

RESTRICTED - APPOINTMENTS



PANEL APPROACH TO COMPETENCIES 2022



## KING'S COUNSEL SELECTION PANEL 2022 COMPETITION

### PANEL APPROACH TO COMPETENCIES

1. Silk is awarded for the demonstration of excellence in all the competencies. The purpose of this paper is to summarise the Panel's approach to the demonstration of the competencies and what constitutes excellence as opposed to competence or good practice in each competency.

#### **Advocacy work**

2. The award of silk is for advocacy in the higher courts. The competency framework refers to the applicant's advancement of their client's case, which in turn requires that some form of dispute exists with another party which requires resolution. The Panel sought to distinguish this from 'advice' as to a proposed course of action or its implications, although this was not always an easy line to draw.

3. Appearance as a witness to give evidence, for example as to foreign law, is not regarded as advocacy. Similarly, where a solicitor-advocate had been involved in a major case, but not as an advocate, that case could not be taken into account in considering that person's advocacy.

#### **Cases of substance, complexity or particular difficulty or sensitivity**

4. Applicants had to provide evidence of their demonstration of the competencies at a level of excellence in cases of substance, complexity, or particular difficulty or sensitivity. Competency B (Written and oral advocacy) *must* have been demonstrated in cases of substance, complexity, or particular difficulty or sensitivity. The Panel looked for the demonstration of all the competencies in such cases. Substance, complexity, or particular difficulty or sensitivity embraced a number of dimensions which could manifest themselves differently in different cases or areas of work. Therefore, the weight to be accorded to any one case, and thus to an assessment on a case, was a matter for Panel members to decide in the light of all the evidence. Each case (or group of cases) of substance, complexity, or particular difficulty or sensitivity was not automatically given equal weight. The nature of each case was crucial. Moreover, it did not follow that all hearings in self-evidently important or substantial cases themselves raised the same challenge or substance as the case as a whole.

5. The range of an applicant's work was normally regarded as a dimension of substance, complexity, or particular difficulty or sensitivity. While some successful applicants came from relatively narrow specialist fields, the Panel had to be satisfied that an applicant had engaged in cases of sufficient substance, complexity, or particular difficulty or sensitivity in order to have been fully tested on each competency and for evidence of apparent excellence to be confidently relied upon.

## General

6. The Panel judged how far an applicant met the competencies as described by the passage in italics in the competency framework. The examples provided below (from the competency framework) were intended to assist applicants, assessors and others.

### Panel approach to excellence in Competency A (Understanding and using the law)

*Has expert, up-to-date legal knowledge and uses it accurately and relevantly, and becomes familiar with new areas of law quickly and reliably.*

*Examples:*

- ✓ Is up to date with law and precedent relevant to each case dealt with, or will quickly and reliably make self familiar with new areas of law.
- ✓ Draws on law accurately for case points and applies relevant legal principles to particular facts of a case.

7. In its approach to excellence in Understanding and using the law, the Panel looked especially for:

- effective work at the appellate level;
- “novel” or “creative” use of the law;
- effective use of examples from other jurisdictions;
- skeleton arguments of high quality – right authorities and relevant ones;
- effective use of recent precedent cases;
- cases involving demanding circumstances – sensitive, difficult, complex points of law;
- the ability to explain difficult points of law succinctly, clearly and persuasively.

8. The Panel recognised that the demands on a silk in connection with Competency A were different in different specialisms. In some a command of the necessary law was required, but particular creativity or innovation was rarely relevant. In other fields the application of law in novel or unexpected situations could be a primary skill. The Panel's consideration of an application took that into account.

9. In general, applicants were expected to have shown intellectual curiosity in the law broadly; to have ideas on developing expertise in their own fields; and to have demonstrated the ability to master new areas of law quickly and effectively. At interview, Panel members asked questions about the cases in which the applicant had been involved, his or her specialist areas, and the wider application of principles; and they sought explanations that were understandable by a lay person or lawyer unfamiliar with the particular area(s) of law. Panel pairs also had available to them a selection of possible questions agreed by the Panel.

10. While the Panel gave some weight to the authorship of recognised legal reference works, it had to be sure of the applicant's role in such works. Editing of legal text books or articles in legal journals could be taken into account as part of evidence of the competencies, in particular Competency A. However, authorship of (or contributions to) legal text books had to be considered on their merits. In some cases the books might have been widely ignored, or symptomatic of a weak practice, or to have involved limited personal input. The Panel had to consider the weight to be given to such activity in each

case. Assessments limited to such written work or academic lecturing were not given weight. Comments from legal directories were not taken into account.

**Panel approach to excellence in Competency B (Written and oral advocacy)**

11. In considering Competency B (Written and oral advocacy) the Panel looked separately at the written (B1) and oral (B2) aspects of advocacy in deciding their view of the competency overall. Advocacy (including written advocacy) had to be demonstrated in relation to developing or advancing a client's or employer's case to secure the best outcome in a dispute actually or potentially before courts, another tribunal, mediation, arbitration (including arbitration tribunals) or in negotiation. That outcome might, for example, have been secured through arbitration, court determination or a settlement agreement.

12. The Panel looked both at the written and oral aspects of advocacy in deciding its view of the competency overall. The outcome for Competency B overall was not reached through aggregating or averaging the component scores, but reflected the Panel members' judgement in relation to the applicant's written and oral advocacy taken together as demonstrated in his or her practice.

13. The Panel recognised that not all applicants will have had the opportunity to undertake significant oral advocacy in court. Whilst there had to be some evidence of excellence demonstrated in oral advocacy, the Panel took into account the type of practice of the applicant and the scope for undertaking advocacy, including recent cross-examination of witnesses. The Panel recognised that some applicants conducted relatively little oral advocacy in their practice, although the Panel has taken the view that to be appointed there must be some evidence of excellence in oral advocacy in some forum.

14. In appropriate cases the Panel was ready to take account of the presentation of the self-assessment in the application form as potentially having a bearing on Competency B1 (Written advocacy), having regard to the constraints presented by the application form, in the same way as the interview potentially had a bearing on oral advocacy (Competency B2).

*Develops and advances client's case to secure the best outcome for the client by gaining a rapid, incisive overview of complex material, identifying the best course of action, communicating the case persuasively, and rapidly assimilating the implications of new evidence and argument and responding appropriately.*

*Examples (Written advocacy):*

- ✓ Writes arguments accurately, coherently and simply, and in an accessible style.
- ✓ Presents facts and structures arguments in a coherent, balanced and focused manner.
- ✓ Deals effectively with necessary preliminary stages of legal disputes.
- ✓ Gains and gives an accurate understanding of complex and voluminous case material.
- ✓ Appreciates aspects of the case that are particularly important, sensitive or difficult and appreciates the relative importance of each item of evidence.
- ✓ Prepares thoroughly for the case by identifying the best arguments to pursue and preparing alternative strategies.
- ✓ Anticipates points that will challenge an argument

*Examples (Oral advocacy)*

- ✓ Deals responsibly with difficult points of case management and disclosure.
- ✓ Presents facts and structures arguments in a coherent, balanced and focused manner.
- ✓ Assimilates new information and arguments rapidly and accurately.
- ✓ Immediately sees implications of answers by witness and responds appropriately.
- ✓ Listens attentively to what is said paying keen attention to others' understanding and reactions.
- ✓ Accurately sees the point of questions from the tribunal and answers effectively.
- ✓ Gives priority to non-court resolution throughout the case where appropriate, identifies possible bases for settlement and takes effective action.
- ✓ Prepared and able to change tack or to persist, as appropriate.
- ✓ Deals effectively with points which challenge an argument.

15. In its approach to excellence in Competency B, the Panel looked for:

- mastery of complex and detailed information;
- evidence of detailed preparation (“did their homework”), including expert and specialist evidence and its use in argument;
- communicating concisely, clearly, attractively at all stages: prior to court and in court or during a negotiation;
- good judgement – consistently 'getting it right';
- taking full account of 'events' and using them to advantage;
- insight;
- persuasiveness;
- clear and succinct, non-repetitive skeleton arguments, having regard to the reading burden on judges and the uses to which the written material might be put;
- adapting written documentation to the forum, or needs of the tribunal;
- good listening skills – sensitive “antennae”, perceptive;

- adapting style of approach to match role and cases;
- ability to explain “technical” specialist or expert detail clearly to the jury, judges in a non-patronising way;
- skill at handling witnesses and fine judgement in when to stop questioning witnesses;
- ability to think rapidly, and effectively, on feet;
- courage - brave enough to change direction or stick to their guns – and judging it right;
- sensitivity to atmosphere in handling of judge, jury, witnesses, and parties;
- did not bully, behaved properly to witnesses, the bench and others;
- ability to draw out the relevant data from experts;
- authority and presence.

### **Panel approach to excellence in Competency C (Working with Others)**

*Establishes productive working relationships with all, including professional and lay clients, the judge and other parties’ representatives and members of own team; is involved in the preparation of the case and leads the team before the court or other tribunal.*

*Examples:*

- ✓ Behaves in a consistent and open way in all professional dealings.
- ✓ Establishes an appropriate rapport with all others in court and in conference.
- ✓ Advances arguments in way that reflects appropriate consideration of perspective of everyone involved in the case.
- ✓ Helps the client focus on relevant points and is candid with the client.
- ✓ Explains law and court procedure to client and ensures the client understands and can decide the best action.
- ✓ Keeps lay and professional clients informed of progress.
- ✓ Is prepared to advance an argument that might not be popular and to stand up to the judge.
- ✓ Responds to the needs and circumstances of client (including client’s means and importance of case to client and bearing in mind duty to legal aid fund) and advises client accordingly.
- ✓ Meets commitments and appointments.
- ✓ Accepts ultimate responsibility for case when leading the team.
- ✓ Motivates, listens to and works with other members of own team.
- ✓ Aware of own limitations and seeks to ensure that they are compensated for by others in team.
- ✓ Able to take key decisions with authority and after listening to views.
- ✓ Identifies priorities and allocates tasks and roles when leading the team.

16. As with all competencies it was important to distinguish excellence from good practice. Excellence here included as a minimum:

- A clear leadership element – delegating, motivating, taking decisions, giving direction, taking responsibility, acting as a role model, being able to strike the right balance between listening and leading;
- inclusivity – seeking to include all those involved in the team, whatever their role;
- emphasis on working in partnership *with* the client and on shared decision making;

- the ability to work as part of a team with other advocates and with others involved in the case.

17. The Panel recognised that the best way of demonstrating this competency was by being an effective member of a team, and also providing leadership (but not necessarily of the same team). If no evidence of leadership and working in a team was available from the assessors' comments or self-assessment, Panel members sought to explore these aspects at interview.

18. In its approach to excellence in Competency C (Working with others), the Panel also looked for:

- understanding and managing clients' expectations and concerns;
- "taking trouble" with clients and sensitivity to clients' position, ensuring that clients were not alienated from the process;
- regular and timely communication with clients;
- management of clients' expectations;
- courtesy, punctuality, dependability, accessibility;
- sensitivity to many different audiences;
- acting with authority;
- showing respect to others.

19. Client assessments could provide particular insights into this competency. The demonstration of this competency often also shed valuable light on Competency D (Diversity).

#### **Panel approach to excellence in Competency D (Diversity)**

*Demonstrates an understanding of diversity and cultural issues, and is proactive in addressing the needs of people from all backgrounds and promoting diversity and equality of opportunity.*

*Examples:*

- ✓ Is aware of the diverse needs of individuals resulting from differences in gender, sexual orientation, ethnic origin, age and educational attainment and physical or mental disability or other reason, and responds appropriately and sensitively.
- ✓ Is aware of the impact of diversity and cultural issues on witnesses, parties to proceedings and others as well as on own client, and adjusts own behaviour accordingly.
- ✓ Takes positive action to promote diversity and equality of opportunity.
- ✓ Understands needs and circumstances of others and acts accordingly.
- ✓ Confronts discrimination and prejudice when observed in others; does not let it pass unchecked.
- ✓ Acts as a role model for others in handling diversity and cultural issues.

20. Excellence in Competency D (Diversity) required both an awareness and understanding of the impact of diversity and cultural differences, and evidence of positive and proactive action in addressing the needs of people from different backgrounds in order to promote fairness. This included awareness of the diverse needs of individuals which may have resulted from differences in gender, sexual orientation, ethnic origin, age, educational attainment/ background, physical or mental ability, or other reasons, and use of appropriate and sensitive responses.

21. Applicants had to provide evidence from their professional lives. The Panel looked for examples from the applicant's practice which showed excellence in the light of his or her circumstances. Where an applicant sought to draw on experience from personal life in relation to this competency, the Panel sought at interview to ensure that the applicant linked the private experience back to professional life. The fact that the applicant or family members had one or more characteristics of diversity was not an indicator of excellence in the competency, although it might have given the applicant a particular perspective. Having a practice which entailed working with foreign clients did not in itself provide evidence of fulfilling the competency. Nor did it follow that an applicant working in the field of equalities law would automatically be personally excellent in Competency D.

22. In its approach to excellence in Competency D (Diversity), the Panel looked for:

- awareness of the impact of cultural factors upon witnesses, parties to proceedings and others as well as on their own clients and evidence that applicants adjusted their own behaviour accordingly;
- evidence of growing appreciation of diversity based on experience and maturity;
- diversity as part of an applicant's mindset and reflected in their day-to-day behaviours;
- taking positive action to promote diversity and equality of opportunity;
- courage and tenacity in confronting discrimination and prejudice when observed in others in any aspects of professional life and not letting it pass unchecked (perhaps in the face of cynicism or apathy);
- learning from their own experience and that of others and making changes on the basis of this experience where appropriate;
- acting as a role model for others in promoting fairness;
- recognition and insight into diversity issues, including less obvious ones;
- the applicant's perceptions of diversity in respect of the legal profession.

23. In the Panel's view, demonstrating these skills and qualities was potentially achievable by any applicant, whatever the nature of their practice. There was no area of practice which would not present an applicant with opportunities to demonstrate excellence in diversity. At the least, in all practices there were relevant issues that arose from the inter-relationships and communications with those working within the chambers or firm, or with clients, colleagues or others working within the judicial system. Issues could embrace, for example, cultural values and behaviours; learning difficulties, mental health and physical disabilities; flexible and part-time working, paternity/maternity leave and carer responsibilities. However, disadvantage and unfairness were not limited to specific categories. The Panel did not find it plausible that a senior junior (or senior solicitor advocate) could not have taken opportunities to develop and apply an understanding of diversity, whether in court, chambers/ firm or broader professional or personal life.

24. The Panel looked for more than a 'tick box' approach to diversity - that is one where an applicant appeared to have become involved in eg membership of chambers diversity committees or charitable work, perhaps with the silk competition in mind. Whilst the latter activities might be laudable and provided evidence of awareness and involvement in diversity issues (and could lead to real commitment), in themselves they were insufficient. The Panel sought evidence of a pro-active approach to diversity issues, which in outstanding candidates ran like a consistent 'thread' through their language and behaviours.



25. However, the Panel recognised that it could be difficult to gain sufficient evidence from assessments in respect of diversity, although weight could be given to the self-assessment, which could provide impressive evidence. A lack of evidence at the grading stage for this competency did not of itself bar an applicant from an interview if one appeared merited on the strength of the other competencies. Evidence from other parts of the application, eg description of practice in the application form, and assessments on other competencies could shed light on this competency. This did not preclude a substantive rating based on the available evidence, where there was sufficient evidence to allow a view to be formed. This competency was covered in all interviews.

### **Panel approach to excellence in Competency E (Integrity)**

*Is honest and straightforward in professional dealings, including with the court and all parties*

*Examples:*

- ✓ Does not mislead, conceal or create a false impression.
- ✓ Honours professional codes of conduct.
- ✓ Where appropriate refers to authorities adverse to the client's case.
- ✓ Always behaves so as to command the confidence of the tribunal and others involved in the case, as well as client.
- ✓ Acts in professional life in such a way as to maintain the high reputation of advocates and King's Counsel.

26. To be recommended for appointment it was essential for applicants to demonstrate Competency E (Integrity). The highest standards of integrity were expected of all advocates. Whether or not seeking appointment as King's Counsel, all advocates had to meet these standards, and were expected to do so as a matter of course as part of their professional life. This competency was regarded as met provided there was no credible negative evidence. Positive evidence was also available in some cases. Any case where there were issues relating to a failure to demonstrate integrity was resolved by the full Panel.

### **Weighting of competencies**

27. All Competencies A-D had to be demonstrated to a standard of excellence: in the absence of evidence to that effect an applicant could not be recommended. It was, nevertheless, recognised that the relevance of different competencies would differ to a greater or lesser extent according to the nature of the applicant's particular practice. Different practices would reflect those competencies to a greater or lesser extent. The Panel took appropriate account of the nature of the applicant's practice as disclosed in the application form, summary description of practice and assessments. It was recognised, however, that only the very best applicants would demonstrate all of the competencies consistently to the highest level. To achieve appointment there had to have been in the judgement of the Panel, as a minimum, strong evidence of excellence in Competency A (Understanding and Use of the Law), Competency B (Written and oral advocacy) and in at least one other competency; and no less than good evidence of excellence in relation to the remaining competency.

### **Attributes of a King's Counsel**

28. In the past the Panel had in addition noted a number of characteristics which aspiring King's Counsel were expected to exhibit in their professional life. They should:

- be entirely trustworthy;
- possess mastery of law and evidence, and be able to deploy it effectively;
- act and speak with acknowledged authority;
- earn respect;
- be independent or courageous, where needed;
- exercise sound judgement;
- take responsibility;
- act responsibly and sensitively;
- communicate in a timely and effective way;
- be alert to the needs of clients, witnesses and others;
- be proactive, rather than reactive;
- have an ability (and readiness) to learn, including from mistakes;
- act as a role model for all in the legal professions in terms of ability, integrity and fairness;
- eschew cynical and disingenuous behaviour;
- stand out (in a positive way) from other practitioners in his/her field.

***KC Secretariat***

October 2022