

## **ERRANT CONDUCT AND POOR PERFORMANCE BY EXTERNAL ADVOCATES**

### **CPS GUIDANCE TO CHAIRS OF JOINT ADVOCATE SELECTION COMMITTEES**

#### **1. BACKGROUND**

- 1.1. The CPS is publicly accountable for the selection and performance of advocates<sup>1</sup> involved in the preparation and presentation of CPS prosecutions.
- 1.2. Where errant conduct or poor performance by an advocate has been identified a judgement must be made as to whether the advocate should continue to be instructed to prosecute other cases. This may necessitate a review of the standing of the advocate on the CPS Advocate Panel.
- 1.3. This guidance provides a framework for Chairs of Joint Advocate Selection Committees (JASCs) to deal with allegations of errant conduct or poor performance consistently and fairly. It also clarifies the role of Chief Crown Prosecutors<sup>2</sup> (CCPs) in dealing with minor conduct or performance issues.
- 1.4. Although not an exhaustive list, for the purpose of this guidance, errant conduct includes:
  - allegations or convictions of criminal offences;
  - allegations or findings of professional misconduct;
  - complaint allegations;
  - behaviour which falls short of published CPS values, or
  - actions which have led to adverse comment as a result of the advocate's behaviour
- 1.5. And, for the purpose of this guidance, poor performance includes:
  - performance issues impacting on the confidence victims and witnesses, CPS, judiciary and others have in the advocate;
  - performance falling below the quality benchmarks as set out in the published CPS casework quality standards<sup>3</sup>;
  - performance resulting in a high level of unsuccessful case outcomes over a number of cases, or
  - performance directly resulting in adverse outcomes, such as custody time limit failures.

#### **2. PURPOSE**

- 2.1. This guidance provides general principles to assist in deciding whether, and to what extent, the errant conduct or poor performance by an advocate should result in a

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<sup>1</sup> The term 'advocates' include self-employed counsel and barristers or solicitors employed by solicitor firms or other external organisations.

<sup>2</sup> References to CCPs include Heads of Central Casework Divisions

<sup>3</sup> Casework Quality Standards published at

[\[http://www.cps.gov.uk/publications/casework\\_quality\\_standards/\]](http://www.cps.gov.uk/publications/casework_quality_standards/)

removal or suspension from the Advocate Panel or restriction of CPS work, and to ensure that national standards are applied.

- 2.2. The guidance has been agreed with the Law Officers. The Bar Council and Law Society have been consulted on the guidance and it has been copied to Circuit Leaders for information.

### **3. SCOPE**

- 3.1. Advocates convicted of criminal offences, or otherwise acquiring public notoriety which may bring their profession into disrepute, may be subject to professional disciplinary procedures. This guidance is not intended to intrude upon such professional procedures, but nor is action by the CPS limited only to matters within the province of the disciplinary body.

### **4. DATA PROTECTION ACT 1998**

- 4.1. The Data Protection Act 1998 (DPA) confers a right of access upon individuals to be told if their personal data is being processed, a description of that data, why it is being processed and to whom it may be disclosed. CPS is an organisation registered with the Data Controller to hold information for the purposes of administration of justice.
- 4.2. The CPS will operate the Errant Conduct and Poor Performance guidance in accordance with the requirements of the DPA. If an individual requests sight of material in accordance with the DPA, the CPS will be responsible for handling the request in respect of the data in its possession.
- 4.3. Personal data might be held at CPS Headquarters, by Chairs of Joint Advocate Selection Committees (JASCs) and/or by Chief Crown Prosecutors (CCPs). Errant conduct and poor performance data will be treated as personal and sensitive and will be kept securely. Data will not be kept for longer than 5 years or the period of any sentence or order (in relation to errant conduct) plus 12 months, if that sentence or order exceeds 4 years. When data is destroyed it will be destroyed securely.

### **5. CPS VALUES**

- 5.1. The CPS is a values led organisation. The CPS expects all employees and advocates acting on its behalf to behave in accordance with the published values, which are:
- **To be independent and fair**
    - We will prosecute independently, without bias and will seek to deliver justice in every case.
  - **To be honest and open**
    - We will explain our decisions, set clear standards about the service the public can expect from us and be honest if we make a mistake.
  - **To treat everyone with respect**
    - We will respect each other, our colleagues and the public we serve, recognising that there are people behind every case.

- **To behave professionally and strive for excellence**
  - We will work as one team, always seeking new and better ways to deliver the best possible service for the public. We will be efficient and responsible with tax-payers' money.

## **6. GENERAL PRINCIPLES IN DEALING WITH ERRANT CONDUCT OR POOR PERFORMANCE**

- 6.1. The removal or suspension of an advocate from the CPS Advocate Panel and the withdrawal of CPS instructions may affect an advocate's livelihood and reputation and, therefore, great care is required in deciding what action to take.
- 6.2. The JASC, or CCP, will need to establish how far confidence in the CPS and the wider criminal justice system will be adversely affected if the advocate continues to be instructed. In this respect it will be necessary to assess individually the level of confidence in the advocate held by:
  - victims and witnesses;
  - the general public;
  - the CPS;
  - the courts;
  - other practitioners, and
  - the police
- 6.3. In assessing public confidence, the degree of media interest (providing accurately reported) and notoriety arising from the incident, behaviour or poor performance issue will need to be taken into account. Furthermore, an assessment will need to be taken of the degree to which the behaviour is consistent with published CPS values. An assessment should also be made as to whether pressures on the advocate arising out of the errant or other conduct could affect his or her judgment leading to an adverse impact on their performance in the conduct of all or specific types of prosecution cases.
- 6.4. In respect of most allegations of errant conduct it would not be appropriate for an advocate to be prosecuting cases which have any similarity to pending or completed cases against him or her.
- 6.5. In respect of allegations of errant conduct all factors must be considered including:
  - nature and seriousness of the allegations;
  - circumstances of victims;
  - level of sentence or potential sentence;
  - appeal procedures;
  - conduct of the errant advocate's defence, which may on occasions provoke further doubt concerning judgement or integrity.

## **7. PROCEDURE**

### **Representations**

- 7.1. Before a decision is taken which may adversely affect an advocate arising out of errant conduct or poor performance, the advocate should be given an opportunity to make written representations as to why action should not be taken. This provides the

advocate with an opportunity to defend or mitigate their position and also acts as a safeguard in cases of mistaken identity or confusion between advocates.

- 7.2. Written representations should be sought by the JASC Chair when some form of sanction is anticipated.

**Duty to report**

- 7.3. Chief Officers of Police are required to report details of convictions and cautions against barristers to the Attorney General and against solicitors to the Solicitors Regulation Authority concerning offences of violence, indecency, dishonesty, drink or drugs, because they reflect on their suitability to continue in a profession or office, and to ensure probity in the administration of law.

- 7.4. Where an advocate is charged with an offence in these categories he or she should make immediate contact with the Chair of the JASC who will need to ascertain the numbers and types of cases in which the advocate is currently instructed.

- 7.5. A decision on whether those instructions should be retained by the advocate pending the outcome of the prosecution will depend on the nature and gravity of the offence charged, in accordance with the principles set out above.

- 7.6. Minor road traffic offences, e.g. those in which the potential for disqualification from driving does not arise, need not be reported.

**CPS Action**

- 7.7. Where errant conduct or poor performance by an external advocate is brought to the attention of the CPS there is a wide range of action that can be taken. Allegations of minor errant conduct or poor performance can be dealt with by a local CCP where no action is required or where the conduct or performance requires the issuing of advice or a warning letter about future behaviour or a letter clarifying the CPS values and standards of behaviour expected e.g. where a witness has complained about an advocate being rude or abrupt. Any correspondence to self-employed counsel should be copied to the Heads of Chambers and any correspondence to advocates employed by firms of solicitors should be copied to a senior partner in the firm. A CCP should notify the JASC Chair of any action she/he proposes to take because the JASC Chair might be aware of other similar incidents or allegations.

- 7.8. Errant conduct or poor performance which is more serious will generally need to be dealt with at JASC level. The only exception is where the nature of the errant conduct or poor performance is so serious that an urgent decision needs to be taken, approved by the Chief Operating Officer, to suspend the advocate from the Advocate Panel with immediate effect and remove all instructions held by the advocate e.g. where the advocate is charged with a serious criminal offence that makes his or her position as a prosecuting advocate untenable.

**8. INTERIM SUSPENSION**

- 8.1. In other cases of urgency where a JASC meeting is not imminent, suspension from the Advocate Panel can be decided by the Chair of the JASC who will advise the advocate of the decision to suspend with immediate effect. Before taking such action the Chair of the JASC should consult with the Circuit Leader / senior partner. The JASC Chair can, and should if time permits, take views of all JASC members via a virtual meeting using

secure email, telephone conference or video conference facilities.

- 8.2. No further instructions will be forthcoming, and in some circumstances it may be necessary to withdraw existing instructions from an advocate, providing that this action is possible without prejudicing the outcome to the prosecution case. The JASC Chair will need to ensure that all CPS Areas and Casework Divisions adopt a consistent approach.
- 8.3. If issue is taken with the decision to suspend, the advocate may make written representations to the Chair of the JASC, which, for self-employed counsel, should also be copied to the Circuit Leader for comment.
- 8.4. The Circuit Leader may, with the agreement of the JASC Chair, speak to the Head of Chambers and the advocate.

## **9. CONSIDERATION BY THE FULL COMMITTEE**

- 9.1. The full circumstances of the errant conduct or poor performance will be tabled for discussion at the next meeting of the JASC. Where a decision is made to suspend for a defined period or remove the advocate from the Advocate Panel or a specialist list, that action will be taken with immediate effect and notified to the advocate. The Circuit Leader will be informed of any decision in respect of self-employed counsel and a senior partner will be informed of decisions in respect of advocates employed by solicitor firms.
- 9.2. Where an advocate is suspended from the CPS Advocate Panel or a specialist list on one Circuit the JASC Chair should routinely notify other JASC Chairs of the decision to suspend and to the administrator of the Advocate Panel. It would be inconsistent for an advocate to be suspended on one Circuit only to be engaged on another.

## **10. ERRANT CONDUCT**

### **Pending Criminal Proceedings (including convictions pending appeal)**

- 10.1. Where a criminal charge is pending and denied, care should be taken not to prejudge the outcome. However, where the circumstances giving rise to the pending prosecution are notorious, and the public image of the CPS or public confidence in the administration of justice might adversely be affected, withdrawal or suspension of instructions must be considered. Similarly, in circumstances where there is an allegation of dishonesty or other form of gross misconduct, it might be appropriate for existing instructions to be withdrawn from the advocate and no further work delivered until resolution of the charge or investigation.
- 10.2. Where criminal proceedings have been instituted against an advocate but a decision is taken not to suspend the advocate from the Panel, the CPS Area responsible for prosecuting the case against the advocate must not instruct that advocate in other prosecution work.

### **CONVICTION OF CRIMINAL OFFENCES**

#### **Sentence of immediate imprisonment**

- 10.3. Where an advocate has been convicted of an offence for which a sentence of imprisonment is imposed it should result in immediate removal of the advocate from

the CPS Advocate Panel. The removal should be expressed as being indeterminate.

**Continuing sentence or order**

- 10.4. Where there is a sentence containing an element of suspension, condition or supervision, the advocate should be removed from the Advocate Panel for at least the period of the continuing sentence or order. Thus an advocate who receives a suspended sentence, probation order, conditional discharge, bind-over or other order should not be eligible to receive CPS instructions for at least the period of the sentence or order.

**Disqualification from driving**

- 10.5. Where an advocate has been disqualified from driving it calls for a measured response according to the circumstances of the case. In most cases it would not be appropriate for him or her to receive, or continue to hold, instructions to prosecute motoring offences.
- 10.6. Aggravating circumstances in drink or drug related driving cases may call for a more severe response from the CPS, e.g. the withholding of all instructions (not just for motoring offences) for the period of disqualification or longer, or in very serious cases for an indefinite period.

**Other errant conduct**

- 10.7. Other conduct, not leading to criminal proceedings may result in a formal or informal police caution or may not be criminal at all and involve, for example, disreputable behaviour exposed with publicity or notoriety. Similarly it may involve professional misconduct which can take a variety of forms or behaviour which falls short of the published CPS values.
- 10.8. Where it is considered that the conduct disclosed could affect public confidence and/or the confidence that the CPS holds in the advocate, the JASC would wish to consider whether the advocate should continue to remain on the Advocate Panel.

**11. POOR PERFORMANCE**

- 11.1. When considering poor performance the JASC will need to take into account the high level of confidence that is required of level 4 advocates and of rape and child sexual abuse specialist advocates because of the nature of work they undertake and the potential consequences when high standards of advocacy are not maintained.
- 11.2. Where there is evidence of poor performance the JASC must consider whether the poor performance could affect public confidence and/or the confidence that the CPS holds in the advocate. If so, the JASC should consider whether the advocate should remain on the Advocate Panel. A review of the advocate's position on the Advocate Panel could result in the advocate being removed from the Panel, being moved to the next level down or being removed from a specialist list e.g. the rape and child sexual abuse list. The removal could be permanent or temporary, possibly subject to a period of re-training. Re-instatement, following a temporary suspension, would usually be on application with evidence of knowledge refresh or re-training.
- 11.3. One option for the JASC, short of suspension, would be to warn the advocate about performance issues and require performance improvement.

- 11.4. Poor performance may become evident as a result of reports of unsatisfactory performance, for example, from the judiciary, Law Officers e.g. when considering unduly lenient referrals or CPS lawyers or paralegal staff; complaints by witnesses; adverse outcomes, including custody time limit failures or high levels of unsuccessful outcomes, and performance falling below the quality benchmarks as set out in the published casework quality standards. For the avoidance of doubt, poor performance is not restricted to advocacy performance alone, it could include any aspect of the service that the advocate provides including late returns, preparedness for court hearings, failure to provide timely written advice etc.
- 11.5. Where there is credible evidence of poor performance the JASC will need to take a carefully considered view about the level and degree of poor performance. The JASC may wish to take soundings of the ability and performance of the advocate in other cases from other instructing lawyers or the judiciary. Where there is a mixed view of the advocate's performance the JASC may decide to commission a formal advocacy assessment.
- 11.6. Where the evidence reveals a lack of knowledge of law, practice or procedure in one aspect of criminal law it would usually be appropriate to require the advocate to refresh their knowledge or undergo a period of re-training. However, a lack of knowledge of law, practice or procedure, even in one aspect of criminal law, would not be expected of level 4 advocates.
- 11.7. Where the evidence reveals a general lack of ability in criminal advocacy to perform at their Advocate Panel level and meet the CPS Casework Quality presentation standard, it would generally result in a down-grading or removal from the Panel or removal from the specialist rape and child sexual abuse list. A general lack of ability could be evidenced by reports from the judiciary, advocacy assessment or repeated adverse case outcomes.
- 11.8. When the JASC is considering taking action in respect of poor performance the advocate should be invited to provide comments or representations before a final decision is taken. The conduct of the advocate in providing comments and representations may on occasions provoke further doubt concerning judgement or integrity.

## **12. PROVISIONS FOR APPEAL**

- 12.1. Where the advocate wishes to appeal against the JASC's decision, he or she should set out in writing the grounds for appeal and serve them on the Chair of the JASC. The Circuit Leader / senior partner should be invited to comment.
- 12.2. The Chair of the JASC will consider the grounds for appeal and reconvene the Committee if appropriate. If the Committee is unwilling to revise their decision, the papers should be referred to Chief Operating Officer, CPS Headquarters for resolution. After consideration (and if appropriate, oral representations from the advocate) the Chief Operating Officer will notify the advocate, JASC Chair and Circuit Leader of the outcome of the appeal.
- 12.3. Ultimately, the decision as to whether an advocate should remain on the Advocate Panel is a matter for the CPS alone and there is no further appeal to a decision of the

Chief Operating Officer as part of this process.

**13. APPLICATIONS FOR REINSTATEMENT**

- 13.1. An advocate who has been suspended or removed from the Advocate Panel may apply for reinstatement, e.g. at the conclusion of a continuing sentence or order of the court, or following a determinate period of suspension or removal. The application should be made to the Chair of the JASC and the Circuit Leader should be invited to comment.
- 13.2. The Chair of the JASC will bring the matter before the Committee and consider the application afresh in the light of present circumstances, applying the principles set out in Section 6 above.
- 13.3. In the event of the advocate's application not being granted he or she should be informed of the decision and advised that further representations may be made to the Chief Operating Officer.

**14. NOTIFICATION**

- 14.1. All decisions to adjust, suspend or remove CPS instructions taken by JASCs must be notified by the Chair of the JASC to the advocate and the Circuit Leader. In difficult or sensitive cases, Chairs will wish to consult the Chief Operating Officer before reaching a final decision.
- 14.2. The Chief Operating Officer must be notified of all decisions. A precedent store will be maintained to guide future decisions and promote consistency throughout the Service. The Chief Operating Officer will notify the Attorney General's Office of decisions to suspend or remove in order that they may (a) have the opportunity of commenting and (b) note the position with regard to their own responsibilities.
- 14.3. In cases of special difficulty or national notoriety, the Chief Operating Officer should be consulted before any decision is taken at Area or Circuit level.

**15. FREEDOM OF INFORMATION**

- 15.1. Request for sight of documentation used in the errant conduct and poor performance process can be made to CPS in accordance with the Freedom of Information Act 2000. CPS will consult with any other parties having an interest in the information but ultimately any decision to disclose will rest with the CPS, as the authority holding the information. CPS will be mindful of the sensitivity of information being held and may well withhold the information by applying section 40, which relates to withholding personal information.

Any queries in relation to this guidance should be addressed to Keith Milburn, Operations Directorate, CPS Headquarters, 0203 357 0803 or [keith.milburn@cps.gsi.gov.uk](mailto:keith.milburn@cps.gsi.gov.uk).

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