

APIL Scotland

Guidance for assessors and candidates for APIL Accredited Clinical Negligence Specialist

1. Introduction

Accredited Clinical Negligence Specialist is a personal accreditation status awarded by the Association of Personal Injury Lawyers. To be eligible to apply, a candidate must have achieved Senior Litigator status. The requirements are not free standing, they are additional to those for Senior Litigator, and accreditation depends on satisfying the general Senior Litigator Standard.

In general, the guidance for assessors of candidates for Senior Litigator status applies to assessors of candidates for Accredited Clinical Negligence Specialist status.

Where assessment takes place wholly within the firm, it 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.

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.

2. Who can be an assessor?

Once the accreditation scheme for clinical negligence specialists is fully established, with a reasonable number of persons having been accredited, it will be the intention of APIL that assessors should be persons who have themselves held accreditation for at least five years.

For the time being, a person wishing to act as an assessor must hold Senior Litigator status, must have at least 5 years experience of clinical negligence cases since acquiring Senior Litigator status, and must be approved to act as an assessor by APIL. In approving persons to act as assessors APIL will wish to be satisfied that the person undertakes a sufficient number of clinical negligence cases, and has experience of a sufficient range of cases to be able to properly assess the knowledge and understanding of candidates.

In a firm with a substantial clinical negligence practice it will be possible for an assessor to be found from within the firm. Where an internal assessor is used, the assessor should usually be responsible for supervising the work of the candidate.

However, APIL recognises that in some firms there will be a single clinical negligence specialist. In such cases application may be made to APIL for an external assessor to be appointed. If an external assessor is appointed, he or she will be an existing Accredited Clinical Negligence Specialist of at least five years standing, or a person recognised by APIL as having comparable competence and experience, as set out in ii) above.

3. Evidence of competent performance

WHERE TO FIND EVIDENCE

The Standard sets out the functions involved in progressing a clinical negligence claim which are additional to the functions covered by the Senior Litigator Standard. The primary evidence that a candidate has undertaken each function successfully 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 portfolio of evidence needs to be maintained.

Although the underlying procedures are substantially common for both mainstream personal injury and clinical negligence matters, it is important that a candidate for Accredited Clinical Negligence Specialist status should be able to demonstrate substantial experience of clinical negligence cases. There is no absolute number of cases which a person should have concluded before applying, as comparable experience may have been gained from a smaller number of large cases, as from a larger number of smaller cases. However, it is likely that a successful candidate will have concluded:

- At least 40 clinical negligence cases, of which
- At least 5 will have been taken to a Ch 42A BOAR Hearing (or Sheriff Court equivalent)

A candidate may have worked as a member of a team handling a large case, or a number of linked multiple defender type cases. Such cases may count towards one-third of these indicative numbers so long as the candidate carried significant personal responsibility for aspects of the overall management of the matter. The candidate must have exercised principal responsibility for the remaining two-thirds of the indicative number of cases.

The general familiarity with court procedures required by the Senior Litigator Standard suffices for Accredited Clinical Negligence Specialist purposes, but hands on experience of precognosing medical witnesses, consulting with experts and preparing cases for proof is vital.

It is likely that a successful candidate will devote a majority of their fee earning and/or supervisory time to clinical negligence matters.

It is expected that over the three years prior to seeking Accredited Clinical Negligence Specialist status a candidate will have averaged at least 8 hours per year of APIL accredited CPD on clinical negligence matters, and that about half of this will have had a focus on medical issues.

Evidence of effective performance should arise naturally from the work of the candidate, and supervision of that work by the assessor. Where assessment is carried out within the firm, 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, consulting with counsel or meeting with experts. Opportunities for this might arise in relation to the more complex cases in which a supervisor might expect to have such an involvement anyway.

Where an external assessor is used, the assessor will review, with the candidate, a sample of current and completed files. The number of files to be reviewed will depend on the size and complexity of the cases handled, but it is unlikely that fewer than 12 files would be reviewed in detail. The assessor will discuss with the candidate the handling of the matters, and the reasons for the decisions taken at key stages. The purpose of this is not to second guess decisions taken, but to establish that the candidate has the knowledge, understanding and know-how necessary to evaluate properly all of the available options at each stage of the case. If an external assessor judges that a candidate has not yet fully satisfied the requirements of the Standard, he or she may identify matters requiring further attention, and agree with the candidate a date by which it would be reasonable to arrange a further assessment meeting.

ADDITIONAL ASSESSMENT AGAINST SENIOR LITIGATOR STANDARD

The assessment guidance for Senior Litigator status allows candidates to satisfy the requirements for a small number of the competences by providing evidence of having undertaken relevant training, without having direct experience of cases involving the competence in question. Competences which may be dealt with in this way include:

1(h): identify any issues with regard to the capacity of the client (e.g. if the client is a child, suffering from a serious head injury, etc) and take appropriate steps such as the appointment of a Financial or Welfare Guardian;

1(i): identify, in relation to a fatal claim, all potential relatives who may have a claim, and any estate or inheritance issues; ensure that an appropriate personal representative is in place; and

3(g): identify any case where a provisional damages award should be considered

A candidate for Accredited Clinical Negligence Specialist **must** meet all of these Standards directly. At Senior Litigator level all that is required is the ability to identify cases in which the course of action in question is appropriate. This ability may have been gained through training alone, or by identifying a case in which the action was required but then passing the matter to a more experienced colleague. A candidate for Accredited Clinical Negligence Specialist status must demonstrate their competence in relation to each of the Standards, by reference to having handled a sufficient number of cases involving each activity to demonstrate knowledge and understanding gained through direct experience.

If, in gaining Senior Litigator status, the candidate satisfied these Standards through attendance at training events only, or by identifying the need for action but then passing the matter to a colleague, they must now demonstrate direct experience of acting for clients in these matters.

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.

Knowledge, understanding and know-how are particularly important in assessing candidates for Accredited Clinical Negligence Specialist status. The number of technical requirements which are additional to those for Senior Litigator is relatively small, but the additional understanding needed to handle these specialist cases, and the additional knowledge of both law and medical matters is substantial. Discussion of files, and questioning of the candidate, is at the heart of the assessment.

Whilst knowledge and understanding are assessed as a part of a holistic appraisal of performance against individual standards, it may help assessors and candidates to keep a note of cases where relevant knowledge and understanding was demonstrated, or relevant training events attended. The Outcomes of Effective Performance section of the Portfolio enables this to be done.

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

The Standard sets out functions which every Accredited Clinical Negligence Specialist 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 Accredited Clinical Negligence Specialist to deal with the full range of issues which may arise in the course of the practice of clinical negligence law.

However, there is one circumstance in which a different approach may be considered.

It is recognised that there are relatively few Fatal Accident Inquiries relating to clinical negligence. Often counsel are instructed and a candidate may not have the opportunity to demonstrate advocacy at an FAI. A candidate should however be able to demonstrate steps they have taken to ensure they are fully familiar with the FAI process. These steps might include attendance at appropriate training events, and must always include having attended an FAI, on one or more occasions, with a fellow lawyer to observe the proceedings and to discuss, with the lawyer having carriage of the case in the FAI, 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 of handling FAI advocacy and examination competently.

5. Satisfying the Standard

In relation to the application of the Senior Litigator Standards to clinical negligence matters, and the additional matters dealt with in the Accredited Clinical Negligence Standard, the assessor should ask themselves:

- ***Do I have evidence that the candidate has carried out all of the additional functions covered by the Standard satisfactorily, in relation to a reasonable number and range of cases?***
- ***Do I have evidence that the candidate has carried out all of the functions covered by the Senior Litigator Standard satisfactorily, in relation to a reasonable number and range of clinical negligence cases?***

- ***Would I be content for the candidate to perform these functions unsupervised, in relation to clinical negligence matters?***
- ***Would I be content for the candidate to supervise and guide other fee earners undertaking these functions in clinical negligence matters?***
- ***Would I be content for the candidate to be self-authorising at any key stage of clinical negligence litigation?***
- ***Would I be content for the candidate to authorise other fee earners to proceed at any key stages of clinical negligence litigation?***

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 Standard.

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.

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. 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 Accredited Clinical Negligence Specialist 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 Accredited Clinical Negligence Specialist status. In common with all retrospective reviews of assessment decisions, this is a review of the assessment made, not of the candidate.