

## 4. Conduct of hearings

### 4.1 Public and private hearings

Subject to what is said in 4.3 below the distinction between hearings in open court and chambers is no longer relevant. The distinction is between hearings in public and those in private. The general rule is that hearings are in public (CPR 39.2). Some hearings are to be heard in private, notably those involving the protection of interests of a child or patient, and hearings without notice (CPR 39.2 (3)).

Whether to hear proceedings in public or private is a decision that should only be made after hearing representations if there is a dispute and regard must be had to Article 6 of the European Convention on Human Rights that in general hearings should be in public. The Practice Direction (PD) to CPR 39.1 lists those hearings which, in the first instance, should be listed as private hearings. They include those where a party's personal financial details are essential to the application such as possession proceedings based on rent arrears or mortgage arrears. They also include proceedings under the Protection from Harassment Act 1997, the Inheritance (Provision for Family and Dependents) Act 1975 and the Consumer Credit Act 1974 (CPR PD 1.5).

### 4.2 Rights of audience

Rights of audience are determined in accordance with the provisions of Pt II of the Courts and Legal Services Act 1990 (the 1990 Act), in particular s.27. Rights of audience are enjoyed by:

- members of authorised bodies – usually barristers and solicitors and fellows of the Institute of Legal Executives; such persons have a duty to the court to act with independence in the interests of justice and to comply with the rules of conduct of the authorised body (s.27(2A))
- employees of, and persons engaged by, authorised litigators
- those granted rights of audience under an enactment or as authorised by the court.

The practical effect of the provisions as they relate to the county court is set out below.

### 4.3 Barristers and solicitors

Under s.31 of the 1990 Act, barristers and solicitors are deemed to have rights of audience before every court in relation to all proceedings, exercisable in accordance with the qualification regulations and rules of conduct of the General Council of the Bar or the Law Society, as the case may be.

Where the advocate is employed as a Crown Prosecutor, or in any other description of employment, any limitation imposed on his rights of audience by professional qualification regulations or rules of conduct has no effect if it does not impose the same limitation on advocates who are not so employed (s31A). Thus professional rules about rights of audience may not now discriminate against employed barristers or solicitors, as opposed to those in private practice.

#### 4.4 Employees of solicitors

A person employed or otherwise engaged to assist in the conduct of litigation by a qualified litigator (which term includes practising solicitors and solicitors employed wholly or mainly for the purpose of providing legal services to their employer) has a right of audience where the proceedings are being heard in chambers and are not reserved family proceedings (1990 Act s27(2)(e)).

Although the distinction between chambers and open court no longer exists under the Civil Procedure Rules 1998 (CPR), PD 1.14 provides that the new scheme of 'in public' and 'in private' does 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. So to find whether a solicitor's employee has a right of audience in respect of a hearing, it is necessary to ask if the hearing would have been in chambers before 26 April 1999. Under CCR Ord. 13 applications in the course of proceedings were heard in chambers. In general, solicitors' employees have a right of audience in all matters except:

- fast track and multi-track trials (including the hearing of claims brought under CPR Pt 8 (see CPR 8.9(c)), and
- committal hearings.

The status of the person exercising rights of audience derives from employment or engagement by a qualified litigator, not from any qualifications or experience: see *Re HS (Minors)* [1998] 1 FLR 868, CA. Thus it is important to have in mind that solicitors' employees exercising a right of audience may be wholly unqualified and their level of expertise will vary enormously.

#### 4.5 Institute of Legal Executives

The Institute is an authorised body and is able to grant limited rights of audience to its fellows under rules approved for the purposes of s.27: see Institute of Legal Executives Order 1998, SI 1998/1077. Legal executives will normally have rights of audience as solicitors' employees, though they have some additional rights, for example, on unopposed applications for an adjournment and for applications for judgment by consent. (The Institute of Patent Agents are similarly an authorised body to grant rights of audience to its members in their areas of work: see Chartered Institute of Patent Agents Order 1999 SI 1999/3137.)

#### 4.6 Rights specifically conferred

A number of enactments confer rights of audience upon particular public officials. The most commonly encountered in the county court are the following:

- 1 An officer of the local authority in local authority housing actions (County Courts Act 1984 s.60). The terms of the section apply only where the action is being heard by the district judge, though a judge may exercise his discretion to grant to the housing officer of the council the same right of audience as he would have done before the district judge.

- 2 An officer of the Commissioners of Inland Revenue (in practice a local Collector of Taxes) (Taxes Management Act 1970 s.66(2)).

#### 4.7 Companies and corporations

In fast track or multi-track interlocutory or final hearings a company or a corporation may be represented at trial by an employee if the employee has been authorised by the company or corporation to appear at trial on its behalf and the court gives permission (CPR 39.6). The rule seems to overlook the fact that directors of a company are its officers and will not always be employees, though probably the term should be read widely enough to include a director, whether or not he is an employee.

Guidance as to the principles upon which permission should be granted or refused is set out in CPR 39 PD 5.3. The intention of the rule is to enable a company to act as a litigant in person, so abolishing the old rule that a company must act by a solicitor. This intention underpins the new rule. Thus permission should be given unless there is some particular and sufficient reason why it should be withheld. In considering whether to grant permission the matters to be taken into account include the complexity of the issues and the experience and position in the company or corporation of the proposed representative (CPR 39 PD 5.3). Permission should not normally be granted in jury trials or in contempt proceedings (CPR 39 PD 5.6).

CPR 39 PD 5.4 provides that permission should be obtained in advance of the hearing. This is not an imperative and it may be obtained informally and without notice to the other parties (CPR 39, PD 5.5). This is the more usual but note that the PD also requires that the judge should record his decision to grant permission in writing and give a copy to the company and to the other party if requested.

Where a company is to be represented at a hearing by an employee, there should be provided to the court a written statement containing the full name and registered number of the company, the position held by the proposed representative, and the date and manner of authorisation (CPR 39 PD 5.2). It is desirable to check expressly with the representative the basis of his authorisation to act as an advocate for the company. In the case of many small companies the would-be advocate will be a director and no difficulty will arise.

The above Rules do not apply to hearings in the small claims track. Any officer or employee of the company may represent it in a case proceeding on the small claims track under CPR 27 PD 3.2(4).

#### 4.8 Small claims track

Any person may exercise rights of audience in proceedings dealt with as a small claim (i.e. a claim allocated to the small claims track and being dealt with under CPR Pt 27). This means that as well as the litigant himself or a barrister or solicitor representing him, a lay person can also represent a party in such proceedings but there are limitations.

The right of a lay person to represent a party in these cases is set out in the Lay Representatives (Rights of Audience) Order 1999. Its effect is set out in CPR 27 PD 3.2(2) which provides that a lay representative may not exercise any right of audience:

- (a) where the party fails to attend the hearing;
- (b) at any stage after judgment; or
- (c) on any appeal.

Notwithstanding this provision the PD continues to provide in para. 27 PD 3.2 (3) that the court may in its discretion hear a lay representative even in those excluded cases. If a judge decides to grant rights of audience in these excluded cases it is important that he gives reasons for exercising that discretion and adequately records those reasons.

#### 4.9 McKenzie Friend

This expression, said to be misleading and to be avoided (*R v Leicester City JJs ex p Barrow* [1991] 2 QB 260, DC), is universally used to describe a person who assists a litigant in person in court by making notes, quietly making suggestions and giving advice. *Collier v Hicks* (1831) 2 B & Ad 663; *McKenzie v McKenzie* [1971] P 33, CA. A McKenzie Friend does not address the court; in some of the cases, however, the expression is wrongly used to include unqualified helpers who are allowed to address the court: see e.g. *Izzo v Philip Ross & Co (a firm)* (2001), *The Times*, August 9, [2001] All ER(D) 464, Neuberger J.

The leading case is now *R v Bow County Court ex parte Pelling* [1999] 1 WLR 1807, CA. A number of principles were stated in that case:

- 1 The McKenzie Friend has himself no status or rights in the proceedings. The status and rights are those of the litigant.
- 2 Where proceedings are in public a litigant should be allowed the assistance of a McKenzie Friend unless the judge is satisfied that fairness and the interests of justice do not require such assistance. Where proceedings are in private, the nature of them may (e.g. in family proceedings concerning children), make the assistance of a McKenzie Friend undesirable.
3. Where the court decides not to permit a litigant to have the services of a McKenzie Friend, reasons for the refusal should be given.

In practice it would be rare not to allow a litigant in person the help of a McKenzie Friend at a trial. It is likely that the reason for doing so would be personal to the McKenzie Friend himself. The overriding objective in CPR 1.1(2)(a) (ensuring that the parties are on an equal footing) and Article 6 of the European Convention on Human Rights (right to a fair trial) would suggest that refusing a McKenzie Friend would be exceptional.

#### 4.10 General discretion to grant a right of audience

The Courts and Legal Services Act 1990 s.27(2)(c) recognises the discretion of the court to grant a right of audience to a specific person in relation to the proceedings. In *D v S (Rights of Audience)* [1997] 1 FLR 724, CA (Dr Pelling) the court said that when faced with applications (by Dr Pelling or someone in his position) to conduct litigation or to exercise rights of audience, courts should ‘pause long’ before granting rights of audience. The *Chancery Guide* in para. 15.12 provides:

‘Only in very exceptional circumstances may the assistant be allowed to address the court on behalf of the litigant under s.27(2)(c).’

The *Queen’s Bench Guide* in para. 2.4.1 is to like effect.

Although the discretion to allow otherwise unauthorised people to act as advocates is there, it should obviously be sparingly used. In particular, because a litigant in person is in apparent difficulty in presenting his case, it would normally be a mistake to allow someone in the position of a McKenzie Friend to become an advocate: it subverts the general statutory scheme of rights of audience and the court does not know what it is getting until the newly authorised advocate speaks. Nonetheless, the question of whether to hear an unqualified advocate under s.27(2)(c) was considered in *Clarkson v Gilbert & Ors (2000)*, *The Times*, 4 July, [2000] All ER (D) 806, the Court of Appeal upheld a decision to allow a husband to represent his wife, but only after careful enquiry of the wife personally. Lord Woolf said that his comments in *D v S* (see above) about people in Dr Pelling’s position ‘did not deal with a situation where a husband wanted to appear for his wife’; but he also said: ‘The courts are at a disadvantage and the public can be at a disadvantage if rights of audience are too readily given to those who do not have the necessary qualifications.’

In *Milne v Kennedy & Ors (1999)* *The Times*, 11 February 28 January, CA the first instance judge’s decision to allow a person with knowledge of the dispute to represent four defendants was overturned: ‘Her experience in the law has been obtained as a litigant in person which has been conducted by her with tenacity.’

In *Izzo v Philip Ross & Co* (a firm) (see above), Neuberger J discussed the merits and risks of allowing an unqualified person to act as an advocate. Relevant considerations include, (a) any saving of time which may result, (b) the appropriateness of the individual as a representative, having regard to his legal training, objectivity of approach and ability, and (c) the objective of providing a fair hearing.

However, the Court of Appeal has stated in *Paragon Finance plc v Noueiri* (Practice Note) [2001] 1WLR 2357 that whether to grant rights of audience should be made by reference to s.17 and s.18 of the Courts and Legal Services Act 1990. In addition, the refusal to allow a person to act would not contravene Articles 6 or 8 of the European Convention on Human Rights.

A person cannot by a power of attorney confer on another a right to appear in court as his representative as this right is personal to the litigant (*Gregory v Turner, R (Morris) v North Somerset Council* [2003] 2All ER 1114).

#### 4.11 General discretion to refuse to hear a person

By s.27(4) Courts and Legal Services Act 1990, the court has power to refuse to hear a person (for reasons which apply to him as an individual) who would otherwise have a right of audience. Where the court does refuse to hear such a person, it must give its reasons for refusing (s27(5)). This is obviously dangerous territory. In particular someone exercising a right of audience who misbehaves is best dealt with by a report to his employer or his professional body, though even that course is likely to be rare.

#### 4.12 Who is appearing?

The court should know who is appearing as an advocate and what his status is. Apart from the particular detailed requirements of persons representing companies, referred to above, CPR 39 PD 5.1 provides that at any hearing a written statement should be provided containing the name and address of each advocate, his qualification to act as an advocate, and the party for whom he acts. That provision is often not complied with fully in practice, but you can insist that it is. As a minimum, this information should be provided to the court staff, and noted by the staff on your court list, or on a slip of paper handed up to you when the case is called on.

#### 4.13 Court discipline

This section deals with two aspects of court discipline:

- 1 Managing the proceedings so that the proper discipline of the hearing is maintained
- 2 The powers of the court when disorder breaks out or is threatened.

#### 4.14 Managing the proceedings

If the judge sets the right tone in presiding over the proceedings, the chances of indiscipline occurring are reduced. *Good court discipline stems from the judge's example.* These are useful guides:

- 1 Do not talk too much. In particular, do not allow the proceedings to become a conversation. Judges have to talk more than in the past. The duty under CPR 1.4 to manage cases actively in order to further the overriding objective makes it necessary now for the judge to intervene, for example, to limit cross-examination, and to identify issues upon which further evidence or submissions are or are not required. But this brings a danger of the essential framework of proceedings being subverted. 'If in doubt, stay silent' is a good approach. In particular, resist the temptation to question witnesses except to clarify an answer or prevent witness and advocate getting at cross purposes. Even with poor advocacy, the need to ask questions from the bench often evaporates before the end of the witness's evidence.

- 2 Do not be humorous. It is very easy to make a flippant remark from the bench, but it is usually at someone's expense. Someone is going to lose the case and perhaps face ruin or hardship, and will remember if the judge cracked a joke. Impose by your manner a sense of efficient seriousness of purpose.
- 3 Enforce basic court etiquette, but without being officious or heavy handed about it. For example, do not allow anyone to speak while the oath is being taken, do not have more than one advocate standing up at the same time, and do not allow one person to interrupt another unnecessarily. Proper rules can, in the case of professional advocates, be enforced firmly.
- 4 It is generally a good idea to begin the list punctually at the listed time. Even if there is an application for more time, it is as well that it is asked for formally. Bad time keeping in a public court gives a bad impression. Moreover, if the parties discern that the court is lax about time, they will take advantage of it to do work that should be done in their time during court time. Where there are several cases in the list and they or some of them are reported as 'not ready', it is sometimes useful to have all the advocates in court to plan the best use of the court's time for the day, rather than simply waiting for a case to be ready.
- 5 Short reasons should normally be given for every procedural decision, for example about the admissibility of evidence. Take particular care to explain to litigants in person the reasons for procedural decisions, especially those that are adverse to them. Non-lawyers (and not a few lawyers) have a limited idea of legal relevance. Very often a short explanation of why something is being excluded or cut short will avoid the sort of ill feeling that may grow into resentment of the process or bad behaviour. A procedural decision can sometimes usefully be followed by a short adjournment for a few minutes, if the effect of it is to cause a party, particularly a litigant in person, to need to take stock. Such time is often well spent in making the proceedings run smoothly, but be careful not to let five minutes extend to 10 or 15.
- 6 In cases where a litigant in person appears before the court it is sensible to take a little time at the commencement of the case to explain briefly the procedure to be adopted and to explain that he may appeal if dissatisfied with the decision but permission must be sought. It is important not to overload the litigant in person with procedural information so explain that this aspect can be considered further, if necessary, at the conclusion of the case.
- 7 Always intervene to prevent a witness from being bullied or harassed. The offender is nearly always a professional advocate getting carried away with a point he is trying to establish, but the effect can be damaging to the trial process.
- 8 Note where people are sitting in court. If necessary intervene to make sure that opponents or others likely to be antagonistic towards each other do not have to sit next

to each other. It adds to the strain of proceedings for people to feel uncomfortable, or worse, because of their proximity to the other side or the other side's supporters. It is important, too, to keep an eye on what is going on in court generally, and not to become engrossed in writing the note or in concentrating exclusively on the witness giving evidence.

#### 4.15 Disorder in court

Disorder in civil cases in the county court is very rare. Litigants are remarkably well disciplined, even when under great personal pressure. Here are some general rules:

- 1 Always be ready to adjourn for a few minutes if things are getting fraught and you fear an outburst or incident. It is important if possible to prevent someone from walking out and abandoning the case, both because of the bad impression it gives and because of the procedural complications that can ensue. 'This isn't justice; I'm going to write to my MP' is best met by a short explanation and a few minutes break.
- 2 Do not be quick to react to personal criticism from litigants. If a sense of grievance seems to have arisen, deal with it, but do not get involved in personal argument. Sometimes it is best to appear not to hear some remarks.
- 3 In the very rare case of an outbreak of disorder, there is nothing that you are likely to be able to do in court. Leave the court and summon help. If appropriate press the red button as you go. But remember that the court is likely to be under staffed, with one usher or clerk, so do what you can to get help. It is important, if sitting in chambers, to know where the 'escape' exit is.
- 4 If you have experienced disorder in say an interlocutory hearing, make a note on the file for any judge who hears the case in the future and give this to the court manager so that consideration can be given as to the appropriate listing in the future: for example, to be heard in a courtroom as opposed to chambers or, perhaps, transferred to one of the larger courts in the group where security is more readily available.
- 5 If disorder is anticipated at a particular time, for instance when judgment is given, try to arrange for a bailiff to be in attendance in court, if one is available (bailiffs work on an appointment system and may not be readily available). You will need to make the appropriate enquiries as early in the day as possible. In a very few cases it is necessary to ask the police to be in attendance at court. You yourself will have to institute the request through the court manager or they are unlikely to come. Do so only for good reason, for instance based on what someone who is to attend court has done before or has actually threatened to do. Making such arrangements as these must be regarded as exceptional. Security is not generally available in a civil court.

#### 4.16 Punishment for behaviour amounting to contempt

The power of the county court to punish disorderly behaviour is statutory, and is contained in s.118 and s.14 of the County Courts Act 1984. Note that these sections confer jurisdiction on deputy district judges to hear contempt proceedings thereunder.

#### 4.17 County Courts Act 1984 s.118

‘(1) If any person:

- (a) wilfully insults the judge of a county court, or any juror or witness, or any officer of the court during his sitting or attendance in court, or in going to or returning from the court; or
- (b) wilfully interrupts the proceedings of a county court or otherwise misbehaves in court;

any officer of the court, with or without the assistance of any other person, may, by order of the judge, take the offender into custody and detain him until the rising of the court, and the judge may, if he thinks fit:

- (i) make an order committing the offender for a specified period not exceeding one month to... prison...; or
  - (ii) impose upon the offender, for every offence, a fine of an amount not exceeding £2500, or may both make such an order and impose such a fine.
- (2) The judge may at any time revoke an order committing a person to prison under this section and, if he is already in custody, order his discharge.
- (3) A district judge, assistant district judge or deputy district judge shall have the same powers under this section in relation to proceedings before him as a judge.’

It is essential that the procedure set out in the Practice Direction – Committal Applications is read and followed. This Practice Direction supplements CCR Order 29 and RSC Order 52 which set out the rules of court for dealing with committal applications. It is Pt II of the Practice Direction that applies to contempt in the face of the court: this is set out in 4.19 below.

Section 118 is limited to contempt in the face of the court but acts outside the courtroom may amount to wilful interruption. A threat to a witness on his way home from court has been held to amount to a wilful insult within the meaning of this section (*Manchester City Council v McCann* (1999) QB 1214). Such a contempt would probably be dealt with on notice using the Pt I procedure in the Practice Direction.

Where a litigant uses abusive language to a judge it is sometimes better to turn a deaf ear and rise for a short adjournment. Sometimes, the circumstances will justify contempt proceedings.

The judge to whom the contempt is uttered may hear the contempt proceedings under this section. The test whether to do so is whether the reasonable bystander would have concerns as to impartiality if that judge were to hear the contempt (*Wilkinson v S* (2003) 2 ALL ER 184).

#### 4.18 County Courts Act 1984 s.14

‘(1) If any person assaults an officer of the court while in the execution of his duty, he shall be liable:

(a) on summary conviction, to imprisonment for a term not exceeding 3 months or a fine not exceeding [£5000] or both; or

(b) on an order made by the judge in that behalf, to be committed for a specified period not exceeding 3 months...to prison...or to such fine as aforesaid, or to be so committed and to such a fine,

and a bailiff of the court may take the offender into custody, with or without warrant, and bring him before the judge.

(2) The judge may at any time revoke an order committing a person to prison under this section and, if he is already in custody, order his discharge.

(3) A district judge, assistant district judge or deputy district judge shall have the same powers under this section as a judge.’

The most usual use of s.14 is to deal with alleged assaults on bailiffs and it is likely that a hearing has been set up on notice, without the necessary urgency that attends the use of s.118. If a part-time judge finds one of these cases in his list it would be as well, if the opportunity arises, to discuss it with a full-time judge of the court.

Again the Practice Direction must be carefully followed. However, since this application is likely to be on notice Pt I applies.

When considering contempt proceedings the following points should be borne in mind:

1. The Practice Direction provides a code to follow where punishment for contempt at court is under consideration. Remember that it is there. Contrary to what is contemplated by s.118 the application of the Practice Direction means that committal there and then is seldom appropriate. See *Newman v Modern Bookbinders Limited* [2000] 2 All ER 814, CA, for an example of county court committal proceedings gone wrong. For a discussion that underpins the law of committal for contempt in the face of the court, see *Balogh v Crown Court at St Albans* [1975] QB 73, CA.
2. The burden of proof required is the criminal standard, i.e. proof beyond reasonable doubt.

3. It is essential to give legal representation. Legal advice and representation for proceedings under s.14 or s.118 County Courts Act 1984 is available as part of the Criminal Defence Service under the Access to Justice Act 1999. If a solicitor or barrister is not available it is almost certain that the proceedings will have to be adjourned.
4. The allegations of contempt must be reduced to writing (*Newman v Modern Bookbinders Limited* (2000) 2 All ER 814).
5. The warrant for committal must specify the particulars of the contempt with sufficient clarity to enable the contemnor to purge his contempt but where the contempt consists of insulting the court the nature of the insult need not be set out in the warrant (*R v Lambeth County Court Judge and Jonas* (1887) 36 WR 475 and *McIlraith v Grady* (1967) 3 All ER 625). It is important, therefore, that the judge checks the actual words used to describe the contempt and not just leave it to the staff.
6. The only officer of the court who can be asked to take the offender into custody is in reality a bailiff of the court, although clerks and ushers are within the definition (County Courts Act 1984 s.147). The employees of private security firms are probably not officers of the court.
7. Assaults and witness intimidation are often best dealt with by the police, especially if the case is over.
8. The contemnor should be allowed to be brought before the judge to purge his contempt under s.118.

#### 4.19 Practice Direction committals: Part II

- '12. Where the committal application relates to contempt in the face of the court the following matters should be given particular attention. Normally, it will be appropriate to defer consideration of the behaviour to allow the respondent time to reflect on what has occurred. The time needed for the following procedures should allow such a period of reflection.
13. A Part 8 claim form and an application notice are not required for Part II, but other provisions of this practice direction should be applied, as necessary or adapted to the circumstances. In addition the judge should:
  - 1) tell the respondent of the possible penalty he faces;
  - 2) inform the respondent in detail and preferably in writing, of the actions and behaviour of the respondent which have given rise to the committal application;
  - 3) if he considers that an apology would remove the need for the committal application, tell the respondent;

- 4) have regard to the need for the respondent to be:
  - (a) allowed a reasonable time for responding to the committal application, including, if necessary, preparing a defence;
  - (b) made aware of the availability of assistance from the Community Legal Service and how to contact the Service;
  - (c) given the opportunity, if unrepresented, to obtain legal advice;
  - (d) if unable to understand English, allowed to make arrangements, seeking the court's assistance if necessary, for an interpreter to attend the hearing; and
  - (e) brought back before the court for the committal application to be heard within a reasonable time;
- 5) allow the respondent an opportunity to:
  - (a) apologise to the court;
  - (b) explain his actions and behaviour; and,
  - (c) if the contempt is proved, to address the court on the penalty to be imposed on him;
- 6) if there is a risk of the appearance of bias, ask another judge to hear the committal application;
- 7) where appropriate, nominate a suitable person to give the respondent the information.

(It is likely to be appropriate to nominate a person where the effective communication of information by the judge to the respondent was not possible when the incident occurred.)

14. Where the committal application is to be heard by another judge, a written statement by the judge before whom the actions and behaviour of the respondent which have given rise to the committal application took place may be submitted as evidence of those actions and behaviour.'

#### 4.20 Final Thoughts

A judge when considering a potential contempt of court or a potential committal to prison should also refer to the contents of **Chapter 10 Committal and Contempt**.