



THE LAW SOCIETY
OF NEW SOUTH WALES

Guidelines for dealing with self-represented parties in civil proceedings

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FOREWORD

This is the second edition of these guidelines. The first edition, published in 2006, recognised an increase in self-represented parties appearing in courts and tribunals. In Australia and overseas there continues to be a large number of self-represented parties in matters before the court, as well as self-represented parties seeking to resolve a legal problem outside of the courts.

Australian courts have recognised the challenges that are faced by self-represented parties and the courts they appear in. Courts have responded with a number of initiatives, including increased information available on court websites to assist self-represented parties, development of self-help guides and connections to legal advice services. Some courts, including the Family Court, have developed specific guidelines to assist the judicial officers to address issues regarding self-represented parties.

The Law Society recognises that self-represented parties pose unique challenges for lawyers. The legal and ethical duties of lawyers in respect of their clients, the courts and other lawyers are generally well established. The obligations and best practice of a lawyer when dealing with another party who is self-represented can be less clear. The usual processes for progressing a matter with another party may not be directly applicable when the other party is self-represented.

Similar difficulties arise for practitioners in dealing with self-represented parties in non-litigious matters, including conveyancing and commercial matters. These guidelines offer specific assistance to lawyers who find themselves in those positions. We have also provided specific guidance in relation to family law, where a significant number of parties are self-represented.

Attached at the end of these guidelines are information sheets for solicitors to send to self-represented parties on the other side of a matter.

With permission from the Bar Association, our Guidelines have drawn upon their Guidelines for Barristers on Dealing with Self-Represented Litigants. Those guidelines are available on the Bar Association's website and are also a very useful resource for practitioners.

I commend these guidelines to you.



Gary Ulman, President
November 2016

GUIDELINES FOR SOLICITORS DEALING WITH SELF-REPRESENTED PARTIES IN CIVIL PROCEEDINGS

1. General issues

- 1.1 The *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Uniform Solicitors' Conduct Rules) and the Law Society's Statement of Ethics¹ require solicitors to act fairly and honestly towards courts and tribunals, the profession and third parties, including opposing parties representing themselves in contentious and non-contentious matters.
- 1.2 Solicitors acting in a matter should always explain to any self-represented party that they act in the best interests of, and advise, their own client. Solicitors should be clear that they are neither acting for nor providing advice to the self-represented party.
- 1.3 Solicitors should instruct their staff on how to deal with a self-represented party.

2. In litigation

- 2.1 Self-represented parties fall into three categories:
 - a. the 'direct' self-represented party, where the party receives little if any legal advice;
 - b. the 'unbundled' represented party, where the party retains a legal practitioner only on certain aspects of law or procedure, or at a particular stage of the case. The legal practitioner may be retained on a paid basis or through a Community Legal Centre or self-representation service; and
 - c. the client of a directly-briefed barrister, which will depend on the terms of the retainer. In such cases, solicitors should be aware that the self-represented party will have to do the legal work that barristers are generally restricted from doing under the *Legal Profession Uniform Conduct (Barristers) Rules 2015*. This work includes commencing proceedings, serving court documents, making demands or conducting certain kinds of correspondence.²
- 2.2 When dealing with an 'unbundled' represented party, a solicitor should ascertain from that party's solicitor the extent of their retainer and, prior to any direct communications or negotiations with the party, ensure that they are not in fact represented by a solicitor in that particular aspect of the matter.
- 2.3 As part of the preparation for any hearing in which another party is self-represented, solicitors are advised to inform their clients of a number of issues that may arise.³ These include the following:
 - a. judicial officers are required to ensure procedural fairness and may give the appearance of significantly assisting the self-represented party;
 - b. a judicial officer may allow a person to assist a self-represented at the hearing, known as a 'McKenzie friend'; and
 - c. the time taken to conduct any hearing may be extended, resulting in increased legal costs to the client.
- 2.4 If the solicitor's client may be cross-examined by the self-represented party, the solicitor should also advise their client of this and counsel their client about how to react to particular lines of questioning.
- 2.5 Solicitors have a duty to assist the court when opposing a self-represented party.⁴

- 2.6 In their dealings with a self-represented party a solicitor:
- a. must act in accordance with their paramount duty to the administration of justice, and their duties to act in their client's best interests and in accordance with their ethical obligations, including ethical obligations set out in the Uniform Solicitors' Conduct Rules;
 - b. is ethically bound to behave courteously and fairly;⁵
 - c. should try to encourage the self-represented party to at least try to obtain some free legal advice, for example from a Community Legal Centre. When this occurs, it should be recorded in any settlement agreement;
 - d. should deal with a self-represented party to the same standard as they would with a represented party;
 - e. should explain to the self-represented party that they will advance all points, take all objections and make all submissions reasonably open to them in advancing their client's case;
 - f. may require that an independent third party be available when negotiating a settlement;
 - g. should confirm before any settlement that the self-represented party understands the terms of settlement and their effect, and have this noted on the record of transcript, orders or other document containing the terms of settlement;
 - h. should confirm communications in writing, using plain language;
 - i. should provide the self-represented party with authorities prior to the hearing; and
 - j. should not burden a self-represented party with unnecessary material.
- 2.7 In interlocutory applications, it is good practice to provide self-represented parties with a copy of the orders that will be sought prior to the date of the interlocutory hearing or directions hearing.
- 2.8 Solicitors should be aware, and make self-represented parties aware, of the information sheet *Representing Yourself in Civil Proceedings in the Supreme Court of New South Wales*, published by the Supreme Court.⁶ The Federal Circuit Court has information on its website to assist self-represented parties.⁷ In certain Federal Court and Federal Circuit Court matters the Self Representation Service managed by Justice Connect may be available.⁸
- 2.9 Solicitors should also refer to the NSW Bar Association's *Guidelines for Barristers on Dealing with Self-Represented Litigants*.⁹

3. Non-litigious matters

- 3.1 Solicitors should be aware that there are many legal conventions of which lay people are not aware. Solicitors should consider taking the opportunity to explain these conventions to the self-represented party as soon as possible. Such conventions may include:
- a. the obligation to comply with reasonable requirements of public authorities, such as the Office of State Revenue and Land and Property Information, or in obtaining ministerial consent to sale; and
 - b. the role of undertakings: while undertakings have particular effect for, and importance to solicitors, lay persons are not bound in the same way, and in particular they are not subject to disciplinary action for breach of an undertaking.¹⁰ Solicitors should also note that enforcement of a lay person's undertaking, unless contained in a deed or supported by consideration, may prove impossible.

4. Family law matters

- 4.1 The difficulties experienced by solicitors when dealing with self-represented parties are often magnified in the family law context because of the personal nature of the issues considered or litigated in family law matters.
- 4.2 The particular Family Court rules that solicitors should be aware of in dealing with self-represented parties are:
- 1.05(1) Before starting a case, each prospective party to the case must comply with the pre-action procedures, the text of which is set out in Schedule 1.
 - 1.15 If a rule or order requires a person to take action but does not specify a time by which the action is to be taken, the person must take the action as soon as practicable.
 - 4.01(1) In an Initiating Application (Family Law), the applicant must:
 - (a) give full particulars of the orders sought; and
 - (b) include all causes of action that can be disposed of conveniently in the same case.
 - 5.03(1) Before filing an application seeking interim, procedural, ancillary or other incidental orders, a party must make a reasonable and genuine attempt to settle the issue to which the application relates.
 - 5.03(2) An applicant does not have to comply with subrule (1) if:
 - (a) compliance will cause undue delay or expense;
 - (b) the applicant would be unduly prejudiced;
 - (c) the application is urgent; or
 - (d) there are circumstances in which an application is necessary (for example, if there is an allegation of child abuse, family violence or fraud).
 - 5.09 The following affidavits may be relied on as evidence in chief at the hearing of an interim or procedural application:
 - (a) subject to rule 9.07, one affidavit by each party;
 - (b) one affidavit by each witness, provided the evidence is relevant and cannot be given by a party.
 - 8.05(1) A party must give an address for service if:
 - (a) the party files or responds to an application; or
 - (b) the party seeks to be heard by the court.
 - 8.05(2) A party must give only one address for service for each application filed.
 - 12.13(1) If an applicant does not attend a case assessment conference or procedural hearing, the court may:
 - (a) dismiss the application; or
 - (b) make an order for the future conduct of the case.
 - 12.13(2) If a respondent does not attend a case assessment conference or procedural hearing, the court may:
 - (a) if the respondent has not filed a Response to an Application for Final Orders – make the order sought in the application;
 - (b) list the case for dismissal or hearing on an undefended basis; or
 - (c) make an order for the future conduct of the case.¹¹

- 4.3 In *re F: Litigants in Person Guidelines* [2001] FamCA 348 the duties of a Family Court judge were expressed by the Full Court to be:
1. A judge should ensure as far as possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial.
 2. A judge should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross-examine the witness.
 3. A judge should explain to the litigant in person any procedures relevant to the litigation.
 4. A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation.
 5. If a change in the normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the self-represented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course.
 6. A judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to enquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise.
 7. If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights.
 8. A judge should attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated: *Neil v Nott* (1994) 121 ALR 148 at 150.
 9. Where the interests of justice and the circumstances of the case require it, a judge may:
 - draw attention to the law applied by the court in determining issues before it;
 - question witnesses;
 - identify applications or submissions which ought to be put to the court;
 - suggest procedural steps that may be taken by a party;
 - clarify the particulars of the orders sought by a litigant in person or the bases for such orders.
- 4.4 The above list is not intended to be exhaustive and there may well be other interventions that a judge may properly make without giving rise to an apprehension of bias.
- 4.5 Guidelines on dealing with self-represented parties are available for solicitors who are appointed as an Independent Children’s Lawyer in matters where one or both parties are self-represented.¹²
- 4.6 Solicitors should be aware of the power of the Family Court and Federal Circuit Court to appoint a case guardian or a litigation guardian where a party does not understand the nature and possible consequences of the proceeding or is not capable of adequately conducting or giving adequate instructions for the conduct of the proceedings. A case guardian or litigation guardian may be appointed by way of an application by a party, or by a person seeking to be appointed as a litigation guardian or on the Court’s own motion.¹³
- 4.7 Situations frequently arise, particularly in the family law or domestic relationships jurisdictions, where self-represented parties use the court proceedings as an opportunity to embarrass or harass their former spouse or partner. This may not be deliberate. However, regardless of the intention of the self-represented party, the cross-examination of the spouse or partner by the self-represented party may have this effect.
- 4.8 It is arguable that the rules which prevent a barrister from making allegations or suggestions under privilege, or to pose questions which are made or asked principally to harass or embarrass another¹⁴ apply just as much to a self-represented party.¹⁵ In appropriate cases, an objection should be made on any of the specific grounds (unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive).¹⁶
- 4.9 Solicitors should be ready to invoke section 117(2A)(c) of the *Family Law Act 1975* (Cth) as to costs and section 118 of that Act as to frivolous or vexatious proceedings.
- 4.10 Solicitors should take care to formally record any undertakings in the prescribed undertaking form and file those with the court.¹⁷
- 4.11 Solicitors may refer to the Family Law Court’s *Best Practice Guidelines for lawyers doing family law work* for further guidance on dealing with self-represented parties.¹⁸ The Family Court¹⁹ and the Federal Circuit Court²⁰ have information on their website to assist self-represented parties.

ENDNOTES

1. Law Society of New South Wales, *Statement of Ethics* (28 May 2009), available at www.lawsociety.com.au/ForSolicitors/professionalstandards/Ethics/statement_of_ethics/index.htm.
2. Rules 13-15, *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW).
3. Family Law Council and Family Law Section of the Law Council of Australia, *Best Practice Guidelines for lawyers doing family law work* (2nd Edition, 2010), available at www.familylawsection.org.au/resource/BestPracticeGuidelinesv8FINAL.pdf, p 31.
4. *Serobian v Commonwealth Bank of Australia* [2010] NSWCA 181.
5. Law Society of New South Wales, *Statement of Ethics* (28 May 2009), available at www.lawsociety.com.au/ForSolicitors/professionalstandards/Ethics/statement_of_ethics/index.htm.
6. Supreme Court of New South Wales, *Representing yourself in civil proceedings*, available at www.supremecourt.justice.nsw.gov.au/Pages/SCO2_facilitiesupport/Representing-yourself-in-civil-proceedings.aspx.
7. Federal Circuit Court of Australia, *About going to court and court process*, available at www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/family-law-matters/about-going-to-court-and-court-procedures.
8. See www.justiceconnect.org.au/get-help/self-representation-service.
9. NSW Bar Association, *Guidelines for Barristers on Dealing with Self-Represented Litigants* (2nd Edition, 2011), available at www.nswbar.asn.au/docs/webdocs/self_reps_10042014_lo.pdf.
10. Rule 6 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*.
11. *Family Law Rules 2004* (Cth). See also Family Law Council and Family Law Section of the Law Council of Australia, *Best Practice Guidelines for lawyers doing family law work* (2nd Edition, 2010), available at www.familylawsection.org.au/resource/BestPracticeGuidelinesv8FINAL.pdf.
12. Family Court of Australia, *Guidelines for Independent Children's Lawyers* (2013), available at www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/guidelines-independent-childrens-lawyer; The Law Society of New South Wales, *Representation Principles for Children's Lawyers* (4th Edition, 2014), available at www.lawsociety.com.au/cs/groups/public/documents/internetcontent/026517.pdf.
13. Rules 11.09, 11.10, 11.11 Federal Circuit Court Rules 2001 (Cth); rules 1.10, 6.08, 6.10, 6.11 *Family Law Rules 2004* (Cth).
14. Rules 61(c), 62, 63 and 67 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015*.
15. See for example, sub-section 41(1) of the *Evidence Act 1995* (NSW).
16. NSW Bar Association, *Guidelines for Barristers on Dealing with Self-Represented Litigants* (2nd Edition, 2011), p 11, available at www.nswbar.asn.au/docs/webdocs/self_reps_10042014_lo.pdf.
17. The prescribed undertaking form is available on the Family Court of Australia website, www.familycourt.gov.au.
18. Family Law Council and Family Law Section of the Law Council of Australia, *Best Practice Guidelines for lawyers doing family law work* (2nd Edition, 2010), available at www.familylawsection.org.au/resource/BestPracticeGuidelinesv8FINAL.pdf.
19. Family Court of Australia, *About going to court and court process*, available at www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/about-going-to-court-and-court-processes.
20. Federal Circuit Court of Australia, *About going to court and court process*, available at www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/family-law-matters/about-going-to-court-and-court-procedures/.

APPENDIX 1 - INFORMATION FOR SELF-REPRESENTED PARTIES IN CIVIL LITIGATION

(Not for use in criminal matters)

Court proceedings are conducted on the principle that each party will fairly present the evidence and make submissions in their case based upon an understanding of the relevant law and identification of the issues in dispute.

It is not enough to have a grievance. The court must have power to deal with that grievance, and you must be able to demonstrate to the court how the facts of the grievance relate to the law, and that there is evidence to support those facts. The role of the court is to make a decision based only on the evidence presented by each party. If you cannot present relevant evidence which supports your case, you will be unsuccessful and may be ordered to pay the other party's costs.

Courts have established rules, practice directions and guidelines which are designed to assist them to deal with cases efficiently and fairly. You should familiarise yourself with all applicable aspects of practice of the court which is dealing with your case.

It is often the case, particularly in certain Federal and State courts, that the rules of that court impose a duty on a party to ensure that litigation is conducted as quickly, cheaply and fairly as is possible. This is not to say that "fairly" means what is fair to just you. It means what is fair to the overall administration of justice. If you breach this duty, the court has power to dismiss your proceedings or to impose restrictions on how your proceedings progress.

As a general principle, each party involved in the proceedings is expected to behave courteously and fairly with the other parties and with the court, while at the same time acting in their or their client's best interests.

If you are conducting your own case, whether as a plaintiff, applicant, defendant or respondent, you should be aware that this is not an easy task. To best protect your interests, you should consider the following avenues of legal representation if you are not able to pay for a solicitor:

- Legal Aid
- a pro bono solicitor
- a no-win/no fee solicitor
- partial representation for a particular aspect of the case
- Self Representation Service - assistance available for bankruptcy, fair work, human rights/discrimination or judicial review issues in the Federal Court or Federal Circuit Court.

What you can expect from the solicitor appearing for the other party

1. The solicitor has a duty to act in the best interests of his or her client
The solicitor will be aiming to present their client's case in the best possible light. This includes the right:
 - to object to any evidence or submissions you present on the grounds that it is inadmissible, irrelevant, is the opinion of a person who is not an expert, or should be rejected as scurrilous;
 - to question the credibility or reliability of your witnesses; and
 - to make submissions which are open to them in advancing their own client's case, for example that the evidence you present is unreliable.

2. The solicitor also has a duty to the court
This means that the solicitor is ethically obliged to bring to the court's attention any matter within the solicitor's knowledge which affects the ability of the court to reach a fair decision, and not to mislead the court in any way. This means the solicitor has an obligation to bring to the court's attention any case law or legislation which is relevant to the case. The solicitor's duty to disclose certain evidence to the court is set out in the relevant court rules. This may include evidence that may not support the client's case.
3. The solicitor cannot advise you on the merits of your case
This does not, however, prevent a solicitor, as part of negotiations, from pointing out what they believe are the weaknesses of your case, or from trying to encourage an early settlement. The solicitor is ethically bound to advise their client to consider opportunities to settle a matter before trial.
4. The solicitor is not obliged to assist you in the conduct of your case
While a solicitor may sometimes offer to assist with some procedural matters in order to ensure that their own client's case is not disadvantaged, you are responsible for running your own case, including preparing your own court documents, meeting deadlines and presenting your case.
5. Negotiations
 - Negotiations must be entered into in good faith and 'without prejudice'. This means that neither party can tell the court about any admissions or concessions which may have been offered as part of the negotiations, but not agreed upon.
 - Each party must regard negotiations as a genuine opportunity to reach agreement on some or all issues and not as an opportunity to continue arguing their case.
 - Not accepting an offer can have an effect on legal costs. If a party makes an offer as part of the negotiations, but the other party rejects it, and the court later makes an order as favourable or more favourable to the party making the offer, the court may be shown the letter of offer and asked to make an order for costs against the party who rejected it.
 - Where agreement is reached, it will be binding on both parties. It will need to be in writing and may be presented to the court as evidence if the matter is not fully finalised, or to prevent further court proceedings on that issue.
 - There are court rules and law regulating the way in which offers are to be made.
6. Undertakings
An undertaking is a promise to do something or not do something as part of the court proceedings. An undertaking given by a solicitor personally can be treated as a firm promise, breach of which may amount to professional misconduct. An undertaking given by or on behalf of the solicitor's client is not an obligation of the solicitor, but of the client themselves. You can ask that an undertaking be given in writing and signed by the person (solicitor or their client) who is giving it. If you give an undertaking, it will normally be required to be made in writing and filed with the court. Breach of an undertaking can amount to contempt of court.

APPENDIX 2 - INFORMATION FOR SELF-REPRESENTED PARTIES IN NON-LITIGIOUS MATTERS

(Matters such as conveyancing and commercial matters; not for use in criminal law matters)

A non-litigious matter is a civil matter that is dealt with outside of a tribunal or court.

As a general principle, each party involved in a matter should behave courteously and fairly with the other parties while at the same time acting in their or their client's best interests. The following information is provided by the Law Society of New South Wales to assist you in conducting your own matter and in understanding what you can expect from the solicitor acting for the other party.

1. The solicitor's duty is to act in the best interests of his or her client
This includes the right to reject your requests or arguments and present their client's position in the best possible light.
2. The solicitor cannot advise you on the merits of your matter
3. The solicitor is not obliged to assist you in the conduct of your matter
You are responsible for the conduct of your own matter.
4. Negotiations
Each party should regard negotiations as a genuine opportunity to reach agreement on some or all issues and not as an opportunity to continue arguing their position. They should be entered into in good faith.
Where agreement is reached, it will be binding on both parties. The agreement will need to be in writing and may be presented to a court as evidence if a dispute arises between the parties or to prevent court proceedings on that issue.
5. Undertakings
An undertaking is a promise to do something or not do something. An undertaking given by a solicitor personally can be treated as a firm promise, breach of which may amount to professional misconduct. An undertaking given by or on behalf of the solicitor's client is not an obligation of the solicitor, but of the client themselves. You can ask that an undertaking be given in writing and signed by the person (solicitor or their client) who is giving it. If the solicitor asks you to give an undertaking, it will normally be required to be by way of a deed.

APPENDIX 3 - USEFUL SOURCES OF INFORMATION FOR SELF-REPRESENTED PARTIES

Court websites

Some courts and tribunals offer dedicated guides for self-represented parties. You should check the website for whichever court or tribunal is relevant to your matter to see if it offers specific guidance.

Start at www.lawlink.nsw.gov.au. Click on *Courts and Tribunals*, then follow the links to the relevant court or tribunal website:

- Supreme Court
- District Court
- Local Court
- Children's Court
- Coroners Court
- Workers Compensation Commission
- Land and Environment Court
- NSW Civil & Administrative Tribunal

For Federal Courts and Tribunals, start at australia.gov.au/topics/law-and-justice/courts-and-tribunals, then click on the link to the relevant website:

- Federal Court of Australia
- Federal Circuit Court of Australia
- Family Court of Australia
- Administrative Appeals Tribunal

Community Legal Centres

Go to www.clcnsw.org.au/. Click on the link Looking for Legal Advice?

Self-Representation Service

Go to www.justiceconnect.org.au/get-help/self-representation-service

Legal Aid Commissions

Go to www.nationallegalaid.org to access websites for Legal Aid Commissions in each State and Territory.

The Law Society of NSW

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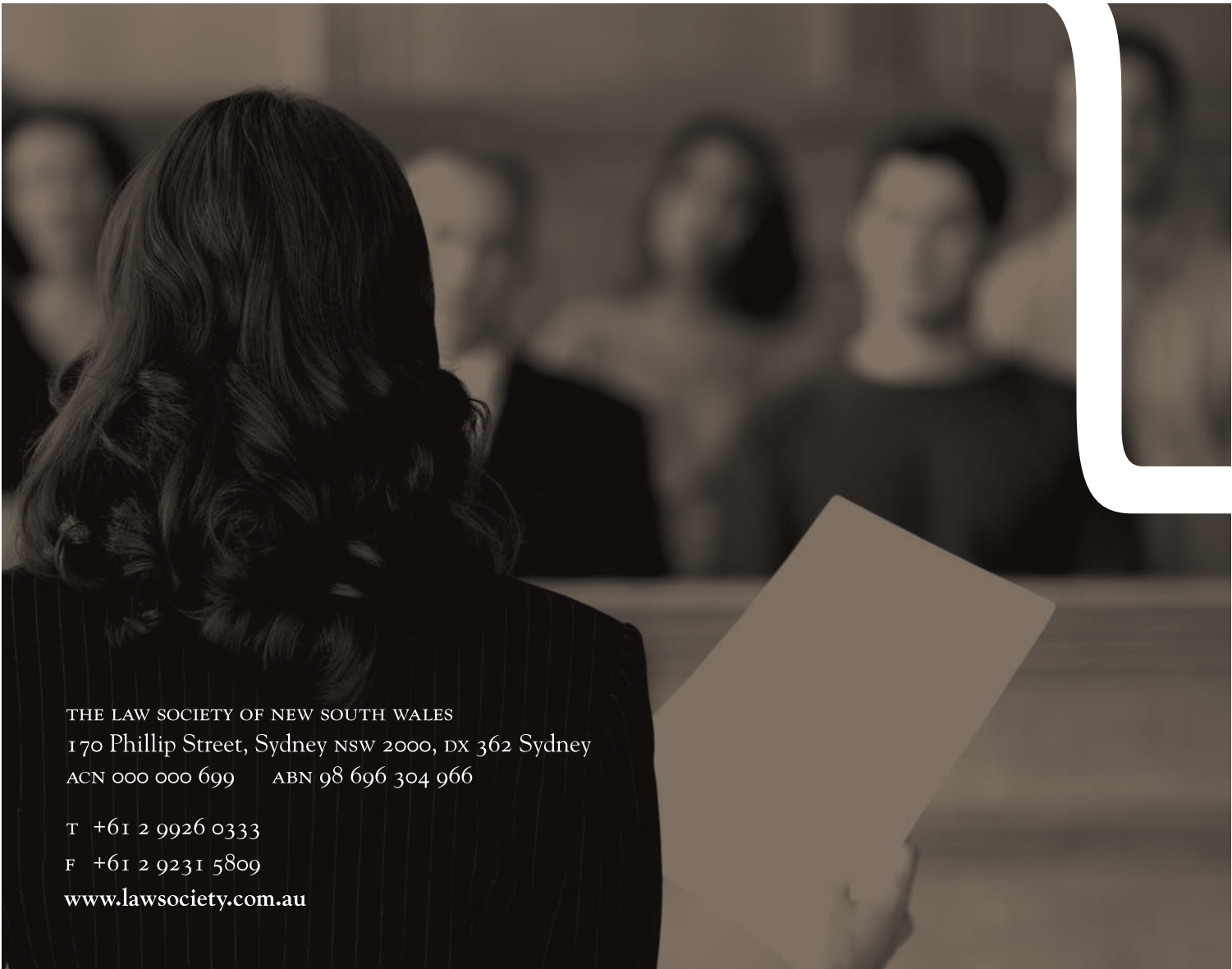
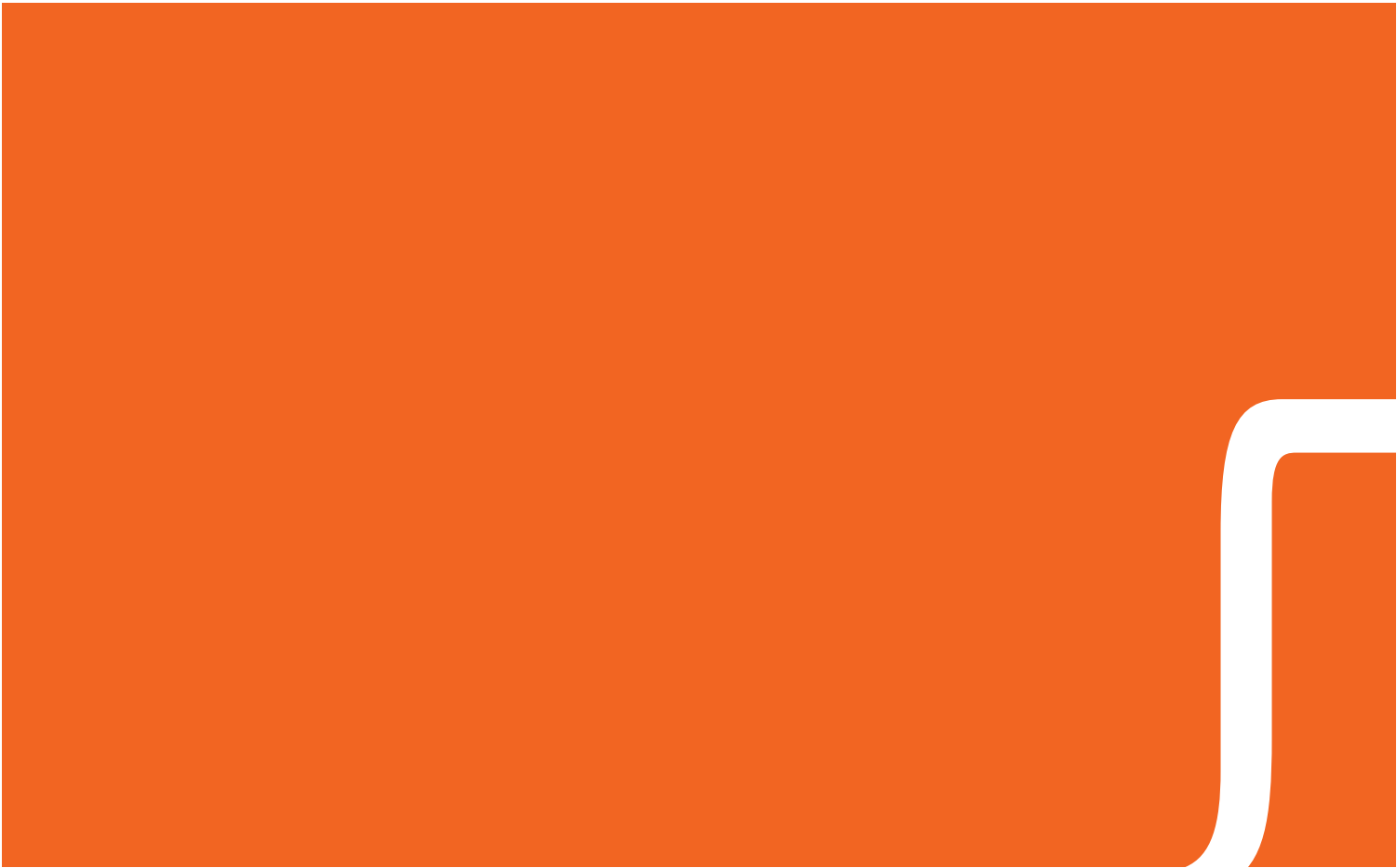
Start at www.lawsociety.com.au. Under the heading For the Community click on the link Finding a solicitor and select from:

- Pro bono scheme
- Find a lawyer
- Solicitor referral service

The New South Wales Bar Association

174 Phillip Street, Sydney NSW 2000
www.nswbar.asn.au

The legal and ethical obligations of a lawyer, with respect to their clients, the courts and other lawyers are generally well established. The obligations and best practice of a lawyer when dealing with another party who is self-represented can be less clear.



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