Criminal law

Avoiding complaints: a guide for Scottish solicitors
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introduction

complaints about criminal law

As can be seen from the chart, criminal law ranks in the top five business areas which attract the most complaints.

Criminal law tends to attract very specific issues of complaint. Examples include:

- Failure to put forward a strong enough argument
- Failure to lead evidence as per client’s instructions/lodge appeal/cite witnesses
- Withdrawing from acting

Drawing on the most commonly complained about issues in criminal law, we have produced this guide specifically aimed at avoiding complaints in this area. Throughout the guide you will find anonymised case examples and S40 best practice guidance.

If followed, we believe that this guidance can significantly reduce the risk of a complaint being made. We hope you find it useful. After all, prevention is better than cure.
introduction

most common complaints

*Other includes failure to prepare adequately (6%), failure to follow instructions (6%) and miscellaneous (8%).

Over the past five years, ineffective communication has consistently been the most frequent type of complaint, across all areas of law.

Although complaints are inevitable, we believe that many of these issues could be avoided through more effective communication with the client.

In our experience, complaints are less likely to arise out of technical legal matters than from shortcomings in service - specifically issues around communication.

Communication related complaints account for 43% of all the complaints we see at the SLCC.
Your Terms of Business letter is a critical tool in reducing the likelihood of complaints. The more clearly you can set out the arrangements at the outset, the lower the risk of confusion and ultimately, complaints.

You should also be aware that your Terms of Business letter will be an important consideration in the event of SLCC needing to investigate a complaint.

- Terms of Business letters should be sent as soon as is reasonably practicable after instructions are accepted.

- Be aware of the Law Society’s guidance on Terms of Business letters and of any recent changes.

- Terms of Business letters should be clear in the first instance, and suitably revised as and when circumstances change throughout the case, for example, changing costs; scope of work; responsible fee earner or Client Relations Manager.

- The content of Terms of Business letters should be explained to clients to make sure they understand. Do not assume that clients will read and understand the significance of this letter.
case example

The complaint:
The solicitor failed to communicate effectively with the complainer by failing to provide him with a Terms of Business letter.

The outcome:
Section B, Rule B4 of the Law Society Practice Rules 2011 requires solicitors to provide clients with a Terms of Business letter at the earliest opportunity.
In this case, the SLCC received no supporting documentary evidence in relation to the complaint from the firm.
Accordingly, it was determined that the complaint was an eligible conduct issue, because if upheld following investigation, it could amount to a breach of Rule B4.

The complaint was accepted at eligibility and sent to the Law Society of Scotland for a conduct investigation.

important update

From 1 April 2017, the time limit for making a legal complaint has been extended from 1 year to 3 years. While this only applies to complaints about new business which commenced on or after that date, all firms are required to change their Terms of Business issued from that date and to make any necessary changes to their internal complaints procedures.
We often receive complaints which are based on a client being unhappy to find that their case is being handled by someone other than the solicitor who accepted instructions.

There are simple ways to reduce the risk of complaints.

- Be clear about who is dealing with the case and at what stages of the process.
- If non-qualified staff are to be involved, explain that they will be supervised and by whom.
- Explain if meetings and court appearances etc. are to be attended by someone else from the office, or by external agents or advocates.
case example

The complaint:
The solicitor had:
a) incorrectly advised the complainer that he would personally conduct the trial.
b) failed to advise that a local agent would be instructed to appear, and
(c) delayed instructing and briefing the agent.

The outcome:
The SLCC noted that the local agent had only been instructed the day before the trial, which was insufficient time to allow adequate preparation. In addition, the solicitor had failed to forward photographs until the morning of the trial.

The SLCC was satisfied that these failings amounted to inadequate Professional Service and ordered the firm to pay £600 compensation to the complainer.

the role of an advocate

Sometimes we see complaints about advocates failing to communicate effectively with clients and failing to act on their instructions. Many of these complaints arise as a result of a lack of understanding about the role of the advocate.

Be sure to explain to your client that it is the solicitor who instructs the advocate.

Make them aware that while advocates will discuss matters with clients at court or at pre-arranged meetings, it is unusual for written communication to be sent by advocates to clients direct.
communication

**Effective Communication**

You must be able to communicate effectively to ensure that you can act in your client’s best interests.

Asking questions, listening, discussing options, explaining legal processes and qualifying advice given (in writing is best practice) are all essential to providing an adequate service.

**Best Practice**

- Keep notes of all instructions received and advice given.

- Be prompt, stick to agreed timescales for appointments. Be sure to contact the client if you are going to be late and explain why.

- Agree suitable methods of communication and adhere to the arrangement.

- Make clients aware of their obligations and responsibilities and what you will be expecting from them during the case.

- Do not assume that everyone will know what to expect when they attend a Police station/court. You should know your client well enough to provide the reassurance they need.
Case example

The complaint:
The complainer had advised another solicitor in the firm, by telephone, that he would be unable to attend court. The solicitor failed to record this on the file, which resulted in a warrant being issued for the complainer’s arrest.

The outcome:
The firm accepted that it had made a mistake by failing to note this on the file and by failing to bring this information to the attention of the court solicitor.

At Mediation, the firm apologised and offered to write a letter explaining what had happened.

responding to clients

Make it clear to your client that you may not always be able to respond immediately to their communication.

If you are regularly out of the office/attend court, provide contact details of the person they should contact when you are not available.
client updates

keep clients updated

One of the most common issues we see are cases in which the complainer feels that they have not been kept up to date with developments on their case.

We tell consumers to be clear at the start how often they can expect to be updated.

best practice

- Clients should be advised of the key stages of the case and when they can expect to be updated.

- At the outset agree how frequently and in what format updates will be provided.

- Explain that charges will be made for responding to requests for updates, even where the firm has nothing new to report.

- If you personally are not able to attend court, ensure that your client is advised of this, and is given as much notice as possible. Be sure to tell them of the person(s) attending in your place.
**case example**

The complaint:
The solicitor unduly delayed informing the client of the final date for lodging an appeal, despite being aware that the client wished to appeal.

The outcome:
The SLCC upheld the complaint as Inadequate Professional Service on the basis that the complainer was not given the opportunity to make an informed decision well in advance of the deadline for lodging an appeal.

Compensation of £1,000 was directed to be paid by the firm to the complainer.

**unreasonable requests**

If clients' expectations are becoming unreasonable, explain to them again, in writing preferably, when they should expect to be updated and the consequences of over communicating with the firm.
Managing clients' expectations at the outset will reduce the likelihood of unhappy clients further in the process.

**be open and honest**

- Be open and firm in the advice that you provide.
- Detail the options open to the client and the action which the firm is able to take.
- Explain when circumstances have changed and how this alters the position or advice given previously.
- Don't put off bad news.
- Do not be tempted to give any absolute guarantees. You are expressing your professional opinion on the best and worst case scenarios.

**best practice**
manage expectations

case example

The complaint:
The solicitor failed to act in the client's best interests by:
(a) failing to contact a witness and doctor for statements
(b) failing to review the evidence provided by the client
(c) failing to review the evidence from the Procurator Fiscal until the night before the trial
(d) inappropriately advising the client to plead guilty
(e) swearing when advising the client how to conduct himself during the court reporting process
(f) erroneously advising that the guilty plea could be withdrawn.

The outcome:
The SLCC was satisfied that the evidence that it had seen in the firm's file contradicted the complaints made, or that there was no evidence to support the allegations made.

clients' instructions

If you are unable to carry out instructions, explain why to the client, making them aware that, if they are not willing to accept advice, that it may no longer be appropriate for you to act for them.
timescales

changing timescales

Criminal proceedings can be unpredictable and setting timescales can be difficult.

By ensuring that clients understand the potential for delays, future frustration can be avoided.

best practice

- Set out the stages of the process and where delays are likely to occur, e.g. court timetables, late disclosure, witness availability etc.

- Legal Aid applications should be completed and evidence on behalf of applicants submitted to SLAB timeously.

- Court adjournments and delays are not unusual. Explain to clients and any witnesses that they should be prepared for a long wait, even where their case has been listed for a specific time of the day.

- Explain to clients that instructing experts can cause delays, especially where they are asked to give live evidence or produce expert opinions.

- Observe timescales for lodging evidence, appeals and citing witnesses.
timescales

case example

The complaint:
The solicitor failed to lodge amended grounds of appeal timeously.

The outcome:
The SLCC was satisfied that the delay amounted to inadequate Professional Service.

The firm was ordered to pay £5,000 compensation to the complainer.

A Complaints Levy of £800 was ordered to be paid by the firm to the SLCC.

legal aid

Delays can be caused by incomplete legal funding applications.

It is vital that clients are made aware of the importance of full and frank disclosure in their applications.
codes of practice, rules and standards

professional judgement

Often complaints are about the way that a client’s case has been prepared and presented. In our consumer guidance we explain that solicitors will exercise their professional judgment when deciding the best course of action for a case.

We also advise consumers that solicitors must still adhere to the Codes of Practice, Rules and Standards.

best practice

- Be aware of the current Codes of Conduct, the service standards and any S40 guidance which has been issued by the SLCC.

- Explain to your client why you think a certain course of action is the best in the particular circumstances, and agree the way forward.

- If you are asked to follow instructions or take action which you are uncomfortable with, seek advice from a colleague, or from the Law Society’s Professional Practice Department before entering a situation which might lead to a contravention of the Practice Rules, or worse, the law.
codes of practice, rules and standards

case example

The complaint:
The solicitor had
(a) engaged in a course of conduct
whereby he withheld and/or unduly
delayed paying funds to expert
witnesses, despite having received
funds from SLAB for said services, and
(b) failed to respond to
correspondence relating to
outstanding fees.

The outcome:
The issues were categorised as
contact and sent to the Law Society
of Scotland for determination.

The Society was satisfied that the
conduct of the solicitor amounted to
a serious and reprehensible departure
from the standard of conduct to be
expected of a competent and
reputable solicitor, was capable of
being proven beyond reasonable
doubt and could amount to
Professional Misconduct.

The solicitor was prosecuted before
the Scottish Solicitors’ Discipline
Tribunal, which found the solicitor
guilty of Professional Misconduct.
These complaints were consolidated
with a number of others, which
resulted in the solicitor being
suspended from the Roll for 3 years.

difficult advice

If you are delivering advice that is unlikely to be
well received, don’t put it off, make sure you are
well prepared and are able to answer any
questions.
Clarity about funding is key. In criminal proceedings it may be difficult to provide a firm fee estimate at the outset. Details of charging rates and the feeing arrangements must therefore be agreed, and kept under regular review with the client.

Make your client aware of the importance of keeping their own finances under review and to advise of any significant changes.

- Fee notes should be clear and contain sufficient information, including VAT charged and any outlays. Agree with the client what format the fee note will take.

- Interim billing should be discussed as an option and methods for paying bills, i.e. can a standing order be set up.

- Discuss what will happen in the event of a dispute about the amount of the fee and how this might be resolved, i.e. signpost to Cashroom Partner, independent law accountant assessment, taxation.

- Make sure that your money laundering checks and records are comprehensive and are carried out in every case.
case example

The complaint:
The solicitor had:
(a) failed to submit the Legal Aid application in sufficient time
(b) failed to update on the progression of the funding application
(c) failed to confirm at court, whether or not Legal Aid had been granted
(d) failed to provide a Terms of Business letter or agreed the feeing arrangements in advance.

The outcome:
The SLCC was satisfied from the evidence available that:
(a) the solicitor had submitted an application for Legal Aid on time
(b) there was no evidence that calls or messages had been ignored
(c) the SLCC was of the view that the firm could have made the Legal Aid position clearer, and that he was now a fee paying client
(d) a copy of a Terms of Business letter addressed to the complainer was on the firm’s file.

The SLCC agreed that there would have been minor inconvenience and distress caused to the complainer, and ordered the firm to pay the complainer £100 compensation. The firm was ordered to pay a £200 Complaints Levy to the SLCC.

legal aid

If your client could be eligible for public funding, they should be aware of this (even if your firm does not offer legal aid).

Terms of Business letters must still be provided for legally aided clients. They should also be clear about any financial contributions that the client might have to make towards their funding.
In our consumer guidance, we advise consumers that there may be occasions when it is appropriate to withdraw from a case.

It is not appropriate to attempt to prevent clients from withdrawing their instructions.

- Explain to your clients the type of situations when it might be necessary for you to withdraw from acting.

- Mandates should be implemented on receipt.

- Make sure that the court and the other parties to the action are aware that you are no longer instructed to deal with the case, or that you have withdrawn from acting.

- Clients should be free to choose their own legal team. You can recommend another firm, but must not pass a client’s file to another firm without the client’s express (written) permission. This is important where one firm is being taking over or merging with another.

- Clients should be aware of all the cost and timescale implications that withdrawing from acting can have on the transfer of their case.
mandates

case example

The complaint:
The solicitor withdrew from acting on the morning of the trial, without informing the complainer that he was doing so.

The outcome:
The complainer had admitted using foul and abusive language towards the solicitor.

The solicitor had warned the client that he would withdraw if it continued, which it did, resulting in him withdrawing from the case.

The court had been advised that the solicitor was withdrawing and it was unlikely therefore that his client would not have been so informed.

The action taken by the solicitor was reasonable in the circumstances. The complaint was not upheld.

mandates - what clients should know

Clients should be aware that not everything in a case file belongs to them and that certain documentation can be retained by the firm.

The solicitor’s right of lien often leads to complaints. Explain to clients why firms can retain files and in what circumstances the firm must send paperwork on to the newly instructed firm.

In Legal Aid cases, SLAB can refuse the transfer of a Legal Aid Certificate to another firm. This possibility should be raised with the client.
internal complaint handling

why bother?

A good complaints handling system not only contributes to better client retention, but allows complaints to be looked at positively rather than defensively.

If approached correctly, complaints can provide a better insight into the needs and expectations of clients and, where justified, can be used to improve the service provided.

best practice

- Your firm must have an appointed Client Relations Manager, a clear written complaints process and an up-to-date complaints log.

- The Terms of Business letter should explain who clients should contact in the event of a complaint.

- Be open to discussing concerns as soon as possible after they arise.

- If matters cannot be resolved, you must signpost the complainer to the SLCC, as the ‘Gateway’ for all legal complaints.

- Information on the complaints process should be freely available to staff and complainers.

- Procedures should be in place to deal with all kinds of complaints and complainers, bearing in mind that complaints can come from anyone, not just your own client.
internal complaint handling

case example

The complaint:
The firm failed to respond to the complainant's initial complaint, to the intimation of the complaint by the SLCC or to the recommendations in the investigation Report.

The Committee also considered that there was more than one issue upheld.

After taking into account all the foregoing factors, the Committee decided that a levy of £1,700 was appropriate in this complaint.

section 40
guidance on first tier complaint handling

Under Section 40 of the Legal Profession and Legal Aid (Scotland) Act 2007, the SLCC may issue guidance in the form of "Best Practice Notes" and make recommendations about standards expected in relation to systems operated by practitioners for dealing with complaints.

All practitioners, not just Client Relations Managers, should ensure that they are aware of the guidance and advice and information issued by both the SLCC and the relevant professional organisation when dealing with all expressions of dissatisfaction.

The SLCC published First tier complaint handling - a guide to effective and efficient complaint handling for Scottish solicitors in June 2017.

Whilst this guidance is not mandatory, non-compliance will be taken into account where a complaint has been made. Any alleged failure to follow the guidance may result in a service or conduct complaint being admitted for investigation.
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