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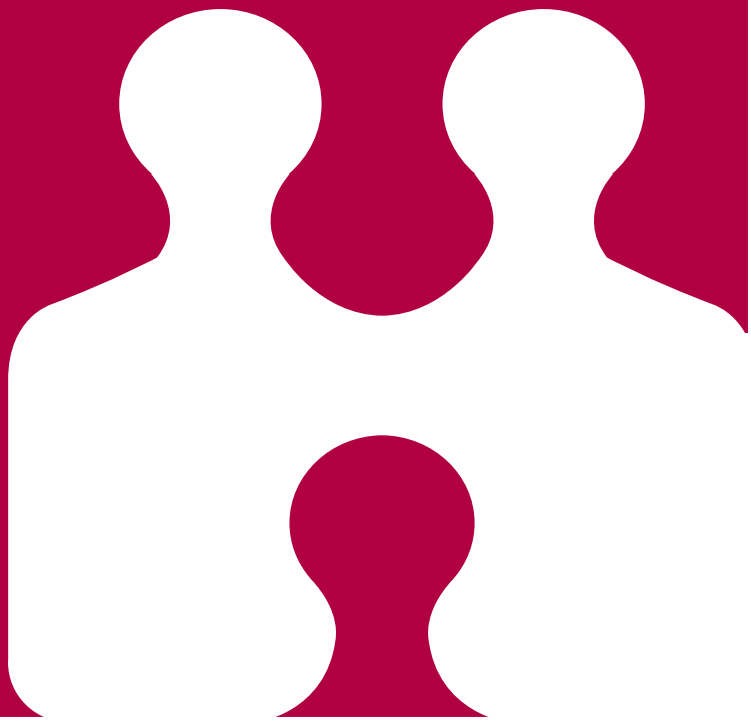
Guide to Good Practice for family lawyers on working with litigants in person



This Guidance was revised in September 2016. The law or procedure may have changed since that time and members should check the up-to-date position.

Guide to Good Practice on Working with Litigants in Person

Introduction

Subject to the rules on vexatious litigants, anyone is entitled to act in person. However, there is a tendency to treat people who do as a nuisance.

With the reforms to family justice, cut backs on legal aid and changes in behaviour in relation to the ways in which people approach family relationship breakdown, it is increasingly likely that you will deal with litigants in person and you should consider how your dealings will differ from those with another lawyer.

First contact

Your first contact with your client's spouse or partner may set the tone for the way in which the whole case is dealt with. Therefore, it is vitally important to have the Resolution Code of Practice and the ethos behind it at the forefront of your mind.

The Code does not only apply to your dealings with your client. It applies to everything you do in connection with your family law work. By becoming a member of Resolution, you have committed yourself to adhering to the Code. Resolution can and does deal with complaints from the client's spouse or partner or, indeed, anyone else involved in the matter, such as a judge, barrister or CAFCASS officer.

Spend a little time thinking about why this person is not instructing a lawyer. It could be because they:

(a) cannot afford to

(b) think that matters are agreed or very straightforward so that there is no need

(c) believe that lawyers are only interested in making money out of their misery; or

(d) believe that they are capable of dealing with the matter as well as any lawyer.

If the reason should be from (a)–(c) above, it is possible that the person will start off feeling at a disadvantage. They may be very distressed, angry and/or confused and finding it very difficult to come to terms with and understand what is happening. They are likely to be totally unfamiliar with the law, procedure and language. They may be particularly sensitive to anything they receive from you and be on the defensive from the beginning.

When you write your first letter to this person, you may not know what the reasons are for them not instructing a lawyer so you should be sensitive to all of the above. Your thinking may also be affected by what you have heard from your client as to the reasons for what

has happened and how they view the behaviour or actions of their former spouse or partner. Remember that your client will always have shaped what they say to you based on their own feelings, what they think you want to hear and perhaps so you also understand that they are not the person 'in the wrong'.

You may not know anything about them – their emotional state, the effect of the separation or dispute on them, or their ability to express their feelings or wishes. We are encouraged to consider the stages our client may be going through – shock, grief, anger etc. – and we are able to do that by observing and talking to them. We cannot do that with the spouse or partner. We are either forming a view and making judgements based on our client's instructions or, if we are able to stand back and take an objective view, acting in the dark. Your first letter might be the first indication the recipient has that the situation is serious. When you write, be aware of the influence of your client's instructions and try to be sensitive to whatever state the recipient might be in, whatever level of communication they might have or any cultural issues that might affect them.

Although the latest edition of the Law Society's Family Law Protocol is silent on the matter, the previous edition contained useful guidance: the initial letter should briefly address the issues and avoid protracted, clearly one-sided and unnecessary arguments or assertions. In drafting the first letter, solicitors must:

(a) where practicable, obtain approval from clients in advance; and

(b) when writing to unrepresented parties, recommend that they seek independent legal advice, and enclose a second copy of the letter to be passed to any solicitor instructed.

You should recommend that the other party consults a Resolution member, but be sensitive to the fact that they may not be able to afford representation. Many people say that they find such a recommendation threatening and aggressive. If they thought matters were agreed with their spouse or partner, they can construe this recommendation as implying that matters are no longer agreed and that some advantage could be taken of them if they do not seek advice. Therefore, it is important to explain why it might be helpful for them to consult a lawyer and/or refer to this suggestion as being recommended good practice. You could suggest other advice agencies and consider with your client suggesting mediation as, for various reasons, this could be a more effective or appropriate option in certain cases. You could explain that the court office can give some help on procedures and refer them to gov.uk Represent yourself in court or the court service website.

You should advise, negotiate and conduct matters so as to help settle differences as quickly as is reasonable for the parties. You should recognise that your client may need time to come to terms with their new situation and so also may their spouse or partner, who will be trying to do so without professional help and support.

Many people say that they feel pressured into responding quickly when time limits for replies or actions are imposed at an early stage. Clearly there may be reasons for speedy action in certain circumstances, but you should advise your client to be sensitive to the time the spouse or partner needs and to allow scope for agreement to be reached. It can be helpful to explain that sometimes matters take time to resolve.

Communications generally

See the Resolution Guide to Good Practice on Correspondence and the Resolution Complaints Handling Toolkit.

When dealing with someone who is not represented, you should take even greater care to communicate clearly and try to avoid any technical language or legal jargon.

It is very easy to use language that we are very familiar with, without thinking about whether the recipient will understand it. Petition, petitioner, respondent, decree nisi, decree absolute, injunctions, periodical payments etc are not words in everyday use. A litigant in person who is already feeling at a disadvantage may be further intimidated and antagonised by the use of such language. Take care not to give unsolicited legal advice to the litigant in person but think about what information might be helpful for them, including providing links to websites or organisations that may be able to offer them help or explanations about the law or procedures.

The Code of Practice says: Avoid use of inflammatory language, both written and spoken.

You should avoid using words or phrases that suggest or cause a dispute where there is none. Emotions are often intense in family disputes. You should avoid inflaming them in any way. You should not express any personal opinions on the behaviour of the other party.

Correspondence should be carefully considered for its potential effect on other family members.

Any communications should aim to resolve issues and settle matters, not antagonise or inflame them. Threats or ultimatums should be avoided.

Paragraph 1.10.3 of the Family Law Protocol Part 1 says “patience, courtesy, good humour and an effort to understand why the person is not instructing a lawyer will get you off on the right foot”.

Many complaints to Resolution concern the giving of personal opinions and comment. It is easy to be drawn into your client’s case and to feel that you are acting in your client’s best interests by being assertive and criticising the spouse or partner. However, it is unprofessional and does nothing to further the case. It may simply make you and/or your client feel better temporarily. If any comment is absolutely necessary, preface it with “My client instructs me that”.

Also, bear in mind, especially when raising a matter for the first time, that your client’s version of events, given to you as fact, may not necessarily be accurate.

The Code of Practice says that you should encourage clients to put the best interests of the children first. You should keep disputes about finances separate from disputes about children. These matters should be covered in separate letters because children are not bargaining tools and by dealing with finance and children in the same letter it may appear that they are being used as such. It can also make each aspect more difficult to resolve.

The stock answer to complaints that child and money matters have been dealt with in the same letter is that the client is a private client and costs are being kept to a minimum. If a member has explained to their client at the outset the approach to be taken in the case, the client cannot complain about any additional costs incurred in dealing with such matters in separate letters.

Care needs to be taken with email correspondence as it is not a secure medium. It is also important to take care, if asked to communicate by fax or email, that the recipient is aware, agrees and can receive faxes or emails in a confidential environment. Complaints have been received that communications were sent to the place of work and were seen by numerous other people first.

The petition or other proceedings

Paragraph 1.11.1 of the Family Law Protocol Part 1 says: "Prior to the issue of proceedings of any nature, solicitors acting for applicants or petitioners should notify those acting for respondents (or respondents themselves where unrepresented) of the intention to commence proceedings at least seven days in advance, unless there is good reason not to do so."

One complaint received by Resolution concerned a member who had dictated a letter saying that her client was willing to negotiate the particulars in the petition, but the letter had been held up in a typing backlog and by the time it was sent the petition had been issued. Always check letters before they are sent out.

The Code of Practice says you should:

- take into account the long-term consequences of actions and communications as well as the short-term implications;
- ensure that consideration is given to balancing the benefits of any steps against the likely costs – financial or emotional; and
- make clients aware of the benefits of behaving in a civilised way.

If a particular step may appear hostile or is capable of being misunderstood, you should consider explaining the reasons for that step to the other party.

Do not lightly/routinely seek costs. Pay particular attention to claims for costs in divorce petitions. If the claim would not be pursued if the petition proceeds on an undefended basis, make that clear in the petition or at least explain to the spouse in advance so as to avoid it being construed as a hostile act. Explain what other claims, eg for a financial order, may be about and why it is necessary to include them in the petition. These are often seen as hostile acts.

Try to achieve consensus before issuing any application.

Paragraph 10.2.1 of the Family Law Protocol Part 2 says that you should provide the respondent's solicitors (or respondent where unrepresented) with the fact or facts on which

the petition is to be based and the particulars, with a view to coming to an agreement. Many people report that no attempt has been made to agree divorce particulars in advance. Members may respond by saying that no one in their area ever does it, that it increases costs because of the negotiation that ensues or that they have considered it with their client but decided not to. Of course, it is impossible to disprove this. Some people say that particulars were sent, but that there was no attempt to negotiate. Remember that the benefits of achieving consensus at this early stage could affect the progress of the whole matter. It will show respect to the spouse or partner, allow them some dignity and encourage working together to find solutions, rather than an 'us and them' culture. If the couple can work together at this stage they are more likely to be able to work together later when you drop out of the picture. Remember that mediation may also be an appropriate and cost-effective means for people to agree together the particulars of the petition.

Domestic abuse

The relationship with the spouse or partner can be difficult if there are allegations of domestic abuse. It is essential that such allegations are treated seriously, but it is also important to remain objective and to allow for the possibility that they may be untrue or exaggerated. After advice you may be instructed to write to the spouse or partner to record the incident, demand cessation of the abuse and indicate further action might or will be taken if it does not cease. Many people say that letters demanding cessation feel threatening and raise the temperature, so it is important to be sure that such a statement is truly warranted in the circumstances.

Service of proceedings

See the Resolution Guide to Good Practice on Service. If you do not have a private address for service of proceedings on the spouse or partner, it may be tempting to serve them at their place of work or when they collect their children from their former spouse or partner, or as they have arranged. You should, at all costs, avoid serving them in front of the children because of the potential impact on them. You should consider the impact of serving them at their place of work and whether arrangements can be made for service in a neutral, private place.

Children disputes

The Code of Practice says: Encourage clients to put the best interests of children first.

Many complaints to Resolution concern disputes about arrangements for children. Spouses or partners allege that members have conspired with the parent with care to deny them arrangements to be with their children and that their actions amount to child abuse. It is to be hoped that the government's early intervention initiatives will reduce the number of disputes about children's arrangements, but in the meantime it is important to remain objective and to do as much as possible to ensure that the best interests of the child really are being put first. We should aim to do better than simply trumpet the complaints of

clients in relation to the child or children's other parent. So often children do not achieve a voice in the processes that resolve the issues that concern them. It is important that practitioner members assist parents to consider the needs and interests of their children, and the importance of making arrangements for their separated parenting that ensure the future security and happiness of their children wherever it is possible, practicable and safe to do so. Practitioners should consider the services, support and sources of guidance that parents and children may need. Most lawyers will want to direct their clients to Resolution's *Separation and Divorce: helping parents to help children* book, the Resolution website or services such as the Parent Connection website. The Parenting Plan, which helps parents to think about what needs to be considered in relation to their future parenting, can be found on the Cafcass website.

Such resources may be particularly helpful for the client's former partner as forming the basis for a common set of principles / norms. Parents who want to take matters further may want to be referred to books such as Christina McGhee's Parenting Apart: How separated and divorced parents can raise happy and secure kids (London, Vermilion, 2011).

Paragraph 4.9.1 of the Family Law Protocol Part 4 says that forms C100 (and C1A) or other documents should be simply worded using factual, rather than emotive language setting out clearly the order sought. Solicitors should avoid drafting statements using emotive or inflammatory language, or expressing subjective opinions. A complaint to Resolution involved a C1 alleging violence against the child and stating that the child was on the At Risk Register. Both allegations were false and caused considerable damage. It is accepted that there is a limit to how much cross-checking can be done, but registration is relatively easy to check.

Agreements and consent orders

Some litigants in person complain that they have reached agreement with their spouse or partner, but then when the solicitor is instructed the solicitor insists on full and frank disclosure and/or advises the client that the agreement is unfair and the whole thing falls apart.

Obviously, you could be found negligent if you do not advise on the dangers of incomplete disclosure and the consequences of financial orders, or on whether the agreement is in the client's best interests and what other options are available. You need to bear in mind all the implications, including the benefits attached to settling on an amicable basis and the cost, risks and time involved in further negotiations, mediation or litigation (especially if the agreement is within the range that the court might order).

Your client should be given the options and advised on the implications of each option so that they can make an informed decision. If they accept your advice that disclosure or more disclosure is required before an assessment of the reasonableness of the agreement can be made, then explain to the spouse or partner that you can only act for one of them, recommend that they obtain independent legal advice and explain why you are seeking that disclosure.

Contact at court

You will need to use your own judgement about whether to speak to the litigant in person outside court. It is possible that they will be feeling extremely nervous. Your duty is to represent your client as effectively as you can. You should, however, speak to the litigant in person in such a way as to ensure that you do not give them the opportunity to allege that you have intimidated them. It may be helpful and useful to speak to your client about your speaking with their former partner so as to reassure them that it is a matter of remaining courteous and polite and in line with your commitment to behave at all time in a conciliatory way.

If the litigant in person is willing and comfortable talking to you then you may negotiate, but take care to avoid abusing a position of superior knowledge of the law and practice of the courts. For example, it would be acceptable to say "Are you prepared/content to agree to one overnight stay a fortnight?" but not acceptable to say, for example "The courts in this situation would never award more than one overnight stay a fortnight so I suggest you agree. If you insist on fighting it out then the court could award costs against you."

If you feel that the litigant in person might allege that you have acted improperly, consider whether it would be appropriate to speak to them in the presence of, for example, a trainee from your firm who has accompanied you to court.

Constant harassment

Sometimes a spouse or former partner may want to talk to you on the telephone, fax you or email you several times a day and, at various stages, accuse you of being aggressive, taking your client's word on everything without checking, not considering the best interests of the children and increasing the costs unnecessarily. Eventually they are personal and abusive or even threatening. What do you do?

Resolution has also received complaints that a member has refused to speak to them or to answer their letters, faxes or emails, or has told them that they do not have to speak to them because they are not their client.

- Try to be civil and polite at all times – however tempting it might be to retaliate.
- Do not shout, threaten, accuse, confront or otherwise act in anything but a professional manner.
- Explain verbally, and confirm in writing, that you have a responsibility to consider the costs of your work, that costs are dependent on your instructions from your client and that that may dictate the extent to which you can respond.
- Keep a file note of every discussion and confirm any agreements reached or important discussions in writing.

- If the spouse or partner instructs a lawyer, explain that you can no longer discuss matters directly. Make sure that you are clear about the extent of that lawyer's retainer. If they are only instructed to deal with financial matters, you may still need to deal with the person directly on other issues.
- If a step has been taken which has increased the costs, explain why that step was considered necessary.
- If the litigant in person cannot speak to you without being rude and aggressive, explain that unless they cease that behaviour you will refuse to speak on the telephone and will only correspond with them. Confirm that warning in writing. (See also Resolution's toolkit for dealing with direct contact in relation to complaints.)
- Discuss the problem confidentially with a colleague or use the Resolution mentoring scheme – see the Resolution website for details.

Dealing with lay advisers

The spouse or partner may seek the assistance of an organisation such as Families Need Fathers, the Equal Parenting Alliance or a McKenzie Friend (fee-paid or otherwise) and ask you to deal with them. Resolution has received complaints that members refuse to deal with such organisations.

Discuss with your client whether they are happy for you to deal with a lay adviser taking account of the following factors:

- they are not officers of the court;
- they may lack objectivity;
- they may not belong to any professional organisation that regulates their conduct;
- they may not have any professional indemnity; and
- they may not be bound by rules of confidentiality.

If your client is content for you to deal with a lay adviser, ensure that you have clear instructions as to which issues you can talk to them about and which documents you can disclose to them.

The right to disclose information to a lay adviser

In Re O (Children): Re W-R (A child): Re W (Children) [2005] EWCA Civ 759; 2 FCR 563; All ER (D) 238 the court held that:

> *"whilst good practice requires the litigant in person to identify and obtain the court's agreement to his use of a particular McKenzie friend, it should not be considered a contempt of court for a litigant in person to seek advice prior to any application to the court from a proposed McKenzie friend, in the same way that it will be legitimate*

for a litigant in person to consult an organisation such as the Citizens' Advice Bureau, or Families Need Fathers, or a particular mediation service. In seeking that advice, we are of the opinion that it is not a contempt if the litigant in person shows court documents to the person from whom the advice is being sought. The critical point is that those to whom the documents are shown appreciate that they are being shown the documents for the purpose of giving advice, and that wider dissemination of the documents is not permissible."

The Family Procedure Rules 2010 provide that a party may communicate any information relating to the proceedings to any person where necessary to enable that party, by confidential discussion, to obtain support, advice or assistance in the conduct of the proceedings.

Practice Direction 27A

All parties involved in family law must be aware of the new Practice Direction that has been introduced in relation to court bundles – PD27A. It is comprehensive and applies to both private and public law. It is essential reading.

The Child Arrangements Programme

The way in which children cases are dealt with has also changed with the introduction of the Child Arrangements Programme ("CAP"). Details of the new programme are set out in Practice Direction 12B and need to be understood and complied with by both parties in children cases, whether or not they are legally represented.

The Children and Families Act 2014

Section 10 of the new Children and Families Act has introduced a statutory requirement that all applicants seeking to issue proceedings (where there is a dispute in relation to arrangements for their children or in relation to their finances) must, unless they meet the stated exemptions, attend a Mediation Information and Assessment Meeting with a mediator for the purposes of finding out about mediation and other forms of family dispute resolution that may be appropriate and suitable for their circumstances. There is also encouragement to respondents to attend a similar meeting. Family mediation remains a voluntary choice for each and both parties.

An unrepresented person may not know or understand that is the case and may also struggle to understand if or when their former partner, having met with a mediator, decides that mediation is not an appropriate choice and they may believe that the solicitor has persuaded their former spouse or partner not to mediate. Wherever possible, it is useful to signpost litigants in person to sources of help and information in regard to pre-court requirements and court processes so that they can access appropriate information.

Useful information

There are numerous sources of information available generally to people who wish to represent themselves. Set out below are details of helpful publications for both litigants in person and Resolution members alike and a number of useful links to various organisations. This list is not intended to be exhaustive and will be updated from time to time.

Publications

- The Law Society Practice Direction (June 2015).
- A Handbook for Litigants in Person – Courts & Tribunals Judiciary (December 2012) written by various High Court judges.
- The Interim Applications Court of the Queens Bench Division of the High Court – A guide for Litigants in Person (revised April 2013).
- The Bar Council's A Guide to Representing Yourself in Court (April 2013).
- A guide to proceedings in the Supreme Court for those without a legal representative (February 2014).
- The Family Court without a Lawyer by Lucy Reed, a barrister at St John's Chambers, Bristol (second edition, updated April 2014).
- Trinder, E., & Hunter, R., et al (2014) *Litigants in person in private family law cases*, Ministry of Justice.
- The Law Society's Litigants in Person: Guidelines for Lawyers (June 2015)
- House of Commons Briefing Paper (2016) *Litigants in Person: the rise of the self-represented litigant in civil and family cases*

Case Law

H (A Child) [2014] EWCA Civ 271

Q v Q, Re B (A Child), Re C (A Child) [2014] EWFC 31

Useful website links

Gov.uk – Represent Yourself in Court

A government information website providing information across a range of subjects, including how to represent yourself in family legal matters and at court. The site includes links to downloadable forms.

Ministry of Justice – Forms

Ministry of Justice (MoJ) downloadable forms and guidance.

Resolution – Advice Centre

Resolution provides information and support for people going through a relationship breakdown, including information about the different legal processes involved.

Advice Now

Advice Now is an independent advice organisation. Its website includes downloadable guidance covering a range of issues, including relationship breakdown. It also provides information about legal aid.

Advice Guide

Advice Guide is the information and advice website of the Citizens Advice Bureaux (CAB). You can find information about the legal issues relating to divorce and separation as well as your local CAB.

The Parent Connection

Information and support for all separated parents.

CAFCASS

CAFCASS is the Children and Family Court Advisory and Support Service. Its site provides information and guidance for parents and for children and young people.

Personal Support Unit

Personal Support Units provide practical and emotional help and support to people representing themselves at court. At present, they are available in eight major court centres; go to the website for further information about locations and services.

Gingerbread

Gingerbread provides expert advice and support for single parents, including tailored online advice and a helpline on **0808 802 0925.**

Grandparents' Association

The Grandparents' Association provides information and support for grandparents affected by divorce and separation of their children. The website includes a range of factsheets and a telephone helpline is available on **0843 289 7030**

Family Mediation Council

Information about mediation, Mediation Information and Assessment Meetings (MIAMs) and a directory of mediators.

Families Need Fathers

Information, advice and support for parents to help achieve positive outcomes for their children. Their site includes information about the law and legal processes and their helpline is available on 0300 0300 363.

Rights of Women

Legal advice and information for women. The website provides access to factsheets and its helpline is available on 020 7251 6577.

OnlyMums and OnlyDads

Both OnlyMums and OnlyDads provide information, advice and support to single parents. In addition to their online information a Family Law Panel is available to answer email enquiries.

Money Advice Service

Advice and information about dealing with financial matters, including the particular issues you might face following a relationship breakdown.

Note

1. This good practice guidance does not and cannot affect any obligations in law, specific court orders or rules of professional conduct.
2. Good practice guidance can inevitably only deal with the generality of situations. It cannot be an absolute rule. The facts of any particular case may justify or require a lawyer to depart from these guidelines.
3. This guidance applies to all family law cases for the better conduct and approach of family breakdown issues, and not just to cases between Resolution members.

Appendix 7A: Practice Guidance: McKenzie Friends (Civil and Family Courts), 12 July 2010

This Guidance applies to civil and family proceedings in the Court of Appeal (Civil Division), the High Court of Justice, the County Courts and the Family Proceedings Court in the Magistrates' Courts[1]. It is issued as guidance (not as a Practice Direction) by the Master of the Rolls, as Head of Civil Justice, and the President of the Family Division, as Head of Family Justice. It is intended to remind courts and litigants of the principles set out in the authorities and supersedes the guidance contained in Practice Note (Family Courts: McKenzie Friends) (No 2) [2008] 1 WLR 2757, which is now withdrawn[2]. It is issued in light of the increase in litigants-in-person (litigants) in all levels of the civil and family courts.

The Right to Reasonable Assistance

Litigants have the right to have reasonable assistance from a layperson, sometimes called a McKenzie Friend (MF). Litigants assisted by MFs remain litigants-in-person. MFs have no independent right to provide assistance. They have no right to act as advocates or to carry out the conduct of litigation.

What McKenzie Friends may do

MFs may: i) provide moral support for litigants; ii) take notes; iii) help with case papers; iv) quietly give advice on any aspect of the conduct of the case.

What McKenzie Friends may not do

MFs may not: i) act as the litigants' agent in relation to the proceedings; ii) manage litigants' cases outside court, for example by signing court documents; or iii) address the court, make oral submissions or examine witnesses.

[1] References to the judge or court should be read where proceedings are taking place under the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, as a reference to a justices' clerk or assistant justices' clerk who is specifically authorised by a justices' clerk to exercise the functions of the court at the relevant hearing. Where they are taking place under the Family Proceedings Courts (Children Act 1989) Rules 1991 they should be read consistently with the provisions of those Rules, specifically rule 16A(5A).

[2] *R v Leicester City Justices, ex parte Barrow* [1991] 260, *Chauhan v Chauhan* [1997] FCR 206, *R v Bow County Court, ex parte Pelling* [1999] 1 WLR 1807, *Attorney-General v Purvis* [2003] EWHC 3190 (Admin), *Clarkson v Gilbert* [2000] CP Rep 58, *United Building and Plumbing Contractors v Kajla* [2002] EWCA Civ 628, *Re O (Children) (Hearing in Private: Assistance*) [2005] 3 WLR 1191, *Westland Helicopters Ltd v Sheikh Salah Al-Hejailan (No 2)* [2004] 2 Lloyd's Rep 535. *Agassi v Robinson (Inspector of Taxes) (No 2)* [2006] 1 WLR 2126, *Re N (A Child) (McKenzie Friend: Rights of Audience) Practice Note* [2008] 1 WLR 2743.

Exercising the Right to Reasonable Assistance

While litigants ordinarily have a right to receive reasonable assistance from MFs the court retains the power to refuse to permit such assistance. The court may do so where it is satisfied that, in that case, the interests of justice and fairness do not require the litigant to receive such assistance.

A litigant who wishes to exercise this right should inform the judge as soon as possible indicating who the MF will be. The proposed MF should produce a short curriculum vitae or other statement setting out relevant experience, confirming that he or she has no interest in the case and understands the MF's role and the duty of confidentiality.

If the court considers that there might be grounds for circumscribing the right to receive such assistance, or a party objects to the presence of, or assistance given by a MF, it is not for the litigant to justify the exercise of the right. It is for the court or the objecting party to provide sufficient reasons why the litigant should not receive such assistance.

When considering whether to circumscribe the right to assistance or refuse a MF permission to attend the right to a fair trial is engaged. The matter should be considered carefully. The litigant should be given a reasonable opportunity to argue the point. The proposed MF should not be excluded from that hearing and should normally be allowed to help the litigant.

Where proceedings are in closed court, i.e. the hearing is in chambers, is in private, or the proceedings relate to a child, the litigant is required to justify the MF's presence in court. The presumption in favour of permitting a MF to attend such hearings, and thereby enable litigants to exercise the right to assistance, is a strong one.

The court may refuse to allow a litigant to exercise the right to receive assistance at the start of a hearing. The court can also circumscribe the right during the course of a hearing. It may be refused at the start of a hearing or later circumscribed where the court forms the view that a MF may give, has given, or is giving, assistance which impedes the efficient administration of justice. However, the court should also consider whether a firm and unequivocal warning to the litigant and/or MF might suffice in the first instance.

A decision by the court not to curtail assistance from a MF should be regarded as final, save on the ground of subsequent misconduct by the MF or on the ground that the MF's continuing presence will impede the efficient administration of justice. In such event the court should give a short judgment setting out the reasons why it has curtailed the right to assistance. Litigants may appeal such decisions. MFs have no standing to do so.

The following factors should not be taken to justify the court refusing to permit a litigant receiving such assistance:

(i) the case or application is simple or straightforward, or is, for instance, a directions or case management hearing;

(ii) the litigant appears capable of conducting the case without assistance;

(iii) the litigant is unrepresented through choice;

(iv) the other party is not represented;

(v) the proposed MF belongs to an organisation that promotes a particular cause;

(vi) the proceedings are confidential and the court papers contain sensitive information relating to a family's affairs.

A litigant may be denied the assistance of a MF because its provision might undermine or has undermined the efficient administration of justice. Examples of circumstances where this might arise are: i) the assistance is being provided for an improper purpose; ii) the assistance is unreasonable in nature or degree; iii) the MF is subject to a civil proceedings order or a civil restraint order; iv) the MF is using the litigant as a puppet; v) the MF is directly or indirectly conducting the litigation; vi) the court is not satisfied that the MF fully understands the duty of confidentiality.

Where a litigant is receiving assistance from a MF in care proceedings, the court should consider the MF's attendance at any advocates' meetings directed by the court, and, with regard to cases commenced after 1.4.08, consider directions in accordance with paragraph 13.2 of the Practice Direction Guide to Case Management in Public Law Proceedings.

Litigants are permitted to communicate any information, including filed evidence, relating to the proceedings to MFs for the purpose of obtaining advice or assistance in relation to the proceedings.

Legal representatives should ensure that documents are served on litigants in good time to enable them to seek assistance regarding their content from MFs in advance of any hearing or advocates' meeting.

The High Court can, under its inherent jurisdiction, impose a civil restraint order on MFs who repeatedly act in ways that undermine the efficient administration of justice.

Rights of audience and rights to conduct litigation

MFs do not have a right of audience or a right to conduct litigation. It is a criminal offence to exercise rights of audience or to conduct litigation unless properly qualified and authorised to do so by an appropriate regulatory body or, in the case of an otherwise unqualified or unauthorised individual (ie, a lay individual including a MF), the court grants such rights on a case-by-case basis (Legal Services Act 2007 s12 – 19 and Schedule 3).

Courts should be slow to grant any application from a litigant for a right of audience or a right to conduct litigation to any lay person, including a MF. This is because a person exercising such rights must ordinarily be properly trained, be under professional discipline (including an obligation to insure against liability for negligence) and be subject to an overriding duty to the court. These requirements are necessary for the protection of all parties to litigation and are essential to the proper administration of justice.

Any application for a right of audience or a right to conduct litigation to be granted to any lay person should therefore be considered very carefully. The court should only be prepared to grant such rights where there is good reason to do so taking into account all the circumstances of the case, which are likely to vary greatly. Such grants should not be

extended to lay persons automatically or without due consideration. They should not be granted for mere convenience.

Examples of the type of special circumstances which have been held to justify the grant of a right of audience to a lay person, including a MF, are: i) that person is a close relative of the litigant; ii) health problems preclude the litigant from addressing the court, or conducting litigation, and the litigant cannot afford to pay for a qualified legal representative; iii) the litigant is relatively inarticulate and prompting by that person may unnecessarily prolong the proceedings.

It is for the litigant to persuade the court that the circumstances of the case are such that it is in the interests of justice for the court to grant a lay person a right of audience or a right to conduct litigation.

The grant of a right of audience or a right to conduct litigation to lay persons who hold themselves out as professional advocates or professional MFs or who seek to exercise such rights on a regular basis, whether for reward or not, will however only be granted in exceptional circumstances. To do otherwise would tend to subvert the will of Parliament.

If a litigant wants a lay person to be granted a right of audience, an application must be made at the start of the hearing. If a right to conduct litigation is sought such an application must be made at the earliest possible time and must be made, in any event, before the lay person does anything which amounts to the conduct of litigation. It is for litigants to persuade the court, on a case-by-case basis, that the grant of such rights is justified.

Rights of audience and the right to conduct litigation are separate rights. The grant of one right to a lay person does not mean that a grant of the other right has been made. If both rights are sought their grant must be applied for individually and justified separately.

Having granted either a right of audience or a right to conduct litigation, the court has the power to remove either right. The grant of such rights in one set of proceedings cannot be relied on as a precedent supporting their grant in future proceedings.

Remuneration

Litigants can enter into lawful agreements to pay fees to MFs for the provision of reasonable assistance in court or out of court by, for instance, carrying out clerical or mechanical activities, such as photocopying documents, preparing bundles, delivering documents to opposing parties or the court, or the provision of legal advice in connection with court proceedings. Such fees cannot be lawfully recovered from the opposing party.

Fees said to be incurred by MFs for carrying out the conduct of litigation, where the court has not granted such a right, cannot lawfully be recovered from either the litigant for whom they carry out such work or the opposing party.

Fees said to be incurred by MFs for carrying out the conduct of litigation after the court has granted such a right are in principle recoverable from the litigant for whom the work is carried out. Such fees cannot be lawfully recovered from the opposing party.

Fees said to be incurred by MFs for exercising a right of audience following the grant of such a right by the court are in principle recoverable from the litigant on whose behalf the right is exercised. Such fees are also recoverable, in principle, from the opposing party as a recoverable disbursement: CPR 48.6(2) and 48(6)(3)(ii).

Personal Support Unit & Citizen's Advice Bureau

Litigants should also be aware of the services provided by local Personal Support Units and Citizens' Advice Bureaux. The PSU at the Royal Courts of Justice in London can be contacted on 020 7947 7701, by email at cbps@bello.co.uk or at the enquiry desk. The CAB at the Royal Courts of Justice in London can be contacted on 020 7947 6564 or at the enquiry desk.

Lord Neuberger of Abbotsbury, Master of the Rolls,
Sir Nicholas Wall, President of the Family Division
12 July 2010