

ACCREDITED SPECIALISATION PERFORMANCE STANDARDS 2017

Family Law

Performance Standards

Practitioners wishing to be accredited should be able to perform the following tasks:

1.1 Develop a Relationship with the Client by:

1.1.1 Listening Effectively to the Client

By listening effectively, the practitioner is able to perceive the client's immediate needs regarding safety, children and the financial situation.

The practitioner becomes aware of the client's non-legal needs, and any gender, language, cross-cultural, personal and religious issues, and their implications.

1.1.2 Communicating Clearly and Appropriately

The practitioner:

- asks effective questions and interacts with the client in a supportive way and, at the same time, adopts methods to test the reality of the client's statements;
- adopts a non-discriminatory attitude and uses plain language to communicate with the client to dispel myths and to educate regarding family law, its limits and realities; and
- responds promptly to the client's inquiries and concerns, demonstrates a commitment to follow the client's instructions (within ethical limits) and an understanding of the client's welfare needs.

1.2 Gather and Assess Facts and Instructions by:

1.2.1 Taking Instructions from the Client

FYI: Instructions include both the client's account of the relevant facts and the client's statements on what he or she wishes to obtain or achieve.

When taking instructions, the practitioner:

- displays thoroughness, persistence and awareness of relevance; and
- structures the process of assisting the client to develop a history, and obtains an initial statement from the client. Client statements include:
 - the nature of the problem;
 - what the client wants to achieve;
 - the client's account of the relevant facts;
 - the positions of children and any relevant third parties;
 - and
 - a view of the opponent's position.
- draws the client's attention to any gaps or inconsistencies and checks the instructions with the client; and

- identifies with the client the basis upon which costs are being charged (scale or costs agreement).

When appropriate, the practitioner:

- obtains written instructions, for example, when instructions are contrary to the practitioner's advice;
- advises the client on the feasibility of obtaining what the client wants;
- distinguishes realistic and unrealistic expectations and canvasses the question of costs;
- deals with any ethical issues arising from the instructions; and
- keeps a clear record of the instructions.

1.2.2 Obtaining Relevant Information from Sources other than the Client

The practitioner:

- conducts appropriate searches and makes appropriate requests for documents and information;
- is skilled in obtaining evidence from a variety of witnesses and experts;
- uses court procedures to gather further evidence;
- makes financial inquiries; and
- when appropriate, takes evidence on commission or engages in extraterritorial procedures.

1.3 **Plan a Timetable and Course of Action by:**

1.3.1 Assessing Facts and Marshalling Evidence

The practitioner:

- assesses the facts by cross-referencing documents and statements, and preparing a chronology and statement of issues;
- briefs experts to comment on evidence;
- ensures that experts focus on the questions of evidence required;
- researches and obtains bodies of expert opinion;
- assesses the reliability of witnesses, the competency of experts; and
- determines what is relevant and admissible.

1.3.2 Conducting Legal Analysis

The practitioner:

- identifies legal principles arising from the facts, the client's instructions, actions by opponents and third parties, if any;
- identifies the extent to which relevant legal principles are clear on contestable issues;
- engages in appropriate research to ascertain legal principles or to develop arguments where legal principles are contestable;
- determines whether to seek counsel's opinion at each stage of the case; and
- seeks appropriate instructions.

1.3.3 Presenting to Clients Options for Reaching Resolution

The practitioner:

- presents the client with options in relation to the client's problems and an estimate of the costs involved;
- identifies the appropriate legal and other remedies, if any, and the forum; and
- identifies and investigates other legal ramifications of various options (for example, taxation and stamp duty implications, capital gains tax implications and corporate law implications).

The options will include:

- *No action*

The client is to be properly informed of all ramifications of this non-action and reassured if adverse reaction starts.

- *Non-legal person or service*

The practitioner:

- recognises the existence of non-legal issues and their importance to the client at the time;
- will refer the client to the appropriate service or services;
- is able to assess non-legal assistance for the client; and
- is up to date on the range of services available, for example, valuers, accountants, interpreters, refuges, support groups, religious groups, psychologists, psychiatrists, educationalists, employment, social security and housing.

- *Support measures*

The practitioner:

- is aware of the physical, financial and psychological needs of the client, and advises the client to take action if appropriate;
- knows the tactics needed to achieve results;

- brings pressure to bear on the other side but refrains from taking action which might imperil the safety of the client or prejudice the client's action;
- is sensitive to the client's mental state, particularly when domestic violence is involved;
- supports the client while maintaining objectivity;
- clearly communicates the limitations of domestic violence orders and advises the client on how to deal with the limitations; and
- is able to act quickly when required.
- is able to advise client regarding availability of legal aid where appropriate.

▪ *Alternative Dispute Resolution*

The practitioner:

- knows the various types of dispute resolution processes which may be available and appropriate at various stages of a matter;
- fulfils the requirements of the appropriate rule;
- adopts an attitude of openness to paths other than litigation (for example, counselling, negotiations, mediation, conciliation and arbitration); and
- prepares the client for his or her part in the settlement process.

▪ *Court action*

The practitioner:

- recommends court action when appropriate but recognises when the process may be too damaging, either financially or psychologically, for the client;
- recognises when to brief counsel; and
- manages the pace of proceedings in accordance with client's needs and instructions in the context of case management guidelines and relevant practice directions.

1.3.4 Developing the Initial Plan

The practitioner:

- makes strategic decisions in light of the law, the facts and the client's instructions;
- assesses what is to be achieved, and how it can be achieved;
- determines which aspects of the case should be emphasised, which issues are capable of immediate resolution;
- reviews the cost-effectiveness of the proposed options; and
- develops an initial plan in collaboration with the client.

1.3.5 Reviewing the Plan and Modifying it in Light of Changes

Throughout the matter, the practitioner;

- Reviews objectives on the basis of changed circumstances resulting from further instructions, other parties' materials, expert opinion and information gained through documents discovered or subpoenaed;
- Presents options responding to the changed circumstances;
- Implements strategies, including interim or interlocutory applications or appeals, security measures and expedition; and
- Undertakes settlement negotiations, where appropriate.

1.4 **Implement a Plan by:**

1.4.1 Preparing Court Documents

The practitioner:

- prepares court documents which properly present the case and comply with court rules and practices;
- presents material in admissible form;
- structures documents in a way that makes them easily understood; and
- amends documents when required.

1.4.2 Dealing with Officials and Third Parties on the Client's Behalf

To deal effectively with officials and third parties on the client's behalf, the practitioner:

- is aware of the authority, duties and responsibilities of the various officers and officials of the court; and
- represents the client effectively before court officials and other parties who may assist the client including members of the extended family, church leaders, doctors, accountants or other experts, Child Support Agency staff, Centrelink staff.

1.4.3 Managing the Negotiation Process

The practitioner manages the negotiating process by considering alternatives and adjusting proposals to meet changing circumstances and stages of litigation.

At all times, the practitioner maintains flexibility, and acts professionally and in accordance with the client's instructions.

1.4.4 Briefing Counsel and Acting as the Instructing Solicitor

The practitioner considers when to brief counsel, having regard to:

- the length of the trial;
- the complexity of law or facts;
- the emotional state of the client;
- the likelihood of success; and
- the client's instructions to proceed against the practitioner's advice.

The practitioner chooses the appropriate barrister for the matter. As instructing solicitor, he or she:

- understands the relationship between barrister and client;
- plays an active role in the management of the case; and
- acts as liaison between the barrister and the client.

1.5 **Act as an Advocate by:**

1.5.1 Undertaking Conciliation Conferences

The practitioner:

- understands the requirements of the rules and the case management guidelines for conciliation conferences;
- advises the client about procedural aspects and prepares the client for the dynamics of the conference;
- communicates the negotiating plan to the client and ensures the client accepts the opening and bottom line negotiating positions;
- delivers an opening statement which summarises the facts and seeks to persuade that the orders sought are just and equitable;
- prepares terms of agreement and/or orders if the conference is successful; and
- debriefs the client, records the important issues, raises and plans the future direction of the case, if the conference is unsuccessful.

1.5.2 Conducting the Hearing

When appearing, the practitioner:

- is articulate, prepared and well-organised;

- has the ability to think quickly on his or her feet;
- re-frames client's subjective concerns into reasonable, obtainable legal outcomes;
- explains the process of cross-examination to the client and relevant witnesses;
- presents a clear opening statement;
- conducts effective cross-examination which is well structured, focuses on achievable objectives and bears directly on the issues;
- controls the subject matter of the questioning and avoids arguments with the witness; and
- makes submissions which:
 - are logical in sequence;
 - are on point;
 - summarise the evidence;
 - re-emphasise the key issues in a persuasive manner; and
 - provide a structure for organising and assessing the evidence.

1.6 Complete a Matter

The practitioner:

- adopts appropriate methods for recording results including agreements between the parties;
- explains any judgments; checks, and if necessary, corrects final orders (knowing the appropriate application of the slip rule);
- advises the client on the consequential procedures including meetings of directors, transfer of property and variation of trust deeds;
- when appropriate, advises on appeal procedures, identifying grounds for appeal;
- prepares and presents to the client final accounts; and
- attends taxation of costs procedures if required.