



## Acting as a Solicitor's Agent

- Purpose:** To draw barristers' attention to issues relating to appearing as a solicitor's agent
- Scope of application:** All barristers, especially unregistered barristers considering acting as solicitor's agents in civil cases
- Issued by:** The Legal Services Committee
- Originally issued:** November 2015
- Last reviewed:** August 2022
- Status and effect:** Please see the notice at end of this document. This is not "guidance" for the purposes of the BSB Handbook I6.4.

### Introduction

1. This document sets out the Bar Council's views in relation to the provisions of the Legal Services Act 2007 (LSA 2007) upon which solicitor's agents rely to establish a right of audience. It is understood that there are a number of unregistered barristers currently appearing in court as solicitor's agents on this basis, principally in family and civil matters in County Courts.
2. This document is issued to ensure that unregistered barristers acting as solicitor's agents and those who instruct them or who encounter them in court are aware of the scope of the relevant statutory provisions and to highlight various considerations to be taken into account when relying on this statute. Although this document principally addresses the position in relation to civil matters by reference to decided cases and the Civil Procedure Rules (CPR), the statutory background will also be of relevance to family matters.
3. This guidance should now be read in conjunction with the judgment of Her Honour Judge Backhouse in *Halborg v. Apple (UK) Limited* in the Central London County Court on 3 May 2022. On the evidence before the court, the judge held that a solicitor's agent did have rights of audience in relation to the hearing of an application to strike out the claim pursuant to CPR rule 3.4(a) and/or for failure to disclose reasonable grounds for bringing it and/or for failing to comply with CPR rule 16.4. In doing so, the judge found that two earlier cases at District Judge level (the decision of District Judge Peake in *McShane v. Lincoln* in the Birkenhead County Court on 27 July 2016 and the decision of Deputy District

Judge Hampson in *Ellis v. Larson* in the Manchester County Court on 20 September 2016) should no longer be regarded as reflecting the correct position in law. Anyone considering this issue should also consult Section 13 of Volume 2 of Civil Procedure 2022 dealing with Rights of Audience.

## Summary

- Unregistered barristers are not “authorised persons” under the LSA 2007. They cannot exercise a right of audience unless they can bring themselves within one of the statutory exemptions.
- Whether one of the exemptions applies is fact sensitive and must be determined on a case by case basis.
- Solicitor’s agents generally rely upon the exemption in paragraph 1(7) of Schedule 3 to the LSA 2007, which applies only when all of the following conditions are met,
  - First, the individual’s work must include assisting in the conduct of litigation, as defined in the LSA 2007. HHJ Backhouse held in the *Halborg* case that the words in question “are sufficiently broad to include advocacy”.
  - Second, the individual must be assisting in the conduct of litigation under instructions from an authorised person (usually a solicitor) and be under the supervision of the same person. Individuals relying on this exemption should satisfy themselves that they have received an appropriate level of supervision in each case. In the *Halborg* case, HHJ Backhouse held that there was an appropriate level of supervision in circumstances where the supervising solicitor operated a system which allowed oversight and direction of the advocates and was adequate to ensure that they could perform the job competently.
  - Third, the hearing must be “in chambers”. In *Halborg*, HHJ Backhouse held that the correct interpretation of “in chambers” in paragraph 1(7)(c) was that it applied to broadly of the type of hearing which would have been heard in chambers under the pre-CPR rules (rather than whether it is an “in private” hearing for the purposes of the CPR).
- There is a separate exemption for an individual acting in a small claim, but the exemption does not apply if the client does not attend, nor at any stage after judgment, nor on an appeal.
- There is a further exemption where a right of audience is granted by the court in a particular case, for example to a McKenzie Friend (who would then become a Lay Representative).

## The relevant provisions of the Legal Services Act 2007

4. Section 12 of the LSA 2007 provides that the exercise of a right of audience is a reserved legal activity. Section 13 of the LSA 2007 provides that in order to carry on a reserved legal activity a person must be either: (a) an authorised person; or (b) an exempt person. Section 14 of the LSA 2007 provides that it is a criminal offence for a person to carry on a reserved legal activity unless he is entitled to do so, such being triable summarily or on indictment, the latter carrying a maximum penalty of two years imprisonment.
5. Section 18 of the LSA 2007 provides that an authorised person is a person who is authorised to carry on the relevant activity by a relevant approved regulator (for example, the Bar Council or the Law Society). An unregistered barrister is not an authorised person. In order to exercise a right of audience, therefore, an unregistered barrister must be an exempt person. Section 19 of the LSA 2007 provides that an exempt person is a person who for the purposes of carrying on the relevant activity is exempt by virtue of schedule 3 to the LSA 2007.
6. In order to establish a right of audience solicitor's agents generally rely upon paragraph 1(7) of schedule 3 to the LSA 2007, which provides as follows:

*The person is exempt if – (a) the person is an individual whose work includes assisting in the conduct of litigation,*

*(b) the person is assisting in the conduct of litigation – (i) under instructions given (either generally or in relation to the proceedings) by an individual to whom sub-paragraph (8) applies, and (ii) under the supervision of that individual, and*

*(c) the proceedings are not reserved family proceedings and are being heard in chambers – (i) in the High Court or county court, or (ii) in the family court by a judge who is not, or by two or more judges at least one of whom is not, within section 31C(1)(y) of the Matrimonial and Family Proceedings Act 1984 (lay justices).*

7. Sub-paragraph 1(8) applies, in essence, to an authorised person or someone who is not required to be authorised because of their rights as a solicitor to a public department or the City of London.

#### **Paragraph 1(7)(a): Assisting in the conduct of litigation**

8. The definition of “conduct of litigation” at paragraph 4(1) of schedule 2 to the LSA 2007 is (so far as material) as follows:

*The “conduct of litigation” means – (a) the issuing of proceedings before any court in England and Wales, (b) the commencement, prosecution and defence of such proceedings, and (c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions).*

9. In *Agassi v Robinson* [2006] 1 WLR 2126 the Court of Appeal considered the definition of the expression “right to conduct litigation” in the Courts and Legal Services Act 1990. That definition was not identical to the definition of “conduct of litigation” in the LSA 2007

(and, in particular, did not refer to the “prosecution and defence of such proceedings” as in sub-paragraph (b) above). The Court of Appeal held that the “right to conduct litigation” in the 1990 Act must be given a narrow meaning and comprised only the formal steps in proceedings, such as issuing a claim form, but did not include giving legal advice in connection with court proceedings. The Court of Appeal did not consider whether exercising a right of audience fell within the definition or not.

10. In *Halborg*, HHJ Backhouse noted that the LSA 2007 had been enacted after *Agassi* was decided and contained a considerably expanded definition of ‘conduct of litigation’ to include ‘prosecution’ and ‘defence’ of proceedings (see paragraph 8 above). Giving these words their ordinary meaning, she held that: “the words ‘assisting in the conduct of litigation’ are sufficiently broad to include advocacy as are the terms ‘prosecution’ and ‘defence’”.

#### **Paragraph 1(7)(b): Instructions and supervision**

11. There are two aspects of paragraph 1(7)(b) which particularly need to be borne in mind. First, the requirement is that the advocate should not only receive instructions, but also that they should be under supervision. Secondly, the instructions and supervision should both come from the same authorised person.
12. “Supervision” is an ordinary English word and the content of such supervision may vary from case to case. Solicitor’s agents should satisfy themselves in each case that they have received an appropriate level of supervision directly from the solicitor who has instructed them. HHJ Backhouse held in the *Halborg* case that the supervising solicitor operated a system which allowed oversight and direction of the advocates and was adequate to ensure that they were competent to perform the job competently. This included significant levels of initial and ongoing training, advocates being observed at court, their performance being monitored through reports and increasingly complex tasks being given to them as their experience increased. The judge held that the supervising solicitor did not need to supervise every activity undertaken by every advocate, so long as there was a system in place whereby any matter that did require the solicitor’s personal attention and input could be dealt with by him. Whilst solicitor’s agents must make their own judgment in the circumstances of the particular case, the implementation of systems such as those set out above as well as discussions with the solicitor who has day-to-day conduct of the case at appropriate intervals throughout the instruction are encouraged and it is recommended that guidance be sought from that individual whenever the solicitor’s agent is in doubt about what to do.
13. It is worth noting that HHJ Backhouse noted at [101] that a Judge dealing with an application that she should refuse to hear an advocate under LSA 2007, s. 192, would not normally enquire into the adequacy of supervision provided by solicitors to any particular person who appears as an advocate, for reasons of proportionality and also that it is a regulatory function.

#### **Paragraph 1(7)(c): Chambers hearings**

14. The LSA 2007 has adopted the terminology “in chambers” for hearings in relation to which a person may have rights of audience. This terminology was previously adopted by the old Rules of the Supreme Court. The terminology found in the Civil Procedure Rules refers to hearings “in private” and hearings “in public”.
15. In the *Halborg* case, HHJ Backhouse held that it was necessary to distinguish between a private chambers hearing under the pre-CPR rules and a private hearing under the CPR. She held that under the CPR, private hearings are those from which the public are excluded (under the pre-CPR rules, the equivalent terms was ‘in camera’ or in secret). However, under the pre-CPR rules, the public could generally have access to a ‘private’ chambers hearing unless the hearing was held in secret.
16. On this basis, the judge held that the existence of rights of audience did not depend on whether the hearing was “in private” in the CPR sense of “in secret”. She held that the correct interpretation of “in chambers” in paragraph 1(7)(c) was the hearing being broadly of the type of hearing which would have been heard in chambers under the pre-CPR rules.

### **Paragraph 1(3): Small claims**

17. Other paragraphs of schedule 3 to the LSA 2007, apart from paragraph 1(7) considered above, may entitle someone to exercise a right of audience. A person is an exempt person under paragraph 1(3), for example, where a right of audience is granted by an enactment. One such enactment is the Lay Representatives (Rights of Audience) Order 1999, paragraph 3 of which provides that any person may exercise a right of audience in proceedings dealt with as a small claim in accordance with rules of court (it is not exclusive to solicitor’s agents). This is, however, expressly precluded: (a) if the client does not attend; (b) at any stage after judgment; or (c) on any appeal against any decision made by a district judge in the proceedings.
18. Solicitor’s agents may therefore be entitled to rely on this provision in relation to small claims proceedings, whether or not paragraph 1(7) applies to them.

### **Paragraph 1(2): Permission**

19. Paragraph 1(2) of schedule 3 to the LSA 2007 provides that a person is exempt if the person: (a) is not an authorised person in relation to that activity; but (b) has a right of audience granted by that court in relation to those proceedings.
20. The *Practice Note (McKenzie Friends: Civil and Family Courts)* [2010] 1 WLR 1881 provides the following guidance (at [19] and [20]):

*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.*

21. Solicitor's agents could not, therefore, normally expect the Court to exercise its discretion to grant a right of audience under paragraph 1(2) of schedule 3 to the LSA 2007. In any event, an application for the grant of such a right of audience would normally have to be made by the lay client at the commencement of the hearing.

## **Conclusion**

22. The LSA 2007 only permits individuals who are not authorised persons to exercise rights of audience if certain criteria are satisfied. The fact that it is a criminal offence to exercise a right of audience if those criteria are not satisfied demonstrates the seriousness which Parliament attaches to these restrictions.
23. The Bar Council is concerned to promote compliance with the Act, since this is in the interests of the proper administration of justice, the protection of consumers and the protection of unregistered barristers who might otherwise open themselves up to potential criminal liability.
24. For these reasons, all barristers undertaking work as solicitor's agents are urged to consider carefully whether they fulfil the requirements of the LSA 2007 upon accepting every new instruction and when attending at court. In particular, in light of the court's conclusions in the *Halborg* case, they should consider with care whether (a) the nature of their work properly enables them to describe themselves as assisting in the conduct of litigation, noting that in *Halborg*, this was held to include advocacy, (b) the extent of supervision by the solicitor with conduct of the case and (c) whether the relevant hearing is of a kind which would have been heard "in chambers" before the introduction of the CPR.
25. Although *Halborg* was the first judgment at Circuit Judge level in which the provisions of paragraph 1(7) of Schedule 3 to the LSA 2007 were considered in detail, it is noted that the judgment concludes with the observation that "judges in the County Court would benefit from more authoritative guidance from the senior courts on the question with which I have been concerned in this appeal".

## **Important Notice**

This document has been prepared by the Bar Council to assist barristers on matters of professional conduct and ethics. **It is not "guidance" for the purposes of the BSB Handbook I6.4, and neither the BSB nor a disciplinary tribunal nor the Legal Ombudsman is bound by any views or advice expressed in it.** It does not comprise – and cannot be relied on as giving – legal advice. It has been prepared in good faith, but neither the Bar Council nor any of the individuals responsible for or involved in its preparation

accept any responsibility or liability for anything done in reliance on it. For fuller information as to the status and effect of this document, please see [here](#).