



ASSOCIATION OF PERSONAL INJURY LAWYERS SCOTLAND

Standard of competence for Senior 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.

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 Senior 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 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.

Senior 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, but is the single most important status, as it represents the minimum level of competence necessary to head the PI litigation function within a firm. Whilst there is no requirement to have served any specified period of time to secure Senior Litigator status, realistically, from first involvement with civil litigation, it is likely to take at least five 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 Senior Litigator status, in that it enables types of experience and training which will develop the required competence to be identified.

A Senior Litigator is deemed to be competent to work without supervision from another personal injury lawyer, may well supervise a team of lawyers and paralegals, will have responsibility for the assessment

and management of risk and, within the framework of the risk management policy of a firm, will usually be self-authorising at all key stages of litigation.

A Senior Litigator will be focused on achieving the best possible result for their client. As a relatively senior fee earner within a firm, a Senior Litigator will have a good commercial awareness and will understand that a firm must be profitable to be viable, to invest in its services and the development of its staff, and to continue to provide a service to its clients.

A Senior Litigator is likely to have handled several types of personal injury litigation, may well specialise in certain fields, and is likely to run cases which are predominantly the more complex and higher value cases.

The scope of the Standard

The Standard assumes possession of the legal knowledge and understanding required for the qualifications of solicitor, or advocate, together with the skills and experience likely to have been developed over a period of about five years' legal employment following initial qualification.

The Standard addresses the circumstances of a person working as a Senior 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.

Related standards

The Standard deals with the litigation function only. Some Senior Litigators will have additional roles within their firms to which other standards of occupational competence, or similar statements may apply. For those with management and supervisory responsibilities, the Management and Leadership Standards published by the Management Standards Centre may be of relevance (www.management-standards.org).

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 Senior Litigator.

THE STANDARD

A Senior 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. He or she is competent to take, without supervision, key decisions on accepting cases, assessing risks, evaluating offers and issuing proceedings. The range of required competences covers:

- 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
- Issuing proceedings
- Managing recovery and disclosure
- Drafting documents
- Instructing counsel and experts
- Preparing for and managing the proof or jury trial
- Managing post-proof or trial or post-settlement and file closure procedures
- Appeal procedure

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. The general law and legal system of Scotland

- The core knowledge and understanding of the law applied in Scotland.

2. Law relating to personal injury litigation generally

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

3. 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.

4. Rules of procedure, etc.

- Voluntary Pre-Action Protocol
- Court of Session Rules
- Ordinary Cause Rules
- Summary Cause Rules
- Voluntary Pre-Action Protocol in Scotland for Personal Injury Claims
- The Rehabilitation Code

- UK Rehabilitation Council standards

5. 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 *McEwan and Paton on Damages*; *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 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 eleven 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:

- 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;
- 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;
- 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;
- 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;
- identify the steps which need to be taken for the collection and preservation of evidence;
- establish the client's current and potential future entitlement to state benefits, and arrange for the client to be advised about these;
- establish any need for rehabilitation, and whether any rehabilitation is in progress;
- identify any issues with regard to the capacity of the client (e.g. if the client is a child, suffering from a serious head injury, etc) and take appropriate steps such as the appointment of a Financial or Welfare Guardian;
- 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;
- 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;
- ensure that the client has understood the consequences of any risk assessment that you/your firm will make of the case, and 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 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;
- g) identify any case where a provisional damages award should be considered.

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 obtaining the relevant medical records and 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 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

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, ensuring the appointment of a Guardian where the client lacks capacity;
- g) run effective joint settlement meetings;
- h) advise clients on the merits of offers made by the defender, notifying funders where and when required;
- i) 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.

6. Issuing proceedings

To meet the Standard, you must be able to:

- a) decide when, within the appropriate time limit, proceedings should be issued to protect the client's rights and interests;
- b) select a court (Court of Session or Sheriff Court, Ordinary Cause or Summary Cause) and a location that is in accordance with court rules and consistent with the tactics of your case plan;
- c) draft the Summons or Initial Writ; or prepare instructions to counsel to draft the Summons or Initial Writ, as appropriate;
- d) complete the appropriate court documents, and assemble other necessary documents, to enable proceedings to be issued;
- e) follow the correct procedures to enable the court to issue proceedings;
- f) follow the correct procedures to ensure service is effected;
- g) ensure that notice is given to third parties such as the Motor Insurers Bureau or the defender's insurers, including notices required under any after-the-event or before-the-event insurance or other funding arrangement;
- h) follow the procedures necessary when suing or suing on behalf of a sequestrated party;
- i) identify the issues the court will be asked to determine, and the potential value of the claim;
- j) identify the experts to be instructed and called;
- k) identify and deal with any limitation or jurisdictional issues;
- l) decide on the facts and merits of each case whether to seek a full proof or trial, a split proof or trial or a proof or trial on quantum only;
- m) identify the circumstances (such as the need to seek an interim payment or a lack of response from the other side) in which it is appropriate to make an interim application or seek decree in absence.

7. Managing recovery and disclosure

To meet the Standard, you must be able to:

- a) ensure that disclosure made to the other side is of that which is required and sufficient to support your clients claim, both before and after court proceedings have been issued, whilst not providing records or information that may properly be withheld;
- b) ensure that sensitive or confidential information is disclosed on a suitably restricted basis;
- c) identify missing documents which should have been provided to you, and seek these from the other side, making an application to the court for commission and diligence where necessary;
- d) ensure that document lists match documents produced and comply with court rules;
- e) ensure that document lists are produced within the timetables set and in an order appropriate for the case and the volume and type of document;
- f) ensure that all properly requested copies are provided in a timely manner, and billed for if appropriate;
- g) ensure that your client understands their duty to preserve evidence and to provide documents sufficient to support their claim, their continuing obligations, and the full scope of disclosure.

8. Drafting documents

To meet the Standard, you must be able to:

- a) draft witness statements, affidavits, 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 case summaries, attendance notes and other documents required for litigation;
- c) draft schedules of loss; understand and use Ogden tables, explain to the client the way in which the law requires losses to be quantified;
- d) 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;
- e) contribute to the development and maintenance of precedent documents within your firm.

9. Instructing counsel and experts

To meet the Standard, you must be able to:

- a) 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;
- b) make a selection of counsel appropriate to the issues in the case;
- c) agree with counsel the basis of their remuneration;
- d) make a selection of experts in relation to the evidence to be proved, using your firm's register of experts and other appropriate sources;
- e) agree the amount and timing of payment of experts instructed;
- f) 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;
- g) 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 Claims;
- h) ensure that instructions to counsel state clearly the objective being pursued by the client, and summarise key issues in the case;
- i) ensure that all and only relevant supporting documentation is sent to counsel and experts;
- j) agree timetables for the provision of opinions or advice, and take effective steps to ensure these are adhered to;
- k) check expert reports and documents prepared by counsel to ensure that all issues identified in the instructions have been addressed;
- l) critically evaluate, test and challenge expert evidence;
- m) evaluate the overall performance of counsel and experts for the purpose of maintaining your firm's register of preferred counsel and experts.

10. Preparing for and managing the proof or jury trial

To meet the Standard, you must be able to:

- a) conduct a review of all relevant issues, in the light of evidence obtained and developments since that time;
- b) review any offer made, consider whether it would be appropriate to make, revise or withdraw a pursuer's offer and, if so, discuss this with counsel and funders (if appropriate) and your client;
- c) instruct, prepare and manage the pre-trial meeting or pre-proof conference;
- d) actively manage the proof or trial date to ensure the availability of counsel, witnesses and experts, notify these and your client of the proof or trial dates set, and the times within the trial period at which their attendance may be required;
- e) serve witness citations if required;
- f) explain to your client and witnesses the proof or trial process, and what will be expected of them;
- g) ensure that any Inventories of Productions contain all necessary documents, are arranged according to court rules and practice directions, and lodged within the court timetable;
- h) ensure that counsel is instructed in good time;
- i) ensure that appropriate arrangements are made to deal with the special circumstances of a client who is a child or is incapable, or who has a disability;
- j) keep under review the level of expenses and outlays, the adequacy of the level of insurance cover, and the need for any necessary authority to proceed;
- k) ensure that full notes are taken of all court hearings;
- l) explain to your client the progress of the hearing and the judgement of the court.

11. Managing post-proof or trial or post-settlement and file closure procedures

To meet the Standard, you must be able to:

- a) provide your client with written confirmation of the outcome of the proof or trial, and advice on the implications of the judgement;
- b) inform funders and experts of the outcome of the proof or trial;
- c) inform any Guardian appointed of the outcome of the proof or trial;
- d) instruct law accountants to prepare a judicial account, and check the contents of the same;
- e) instruct law accountants to prepare a list of objections to the other side's expenses, where necessary;
- f) attend and conduct, or instruct law accountants to attend a diet of taxation;
- g) take the necessary steps to enforce recovery of a judgement, if payment is not made by the other side;
- h) 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;
- i) deal with any agent/client legal fees;
- j) 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;
- k) arrange for the closure and archiving of the file, in accordance with the policies of your firm.

12. Appeal Procedure

To meet the Standard, you must be able to:

- a) in the event that your client has not been successful at proof or jury trial, consider the prospects of appeal, and advise your client accordingly;
- b) if an appeal is being proceeded with, mark the appropriate appeal to the Sheriff Appeal Court, or from the Sheriff Appeal Court or the Outer House, to the Inner House of the Court of Session, whichever is appropriate, and to comply with the relevant procedural requirements, including the preparation and lodging of Notes of Arguments, and Appendices;
- c) in the event that the defender in the case marks an appeal, comply with the relevant procedural requirements as above;
- d) prepare and conduct the appeal, or to instruct counsel to do so;
- e) ensure full notes are taken of the appeal;
- f) note the outcome and report to your client.

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.