



ASSOCIATION OF PERSONAL INJURY LAWYERS SCOTLAND

Standard of competence for Litigators

INTRODUCTION

Standards of occupational competence

Standards of occupational competence are widely used in many fields of employment. They are based on an analysis of the main functions of a job, and state what it is the job holder must be able to do to perform effectively. That analysis enables an identification of the knowledge, understanding, know-how, skill and behaviour required for effective performance.

A Standard is thus, primarily, a business tool. It enables a firm to specify what is required for the effective performance of a job. That specification can then be used as an aid to recruitment or promotion, but it is probably of greatest use in drafting a development plan for an individual who aspires to the role concerned, in appraising the performance of those who hold the role, and in identifying training needs which may exist.

Standards of occupational competence are used also as a means of setting the intended learning outcomes from training programmes, or for qualifications. They provide a benchmark against which personal accreditation of competence may be judged.

The Litigator

Pursuer personal injury lawyers act for the victims of accidents, disease and injury, and seek to establish, assert and enforce their rights, in an effective and efficient manner, through negotiation, mediation or litigation. The range of cases, in terms of complexity and legal challenge, is very wide, ranging from minor road accidents to catastrophic multiple injuries, progressive industrial diseases and clinical negligence cases. Whilst financial remedies are important, rehabilitation of the injured person to restore them to as productive and independent a lifestyle as possible, through the use of medical, functional and vocational intervention, is also vital.

Litigator is a personal accreditation status awarded by the Association of Personal Injury Lawyers to its members. It sits in a hierarchy of personal accreditation, and for some lawyers will represent a step on the way to securing Senior Litigator status.

A Litigator will usually work under supervision. A Litigator will usually have their own files, carriage of which is their responsibility. A Litigator may work on relatively straightforward Sheriff Court cases, with fairly light supervision, they may progress Court of Session or more valuable Sheriff Court cases, under closer supervision, or they may assist a more senior lawyer with aspects of a complex case.

Whilst many of a Litigator's cases will be settled by negotiation with the other side, a Litigator is more than a negotiator. He or she is a lawyer dealing with a case in a legal framework where there are rules, duties and obligations to be observed. A Litigator may take a case to the point of negotiated settlement, or to the point at which it is appropriate to issue proceedings. Beyond the point of issue of proceedings, the case may pass to a Senior Litigator, or may be subject to fairly close guidance from a Senior Litigator. As, at the outset of a case, it cannot be known if it will be necessary to issue proceedings, all of the work of a Litigator must be to a standard appropriate to a matter which could result in a court hearing.

A Litigator will be focused on achieving the best possible result for their client. A Litigator may handle more than one type of personal injury case, but may well deal only with an individual field, such as road traffic accidents or employer's liability.

There is no requirement to have served any specified period of time to secure Litigator status. Realistically, from first involvement with civil litigation, it is likely to take at least two years' experience to develop fully the competence required for the status. The Standard is thus of particular value in preparing a personal development plan for an individual who aspires to Litigator status, in that it enables types of experience and training which will develop the required competence to be identified.

The scope of the Standard

The Standard assumes knowledge of civil litigation law and procedure sufficient to progress Sheriff Court cases.

The Standard addresses the circumstances of a person working as a Litigator in an office of a firm of solicitors.

The Standard reflects the law, regulations, Voluntary Pre-action Protocol, Court of Session and Sheriff Court Ordinary and Summary Cause Rules.

A firm of solicitors is subject to all of the standards of professional conduct published by the Law Society of Scotland, and may be covered also by the standards of the APIL Corporate Accreditation Scheme.

Nothing in the Standard is inconsistent with any of these other standards or requirements.

APIL accreditation

A separate guide is available on the use of the Standard in determining eligibility for personal accreditation as a Litigator.

THE STANDARD

A Litigator manages and progresses a personal injury case so as to establish, assert and enforce the rights of an injured client in an effective and efficient manner, and is competent in:

- Taking initial instructions
- Dealing with funding and regulatory matters
- Advising the client and managing their expectations
- Planning the case, gathering evidence and making the claim
- Dealing with the defender and other parties up to the point of issuing proceedings
- Drafting documents
- Instructing counsel and experts
- Managing post-trial or post-settlement and file closure procedures

A person will be regarded as competent if they have the knowledge, understanding, know-how and skill to demonstrate the outcomes of effective performance listed below, whilst displaying the behaviours which underpin effective performance.

KNOWLEDGE AND UNDERSTANDING

To meet the Standard, you need to have knowledge and understanding of:

1. Law relating to personal injury litigation generally

- Common law principles, legislation and court decisions relating to liability, causation and damages.

2. Law relating to types of personal injury covered by your field of practice

- Depending on your field of practice, you will have knowledge and understanding of statutes and regulations relating to occupiers' liability, employers' liability, workplace accidents, public liability, road traffic accidents and occupational disease, together with the rules governing the schemes of the Criminal Injuries Compensation Authority and the Motor Insurers Bureau.

3. Rules of procedure, etc.

- Court of Session and Sheriff Court Rules
- Voluntary Pre-Action Protocols in Scotland for Personal Injury Claims
- The 2007 Rehabilitation Code
- UK Rehabilitation Council standards

4. Professional conduct

- Rules and Guidance issued by the Law Society of Scotland
- Association of Personal Injury Lawyers Code of Conduct
- Association of Personal Injury Lawyers Consumer Charter

KNOW-HOW

To meet the Standard, you need to know how to find up to date law and precedents using different methods of conducting research for current precedents on matters of law and quantum. You will be able to use publications such as *Current Law*, *Butterworths Personal Injury Service*, *McEwan and Paton on Damages*, *Kemp and Kemp: the Quantum of Damages*, *JSB Guidelines for the Assessment of Damages*, *Facts and Figures: Tables for the Calculation of Damages*, the APIL/Jordan series of guides, and electronic databases such as *Lawtel* and *JustCite*. You will make appropriate use of seminars, networking and knowledge sharing activities (for example through APIL) to keep yourself up to date and adhere to APIL's 16 hour CPD requirement.

THE OUTCOMES OF EFFECTIVE PERFORMANCE

The outcomes of effective performance are grouped in to eight units, based broadly on the sequence of events involved in progressing a personal injury case. Each unit is made up of a number of elements, each of which in turn reflects a specific function, or a group of related functions.

1. Taking initial instructions

To meet the Standard, you must be able to:

- a) Address liability, establish the limitation date, the identity of the client and other potential parties, check for any conflicts of interest which might prevent you/your firm acting in the matter;
- b) satisfy yourself that the matter is within the expertise of yourself/your firm, and if not, make arrangements for the matter to be referred elsewhere;
- c) identify cases which your firm is unwilling to accept, explain to the client why this is, advise them of their ability to seek assistance elsewhere, and provide limitation advice;
- d) collect from the client sufficient information to establish liability (both breach of duty and causation), facts and quantum of damages and to enable an initial plan for the case to be developed;
- e) identify the steps which need to be taken for the collection and preservation of evidence;
- f) establish the client's current and potential future entitlement to state benefits, and arrange for the client to be advised about these;
- g) establish any need for rehabilitation, and whether any rehabilitation is in progress;
- h) 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;
- i) ensure there is a clear understanding of the next steps to be taken by yourself/your firm, the client and any third parties, giving priority to any issues concerning liability, and limitation;
- j) ensure that the client has understood the consequences of any risk assessment that you/your firm will make of the case, and of any limit to the scope of the retainer.

2. Dealing with funding and regulatory matters

To meet the Standard, you must be able to:

- a) conduct an initial risk assessment, in accordance with the policies of your firm;
- b) explain to the client the funding options available, including speculative fee/after the event insurance arrangements, legal expenses insurance, legal aid (where available), trade union funding, paying personally; and the consequences of these arrangements for the client in terms of any personal liability for costs;
- c) put in place the agreed funding arrangements;

- d) issue to the client the firm's standard client care letter, and explain to the client its provisions, including arrangements for dealing with yourself or another named contact within the firm, and complaints procedures;
- e) disclose and explain to the client (where required) any referral arrangements;
- f) comply with your firm's procedures for "know your client" and the conduct of any anti-money laundering checks;
- g) exercise vigilance in satisfying yourself that the claim your client wishes to pursue is not fraudulent.

3. Advising the client and managing their expectations

To meet the Standard, you must be able to:

- a) advise the client, in clear language, of
 - your analysis of the case and the relevant law,
 - the likely outcomes, including best and worst case scenarios, and possible compromise solutions,
 - the available options for resolving the matter, including negotiation, mediation or other alternative dispute resolution and litigation,
 - the appropriate forum for raising any court action, either the Court of Session or Sheriff Court, the choice between these, and the consequences in terms of procedure and time likely to be taken,
 - rights and duties in relation to disclosure of information, dealing with the defender, third parties, after-the-event and before-the-event insurers, experts and the court, and your client's dealings with you/your firm,
 - how you will plan the conduct of the case and consult with the client on tactics and proposed courses of action;
- b) continually manage the expectations of the client by advising them, as the case proceeds, of the prospects of success, the range within which any award of damages might fall, the significance of issues raised by the defence; the risks inherent in litigation, and when and why there may be periods of apparent inactivity due to factors such as time allowed for the defender to respond, awaiting stabilisation of an injury pending medical assessment, etc;
- c) ensure the client has a clear understanding of any documentation or other evidence they must supply, information (such as costs of care) which they must record, and changes in medical condition or employment circumstances of which they must notify you;
- d) assess (with specialist advice where necessary) and explain to the client the impact on state benefits to which the client may be entitled of any interim payments and final settlement;
- e) check, in respect of all advice given, that the client has understood what you have told them, and understands any action they must take, and the time within which it must be taken;
- f) identify cases where a personal injury trust ought to be set up to protect any of the client's means-tested state benefits; identify cases in which a Compensation Recovery Unit Certificate should be sought, advise the client of the consequences of securing a certificate, and check that the compensator has applied, or is applying for a Certificate.

4. Planning the case, gathering evidence and making the claim

To meet the Standard, you must be able to:

- a) prepare a case plan, including a costs budget and timing;
- b) at all times, conduct the case within the provisions of the relevant Pre-Action Protocol;
- c) gather medical evidence, including by instructing appropriate medical experts;
- d) identify and instruct other expert witnesses;

- e) arrange for the collection, preservation and accurate recording of evidence such as photographs of accident scenes, measurements, etc;
- f) arrange interviews of, or information collection from, witnesses as to liability and/or damages in a timely, economical and professional manner;
- g) place an initial value on the claim, and identify and calculate the heads of damage and rehabilitation;
- h) assemble evidence for a schedule of special damages and future loss;
- i) ensure that the client's need for rehabilitation is addressed as a priority, and that appropriate action is taken to communicate with the compensator and to arrange assessment as provided in the 2007 Rehabilitation Code, or make other appropriate arrangements;
- j) review and revise the case plan, review the level of expenses and outlays and the adequacy of insurance cover, and conduct on-going risk assessment, in the light of evidence gathered;
- k) review medical and other evidence to ensure it is consistent with the client's own account of their injury, and review any discrepancies with the client;
- l) draft and submit the claim and any necessary notification of funding arrangements.

5. Dealing with the defender and other parties up to the point of issuing proceedings

To meet the Standard, you must be able to:

- a) progress the case within the timescales and other provisions of the relevant Pre-Action Protocol;
- b) negotiate effectively, with the aim of achieving a settlement of the case (or an issue within it) to the client's best advantage, within the limits of the law and evidence;
- c) make effective use of office computer systems to manage the progress of cases;
- d) take a pro-active approach to dealing with insurers or other compensators, recognising circumstances in which you need to take an initiative to move a matter forward;
- e) resolve problems arising from a defender's refusal to negotiate, a lack of cooperation from a client, or a lack of response from an expert;
- f) seek interim payments if this is appropriate;
- g) advise clients on the merits of offers made by the defender, notifying funders where and when required;
- h) review and revise the case plan and the risk assessment in the light of responses from other parties, inform the client of progress and agree with the client any revised strategy;
- i) decide when, within the appropriate time limit, proceedings should be issued to protect the client's rights and interests.

6. Drafting documents

To meet the Standard, you must be able to:

- a) draft attendance notes, witness statements, and pleadings including Summonses, Initial Writs, Summary Cause Summonses, Notes of Adjustments, Minutes of Amendments, Statements of Value of Claim, Notices to Admit, Joint Minutes of Admissions, Joint Minutes;
- b) draft schedules of loss, understand and use Ogden tables, explain to the client the way in which the law requires losses to be identified;
- c) draft documents which:
 - are succinct but comprehensive and are written in good English,
 - are produced in a format and style appropriate to their intended purpose and audience,
 - are designed to further clients' interests,

- fulfil legal requirements, are accurate in law and make critical use of precedents,
- if formal court documents, conform to court rules,
- are produced in an efficient and timely manner.

7. Instructing counsel and experts

To meet the Standard, you must be able to:

- identify the point(s) in a case at which it is appropriate to involve counsel through seeking informal advice, a formal opinion, or holding a consultation with counsel;
- make a selection of counsel appropriate to the issues in the case, using your firm's register of counsel;
- agree with counsel the basis of their remuneration;
- make a selection of experts in relation to the evidence to be proved, using your firm's register of experts;
- agree the amount and timing of payment to experts instructed;
- explain the role of counsel and experts to your client, and in particular the duty of the expert to the court; agree with your client whether they should attend a consultation with counsel;
- ensure that letters of instruction to experts set out clearly the nature of the opinion that is sought using, where appropriate, the model letter to medical experts annexed to the Pre-Action Protocol for Personal Injury Cases;
- ensure that instructions to counsel state clearly the objective being pursued by the client, and summarise key issues in the case;
- ensure that all and only relevant supporting documentation is sent to counsel and experts;
- agree timetables for the provision of opinions or advice, and take effective steps to ensure these are adhered to;
- Check expert reports and documents prepared by counsel to ensure that all issues identified in the instructions have been addressed.

8. Managing post-trial or post-settlement and file closure procedures

To meet the Standard, you must be able to:

- provide your client with written confirmation of the outcome of the proof or trial, and advise on the implications of the judgement;
- inform funders and experts of the outcome of the proof or trial;
- inform any Guardian appointed of the outcome of the proof or trial;
- instruct law accountants to prepare a judicial account, and check the contents of the same;
- instruct law accountants to prepare a list of objections to the other side's expenses, where necessary;
- attend and conduct, or instruct law accountants to attend a diet of taxation;
- take the necessary steps to enforce recovery of a judgement, if payment is not made by the other side;
- ensure that your client is provided with the opportunity of taking independent financial advice on the investment of any damages awarded; where appropriate advise on the establishment of a personal injury trust;
- deal with any agent/client legal fees;
- identify circumstances in which the file should be retained to enable long term procedures and advice to be dealt with, for example where a provisional damages award is made, or where the client is a child;
- arrange for the closure and archiving of the file, in accordance with the policies of your firm.

BEHAVIOURS WHICH UNDERPIN EFFECTIVE PERFORMANCE

1. At all times you act in a manner which reflects your duty to act in the best interests of your client, and your duty to the court.
2. You conduct all of your work to a proper professional standard and safeguard your independence and integrity as a lawyer.
3. You maintain an orderly file, with detailed attendance notes.
4. You have an awareness of the limits of your own knowledge and competence, you seek advice where necessary, and you refer on matters which are outside your field of expertise.
5. Your behaviour reflects your awareness that your firm can only provide a service to its clients if the firm is commercially viable.
6. You present information clearly, concisely, accurately and in ways which promote understanding.
7. You use communication styles which are appropriate to different people and situations, and display empathy with the injured client and their family.
8. You respond promptly and positively to problems with a proposed course of action.
9. You are pro-active in case management, taking the initiative where appropriate, and never leaving matters until the last minute.
10. You are a willing and positive participant in your firm's arrangements for quality assurance and peer review of files.
11. You are active in keeping up to date with developments in the law, through reading journals and participation in conferences and training, and you are always willing to share your expertise with colleagues.