

**REFORMING THE COURTS' APPROACH TO MCKENZIE FRIENDS
DRAFT RESPONSE OF THE CHANCERY BAR ASSOCIATION**

The Chancery Bar Association (“ChBA”) is one of the longest established Bar Associations and represents the interests of over 1,250 barristers. Its members handle the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales and in cases overseas. It is recognized as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

The Chancery Bar Association (ChBA) has responded to the Court Service’s consultation on McKenzie Friends.

Question 1

Yes, the term ‘McKenzie Friend’ should be replaced. It is a term which has no obvious or readily deducible meaning, and does not therefore promote transparency in the litigation process.

Question 2

Yes, the term ‘court supporter’ should replace ‘McKenzie Friend’. Court supporter is more specific and does not by inference create any false impressions as to the scope of the role.

Question 3

Yes, the present Practice Guidance should be replaced with rules of court, essentially for the reasons given at para 4.10. The most important of these is clarification within a set of rules which have a statutory basis. This will make the principles more accessible to LIPs.

Rules 3.22 and 3.23 have been re-drafted and a copy accompanies this responds.

Question 4

No, there should not be a fundamental difference of approach between family and civil proceedings, and the rules should be common but contain sufficient flexibility to accommodate any differences that may arise. It is not obvious why it is suggested that there should be a difference, and each jurisdiction can involve highly stressful situations for a litigant in person. Family cases relating to children are obviously an area where a court supporter could be beneficial because of the level of emotion. However, civil cases involving possession of a family home, or disputes about family trusts or estates, are also highly emotive and a court supporter might be beneficial. The basic test should therefore be the same.

Question 5

Yes, standard form notices should be used. In the attached draft rules, we have called these litigant's statement and supporter's certificate. This would enable the court to oversee the appointment, hopefully avoiding the appointment of anybody unsuitable. It would bring home to the court supporter his/her responsibilities/duties and the associated documents would provide protection to the LIP by defining the scope of the role.

We considered that the purpose and structure of draft rules 3.22 and 3.23 were a little unclear and the issues of the right to have a court supporter/the requirement for permission in cases heard in private/standard form notices required amplification. An attempt has been made to redraft them.

Question 6

Yes, a Code of Conduct for court supporters should be drafted and included within the notice or notices for the reasons given in the answers to Question 5.

Question 7

Yes, a plain language guide for LIPs and court supporters should be produced. This could be within or without the new rules. It could be made available via the rules (online, and in hard copy), and as a free-standing publication available in advice centres and at court. Making it available in this way would increase awareness of it, and would give all parties to litigation the opportunity to consider it.

Question 8

It would be desirable for a non-judicial body with expertise in drafting to be consulted in the production of such a guide so that it is readily understandable and free of jargon.

Question 9

Yes, there should be a prohibition on fee recovery. Recovery of fees would, by providing a financial incentive for providing advice and assistance, indirectly create a new branch of the legal profession which is unregulated. It is in the public interest that those who exercise rights of audience and conduct litigation, or act in a way which is akin to these activities, are properly regulated. The role of a court supporter should therefore remain outside the legal profession, and any financial incentive to act in a way which is akin to exercising rights of audience or conducting litigation should be removed.

Question 10

Consideration should be given as to how these proposals fit with the Civil Court Structure Review being carried out by Lord Justice Briggs.

COURT SUPPORT RULE – ChBA DRAFT

3.22 Assistance by court supporters

- (1) Except where a rule, practice direction or enactment provides otherwise, where a hearing is in public a court supporter may provide assistance to a litigant.
- (2) Assistance by a court supporter at a hearing may take one or more of the following forms:
 - a. providing moral support to the litigant;
 - b. helping to manage a litigant’s documents;
 - c. taking a note for the litigant;
 - d. providing advice to the litigant.
- (3) For the purpose of this rule and rule 3.23:
 - a. litigant means an individual who is not represented by a legal representative;
 - b. court supporter means an individual who is not a legal representative.
- (4) Where a hearing is held in private a court supporter may only assist a litigant with the court’s permission.
- (5) An application for permission under sub-rule (4) must:
 - a. be made by the litigant (in Form x);
 - b. identify the hearing or proceedings in which the court supporter’s assistance is sought.
- (6) Where a litigant wishes to have the assistance of a court supporter at any hearing (whether in public or in private), the litigant must provide the following information to the court and the other parties:
 - a. a litigant’s statement (in Form Nx with signed statement of truth).
 - b. a court supporter’s certificate (in Form Ny with signed statement of truth).
- (7) The litigant’s statement must provide details of:
 - a. any relevant experience of the court supporter (or confirmation that they have none);
 - b. any civil restraint order made against the court supporter (or confirmation that there is none);
 - c. any financial or other interest which the court supporter has in the proceedings (or confirmation that there is none).
- (8) The court supporter’s certificate must confirm that:
 - a. the information provided in the litigant’s statement is true;
 - b. the court supporter agrees to comply with the Code of Conduct.
- (9) The court may on its own initiative or at the request of a party at any time:
 - a. prohibit the court supporter from providing assistance under sub-rule (1);
 - b. refuse an application for permission under sub-rule (4);
 - c. withdraw or vary the permission granted under sub-rule (4);
 - d. restrict or impose conditions on the giving of assistance under sub-rules (1) and (4).

- (10) The Court may make an order under sub-rule (9) where it appears that:
- a. any of the information provided under sub-rule (7) is misleading or incorrect;
 - b. the litigant does not reasonably need the court supporter's assistance to present his case to the Court;
 - c. the court supporter is not an appropriate person to provide such assistance;
 - d. the provision of assistance is not conducive to the efficient administration of justice.
- (11) The Court must make an order under sub-rule (9) prohibiting, refusing or withdrawing permission to a court supporter to provide assistance to a litigant where it appears that:
- a. the court supporter is the subject of a civil restraint order;
 - b. the court supporter is being remunerated, directly or indirectly, for the provision of assistance.
- (12) When the court is considering the grant of permission under sub-rule (4) or the making of an order under sub-rule (9), the court supporter will generally be allowed to assist the litigant until a decision is made.
- (13) If requested and subject to any order under sub-paragraph (9), any permission given under sub-section (4) will generally continue until the proceedings (including any appeal) finish.
- (14) Where a court supporter is providing assistance, the litigant may:
- a. show the court supporter any document relating to the proceedings;
 - b. impart to the court support any information relating to the proceedings
- but the court supporter is deemed to be subject to the same prohibitions or restrictions on the disclosure or use of such document as the litigant is under.

3.23 Grant of rights of audience or to conduct litigation

- (1) This rule is without prejudice to any rule or enactment under which provision is or may be made for a party to be represented by an individual other than a legal representative.
- (2) The court may grant permission to a litigant for a court supporter to:
- a. exercise a right of audience on behalf of a litigant at a specified hearing or in specified proceedings;
 - b. carry out the conduct of litigation on behalf of the litigant in specified proceedings;
- (3) A court supporter must not exercise a right of audience or carry out the conduct of litigation at any time before the court has granted permission under this rule.
- (4) An application for permission under sub-rule (2) must be:
- a. made by the litigant (in Form Nx);

- b. identify the hearing or proceedings for which permission is sought;
 - c. supported by a litigant's statement (in Form Nx with signed statement of truth).
 - d. accompanied by a court supporter's certificate (in Form Nx with signed statement of truth):
- (5) The litigant's statement must:
- a. provide the information about the court supporter specified in rule 3.22(7);
 - b. identify the activities to be undertaken by the court supporter for which permission is sought.
 - c. detail any need or reasons for which the court's permission is sought.
- (6) The court supporter's certificate must confirm that:
- a. the information provided in the litigant's statement pursuant to rule 3.22(7) is true;
 - b. the court supporter agrees to comply with the Code of Conduct.
- (7) An order under sub-rule (2) may only be made where the Court is satisfied that:
- a. there is a good reason for seeking the court's permission;
 - b. the granting of permission is in the interests of the efficient administration of justice.
- (8) The court may on its own intuitive or at the request of a party at any time:
- a. refuse an application for permission under sub-rule (2);
 - b. withdraw or vary the permission granted under sub-rule (2);
 - c. place restrictions or conditions on the permission granted under sub-rule (2).
- (9) The Court may make an order under sub-rule (8) if it appears that one or more of the circumstances in rule 3.22(10) apply.
- (10) The Court must make an order prohibiting, refusing or withdrawing permission under sub-rule (8) if it appears that one or more of the circumstances in rule 3.22(11) apply.
- (11) The Court cannot grant permission under sub-rule (2) retrospectively.