

GDPR and Assessment of Candidates for APIL Personal Accreditation

Changes to Arrangements for Completing the Candidate Portfolio that is submitted to APIL

Introduction

1. This note sets out and explains some minor changes to the way in which the Candidate Portfolio on candidates for personal accreditation as meeting the APIL Competence Standards (Litigator, Senior Litigator, etc.) should be completed prior to submission to APIL. The changes are to ensure compliance with the General Data Protection Regulation (GDPR) which takes effect on 25th May 2018.
2. GDPR specifies six available lawful bases for processing personal data; at least one of these must be met. The personal data involved in personal injury cases concerns the health of the individual, thus it is 'special category data' in respect of which at least one of a further ten conditions must be met to allow processing.
3. Where data is processed for a purpose not directly related to the reason why the client supplied it to the firm and which would involve it being seen by a third party (for example, to allow monitoring of compliance with APIL standards), consent is the most likely of the available lawful bases that may be used for processing. APIL has already advised accredited firms of a revised form of wording for obtaining client consent to file inspection by APIL in the course of its monitoring of compliance with both personal and corporate accreditation standards. That revised wording is designed to meet the new, higher standards imposed by the GDPR. Consents using earlier forms of wording will no longer be valid from 25th May 2018.
4. The APIL standards of personal competence were designed primarily as a business tool to be used by firms in developing and assuring high standards of competence on the part of their fee earners. They are thus used for these internal purposes by firms, as well as for the purpose of personal accreditation by APIL. Monitoring of assessments of personal competence by APIL, in the course of a monitoring visit, involves file inspection and requires a valid post-GDPR client consent to be in place. For the internal purposes of firms other lawful bases for processing will be more appropriate. The minor changes described in this note are designed to ensure that applications for APIL accreditation can be made in a manner in which only the data of the candidate, and not any personal data of clients is supplied to APIL.

Lawful Basis for Processing Data

5. A firm must be able to demonstrate that it is necessary to process data, and then identify the relevant lawful basis for doing so. Clearly, a personal injury claim cannot be progressed without processing the personal data of the client. As that data relates to the health of the individual, it is also 'special category data' to which a higher standard of protection applies.

6. The lawful basis for processing the substantive legal work undertaken is straightforward. Article 6 (1) (b) provides as a lawful basis: *'the processing is necessary for a contract you have with the individual, or because they have asked you to take specific steps before entering into a contract.'* With respect to the conditions for processing special category data Article 9(2)(f) provides as a condition: *'processing is necessary for the establishment, exercise or defence of legal claims or wherever courts are acting in their judicial capacity'*.
7. Consideration needs to be given also to processing data through internal review of files. Such reviews are an essential safeguard of the quality of the legal work undertaken and hence of the interests of the client. Reviews will involve the provision of direction and guidance from a more experienced supervisor, checking that work is being carried out to a proper professional standard, and identifying training needs to ensure that the fee earner's knowledge and understanding of relevant substantive law, procedural law and precedents is fully up to date. Firms may choose to use the APIL standards as a business tool for some of these purposes.
8. In establishing a lawful basis for this processing, whether Article 6(1)(b) is engaged will depend on the terms of the client engagement letter. However, Article 6(1)(f) concerning legitimate interests will apply. This provides: *'the processing is necessary for your legitimate interests or the legitimate interests of a third party unless there is good reason to protect the individual's personal data which overrides those legitimate interests'*.
9. It is in the legitimate interests of the firm that work is carried out competently so as to avoid reputational damage, negligence claims and the consequent increased indemnity insurance premia, or judicial criticism of the conduct of a matter.
10. With respect to the conditions for processing special category data, supervisor guidance and checks on quality and competence are a necessary part of establishing and exercising legal claims and so should fall within the Article 9(2)(f) condition.
11. Use of the APIL standards for these internal management purposes does not, in the view of APIL, require separate client consent, as reliance can be placed on the alternative bases and conditions identified above.
12. Firms should remember that their privacy notice should specify the purposes for which processing is undertaken, the lawful bases relied upon and the condition(s) relied on for processing special category data. For the purpose of demonstrating GDPR compliance a record should be kept of the decision taken about applicable lawful bases and conditions.

Ensuring compliance with the 'legitimate interest' lawful basis for processing

13. In most cases, supervisory and quality assurance activities are carried out by the immediate supervisor of the fee earner, as a part of their normal managerial function.

14. In other cases, a firm may use an external assessor to provide the specialist expertise necessary for effective peer review of the quality of legal work. It is in these cases that a firm will need to take care to ensure that it is demonstrable that access to client files falls within the 'legitimate interest' of the firm.
15. There are two broad circumstances in which an external assessor may be used.
16. The first is where the fee earner is a sole practitioner, or is the only PI fee earner in the firm. A firm may engage a PI practitioner (sometimes retired) to attend the office periodically to conduct random file reviews, to be available for consultation, and sometimes to provide locum cover for holidays or sickness. It is self-evident that such a pattern of regular engagement is in pursuit of the 'legitimate interest' of the firm in maintaining quality, and is a substitute for the specialist supervision that would be available if PI work was conducted by a larger team, or within a general civil litigation department.
17. The second circumstance concerns a more senior fee earner, who may be the head of a PI department, or specialist in a field such as clinical negligence or brain injury. In such cases a firm may not require continuous supervision of the quality of the work undertaken, but may regard it as prudent to undertake a periodic benchmarking of the quality of the work of the individual. Typically, this may be done through an external assessment of the individual in the course of seeking or re-validating an APIL personal accreditation.
18. In this second circumstance it is important for the terms of engagement of the external assessor to make clear the purpose of the file reviews that will be undertaken, in relation to the 'legitimate interest' of the firm in assuring the quality of its work that is relied upon to provide a lawful basis for processing the data of clients contained in those files. Annex 1 to this note is a suggested form of words that could be incorporated in any letter of engagement.
19. In all of the circumstances described above – internal reviews by a supervisor, continuing review by an external assessor and one-off periodic reviews by an external assessor – it is important to distinguish between the processing of client data and the processing of data about the competence of the fee earner. Consideration of a client file involves using client data to make a judgment about how the fee earner handled the matter, for example, in applying the law to the facts of the case, in identifying and instructing appropriate experts, and in exercising judgment about how to respond to a Part 36 offer, whether to issue proceedings, etc.
20. The process of considering a number of client files generates a new set of data which is about the fee earner. These concern the competence of the fee earner in relation to the various stages of litigation, the ability to make appropriate judgments as between alternative courses of action, and the identification of training and development needs. These new data sets are personal data of the fee earner, and clients cannot be identified from them.

Applying to APIL for Personal Accreditation

21. When a candidate applies to APIL for personal accreditation, the version of the Candidate Portfolio that is submitted to APIL should contain only the candidate's data and no client data. At present client names are removed prior to submission to APIL, so the only client data that appears are the reference numbers of files that have been considered. In future individual file reference numbers should not be used. Instead, each file considered in relation to each element of a function should be numbered sequentially (Case 1, Case 2, Case 3 etc.). Annex 2 to this note illustrates how this column should be completed in future.
22. Versions of the Candidate Portfolio retained within the firm should continue to have case names entered. If your firm is selected for a monitoring visit to check on the assessment made, this will assist the person conducting the visit in identifying files he or she may wish to inspect. Please note that the person conducting the monitoring visit will only ask to see files that have on them client consents for such inspections which use the new wording that APIL has recommended to ensure compliance with GDPR.
23. The Candidate Portfolio ends with a certification by the candidate that they wish to apply for the APIL accredited status in question, and that they undertake to comply with APIL CPD requirements. The candidate is thus supplying their own personal data to APIL; it is not an act of processing by the firm. The candidate supplies the data in the knowledge that it will be handled by APIL in accordance with APIL's privacy policy.

Summary

24. The use of client personal data for file reviews conducted for quality assurance purposes is likely to be covered by the 'legitimate interest' legal basis for processing provided by Article 6(1)(f), and by Article 9(2)(f) (establishing and exercising legal claims) to the extent that the data on the file is 'special category data'. Overall judgments about the competence and quality of work of individual fee earners which are made as a result of the review of a large number of files are personal data of the fee earner, not of any client.
25. To ensure a clear distinction between the personal data of clients and the personal data of fee earners, the firm's file reference numbers should no longer be included on the version of the Candidate Portfolio that is submitted to APIL to certify competence for the purpose of the grant of APIL accredited status to individuals.

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Annex 1

Wording for consideration for use when engaging an external assessor to conduct a periodic review of the files of a fee earner

As a part of its quality assurance of its legal work, (name of firm) commissions periodic peer reviews of the work of certain of its senior fee earners, using external, expert practitioners. The purpose of the peer review is to provide assurance to the firm that the work of the fee earner continues to meet high standards of professional competence and that training and development undertaken is appropriate in relation to developments in the field of practice.

The firm wishes to appoint an expert practitioner to review the work of (name of fee earner) in the field of (insert as appropriate, e.g. personal injury, clinical negligence, brain injury, etc.).

The firm uses the Standards of Competence of the Association of Personal Injury Lawyers as a benchmark, and the review should have regard to the APIL standards for (insert as relevant¹).

The review should involve inspection of a comprehensive sample of the files of (name) and discussion of them with him/her.

The assessor should submit a brief report to the firm:

- Confirming (if such confirmation is appropriate) that (name) continues to meet high standards of professional competence.
- Recommending (if necessary) steps that should be taken to remedy any shortcomings.
- Identifying (if appropriate) any training or development activities that are needed but not already planned.

(Name) is a member of the Association of Personal Injury Lawyers and is seeking accreditation/re-validation as (insert). The assessor should complete also the Assessor's Report Sheet for submission by (name) to APIL in support of such accreditation/re-validation.

¹ Where a standard e.g. brain injury has as a pre-requisite Senior Litigator status both the Senior Litigator and the relevant specialist standard should be specified.

Example of Completion of Candidate Portfolio submitted to APIL

This is an example of completion of that part of the portfolio relating to the functions carried out in progressing a personal injury matter. As before, the case names in the first column of the Candidate's section should be removed. In the second column of the Candidate's section file reference numbers should no longer be entered. Instead this column should be used to show sequential case numbers. Start a new numbering sequence for each row. The purpose of the numbering is to show the number of cases in which the candidate has demonstrated their competence in relation to the criterion. For example, in the illustration below, the numbers 1 to 3 in the first row simply show the total number of cases considered. Case number 1 in the first row is not necessarily the same matter as Case number 1 in the second row.

Candidate's section Assessor's section

Function	Case names	Sequential case numbers	Action taken by assessor (e.g. "reviewed file", "discussed case", "observed client interview: etc.)	Date action taken and assessor's initials
<p>6. Issuing proceedings, the allocation stage and case management conferences</p> <p>To meet the Standard, candidates must be able to:</p>				
a) decide when, within the appropriate time limit, proceedings should be issued to protect the client's rights and interests;		1 2 3	Discussed case Discussed case Discussed case	8.5.2018 abc 21.5.2018 abc 11.6.2018 abc
b) Select a court (high court or county court) and a location that is in accordance with court rules and consistent with the tactics of your case plan;		1 2	Reviewed file Discussed case	4.4.2018 abc 21.5.2018 abc