

# Guidance on the Instruction of Solicitors Agents by Inspectors in England and Wales

**OC 168/13**

**Version: 6**

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## Summary

This operational guidance replaces that previously held under OC 168/7. As with OC 168/7 this OC gives guidance on when a solicitor agent may be used, the procedures for choosing and instructing them, the duties of solicitor agents and the inspector's role and how the costs and quality of their work should be monitored. In cases where a solicitor was instructed prior to 23 April 2007 then that solicitor should continue to conduct that case until its conclusion. Where there are any difficulties you should refer to Solicitor and Advocate Liaison Team. Appendix 1 has been updated.

## Background - when to use a solicitor agent

1 HSE has recently appointed a panel of approved solicitor agents to provide advice on and conduct enforcement cases on its behalf in England and Wales, with the intention that solicitor agents better serve HSE as a whole.

2 The firms selected have been assessed against the following criteria: hourly rates charged, quality of written work, ability to provide legal advice and representation, ability to meet deadlines, expertise and experience, facilities to undertake the work and ability to work as a team, commitment to prosecuting health and safety cases and ability to undertake work in a particular geographical area. The object of the selection process was to ensure a consistent level of service and value for money. Members of HSE staff are entitled to expect a high quality service within the terms agreed with the agent solicitors. A list of firms, approved to act as solicitor agents for HSE, is to be found at ➔Appendix 1 ←. Those firms have been appointed for a period of three years and have been allocated to different HSE Divisions ( Wales and the West are treated separately because of the geographical distances).

3 Operational Band 3 and 4 staff must obtain the approval of a Band 2 before engaging any solicitor agents. Only those firms on the HSE approved list are to be instructed to undertake any enforcement work on behalf of HSE. This guidance sets out how and when to use solicitor agents for enforcement work. It replaces all earlier guidance on the management of solicitor agents but is not relevant to cases in Scotland. Inspectors are expected to be familiar with the contents of this guidance before instructing a solicitor agent.

4 As with any resource, inspectors are expected to use solicitor agent services appropriately. Inspectors are required to consider the arrangements for Independent Legal Oversight (ILO) (OC168/11) before instructing a solicitor agent. In addition solicitor agents should not be asked to undertake tasks that could be undertaken more cost effectively within HSE. Where the ILO criteria are not met it will be appropriate to consider consulting a solicitor agent in the following circumstances:

- a. where HSE is proposing prosecution on indictment, and/or the defendant has indicated an intention to elect Crown Court trial or where it is thought probable that the magistrates will not wish to hear the case themselves;
- b. in especially factually and/or legally complex cases;
- c. where the defendants or their solicitors indicate a procedural defence or are generally hostile or have made accusations about the behaviour of the inspector or HSE generally;
- d. where inspectors have become closely involved with an injured person or with bereaved relatives and would find a dispassionate court presentation difficult;
- e. where all inspectors in the group who are trained and competent to conduct cases are otherwise unavailable, including where the line manager judges other work they are doing to be of higher priority;
- f. defended cases other than in exceptional circumstances;
- g. for all cases in directorates where inspectors are not trained to conduct cases, and
- h. where directed by Legal Adviser's Office or Band 1 identifies a particular operational reason for engaging solicitor agents.

5 The named individual lawyers at the approved firms will not be permitted to accept instructions to defend cases brought by the Health and Safety Executive during the period of appointment (except with the written permission of HSE's Legal Adviser's Office). However the firms as a whole may have prior professional relationships. Those professional relationships may prevent them from acting for HSE against those clients. In anticipation that these issues might arise HSE has appointed a number of firms to each Division. If all those firms are conflicted, inspectors should contact Legal Adviser's Office for guidance. Every solicitor agent on the list will have procedures in place to deal with any consequent conflict of interest that might arise within their firm.

### **Procedure to follow when instructing a solicitor agent**

6 Once a decision to use a solicitor agent in a particular case has been taken and approved:

- The inspector should choose one of the appointed firms. All the appointed firms have satisfied HSE of their capabilities. In the first instance inspectors should seek to instruct one of the firms nominated for their area.
- The inspector should choose the solicitor agent from the list who is best able to supply the service in the most cost effective way. This may be by reference to who is closest to the relevant HSE office, the relevant Court, the amount charged, and/or experience to deal with a particular issue.
- The solicitor agent should be telephoned to confirm that the firm does not act for the defendant or any of its directors or partners; and that the solicitor agent can act for HSE. If there is a conflict of interest, such as the firm already being instructed by the Defendant then contact another solicitor agent in the region. In the event that the other firms cannot act, Legal Adviser's Office should be consulted in order to identify another firm.
- The folder of papers should be prepared in the normal way including any relevant information (including unused material that might undermine the prosecution and/or assist the defence), a brief summary of the facts, an explanation of any prosecution/enforcement decision (including statistics of accidents if relevant), possible defence arguments and any particular line the HSE would like taken. Original statements and exhibits should not be sent to the solicitor agent. However, there will be occasions when the solicitor agent requires sight of the original documents and/or exhibits. In these instances, it will be the duty of the Disclosure Officer or person in charge of the exhibits to arrange access.
- The folder of papers should be sent to the solicitor with a covering letter confirming instruction. It will usually be necessary to meet the solicitor to discuss the case. (The solicitor agent should return the folder after the expiry of the period for appeal unless otherwise agreed with the inspector.)
- Legal Adviser's Office must be informed. The relevant directorate/divisional finance manager should also be informed (with annual updates if appropriate) where the expected costs of using solicitor agents are likely to exceed £50,000.00. Solicitor agents should be able to provide estimates when they have considered the case papers.

## **Role of solicitor agents (CPIA and enforcement guide)**

7 The inspector who instructs the solicitor agent remains responsible, on behalf of HSE, for its overall management. Inspectors should discuss any concerns as the case progresses with their line manager. The involvement of a solicitor agent means that the particular solicitor acting for that firm will act as the 'Prosecutor' for the purposes of the Criminal Procedure and Investigations Act 1996 (CPIA). The approval officer will remain responsible for the prosecution decision and the Disclosure Officer will remain responsible for his/her distinct duties under the CPIA.

8 Solicitor agents are contracted to meet the standards below. They are expected to demonstrate their familiarity with the contents of HSE's Enforcement Guide and to follow the lines set out in that document and HSE's Operational Procedures. If they wish to depart from any of HSE's published policy lines in the course of conducting a case on behalf of HSE they must first obtain agreement from Legal Adviser's Office.

## **Monitoring solicitor agents**

9 HSE needs to ensure that it is receiving value for the money it spends on solicitor agents. Whilst a large proportion of costs are recovered it must be able to satisfy itself and Ministers that it is receiving a high quality legal service. Inspectors are therefore responsible for ensuring that solicitor agents comply with the requirements of this guidance and for completing a report on their

performance at the completion of a case or a piece of formal advice. The monitoring form is to be found at Appendix 2.

10 The monitoring form **MUST** be completed and submitted to the Solicitor Agent and Advocate Liaison Team (SALT) within 28 days of any case being completed or receipt of the invoice for formal advice.

11 If a solicitor agent does not carry out HSE instructions to the satisfaction of the inspector and/or their line manager, these failures should be discussed, initially with the firm. If the inspector does not receive a satisfactory response, s/he should contact the SALT in Legal Adviser's Office. SALT's role and responsibilities are set out in Appendix 3. SALT is there to support inspectors and to ensure that solicitor agents are managed appropriately in the best interests of HSE.

12 SALT can intervene at any time in the conduct of an HSE case by a solicitor agent and will be responsible for monitoring compliance with CPIA duties. In the event that the monitoring form suggests that the performance of the solicitor agents has fallen below the standard required by HSE then SALT will investigate. If the Solicitor and Advocate Liaison Team finds that the complaint is justified HSE reserves the right to terminate the contractual arrangements with the firm in question.

## **Performance standards for solicitor agents**

13 All approved solicitor agents have been appointed to work for HSE under a single contract. The previous terms of instruction should no longer be used. All approved solicitor agents now work under contract for a period of three years from the date of appointment and have agreed to work to the following standards:

### **Overall performance**

14 Solicitor agents are expected to supply high quality legal services to the HSC/E in support of the Commission Strategy, HSE's strategic programmes and statutory responsibilities. HSE's programmes are underpinned and supported by efficient and effective enforcement, thereby promoting delivery of HSE's goals. Solicitor agents should carry out this role in accordance with HSE's published policies, with particular regard to the Enforcement Guide, and in line with HSE's values. All prosecution cases should be conducted in accordance with the Health and Safety Commission's Enforcement Policy Statement and the Code for Crown Prosecutors.

15 Solicitor agents may be asked to undertake some or all of the following:

- advise generally as appropriate;
- prepare informations/summons;
- communicate/liaise with the courts and defendants (or their representatives);
- prepare advance information;
- advise on the contents of schedules and effect disclosure;
- prepare committal bundles;
- prepare for trial or a guilty plea (including preparation of a Case Summary);
- conduct advocacy in the Magistrates' Courts;
- brief higher courts advocates;
- support advocates in the higher courts;
- arrange conferences/consultations;

- liaise with HSE Legal Adviser's Office regarding issues of national importance and or matters of policy to ensure consistency, and
- report regularly to the inspector instructing the solicitor on behalf of HSE.

16 Once a solicitor agent has been appointed, that solicitor is entitled to expect the following from HSE:

- a willingness to work as a team and to accept legal advice;
- a properly investigated case in line with the provisions of the Criminal Procedure and Investigations Act 1996 (as amended) and the Code of Practice issued under Part II of that Act;
- witness statements which can be understood and contain admissible evidence;
- expert reports/statements (if required) which can be understood and which assist in proving the case;
- properly exhibited documents and real exhibits;
- a prosecution file prepared to HSE procedures;
- schedules of relevant Unused Material (where appropriate).

17 The approved solicitor agents will be retained for the period of the contract. Accordingly the named individual lawyers in those firms will not be permitted to accept instructions to defend any case brought by the Health and Safety Executive except with the written permission of the Solicitor and Advocate Liaison Team during the period of appointment. All HSE solicitor agents have procedures in place to deal with any consequent conflict of interest that might arise within their firm.

18 Solicitor agents are instructed by HSE and must act in the best interests of the HSE as a whole.

### **Charges and use of HSE resources**

19 Solicitor agents are required to retain an accurate record of costs incurred by and on behalf of HSE. Charges (or fees) should be calculated principally based on the time spent dealing with a matter. HSE will expect full details including time spent on any of the following:

- Meetings with client's employees and others (including time taken to prepare a written record of the meeting);
- Travelling, waiting, considering, preparing and working on papers;
- Making notes;
- Letters, e:mails, faxes in and out, making and receiving telephone calls;
- Research and preparation of any detailed costs schedules.

Time spent will be recorded in "units" of six minutes.

20 The solicitor agents have agreed to undertake HSE's work at set rates for the period of appointment. Details of rates are available at ➔Appendix 1 ◀, which sets out the rates for the individual members of the firms their position and hourly rate. The rates shown are exclusive of VAT.

21 Solicitor agents are expected to adhere to the procedures for case management (Appendix 4) and ensure that any advocate's work is necessary and proportionate to the instructions received.

22 Solicitor agents are required to inform the designated HSE representative who is managing the case in advance if any unforeseen additional work becomes necessary (e.g. due to unexpected difficulties or if the requirements or the circumstances significantly change during the course of the matter).

23 HSE will be invoiced at the conclusion of the prosecution or the solicitor agents' involvement for any outstanding amount. If the matter is terminated for any reason HSE will be invoiced for the amount of work conducted until that time. Solicitor agents are required to submit an interim invoice one month before the end of HSE's accounting year for payment of any outstanding work undertaken in that financial year that has not already been submitted for payment. If HSE requests a bill, or if it is necessary for the solicitor agent to request a payment on account, the solicitor agent will ensure that HSE is provided with reasonable notice, as and when the need arises.

24 Inspectors can request that the solicitor agent provides HSE with up to date information on the amount of the charges and expenses incurred at that point in time and any anticipated in the future. (Estimates are provided on the understanding that they are not intended to be fixed and costs will depend on the amount of time actually spent.)

25 Solicitor agents are not entitled to claim for the following matters: the initial preparation of disclosure schedules (CPI1, 2 and 3), taking statements, instructing experts, contacting witnesses, liaising with witnesses or other administrative tasks that could be carried out more cheaply in-house (except where court deadlines require it). Solicitor agents are expected to ensure that they are sufficiently represented at court e.g. to deal with witnesses etc. so as to avoid the unnecessary attendance of HSE personnel other than the investigating inspector.

### **Recovery of costs**

26 If the defendant is convicted, the solicitor agent must apply to the court for an order for costs to be paid by the defendant. Solicitor agents are required to apply to recover all the costs incurred by HSE (including fees for barrister and solicitor agent together with the cost of investigation, less VAT which can be recovered by HSE) from the defendant (as per R v Associated Octel Co. Ltd.)

27 At the conclusion of a case or the provision of formal advice the solicitor agent must send their bill to HSE for approval and payment. Detailed requirements regarding charges are set out in the section at paragraph 19. (In long running cases it may be appropriate to settle an interim bill or bills before the final hearing.) Law Society practice dictates that the invoice should show counsel fees, agent costs and disbursements separately. Any invoice that is not itemised in this way should be returned for amendment. Inspectors should check the bill carefully to ensure that the fees claimed are reasonable and in line with the Terms of Instruction agreed at the beginning of the case.

28 Inspectors should be aware of HSE's internal accounting arrangements. Items from a solicitor agent's invoice should be accounted against the following Expense Heads:

- i) 4613 Counsel Fees - for costs directly attributable to advocates and counsel.
- ii) 4612 Solicitor Agent Costs - for costs directly attributable to the work of the solicitor agent.
- iii) 4611 Legal Costs - for all other costs and disbursements.

29 In long-running cases the person managing the case should monitor the accumulation of the solicitor agent's costs. Concerns about possible excessive costs should be discussed initially with the band 1 and advice sought from SALT.

30 SALT will advise on any charges submitted by solicitor agents. Invoices can be submitted for scrutiny, advice and/or renegotiation if required.

### **Storage of documents**

31 Solicitor agents are responsible for ensuring the proper storage and security of materials supplied to them. Solicitor agents must retain their file of papers (except for those which HSE asks to be returned) for not less than 6 months after the conclusion of any appeal period or custodial sentence. The solicitor agents will not destroy documents, which HSE requires are deposited in safe custody.

### **Speed and timeliness of work**

32 Solicitor agents can be expected to provide advice as and when required. They should deal with correspondence and requests for information/advice/formal documents (such as Friskies schedules) within 7 days, or otherwise by agreement with the person managing the case on behalf of HSE. However solicitor agents must comply with all court and statutory deadlines and timetables where compliance is within their control.

33 If there are any matters, which undermine the prosecution case then they should be brought to the attention of the solicitor agent immediately in order to minimise the expenditure of unnecessary costs. Similarly if matters emerge during the course of proceedings the solicitor agent will be expected to bring this to the attention of the approval officer immediately in order to minimise the expenditure of unnecessary costs. Solicitor agents must inform Legal Adviser's Office immediately upon it coming to their notice that there is either a potential challenge to health and safety legislation or a challenge based on human rights legislation. The solicitor agent must similarly contact HSE for guidance on enforcement policy.

34 Once a matter is committed to Crown Court, the solicitor agent must contact SALT in writing as soon as practicable thereafter and no later than 14 days, to arrange the nomination of an appropriate advocate (see below).

35 Once a case has been concluded the solicitor agent must inform LAO and the person managing the case on behalf of HSE within 14 days of the outcome, returning the completed advocate monitoring form as appropriate. The solicitor agent must supply further details upon request.

### **Quality of advice and written work**

36 HSE is entitled to rely on the advice supplied by the solicitor agent. HSE is entitled to ask for that advice in writing. All advice must be clear and relevant to the issues in the case. Advice should be in clear straightforward language and address all legal points.

37 Solicitor agents are expected to advise on any issues that may arise in relation to investigations, particularly compliance with the requirements of the Criminal Procedure and Investigations Act 1996 and the Code of Practice issued under Part II of that Act. The solicitor agent should advise on the sufficiency, admissibility and quality of the evidence obtained, including the accessibility of expert reports/statements and the manner in which documents and other material is exhibited. The

solicitor agent must alert the inspector wherever there has been a failure to follow the Enforcement Guide or other published HSE policies. Inspectors should inform SALT wherever a case is dismissed on the direction of a judge. HSE does not expect cases to be dismissed due to no case to answer, where the reasons were within the control of the solicitor agent.

38 At all times the solicitor agent's client is HSE as a whole not any individual involved. The solicitor agent cannot therefore provide independent legal oversight. The decision to prosecute remains with the HSE at all times, although the solicitor agent's advice will be given due weight. Similarly the solicitor agent cannot fulfil the role of Disclosure Officer. The solicitor agent can advise on compliance with disclosure duties but must not undertake that role.

### **Managing advocates**

39 HSE is committed to using advocates from the Attorney General's Unified Panel of Prosecuting Advocates. Solicitor agents must not instruct any advocate to exercise rights of audience in the higher courts without first seeking the approval from Legal Adviser's Office. SALT will nominate an appropriate advocate based on the information supplied by the solicitor agent and will set the hourly rate to be paid to that advocate in the case. Solicitor agents must complete and return an advocate monitoring form (Appendix 6) to the SALT in any case in the Crown Court or above, or where an external advocate has been nominated, within 14 days of the completion of that case. The solicitor agents are required to accept any alternative nomination and monitoring procedures that may be introduced during the relevant period for their conduct of the case.

### **Relations with HSE**

40 The solicitor agent will form part of the team responsible for presenting the prosecution on behalf of HSE. The team may consist of the investigating inspector, the solicitor agent, a higher court advocate (if required), and possibly an expert at limited times during the prosecution. The solicitor agent should devote the time and demonstrate the commitment, level of accessibility to HSE staff and willingness to travel that is appropriate to the case.

41 Solicitor agents are expected to act with courtesy towards all HSE staff and in their dealings with external stakeholders, particularly victims and witnesses. If employees of HSE have any questions or concerns about the work of the solicitor agent the solicitor agent is expected to deal with those queries within 14 days. The solicitor agent is required to nominate a person within that firm to deal with any issues that cannot be dealt with satisfactorily by the lawyer with conduct.

## → Appendix 1

- List of approved solicitor agents



## Appendix 2 Solicitor agent monitoring form

HEALTH AND SAFETY EXECUTIVE  
**SOLICITOR AGENT PERFORMANCE MONITORING FORM**

The information provided on this form will be used for the purposes of (i) monitoring the performance of solicitor agents; and (ii) informing the HSE in considering future arrangements for the appointment/instruction of solicitor agents. The information may be seen by the solicitor's firm to whom it relates and will be made available within HSE. There has been Notification, as per the Data Protection Act 1998.

**NAME OF SOLICITOR'S FIRM:**

**NAME OF INDIVIDUAL SOLICITOR**

**POSITION IN FIRM**

**HOURLY RATE**

**NAME OF CASE** \_\_\_\_\_

**Range of Work:** 1. General Advice (not linked to the prosecution)

(Circle number) 2. Pre charge advice

3. Case Handling

**Reason for using solicitor agent?**

**Costs incurred by solicitor agent: £ Hours**

**Proportion of total costs recovered:**

(as detailed in the Cost Schedule presented to court)

**Who complied the disclosure schedules?**

General Comments (see overleaf):

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Name of Person Completing Form (Inspector in the case):

Date:

**PLEASE GIVE DETAILS IN THE COMMENTS BOX AS TO THE CHOICE OF RATING. THIS IS IMPORTANT INFORMATION WHICH ALLOWS US TO MONITOR THE SERVICE PROVIDED AND FOLLOW UP ON ANY ISSUES ARISING FROM IT. (Use an additional sheet if further space is required)**

**RATINGS: 1 = EXCEPTIONAL; 2 = GOOD/FULLY MET REQUIREMENTS; 3 = BELOW REQUIREMENTS**

Would you use this agent again?	YES	NO		
<p><b><u>OVERALL PERFORMANCE</u></b>                      Areas to Consider:</p> <p>Quality of legal service supplied, Did the solicitor agent follow the Enforcement Guide and other HSE policies? Was the Code for Crown Prosecutors and the Enforcement Policy Statement followed? Were charges/costs dealt with appropriately? How did the solicitor manage the advocate?</p>	1	2	3	Comments:
<p><b><i>SPEED/TIMELINESS OF WORK</i></b>                      Areas to Consider:</p> <p>Did the solicitor agent deal with all correspondence and requests for advice within 7 days unless otherwise agreed? Were all deadlines met? Did the solicitor agent contact you immediately if a problem arose with the case?</p>	1	2	3	Comments:
<p><b><i>QUALITY OF WRITTEN WORK</i></b>                      Areas to consider:</p> <p>Was all advice clear and relevant to the issues in the case? Was all advice written in clear straightforward language addressing all legal points?</p>	1	2	3	Comments:
<p><b><i>RELATIONS WITH CLIENTS/APPROACHABILITY</i></b>                      Areas to consider:</p> <p>Did the solicitor agent work well as part of your team? Was s/he accessible by phone, email etc and were messages returned promptly? Did the solicitor agent deal appropriately with victims or witnesses and do you feel that their manner was consistent with HSE's values?</p>	1	2	3	Comments:

## Appendix 3

### Solicitor and advocate liaison team (SALT): role and responsibilities

#### Role:

To act as the primary point of contact for operational staff and solicitor agents on related issues:

- SALT to be informed whenever a solicitor agent is instructed regardless of whether it is necessary to instruct counsel.
- Solicitor agents required to contact SALT if they wish to depart from any of HSE's published policy lines in the course of conducting a case as agreement is needed from LAO first.
- Solicitor agents must inform SALT/LAO immediately upon it coming to their notice that there is either a potential challenge to health and safety legislation or a challenge based on human rights legislation.
- Solicitor agent required to contact SALT for guidance on enforcement policy.
- Assist operational colleagues with consideration of solicitor agents invoices and advise in relation to the renegotiation of fees where appropriate.
- Promote the new procedures attending road shows etc where appropriate.
- Responsible for liaison with solicitor agents where a potential conflict arises and for authorising the instruction of a solicitor agent outside geographical Division.

#### Responsibilities:

- Maintain LAO's databases detailing ongoing and concluded solicitor agent cases, Solicitor Agent and counsel monitoring.
- Monitor compliance with HSE policies: HSC EPS, the Enforcement Guide and other Operational Procedures and the Criminal Procedure and Investigations Act 1996 (CPIA).
- Ensure casework quality assurance by recording results from monitoring forms and taking appropriate action.
- Investigate where a monitoring form indicates that a solicitor agent's performance has fallen below that expected.
- Advise inspectors where the standard of service expected from a solicitor agent has fallen below the standard expected.
- Carry out file audits of solicitor agent's case files, both random and whenever CPIA disclosure duties are engaged.
- Communication of nomination and hourly rate of advocates to solicitor agents, collating and reporting on advocate monitoring forms completed on behalf of HSE.
- Provide RCPO with a quarterly return in relation to counsel nominations.
- Preparation of an annual report to the Legal Adviser, HSC/E identifying annual expenditure on external enforcement legal services and sum recovered from courts, the performance of Solicitor Agents and efforts to improve that performance, common issues.

1 SALT is responsible for proactively monitoring cases that are being dealt with by Agents it is primarily dedicated to assisting inspectors in managing solicitor agents. This means that HSE will be in a better position to identify those agents that do not follow published guidance, and to take action where necessary, issue guidance detailing the performance of counsel/solicitor agents and where standards have fallen far below those expected by HSE applicable, instruct that they are no longer to be used.

2 As the single point of contact, SALT is in a position to ensure consistency in approach and that accurate and up to date information is maintained, which inspectors can then call on when selecting an appropriate solicitor agent. SALT will liaise with inspectors and solicitor agents for case details, be able to question when procedures are not being followed and provide a single point of contact when queries from the field and Agents come in. SALT is responsible for monitoring the fees and costs paid to Solicitor Agents to ensure compliance with the instructions and value for money.

3 SALT will use the data collected to prepare an annual report for the senior user group made up of operational Band 1s from FOD and HID.

4 The Solicitor and Advocate Liaison Team (SALT) will use the following procedures to ensure casework quality assurance:

### **Management of advocates**

5 On receipt of a request from a solicitor agent to nominate an advocate SALT will consider the request having regard to the facts of the case and the complexity and issues raised. A suitable advocate will then be nominated from the Attorney General's Unified Panel of Prosecuting Advocates and an hourly rate set from the LAO set fee range. A nomination letter will be sent to the solicitor agent detailing the nomination and the hourly rate at which the advocate is to be paid. SALT will then open a file and log the case on LAO's database ensuring that brief facts are given.

6 As updates on cases are received from solicitor agents these will be added to LAO's database so that an accurate picture of each case is maintained. Where regular contact is not maintained by an agent SALT will chase the agent for up to date information and maintain a record of those firms who do not maintain regular contact with the unit.

7 At the conclusion of the case the solicitor agent is required to write to SALT with details of the outcome, to include sentence and costs paid out and awarded by the court, and an advocate monitoring form. SALT will seek evidence that the advocate in question has been properly managed and only engaged to undertake that work which was necessary for the case to be presented. If these details are not forthcoming then SALT will chase the solicitor agent and record which agents who do not provide accurate and timely data.

8 Once details of the result of the case are received SALT will email the instructing inspector requesting a completed solicitor agent monitoring form if it has not already been sent in.

### **Monitoring forms**

9 Monitoring forms should be sent by the solicitor agent in relation to the work that the advocate has done, and from Inspectors in relation to the performance of solicitor agents. The information in relation to the advocate monitoring forms part of a mandatory quarterly return that is supplied to the Revenue and Customs Prosecution Office.

10 Ensuring that HSE has up to date and accurate information will enable SALT to monitor the level of performance of both advocates and solicitor agents, spot trends in good and poor performance and tackle any issues of concern at the outset to ensure that HSE continues to be provided with a good and effective service from those that it instructs. Providing accurate information has been sent to SALT at the commencement of a case SALT will be in a position to chase solicitor agents etc who have not returned their monitoring forms at the conclusion of a case.

## **Costs**

11 SALT will remind solicitor agents about the type of cases that they can and should accept and be robust in returning those cases which should be dealt with under ILO. SALT will be able to assist inspectors in ensuring that agents are providing value for money and will scrutinise invoices when requested to ensure that HSE is not paying for work that it could have done in-house or that a more junior member of the solicitor agent firm could have completed. SALT will assist inspectors in ensuring that agents are aware of what HSE expects in terms of hours spent on work and ensuring adherence to agreed hourly rates. SALT will also be able to provide assistance to agents who need to renegotiate counsel's fees.

## **File audits**

12 SALT will be in a position to randomly audit solicitor agents' files to ensure consistency of approach and adherence to HSE's published guidelines and procedures. SALT will not undertake a review of the evidence or consideration of any disclosure tests but will generally consider the following:

- Timely response to correspondence from defence and the court.
- Full review decisions recorded in relation to the evidential review and disclosure requirements. Evidence that the file is under continuing review.
- Accurate recording of costs in relation to hours spent on work. Evidence that work is being completed by those best placed to complete tasks rather than those that are the higher fee earner.
- Clear records of contact with those instructing the solicitor agent to include details of instructions given and evidence of how those instructions have been taken forward.
- Clear evidence that the advocate has been provided with all necessary information to enable him/her to prepare fully for hearing.
- Evidence that procedures in relation to case management plans have been followed. This is particularly important in large and complex matters where advocates will need to spend many hours preparing the case. SALT will expect to see regular contact with the advocate and/or his/her clerk, discussing hours of preparation and work anticipated to ensure value for money and realistic brief fees.
- Evidence that all court orders have been complied with in time, if this is not possible then evidence to show that the agent has done all that it could to comply with the court order ensuring that the defence and court are kept up to date with progress as necessary, and where appropriate the listing of the case for mention to seek further time.
- Evidence that the court has been served with papers on time and that such papers that have been served are clearly indexed and paginated.
- Evidence that any indictment has been lodged within the 28-day time limit.

## **Disclosure**

13 In relation to disclosure issues SALT will, in every case, engage in a random file audit once the duties to disclose under CPIA have been engaged. SALT will use the following questions to assess compliance with either CPIA or the CPIA as amended by Criminal Justice Act 2003. The questions relate to compliance with duties within the disclosure regime, and the taking of reasonable action to support an informed decision. The questions do not deal with the ultimate issue of whether the disclosure of material was correct as this could necessitate an assessment of all the unused material itself.

14 SALT will be interested in ensuring that the correct person complied with their responsibilities. Compliance by solicitor agents depends upon timely supply of correctly completed schedules by the inspector. A failure in this respect needs to be addressed by the solicitor agent, and failure to do so should be recorded. If the solicitor agent has taken all reasonable steps to address a failure by HSE then they will be treated as having dealt with disclosure properly, provided that the defence have been told that disclosure is deficient in that respect. As with inspectors, solicitor agents are expected to follow the guidance provided by the Enforcement Guide.

### **Initial/primary disclosure**

Was primary disclosure/the initial duty of disclosure properly complied with?

- Was the non-sensitive unused material schedule completed correctly?
- Was a disclosure officer's report and certificate provided?
- Was there evidence that the solicitor agent considered any potentially undermining material or material that might assist the defence before initial disclosure was made?
- Was there a record of the reasons for the decision in relation to primary disclosure?
- What steps were taken to address any deficiencies?

### **Continuing/secondary disclosure**

Was primary disclosure/the continuing duty of disclosure complied with?

- Was there an adequate defence statement?
- Was there a record of the reasons for the decision in relation to continuing or secondary disclosure?

### **Sensitive material**

Was any sensitive material dealt with properly?

- Was the sensitive unused material schedule completed correctly?
- Was there evidence that the lawyer considered any sensitive material that might potentially assist the defence before continuing/secondary disclosure was made?
- Did any unused material give rise to questions of public interest immunity?
- Was the appropriate type of PII application made?

### **Material held by other authorities/agencies**

Did the lawyer/counsel take the appropriate action (if any) in respect of any third party material?

## Appendix 4 - Procedures for case management of advocates

1 The Health and Safety Executive is under an obligation to consider ways in which the level of fees paid to counsel can be monitored. The Management Board for the Government Panel has asked whether this information can be included in the Returns on the Performance of Counsel. The efforts which are taken to monitor and control costs incurred before and during a prosecution will also form part of the Solicitor Agent monitoring process.

2 One way in which this might be achieved is through the use of Case Management Plans. The Crown Prosecution Service employs similar arrangements in heavy and complex cases. HSE does not wish to become overly bureaucratic, however it would be beneficial to have controls in place in order to avoid the large costs which have been incurred by Counsel, without prior agreement, in a number of recent cases. It is therefore suggested that HSE Solicitor's Office and solicitor agents employed on behalf of HSE should adopt a much simplified version of this scheme.

3 Solicitor agents will still be required to seek the nomination of Counsel before instructing them. Counsel must be on the list of approved Government prosecuting advocates. Solicitor Agents will be required to indicate whether the case is straight forward (e.g. committal for sentence, appeal against sentence to the Crown Court). In cases requiring more extensive preparation, in addition to the name of nominated Counsel, HSE Solicitor's Office will also indicate the hourly rate at which that Counsel is to be paid.

4 The hourly rate that is to be paid should be indicated in the brief to Counsel. Counsel should then be asked to complete the Action Plan and return to the instructing lawyer for agreement. Counsel will not be paid for work that has not been previously agreed with either the allocated lawyer or caseworker with conduct of the case. It should be made clear to Counsel in the instructions that work which is included in the approved Action Plan will not require additional formal instructions but if work is undertaken that does not feature in the approved Action Plan the onus is on Counsel to show that this additional work was completed as a result of instructions. Counsel will not be paid for work where he or she is unable to show that there were appropriate instructions from the lawyer and/or caseworker.

5 The Case Management Plan will consist of two documents: the Action Plan; and the Work Plan (see below).

6 Counsel will, upon consideration of the papers, record his or her estimate for preparing the case for trial on the Action Plan. That estimate must be agreed with the designated lawyer or caseworker who will specify on the Action Plan when that work should be undertaken, for example Solicitor's Office will not usually agree to Counsel advising on jury bundles until after the Plea and Directions Hearing. The Action Plan must be signed by the lawyer or caseworker, copied, and then returned to Counsel, with any amendments.

7 Counsel will be required to record all work undertaken on the relevant case on the Work Plan, together with the hours in which they were engaged. If it is necessary Counsel's Clerks may seek to extend the number of hours allowed for particular tasks. If it appears that the hours allowed will be insufficient for the proper preparation of a case then the onus is on Counsel to revert to the person with conduct to renegotiate the Action Plan. If Counsel does not obtain prior agreement to work additional hours he or she may not receive payment for those additional hours.

8 It will be necessary to explain these new arrangements to Counsel in your instructions.

9 All lawyers will be required to submit a copy of the completed Case Management Plan with the Counsel Monitoring Form at the end of the case.

10 If you are in any doubt as to the content of this Memorandum or the operation of the Case Management Plan then please do not hesitate to contact the Solicitor and Advocate Liaison Team in Legal Adviser's Office.

Appendix 5 -

**ADVOCATE CASE MANAGEMENT PLAN  
HEALTH AND SAFETY EXECUTIVE, LEGAL ADVISER'S OFFICE**

<b>PART 1 ACTION PLAN</b>					
<b>Regina (HSE) - v- .....</b>					
<b>No:.....Court:.....</b>					
<b>Counsel:.....Caseholder(s):.....</b>					
Work to be undertaken by Counsel	Counsel's estimate	Caseholder(s) Approval/Comments	Action Date	Further Action Agreed	Action Date
1. Read Papers and confirm in respect of each defendant and each charge or count (i) evidential sufficiency (ii) plea acceptability (iii) requirement for further evidence					
2. Listen to audio tapes View video tapes					
3. *Check / settle indictment (*Delete as appropriate)					
4. Consider unused material: (i) Service (ii) Disclosure (iii) Non - disclosure					
5. Conference required with inspector and / or expert					
6. Friskies Schedule					
7. Case Summary					
8. Consider the reduction of the case by: (i) the elimination of unnecessary material (ii) the drafting of S. 10 admissions					
<b>Regina (HSE) - v - .....</b>					
<b>No:.....Court:.....</b>					

Work to be undertaken by Counsel		Action Date	1st Review date:..... Reviewed by:.....	1st Review Date:..... Reviewed by:.....		
			Further action agreed	Action date	Further action agreed	Action Date
9.	Liaison with defence counsel in connection with: (i) anticipate pleas (ii) admissions (iii) schedules etc. (iv) witnesses (v) legal submissions (vi) editing of records of interview (vii) content of jury bundle including photographs (viii) content of opening					
10.	Consider use of schedules, glossaries and graphics					
11.	Preparation of schedules, glossaries and graphics.					
12.	Preparation of jury exhibits.					
13.	Preparation of order of witnesses.					
14.	Final preparation for hearing.					
15.	Other work (specify)					
<p><b>Regina HSE) - v - .....</b>No:.....<b>Court:</b>.....</p>						
<b>Estimated hours of preparation</b>				<b>agreed hours of preparation</b>		
<b>Counsel</b>			<b>Instructing Solicitor</b>			



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## APPENDIX 6

This form may be disclosed to the Advocate on request under the Data Protection Act 1998

### ATTORNEY GENERAL'S UNIFIED LIST OF PROSECUTING ADVOCATES PERFORMANCE MONITORING REPORT

Please refer to the separate guidance for notes on how to complete this form

<b>Prosecuting Department</b> (Delete as applicable)	RCPO BERR DWP HSE EA DEFRA ORR OFSTED
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Name of Counsel	Name of Case	Court

Person observing	Activity observed & date/s	Duration

Performance indicator	Comment	To be completed by Case Lawyer/Case Manager			
		1	2	3	4
What did counsel achieve?					

How well did counsel understand and marshal the case?					
How did counsel relate to the rest of the case team?					
Did Counsel miss anything?					
Would you recommend this counsel to a colleague?					

**Signed:**

**Case Manager**

**Case Lawyer:**

**Names:**

**Date**

<b>Division/Unit Head comment</b>	
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# ATTORNEY GENERAL'S UNIFIED LIST OF PROSECUTING COUNSEL

## GUIDANCE FOR COMPLETING THE PERFORMANCE MONITORING REPORT FORM

Updated January 2008

This form is designed to ensure that staff at instructing departments who observe counsel in action provide meaningful feedback about counsel's performance. It requires some thought in completion and may be disclosed to counsel under the Data Protection Act 1998.

Completion is **mandatory** in all cases. There is no limit to the number of times a form may be submitted during the lifetime of a case, but at least one is required at the conclusion of a case.

You are asked to record:

1. The name of counsel
2. The name of the case
3. The court
4. The name of the person observing counsel (this might be the case lawyer, the case manager or another member of RCPO attending in their place)
5. The activity observed (e.g. trial, PDH, mention, other application, conference, written advice received). This list is not exhaustive.
6. The duration – was counsel seen over a period of minutes, hours, days, on several occasions?

You are then asked to answer 6 specific questions. Please try to limit your answers to a maximum of 100 words for each question, unless there are particular reasons for writing more.

The Case Lawyer or Case Manager should also complete the last column, indicating if in their view, the performance is:

- Very Good (box marking 1)
- Good (box marking 2)
- Satisfactory (box marking 3)
- Poor (box marking 4)

**Please be aware that your comments may be used in any further Counsel recruitment exercises.**