



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
- Issued by:** The Legal Services Committee
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- 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.
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.

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. Examples of hearings generally held in private are given in the table under paragraph 13 below. 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. 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”. Confusingly, however, paragraph 1.14 of CPR PD39A states: “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.” It is, therefore, arguable that the exemption applies even to a hearing in public, if that hearing would have been held in chambers under the pre-CPR rules of court.

15. 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.

16. Pursuant to CPR 39.2(1) the general rule is that hearings are in public, albeit paragraphs 1.5, 1.6 and 1.7 of CPR PD39A provide for some specific exceptions. In the Bar Council’s view, the uncertainty surrounding the expression “in chambers” means that the safest course is for solicitor’s agents only to appear at hearings which are “in private”. The following table is a non-exhaustive list of examples as to types of hearings that would ordinarily be heard in public or in private:

In public	In private
Case Management Conferences	Mortgagee Possession Hearings
Disposal Hearings (Including MOJ stage 3 hearings)	Landlord Residential Possession Hearings Based on Non-Payment of Rent
Interim Application Hearings	Applications for Charging Orders
Allocation Hearings	Applications for Third Party Debt Order
Part 8 Claims	Infant Approval Hearings
Trials	Children / Protected Parties Proceedings

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. The decision in the *McShane* case interprets the exception in paragraph 1(7) of schedule 3 to the LSA 2007 narrowly, such that, 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.

24. For these reasons, all individuals 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.

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 refer to the professional practice and ethics section of the Bar Council's website [here](#).