

APIL SCOTLAND

GUIDANCE ON ASSESSMENTS FOR LITIGATORS UPGRADING TO SENIOR LITIGATOR STATUS

1. Introduction

Senior Litigator is a personal accreditation status awarded by the Association of Personal Injury Lawyers. A candidate for Senior Litigator status must demonstrate that they meet the Standard of Competence for Senior Litigators. This will involve assessment against the Outcomes of Effective Performance contained within the Standard.

Assessment should be integrated with the normal supervision and management of a fee earner. There is not a separate assessment process, nor is there a requirement to assemble further evidence over and above completion of the Portfolio. Evidence of competent performance will come from the day to day work of the candidate. The judgements required to assess competence, for the purpose of achieving Senior Litigator status, are the same judgements that a firm should be making in deciding on the extent to which a fee earner is ready to work unsupervised, to supervise the work of others, or to be self-authorising at key stages of litigation.

The Standard, and this guidance, will help you take those decisions in a structured, reliable and defensible way, as well as enabling you to certify that a candidate meets the Standard for Senior Litigator status.

2. Who can be an assessor?

An assessor should be an existing Senior Litigator of at least five years' standing, a Fellow or a Senior Fellow. The assessor should usually be responsible for supervising the work of the candidate. It is recognised that, with turnover of senior staff and the period of time necessary for full competence to be demonstrated, more than one person may act as assessor of a candidate. In such cases, each assessor should make it clear which units of the Standard they have assessed.

If a candidate works in a firm in which he or she is the only or the senior PI fee earner, application may be made to APIL for another member of the firm to act as assessor. Such a person should have comparable civil litigation experience to a Senior Litigator, and should be the person responsible for supervising the candidate.

If a candidate is a sole practitioner, application may be made to APIL for a Senior Litigator (or above) who assists the firm by conducting file reviews to act also as an assessor.

If the person providing assistance, and acting as an assessor, is retired from practice, they should have been a Senior Litigator when in practice, or have had experience equivalent to that of a Senior Litigator.

Where an external assessor is appointed, all of the evidence required will still come from the files on which the candidate has worked, and from discussion with the candidate. Candidates should contact APIL to arrange an external assessor if required.

3. Evidence of competent performance

Where to find evidence

The Standard sets out the functions involved in progressing a personal injury claim, in a broadly sequential manner. It is divided into eleven units, each dealing with a stage in the litigation process. Each unit is subdivided into elements addressing a function, or group of closely related functions. The primary evidence that a candidate has undertaken each function will come from the files for which they are responsible. The steps taken in progressing the matter should be self-evident from the file, in the form of attendance notes, correspondence, etc. It is because the evidence is largely on these files that no separate collection of evidence needs to be maintained. All that is required is completion of the tables under each function. However as each element of each unit is over and above the requirements set out in the eight units for candidates applying for Litigator status, the Litigator Standard should also be considered during the assessment of the candidate.

Evidence of effective performance should arise naturally from the work of the candidate, and supervision of that work by the assessor. Evidence will almost always come from a candidate being assessed in the normal course of their work. In relation to each function, you need to be satisfied that the candidate has carried it out, has done so properly, and has done so consistently. Remember that the performance you are looking for is performance which would give you the confidence to entrust the candidate with the power to be self-authorising at key stages in litigation, in respect of their own cases, and to be able to authorise others at those stages. This means that you are looking for more than a single example that a function has been properly undertaken, you are looking for consistent performance over a period of time, preferably over a range of types of case, and in a sufficient number of cases to make it likely that most of the problems and challenges which can arise have been encountered and dealt with.

Opportunities for evidence to arise include the general discussion of the progress of cases that is a normal part of the relationship between fee earner and supervisor; from formal reviews of files, either at key stages of litigation or through random file review; from annual or other appraisal of performance; and from observation of how the fee earner manages the relationships involved in progressing a case. An assessor might wish to observe the candidate conducting a client interview, conference with counsel, case management conference or joint settlement meeting. Opportunities for this might arise in relation to the more complex cases in which a supervisor might expect to have such an involvement anyway.

Assessment should not take place too soon. A fee earner is likely to be ready to be assessed against the Senior Litigator Standard once the firm is ready to consider granting the fee earner the authority to be self-authorising at key stages of litigation, in a range of more complex cases. This point is unlikely to be reached before a fee earner has at least five years' experience of personal injury cases. On the other hand, early opportunities to demonstrate competence in relation to matters which arise less frequently should not be missed. Candidates should use the Portfolio to record the name and file reference of a matter which enabled them to demonstrate competence in relation to a function.

Evidence **must** come wholly or mainly from the handling of Court of Session or Sheriff Court Ordinary Cause cases. It is desirable that evidence should come from more than one type of case (e.g. employer's liability, public liability, industrial disease, etc). It is recognised that some firms specialise in a single type of personal injury case (e.g. clinical negligence, road traffic accidents, etc.). In such cases evidence can come from that type of work alone, but must demonstrate full competence across all of the functions.

Knowledge, understanding and know-how

You need to be satisfied not only that the function has been undertaken, but that it was done properly. It is important to ensure that the candidate understood what they were doing and why, and did not just happen to do the right thing by luck. You can establish this by discussing the case with the candidate, and questioning them as to why they took, or propose to take, a particular course of action. This is no different to the discussion you would expect to have anyway with a fee earner when discussing a case with them, or reviewing one of their files. This type of questioning allows you to satisfy yourself that the candidate has the necessary knowledge, understanding and know-how to enable them to operate properly, and to deal with the unusual or unexpected.

Assessing particular types of function

There are some types of function which recur throughout the Standard, and a broadly consistent approach should be taken to assessing whether the candidate has demonstrated competence in them:

- At several points in the Standard, the candidate has to review the case so as to advise the client, or decide on the next step to be taken. Examples are at 6a and 10a. In determining whether the Standard is met, you will need to consider whether the candidate has assembled all necessary and relevant evidence, applied the relevant law to the facts, and identified and made appropriate use of any relevant precedents. Your evidence would come from the file (probably from letters sent to the client, instructions sent to counsel, revisions to the case plan) and from discussion of a case in the normal course of supervision.
- At several points in the Standard, the candidate has to decide whether or when to take a particular course of action. Examples are at 3a, 5a, 6a, 6l and 6m. In respect of each of these you need to consider how the candidate reached, or proposes to reach their decision. Have they fully considered the advantages

and disadvantages of the available courses of action, in relation to the law, the evidence, and the wishes of the client, and then selected the course of action most likely to secure the best possible outcome for the client? Your evidence would come from any note on the file of reasons for selecting a course of action, but predominantly from your discussion of cases with the candidate, in the normal course of supervision. In making your judgement, remember that there may be more than one appropriate course of action. The test is not whether the candidate has selected the course of action that you would have chosen yourself, but that the decision or proposal was reached through a sound process of reasoning based on the law, the evidence and the client's interests. It is soundness of reasoning which will give you the confidence that the candidate is ready to work unsupervised, and which will demonstrate that the Standard is met.

- At several points in the Standard, the candidate has to progress a matter through a case conference or other meeting. An example is at 5b. The best evidence of effective performance in a meeting comes from observation of the performance of the candidate in the meeting itself. This can be gained from cases in respect of which you would wish, as the supervisor, to accompany the candidate at a meeting anyway. You should satisfy yourself, in preparatory discussion, that the candidate has a clear view of the outcome they wish to achieve from the meeting, that such an outcome is appropriate and realistic, and that the likely reactions of other parties to the meeting have been anticipated and contingency responses prepared. In the meeting itself you should assess the effectiveness and clarity of presentation by the candidate, and effectiveness of judgement by the candidate in relation to such things as responses to points raised (both foreseen and unforeseen) and decisions as to whether to press a matter to a conclusion or to seek adjournment.
- At several points in the Standard the candidate is required to identify cases where particular action may be appropriate. Examples are at 3a, 5a, 6k, 6m and 10c. In respect of these actions it is not enough that the candidate should be aware that they are available. In general, to demonstrate full competence, the candidate should have handled successfully cases in which the action specified for consideration was actually carried out.

4. What can you do if evidence is not available?

The Standard sets out functions that every Senior Litigator ought to be able to carry out competently. In general, evidence ought to be available in relation to every element of every unit, to demonstrate an all-round ability which enables the Senior Litigator to deal with the full range of issues which may arise in the course of the practice of personal injury law.

However, there are two circumstances in which a different approach may be considered.

First, given that very few personal injury cases now go to proof or jury trial, it may be difficult for some candidates to present direct evidence in respect of some elements of Units 10 of the Standard, dealing with the management of proof/jury trial and post proof/trial procedures. The candidate must have demonstrated their ability to handle all of the pre-court procedures listed under Unit 10. However, if the candidate has never had a case which went to court, a covering note to the application should set out what steps have been taken by the candidate to ensure they are fully familiar with the court process. These steps should include attendance at appropriate training events, and must always include having attended court, on one or more occasions, with a fellow lawyer to observe the court proceedings in a civil litigation matter and to discuss, with the lawyer having carriage of the case, the way in which it was conducted. The assessor should seek confirmation from the lawyer so observed that, in the opinion of that lawyer, the candidate would be capable handling the trial procedures competently. The elements which may be addressed in this way are 10d, 10e, 10f, 10g, 10i and 10k.

Second, in some types of practice the opportunity to deal with some of the functions contained in the Standard may arise infrequently, or not at all. It would not be reasonable to deny Senior Litigator status because a function which arises relatively infrequently in practice had not been experienced.

Such functions fall in to two categories. The first comprises those which are genuinely uncommon, or which are unlikely to arise in certain fields of practice. This category includes such things as acting for a child, in a fatal claim, for or against a sequestered party, or seeking provisional damages. The second category is matters which may not be encountered because of a policy of the firm to conduct business in a particular way, for example instructing counsel to draft a Summons.

It is preferable that candidates should demonstrate their competence in relation to these matters through the handling of actual cases. So, it would not be acceptable for a candidate never to have drafted a Summons if the opportunity to do so had been present, and the candidate had simply preferred to pass the matter to counsel. However, if the firm had a policy of such drafting always being undertaken by counsel, it would be unreasonable to deny the candidate access to Senior Litigator status as a consequence.

Where a candidate has not had the opportunity to gain personal experience of a less common function, and to demonstrate competence in its discharge, they should attend a training event or events covering the function(s), and the supervisor/assessor should satisfy themselves, through discussion with the candidate following the training event, that the candidate would be fully capable of discharging the function, should the need arise. A reasonable period of time should be allowed to provide opportunities for less common functions to be undertaken to arise. As such, performance in relation to an element may only be assessed other than by actually discharging the function if the candidate has at least 6 years' experience of personal injury litigation, and no opportunity to undertake the function has arisen in that time.

To ensure that eligibility for Senior Litigator status remains based largely upon demonstrated competence in practice, the following are the only elements which may be dealt with in this way:

- 1h (acting for a child or client lacking capacity)
- 3g (seeking a provisional damages award)
- 6c (drafting a Summons)
- 6h (acting for or against a sequestrated party)

From time to time APIL and other training providers offer accredited courses dealing with:

- Managing proof/trial and post proof/trial procedures
- Less common procedures in PI

These courses are designed to meet the needs of candidates for Senior Litigator status. It is not necessary to wait until 6 years' experience has been gained before attending such a course, as the courses have value in preparing a candidate for dealing with a less common procedure, should one arise.

5. Satisfying the Standard

In relation to the elements under each unit of the Standard, the assessor should ask themselves:

- ***Do I have evidence that the candidate has carried out all of these functions satisfactorily, in relation to a reasonable number of appropriate cases, preferably over a range of types of case?***
- ***Would I be content for the candidate to perform these functions unsupervised?***
- ***Would I be content for the candidate to supervise and guide other fee earners undertaking these functions?***
- ***Would I be content for the candidate to be self-authorising at any key stage of litigation contained within these functions?***
- ***Would I be content for the candidate to authorise other fee earners to proceed at any key stages of litigation contained within these functions?***

If the answer to any of these questions is "no", then the candidate is not yet fully competent. Further experience will be required, together with training, mentoring or guidance on carrying out the functions in questions, before a further assessment is made.

If the answer to all of these questions is "yes", then the assessor can certify the candidate as competent in relation to the elements of the unit in question. For the purpose of the final assessment, the assessor confirms competence in relation to each element of each unit, basing the decision on his or her record of the candidate's performance in respect of each individual element.

There is no separate assessment of possession of knowledge and understanding, or of know-how. A person who lacked the necessary knowledge, understanding or know-how would be unable to carry out many of the listed functions satisfactorily. A weakness in knowledge, understanding or know-how might lead an assessor to the conclusion that they did not have evidence that the candidate had carried out the functions satisfactorily, or that they would not be willing to allow the candidate to work unsupervised. In that event, the candidate should be advised of the shortcoming, and it should be addressed through a training plan.

Whilst knowledge and understanding are assessed as a part of a holistic appraisal of performance against individual standards, overall assessment is more than the sum of the parts represented by the units of the Standard. Assessors must be satisfied that candidates have successfully integrated their learning from each of the units, and that this is evidenced from their overall handling of cases and their application of knowledge and understanding. Assessors should ask themselves:

- ***Am I satisfied that the candidate's handling of cases demonstrates full possession of the knowledge and understanding required to meet the Standard?***
- ***Am I satisfied that the candidate has successfully integrated their ability to carry out each function covered by the Standard, and that this is demonstrated by effective overall case management?***

If the answer is "no", the candidate is not yet fully competent, and the assessor should not sign the declaration at the end of the Portfolio that the candidate is competent. Deficiencies should be identified and explained to the candidate. Further experience will be required, together with a training plan to remedy and shortcomings in knowledge and understanding; as will guidance and mentoring on overall case management.

6. Using the Portfolio

Assessors should keep a record of the candidate's progress. This can be done by completing the assessor's part of the Outcomes of Effective Performance section of the Portfolio.

If you feel that a case handled by the candidate provides evidence that an element of the Standard has been fully met you should enter what you did to ascertain this (e.g. "reviewed file", "discussed case", "observed client interview"), the date and your initials.

In relation to trial procedures, if the candidate has not had personal carriage of a matter at trial you should enter "discussed trial attended". Similarly, if the candidate is relying on a training course in respect of one or more less common procedures, you should enter "discussed course attended". The Outcomes of Effective Performance section then enables you to:

- Identify any elements of the Standard in which evidence is lacking, enabling you then to allocate to the candidate cases which would provide the opportunity for competence to be demonstrated;
- Facilitate eventual completion of the Portfolio, which must be submitted to APIL when formal application for Senior Litigator status is made;
- Pass on the record of the evidence you have assessed, should you cease to be the candidate's supervisor;
- Have a record of your assessment decisions on file, should the decision in respect of your candidate be one of those reviewed as a part of the APIL quality assurance procedure.

No record beyond the Portfolio is needed as, if properly completed, it will point to where evidence exists on file. Where you have been satisfied, from your own observation (for example, of a client interview in relation to Unit 1), that an element of the Standard is satisfied, your comments in the Outcomes of Effective Performance section will be taken as conclusive evidence.

For reasons of client confidentiality the first column (cases providing evidence) should be anonymised before submitting a copy of the Portfolio to APIL, by deleting the case names or deleting the columns electronically. A copy of the original Portfolio must be retained by the firm.

7. Quality assuring assessment decisions

APIL will review a sample of assessment decisions, to ensure that the personal accreditation scheme remains credible. The review will usually consist of reviewing with the assessor the evidence on which they relied in making their judgements, making use of the Portfolio copy retained in-house. For this purpose, copies of Portfolios should be retained by the firm for a period of five years following the submission of the application for Senior Litigator status. In common with all retrospective reviews of assessment decisions, this is a review of the assessment made, not of the candidate.