

Standards for solicitor higher courts advocates and outline proposals for a new accreditation scheme

Draft response of the Council of Her Majesty's Circuit Judges

Question 1

Do you consider the regulatory approach suggested in paragraph 12 of the consultation paper sufficient to protect the public interest and ensure the standard of advocacy in the higher courts?

Response

As representatives of the bulk of the Circuit Judges in England and Wales, we are primarily concerned to ensure as high a standard of advocacy in the higher courts as possible and to ensure that those represented by advocates, lay people as well as professional clients, particularly vulnerable people, are protected against inadequate, incompetent or inexperienced advocates. Although in paragraph 7, the Authority quotes, apparently with approval, an extract from the Clementi report which indicates "it is difficult to see why a solicitor with considerable experience in lower courts needs additional training to become a solicitor advocate [in the higher courts]", we cannot agree with that proposition in isolation. The demands on advocates in the higher courts very often are greater than in the lower courts.

Certainly the matters in issue are more serious and often more complex. It is right that the higher courts should expect a proportionately higher standard of advocacy before them. In our judgment, that higher standard of advocacy does demand additional training, whether that be in the professional law schools, during pupillage (for the bar) or during the training contract for solicitors and it requires those considering conducting advocacy in the higher courts to shadow experienced advocates or marshalling judges in order to see at first hand how best to conduct advocacy in the more difficult cases dealt with in the higher courts. An adequate pupillage should provide a young barrister with that experience although all advocates should start with less difficult cases and work up to more difficult. We believe that, under the current LPC, would-be solicitors are required by all providers to pass an assessment in advocacy in either criminal law or in civil. As we understand it, this is a requirement imposed by the SRA. Although providers may choose to assess advocacy in both civil and crime, they are not required to assess in both, though we understand that many, if not all, give tuition in both civil and criminal advocacy. We are concerned to see no reference in this consultation paper to any commitment by the SRA to ensuring that adequate advocacy skills in both civil and crime are taught to law students on the LPC and are rigorously assessed. We are, in general, in agreement with the statement of standards set out in Annexe 1 to the paper, but we would value a clear commitment, perhaps backed up by a reference in the Law Society's code of conduct, to students having to demonstrate adequate capacity to meet those standards, by compulsory assessments, before qualification.

Such assessment should be a central and compulsory part of the new proposed LPC. We also understand that during their training contract, each trainee must do a mix of contentious and non contentious work. We are concerned that the SRA proposals do not require a solicitor who wishes to do Higher Court advocacy to do a seat in litigation which enables him or her to witness more experienced advocates at work in the Higher Courts. We invite the SRA to consider building such a requirement into the Professional Skills Course which currently is available to trainees although we are not clear under the proposals for the new training framework what will happen to that course. Further compulsory advocacy training and assessment, including shadowing experienced advocates or marshalling, should be a requirement of all solicitors training, just as it is for the Bar. All young barristers are required to complete advocacy training organised by the Inns of Court during their first 6 months of pupillage and must complete 9 hours CPD in their first 3 years of practice. No less training should be required of a young solicitor who wishes ultimately to practice as an advocate in the higher courts. We also consider that the Code of Conduct should recommend that any solicitor wishing to exercise rights of advocacy in the higher courts, particularly if lacking relevant experience, should seek the voluntary accreditation through the process proposed in the paper. Publicity of the names of those solicitors and RELs who have achieved accreditation should be easily accessible, not only to judges, who will be in the best position to assess the quality of advocacy before them, but also to the general public. The lists should be on the SRA's and Law Society's websites and should be available at court centres. The Law Society should give prominence to the accreditation as a benchmark for any person or organisation seeking representation in the higher courts. Firms or LLPs should be required to state on their letter heading that a list of their accredited higher court advocates is available on request.

Question 2

Do the standards adequately cover the knowledge and skills that should be expected of a solicitor advocating in the higher courts? Please explain with particular reference to any gaps in knowledge and skills and how these can be best addressed.

Response

Generally we considered the standards in Annex A and the performance indicators to be adequate with the following comments:

- a. Under Part 1 – Evidence – in the third paragraph we would delete the words “may, arguably”. Adherence to the standards for evidence which are then set out do apply as much to Magistrates and County Court work as to Crown and High Court work.
- b. We would add after paragraph 8 under Standards for Evidence, in view of the importance of the Act, “The structure and content of the Criminal Justice Act 2003”.
- c. Under Standards for Ethics we would add to paragraph 1 the words “and should advise the client on suitable representation at court, including the possibility of instructing a barrister or a solicitor HCA not from his own firm. The advocate should advise the client that the cost of instructing an independent advocate may not necessarily be higher than instructing an “in house” advocate.”
- d. Under Sentencing, we would add after the 2 existing bullet points two further bullet points namely “Sentencing Guidelines promulgated by the Sentencing Guideline Council and guideline cases” and “the obligation of advocates, whether for the prosecution or the defence, to draw the trial judge’s attention to limitations on his or her sentencing powers and to any appropriate guidelines or guideline cases”.

Question 3

Do you think that the standards are set at the appropriate level of a competent solicitor higher courts advocate?

Response

Yes. It should be made clear that no lower standards are acceptable.

Question 4

Do the standards as drafted achieve the desired aims set out at paragraph 16 of the consultation paper?

Response

Yes, with the amendments suggested above

Question 5

Are the performance indicators appended to the standards (see Annex 1 of the consultation paper) sufficient explanation of the required competence?

Response

Yes

Question 6

Is the proposed assessment process adequate to establish the competence of the applicant?

Response

No. We disagree with the SRA's intention not to prescribe training requirements. This seems to us to be an abrogation of their responsibility for ensuring that their accreditation process actually achieves that those who pass it have been assessed appropriately as meeting the standards that the SRA have laid down in Annex 1. The SRA impose certain basic requirements on providers of training for the LPC and if the new accreditation is to mean anything as a quality mark, minimum standards should also be set for the providers of the teaching. No organisation providing the tuition for the accreditation and assessing that accreditation is earned should be approved by the SRA unless it meets certain minimum training standards, just as the current providers of the LPC must meet certain minimum standards. Letting the market decide is a recipe for achieving the lowest common denominator.

Question 7

Should holders of the higher courts accreditation be revalidated every five years?

Response

There should be revalidation but it should be every 4 years. We consider 5 years to be too long a period.

Question 8

If you answered "yes" to Question 7 above, please provide us with any views you may have on the proposed process.

Response

Consideration should be given to requiring more substantial evidence of continuing advocacy as an accredited HCA from those who, in the main, represent lay as opposed to professional clients. The professional client will, most often, be better able to judge the adequacy of representation and will determine, accordingly, whether to continue to instruct such the advocate.

Much will depend on how often the higher court rights are being exercised and we consider that a requirement of the re-validation process should be the submission of a dossier indicating briefly what work has been done. A less "light touch" accreditation is, we judge, necessary for those who have only exercised occasionally their qualification in the relevant period. We consider it might be thought appropriate for those who require revalidation to have acquired a minimum number of CPD hours in an advocacy or litigation subject during the period leading to a re-validation.

Question 9

Should solicitors holding a higher courts qualification under the current regulations be passported onto the new scheme?

Response

No. There should be assessment that they are up to the new standards proposed in Annex A. It may be that the re-validation process might, more fairly, be required of them initially having regard to the fact that they have already qualified under the old system

Question 10

Should passported advocates be required to complete the revalidation process in due course?

Response

Yes. See the response to question 9 above.

Question 11

Do you consider that the proposed regulatory approach, competence standards, and scope and structure of the new accreditation scheme have potential positive or adverse impacts in the following areas?

For each equality strand, please place a check in one of the three columns to indicate your answer.

Response

We do not consider that the proposals have any potential positive or adverse impacts in any of the areas.

Question 12

Do you hold a higher courts qualification awarded under the current or previous Regulations?

Response

Not applicable