

# **JUSTICES' CLERKS SOCIETY**

## **Rights of Audience before Justices sitting in the Family Court**

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**JCS**

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**The professional society for  
lawyers who advise magistrates**

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## Rights of Audience before Justices sitting in the Family Court

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## Introduction

This guidance document is prepared by the JCS Family Law and Procedure Network and considers the courts authority to grant rights of audience to trainee solicitors, paralegals and legal executives appearing before magistrates and legal advisers in the Family Court.

There is nothing in the inception of the Family Court or the statutory scheme found in the Legal Services Act 2007 which affects the courts discretionary power to grant a special right of audience in particular proceedings on a case by case basis. *D v S (Rights of Audience)* [1997] 1FLR 724. The court here was dealing with an application by Dr Pelling, the Chairman of East London Families need Fathers to be given rights of audience on an application for leave. The Master of the Rolls, Lord Woolf at paragraphs 18 -- 20 provided the following guidance: --

*“When you consider Dr Pelling's background, he is conducting, on behalf of those who wish to do so, assistance in the litigation process which is totally out of accord with the spirit of the act. I consider that, on any application which Dr Pelling makes in future, careful consideration should be given by the court as to whether it should exercise its discretion by allowing him to have advocacy rights. This is not a matter for the consent of the parties . It is the responsibility of the courts that have been given that responsibility by Parliament. Those who have rights of audience are subject to very stringent requirements. It cannot be right that Dr Pelling can bypass those stringent requirements, albeit that no doubt those who he has helped are very grateful for his assistance.*

*The law must be administered fairly. If the position was otherwise than I have indicated, others can do exactly the same as Dr Pelling and that would be monstrously inappropriate having regard to the requirements that are placed upon those who have normal rights of audience.*

*I would therefore give this guidance to courts for the future when exercising their discretion. When they have applications by Dr Pelling or others in the same position, they should pause long before granting rights of audience. This is because otherwise by considering each case individually, the collective effect of what they are doing is allowing Dr Pelling to bypass the provisions of the Act. That is clearly not what Parliament intended.”*

The statutory provisions governing rights of audience are contained in the Legal Services Act 2007, in force from 1 January 2010. Entitlement<sup>1</sup> to carry on any reserved legal activity<sup>2</sup> including the exercise of a right of audience can only be undertaken where the person is either;

- (a) authorised in relation to the relevant activity or
- (b) is an exempt person in relation to that activity.

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<sup>1</sup> S 13 (2) (a) and (b)

<sup>2</sup> defined in S 12 (1)

## Authorised in respect of the relevant activity

Authorisation is carried out by the relevant approved regulator<sup>3</sup> which for the purpose of this guidance includes the Law Society, the General Council of the Bar and the Institute of Legal Executives. Each regulator may regulate certain reserved legal activities<sup>4</sup> with the Law Society and the General Council of the Bar having the widest extent of reserve legal activities in which to regulate. Notably ILEX may only regulate the exercise of the right of audience and the administration of those and cannot regulate the conduct of litigation.

It is perhaps worth emphasising at this point the differential between the two defined reserved legal activities. The Legal Services Act 2007 differentiates between rights of audience and conduct of litigation which are respectively defined as: --

*A 'right of audience' means the right to appear before and address a court including the right to call and examine witnesses.*<sup>5</sup>

*The 'conduct of litigation' means the issuing of proceedings before any court in England and Wales, the commencement, prosecution and defence of such proceedings, and the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions).*<sup>6</sup>

The differential between these two reserved legal activities is important in relation to Legal executives' authorisation, which does not include 'conduct of litigation' and equally important when we look at exempted persons later in this paper.

We are perhaps more aware of the authorisation processes for solicitors and barristers and the use of such terminology as practising and non-practising, the former requiring a practising certificate, payment of the necessary fees and provision of suitable underwritten insurance dependant upon the type of work undertaken, but what of ILEX members?

Authorisation in respect of rights of audience can be obtained by any legal executive who has obtained the 'extended rights of audience qualification' for the specific jurisdiction in which they are to exercise that right of audience. There are separate certificates for family, civil and crime therefore any legal executive with the extended rights of audience qualification in family can appear in open court in the Family Court (including justices) in any type of hearing.

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<sup>3</sup> S20.

<sup>4</sup> Schedule 4 part 1

<sup>5</sup> Schedule 2 paragraph 3 (1)

<sup>6</sup> Schedule 2 paragraph 4 (1) (a) (b) (c)

## Exemption in relation to a reserved legal activity<sup>7</sup>

For trainee solicitors, paralegals and legal executives who have not obtained an 'extended rights of audience qualification', their only gateway to exercise a right of audience is through the exemption provisions of schedule 3.<sup>8</sup>

There had previously existed a differential between a right of audience exercised before magistrates and the exercise of that right before the High Court or the County Court for proceedings heard in Chambers. In the latter case where trainee solicitors, Legal executives and paralegals were assisting in the conduct of litigation under the instruction and supervision of an authorised person those individuals were able to exercise a limited right of audience<sup>9</sup>. This limited right is not the same as a 'right of audience' within the meaning of reserved legal activities.

To some extent this is where the professions have become confused when hearings are before magistrates. In such circumstances trainee solicitors, non certified legal executives and paralegals do not have a right of audience.

The historical difference seen in the Courts and Legal Services Act 1990, replicated in the Legal Services Act 2007 as further amended by the Crime and Courts Act 2013<sup>10</sup> ensured that the differential remained for those individuals claiming the exemption through assisting in the conduct of litigation route to a right of audience. Magistrates do not sit in Chambers as a rule, but even if they were to do so to accommodate a particular application for example without notice non-molestation, trainee solicitors, non-certified legal executives and paralegals would not be able to exercise a right of audience under this exemption as lay justices are specifically excluded<sup>11</sup>.

This restriction extends to legal advisers even when they sit in Chambers exercising their delegated powers.

It would therefore appear that the only remaining recourse for trainee solicitors, non certified legal executives and paralegals is to apply for exemption to be granted by that court in relation to those proceedings in respect of a specific 'right of audience'<sup>12</sup>. The widest interpretation of schedule 3 paragraph 1(2)<sup>13</sup> appears contrary to the intention of the

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<sup>7</sup> S19 and Schedule 3

<sup>8</sup> Legal Services Act 2007

<sup>9</sup> schedule 3.1 (7) 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

<sup>10</sup> paragraph 98 schedule 10 Crime and Courts Act 2013 The proceedings are not reserved proceedings and are being heard in Chambers (i) in the High Court or the 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 S31 c (1) (y) Matrimonial and Family Proceedings Act 1984 (lay justices).

<sup>11</sup> Schedule 3 (1)(7)(c) of Legal Services Act 2007 as amended by paragraph 98 schedule 10 Crime and Courts Act 2013.

<sup>12</sup> Schedule 3 paragraph 1 (2) The 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.

<sup>13</sup> The word "court" in a generic manner and "those proceedings" as those proceedings to which the right of audience is granted.

legislation which is to distinguish between those who appear before judges in Chambers and those who can appear before lay justices<sup>14</sup>.

Justices' Clerks regularly receive correspondence in which they are asked to agree to a right of audience for a trainee solicitor, non certified legal executive or paralegal. Although there can be no specific grant/agreement of such a right of audience it is open to the Justices' Clerk to facilitate an overview of these applications and advise magistrates on a candidates suitability for the granting of an exemption. However, the actual decision to grant an exemption to an individual for a set of proceedings remains with the court.

Justices' Clerks should discuss and agree with their Bench Chairmen how such exemption requests should be dealt with. The advantages in a Justices' Clerk continuing the practice of provisional exemption authorisations are that it;

1. Obviates the need for case specific applications to be made repeatedly to the court, taking up valuable court time as it enquires about a candidate's relevant experience.
2. Benchmarks decisions against the guidance enabling consistency and a greater degree of expedition.
3. Facilitates an overview and to keep a record of those who have applied for rights of audience as an exempted person.
4. Maintains the spirit of the 2007 Act which places stringent requirements as to the training and conduct on authorised individuals and requires that the approved regulators (the Law Society, the General Council of the Bar and ILEX) have disciplinary processes with consequences for those who fail to comply with industry standards.
5. Provides assistance to 'relevant approved regulators,' primarily firms of solicitors, which they could then utilise when writing to the respective Justices' Clerk reducing unnecessary correspondence as fully reasoned applications in writing are capable of being dealt with expeditiously.

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<sup>14</sup> Schedule 3 (1) (7) of Legal Services Act 2007 as amended.

## Guidance for dealing with exemption requests

The Society recommends that the following guidance applies when considering whether or not to advise magistrates to allow such a right of audience or indeed for use by magistrates when faced with an application in the face of the court: -

1. The court 'should pause long before granting rights of audience' primarily because it is not in the spirit of the act and bypasses the stringent requirements placed on those who are authorised.
2. What are the applicant's qualifications and experience in general and more specifically to the jurisdiction in which they are requesting a right of audience?
3. What experience do they have of the specific matter before the court, is there oversight of their work, by whom, what checks and balances are in place within that oversight and that the clients are aware of their representatives status?
4. The nature of the proceedings -- public or private law?
5. What stage is the case at e.g. directions, fully contested?
6. What role are they to play? A watching brief or specific instructions and knowledge of the case in circumstances which are unavoidable e.g. illness of the principal, which would mean inappropriate delay would occur if the case specific right was refused?

Recommended exemption approval guide for various types of family hearing: -

	<b>Non accredited legal executive/trainee solicitor</b>	<b>Paralegal/legal clerk</b>
<b>Directions hearing</b>	Yes	Yes
<b>S8 contested hearing</b>	No	No
<b>S8 uncontested hearing</b>	Yes	No
<b>Application for PR if unopposed</b>	Yes	No
<b>Part IV (FLA) ex parte/ unopposed</b>	Yes	No
<b>Enforcement of part IV FLA</b>	No	No
<b>Maintenance and reciprocal enforcement</b>	No	No
<b>Care applications</b>	No	No
<b>Applications under HEEA 1990</b>	No	No
<b>Private adoption hearings</b>	No	No
<b>Applications for declaration of parentage</b>	No	No