



**Joint Consultation by the Solicitors  
Regulation Authority, ILEX Professional  
Standards and the Bar Standards Board**

**Advocacy Standards**

**December 2009**

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## **Advocacy Standards**

### **Introduction**

1. The Bar Standards Board (BSB), the Solicitors Regulation Authority (SRA) and ILEX Professional Standards (IPS), the primary regulators of legal advocacy, are committed to developing and quality assuring overarching standards for advocacy. This consultation paper is the first step in the journey towards that goal.
2. Advocacy is a fundamental pillar of the justice system. Members of the public rely upon it for the proper representation of their case and the courts are dependent upon it for the proper administration of justice.
3. Given its importance, the BSB, SRA and IPS have agreed to work together to develop common standards with a view to fostering consistent standards of advocacy throughout the legal profession. Such an approach will be beneficial to all parties to the legal process: lawyers will know what is required of them by their regulators, clients will have a better understanding of the standards to which a competent advocate will be expected to perform and the judiciary will have confidence that advocates appearing before them are operating to consistent competency standards.
4. It is important to recognise that a wide range of competence and standards frameworks already exists for advocacy across the legal profession, many of which are robust and effective in defining and maintaining standards. There is not, however, one set of standards which clearly sets out what is expected of all legal advocates. The BSB, SRA and IPS believe that this is now necessary. We wish to build on what is currently in existence and have therefore considered carefully the current frameworks when developing the standards upon which we are now consulting.

5. We are attempting to develop common standards that can be applied to all advocates in all areas of practice. This will require ensuring that standards and their associated competencies are applicable in a wide range of contexts. This is a significant task and the regulators propose therefore to undertake it incrementally starting where there has been greatest interest in the consistency of advocacy competence and performance, namely criminal practice. This consultation paper therefore seeks views on proposed common standards for criminal advocates.
6. During the consultation period we will be considering how the standards adopted for criminal advocates could apply in practice; that is how they might be assessed and ultimately accredited. We intend to consult during 2010 on the detail of a proposed scheme for criminal advocacy.
7. It is proposed that following the agreement on, and introduction of, standards for criminal advocates, consideration can then be given to standards across other areas of practice with the eventual goal of having common standards in place across all advocacy. Responses are welcome from anyone who has evidence or views about the questions raised in this paper. We will summarise and discuss collectively the responses received. Responses will be published on the relevant website. If you do not want your response published please make that clear when you reply.
8. Responses should be sent either to the BSB or to your respective regulator by 22 March 2010.

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Advocacy Standards consultation

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**Background**

9. The regulation of the legal profession has changed markedly since the publication of the Sir David Clementi review of the provision of legal services in 2006. For example the Bar Council, Law Society and the Institute of Legal Executives have separated their regulatory and representative functions. The SRA, BSB and IPS have each been established with independent responsibility for regulating their respective professions in the public interest with the emphasis on the provision of good quality and accessible legal services.
10. Each of the regulators is committed to proportionate and evidence based regulation and targeting regulatory intervention where risk dictates there is the greatest need. In order to do this, clear standards are required. The absence of common standards against which to measure competent advocacy, or indeed other legal services, has inhibited the regulators from systematically identifying those practitioners and practices requiring regulatory action which may include remedial training to ensure that minimum standards are consistently demonstrated in practice. This has led to damaging anecdotal evidence about a minority of advocates allegedly not performing to appropriate standards,

which has caused the majority to be tarnished by the perceived incompetence of the few.

11. The SRA, BSB and IPS believe that in developing common, assessable advocacy standards a framework will be established through which incompetent or poor quality advocacy can be more robustly and defensibly identified and dealt with appropriately.
12. In addition to the separation of regulatory and representative functions is the additional dimension of the Legal Services Board (LSB). The LSB was established by the Legal Services Act as the oversight regulator for the legal profession. It is the LSB's responsibility to ensure that the regulatory objectives in the Act are being met by each of the legal regulators. The LSB has already stated publicly that there is a need for a quality assurance scheme that is rigorous and transparent whilst also being proportionate and targeted.
13. Finally, it is important to recognise the role that the Crown Prosecution Service (CPS) and the Legal Services Commission (LSC) have to play in developing common standards of advocacy.
14. The CPS has defined its own prosecution standards with advocates benchmarked against these standards and 'graded' according to their experience and competence. These standards have been carefully considered when developing the proposed advocacy standards which are being consulted upon. Clearly, where possible, there should be consistency, both in terms of standards setting and assessment so as to avoid unnecessary bureaucracy and expense.
15. The LSC has, through its commission of Cardiff University, recently undertaken research into the quality assurance and grading of advocates. The LSC commenced its work on the development of a quality assurance scheme for criminal defence advocates following the report by Lord Carter (July 2006). The Carter report was commissioned by the Government into the procurement

of legal aid and the role of advocacy assessment was highlighted in recommendation 5.3<sup>[1]</sup> of the final report of Lord Carter's review.

16. In support of that recommendation, the LSC has piloted a quality assurance scheme of its own. The LSC used a competency framework against which a number of advocates were assessed. The BSB and SRA played an active role in the development of the competency framework and close regard has therefore been paid to it when developing the common advocacy standards proposed in this consultation. We have taken into account the comments and recommendations raised in the final report by Cardiff University when developing the advocacy standards upon which we are now consulting.
  
17. The LSC scheme's focus inevitably lies on advocates in a publicly funded context. Regulators have a responsibility across the whole of their respective professions and must develop quality assurance measures including advocacy standards that can be applied to all advocates. The duties of a Regulator and the interests of particular clients need not be identical. We anticipate that many of the objectives around quality assurance for a purchaser of legal services will be common with the regulators and we will have regard to the needs of the LSC, CPS and other interested parties when developing any regulatory scheme. Whilst the LSC scheme is useful background and its competency framework a helpful reference point, it will inform, but not dictate any regulatory scheme for quality assuring advocacy in broader terms.
  
18. That said, we are keen to ensure that any regulatory approach to quality assurance is, as far as possible, compatible with the requirements of major

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<sup>[1]</sup> **Recommendation 5.3:** A proportionate system of quality monitoring based on the principles of peer review and a rounded appraisal system should be developed for all advocates working in the criminal, civil and family courts. This system should be developed through a process chaired by a member of the judiciary in partnership with the Bar Council, Law Society, Legal Services Commission and DCA to ensure it covers all advocates with relevant rights of audience in these courts. The new quality monitoring system should be developed in the first instance for publicly funded criminal advocates, then for publicly funded family and civil advocates, and ultimately for all advocates. The scheme for publicly funded criminal advocates should be in place by the time the new graduated fee schemes are implemented in the Crown Court in April 2007. The system should be subject to a full regulatory impact assessment before being implemented.- Lord Carter Review of Legal Aid Procurement – July 2006

purchasers of legal services, such as the LSC and CPS, and we will be working closely with these organisations.

### **What quality assurance arrangements exist already?**

19. In order to provide the context for any standards it is useful to set out the current quality assurance arrangements that exist for the Bar, solicitor advocates and legal executives.

### **Quality assurance arrangements for solicitor advocates**

20. Solicitors have one of the most rigorous and thorough training regimes of all UK professionals. Basic grounding in English and Welsh law is provided through the Qualifying Law Degree, subject to shared quality assurance with the Bar Standards Board through the Joint Academic Standards Board.
21. Vocational training in the skills needed to practice begins with the one-year Legal Practice Course (LPC). Litigation and advocacy are core areas. The LPC has recently been modernised with a stronger focus on achievement of outcomes. There is extensive quality assurance of the course providers through a combination of rigorous validation processes, ongoing scrutiny through external examiners, annual reporting by providers and, where risks are identified, visits to providers.
22. The final stage, closely supervised training in the workplace, also requires experience that will further develop skills in advocacy. The training establishment must give the trainee activities which will develop skills in preparing, conducting and presenting a case. This is further reinforced by training under the Professional Skills course. The SRA is also piloting a new approach to this last training stage – called Work Based Learning – which will build on the current training process and also require objective assessment in the skills needed to be an effective and competent advocate.

23. Upon admission, solicitors have automatic rights of audience in the lower courts, supported by the training they have undertaken. In order to appear in the higher courts, solicitors must hold the Higher Rights of Audience qualification.
24. This is a compulsory requirement for solicitors appearing in the higher courts. When the new HRA qualification scheme is introduced in April 2010, solicitors seeking the qualification will have to pass an advocacy assessment based on a set of competence standards covering evidence, ethics, advocacy skills and equality and diversity. Solicitors can seek the qualification in either civil or criminal proceedings (or both if they take both assessments) and the advocacy skills element of the assessment will be tailored to the specific set of proceedings. There will be no mandatory training requirement or requirement for prior experience although individuals are free to take preparatory courses if they wish.
25. Applicants for the qualification will be assessed holistically through a clinical or simulated assessment which may be supplemented by a written assessment. The assessments will be provided by assessment providers authorised and quality assured by the SRA specifically for that purpose. The SRA's quality assurance arrangements are based on:
1. Authorisation by an SRA panel against a set of standards for authorisation;
  2. The appointment of external examiners by the SRA who will advise the SRA on the standards set by the assessment provider and candidate achievement in relation to those standards;
  3. Analysis and review of annual reports submitted by assessment providers;
  4. The facility to visit the providers to review provision where there is evidence that the quality and/or standards of the assessment are at risk.
26. Throughout a solicitor's practising life he or she remains subject to annual continuing professional development requirements. At present these are based on a combination of hours requirements and accredited training. The



SRA is looking to enhance the CPD requirements to make them outcomes focused and to further assist in ensuring that solicitors remain up to date.

### **Quality assurance arrangements for legal executive advocates**

27. In order to become a Legal Executive (ie a Fellow) an ILEX member must:

1. Successfully complete the ILEX Level 3 Diploma and the Level 6 Higher Diploma in Law and Legal Practice. The Higher Diploma provides for study at honours degree level in one of the main specialist areas of legal practice, reflecting the member's area of specialist work.
2. Have 5 years legal experience in a lawyer's office including 2 consecutive years after the qualifications are completed.

28. Applications for Fellowship must be supported by an employer's certificate of fitness. CPD requirements for Fellows are 16 hours, half of which must relate to the Fellows' specialist area of work.

29. The ILEX advocacy qualification scheme was approved by the Lord Chancellor under the arrangements set out in the Courts and Legal Services Act 1990. ILEX must follow the Rights of Audience Certification Rules agreed under those arrangements when dealing with course providers and candidates. The Rules incorporate course delivery, course outcome and assessment criteria.

30. In order to be authorised to exercise Rights of Audience, Fellows have to:

1. Apply for a Certificate of Eligibility to undertake an Advocacy Skills Course accredited by ILEX;
2. Attend and successfully complete an Advocacy Skills Course;
3. Pass a written test in the Law of Evidence;
4. Apply for the award of an Advocacy Certificate.

31. To be granted a Certificate of Eligibility to take the skills course Fellows must provide evidence of their knowledge and experience in relation to the type of

work they specialise in – either criminal, civil or family. Experience is evidenced by portfolios of cases they have had responsibility for involving litigation and either advocacy or, in relation to crime, police station work. Portfolios are externally assessed and subject to agreement by an advocacy rights committee.

32. The advocacy skills course, including the evidence test, is provided and assessed by independent organisations approved by the advocacy rights committee. Standards are monitored by external advisors and the advocacy rights committee. Candidates are tested in relation to case analysis and preparation; examination and cross examination; opening and closing speeches; and submissions. Case study scenarios are used for training and assessing candidates.
33. Further portfolios have to be completed by ILEX advocates at the end of the first year of practice and annual CPD must include at least 5 hours of advocacy skills training each year.
34. ILEX advocates have rights of audience in open court in the Magistrates' and County Courts, Coroners' Courts and most Tribunals according to whether they hold a civil, criminal or family proceedings certificate.

### **Quality assurance arrangements for barristers**

35. The Bar has a long history of extensive and rigorous advocacy training to ensure that those entering the profession are of a sufficiently high quality. There is extensive training during the Bar Vocational Course (to be known as the Bar Professional Training Course (BPTC) from 2010) on the theoretical principles of advocacy as well as their practical application, with clearly defined outcomes that must be achieved by the completion of the course. The BPTC has been strengthened and reinforced as a result of the recent review by the BSB. This is supplemented by compulsory advocacy training during pupillage and the first three years of practice at the Bar. Thereafter there are formal

continuing professional development (CPD) requirements, although not with any mandatory advocacy element.

36. The current CPD requirements for barristers are presently being reviewed by the BSB. The review will range from the accreditation of CPD courses and the assessment of attendees to the specific CPD requirements for individual barristers. The review is expected to conclude in late 2010.

37. It is evident from the above that the Bar and the users of its services would benefit from clarity over what is expected of a competent advocate. Common standards of advocacy could be complemented by tailored CPD requirements and, where appropriate, could be used to help prepare the advocate for applying to become a Queen's Counsel.

#### **The Queen's Counsel selection process**

38. The Queen's Counsel selection process involves assessment of the applicant against defined standards and criteria in order to identify excellence in practice. Assessment involves the provision of an extensive portfolio of work, references and interview.

#### **Developing common standards**

39. In order to investigate the development of common standards, the Joint Advocacy Group (JAG) was established by the regulators and comprises representatives from each of them. The terms of reference for the group are:

1. *To develop, consult upon and implement common standards of advocacy;*
2. *To build on existing quality assurance arrangements and advocacy expertise to develop a proportionate and consistent means to ensure that advocates meet and maintain those standards in the public interest;*
3. *To report its findings to its respective regulatory boards and committees.*

40. This consultation paper and proposed standards are the result of the discussions by JAG and carry the authority and endorsement of each of the regulators.

### **The proposed standards**

41. In the light of the analysis outlined above and the meetings of JAG, common standards for criminal advocates at trial have been drafted. They are set out below:

#### **Preliminaries and preparation**

<b>A1</b>	<b>Only undertakes advocacy in a case in which they have the knowledge, experience and skills required for that case</b>
1	Has regard to their experience and competence when deciding whether can accept instructions in each case

<b>A2</b>	<b>Is properly prepared</b>
1	Where necessary has a clear strategy for the case.
2	Case strategy is supported by questions asked and evidence called
3	Understands client's and opponent's case and assimilates opponent's evidence
4	Knows the relevant law and procedure for the matter in hand

<b>A3</b>	<b>Adopts appropriate structure and sequence</b>
1	Complies with appropriate Procedural Rules and judicial direction
2	Is aware of the requirements regarding disclosure in the case and how they affect the client's case
3	Provides appropriate disclosure of evidence

<b>A4</b>	<b>Meets deadlines</b>
1	Keeps or ensures that the court is kept promptly informed of any timings problems/delays
2	Complies with court imposed timetables

#### **Case presentation/advocacy**

<b>B1</b>	<b>Presents clear and succinct written and oral submissions</b>
1	Drafts clear skeleton arguments
2	Makes relevant and succinct submissions by reference to appropriate authority
3	Speaks clearly and audibly
4	Maintains appropriate pace throughout the course of the trial

<b>B2</b>	<b>Conducts focussed questioning</b>
1	Observes restrictions and judicial rulings on questioning
2	Questions to witnesses are clear and understandable
3	Questioning strategy relevant to issues
4	Avoids introducing irrelevant material

<b>B3</b>	<b>Handles witnesses effectively and appropriately</b>
1	Gives clear guidance to own witnesses
2	Deals appropriately with vulnerable witnesses
3	Deals effectively with uncooperative witnesses
4	Uses and challenges expert evidence effectively

<b>B4</b>	<b>Understands and applies sentencing guidelines</b>
1	Makes appropriate representations to the court on sentencing
2	Ensures that all relevant material for sentencing is before the court

#### **Working with others (where applicable)**

<b>C1</b>	<b>Assists clients in autonomous decision making</b>
1	Any advice given to a client is clear and accurate
2	Keeps lay and professional client up to date
3	Ensures lay client understands the process
4	Keeps adequate notes of decision making process

<b>C2</b>	<b>Establishes professional relationships in court</b>
1	Observes professional etiquette and ethics in relation to the client and to third parties
2	Is courteous at all times

<b>C3</b>	<b>Effectively leads an advocacy team</b>
1	Takes responsibility for effective case management

#### **Integrity**

<b>D1</b>	<b>Observes professional duties</b>
1	Observes duty to act with independence
2	Advises the court of adverse authorities and, where they arise, procedural irregularities
3	Assists the court with the proper administration of justice

#### **Equality and diversity**

<b>E1</b>	<b>Has a demonstrable understanding of equality and diversity principles</b>
1	Recognises the needs and circumstances of others and acts accordingly
2	Treats clients, colleagues and parties fairly and does not discriminate against them

## **Explanation of the standards**

42. The aim of these standards is to articulate clear standards for criminal trial advocacy. They seek to cover all of the primary standards that would be expected of a competent advocate and provide a benchmark against which assessment can be made. The standards themselves could be annexed to the relevant codes of conduct.
43. At this stage, the standards set irreducible minimum standards which all advocates should be able to demonstrate. Looking at issues such as the contexts in which advocacy is undertaken and appropriate methods of assessment is the next phase of work for the Joint Advocacy Group. We are aware that there are schemes which include levels or grades, for example those used by the CPS. These are helpful in procurement or commissioning context but, as regulators, we believe that our focus, at least initially, should be on defining minimum advocacy standards which can be consistently assessed.
44. These standards draw together, and build on, the existing competency/standards frameworks for advocacy across the legal profession with a view to providing an overarching statement of what is expected of an advocate.

## **Your views**

45. At this stage we are seeking views on whether these standards are appropriate and adequate for criminal advocates. The next stage will be to consider how advocates should be assessed or accredited against them and by whom. The nature of the advocate and the individual needs of each regulator will dictate to some extent the type and range of any assessment of accreditation. Our preference is for a consistent assessment framework against which assessment providers can operate. It is conceivable that the quality assurance agenda may vary between regulators and/or purchasers. Any scheme should therefore be sufficiently flexible to allow for, and not fetter, these potential variations.

46. We do not propose to put forward any firm proposals in this regard at this stage but views and suggestions are welcome.

### **Equality impact**

47. The Joint Advocacy Group is committed to promoting equality and diversity throughout the advocacy professions. As part of the wider development process for a quality assurance for advocates scheme we will undertake an Equality Impact Assessment. Focusing solely on the standards we anticipate some significant positive equality benefits and would welcome your views on these:

1. Common standards of advocacy across the three professions could assist in ensuring that there is an even playing field which will ensure that no specific group is disadvantaged.
2. There is some evidence that female and BME barristers earn less than their counterparts at the Bar. Common standards could help reduce this disparity.

48. In addition to the questions on the standards we have asked you to respond to, please could you also let us know if any issues arise in the consultation paper which you consider might have implications for equality. This includes discrimination on the grounds of race, gender, disability, religion or belief, sexual orientation and age. We would particularly welcome feedback on whether there are likely to be any negative consequences for any group arising from the proposed changes and how these could be mitigated, or if there are opportunities to promote greater equality.

### **Consultation questions**

**Q1 How comprehensive are the proposed standards? Do they cover all the areas that you would expect of a criminal advocate? Please set out your rationale.**

**Q2 Are there any standards that are missing or that should be removed?  
Please set out your rationale.**

**Q3 We have identified some equality benefits to putting in place common standards and assessing against them. Are there any other positive benefits? Are there any negative consequences for any group? How can we further promote equality and diversity? How can we mitigate any negative consequences?**

### **Conclusion**

49. This consultation paper constitutes the start of a programme of work towards proportionate quality assurance of advocacy. It is a long and difficult road. As regulators, we are committed to working together to develop standards which carry the confidence of the profession and consumers and which can also be applied to meet the needs of major purchasers like the LSC and CPS.

50. Competent advocacy is crucial to the effective delivery of legal services and the upholding of the rule of law and the proper administration of justice. Clients depend upon effective advocacy to ensure they are treated fairly within the criminal justice system. Agreed, clear and assessable standards of advocacy will go a long way to ensuring that advocates continue to be held in high regard throughout the legal profession and the wider community.

51. We look forward to receiving your comments.

**December 2009**