal Aid Board. A reassessment of your financial eligibility will be carried out. The duty to inform the Board of a change of circumstances continues until one year after the assessment of your contribution. Failure to notify the Board of any change in circumstances may have serious consequences including suspension or termination of your Legal Aid Certificate or even a criminal investigation and prosecution against you.

If you are in receipt of Legal Aid, and you receive any money in connection with your case (whether or not your case actually goes into court), then the money must be

retained to pay your legal expenses. Even if you would prefer to settle your bill yourself, this cannot be done. The Board will then check our account and once it has been paid, the money will be released to you after deducting what they have paid to us. This can sometimes cause substantial delays in your receiving money due to you, but regrettably this is unavoidable because of the Legal Aid rules. There are no exceptions to this rule. If what you receive is not money but property, and you do not have free cash to pay what is due by way of fees and outlays, the Board will take a security (mortgage) over the property, and when it is sold you will have to pay them what is due with interest. The rate of interest can be very high, and you may wish to consider borrowing to pay the bill instead.

If you are successful in your case, the court may order your opponent to pay your expenses. You may still be required to pay your bill but the Board will repay you what they recover from your opponent, when they recover it (which may be after a substantial period or never). You should also be aware that there may be a shortfall in the expenses which can be recovered from your opponent and you must pay that shortfall. If you are required to pay a shortfall, it will be met, in the first instance, from any contribution you have paid and thereafter from any money or property that you recover.

If you are unsuccessful in your case, the Legal Aid Board will meet your costs but the court may order that you pay your opponent's expenses. In such circumstances it is possible to ask the court to reduce your liability for such expenses. The decision to reduce those expenses and by how much is entirely at the court's discretion. The court will have regard to your financial circumstances and the conduct of your case.

3. Another version where there is an emphasis on court action and legal aid

You may be eligible for Legal Aid to allow us to deal with your case in court. It is important that you are aware of certain procedures of the Legal Aid system.

1. Advice & Assistance
   Legal Aid is available in two forms, the first of which is Legal Advice & Assistance. This is assessed on your income and that of your spouse or partner for the 7 days prior to you consulting us and the amount of savings or capital which you and your spouse or partner own. A contribution may be assessed at your first meeting. Please ensure that if you have not already done so you settle this contribution within the next two weeks.

2. Legal Aid Applications
   The second level of Legal Aid is for court actions. An application requires to be supported by evidence to show that you have a case to argue as well as financial information from you, your spouse or partner and, if appropriate, your employer. The Scottish Legal Aid Board ("the Board") may assess you as requiring to pay a further contribution. The amount of any contribution will be assessed by the Board and you will be asked in advance if you are willing and able to pay this contribution, usually by twenty monthly instalments. This contribution will be payable directly to the Board. If work requires to be carried out on an emergency basis you will be asked to sign a

mandate agreeing to pay the contribution which may ultimately be assessed by the Board before any work is carried out on your behalf. Please note that if you are granted Legal Aid you are required to notify the Scottish Legal Aid Board of any changes in your financial circumstances or those of any partner with whom you reside. The Scottish Legal Aid Board will thereafter carry out a re-assessment of your financial eligibility for Legal Aid. Failure to do so may result in the suspension or termination of your Legal Aid Certificate or indeed your prosecution. The onus is on you to report changes in your financial circumstances to the Scottish Legal Aid Board and you should not assume that we are aware of any such changes or have reported any such changes to the Scottish Legal Aid Board on your behalf.

3. Your Opponent's Expenses

Legal Aid pays your own solicitors' expenses. The Scottish Legal Aid Board are not responsible for your opponent's expenses if you lose your action or if the court orders you to pay part of your opponent's expenses. In these circumstances legally aided persons can apply to court to have their liability for such expenses reduced. The court takes into account your financial position and in many cases will reduce the amount payable by you to nil. However, this is entirely at the court's discretion and cannot be guaranteed. The conduct of the case will be taken into account when the court makes this decision.

4. Your Contribution

If you lose your case then the Scottish Legal Aid Board will pay your own solicitor's fees from the Legal Aid Fund using firstly the contribution you paid and any balance coming from the Fund. If your case settles with each side bearing their own expenses then the same rule applies. If you succeed in your case then the other side will normally be ordered to pay your judicial expenses. (See below). The Board would pay your solicitors' fees from the Fund and then try to recover the expenses from the unsuccessful party. Only when these expenses are recovered will the Board pay back your contribution or any element of it.

5. Court Expenses

Please note that the court can only award "judicial" expenses, which are expenses reasonably and necessarily incurred in taking the action to court. Your opponent will not be expected to meet "Agent and Client" expenses which are expenses incurred by your solicitors in their dealings with you and are not all considered essential to the conduct of the case. Even if you succeed in your action and are awarded expenses there may be a shortfall in the expenses recovered and you must pay that shortfall. If you are required to pay a contribution towards Legal Aid the Board will firstly seek to recover the shortfall from that contribution. If you recover money as a result of your action then the Board will recover any remaining shortfall from your award. The balance remaining will be released to you. Please remember that Legal Aid is not intended to place you in a better position than a person who can afford to pay privately.

6. Financial Recoveries and Legal Aid

In cases where an award of Legal Aid has been made if you recover or preserve any assets then those assets must, in the first instance, be applied towards meeting your legal fees. This may mean that we require to retain funds recovered on your behalf and pay those funds to the Scottish Legal Aid Board to meet your legal fees.

7. Actions for Personal Injury

If you are seeking compensation for personal injuries it is important that you are aware of the regulations regarding recovery of state benefits from your award.

If you have received state benefits as a result of your injury the Compensation Recovery Unit (CRU) will claw back the total amount of benefits which you have received from any award made in your favour. This deduction is made before any payment is made to you. For example, if you are awarded £20,000 and the total benefits paid amount to £15,000 over the relevant period then only £5,000 compensation will be paid to you. The balance of £15,000 will be repaid by the compensator to the Benefits Agency. The only exception to this rule is when the compensation relates only to pain and suffering and not loss of earnings.