

Guidance on assessments for APIL Accredited Specialist Counsel in Personal Injury – Scotland

1. Introduction

Accredited Specialist Counsel in Personal Injury (ASCPI) is a personal accreditation status awarded by the Association of Personal Injury Lawyers to advocates and solicitor advocates. It is broadly equivalent to the status of Senior Litigator, which is available, primarily, to solicitors and other senior fee earners in firms of solicitors. A candidate for ASCPI status must demonstrate that they meet the Standard of Competence for ASCPI. This will involve assessment against the Outcomes of Effective Performance contained within the Standard.

In the case of the other personal accredited statuses awarded by APIL, assessment is usually integrated with the normal supervision and management of a fee earner. Evidence of competent performance comes from the day to day work of the candidate. The judgements required to assess competence, for example 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.

In the case of members of the bar and solicitor advocates there is not usually an equivalent supervisory structure, nor is there a requirement for the work of an advocate or a solicitor advocate to be checked and authorised at key stages in litigation. Accordingly, evidence from referees provides the main independent evidence of competence in relation to the standards.

This guidance, and the Standard to which it relates, is intended to enable referees to provide evidence of competent performance in a structured, reliable and defensible way.

2. Who can be a referee?

A referee must be a person with substantial personal knowledge of the professional work of the candidate and must be competent to make judgements about the professional skills, knowledge and behaviour of the candidate. It is likely that more than one referee will be needed to cover all aspects of the Standard; in any event APIL requires a minimum of two referees.

A referee is likely to be:

- A senior member of the chambers in which the candidate works, who has worked with the candidate on PI cases
- A judge before whom the candidate has appeared regularly on PI matters
- A member of a firm of instructing solicitors who holds personal accreditation as a Senior Litigator or above
- An advocate or solicitor advocate who has appeared regularly on the other side from the candidate
- An expert witness who has been consulted and examined by the candidate on multiple occasions
- Leading counsel (including solicitor advocates) with whom the candidate has appeared as a junior.

As a prime purpose of the accreditation scheme is to assist solicitors in identifying expert advocates and solicitor advocates to instruct, at least one referee must be an instructing solicitor holding Senior Litigator status or above.

In considering whether they have sufficient knowledge of the work of the candidate to act as a referee, the individual concerned should review the Portfolio to satisfy themselves that they are able to report fully on a reasonable proportion of the competences listed. It is not expected that a single referee will necessarily be able to report on every competence, and some referees (e.g. expert witnesses) may be able to report on a limited range of competences only. Between them, referees must cover all of the competences which make up the Standard, and it is the responsibility of the candidate to identify referees who are able to do this.

The table annexed to this guidance suggests the professional background of persons who might act as referees in relation to each of the units of the Standard.

3. Evidence of competent performance

Where to find evidence

The Standard sets out the functions in which an advocate or solicitor advocate is likely to be involved in handling a personal injury claim, in a broadly sequential manner. It is divided into five units, each dealing with a stage in the litigation process. 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, has done so to a satisfactory standard, and has done so on a sufficient number of occasions to develop the depth of understanding to be able to handle the unusual or the unexpected, will come from referees who have personally observed the work of the candidate through their own professional involvement in matters handled by the candidate.

Evidence of effective performance should arise naturally from the work of the candidate, as observed by the referee. In relation to each function, the referee must be satisfied that the candidate has carried it out, has done so properly, and has done so consistently. The referee should be able to attest to performance which would enable a confident recommendation of the candidate to be made to a firm of solicitors seeking advice on whom to instruct in complex or difficult cases. This means that the referee is looking for more than a single example that a function has been properly undertaken; what is sought is confirmation of 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 referees to gather evidence of competent performance will arise from events in the litigation process in which other professionals, who might be asked to act as referees, will be present. A table is appended which suggests the professional backgrounds from which referees might be drawn in relation to each unit of the Standard.

Assessment should not take place too soon. An advocate or solicitor advocate is likely to be ready to be assessed against the ASCPI Standard once he or she is regularly instructed by firms of solicitors in the more difficult or complex cases. This point is unlikely to be reached before the candidate 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.

Two matters arise from this. First, candidates should use the Outcomes of Effective Performance section of the Portfolio to record brief details of cases which enabled them to demonstrate competence in relation to a function. This record should then be used in discussion with a referee to support the evidence arising from the referee's personal observation of the work of the candidate. Second, it is sensible to identify, some time in advance of making an application, the persons who might act as referees. This enables a referee to keep their own notes on the performance of the candidate, over time. In addition, a referee may play a mentoring role, advising a candidate if there are areas in which it would be desirable to gain further experience, and suggesting when the point has been reached at which an application would be appropriate.

Evidence relied upon by referees **must** come wholly or mainly from the handling of cases in the Court of Session, or cases in the All-Scotland Personal Injury Sheriff Court in which sanction for the employment of counsel was granted. 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 small number of types of personal injury case (e.g. clinical negligence, brain injury, etc.). In such cases evidence can come from those types of work alone, but must demonstrate full competence across all of the functions.

Knowledge, understanding and know-how

Referees need to be able to confirm not only that a function has been undertaken, but that it was done properly. To this end, the referee must be able to confirm that the candidate understood what they were doing and why, and did not just happen to do the right thing by luck. Whilst it would not be appropriate for a judge to discuss a case with the candidate, other professional referees may be able to do so and to question why a particular course of action was proposed or taken. This is no different to the discussion an instructing solicitor would expect to have anyway with counsel when considering a case with them. This type of questioning allows the referee to be satisfied 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

Matters which referees should take into account in commenting on performance against particular types of function include the following:

- In relation to advising on the merits of a case (for example 2(a), 2(b), 3(i)(c) and (d), 3(ii), 3(iv)(b)) the referee should consider whether there is evidence that the candidate consistently assesses all necessary and relevant evidence, applies the relevant law to the facts, and identifies and makes appropriate use of any relevant precedents
- In relation to advising on the tactics of handling litigation (for example 3(iii)) the referee should consider whether there is evidence that the candidate has fully considered the advantages and disadvantages of the available courses of action, in relation to the law, the evidence, and the interests of the client, and then selected the course of action most likely to secure the best possible outcome for the client. In doing this the referee should bear in mind 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 the referee would have chosen, 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 should give the referee confidence that the candidate is able to handle the more complex and difficult cases to which the Standard is addressed
- In relation to the conduct of meetings in which a negotiated settlement may be reached (5(ii)) the referee should consider whether there is evidence 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. The referee 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
- In relation to court advocacy (5(i)) the referee should bear in mind that in respect of the types of court proceedings listed it is not enough that the candidate should be merely aware of how proceedings should be conducted. In general, to demonstrate full competence, the candidate should have acted as advocate in the types of proceedings specified.

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

The Standard sets out functions that every ASCPI 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 ASCPI to deal with the full range of issues which may arise in the course of the practice of personal injury law.

However, there is one circumstance in which a different approach may be considered. Dependent on the nature of their practice, some advocates and solicitor advocates may not have personal experience of all types of court proceedings. Jury trials rarely proceed, though it would be anticipated a candidate should be able to demonstrate experience of giving appropriate advice on seeking jury trial and taking the necessary pre-trial steps. In relation to appeals, it may be the case that all appeals in which the candidate has been involved have been led by leading counsel. In these circumstances, evidence arising from involvement in such cases as a junior may be accepted.

5. Satisfying the Standard

In relation to the elements under each unit of the Standard in respect of which the referee is able to comment, the referee should ask themselves:

- ***Do I have evidence that the candidate has carried out all of these functions satisfactorily, in relation to a number of relevant cases, preferably over a range of types of case?***
- ***Would I be willing to recommend this candidate to a firm of solicitors as a person able to perform these functions competently in complex or difficult cases?***

If the answer to either 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 question, before a further assessment is made.

If the answer to both of these questions is “yes”, then the referee can certify the candidate as competent in relation to the elements of the unit in question.

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 the listed functions satisfactorily. A weakness in knowledge, understanding or know-how might lead a referee 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 recommend the candidate to a firm of solicitors. In that event, the candidate should be advised of the shortcoming, and it should be addressed by the candidate undertaking further training and/or acquiring further experience before reapplying.

Whilst knowledge and understanding are assessed as a part of a holistic appraisal of performance against individual standards, it may help referees and candidates for the candidate to keep a note of cases where relevant knowledge and understanding was demonstrated, or relevant training events attended.

The behaviours which underpin effective performance should also be demonstrated in relation to relevant elements of the units of the Standard. However, referees 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 referee 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 referee can certify that the candidate demonstrates the required behaviours.

6. Using the Portfolio

If the candidate considers that a case he or she has handled provides evidence that an element of the Standard has been met, brief details of the matter should be entered into the Outcomes of Effective Performance section of the Portfolio, together with the date that the relevant task was undertaken. Remember that effective performance against the Standard must be demonstrated on more than one occasion. Similarly, the referee should keep a record of cases where he or she has observed effective performance by the candidate.

Copies of the original Portfolio must be retained by the candidate and referees, and submitted to APIL in support of a candidate’s application for ASCPI status.

7. Quality assuring assessment decisions

APIL may, from time to time, invite a suitably qualified person (either an APIL Senior Fellow or a QC specialising in personal injury work) to review a sample of assessment decisions, to ensure that accreditation decisions are being taken consistently and the personal accreditation scheme remains credible.

Persons suitable to act as referees

The table below suggests the professional background of persons who might act as referees in relation to each of the units of the Standard.

Unit of standard	Appropriate referee
1. (Accepting instructions)	<ul style="list-style-type: none"> • Instructing solicitor holding senior litigator status • Senior member of candidate's chambers who has worked with the candidate on PI matters
2. (Advising – general)	<ul style="list-style-type: none"> • Instructing solicitor holding senior litigator status • Senior member of candidate's chambers who has worked with the candidate on PI matters • Leading counsel with whom the candidate has appeared as junior
3. (i), (ii) and (iv) (Advising – specific issues)	<ul style="list-style-type: none"> • Instructing solicitor holding senior litigator status • Senior member of candidate's chambers who has worked with the candidate on PI matters • Leading counsel with whom the candidate has appeared as junior
3. (iii) (Advising – specific issues) (pre-trial procedures)	<ul style="list-style-type: none"> • Instructing solicitor holding senior litigator status • Senior member of candidate's chambers who has worked with the candidate on PI matters • Advocate or solicitor advocate who has appeared regularly on the other side from the candidate • Judge before whom the candidate has appeared regularly on PI matters
4. (i) (Court advocacy)	<ul style="list-style-type: none"> • Instructing solicitor holding senior litigator status • Senior member of candidate's chambers who has worked with the candidate on PI matters • Advocate or solicitor advocate who has appeared regularly on the other side from the candidate • Judge before whom the candidate has appeared regularly on PI matters • Leading counsel with whom the candidate has appeared as junior

5. (i) (Court advocacy)	<ul style="list-style-type: none"> • Instructing solicitor holding senior litigator status • Senior member of candidate's chambers who has worked with the candidate on PI matters • Advocate or solicitor advocate who has appeared regularly on the other side from the candidate • Judge before whom the candidate has appeared regularly on PI matters • Leading counsel with whom the candidate has appeared as junior
5. (ii) (other oral representation)	<ul style="list-style-type: none"> • Instructing solicitor holding senior litigator status • Advocate or solicitor advocate who has appeared regularly on the other side from the candidate
6. (iii) and (iv) Other oral representation	<ul style="list-style-type: none"> • Instructing solicitor holding senior litigator status
3. (iii) (e) and (h) only	<ul style="list-style-type: none"> • Expert witness with experience of candidate's work
5. (iv) only	
Behaviours	<ul style="list-style-type: none"> • Instructing solicitor holding senior litigator status • Senior member of candidate's chambers who has worked with the candidate on PI matters • Advocate or solicitor advocate who has appeared regularly on the other side from the candidate • Judge before whom the candidate has appeared regularly on PI matters