

APIL SCOTLAND

GUIDANCE ON ASSESSMENTS FOR LITIGATOR STATUS

1. Introduction

Litigator is a personal accreditation status awarded by the Association of Personal Injury Lawyers. A candidate for Litigator status must demonstrate that they meet the Standard of Competence for 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 Litigator status, are the same judgements that a firm should be making in determining the level of supervision a fee earner requires, and the extent to which they are able to take certain steps in progressing a claim on their own authority.

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 Litigator status.

2. Who can be an assessor?

An assessor should be a Senior Litigator of at least two 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 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 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 eight units, each dealing with a stage in the litigation process which might be handled by a Litigator. Each unit is sub-divided 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.

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. 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, 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 or consultation with counsel.

Whilst some Litigators may handle some aspects of certain Court of Session cases, it is acceptable for evidence to come wholly from the handling of Sheriff Court 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.), or within a department, a person working towards Litigator status may be engaged on a single type of work. 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 3a, 3b, 4g, 4j, 5h, and 5i. 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 3f, 5f, 5g, and 7a. 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.
- At several points in the Standard the candidate is required to identify cases where particular action may be appropriate. Examples are at 3f, 5f, and 5g. In respect of these actions it is not expected that the candidate will necessarily have undertaken the action (as, if it were required, the file might then be assigned to a more senior fee earner), but candidates should be able to demonstrate an understanding of a course of action which might be available, and which should be considered as a way of progressing a case.

4. 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 cases, preferably over a range of types of case?***

If the answer to the question 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 the question 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.

The behaviours which underpin effective performance should also be demonstrated in relation to relevant elements of the units of the Standard. However, assessors are asked additionally, to confirm that, from their observation of the candidate, they have seen evidence that all of the behaviours are displayed. To do this, the assessor should ask themselves:

- ***Can I point to instances where each of these behaviours has been displayed?***

If the answer is “no”, the candidate is not yet fully competent. Further experience will be required, together with guidance and mentoring on developing appropriate behaviours.

If the answer is “yes”, then the assessor can certify that the candidate demonstrates the required behaviours.

5. 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 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.

6. 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 Litigator status. In common with all retrospective reviews of assessment decisions, this is a review of the assessment made, not of the candidate.