Solicitors Regulation Authority

Criminal Advocacy

Thematic Review

Contents

Executive summary

Criminal advocacy is an area that has come under increased scrutiny from both a public and political perspective particularly following:

- the suspension of the Quality Assurance Scheme for Advocates (QASA)
- The Review of Independent Criminal Advocacy (The Jeffrey Review)[1] - a 2014 government review looking at training, skills and standards in criminal advocacy.

It is a fundamental area of concern for us, given its importance in:

- maintaining the public's trust in the legal system
- consumer protection
- upholding the rule of law and the proper administration of justice.

Despite this, it is not an area of law that attracts a high volume of complaints to us from the public, firms or indeed the judiciary. As a result, this thematic review was commissioned to give us an opportunity to proactively improve our understanding of the sector, its challenges and the potential risks.

Key findings

- The majority of firms demonstrated good practice in most areas of their criminal advocacy work, yet there were areas for improvement for some firms, such as in the quality of training

- The market is dominated by smaller firms, but in recent years there has been a reduction in both the overall number of firms and new entrants choosing to practise in this area. As criminal law is practised by an ageing profession, this could mean there are quality and capacity issues over the long term.

- Level of complaints regarding advocacy work are relatively low - during a 24 month period there was only 22 recorded complaints across all of the 40 sample firms. This may be because clients do not know what good service looks like, or that clients who are vulnerable or of low literacy would find it difficult to complain.

- Approaches to training were inconsistent, with its delivery often infrequent, limited or not planned. More focus could be placed on formal observation of solicitors in court to monitor advocacy skills. Firms also stated they would welcome more advanced advocacy training geared towards the Crown Court.

- Firms generally tailor their approach to dealing with young and vulnerable clients, with many experienced solicitors active in youth courts. Yet they could do more, for instance by using intermediaries to assist with communication with vulnerable defendants.

[1] www.gov.uk/government/publications/independent-criminal-advocacy-in-england-and-wales

- Firms use in-house solicitors to support the vast majority of criminal work in magistrates' courts (90 percent) and youth courts (89 percent), and 29% of work in the Crown Court.

- Advocate experience and client choice are the two main factors firms take into account when allocating work.

- We found no evidence of serious misconduct. For instance, inappropriate referral arrangements or touting for clients. However,there were continued concerns expressed about third parties touting for business at police stations and youth courts.

Findings by area covered

Introduction of Clients

- We found no evidence of payment or receipt of referral fees among the criminal practitioners we met with. Practitioners tended to get their work from a wide range of sources.
- We found no evidence of touting during our file reviews. However, firms confirmed that this remained a problem, particularly with clients in custody and prison.

Choice of advocate

- In the last 12 months, the average percentage of sample firms who kept criminal work in-house was 90% in the magistrates' court, 89% in the youth court and 29% in the Crown Court.
- Firms take into account a variety of factors when choosing a criminal advocate for a case. Advocate experience and client choice are the two main factors.
- A decision on choice of advocate is generally made by firms as early on in the process as possible, to make sure that there is continuity in representation.
- Generally, firms verbally explain choice of advocate to clients, but only a limited number of firms recorded the options and reasons for choice of advocate in writing.
- Only 5% of firms had advocates who worked on a guilty plea only basis.
- 78% of firms stated that the same advocate will often deal with the case from start to finish in the magistrates' court.
- 63% of firms said that the same advocate will often deal with the case from start to finish in the Crown Court.

The youth court

- There are a lot of experienced solicitors and solicitor advocates doing youth court work.
- At the majority of firms, all advocates will do youth court work. Managers and heads of criminal practice tend to see youth court work as part of day-to-day practice.
- Eight of the sample firms had specialist youth court advocates. However, some firms said it was no longer profitable to have specialist teams due to the drop in the number of youth court cases.

- Firms use various methods to keep their competency in youth court work up to date. Electronic resources, such as Crimeline (an online subscription resource which provides legal updates), were the most popular.
- Four firms had not conducted any specific training in relation to youth court work.
- Most fee earners felt that youth court work was more demanding than adult work.
- Firms should consider using a number of different resources, including training in various areas such as advocacy. This is particularly important for those firms who tend to rely on 'on the job' training as there are now reduced opportunities to develop advocacy in the Youth Court.
- Advocates would benefit from specific training on how to engage with young clients.
- Managers felt it was important to build rapport with the client and understand their background. Good advocates said it was important to take time to understand their client's key issues.
- Firms had various strategies for dealing with young and vulnerable clients.
- However, more firms could make use of intermediaries, registered people who assist in communicating questions and answers to and from vulnerable defendants.
- There were some good examples of firms working with charities and other professionals to get the best outcome for their client.
- The majority of firms said they would work with the prosecution and the youth offending team (YOT). The managers' views of their local YOT were largely positive.

Competency, supervision and training

- Getting client feedback and file reviews were the most popular supervision procedures.
- 21 firms said they would informally observe their advocates in court as part of supervision. There was a formal observation and review process at five firms.
- Several firms said they relied on their advocates' PQE experience as a measure of competency. However, firms should not purely rely on this measure.
- Firms provided various training to their criminal advocates. Delivery of this training was sometimes left for long periods of time and some firms said they had never provided training in key areas.
- Firms took a number of actions when dealing with more vulnerable clients, including providing training, the use of counsel and experts.
- Some firms said that advocacy training for solicitors was limited and not geared towards the Crown Court. They would welcome more advanced training.
- Other useful training could involve the use of digital court systems.
- Firms tended to rely on electronic resources, such as Crimeline and Datalaw, to keep their day-to-day knowledge of criminal law and procedure up to date.

Case preparation

- Firms placed an emphasis on case preparation.
- The majority of firms felt they had sufficient time to prepare for hearings.
- There was no standard process for case preparation and each matter is dealt with individually.

- Warned trials, where a trial may begin if there is court time and space available, limited the firms' ability to prepare.
- Firms had processes and procedures in place to make sure matters were handled consistently between advocates.

Complaints and concerns

- Only 22 complaints in relation to criminal advocacy were received by the whole sample in the 24 months before the thematic review.
- 19 of those firms stated they had never received any advocacy-related complaints.
- Some firms stated that providing early and clear advice to clients helps manage expectations and avoids complaints.
- Three firms had received judicial criticisms of one of their criminal advocates.

Sector picture

- Firms in criminal practice tend to be small and have traditional management and ownership structures.
- The number of firms in criminal practice in a region may not be proportionate to its population or crime rate.
- Criminal law is generally practised by an ageing profession and there appear to be fewer new entrants.

Conclusion

This review has examined issues raised by a number of internal and external stakeholders. We have worked with a broad range of firms who provide criminal advocacy on behalf of a wide range of clients. The firms we interviewed have largely welcomed the thematic review and the focus on the criminal area of practice.

The majority of firms showed good behaviours and we did not encounter any issues in this review which resulted in any firms being subject to our disciplinary processes. This is despite having to meet the particular challenges of the last few years, including significant changes in the legal aid sector.

Future steps

Criminal Advocacy will remain a key area for us and we will continue to progress the findings from this report and provide support to practitioners in the sector. As part of this, we will be considering the following further steps to support this report:

- The youth court findings in this report will be included in the youth court materials on our website.
- Continuing to work with other regulators to help keep consistent standards of advocacy across the court system.
- Continuing to encourage the reporting of touting and maintain a strong position on inappropriate behaviour.

- Sharing these findings with the Legal Aid Agency and the Ministry of Justice (MoJ).
- Continuing to promote our new approach to continuing competence by encouraging solicitors to reflect on the quality of their criminal advocacy service.

Introduction

A proactive approach to the competence of advocacy in the criminal courts is needed to maintain public confidence, ensure consumer protection, the rule of law and proper administration of justice.

Solicitors automatically have rights of audience in the magistrates' court and the youth court. If they pass a further advocacy assessment, they gain rights of audience in the Crown Court, Court of Appeal and Supreme Court. In this report, we refer to solicitors with higher rights as 'solicitor advocates'.

This thematic review took place against a background of increased scrutiny of the quality and future of criminal advocacy. Concerns have been raised over a decline in the quality of criminal advocacy, leading to a number of reviews and initiatives:

- the Jeffrey Review[2]
- a Government consultation paper, Preserving and Enhancing the Quality of Criminal Advocacy[3]
- the development of the QASA scheme
- the Review of the Youth Justice System (the Taylor Review)[4]
- our 2015 consultation, Improving Regulation: Targeted and Proportionate Measures, which included referral arrangements in criminal cases, particularly involving legally aided work[5]
- the Law Society's consultation exercise in relation to touting[6].

This report discusses the findings and concerns raised in all these papers.

[2] www.gov.uk/government/publications/independent-criminal-advocacy-in-england-and-wales
[3] consult.justice.gov.uk/digital-communications/enhancing-the-quality-of-criminal-advocacy/
[4] www.gov.uk/government/uploads/system/uploads/attachment_data/file/577103/youth-justice-review-final-report.pdf
[5] pp. 21-22: www.sra.org.uk/documents/SRA/board-meetings/2015/board-2015-09-09-improving-regulation.pdf
[6] *Law Society supports efforts to tackle solicitors who 'tout' for criminal legal aid work*, 31 October 2016

Our approach

Objectives

Our objectives were to:

- Gain a better understanding of the criminal advocacy sector in all courts by:
    - analysing data held by us about firms involved in the sector, to establish size, nature, structure and the make-up of firms, eg solicitor advocates, in-house, barristers.
    - reviewing the practices and behaviours of sample firms by testing their systems and processes to identify risk, and to provide assurance to us about the level of risk posed.
- Engage with firms to explore their practices and behaviours and cover areas such as:
    - how firms assess and select their advocates
    - complaints received by firms about quality of work by solicitor advocates[7]
    - the procedure behind in-house instructions
    - the use of “referral fees” or other types of fees.
- Test the prevalence and raise awareness of best practice and ethical conduct.
- Challenge poor behaviour and practices, with a view to encouraging process change and improvement.
- Identify whether any firms have breached the core professional principles and take regulatory action, where appropriate.

Selection of firms

At the time of this thematic review, 1,988 firms told us they did criminal work when applying for the annual renewal of their solicitors’ practising certificate. We then divided them into four groups, based on the percentage of criminal work they carried out.

These were:

- 11 to 25%
- 26 to 50%
- 51 to 75%
- 76 to 100%

We excluded firms which had fewer than five qualified staff. This was to make sure we looked at firms likely to have a variety of advocates to choose from.

We then randomly selected 10 firms from each of the four groups. All 40 firms held a legal aid contract.

[7] For the purposes of this thematic review, this means all solicitor advocates except those with exclusively civil higher rights

Chosen research/interview methods

We produced a uniform, three-part questionnaire:

1. An online survey, to be completed by the firm.
2. A one-to-one meeting between a member of the Thematic Team and one of the firm's managers or head of criminal practice, lasting around two hours.
3. A one-to-one meeting between a member of the Thematic Team and a fee earner from the firm.[8] This fee earner would have to hold a criminal caseload, including a review of a criminal file in which there had been at least one hearing. This would last around one and a half hours, and the questions would be different to those asked of the manager or head of criminal practice.

Demographics of the sample

We asked sample firms to tell us the main region in which they carried out criminal work, rather than where they were based, as well as any other regions.

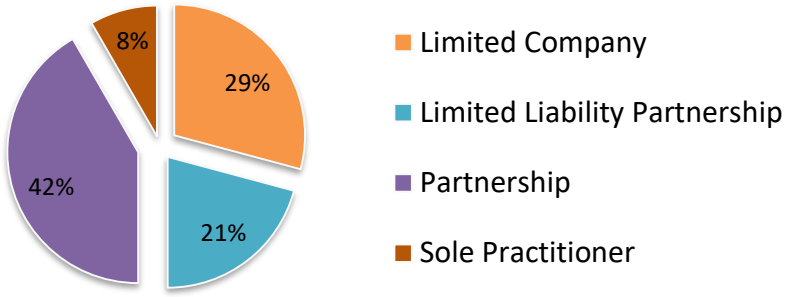
We found that the highest numbers of sample firms were based in the North West and London, which, according to our records, does broadly reflect the national spread of criminal firms.

Regions where firms carry out criminal work

The majority (29) undertook 90 to 100% criminal legal aid work, while only two firms did less than 50%.

[8] In practice, this could be with the manager who carried out the initial interview if no fee-earners were available.

Types of corporate structure

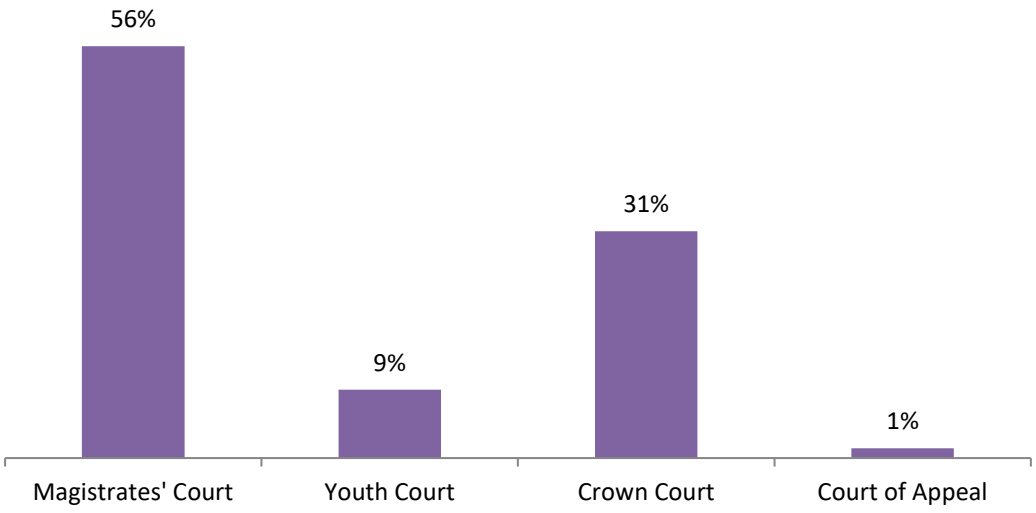


Number of managers in firms

The sample was largely representative of the criminal law population as a whole, with the majority of firms being smaller firms and partnerships. Three firms in the sample fitted our definition of a "small firm", ie a firm with four or fewer managers and no more than £400,000 per annum turnover[9]. The sample had a lower proportion of small firms (by our definition) than in criminal practice as a whole.

[9] www.sra.org.uk/solicitors/small-firms.page

Average percentage of firms working in the following courts

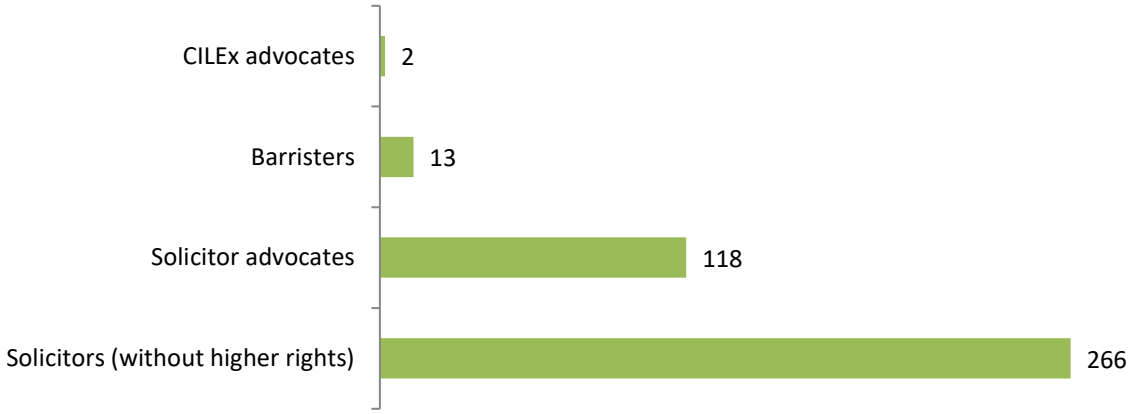


We asked firms about the percentage of criminal cases they handled in the courts. The chart above shows the average percentage of work for each court. None of the sample firms said they worked in the Supreme Court.

The 40 firms in the sample represented a total of 399 legal practitioners, consisting of:

- solicitors without higher rights, who can act in the magistrates' and youth courts
- solicitor advocates
- barristers
- CILEx advocates, legal executives who have passed an advocacy assessment giving them rights of audience in the magistrates' and youth courts and rights for certain hearings in the Crown Court.

Legal practitioners by qualification



As well as qualified lawyers, many firms employed fee-earning staff without legal qualification. These included practice managers, legal clerks and litigators. Many of these employees had an active involvement in criminal cases, such as handling case administration or acting as a point of contact for the client. They could also play a role in selecting external advocates for cases.

Introduction of clients

Concerns

Our 2015 consultation[10] discussed concerns that improper referral fees were frequently paid and received by firms within the criminal sector in return for work. In particular, it was suggested that financial incentives were being used to poach clients from other firms.

Concerns were also raised in the consultation about firms touting for criminal work. Typically, this might include solicitors improperly influencing other firms' clients to instruct them, impersonating a genuine duty solicitor or approaching other firms' clients in prison. We sent an open letter to the Law Society in October 2016[11] encouraging members of the profession to report touting.

The SRA Code of Conduct 2011 (the Code) prohibits payments to introducers in criminal proceedings or where an individual has the benefit of public funding[12].

Key findings of the thematic review

- We found no evidence of payment or receipt of referral fees among the criminal practitioners we met with. Practitioners tended to get their work from a wide range of sources.
- We found no evidence of touting during our file reviews. However, firms confirmed that this remained a problem, particularly with clients in custody and prison.

Findings

Firms received work from a variety of sources. The three most common (in order) were:

- existing clients
- the duty solicitor scheme
- recommendations from existing clients.

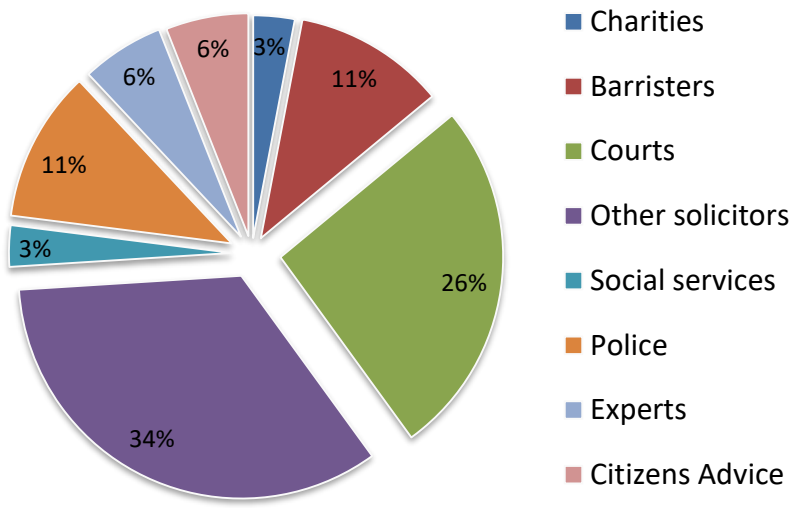
We found no evidence of firms paying referral fees.

[10] pp. 21-22: www.sra.org.uk/documents/SRA/board-meetings/2015/board-2015-09-09-improving-regulation.pdf
[11] www.sra.org.uk/sra/news/press/touting-clampdown.page
[12] Outcome 9.6.

Firms placed an emphasis on their reputation and said this stimulated repeat work and recommendations from existing clients. The majority of firms believed that this helped to self-regulate the criminal legal sector.

We asked firms to provide details about third-party introducers. Of our firms, 35 gave a response, while the remainder said they did not have any third-party introductions.

Firms' source of work



Our review of fee earners' files reflected the comments made during our meetings with firm managers and heads of criminal practice:

- 15 files featured an instruction from a client through the duty solicitor scheme
- 14 files featured an instruction from an existing client.

Of the firms we spoke to, 12 received work from other law firms. Firms explained that this was typically because the referrer had left the criminal advocacy sector or was in a different geographical location. The arrangements were informal and there was no evidence of financial incentives being provided or received.

Nine firms received work direct from the court. The appointments occurred either when unrepresented individuals arrived at the court and requested a lawyer or when a third-party appointment was required by statute. In particular, sections 34 to 36 of the Youth Justice and Criminal Evidence Act 1999 prohibit unrepresented defendants from cross-examining vulnerable witnesses and sexual offence complainants. Courts appoint solicitors in these circumstances.

Touting

Eleven firms gave specific details about their experiences of touting. The majority provided concerns about practices within prisons. Interviewees raised the following typical experiences:

- clients in custody have been approached by other firms within prisons
- clients receive unsolicited letters from large firms offering services. It is not clear how these firms would know who the client was or where they were imprisoned.

In addition, interviewees gave anecdotal examples of touting. They told us:

- one individual impersonated a probation officer to gain access to the prison and made a client sign a legal aid form
- one individual had been known to push business cards beneath doors in police station cells
- solicitors have attended court to find an unknown person with their client. The client then told the solicitor that they had been told the unknown person was from the solicitor's own firm.

Despite a number of these examples, only one firm had actually reported an incident of alleged touting to us. Firms said they resolved these issues informally among themselves, eg by speaking direct with the firm involved. They also said they were not always sure that they had enough evidence to make a report to us. We reminded firms that directly approaching members of the public for work is prohibited by the Code and is potentially serious misconduct. All members of the profession are under a professional obligation to promptly report serious misconduct by third parties to us. This is clearly an area where firms are under-reporting issues to us.

Good Practice	Poor Practice
• Obtaining work from a variety of legitimate sources. • Firms acting independently and free from adverse interference. In particular, firms did not have referral arrangements in place that generated financial incentives. • Placing an emphasis on excellent service to encourage repeat work and recommendations. • Promptly reporting any incidents of touting to us.	• Touting for work. • Failing to report third parties who touted for clients.

Choice of criminal advocate

Concerns

The Jeffrey Review[13] raised concerns about the quality of criminal advocacy. There was, in particular, a concern that advocates working in smaller solicitor practices would, for commercial reasons, work on cases that were beyond their expertise.

The Jeffrey Review also noted the Bar Council's statement that some solicitor advocates were being pushed by their employers to take on cases "which are far beyond their experience and of a difficulty in excess of their talents"[14].

Given the concerns raised in the Jeffrey Review and the proposals put forward by the MoJ, there is a need to better understand the:

- internal processes firms use to select appropriately experienced advocates
- factors influencing the choice of advocate
- the level of court in which solicitors exercise their rights of audience.

Key findings of the thematic review

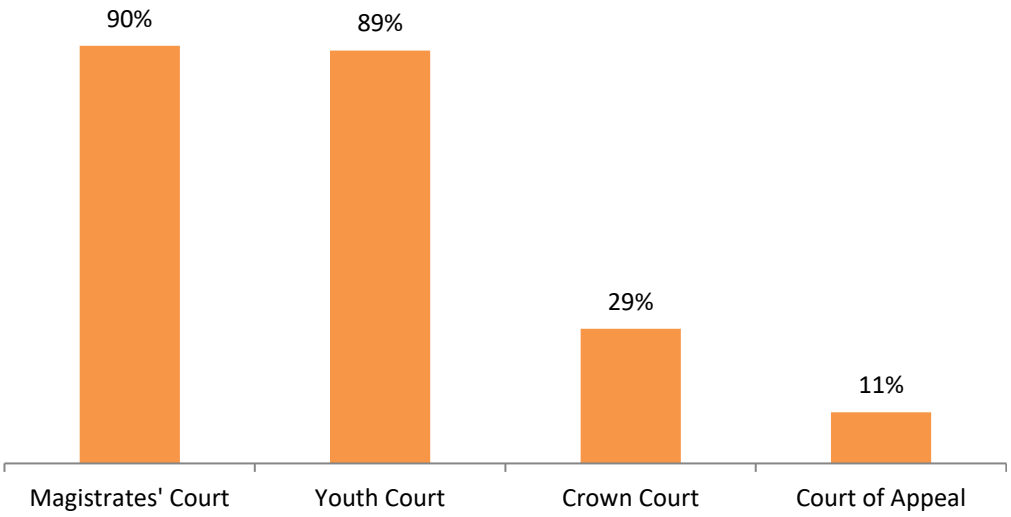
- In the last 12 months, the average percentage of sample firms who kept criminal work in-house was 90% in the magistrates' court, 89% in the youth court and 29% in the Crown Court.
- Firms take into account a variety of factors when choosing a criminal advocate for a case. Advocate experience and client choice are the two main factors.
- A decision on choice of advocate is generally made by firms as early on in the process as possible, to make sure that there is continuity in representation.
- Generally, firms verbally explain choice of advocate to clients, but only a limited number of firms recorded the options and reasons for choice of advocate in writing.
- Only 5% of firms had advocates who worked on a guilty plea only basis.
- 78% of firms stated that the same advocate will often deal with the case from start to finish in the magistrates' court.
- 63% of firms said that the same advocate will often deal with the case from start to finish in the Crown Court.

[13] p.22
[14] paragraph 2.5, p.22

In-house advocacy

Firms were asked what percentage of criminal advocacy work they carried out in-house in various courts in the last 12 months.

Percentage of criminal advocacy work carried out by one of the firm's advocates in the past 12 months



As expected, the majority of magistrates' and youth court work was carried out in-house. We found that only 29% of Crown Court work was carried out in-house, despite the number of solicitor advocates in the sample of firms.

Factors influencing the choice of advocate

Firms were asked how they made sure their financial interest to keep advocacy work in-house did not conflict with the best interests of the client. There is a concern that firms could keep advocacy work in-house to retain the fees, regardless of whether this was in the client's best interests.

We asked firms about how they chose an advocate. Managers were asked to rank the top five factors in the order of influence over the choice of advocate. The results are ranked below:

Item	Overall Rank	Rank Distribution	Score	Total Respondents
Advocate's experience	1		413	38
Client choice	2		386	37
Advocate's legal specialism	3		267	26
Needs/vulnerability of the client	4		203	21
Advocate availability	5		194	21
Continuity of representation	6		151	16
Advocate's reputation	7		125	13
Advocate's technical specialism	8		111	12
Advocate works at our firm	9		67	7
Geographical location	10		36	4
Other	11		29	3
Cost	12		18	2

Review of skills, experience and competence

Firms will generally review the skills, experience and competence needed on a case when deciding which advocate is chosen. Cases with a low level of seriousness or complexity can be dealt with efficiently in-house.

Advocates at some firms often had in excess of 25 years' experience and were considered able to pick up all levels of case in any court. One firm stated that although it could have a separate Crown Court team due to the volume of Crown Court work it receives, it did not have the experience to carry out these matters. This work was sent to external barristers, generally referred to as 'counsel'.

Some advocates within firms expressed a personal preference not to carry out Crown Court work. Others enjoyed the challenges this type of work offered. Where fee earners expressed discomfort with the type of work, cases were allocated elsewhere.

A number of firms have advocates with certain legal and technical specialism, such as motor offence expertise. This was a key factor in allocating work. Some firms have specific teams set up to accommodate magistrates', Crown or youth court work. They may also have their own in-house advocacy team to conduct work in specific courts. Other firms robustly stated that they employed experienced advocates at considerable cost and it did not make sense not to use them.

Firms will generally send Crown Court matters to external counsel, although 22 firms had experienced in-house advocates who carried out Crown Court cases. Serious cases such as rape, sexual abuse or murder tended to go to external counsel.

Another factor firms considered was the experience of external counsel to conduct cases in the magistrates' court. Some firms stated that experienced counsel might not be willing to attend the magistrates' court. Firms said they were often offered advocates who were junior, and lacked the skills and experience necessary to properly do this work.

Client choice

Client choice is a key driver taken into account by firms. If a client asks for a particular advocate, firms will generally try to meet that request. Client choice is given increased importance as some firms have a number of established clients that provide repeat business. These clients, having been through the system before, selected their own advocate and firms were keen to accommodate these requests.

Client choice is not always a decision that is made at the outset. Some firms emphasised that it extends to client's changing advocates further along the process. This may be because the client is unhappy or uncomfortable with the advocate selected.

Firms acknowledged that clients like a familiar face and they may even see several generations of the same family. Some advocates have known adult clients since representing them in the youth court.

One of the firms interviewed actively promoted client choice. Clients are informed that they will only get one opportunity in the Crown Court and they must be happy with their advocate.

Characteristics of the advocate

Firms might look at an advocate's reputation and personality as well as the needs of the client. Firms also stated that they considered factors such as:

- the client's needs and vulnerability
- a good working relationship between the client and the advocate
- the likes and dislikes of the client and advocate.

Some clients expressed a desire for a robust advocate due to the nature of the case. Drugs cases at one firm were generally passed to a specific advocate because he had a reputation as a "fighter". Youth court work, where there are a number of vulnerable witnesses, was passed by one firm to a particular advocate because of their honed soft skills, which they hoped would get a better response from clients and witnesses.

Availability and continuity

Firms will check advocate availability before allocating cases. One firm had an advocate who was also a part-time judge. Prior to accepting any case, he would check his availability. If there were any issues, he would refuse to accept a matter, even if there was a chance he might become available.

Another firm operated a cab rank system, where cases were passed to whoever was available. Each member of staff at the firm has over 20 years of experience and is able to deal with all types of work.

Continuity is an important factor for clients and was therefore a key driver that firms took into consideration. Having the same individual represent the client from start to finish in a series of hearings is important when building a relationship of trust. A number of firms identified this as a significant benefit they could offer clients and therefore made every effort to make sure the same advocate handled the matter from beginning to end. This involved choosing an advocate early on in the process.

We found youth court work was generally kept in-house, unless it was complex or involved serious allegations of a sexual nature where it could then be sent to external counsel.

Reputation and providing a good service

Making sure a client was happy with the service they received was a key consideration for most firms. A poor service affects the firm's reputation and is unlikely to lead to repeat work. It is therefore both in the client's and firm's best interests to make sure that the correct choice of advocate is made, irrespective of financial considerations.

One firm stated that getting the right advocate for the client was its primary consideration. Retaining work in-house but having an unhappy client at the end of a matter made no sense. Another firm also regarded client loyalty as a key factor. It wanted to satisfy each client and give them the best possible experience. This was because clients were knowledgeable and would move on if their interests were not being served. Keeping advocacy in-house, where there was a better alternative available to the client, was short-sighted and could impact on long-term repeat work.

If a firm put its own interests ahead the client's, it risked damaging its reputation. Reputation was even more of an important factor if a firm operated in a small, local sector.

Firms were proud of their reputation and worked hard to provide a high-quality service from start to finish. One firm stated that it had no desire for its partners to "be hauled before judges" on issues of poor advocacy. For that reason, if the firm did not have the experience to conduct a case, it would always send it to an experienced external advocate.

Another firm stated that it was driven more by what it could achieve in a case. Work was sent externally if the firm could not do it in house, eg murder or certain sexual offences. Its advocates had no interest in standing in court and "looking like fools".

Location and court venue

For some firms, location of the work is a factor affecting choice of advocate. If the matter is not local, they might instruct an agent. Other firms are content for their advocates to travel.

Cases heard in the magistrates' court were generally retained in-house by firms. This was mainly because firms had the necessary skills, competence and experience (see below) to

deal with work in this area. Firms also tended to have a daily presence in these courts, which assisted with the allocation of work.

A significant number of firms stated that Crown Court work was generally sent to external counsel. Firms argued that this demonstrated that they were not motivated by a financial interest to keep the work in-house. As noted above, only 29% of the advocates in the sample had carried out Crown Court work in the previous 12 months.

Court allocations might cause a firm to vary its advocate selection. If an advocate is already at one court for most of the day it might make sense, in terms of time and cost, for that advocate to carry out work on behalf of other fee earners in the same court that day. This was provided there was no objection from the client.

Cost and time

Cost and time is a consideration for some firms when selecting an advocate, particularly as counsel can be a cost-effective alternative.

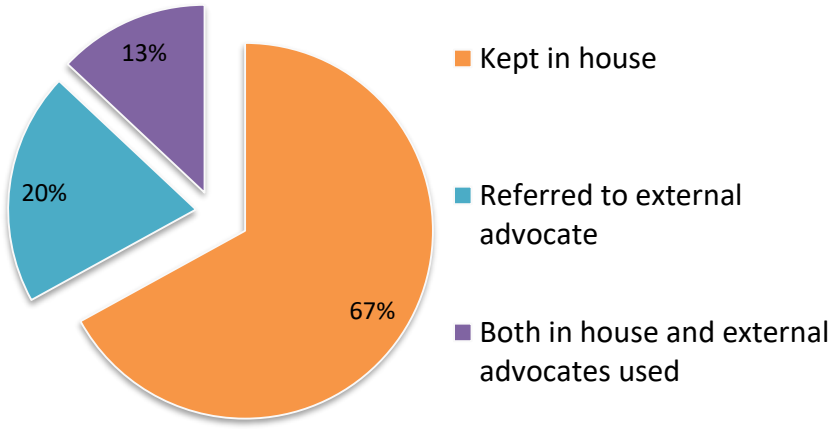
One firm had three solicitors with higher rights but rarely used them, as they found it more cost and time efficient to instruct counsel. Generally, firms stated that magistrates' and youth court work, from a cost and time perspective, were more suited to solicitors and solicitor advocates.

A firm we visited also stated that capacity and existing commitments prevented financial considerations being a factor affecting choice of advocate. The firm had more advocacy work than it could deal with, so a substantial amount had to be passed to counsel.

Another firm expressed the view that it was difficult to keep larger cases in-house, as it could not afford to tie up an internal advocate for a long period of time. Larger cases involved a lot of preparation and delays at trial. If financial considerations were the firms' main driver, it would try to keep much more work in-house and look to expand.

This is not true of all firms. Another firm stated that it did as much work as possible in-house. This is, however, only on the basis that they were competent and experienced enough to do the work.

Who carried out advocacy work



Advocacy work on the 40 files we reviewed was largely kept in-house. Firms gave various reasons why advocacy work on the file was kept in-house or sent to an external advocate. These reasons have already been discussed above.

Firms selected a combination of in-house and external advocates on files for the following reasons:

- the initial hearing was in the magistrates' court before the case was moved to the Crown Court
- the case became more complicated and/or complex than originally envisaged
- availability became an issue, so the matter had to be passed to another advocate.

Explaining choice of advocate to clients

We asked firms how they explained the choice of advocate to clients. In some instances, firms used a combination of approaches.

Verbal communication

Most firms had some form of verbal discussion with clients about choice of advocate.

One firm stated that nine out of 10 times it verbally informed the client who it was instructing as their advocate. In some instances, this was followed by a discussion with the client. Other firms discussed the choice of advocate with the client pre-appointing the advocate. This was an informal chat with the client, where their preference, if any, was discussed. In some cases, the firm gave the client a choice and guided them to the best option by making a recommendation.

Written communication

Out of the sample, 11 firms wrote to the client about choice of advocate. Some firms stated they would only do this for cases taking place in the Crown Court, as magistrates' court work

was more straightforward and largely done in-house. A limited number of firms did mention client choice in their client care letter/terms of business, but it was unclear how many clients read this documentation.

How clients chose their advocate

Some firms stated that in big cases, such as fraud or with longstanding clients, the choice of advocate was explained to the client and the client was then left to pick the advocate. One firm, whose clients were mainly privately paying, selected three barristers and arranged for the client to meet all three. The client was then left to choose the barrister they preferred.

Where the client expressed a choice of advocate from the outset, more limited discussions took place. The firm could express a view to the client if there was a concern or issue over the advocate.

One firm stated that clients were happy to be led about choice of advocate and rarely asked for a specific individual. The firm saw it as their responsibility to recommend an advocate and, in around 50% of cases, the client accepted their recommendation.

Some firms stated that clients were informed that the choice of advocate could be kept under review. This allowed flexibility if the client did not get on with an advocate.

Flexible procedures

Six firms stated that they had no real procedure to explain the choice of advocate to the client. In these instances, clients placed a great deal of reliance on the firm. Some stated that they did not discuss choice of advocate because clients expected the firm to be the expert and make the right decision. They thought that it was artificial to ask the client to choose. Clients could become concerned if they were asked questions about choice of advocate.

Another firm stated that, in magistrates' court cases, most of its clients were repeat offenders and understood they could get a solicitor of their choice. This avoided the need for a discussion.

In other circumstances, the practical reality is that an individual on remand with a hearing the next day had little choice other than to accept the advocate given.

Recording the choice of advocate

Firms were also asked how the decision on choice of advocate was recorded. The responses included:

- No written record was kept, as the process was explained verbally or not explained at all. Firms stated that choice of advocate was a natural part of the process and there was no specific requirement set out in their legal aid contract to record this information.

- Choice of advocate was confirmed in a client care/covering letter to the client. In some cases, a letter was only sent for Crown Court matters as magistrates' court work was largely done in-house.
- Choice of advocate was documented in a file note. Sometimes this was done to record that the firm disagreed with or had concerns over the client's choice of advocate. On other occasions, it was done if the firm felt the client was sensitive about this issue or likely to be difficult and later complain.

Fee earners were also asked why there was no explanation of the options or reasons for the choice of advocate on the file. Responses ranged from an explanation being provided verbally to no record being made as it was the client's decision. Firms tended not to record this unless it was of interest, unusual or concerns had been raised with regard to the choice of advocate. One firm stated that, presently, the legal aid contracts do not require reasons for choice of advocate to be recorded, which is why they do not do so.

Guilty plea only

There was a concern that there is an inherent conflict of interest in advocates only taking on cases where the client would plead guilty. There is a risk that such advocates might put pressure on clients to plead guilty, so that they could retain the work.

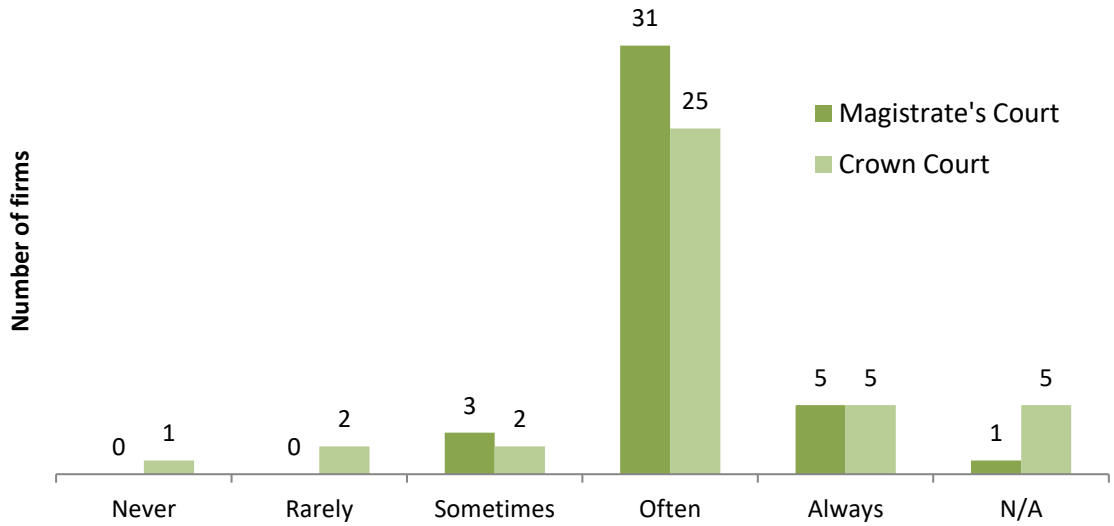
Only two firms, 5% of the sample, had advocates who represented clients on a guilty plea only basis.

One firm stated that one of its advocates only does this work as it was not feasible for him to be out of the office doing long trials. The fee earner had the capability and experience to undertake trials, but the firm made a practical decision that he would not undertake this work.

The other firm stated that some advocates at the firm carried out guilty plea only work as they did not do Crown Court trial work. These advocates carried guilty plea hearings to fill in time. The firm, however, also had solicitor advocates who did full Crown Court trials.

Continuity

How often do advocates deal with cases from start to finish in the magistrates' and Crown Courts?



Managers and heads of criminal practice responded to this question. We then checked the position on the files we reviewed. On 60% of the files, the same advocate dealt with the case from start to finish. Firms gave a variety of reasons why cases were referred between advocates:

- availability, due to illness, holiday or over-running trials
- urgent situations arising
- clients asking for a change of advocate
- issues arising that need specialist attention.

Warned lists

A warned list is a mechanism used by courts to notify advocates of upcoming trial dates. It means that, for a specified time, a trial may begin if there is court time and space available. If a case is not called, it will either go into a later warned list or be given a new fixed trial date.

Firms stated that warned lists can be difficult to accommodate. It makes it harder to plan and arrange advocates and can lead to referrals being made at the last moment.

Quality control

Firms were asked whether they applied any quality control measures when referring cases to external advocates, and 81% stated that they did. The same percentage of fee earners applied quality control measures to the advocates on the files we examined.

Some firms based advocate selection on their personal experience. Many of the advocates we met had been practising for many years and have extensive knowledge of the criminal

justice system. At one firm, for example, the heads of both the magistrates' and Crown Court practices had over 20 years of experience and one sat as a part-time judge. They knew most counsel and used this knowledge to select the right counsel for the right case.

Others used an expert register. A number of firms have an expert register that records the performance of external counsel. These registers are reviewed on a regular basis. One firm graded external counsel using a scale of 0 to 5. Factors such as advocate punctuality and reliability were taken into consideration.

Other firms had a checklist on the file to analyse counsel's performance. This was kept partly due to Lexcel accreditation requirements, which ask firms to monitor the performance of third parties.

Some firms stated that if the barristers they instructed were unavailable, they would discuss the skills and experience of alternative counsel with the clerks. They would not, however, base their selection solely on the clerk's recommendation.

Other selection measures included:

- listening to recommendations from peers
- using trusted and established barristers’ chambers
- not using new counsel, eg a number of firms stated they only instructed advocates with whom they had direct experience and trusted
- reviewing online profiles of counsel as well as their CVs
- reviewing any client complaints made against counsel - one firm stated that if, over a period of time, clients made several justified complaints about a barrister, the firm would not use them again
- reviewing PQE and the seniority of counsel to handle cases
- discussing advocate performance at team meetings
- observations at court, eg if a firm had a particularly large or complex case, it might attend court to review counsel's advocacy skills.

Good Practice	Poor Practice
• Choosing advocates by merit and basing the selection of advocates on experience, skill and the best interests of the client. • Covering choice of advocate in both the firm's terms of business and client care letter. • Informing clients of their right to select an advocate of their choice. • Discussing choice of advocate with the client and asking them if they have a preferred advocate. • Keeping clients up to date and introducing them to a new advocate if a file needs to be handed over. • Giving clients an explanation of the reason for a change of advocate. • Advising clients on choice of advocate but giving weight to their wishes. Basing decisions on long-term benefit for the client. • Changing advocates if the client is unhappy. • Keeping a list of approved and non-approved counsel, which is continually updated. • Giving fee earners an opportunity to reject taking on advocacy if they are uncomfortable or feel they do not have the necessary experience, and respecting their decision.	• Having no formal process for selecting advocates. Decisions are based purely on personal preference without consideration of the client's best interests. • Having no written record demonstrating whether the options and reasons for choice of advocate were explained to the client. • Over reliance on the client knowing best without any guidance provided on their choice of advocate. • Having a small pool of advocates from which the firm chooses. This selection may impact on client choice and raises concerns over whether the firm has access to a sufficient breadth of advocates with the skills and experience to cover all types of work.

The youth court

Youth courts are a special sitting of the magistrates' court and deal with defendants aged 10 to 17. Unlike the magistrates' courts, youth courts have jurisdiction over all but the most serious crimes involving young defendants. Serious crimes, such as murder and rape, will begin in the youth court and may be committed to the Crown Court.

The youth court can pass special sentences unavailable in other courts. These tend to be aimed at rehabilitation and preventing further offences. They include:

- referral orders, where the defendant agrees to abide by certain commitments for a set period
- youth rehabilitation orders, such as a curfew, training or therapy
- detention and training orders. This is effectively a custodial sentence in a children's home, secure training centre or young offender institution.

Concerns

The Youth Proceedings Advocacy (YPA) Review[15] highlighted a number of concerns about the quality of advocacy in the youth court. The Review was commissioned by the Bar Standards Board (BSB) and CILEx Regulation and the research focused its attention on barristers and legal executives. However, the researchers also interviewed 30 'other' youth justice practitioners and 25 young defendants, who voiced concerns about the quality of some advocacy in youth court proceedings.

Most of the 34 advocates interviewed were critical of certain aspects of advocacy in the youth court. The key shortcomings identified[16] included:

- Many advocates lack knowledge of youth justice law, procedures and provisions. They struggle to communicate well with young defendants and witnesses and, particularly, to cross-examine in an appropriate and effective manner.
- Barristers tend to practise in the youth court at the outset of their careers, and more able, ambitious lawyers tend to favour other kinds of criminal work.
- Advocates and their professional colleagues often fail to recognise the significance of youth court work – in terms of the level of offending dealt with and the serious repercussions for the parties involved.
- Advocates in youth proceedings, and especially solicitors in the youth court, are working for reduced legal aid fees while juggling large caseloads.
- Some advocates treat individual cases as matters to be processed as quickly as possible and fail to prepare, research and review their cases adequately.

Although the Taylor Review primarily focused on the youth court system, the following findings were relevant to this thematic review:

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[15] www.barstandardsboard.org.uk/media/1712097/yparfinalreportfinal.pdf
[16] Summarised on pages 5 and 6

- the fee structure for youth court cases discouraged good quality, experienced advocates from appearing
- there should be a mandatory training scheme for legal professionals appearing in the youth court.

The majority of youth court work is conducted by solicitors. As part of this thematic review, we explored how well solicitors dealt with the above issues in their own practice.

Key findings of the thematic review

Staff

- There are a lot of experienced solicitors and solicitor advocates doing youth court work.
- At the majority of firms, all advocates will do youth court work. Managers and heads of criminal practice tend to see youth court work as part of day-to-day practice.
- Eight of the sample firms had specialist youth court advocates. However, some firms said it was no longer profitable to have specialist teams due to the drop in the number of youth court cases.

Knowledge and training

- Firms use various methods to keep their competency in youth court work up to date. Electronic resources, such as Crimeline (an online subscription resource which provides legal updates), were the most popular.
- Four firms had not conducted any specific training in relation to youth court work.
- Most fee earners felt that youth court work was more demanding than adult work.
- Firms should consider using a number of different resources, including training in various areas such as advocacy. This is particularly important for those firms who tend to rely on 'on the job' training as there are now reduced opportunities to develop advocacy in the Youth Court.
- Advocates would benefit from specific training on how to engage with young clients.

Working with young clients

- Managers felt it was important to build rapport with the client and understand their background. Good advocates said it was important to take time to understand their client's key issues.
- Firms had various strategies for dealing with young and vulnerable clients.
- However, more firms could make use of intermediaries, registered people who assist in communicating questions and answers to and from vulnerable defendants.

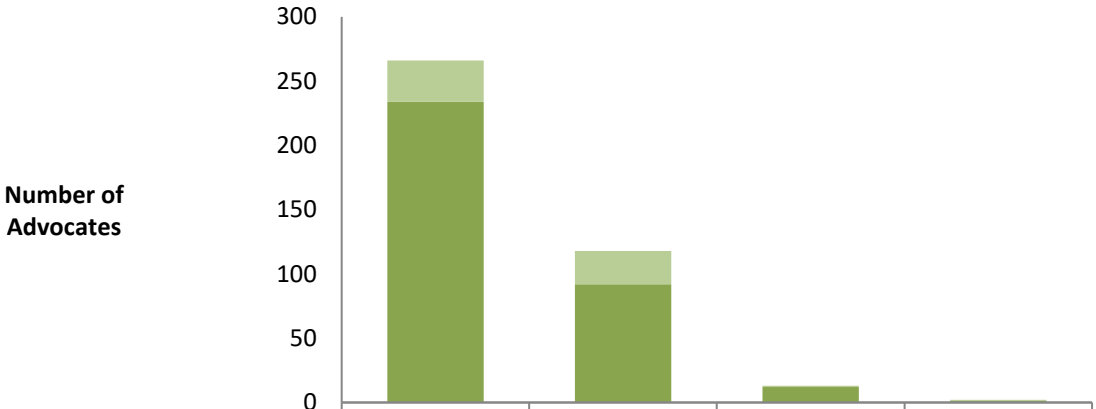
Relationships with other organisations

- There were some good examples of firms working with charities and other professionals to get the best outcome for their client.
- The majority of firms said they would work with the prosecution and the YOT. The managers' views of their local YOT were largely positive.

Solicitors carrying out youth court work

There are a lot of experienced solicitors doing youth court work. A large proportion of the sample, 88% (234 solicitors) said that they did youth court work. And 92 solicitor advocates (72%) said the same.

Advocates carrying out youth court work



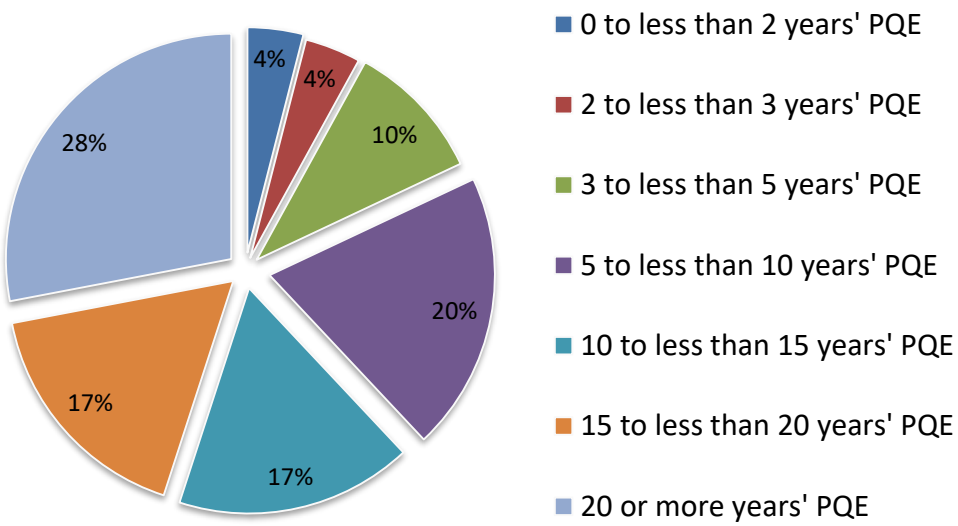
	Solicitors	Solicitor Advocates	Barristers	CILEX
Advocates who do not do Youth Court work	32	26	1	1
Advocates who do Youth Court work	234	92	12	1

In the sample, 61% of solicitors had 10 or more years' PQE. Only 19% of solicitors had less than five years' PQE.

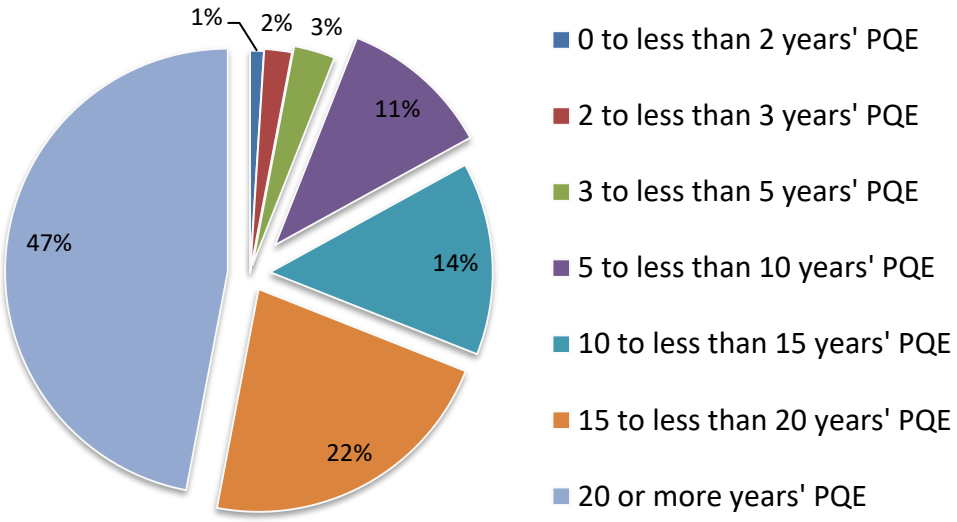
For solicitor advocates, the number of people with 10 or more years' PQE was even greater, at 83%. Only 6% of solicitor advocates had less than five years' PQE.

Two thirds of the sample (26 firms) said that all of their criminal advocates did youth court work. The level of advocate experience for solicitors and solicitor advocates at these 26 firms is shown below.

Level of solicitor experience



Level of solicitor advocate experience

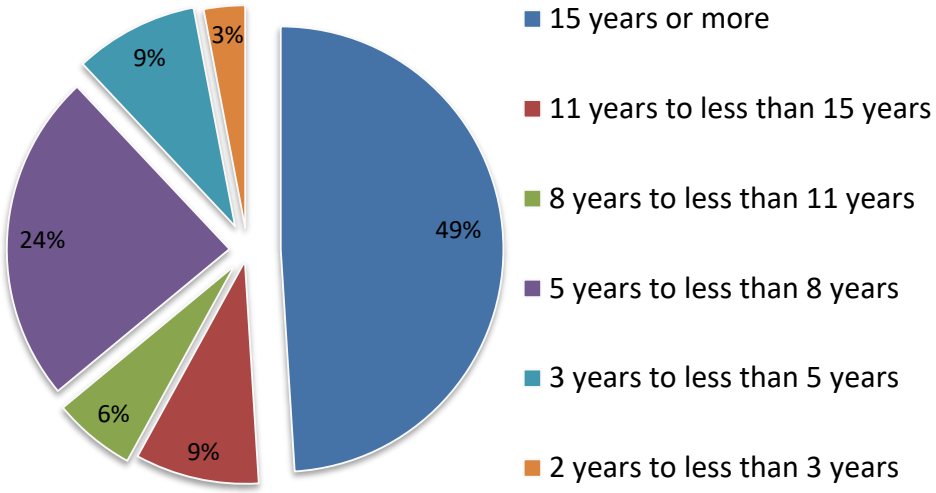


The majority of our sample solicitors and solicitor advocates who practise in the youth court have at least 10 years' PQE. As set out in the sector overview section later in this report, the cohort of criminal solicitors in England and Wales is an experienced, yet ageing one. This is also true for practitioners in the youth court.

There were several reasons why some firms had advocates who did not do youth court work. These included the reduction in Youth Court work and advocates who specialised in certain areas, such as Crown Court work.

A high proportion of the fee earners we interviewed, 82%, said that they did youth court work. These were a mixture of solicitors and solicitor advocates. There was again a trend towards more experienced advocates doing youth court work, as 49% of fee earners had been carrying out youth court work for 15 years or more.

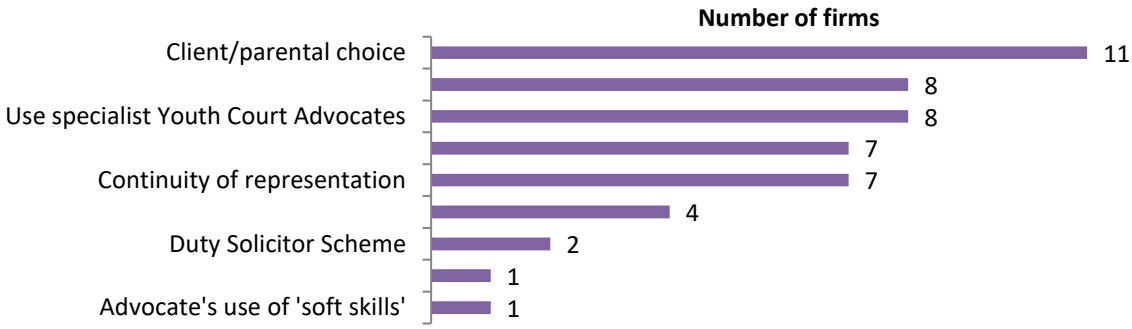
Years spent working with youth court clients/young defendants



Choosing an advocate

Firms allocated youth court work to advocates for a variety of reasons. Some 23 managers said during the interview that all their advocates were capable of doing youth court work. They did not regard the work as anything separate from their day-to-day practice. We asked firms to give the main reasons influencing their choice of youth court advocate.

Deciding who carries out youth court advocacy work



Eight firms said that they had specialist youth court advocates who would carry out the work. However, some firms said that it was no longer necessary or profitable for them to have specialist teams or advocates, due to the decline in the amount of youth court work. This general decline was mentioned by many of the firms we visited. This was generally felt to be because of a greater use of restorative justice and diversion in the youth offender system. This resolves matters without the need for a trial, which can be very beneficial to the client. One solicitor, however, was concerned that some clients feel pressured to go down this route and a trial could sometimes be in the client's best interest.

Interestingly, some firms also said that they would not allocate youth court work to their most inexperienced advocates. This suggests that some managers view youth court work as more serious, requiring specific knowledge and experience. These inexperienced advocates would job shadow and be under more stringent levels of supervision until the manager was satisfied with them.

Seven firms mentioned continuity of service. It is especially important for young people to have trust in their advocate and continuity of service helps to build this.

We understand that there are currently no specific resources for finding a solicitor with specialist knowledge of the youth court or young people's issues. This makes finding a specialist solicitor harder for young people, particularly those who have specific needs, such as autism or ADHD. This is discussed in more detail below. They may turn to charities for advice, but these are not always clearly signposted.

Use of counsel

Eight managers also said they would use counsel if the case was more complex or serious, particularly for sexual offences. This suggests that these managers were aware of their advocate's limitations in respect of youth court work. There were also practical reasons why firms sometimes used counsel, such as their availability for longer trials.

In response to the online questionnaire, 25 firms (64%) said they would refer some youth court work to external counsel. Three managers, however, said they were concerned about whether barristers had the required knowledge and expertise to deal with youth court proceedings. They felt that solicitors were often more experienced than barristers, as the people and procedure in the youth court are different to other criminal courts. One manager also said that solicitors had a better relationship with young defendants.

Knowledge and training

We asked managers and fee earner advocates about how they maintained their competency to carry out youth court work. Some of the most common answers are shown below.

How do you make sure that criminal advocates have the necessary knowledge and are competent to conduct youth court cases?

The most common method firms used to keep their knowledge up to date was to use electronic resources. The most popular of these was Crimeline, but some firms also mentioned Datalaw and LexisNexis. Crimeline provides regular updates on law and procedure, including those relevant to the youth court. It also has a number of resources, training modules and quizzes to help keep knowledge up to date.

A number of firms also mentioned "on the job experience" as important. Recent changes to the assessment of professional competency recognise the value of on the job research and experience. However, our view is that firms should also supplement this experience with external training or other resources, to make sure that they receive a thorough grounding in the specific needs of young offenders and how best to represent them. This is becoming more important due the reduction in the number of youth court cases, leading to fewer opportunities for advocates to develop their skills.

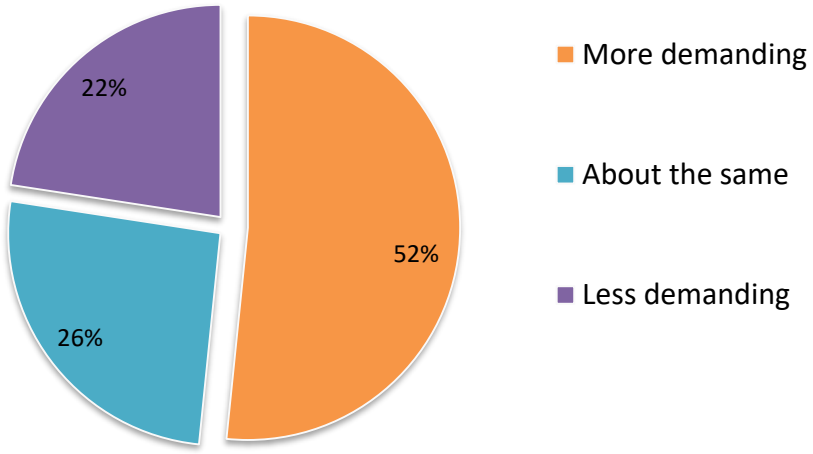
Three managers (8% of firms) said that they had experienced concerns about the quality of advocacy in the youth court. Only one of these managers referred to one of their own advocates who had poor communication skills. This person was not selected for further youth court work. The two other concerns related to advocacy by the prosecution and an advocate at another firm.

Fee earner interviews

Fee earners gave similar responses to the managers when asked about how they kept their competency in the youth court up to date.

Just over half of the fee earners we interviewed, 52%, felt they were "very confident" in respect of their youth court advocacy. The remaining 48% felt they were "confident". The majority of fee earners referred to their experience in the job. Other fee earners mentioned training and the importance they placed on preparation.

Demands of youth court advocacy work compared with advocacy in the adult courts



Reasons for saying 'more demanding' included:

- it took longer to take instructions, as clients could be immature and have a limited understanding of what was happening
- young clients often had various personal issues and could be unreliable
- it can be difficult to get information from young clients
- cases sometimes involve more complex issues with serious long-term consequences for the young client
- there were more individuals involved, including the client's family
- the youth court process and sentencing were constantly changing.

In addition, individual youth courts do not always have the same approach. This can be confusing to advocates who are not familiar with a particular youth court and how it operates. However, most advocates were experienced in their local youth court and understood how it works.

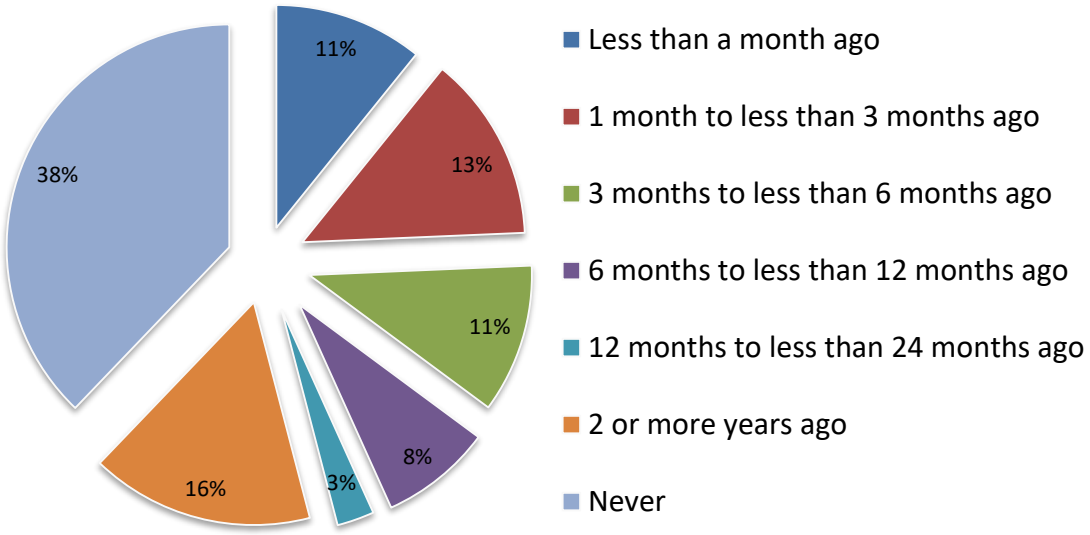
Reasons for saying "less demanding" included:

- there was a more relaxed, calmer setting
- advocacy is easier as the court gives advocates more latitude
- the court was often guided by the views of the YOT and rarely disagreed with them.

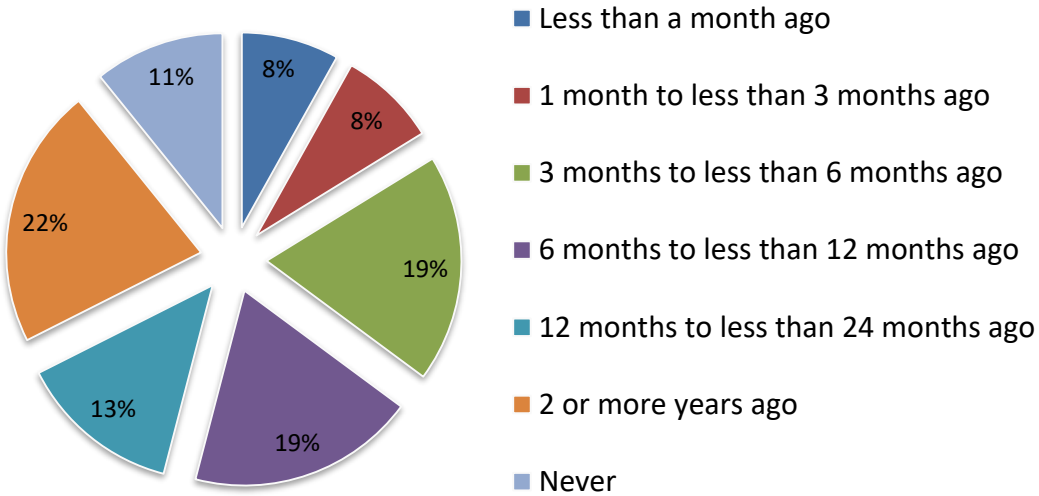
Training

The YPA Review and the Taylor Review both recommended that legal training bodies should introduce mandatory training and licensing for all advocates who practise in youth court proceedings[17].

When firms last provided internal training on youth court work



When firms last provided external training on Youth Court work



[17] The YPA Review, p.64; the Taylor Review, paragraph 69

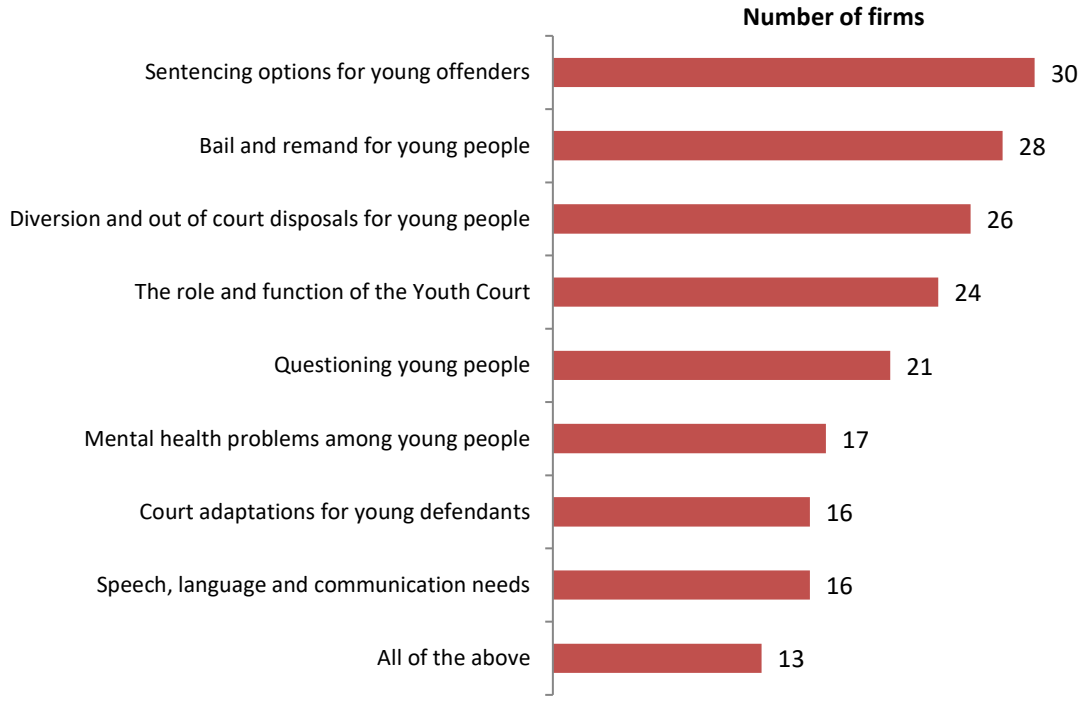
The preference was for firms to offer external training in this area, as 38% of firms had never provided internal youth court training. Some firms, 11 in total, said that they had never provided external youth court training. Among these, four firms (10%) said that they had not provided either internal or external training on the youth court. These firms could struggle to meet the requirements set out in the statement of solicitor competence in relation to their youth court work. The advocates would have to show they use sufficient other methods to maintain their competency.

It is encouraging that 35% of firms said that they had provided either internal or external training in the last six months. It is important to keep up with the fast changing pace of youth court work. Regular training combined with other means of keeping up to date would be the best way to maintain competency as an advocate.

Some firms said that youth court training was usually incorporated within other training courses, rather than something separate and distinct.

Training content

Which of the following areas were covered in the Youth Court training?



Training on speech, language and communication needs was offered by 16 firms. Training on how to question young people was offered by 21 firms. However, there is a concern that not enough firms are carrying out training on how to communicate and engage with young people. This is a specific skill and is essential in making sure that advocates get the best evidence and instructions possible from the client.

Advocates tended to say that they learned how to engage with young clients "on the job" and from practical experience. However, this may not give them a sufficiently embedded knowledge of young people and their issues. It can be hard for solicitors to identify gaps in their own knowledge and to identify where they need further training. Fortunately, there were some firms who took a pro-active approach to self appraisal. Here the advocates would ask, "what could I have done differently?" at the end of a case. This is a worthwhile practice that is encouraged and is consistent with our competency requirements.

To help solicitors assess their own level of competency in the youth court, we have developed the Youth Court Advocacy toolkit[18]. This went live during the interview stage of the thematic review.

General comments on the sample firms' approach to training are considered later in this report.

Working with young clients

The YPA Review found that young defendants interviewed had experienced both good and poor criminal advocacy. The measure of good and poor advocacy was the extent to which advocates cared about and applied themselves to the case at hand.[19] They also said that advocates could be difficult to understand in the context of a court process that was often highly confusing[20] to young people.

Solicitors should be prepared to take a robust approach in defence of their young clients. They should be clear about their role and explain that they are there to get the best outcome for their client. They should also explain how the youth justice system works, including:

- the right to confidentiality
- the right to change solicitor
- the right to see your file
- what it means to get free legal advice.

The solicitor should also do their best to understand the client's background and show an interest in their future to engage with the client. Building trust is an important factor and this can easily break down if the young client feels they are being judged rather than listened to by their own representative.

If the solicitor identifies issues beyond their expertise, they should be able to signpost their client to other resources to help them. This may not always be easy for the advocate, especially if they have just met their client at court. However, solicitors have developed a number of ways of assessing clients' needs.

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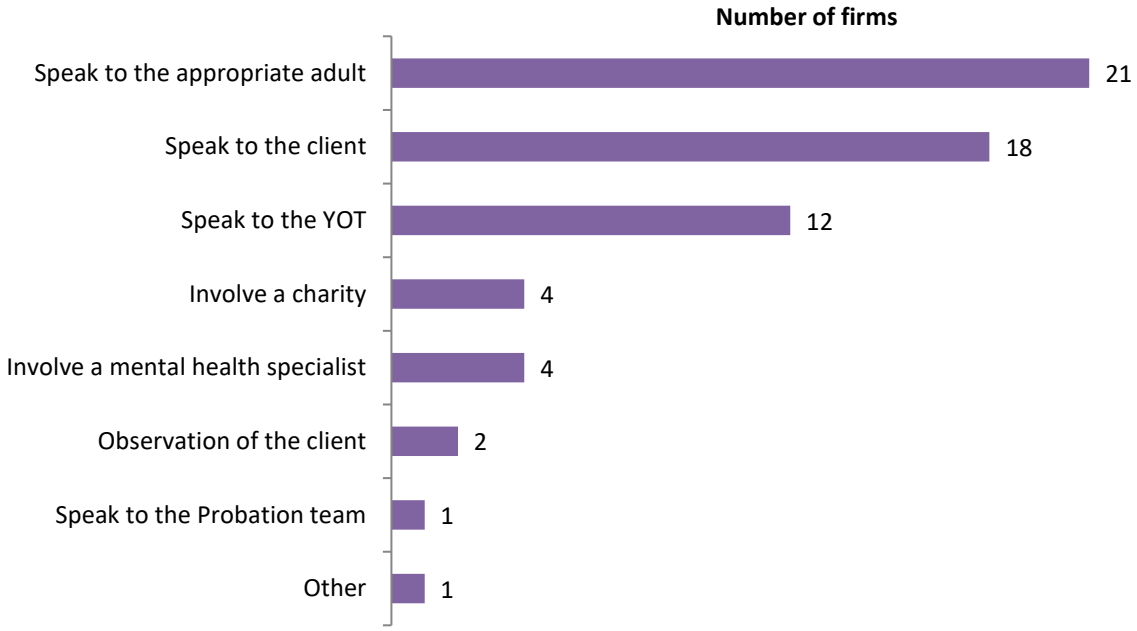
[18] www.sra.org.uk/solicitors/cpd/youth-court-advocacy.page
[19] The YPA Review, page vi
[20] The YPA Review, page vi

Assessing young clients' needs

All managers said their advocates assessed the developmental, communication, wellbeing and mental health needs of the young defendant client. This was done in several ways.

How developmental, communication, wellbeing and mental health needs of a young defendant are assessed



Generally, managers felt it was important to build rapport with the client and understand their background. They said it was important to take time to understand their client's key issues. These help to present their client's case to the court in the best possible way. They explained there are certain key issues that were important to raise in advocating the client's case. These issues could help to make sure that the client receives a specific outcome where these are raised, as the court has to follow set procedures.

Managers also said it was important to ask about the client's education. This often gave information about their background and literacy. It was an important factor for the court to consider.

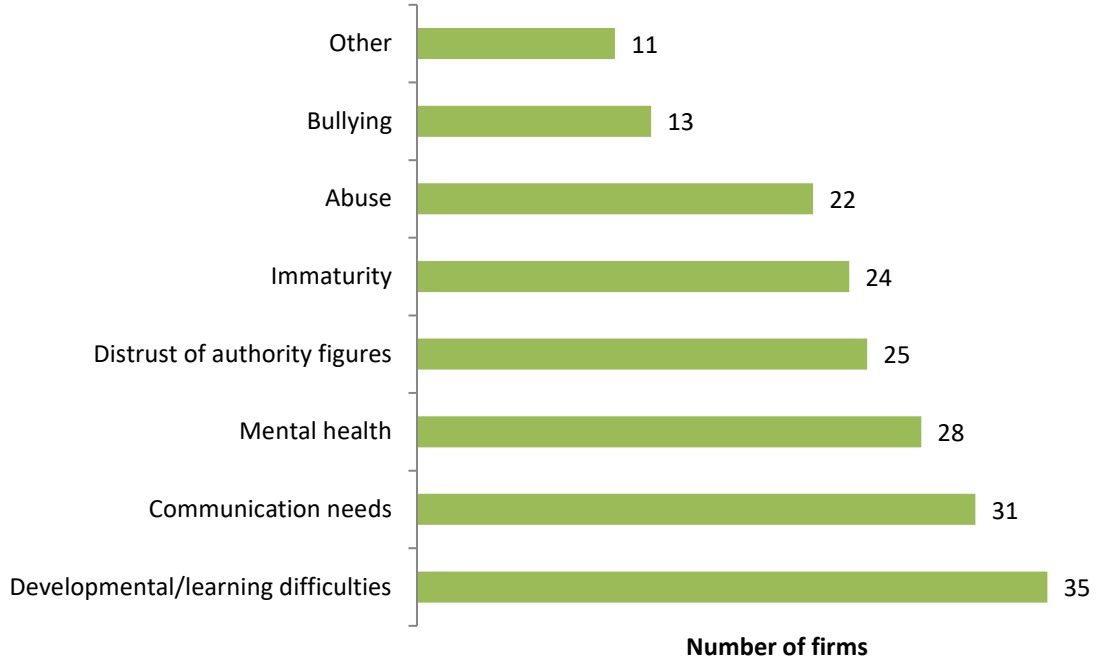
They also emphasised the need to carefully observe the general manner and physical wellbeing of clients for indications of potential concerns, such as signs of abuse or drug use.

Some firms said that, on the whole, the courts were very helpful and relaxed. They were keen to make sure the defendant was comfortable, for instance offering breaks when needed. Sometimes the advocates sought an audience with the judge before the client arrived to make them aware of particular issues, for instance behavioural problems or anxiety.

However, one firm felt the parent or guardian should be spoken to as it is more effective. The fee earner felt uncomfortable talking to young people about their development needs. This shows that some advocates would benefit from specific training on communication with young people. Firms might also want to consider engaging with young clients about their future plans to show that they are interested in the client's future, as well as their past.

Common client needs

The most common needs identified in young defendants



Other factors included:

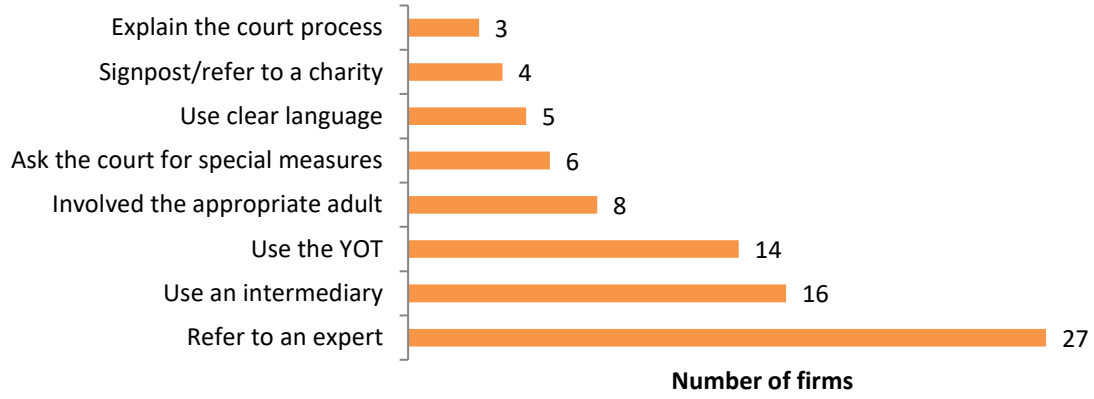
- attention deficit hyperactivity disorder (ADHD)
- drug use, including legal highs
- addiction
- autism
- children living on their own
- gang-related issues
- poor home life.

The main area of concern related to developmental and communication needs. However, 28 firms said they commonly encountered mental health issues among their young clients. This demonstrates the need for advocates to be aware of this and have a strategy to deal with any issues.

Steps taken if needs are identified

There were a number of strategies that managers said could be used to help the client if these needs and vulnerabilities were identified.

Provisions made when addressing client needs



It is encouraging that so many firms said they would use experts, particularly for mental health issues. It is also good to see that a number of firms had used intermediaries and would involve the YOT. However, more firms could make use of these. The YOT is discussed further below.

Some examples of good practice included a firm who asked young clients to repeat questions to make sure they had understood them.

Another firm received instructions from the National Autistic Society, who would pick up developmental needs. This firm also had a specialist dealing with autism spectrum disorders and carried out trials with defendants suffering from Asperger's syndrome. It had specialist advocates to do this work.

Another good example of a firm considering client needs was one which said it tried to get a case heard on the same day a mental health nurse attended court.

File reviews

We reviewed 11 files in relation to youth court clients. All of the fee earners said they had carried out some form of assessment of the client's needs. However, there was nothing to support this on two files.

Clients had been assessed as having a number of needs, including:

- two files where the client had mental health needs
- two files where the client had experienced some form of bullying
- one file where the client had experienced abuse of some kind.

Actions carried out by the fee earners included speaking to the client to assess their reading ability and talking to the appropriate adult. A psychologist's report was obtained for one client, who was visibly upset about the loss of their father. The Child and Adolescent Mental Health Service[21]was also involved on two files.

Fee earners said it was important that the client understood the youth court system and took steps to explain it. However, on four of the files there was no evidence to show this. One fee earner said this was not as important for repeat clients who knew the system. Fee earners also said they might not always record this advice on their files.

The youth court process

It is important for the advocate to explain the court process to the young client in clear and appropriate language. Firms used a number of strategies to do this. These included an explanation of:

- the layout of the court, including the seating arrangements
- key roles, including the advocate's own role and the prosecution
- the need to be frank in answers to questions and to show remorse (if appropriate)
- the dress code and how to address the court
- sentencing and reporting restrictions
- the court timetable and how long the case would take.

Some managers said this would be explained using clear and simple language. They would ask questions to make sure the client understood. Some firms said they would provide a handout or leaflets to the client.

Some firms conducted court visits to make sure the client was familiar with the court layout. One firm said that the advocate used to speak to the client at court, but court cutbacks have meant there are fewer rooms available. This has impacted on their ability to advise the client.

There was anecdotal evidence that young clients can often be more knowledgeable than adult clients, especially if they have been through the process before. However, managers also recognised that all young people are different and the majority they act for have challenging issues. They therefore have to tailor their approach to each client.

The appropriate adult

Under the Police and Criminal Evidence Act 1984, a young person can only be interviewed if an appropriate adult is present. The appropriate adult will usually be the young person's parent, but might also be a social worker, a YOT worker or a volunteer.[22]

[21]www.youngminds.org.uk/about/our_campaigns/transitions?gclid=CJiD6I7cvNACFQEM0wodQgkEtw
[22] www.gov.uk/guidance/appropriate-adults-guide-for-youth-justice-professionals

All firms who did youth court work said they spoke to the client and the appropriate adult before trial. This was to understand the client's background, home life and education.

All but one firm said they would take steps to make sure their clients were able to give free and full instructions without external influence. The other firm was not sure. Firms said the presence of an appropriate adult during interviews could be a helpful influence as it helps the solicitor to communicate with the young client and gather information. The appropriate adult, particularly a parent, can assist in encouraging the client to co-operate. However, it can also be a negative influence if the appropriate adult saw him or herself as the client, and tried to influence the client's response and behaviour or had a particular agenda.

Several firms said they asked whether their clients were comfortable with an appropriate adult being present during an interview. They were aware of the need to maintain client confidentiality. Some advocates said they would usually make sure that the appropriate adult was not present during an interview. This allowed the young client to speak more freely. There could also be a problem if the appropriate adult was needed as a witness.

Relationship with other parties

The early involvement of the appropriate adult and other professionals could help to identify other issues the client is facing and head off the need for a trial.

We were told about some good examples of advocates working with other professionals to gain a better understanding of their client's needs. These included:

- the YOT
- charities, such as the National Autistic Society[23] and Just for Kids Law[24]
- court staff and judges.

The majority of the firms, 38 in total, said they would also speak to the prosecution about the merits and plea. This included out of court disposal and early credit for a guilty plea.

One firm said that Just for Kids Law works nearby and they can refer children to them, to work on a one-to-one basis.

The Youth Offending Team

There were 37 firms who said their advocates spoke to the YOT worker before a trial. The YOT are part of the local council and are separate from the police and the courts. They work with:

- the police
- probation officers

[23] www.autism.org.uk
[24] www.justforkidslaw.org

- health, housing and children’s services
- schools and education authorities
- charities and the local community.

Its role is to look into the background of a young person and try to help them stay away from crime. The YOT runs local crime prevention programmes and helps young people at the police station if they are arrested or in court. It also supervises young people serving a community sentence and stays in touch with a young person if they are sentenced to custody.

The YOT plays an important part in the youth justice system. We wanted to understand how closely advocates worked with the YOT and what their impression of them was.

The YOT: managers' views

The majority of managers said that their advocates had developed relationships with their local YOT.

Some firms said that the local YOT was "brilliant" with a wealth of expertise. They were really good and worked hard. They said that staff genuinely cared about people and were on the side of the children.

However, managers at three firms said that their local YOT was quite poor. Comments included that "their heart is in the right place”, but they did not have sufficient resources.

Despite this, the overwhelming majority of managers were positive about the YOT. They recognised the contribution of the YOT to the process and made use of them.

File reviews

The fee earners said they had spoken to various parties on the files including the prosecution in nine cases and the YOT in eight cases. Other parties included:

- the district judge on a technical report
- the client's family
- court legal advisers
- social workers.

General comments

Overall, our experience of speaking to managers and fee earners about youth court work was positive. There were a number of fee earners who seemed very alive to youth court issues and were passionate about their work in this area. Others tended to see the youth court as part of their day-to-day role, but were aware of the different needs of young defendant clients. They should continue working with other organisations to achieve the best outcome for their clients.

As with other areas of criminal advocacy work, it is important that advocates keep their knowledge and skills up to date. This may become more challenging due to the reduction in the amount of youth court work.

Good Practice	Poor Practice
• Using a number of different resources to keep knowledge of youth court practices, processes and decisions up to date. • Making sure young people understand the youth court process. • Making sure to listen to, rather than judge, the client. • Explaining what the firm can do for the client. Demonstrating a human side while remaining professional. • Engaging with young clients and showing an interest in their future. This helps to build trust and show the firm is on their side. • Considering whether advocates would benefit from specific training on how to engage with young people. • Maintaining continuity of representation where possible and appropriate. • Training on identifying and addressing the broader needs of young defendants. • Working closely with organisations, such as the YOT, to use its expertise and achieve the best outcome for the client.	• Failing to engage with the client and gain the client's trust. This may be through a lack of interest in their case or judging their actions. • Failing to explain the client's rights, including that they can change their solicitor if they are not happy. • Failing to keep knowledge of youth court practice up to date and appearing uncomfortable.

Competency, supervision and training

Concerns

The Jeffrey Review contained a wide variety of views on the question of quality of advocacy. There was a strong and consistent view among the judiciary[25] that:

- although the best was still very good indeed, among both barristers and solicitor advocates, standards in the Crown Court had, in general, declined in recent years
- it was not uncommon for advocates (for both the prosecution and the defence) to be operating beyond their level of competence
- judges frequently felt concern about "inequality of arms" between prosecution and defence, if one side or the other was inadequately represented.

Our statement of solicitor competence

Our statement of solicitor competence recognises that job requirements and expectations change depending on the job role, stage of career or work context.

For a solicitor, meeting the competencies set out in the competence statement is part of the requirement to provide a proper standard of service under Principle 5 of the SRA Principles 2011.

To do this, solicitors need to carry out regular learning and development, so their skills and knowledge remain up to date. We expect solicitors to:

- identify learning and development needs
- address learning and development needs
- record and evaluate their needs.

From 1 November 2016 solicitors are required to make an annual declaration that they have completed the above.

We have produced a continuing competence toolkit[26] to help solicitors reflect on their practice and identify learning and development needs. This toolkit should be used along with our statement of solicitor competence.[27]

Solicitor advocates who work in the higher courts should also follow the statement of standards for higher court advocates.[28] This covers key competency areas including:

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[25] The Jeffrey Review, page 22
[26] www.sra.org.uk/solicitors/cpd/tool-kit/continuing-competence-toolkit.page
[27] www.sra.org.uk/solicitors/competence-statement.page

[28] www.sra.org.uk/solicitors/accreditation/higher-rights/competence-standards.page

- evidence
- ethics
- advocacy (both criminal and civil)
- equality and diversity.

The Jeffrey Review's findings and the recent changes to our competency requirements led us to ask how solicitors were keeping their criminal advocacy skills up to date. We also wanted to understand how managers supervised their fee earners to make sure they provided good advocacy services to clients.

Key findings of the thematic review

- Getting client feedback and file reviews were the most popular supervision procedures.
- 21 firms said they would informally observe their advocates in court as part of supervision. There was a formal observation and review process at five firms.
- Several firms said they relied on their advocates' PQE experience as a measure of competency. However, firms should not purely rely on this measure.
- Firms provided various training to their criminal advocates. Delivery of this training was sometimes left for long periods of time and some firms said they had never provided training in key areas.
- Firms took a number of actions when dealing with more vulnerable clients, including providing training, the use of counsel and experts.
- Some firms said that advocacy training for solicitors was limited and not geared towards the Crown Court. They would welcome more advanced training.
- Other useful training could involve the use of digital court systems.
- Firms tended to rely on electronic resources, such as Crimeline and Datalaw, to keep their day-to-day knowledge of criminal law and procedure up to date.

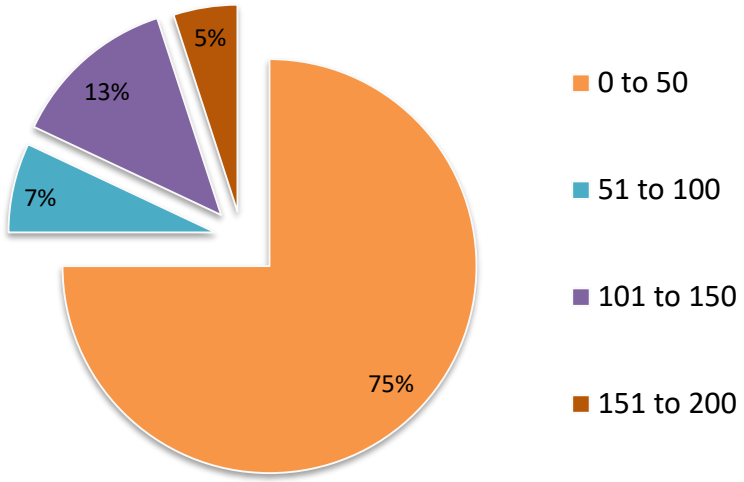
Supervision and competency

We asked managers about what they did to make sure criminal advocates were competent enough to represent their clients. Answers fell into five broad categories of response:

- supervision
- feedback from clients and others
- advocate experience
- outcome reviews
- training.

Supervision

Criminal caseloads for advocates - number of matters



We asked firms how many criminal cases a fee earner would have, on average, at any one time. A higher caseload could affect the fee earner's ability to carry out their work. It also has an impact on the level of supervision needed, as a higher caseload may require greater supervision.

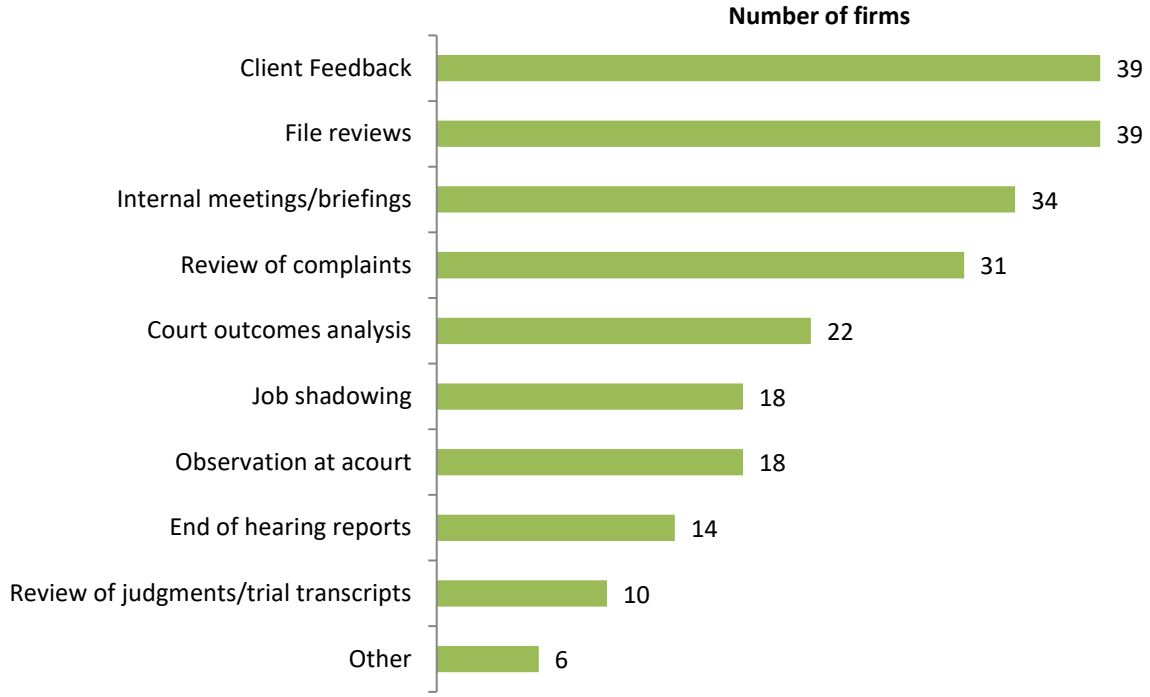
The strong tendency towards lower caseloads (fewer than 50 cases) could be attributed to some of the following factors:

- the relatively quick turnover of magistrates' court matters, leading to a shorter case length
- a general decline in criminal work reported by firms
- the limited workload capacity of smaller firms, who make up the majority of the sample
- limitations on caseload due to the pressure of court advocacy.

Firms also tended to calculate caseload figures in different ways, due to the way in which cases were handled, eg at two firms, cases were pooled and worked on by different advocates. Two firms did not include police station files, as these might not proceed to a hearing, although they accounted for 70% of one firm's work.

We then asked managers how they supervised their criminal advocates.

Supervision procedures



'Other' procedures included:

- annual appraisals
- using case management software and management information
- update emails from the Crown Prosecution Service (CPS) and the court
- informal discussions, ie an "open door policy"
- legal aid peer review.

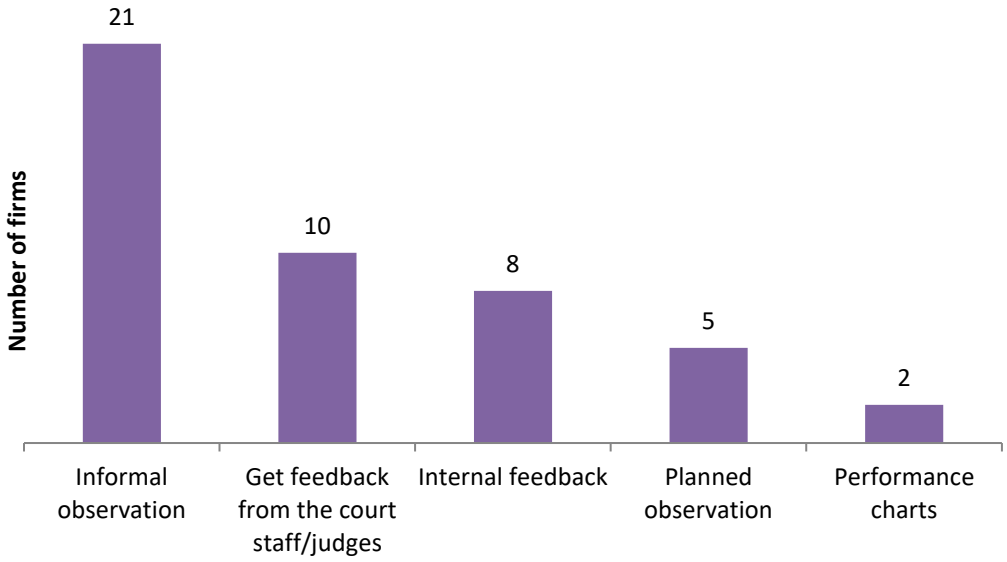
Reviewing files was one of the most popular methods of supervision, with 39 firms saying they used this method. Firms tended to review one or two files randomly per month, depending on the fee earner's experience.

Internal meetings and briefings were also a common way for managers to supervise. These allowed managers to allocate work. They could also be used to share important technical information with their advocates. Some meetings were ad hoc, while others were planned on a weekly/monthly basis.

Observation at court

Interestingly, 29 managers said they carried out some form of observation of their advocates in court. In addition, 33 firms (82%) said they used this method when asked about it in a separate question. For the most part, observation tended to be on an informal basis and when senior staff were already attending court. But five firms said observation was planned. This included two firms who said they had formal performance chart indicators that were completed by senior staff observing their advocates. The chart below shows what methods managers used.

Assessing the competency of your criminal advocates in court



An exemplar firm said it regularly observed advocates in court. This included equity partners visiting court. They commented that it was part of their job to go and watch fee earners perform as advocates. The equity partners spoke with and got feedback from judges, the prosecution and court clerks on a weekly/monthly basis. The firm also collected feedback from clients.

However, one firm said they did not send people to watch as it "stresses people out". The firm mainly relied on client feedback. We would question whether an advocate who feels stressed by observation might need further training.

Feedback from clients and others

Client feedback was another popular way for firms to decide whether advocates were doing a good job, and 39 firms said they asked for this. Client feedback can be useful. However, firms said that the client might not always be in a position to know whether they have received a good service, as their satisfaction might be based on the outcome of the case. Some firms also told us that clients rarely returned feedback forms. Firms should therefore consider other measures.

Other forms of feedback included feedback from judges, court staff and other lawyers. A number of firms said they heard about poor performance by their advocates in this way. They were keen to avoid any negative feedback as this would reflect badly on the firm's reputation.

Advocate experience

Several firms said they relied on their advocates' PQE as a measure of competency. One manager said they recruited on the basis of experience and have confidence in their advocates.

Another firm said they encouraged advocates to watch advocates from other firms. This helped them to gain different experience and develop their skills.

Although advocate experience is helpful, advocates should not purely rely on this as a measure of competency. This is especially the case as the opportunities to carry out advocacy may not always be predictable.

Outcome review

Just over half (21) of the firms also analysed the outcomes of cases. This included one manager who said the advocates knew their own skills and reflected on what they did in a case. They asked whether they could they have done anything differently or better. Our view is that self reflection is a good way to identify any gaps in training.

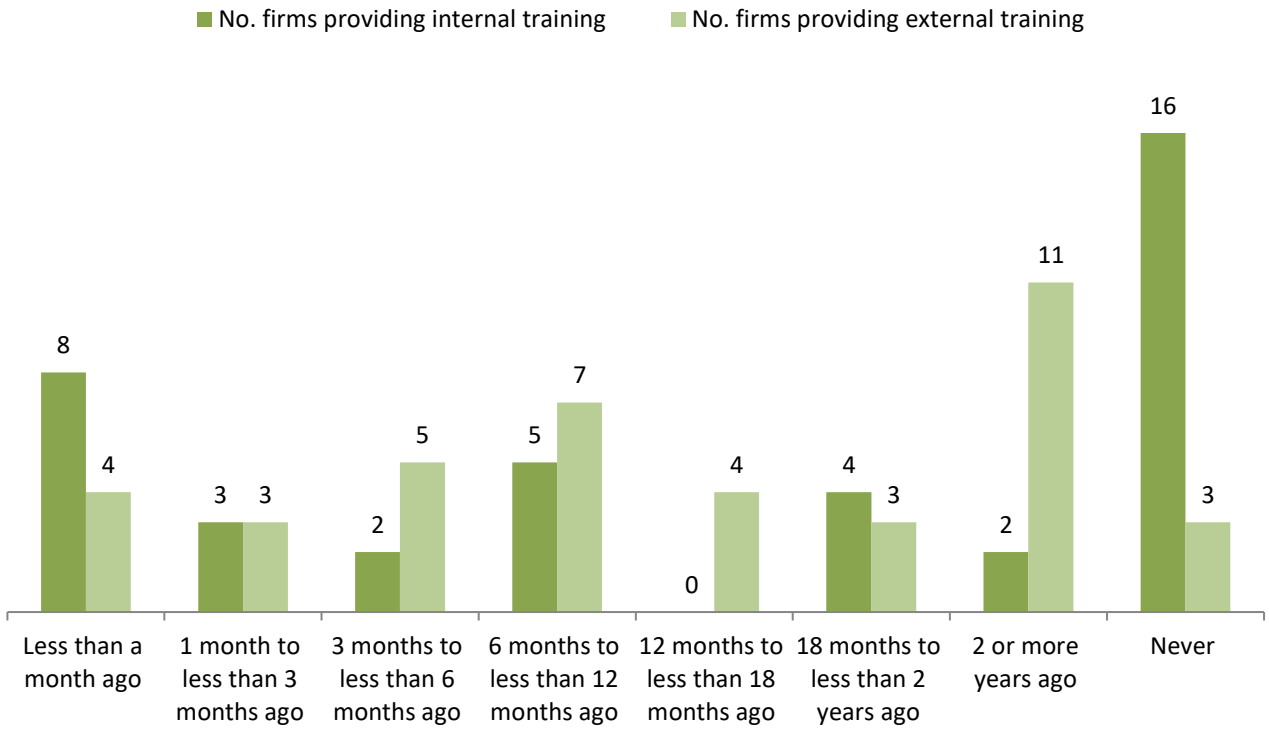
Training

A common way firms addressed competency needs was through training. The Jeffrey Review highlighted a gap between the mandatory advocacy training for solicitors and barristers[29]. It recommended that there was a case for deepening the cooperation between ourselves and the BSB and developing a more consistent training and accreditation framework for advocacy[30]. However, he acknowledged that there is more to competent advocacy than training. It is also important to have constant practice to build skills.

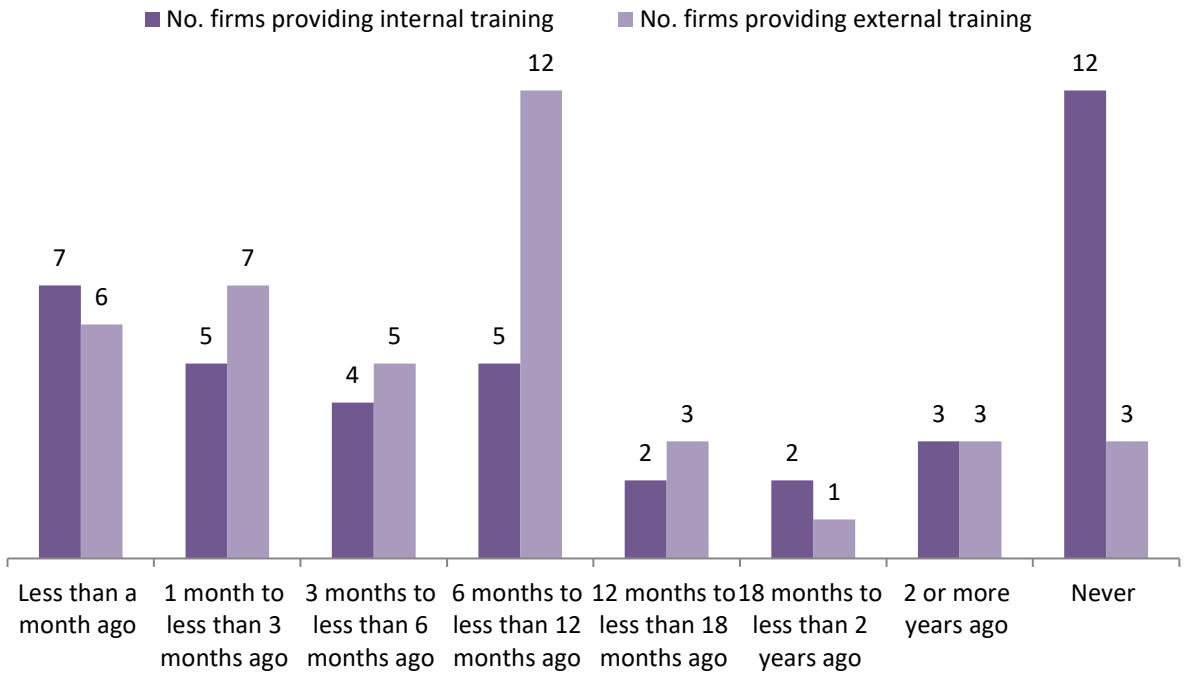
The following charts show when firms last provided internal and external training in some key areas:

[29] 120 days plus pupillage for barristers and 22 hours for solicitors (the Jeffrey Review, page 30).
[30] The Jeffrey Review, page 31.

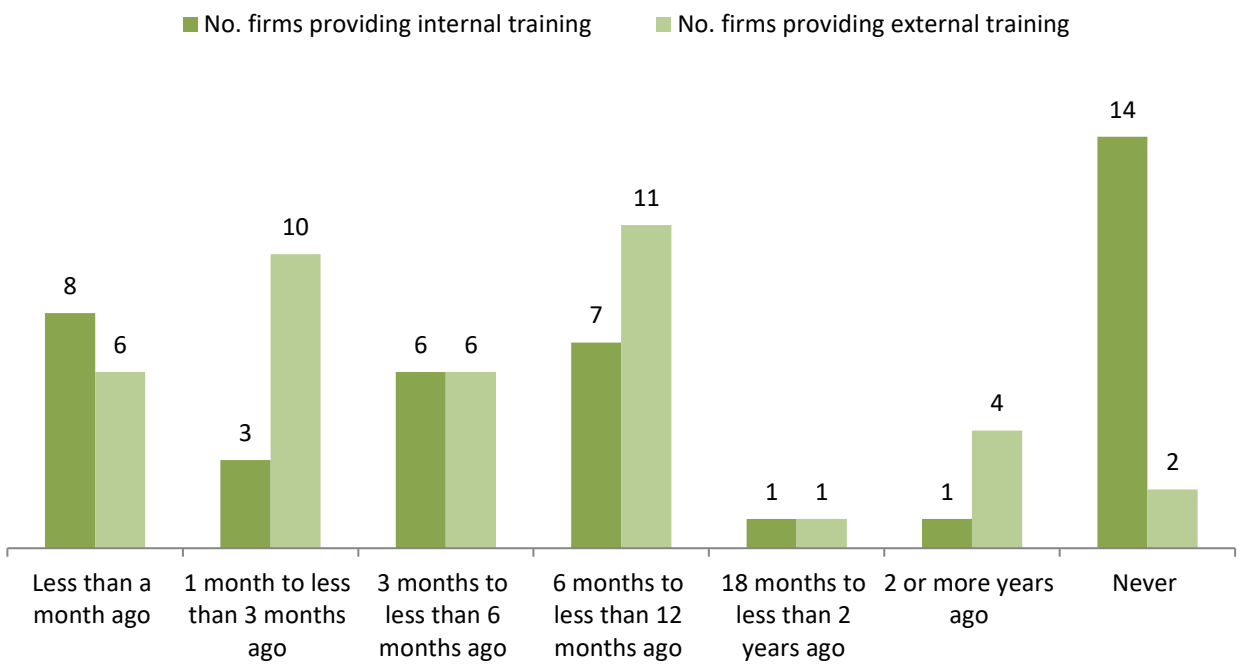
Firms providing training on advocacy



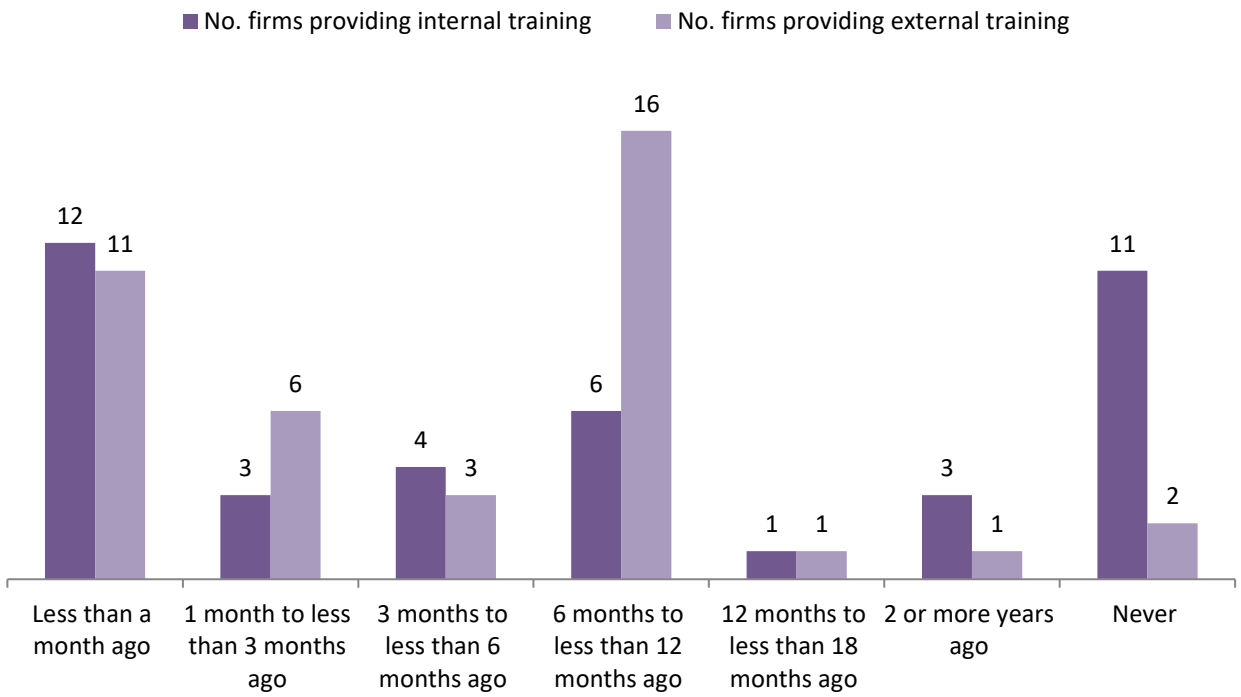
Firms providing training on evidence



Firms providing training on sentencing



Firms providing updates on criminal law



Vulnerable clients

We also asked managers whether their firms did anything to make sure their advocates were competent at dealing with vulnerable witnesses and defendants.

The main focus of the responses was on training. This included:

- training on "soft skills", such as communication
- specific training given by the Advocates' Gateway
- talks by charities
- the use of criminal resources, such as Datalaw and Crimeline.

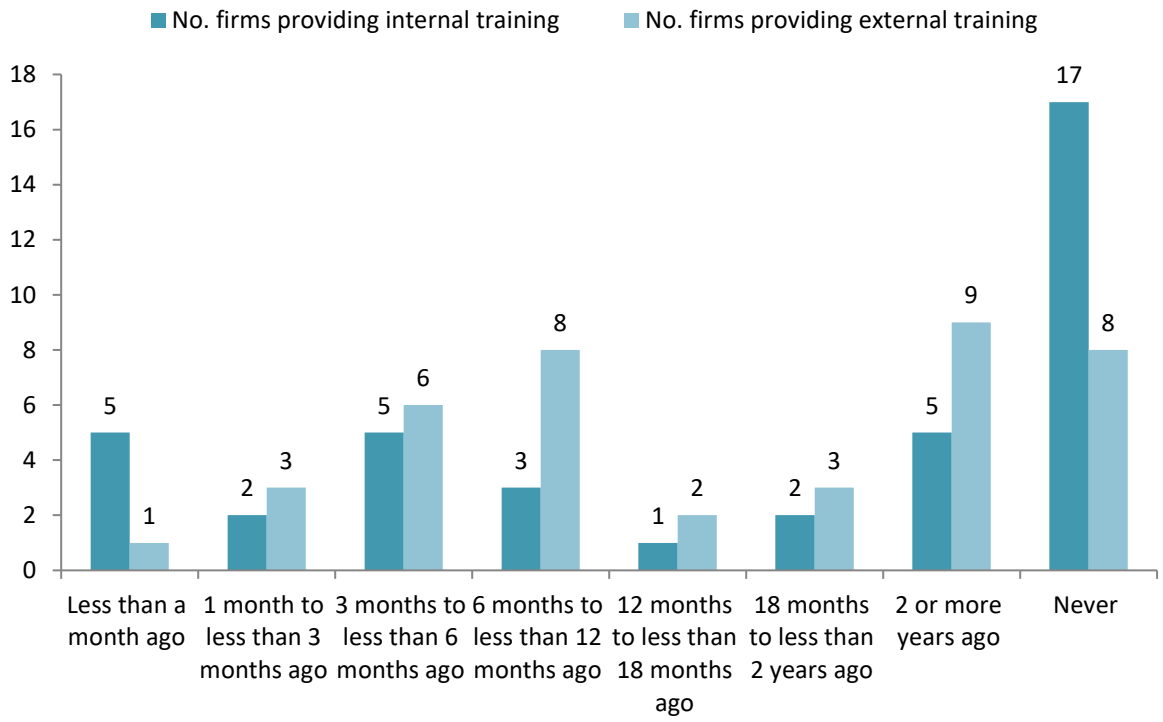
Other actions included:

- the supervision of advocates to identify gaps in skills and training
- the use of medical specialists (if there were concerns such as mental health)
- the use of counsel if the client was particularly vulnerable.

One good example of this was a manager who said that the firm's Court of Protection team had developed a relationship with an autism charity. It had developed an advocate toolkit and gateway to explain issues about vulnerable clients and how to question them.

Firms were also asked about training on dealing with vulnerable people as part of our online survey. The chart below shows when firms last provided training in this area.

Training on dealing with vulnerable people

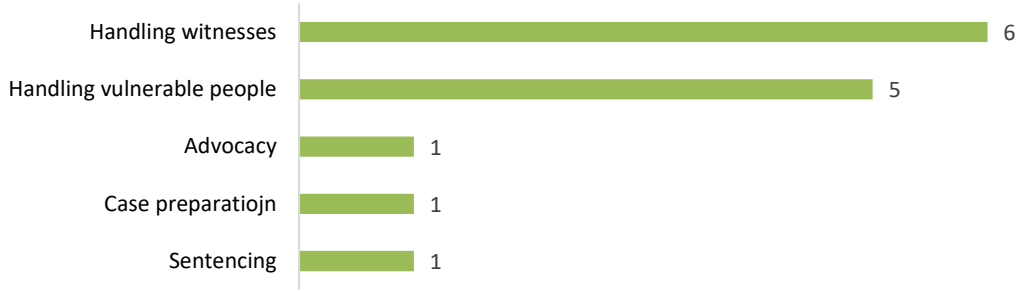


Training analysis

The training charts show that the majority of firms had undergone training in key areas within the last two years.

There were a number of firms who said they had not provided either internal or external training in these key areas. These are shown in the chart below.

Number of firms who have never provided training in key areas



There could be a concern that some firms said they have not provided training in these areas. However, we appreciate that training is only one way of maintaining competency.

One firm did not answer the question as it said it did not provide "training", such as specific courses, in these areas. It viewed its training as an ongoing process. Junior colleagues learned through shadowing senior staff and being supervised and appraised. Cases were specifically selected as suitable for them to conduct.

The one firm who had not provided advocacy training passed the majority of its advocacy work to counsel. It had not provided training on handling vulnerable people and witnesses for a similar reason. It viewed their role as preparing cases for counsel and acting as a liaison between counsel and the client.

The results do show that some firms could benefit from specific training aimed at working with more vulnerable people.

It is important for firms to consider training as a useful tool to develop and maintain competency. However, it should be used together with other methods to develop a well-rounded and competent advocate. Any training provided should be tailored to the needs of the firm's advocates.

Additional areas of training

We also asked firms whether there were any other areas where firms thought that training would be useful.

Some firms felt that there was insufficient training for solicitors on advocacy in the higher courts. They felt that some practical skills based training would be useful. Advocacy courses for solicitors tended to focus on the basics and the magistrates' court.

Several firms said that training on digital case management systems would be helpful. The firms were increasingly aware of the move towards digitalisation of the courts service and the need to keep up with the pace of change.

Other training areas

Firms were asked about any other area in which they provided training. This produced some a wide range of results, which demonstrate the breadth of knowledge that criminal advocates sometimes have to have.

- Professional ethics
- Conduct
- Diversity
- Funding
- Appeals
- Inquests
- Sports law
- Human trafficking
- Digital court systems
- Risk management
- Family law
- Personal injury
- Conflict
- Mental health
- Police station procedure
- Cyber security
- Health and safety
- Disclosure
- Expert evidence
- Immigration and asylum
- Vulnerable witnesses
- Extradition
- Intermediaries
- Dangerous dogs

Electronic resources

As mentioned earlier, electronic resources were a popular way of keeping up to date with changes in criminal law and procedure. We asked managers about their use of various resources.

Criminal advocates' use of the following resources

"Other" included:

- online resources, eg bailii.org or cps.gov.uk
- subscription services such as Crimeline and Westlaw
- published works, such as Archbold or other textbooks
- training from barristers' chambers
- seeking advice from peers.

Crimeline and Datalaw were the most popular "other" sources. It is encouraging that firms are aware of these resources. However, more firms could make use of resources such as the Solicitors' Association of Higher Courts Advocates (SAHCA) and the Advocates' Gateway.

One manager said the firm had an agreement with a senior barrister who effectively acted as the firm's head of chambers, and anyone in the firm could call him for advice.

Record keeping

Almost all firms, firms, 95%, said that they kept training records. However, only 65% of firms said that they kept a training schedule outlining training available to fee earners.

The new approach to continuing competence asks solicitors to plan their development and to keep written records. This is an important part of the development process. We are planning to do further work to see how this approach is embedded in firms.

Good Practice	Poor Practice
• Using a variety of different methods to help maintain competence. • Avoiding over-reliance on one specific method. • Self-appraisal of advocates' own performance. Considering if there is anything they could have done differently in a case. This can help to identify any gaps in their knowledge. • Making sure that supervision methods are tailored to specific needs. • Observation in court by supervisors to monitor the quality of advocacy. • Offering training at appropriate intervals. Considering whether any specific training might help, such as how to work with vulnerable people. • Gathering and listening to feedback from clients and other professionals, including court officials and judges.	• Failing to take time to reflect on their own performance and "self-appraise" their own work. There is no analysis of gaps in their knowledge. • Relying solely on PQE as a measure of competency. • Avoiding training when it is offered and not asking for training on any gaps identified. • Firms failing to make sure advocates are kept up to date.

Case preparation

Concerns

The Jeffrey Review raised concerns about the quality of preparation undertaken by fee earners during criminal cases. This particularly relates to preparation for trial. In particular, the Jeffrey Review noted that fee earners were required to pick up cases at short notice and many were not prepared.

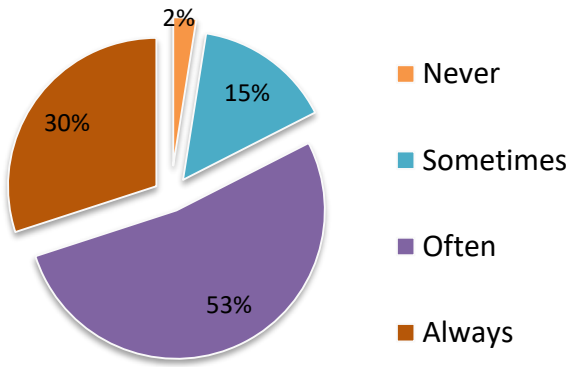
Key findings of the thematic review

- Firms placed an emphasis on case preparation.
- The majority of firms felt they had sufficient time to prepare for hearings.
- There was no standard process for case preparation and each matter is dealt with individually.
- Warned trials limited the firms' ability to prepare.
- Firms had processes and procedures in place to make sure matters were handled consistently between advocates.

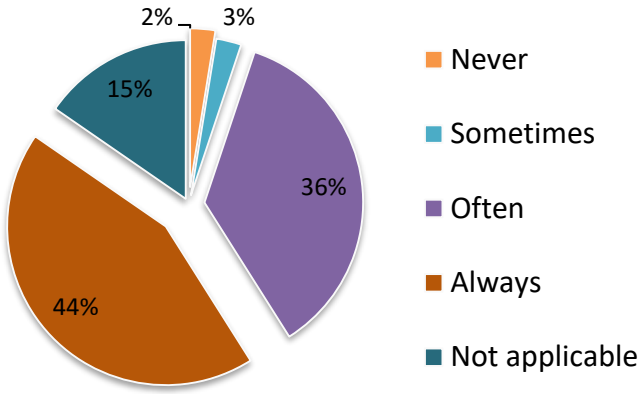
Preparing cases

The majority of firms told us that, in general, they had sufficient time to prepare for court hearings. Interestingly, the answers slightly varied depending on the venue.

Magistrates' court: how often advocates have sufficient time to prepare for a hearing, including trials



Crown Court: how often advocates have sufficient time to prepare for a hearing, including trials



Firms said the gap between the Crown Court and magistrates' court was due to a number of reasons. They said that Crown Court judges were more accommodating where there was a genuine need for adjournments. In particular, judges were stricter with the prosecution about disclosure and were more flexible with defendant solicitors. If the defendant solicitor has not received evidence, they are given further time to prepare. Other firms, however, also suggested that judges within the Crown Court are less tolerant of poorly prepared advocates.

Firms said that in the magistrates' court there was an emphasis on progressing matters on the day. Hearings before the magistrates' court are typically simpler and less serious than Crown Court matters. The vast majority of cases are heard within a day, and therefore the magistrates' court procedure is shorter. In addition, proceedings must be brought within six months by law[31]. This inevitably puts pressure on firms, as there is less time between the initial charge and the first court appearances. In addition, an advocate in the magistrates' court may be required to cover a number of different cases.

Who carries out case preparation?

There was no standard approach as to how cases were prepared and who did the work. Broad distinctions were made depending on whether a matter was destined for the magistrates' or Crown Court.

In general, magistrates' work is carried out by in-house advocates. Crown Court work was either handled by the fee earner and external counsel or by external counsel alone.

[31] s.127 Magistrates' Courts Act 1980

Where firms and external counsel worked together, the division of work and responsibility for case preparation varied for each case. Some firms divided their staff by the court the cases appeared in, or by the work they did, ie case preparation and advocacy.

Time management

Firms tracked court dates by using paper and electronic diaries. A number of firms said that dual entry was necessary to avoid relying exclusively on either method. For example, some firms said that servers and software issues had occurred in the past which had affected their electronic diaries.

In addition to the diary system, some firms arranged weekly diary meetings. This allowed firms to prepare for the forthcoming court appearances and helped to resolve diary clashes.

Significantly, courts set timetables to determine when a trial would start. Courts may set a fixed date for a trial or place the matter on the warned list. This provides a specific time and date for the start of a trial. It also gives firms certainty and allows them to manage their time. Matters are likely to be fixed where the witnesses need special consideration, eg they are vulnerable, they are based abroad, or the matter requires a subject matter expert.

If a matter was placed on a warned list, it might begin at any point in a warned period. A matter can be placed on a number of consecutive warned periods before it is heard. Firms said this caused some difficulties. Firms must be flexible and well prepared, but warned trials have an impact on how firms prepare for a trial. Firms told us it was difficult to make long-term staff plans and rotas because of the courts' flexible approach.

Evidence

Fee earners were responsible for gathering and reviewing evidence. Where external counsel was instructed it was often under their direction.

To instruct external counsel, firms provided a brief. This document was drawn up by the firm and provided counsel with an explanation and overview of the case, together with the information needed to represent the client.

There was a concern that firms were failing to provide adequate briefs to counsel. We asked firms why they might not be able to fully brief an external advocate. Many firms said there was no excuse. They considered this to be a fundamental part of the process and it was a straightforward task.

A minority of firms said briefings could be affected by a last-minute change of counsel or where they had not received papers from the prosecution.

A number of firms said that, occasionally, their initial choice of counsel would become unavailable at short notice when trials overran. This problem was made worse by the number of trials that were placed on the warned list. Other firms said that counsel was sometimes double booked. A number of firms said that, on these occasions, barristers would

choose to represent firms who provided the largest volume of work. This was mentioned by both large and small firms.

At the outset, all firms must review the evidence provided by the prosecution. A significant number of firms said they experienced difficulty in retrieving papers and evidence from the prosecution. Firms said the CPS was under-resourced, and this affected their ability to punctually provide evidence. In addition, firms said the CPS often did not receive all of the evidence from the police.

Guilty anticipated plea (GAP) and not guilty anticipated plea (NGAP) hearings

Firms said that the issue of insufficient evidence occurred regularly because of how the police categorised cases. The police are responsible for charging defendants and will make an assumption about how a defendant will plead. This assumption is based on the police's perceived strength of the evidence.

Police may consider a defendant to be either an NGAP or a GAP. Some firms said this review by the police can be wrong. This is significant because the police will sometimes provide less information if the defendant is perceived to be a GAP. More thorough preparation and disclosure is provided by the police to the CPS where they believe the offence will be contested. Where the police did not provide evidence to the CPS this also naturally affected the defendant firms.

Crown Court digital system

The Crown Court has recently introduced a new digital case system. The online system allows people to:

- lodge court documents
- share information with court staff, the judge, the prosecution or defence
- collaborate on documents and the bundle.

The majority of the firms believed that the system had improved the rate and scope of disclosure. Despite initial teething problems, the firms saw this as a positive step forward and believed it would help reduce issues in court.

Plea

Fee earners told us that the nature of the alleged offence (indictable-only, either-way or summary-only) might be significant in the client’s plea decision. In particular, they told us that the prosecution rate at the Crown Court is lower, but the sentencing powers are more significant.

The list of charges is read to the defendant and they are asked to enter a plea. This is a significant part of the process and fee earners regularly advise their clients on the nature of the offence and the strength of the evidence and therefore the appropriate plea. Our file reviews reflected this and 90% of the files featured advice about pleas (four files had not reached this stage).

Firms told us that the prosecution process was heavily geared towards securing an early guilty plea. Defendants may be given a reduction of sentence, called "credit", for an early guilty plea[32]. An early guilty plea:

- allows swifter justice and reduces the anxiety of a victim
- helps to fast track matters and avoid prolonged preparation by the police and the CPS so they can target their resource on contested matters
- allows the courts to deal with the plea and the sentencing in one hearing. This is more efficient and frees up the court resources.

Court forms and processes ask firms to confirm that they have discussed early guilty pleas. The prosecution might also be willing to accept a different basis of plea.

Some firms believe that the credit system occasionally encouraged people to enter a guilty plea despite being innocent. Although all firms said they strenuously advised against this, clients would sometimes prefer to cut short proceedings. This was significant as a guilty plea might have consequences for an individual for many years afterwards, eg job applications. Most offences only became "spent", meaning not disclosable, after a set number of years. The most serious are never considered spent. Even spent convictions may appear on an enhanced Disclosure and Barring Service check.

Despite concerns, there was little evidence of plea only advocates in the sample, and a number of firms expressed doubt as to whether this arrangement would be profitable due to the way they worked.

When is a plea discussed?

A number of firms said a discussion about plea typically occurred at the outset. Initially, fee earners reviewed the elements of an offence and the available evidence. This information was explained to the client and the client would discuss their plea. A discussion about plea could occur at the police station, a prison, the firm's office or at the court. Where possible, firms preferred to discuss plea in advance at their offices. This allowed fee earners to discuss all aspects of the case and provided an opportunity to prepare a response or gather additional evidence. However, a number of firms said this was difficult to arrange as clients rarely booked or attended pre-trial appointments. Some firms told us that fee earners were often asked to attend court on behalf of their client at very short notice.

Fee earners document advice about plea in a client care letter and/or an attendance note. This was significant because it explained the rationale for the advice.

Changing a plea

The client is required to personally enter a plea at court. Occasionally, a client might change their plea. All fee earners said this was significant and they would ask the court for an

[32] www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-sentence-for-a-guilty-plea-consultation-paper-web.pdf

adjournment. The fee earner then discussed the change in plea and had to consider whether a conflict has arisen. In particular, if the client changed their plea to not guilty, the fee earner may no longer be able to represent the client.

The fee earner has a duty to the court and, under the Code, must act with integrity at all times. If they know the client is guilty, eg if the client has confessed during a client meeting, they are not able to say in court that the client is innocent, and the client cannot be called as a witness as he or she would lie on oath. The defendant's advocate would only be able to test the prosecution's evidence, not advance a positive case. On these occasions, the fee earner may be professionally embarrassed and have to stop acting. Several fee earners acknowledged that they were still bound by client confidentiality and would make no further comment to the court.

A number of firms told us that the nature of the offence might also affect how a client pleads.

Advocate consistency

Firms acknowledged that matters could be transferred between fee earners (sometimes at short notice) for reasons previously discussed. To make sure this is not an issue, firms did a number of things to try to make sure that matters were handled consistently.

Some firms said they required specific handover meetings and file notes when matters were passed between fee earners.

Others adopted systematic ways to improve consistency. This included requiring a strict file structure and adherence to set templates and documents, eg file notes. This made sure that files were dealt with in a consistent way and could be passed among fee earners with minimal issue. Most firms had an audit system in place to check that fee earners adhered to these processes.

Some firms said that general things helped, eg they were a small team, an open-plan office and/or regular diary meetings. Although these factors might help, we do not consider them to be an adequate substitute for proactive action and structured supervision.

Good Practice	Poor Practice
• Arranging to meet with the client in advance to discuss the evidence, offence and plea. • Informing clients at an early stage about what their plea means and the consequences of any decision, including changing a plea. • Making all reasonable attempts to acquire evidence (including chasing the prosecution where necessary). • Having systems in place to monitor significant court dates. Firms have secondary measures in place to record dates and avoid over-reliance on a single method of recording. • Having sufficient time to prepare a case for trial. • Having measures in place to promote consistency among fee earners, eg file structure, template documents and audits.	• Failing to monitor significant trial dates or relying on a single system. This leaves them exposed to technical malfunctions and/or human error. • Failing to prepare sufficiently and not providing counsel with an adequate brief.

Complaints and concerns

Key findings of the thematic review

- Only 22 complaints in relation to criminal advocacy were received by the whole sample in the 24 months before the thematic review.
- 19 of those firms stated they had never received any advocacy-related complaints.
- Some firms stated that providing early and clear advice to clients helps manage expectations and avoids complaints.
- Three firms had received judicial criticisms of one of their criminal advocates.

We receive comparatively few reports relating to criminal advocacy, particularly from the judiciary, and these are may be service issues which are passed to the Legal Ombudsman (LeO).

The whole sample only received 22 complaints in the 24 months before the review. In addition, 19 of the 40 firms we spoke to had never received an advocacy-related complaint.

The remaining firms had received only a small number of complaints in relation to criminal advocacy. Where these were referred to LeO, firms stated that no further action was taken. One firm stated that it had only one complaint in 22 years. Their approach to cases is likely to have contributed to this record:

- properly preparing for hearings
- providing clear explanations to the client
- being supportive of the client's needs
- managing the client's expectations
- addressing any issues at the time they arise, so that a formal complaint is not made.

Another firm noted that it had only one complaint in the last 24 months. The advocate at the firm was unable to represent the defendant due to an injury. The defendant maintained that the firm had unreasonably changed advocates at the last minute, which resulted in him losing his case. The matter was referred to LeO but the complaint was not upheld.

Some firms stated that providing early and clear advice to clients about the merits of their case and prospects of success helps manage expectations and avoid complaints in the future.

Judicial criticism

Firms were asked if they were aware of judicial criticism of any of their criminal advocates. Three firms had received judicial complaints, which related to:

- the standard of advocacy provided
- an advocate missing a date through an administrative error
- the conduct of the client during his examination for which the advocate was then held responsible, but no further action was taken.

It should be noted that some firms stated that judges have praised their advocates on many occasions.

Providing a good service

Firms were also asked how clients know whether they have received a good service or not. They stated clients will make it plain if they have not received a good service, giving frank feedback. The lack of complaints received may challenge this assumption. Firms described a number of matters where a client had raised concerns but had not made a formal complaint.

Clients will also re-instruct the firm. Some firms stated that a number of clients in this sector are well-informed consumers and recognise good service. If they have received it, they will instruct the firm again.

Some firms said that clients review their outcome against the sentencing guidelines to measure the service they have received and whether they were satisfied. Some firms, however, recognised the limitations of this review. Even good advocacy may result in a poor outcome from the defendant's point of view. Equally, a successful result does not mean that a good level of service was provided. The outcome may not always tell you much about the standard of advocacy.

Other measures of good service used by clients included:

- talking to other prisoners
- having a good knowledge of the system and what they can expect, as a number are repeat offenders.

Some firms said that clients might not know if they have received a good service. They are not experts and, in many cases, have limited experience of the system, so do not know what to expect. Clients rely on the firm to act in their best interest.

Good Practice	Poor Practice
• Assessing the merits and prospects of the case's success at an early stage and clearly communicating this to the client. • Managing the client's expectations from the outset. • Addressing any issues raised by the client at the time they happen to prevent it from becoming a complaint. • Properly supporting the client throughout the process. • Sending feedback forms to clients at the end of each case, reviewing responses and following them up. • Following up complaints of poor advocacy with specific training to improve performance.	• Failing to act on criticisms or concerns raised by clients or judges. No steps are taken to improve the service provided. • Failing to manage client expectations. • Issues raised by the client are not promptly or properly addressed.

Sector concerns and future issues

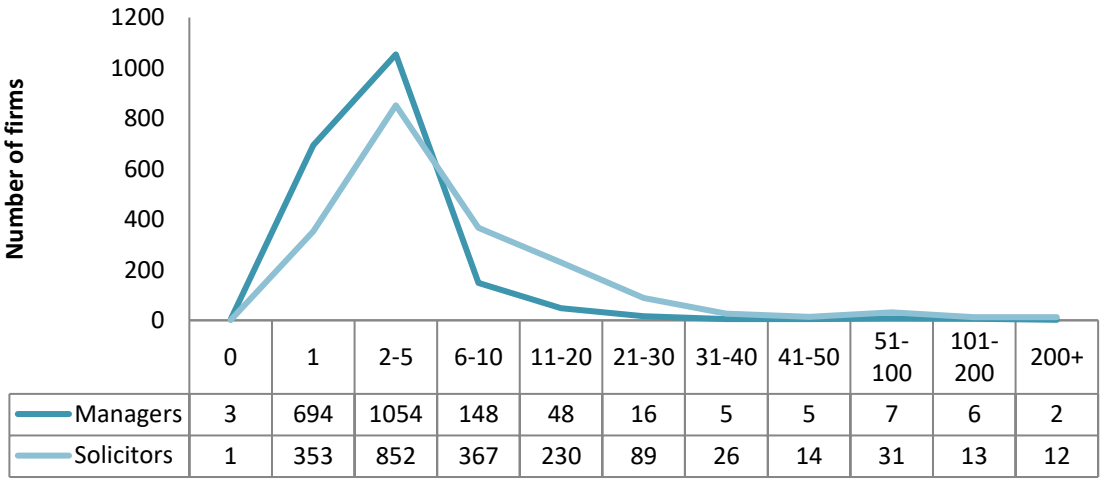
Key findings of the thematic review

- Firms in criminal practice tend to be small and have traditional management and ownership structures.
- The number of firms in criminal practice in a region may not be proportionate to its population or crime rate.
- Criminal law is generally practised by an ageing profession and there appear to be fewer new entrants.

Sector overview

Our records show that, as at June 2016, there were 1,988 firms who reported doing some criminal work. The percentage of their criminal law workload ranged from 0.07% to 100%.

Size of firms in criminal practice by managers and solicitors[33]



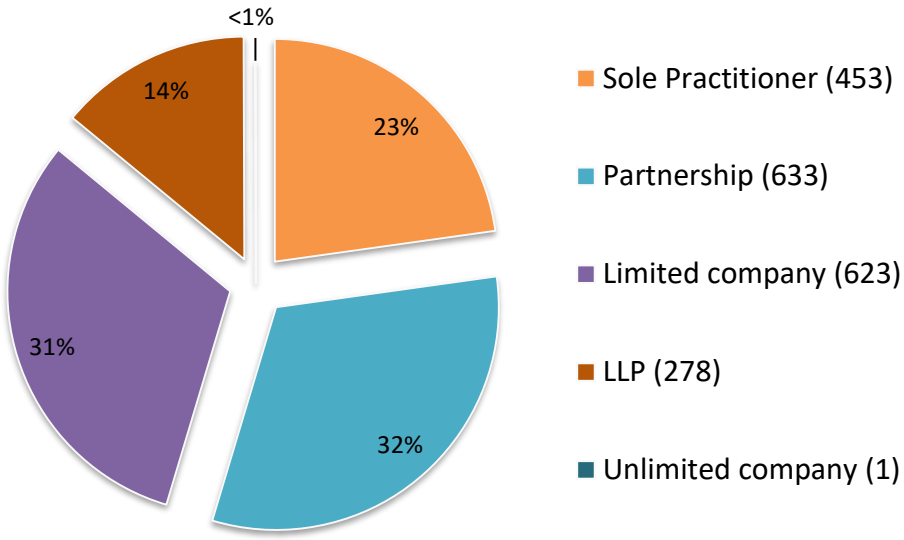
	0	1	2-5	6-10	11-20	21-30	31-40	41-50	51-100	101-200	200+
Managers	3	694	1054	148	48	16	5	5	7	6	2
Solicitors	1	353	852	367	230	89	26	14	31	13	12

This is a sector where smaller firms are prevalent. The majority of firms had no more than five managers or qualified solicitors.

Just under half of the total, 911 firms, fell within our definition of a "small firm" (a firm with four or fewer managers and no more than £400,000 per annum turnover[34]).

[33] 'Managers' relates to a physical manager of the firm. There were three firms where there were no physical managers recorded as the managers of the business were limited companies. There was one licensed body whose managers and owners were all non-solicitors.
[34] www.sra.org.uk/solicitors/small-firms.page

Corporate structure of all criminal firms



As the chart above shows, criminal practice appears to be an area where traditional law firm structures dominate the sector, as 55% were either sole practitioners or partnerships

This may be surprising, as firms have been able to incorporate since 1992 and to form LLPs since 2000. A potential explanation for this could be related to the number of small firms in the criminal sector. The cost and administration involved in incorporation or forming an LLP (eg appointment of officers, filing accounts) may make this a less attractive option than for medium and large firms.

There appears to be a tendency for firms to either specialise in criminal law completely, or for it to be a small percentage of the firm's workload. This is mirrored in the graph relating to turnover (above), which shows 325 firms earning less than £10,000 per annum in fees for criminal work.

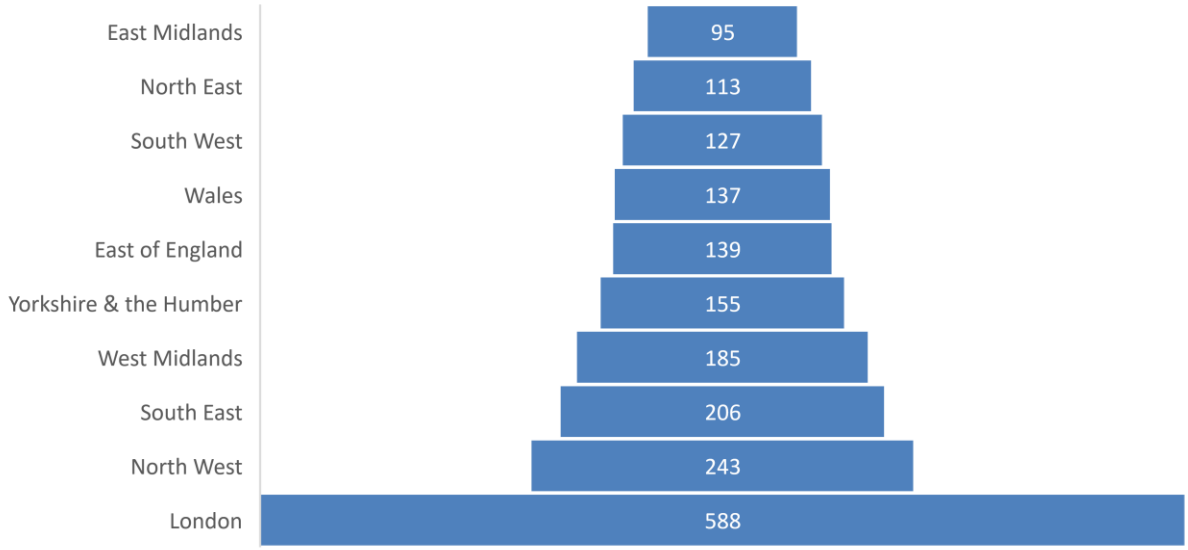
Geographical location

We categorised the 1,988 firms in criminal practice by their region. We used the nine regions adopted by the government in 2011.

It is worth noting that the statistics we have reviewed refer only to the number of criminal firms and the location of their head offices. The firms could have several branch offices, potentially serving more areas. We explored this possibility in our questionnaires.

However, the analysis of the firms' head office location reveals the following results:

Firms in criminal practice by region: all firms



London predominates, with 30% of all firms in criminal practice, followed by densely populated areas such as the South East, North West and West Midlands.

The chart shows some areas that have unexpectedly few firms: the East Midlands, South Wales and the North East in particular. The East Midlands result is particularly surprising. It is a large region containing some large cities, such as Nottingham and Leicester, but has only the head offices of 95 criminal practices.

Solicitor advocates

We obtained information about the number of solicitor advocates at firms who had criminal higher rights of audience, whether alone or combined with civil higher rights.

Of the 1,988 firms in criminal practice, 995 (51%) have at least one solicitor advocate on the staff.

Almost half of all firms in criminal practice, even those doing very high proportions of criminal work, do not have any solicitor advocates. The pattern continues even in specialist firms. The highest number of criminal solicitor advocates reported in one firm was 41, in a firm with 110 solicitors in total.

Some 125 firms reported having at least one barrister on the staff. This data, however:

- does not specify whether this refers to people who have only been called to the Bar[35] or those who have gained full or partial rights of audience
- was gained as part of a diversity survey and 104 firms declined to answer.

[35] i.e. have not yet begun or completed pupillage and thus have no rights of audience

Managers' views

At the end of our interviews with managers, we asked them to give us their impression of the current criminal law sector. This was an open question which gave them an opportunity to raise any issues they thought we should know about.

Only four firms expressed satisfaction with the sector as it currently stands. The remaining 90% gave a generally pessimistic account. There were accounts of sector shrinkage due to the increasing number of out of court disposals, not just in the youth court but more widely.

Six firms also said they were concerned that the criminal justice system appeared to concentrate on speed and cost, at the expense of justice. They attributed this to cuts in the criminal justice system generally and the consequent pressure of work.

Two firms expressed the opinion that the standard of advocacy had decreased recently:

- One said that stricter sentencing and procedural guidelines had made advocacy mechanistic. As a result, younger advocates tended to read from their notes and adopted an inappropriately conversational tone. The manager was also concerned that virtual hearings[36] would have a negative impact on advocacy skills.
- The other firm said that the decline was due to firms taking on advocates for commercial reasons and failing to make sure they had the necessary skills. Although this does not entirely fit with the data we have gathered, it does emphasise the importance of ongoing training and support.

Two firms felt that the sector suffered from a surplus of criminal law firms.

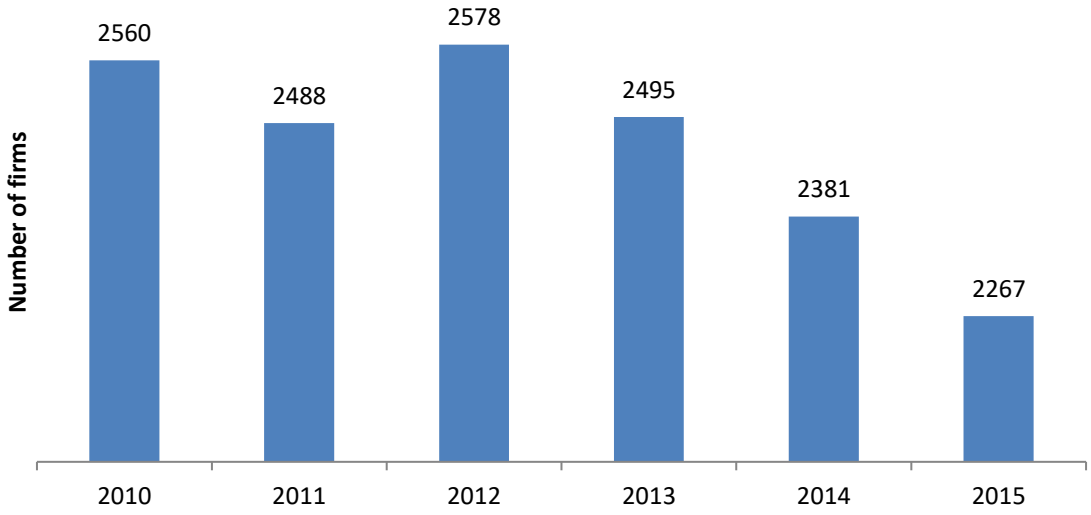
Five firms described a loss of respect for the criminal defence profession. They said that criminal law used to be seen as a noble profession, but defence lawyers were now seen in a negative light. Four firms, however, described criminal law as an interesting, varied and rewarding field in which to work. Despite the challenges which these firms faced, they stated that a sense of vocation had kept them in criminal practice.

[36] Hearings via video link, where the defendant is filmed at a local police station rather than attending the magistrates' court in person.

The future of criminal practice

Nine firms stated that criminal law is an ageing profession and that there were too few solicitors entering the sector. This was echoed by the Jeffrey Review[37].

Firms undertaking criminal work 2010 to 2015[38]

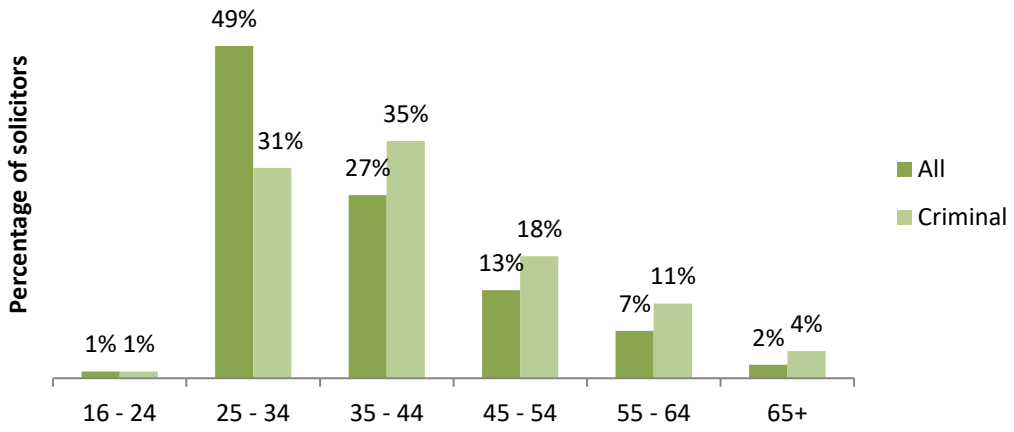


An overall steep decline in the size of the sector from 2012 onwards is immediately noticeable, from 2,578 firms in 2012 to 2,267 in 2015. These 311 firms represent a decrease of 12% in a period of three years.

Although firms tended to put this shrinkage in the sector down to legal aid cuts, the Crime Survey for England and Wales[39] records a noticeable decrease in the crime rate during this period. These figures are based on offences recorded by police, and so will include out of court disposals and cautions. This means that crime overall is decreasing, and not just those offences which lead to a solicitor becoming involved.

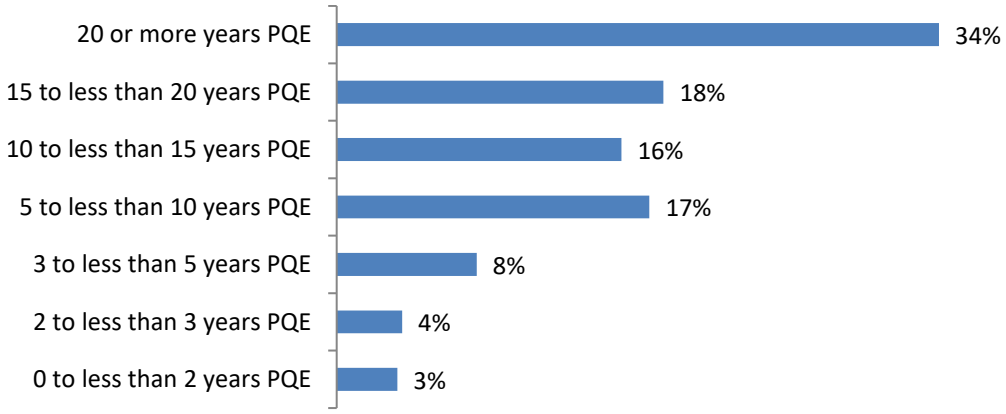
[37] at p.8
[38] This data does not exclude non-trading entities - so the totals may be even lower.
[39] www.crimesurvey.co.uk/

Age profile of solicitors in criminal practice compared with all solicitors



The diversity data we hold[40] suggests that the lack of new entrants is an issue not just for our sample of firms but for criminal practice generally. The evidence suggests that it is an ageing profession, and highlights the lack of new entrants. Although 67% of criminal solicitors fall into the lower three categories, the largest difference in age categories in the graph above relates to the 25 to 34 age group, which contains most post-graduate entrants to the profession. In the other categories from 35 to 44 onwards, criminal practice has a higher number of solicitors.

Solicitors and solicitor advocates in the sample sorted by PQE



The pattern was repeated in the sample, with the highest percentage of solicitors and solicitor advocates having 20 years or more PQE. By contrast, the smallest categories represented newly qualified solicitors. Low rates of pay and unsociable hours were cited as factors which put younger lawyers off a career in criminal law, as well as a perception that criminal defence work was less respectable than other areas.

[40] www.sra.org.uk/solicitors/diversity-toolkit/law-firm-diversity-tool.page

Conclusions

This review has examined issues raised by a number of internal and external stakeholders. Its focus on solicitors has helped us to understand how they operate within the criminal sector. This is an area that has faced increasing scrutiny from the government and other professions.

We have worked with a broad range of firms who provide criminal advocacy on behalf of a wide range of clients. The firms we interviewed have largely welcomed the thematic review and the focus on the criminal area of practice.

The majority of firms showed good behaviours. This is despite having to meet the particular challenges of the last few years, including significant changes in the legal aid sector. However, there is more that could be done by firms working in criminal practice. This section sets out our conclusions on each of the areas considered in the review.

The sector picture

Criminal advocates are, in general, very experienced. Clients who instruct one of the sample firms are likely to deal with a lawyer who has the benefit of many years in practice. Along with our internal data, though, this suggests that the criminal legal profession is ageing and that new advocates are not entering the sector.

Two-thirds of practitioners in the sample were solicitors without higher rights. This echoes the internal data we hold, and fits in with the general picture of firms doing the majority of their work in the magistrates' court. Some solicitor advocates in the sample told us that even though they were qualified to act in the Crown Court, they preferred not to do so.

The picture which emerges of the criminal justice sector is that it is shrinking. On the basis of the figures we have seen, and what firms have told us, firms and practitioners are leaving the sector and are not being replaced. This naturally has implications for our priority risk of access to justice. A ready supply of practitioners is vital for the criminal justice system to operate, both at police stations and at court.

Legal aid made up the vast bulk of the sample's caseload, which emphasises how important this work is for those who are otherwise unable to pay.

Introduction of clients

We found that although firms gained work from a number of different sources, there was no evidence of paid referral arrangements in the sample. Firms tended to receive repeat instructions or word of mouth referrals.

Touting and referrals

Firms suggested that touting was less of a problem than it had been previously, though it still existed. We are concerned, however, by the reluctance of firms to report instances of touting.

Where firms gave a reason for this, it tended to be because:

- they wanted to resolve the problem without involving the regulator
- they felt that they did not have enough evidence to make a report
- they did not think we would do anything about it.

Solicitors are under an obligation to report misconduct where they find it, so any instances of touting should be reported. In terms of evidence and action we take, we have informed firms that while we may not be able to act on individual reports, they may help to build up an emerging picture. Since our statement on 28 October 2016, we have received very few reports of touting.

Touting takes place at courts, prisons or police stations, rather than at firms. It is therefore difficult for us to investigate without evidence. This does not need to be documentary evidence as we can build up a picture if several reports are received over time. We want to emphasise to firms that they can make confidential reports and that any evidence is useful to us.

Choice of advocate

The majority of firms used in-house advocates for magistrates' court and Youth Court work. Cases going to the Crown Court, and appeals from there, tended to be referred to external counsel, even if the firm employed solicitor advocates.

The firms in the sample took a variety of factors into account when selecting an advocate, of which the advocate's experience and client choice were the two highest. We saw no evidence that firms were keeping work in-house to maximise their profits. On the contrary, they often saw an external advocate as being in the clients' and the firm's best interests.

Firms explained the choice of advocate to the client, but this was not always recorded. Many firms said that clients who had been through the criminal justice system before would have their own preferred advocates. Firms also tried to give continuity of representation where possible.

There was little evidence of plea-only advocates in the sample, and a number of firms expressed doubt as to whether this arrangement would be profitable due to the way they worked.

The youth court

The majority of solicitors in the sample who practise in the youth court are experienced. This experience is reflected in both the wider sample of solicitors and the population of solicitors in criminal practice as a whole. While this experience is welcome, it raises concerns about the future supply of youth court advocates.

It was good to see that eight firms had specialist youth court advocates. However, for the majority of firms, youth court work was part of their day-to-day practice.

The ability to gain experience in youth court work is an issue. It is important that advocates develop their specialist knowledge of the youth court and its procedures. This requires specific training, resources and commitment from staff, including the advocates.

We have already taken steps to provide support to solicitors practising in the youth court in the form of an online toolkit[41]. As the Taylor Review stated, it is important that young people involved in the criminal justice system have access to good quality legal representation. All solicitors have a responsibility to keep their knowledge and skills up to date.

There is, however, currently little practical or financial incentive for many firms to put further resources into this area, due to the drop in the number of youth court cases. Criminal firms have already had to deal with changes to legal aid fees and the number of criminal firms has decreased. There may be a higher demand for youth court specialists in some of the metropolitan areas. However, the solicitors we spoke to tended to develop their knowledge because they wanted to do a good job and deliver the best standard of service for their client.

We have seen good examples of firms working with other organisations, such as the YOT and young people's charities. We are pleased that some firms are taking the initiative and time to do this, although this is not universal. This is to be encouraged.

We have also seen good examples of firms using electronic resources to keep their competency up to date. The use of electronic resources is a relatively inexpensive way of doing so, in terms of knowledge, and has the advantage of being instantly accessible and frequently updated. However, skills and competence could be enhanced by other methods, including training, particularly on how to engage with young people. This should benefit solicitors and help them to build empathy and trust with their young clients. A solicitor may be an expert on youth justice, but this does not help the client if they are unable to engage with the client.

[41] www.sra.org.uk/solicitors/cpd/youth-court-advocacy.page

Competency, supervision and training

We have seen the popularity of online resources to develop and maintain knowledge of criminal law and procedure. However, advocates use various different tools to develop and maintain their competency including:

- file/peer review
- reviewing client feedback
- observation at court by senior staff
- using internal meetings/briefing
- reflection on the outcomes of cases
- training.

The use of a combination of these tools is to be encouraged. There were some firms who are likely to benefit from training or more frequent training in certain key areas, such as advocacy and working with vulnerable people.

There were several firms who also said that they relied on their advocates' PQE as a measure of competence. The challenge for experienced advocates is to consider how they can most effectively evaluate their performance and refresh their knowledge. This is particularly important in fast changing areas such as the youth court. Self-reflection, particularly on the outcome of a case, is a good way to do this. We were pleased that some advocates said that they did this, but more could be encouraged to do so. The continuing competence toolkit has some useful advice on how to do this.

It was disappointing that only 65% of firms said they kept a training schedule outlining the training available to fee earners. Planning and recording development feature more prominently in the new approach to continuing competence. The continuing competence toolkit also contains advice on how to address advocates' needs and record the outcome.

Some solicitor advocates asked for more advanced advocacy training geared towards the Crown Court. They felt that current advocacy training was basic and geared towards the magistrates' court.

Case preparation

Firms used a variety of methods to make sure that they were fully prepared, and external advocates were fully briefed, on clients' matters. The warned list system, however, meant that time was sometimes short.

The firms also told us that they were always careful to tell clients that credit was available for an early guilty plea. Some were concerned about the pressure that clients may face to plead guilty.

Complaints and concerns

Firms were careful to manage clients' expectations.

Only 22 complaints were received by the 40 sample firms as a whole in the last 24 months. Although this does suggest a high level of client satisfaction, firms should reflect on how clients know what good service looks like. Low literacy rates among prisoners also suggest that some clients may find it difficult to deal with a system based on written complaints.