

Guidelines for Assessors in the Conduct of Assessments

(Issued by the Higher Rights Assessment Board pursuant to Rule 19 of
the Higher Rights of Audience Rules)

Introduction

The primary purpose of this Guideline is to set out what the assessors should expect of a competent candidate both before and during trial, in terms of case analysis, organization, preparation and presentation. The standards identify the generic skills and knowledge expected for all solicitor-advocates.

Amongst other things, candidates must demonstrate to the assessors that they comply with the relevant legislation and procedures in force or at the time, which govern the case(s) they deal with.

Part 1 – Evidence

Candidates must demonstrate to the assessors that they have a sound knowledge of the applicable rules and law of evidence.

Standards for evidence

Assessors should assess whether candidates are able to apply the rules of evidence, to determine when evidence is relevant and therefore potentially admissible, and to demonstrate their understanding of:

1. Burden and standards of proof and the differing roles of judge and jury.
2. Disclosure, including issues relating to confidentiality, privilege and public interest immunity.

3. Hearsay evidence, including being able to identify hearsay evidence, recognize when it may be admissible, how it may be admitted and its evidential value when adduced.
4. Documentary hearsay including laying the foundation for the admission of documentary hearsay, any formal requirements and time limits.
5. Similar fact and character evidence, including being able to recognize when similar fact and character evidence is appropriate as evidence.
6. Opinion and expert evidence, including when and to what extent opinion and expert evidence is admissible.
7. Improperly obtained evidence, including being aware of how evidence has been obtained, the evidential constraints and the effects of adducing improperly obtained evidence.

Part 2 – Ethics

Candidates should be tested where necessary on their familiarity with and understanding of the Solicitors' Guide to Professional Conduct to deal with a matter and Rule 11 – Litigation and advocacy, as well as the Bar's Code of Conduct.

Standards for ethics

Candidates may be tested on the following matters:

1. Advice to the client on suitable representation at court including the possibility of instructing a barrister or a solicitor-advocate not from his/her own firm or practice.
2. Resolving issues arising from unintentional or inadvertent disclosure of confidential or privileged information.

3. Resolving potential and actual conflicts including conflicts arising between the solicitor-advocate's duty owed to the client and the duty to the Court.
4. Advising on potential conflicts between acting as a solicitor-advocate for a client and becoming a potential witness for that client.
5. Recognizing when a solicitor-advocate may become professionally embarrassed and have to withdraw from a case.
6. Advising the client of the solicitor-advocate's need to maintain professional independence and the associated need to draw any unfavourable law of which he is aware, to the attention of the court.
7. Complying with courtroom etiquette.

Part 3 – Advocacy

Assessors should assess whether candidates are competent in each of the skills areas set out below.

Candidates must demonstrate appropriate techniques for handling witnesses as well as sound skills in legal and factual submissions in a contested, adversarial context.

Assessors should assess whether candidates are able to analyze and understand the test case they are dealing with, assimilate the facts and apply relevant statute and case law, and are able to react to unexpected events in court, and can demonstrate that they have a thorough knowledge of the evidence.

Standards for evidential and legal submissions/interim applications

1. Assessors should assess whether candidates are able to:
 - (a) prepare coherent skeleton arguments and necessary supporting documents and supply the court with copies of the relevant law;
 - (b) present legal argument to the court accurately, citing only relevant and material law where necessary;
 - (c) respond to interventions by the court and develop legal argument;
 - (d) respond to the opponent's legal arguments and develop appropriate legal argument in the light of these.

Standards for trial advocacy

1. The assessors must be satisfied that candidates:
 - (a) understand the importance of and is able to draft and present clear trial strategies and plans, and using the trial strategy and plan, be able to outline the facts and evidence, in terminology and detail as appropriate to the type of case.
 - (b) are able to present an effective and coherent opening speech.
 - (c) are able to conduct an examination in chief, if required, by:
 - asking relevant non-leading questions which promote the client's case
 - identifying and placing before the court relevant documentation produced by the witness after establishing the necessary evidential foundation for it.
 - (d) are able to conduct cross-examination, and to demonstrate:
 - knowledge of the matters in dispute on which a witness

can be cross examined

- ability to control the direction and pace of the evidence
- ability appropriately to challenge the witness' evidence in accordance with the client's instructions
- ability to ensure that all relevant disputed matters are put to the witness
- ability to identify and appropriately cross-examine on any previous inconsistent statements.

(e) are able to identify situations when re-examination is required to put the client's case and to repair damage done to the witness in cross examination or to clarify or amplify matters raised in cross-examination.

2. If required to handle special witnesses:

(a) The candidates must be able to:

- identify and use effectively expert evidence
- challenge expert evidence
- where necessary confirm or question the expert's qualifications and expertise.

(b) The candidates must be able to:

- identify vulnerable witnesses
- use appropriate techniques when questioning vulnerable witnesses
- comply with judicial directions regarding vulnerable witnesses.

3. Closing speeches

Where a closing speech is required, the assessors should be satisfied that the candidates are able to:

- identify and appropriately present the:
 - key issues in the client's case
 - positive and negative evidence elicited from witnesses
- anticipate and appropriately address arguments likely to be advanced by the opposing candidate

- deal effectively with interventions by the court and respond appropriately to them.

Part 4 – Civil advocacy

Introduction

These standards identify those activities, procedures and practices specific to advocacy in civil proceedings before the Court of First Instance and above, and what is required by the assessors in considering candidates.

Assessors should be satisfied that candidates:

- comply with the Civil Procedure Rules and Practice Directions throughout the trial process
- recognize the costs implications at all stages of preparation and during the trial
- apply pre-hearing directions where relevant
- are able appropriately to advise the client on alternative dispute resolution remedies.

Trial preparation

Assessors will know that the candidates may not have drafted the Pleadings and other trial documents but they should be satisfied that the candidates have the ability to do so and to be able to identify deficiencies in the drafting of any documents.

Assessors should assess whether preparation for trial has been thorough, and reflect the senior jurisdiction of the High Court. Thus the candidates must:

- be able to demonstrate a coherent and effective strategy including:
 - Statement of Case
 - Witness Statements

- Other disclosed documents put before the court
- exercise sound judgment in the making of appropriate interim applications
- understand the effect of interim orders
- identify any costs implications resulting from interim orders
- draft coherent skeleton arguments to assist the court.

Trial Bundle

Candidates should show that they understand the implications and requirements of current Practice Directions as to what needs to be included in the trial bundle.

Alternative Dispute Resolution

If required the candidates should demonstrate that he/she understands the importance of alternative dispute resolution and when it is appropriate, and be able to advise the client appropriately.

Part 5 – Criminal advocacy

Introduction

These standards identify those activities, procedures and practices specific to advocacy in criminal proceedings before the Court of First Instance and above. The assessors should assess whether the candidates:

- understand and comply with the Criminal Procedure Rules during the trial process
- understand and are shown to be able to advise on the differing practices and policies of other prosecuting authorities, such as the SFC
- ensure that documents which may be put before the judge and jury are in the appropriate format, accurate and material to the case
- ensure that copies of any law to be argued are prepared for the benefit

- of the judge and the opposing candidates
- demonstrate an understanding of the potential admissibility of confessions and previous inconsistent statements including the exercise of the courts discretion.

Trial preparation

Assessors should assess whether preparation for trial has been thorough. The candidates must:

- be able to demonstrate a coherent and effective strategy including:
 - an understanding of the rules relating to indictments
 - an understanding of the rules relating to disclosure
 - an understanding of the issues that may arise at and/or from plea and any direction hearings
- be able to deal promptly and effectively with issues that may arise at and/or from the plea and/or direction hearings.

Trial procedure

Assessors should be satisfied that candidates understand:

- the procedure for empanelment of the jury
- the order of speeches and witnesses
- when legal submissions should be made to the judge in the absence of the jury
- matters which the judge should cover in summing up
- how they can assist the judge with any specific points to be addressed in the summing up.

Sentencing

The candidates should demonstrate an understanding of the issues involved in dealing with sentencing including:

- matters relating to advice on a plea of guilty
- sentencing guidelines and case law, the judge's sentencing powers and the range of sentencing tariffs
- the obligation whether for the prosecution or the defence, to draw the trial judge's attention to limitation on his/her sentencing powers.

Overall

Above all, assessors will take a general view of the candidates' ability. It will not be necessary to mark them as a pass on every single attribute, but to take an overall approach to the candidates' suitability to be a solicitor-advocate.