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:	January 2020
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, the statutory background will also be of relevance to family matters.

3. This guidance should now be read in conjunction with the decision of District Judge Peake in *McShane v. Lincoln* in the Birkenhead County Court on 27 July 2016. On the evidence before him, he held that a solicitor's agent did ***not*** have a right of audience to conduct a Stage 3 Hearing to assess damages pursuant to the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. This decision of an experienced district judge, who had heard full argument on the issue, is likely to be persuasive in other similar cases. Indeed, its reasoning has been reflected in a subsequent decision of Deputy District Judge Hampson

in *Ellis v. Larson* in the Manchester County Court. He also held that a solicitor's agent had no rights of audience in relation to a Stage 3 Hearing, for very similar reasons. Both these cases were decided before amendments to CPR 39 took effect from 6 April 2019, which further limit the circumstances in which hearings can be held in private. As explained below, these amendments made it even less clear whether solicitors' agents have rights of audience in the majority of civil cases. Anyone considering this issue should also consult Section 13 of Volume 2 of Civil Procedure 2019 (page 2911 of the 2019 White Book) dealing with Rights of Audience.

Summary

- Unregistered barristers are not "authorised persons" under the Legal Services Act 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. The precise meaning of this expression is open to question and there is no definitive court ruling on it, although D J Peake held in the *McShane* case that "*the work of a solicitor's agent does not include assisting with the conduct of litigation*".

  - 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 *McShane* case, DJ Peake held that supervision by the manager of an agency did not suffice, since that person was not the same as the solicitor who was providing the instructions.

  - Third, the hearing must be "in chambers". This refers to hearings in private, although it is possible that it extends to hearings which would have been heard "in chambers" prior to the introduction of the CPR, even if they are now held in public. Following amendments to CPR Part 39 which came into effect on 6 April 2019, no hearings are now to be held in private unless the Court so decides in accordance with CPR 39.2. DJ Peake held that a Stage 3 Hearing was equivalent to an assessment of damages hearing which was, and had always been, held in public rather than in chambers.

- 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 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. If the definition of "conduct of litigation" in the LSA 2007 were to be interpreted narrowly, along similar lines to the Court of Appeal's interpretation of the expression "right to conduct litigation" in the 1990 Act, it is doubtful whether the work of a solicitor's agent, who essentially provides advocacy services rather than assisting with the formal steps in proceedings, could be said to include assisting with the conduct of litigation. DJ Peake interpreted "conduct of litigation" in this way in the McShane case. He did not consider that exercising a right of audience necessarily involved assisting in the conduct of litigation and he distinguished the position of a solicitor's agent from "*the work of a solicitor's clerk or legal executive employed by the solicitor who assists with the preparation of the case before attending a hearing who is clearly assisting in litigation*". His decision that solicitor's agents do not assist in the conduct of litigation is expressed as a general conclusion, rather than a decision on the facts of the particular case before him.

11. DJ Peake did not expressly consider the addition of the words "prosecution and defence of such proceedings" in the definition of "conduct of litigation" in the LSA 2007, although he appreciated that the wording of the provision was not the same as that considered by the Court of Appeal in Agassi. It is, therefore, possible that DJ Peake's conclusion may subsequently be questioned. We are aware of a decision of the Bar Disciplinary Tribunal (pre-dating the McShane case) which concluded that advocacy services can fall within the definition of "conduct of litigation". In our view, however, it would currently be unsafe for a solicitor's agent to rely on the exemption in paragraph 1(7) of Schedule 3 to the LSA 2007, unless the particular work being done is equivalent to that of a solicitor's clerk or legal executive.

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

12. 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.

13. "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. DJ Peake held in the *McShane* case that supervision by the manager of the agency was not sufficient. The notes at paragraph 13-10 of Volume 2 of the White Book describe the term "*solicitor's agent*" as "*misleading … in this context as it implies an authority which does not exist*", in other words someone is not acting under the instructions and supervision of a solicitor merely by virtue of being called a "solicitor's agent". Whilst solicitor's agents must make their own judgment in the circumstances of the particular case, discussions with the solicitor who has day-to-day conduct of the case are encouraged at appropriate intervals throughout the instruction and it is recommended that guidance be sought from that individual whenever the solicitor's agent is in doubt about what to do.

Paragraph 1(7)(c): Chambers hearings

14. The LSA 2007 has adopted outmoded terminology in relation to "in chambers" hearings. 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". Before 6 April 2019 paragraph 1.14 of CPR PD39A stated: "*References to hearings being in public or private ... contained in the [CPR] ... and the practice directions ... do not restrict any existing rights of audience or confer any new rights of audience in respect of applications or proceedings which under the rules previously in force would have been heard in court or in chambers respectively.*" PD39A was, however, deleted with effect from 6 April 2019 and the quoted words no longer appear anywhere in the CPR. Changes were also made at that time to the body of CPR Part 39. These changes clarify that a "hearing" is to be construed widely, including any interim or final decision at which a person is, or has a right to be, heard (CPR 39.1) and further erode the circumstances in which a hearing can be held in private (CPR 39.2).

15. Despite the changes to CPR Part 39, the notes at paragraph 13-10 of Volume 2 of the 2019 White Book suggest (without much explanation) that the provisions of the Legal Services Act 1990 and the LSA 2007 were intended to preserve those rights of audience which the High Court and county courts, when sitting "in chambers", had customarily extended to solicitor's clerks, legal executives and similar individuals acting under solicitor's instructions. It is, therefore, still arguable that the exemption in paragraph 1(7) of schedule 3 to the LSA 2007 applies even to a hearing in public, if that hearing is of a kind which would have been held in chambers under the pre-CPR rules of court.

16. The *McShane* case was concerned with a Stage 3 Hearing, which DJ Peake held was not held in private and would not have been heard "in chambers" prior to 1999. Whilst his decision concerned that particular kind of hearing, his reasoning included the propositions that "in chambers" means "in private" (for which he cited *R v. Bow County Court* [1999] 1 WLR 1813) and that a disposal hearing, even without oral evidence, was still a "*final contested hearing*", which is the definition of a "trial" in CPR 45.29C(4)(c), and therefore must be heard in public.

17. In *National Westminster Bank plc v. Smith*, decided on 27 February 2019 (before the changes to CPR Part 39 took effect), Deputy District Judge Leach decided in the county court at Kingston-Upon-Hull that "in chambers" means "in private" and that the application for summary judgment listed before him was not "in private" pursuant to CPR Part 39 (as it then stood), so that the solicitor's agent seeking to represent the claimant did not have a right of

audience. DDJ Leach did not, however, consider whether the hearing was of a kind which would have been held in chambers under the pre-CPR rules and it is at least arguable that a summary judgment application made to a District Judge was of such a kind. If that is right, DDJ Leach might have been wrong to decide that the solicitor's agent did not have a right of audience for failure to satisfy paragraph 1(7)(c) of schedule 3 to the LSA 2007 and should have considered paragraphs 1(7)(a) and (b).

18. In the Bar Council's view, there is serious uncertainty surrounding the expression "in chambers" which remains unresolved by recent court decisions and has been exacerbated by the changes made to CPR Part 39 in April 2019. This means that the safest course is for solicitor's agents only to appear at hearings which are "in private". In practice, however, it is likely to be difficult to achieve this after the changes to Part 39, since most hearings will initially be listed in public, will only be heard in private if the court so decides (irrespective of the parties' consent – see CPR 39.2(1)), and the debate about whether the hearing should be in private is likely to take place in public, potentially precluding any right of audience under paragraph 1(7). A solicitor's agent is, thus, likely to be left only with an argument that the hearing is of a kind which would have been heard "in chambers" before the CPR were introduced, that it was the intention of Parliament that the LSA 2007 would preserve the rights of audience which previously existed in such circumstances and that this intention should prevail, despite the deletion of PD39A, which had contained express wording to that effect.

Paragraph 1(3): Small claims

19. 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.

20. 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

21. 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.

22. 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.

23. 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

24. 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.

25. 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. The decision in the *McShane* case interprets the exception in paragraph 1(7) of schedule 3 to the LSA 2007 narrowly and the changes to CPR Part 39 in April 2019 appear further to limit the circumstances in which that exception applies. Consequently, in the Bar Council's view, many individuals currently exercising rights of audience in reliance on this provision are at risk of contravening the Act.

26. 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, unless and until the decision of DJ Peake in the *McShane* case is doubted or overruled, they should consider with care whether the nature of their work properly enables them to describe themselves as assisting in the conduct of litigation in the narrow sense explained, whether they are being supervised by the solicitor with conduct of the case and whether the relevant hearing is in private, or is at least of a kind which would have been heard "in chambers" before the introduction of the CPR.

Important Notice

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