



THE LAW SOCIETY
OF NEW SOUTH WALES

Guidelines for solicitors dealing with self-represented parties

April 2006



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Foreword

The Council of the Law Society recognises the trend toward self-represented litigants appearing in courts and tribunals and that legal practitioners often face significant difficulties in dealing with them. This is occurring particularly in the Family Court where that court has pronounced guidelines for the benefit of its own judicial officers.

The Council also recognises similar difficulties for practitioners dealing with parties involved in non-litigious matters including conveyancing, probate and commercial matters who often act for themselves.

The New South Wales Bar Association's Guidelines for barristers dealing with self-represented litigants available on the Bar Association's website www.nswbar.asn.au (used and quoted with permission) are very useful for practitioners engaged in litigation. These guidelines are designed to assist practitioners deal not only with matters involving litigation but also with matters involving other than court or tribunal work.

Attached are information sheets for solicitors to send to the self-represented party on the other side of the matter.

I commend these guidelines to you as a useful guide.

A handwritten signature in black ink, appearing to read 'June McPhie', with a horizontal flourish underneath.

June McPhie
President

February 2006

Guidelines for solicitors dealing with self-represented parties

1. In litigation

- 1.1 Self-represented litigants fall generally into three categories:
 - a. the 'direct' self-represented opponent;
 - b. the 'unbundled' represented opponent (this is where the opponent is on record, but has sought advice on limited aspects of law or procedure, or a stage of the case); and
 - c. the client of a directly briefed barrister.
- 1.2. So far as the self-represented opponent is concerned:
 - a. ethically, a solicitor is bound to perform duties to the opponent, whether or not these are reciprocated (the general duties are set out in the information sheets for self-represented parties that form part of these guidelines);
 - b. a solicitor should deal with a self-represented party to the same standard as he/she would with a represented party;
 - c. solicitors should set the parameters for dealing with the self-represented party. Certain matters may need to be brought to the attention of the self-represented party, including that the self-represented litigant should communicate with the solicitor and not the solicitor's client, and preferably in writing. Other suggestions include that a solicitor may require an independent person to be available when negotiating with the self-represented party, and before concluding settlement, the solicitor should confirm the other party's understanding, and have this noted on the record by transcript or notation on orders or terms of settlement;
 - d. a solicitor can and should advance points and take all objections and make all submissions reasonably open to the solicitor in advancing their client's case.
- 1.3 Where a person engages a solicitor for a particular purpose, phase or task, the solicitors on both sides should ensure their retainers reflect this arrangement, and the solicitor engaged for a particular purpose should get on and off the record promptly.
- 1.4 The use of a legal practitioner for the full matter or for limited tasks is something that the solicitor should recommend to a self-represented party, as this is conducive to saving the time and costs of their own client. (See the articles on "Unbundling legal services" in *LSJ* July 2003 at www.law.society.com.au/page.asp?partid=7287 and www.lawsociety.com.au/page.asp?partid=7292.)
- 1.5 When dealing with an opposing party in an 'unbundled' matter, a solicitor should, prior to any communications or negotiations concerning an aspect of the matter, ensure that the party is not in fact represented in that particular aspect.
- 1.6 These guidelines are also applicable where a client directly briefs a barrister, and has to do the legal work of a solicitor which is forbidden to the barrister. Note that rule 31.3 of the Revised Professional Conduct and Practice Rules prohibits a solicitor from communicating with another solicitor's client, but "does not apply when the other party is represented by a barrister directly instructed by the party, and the barrister's retainer is so limited, in accordance with the rules of the NSW Bar Association, as to preclude the barrister from conducting correspondence on the party's behalf".

2. **Non-litigious matters**

2.1. Solicitors should be aware that there are many conventions of which lay people are not aware, and should consider taking the opportunity to explain these to the self-represented party as soon as possible, for example:

- compliance with reasonable requirements of public authorities, such as the OSR and LPI, or obtaining ministerial consent to sale.
- 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 undertaking. Enforcement of a lay person's undertaking may prove impossible.

3. **General issues**

3.1 The Revised Professional Conduct and Practice Rules 1995 (www.lawsociety.com.au/page.asp?PartID=574) and the Law Society's Statement of Ethics (www.lawsociety.com.au/page.asp?partid=547) require solicitors to act fairly and honestly towards the courts and tribunals, the profession and third parties, including opposing parties representing themselves in contentious and non-contentious matters.

3.2 Solicitors should instruct their staff on how to deal with a self-represented party.

3.3 Solicitors should explain, in all dealings with a self-represented party, that they are neither acting for nor providing advice to the party. □

Matters relevant to particular jurisdictions

A. Family Law

1. Harassment or embarrassment of a party or witness by a self-represented litigant.
 - a. Situations frequently arise, particularly in the family law or domestic relationships jurisdictions, where self-represented litigants 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 litigant, their cross-examination of the spouse or partner is likely to have this effect.
 - b. It is suggested 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 another (rules 35(c), 37, and 38, cross-examination on credit) apply just as much to a self-represented litigant – see for example, sub-section 41(1) of the *Evidence Act 1995*. In appropriate cases, an objection should be made on any of the specific grounds set out in paragraph 41(1)(b), i.e. “unduly annoying, harassing, intimidating offensive, oppressive or repetitive”. (“Guidelines for barristers on dealing with self-represented litigants”, p.10.)
2. In *re F: Litigants in Person Guidelines* [2001] FamCA 348 (4 June 2001), the duties of a Family Court judge are 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. (“Guidelines for barristers on dealing with self-represented litigants”, p.14.)”
3. Particular Family Court rules solicitors should enforce 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, including attempting to resolve the dispute using primary dispute resolution methods.
(subject to sub-rule (2))
- 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 Application for Final Orders (Form 1), 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 a Form 2, a party must make a reasonable and genuine attempt to settle the issue to which the application relates.
(subject to clause (2))
- 5.09(1) 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.
(2) If an application is for a parenting order, the affidavit mentioned in paragraph (1)(a) must be in the form approved by the Principal Registrar.
- 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.
(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.
(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 (Form 1A) – 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.
4. Solicitors should be ready to invoke sections 117(2A)(c) as to costs and 118 (frivolous or vexatious proceedings).
5. Undertakings should be formally recorded in the previous form 41A and filed with the court.

B. Land and Environment Court

There are many situations in this jurisdiction where self-represented litigants use the court proceedings to vent anger against a neighbour where neighbourhood relationships have broken down due to either:

- a. an unauthorised use or development of land by a next-door neighbour;
- b. the submission of a development application to council seeking approval to a development to which a neighbour has taken great objection, fearing a loss of amenity occasioned by overlooking, noise or some other impact on residential amenity; or
- c. a building encroachment which ultimately results in action in the Land and Environment Court under the *Encroachment of Buildings Act*.

Often, as a consequence, a self-represented litigant will use the court as a means of embarrassing or harassing neighbours through cross-examination or attempts to tender evidence of spurious value or truth.

Actions are also often brought in the court in class 4 of the court's jurisdiction by environmental groups who are represented by a spokesperson for the group bringing the action rather than a legal representative.

Objections should be made on any of the grounds set out in paragraph 41 1(b) of the *Evidence Act 1995*.

There are no particular rules or duties expressed by the court in relation to litigants in person, however, the court rules contain requirements generally in accordance with the duties of a Family Court judge expressed by the full court of the Family Court in *Re: F*.

Rules 5A, 5B, 5C and 6 of the Land and Environment Court Rules enable the court to make directions, manage cases and limit the time taken at hearings to ensure that the real issues between the parties and the proceedings are disposed of in a just, quick and cheap manner. The overriding purpose of the rules set out in rule 5A also apply to a party to proceedings (rule 5A(3)).

Solicitors should ensure that a self-represented litigant provides a name and address for service (part 4 rule 1(4)(d)). Solicitors should also be aware of rule 4A in relation to requests by unrepresented litigants for the issuing of a subpoena, i.e. leave of the court is required for the issuing of a subpoena unless the issuing party is represented by a solicitor.

Rule 8 provides that the court may order documents which are "scandalous, frivolous, vexatious, irrelevant or oppressive" to be struck out.

Solicitors should also note that pursuant to part 6 rule 1, certain of the Supreme Court Rules form part of the Land and Environment Court Rules in classes 1, 2 and 3 of the court's jurisdiction. In classes 1, 2 and 3, no security for costs of an appeal to the court is normally to be required other than in special circumstances (See part 13 rule 40). This is in respect of appeals to a judge of the court of the from a decision of a commissioner (s.56A).

Part 11 rule 7 provides that if certain elements are satisfied, the court may order a stay of further proceedings until costs are paid.

Section 69B of the *Land and Environment Court Act* provides for enforcement of directions of the court in certain circumstances to be endorsed by a person nominated by the court, and s.70 may be invoked in relation to a vexatious litigant.

The doctrine of abuse of process has also been held to apply to planning matters in the Land and Environment Court.

Authorities and references

- New South Wales Bar Association Guidelines for barristers on dealing with self-represented litigants available on Bar Association's website www.nswbar.asn.au (used and quoted with permission)
- Creation of tribunals with special rules and procedures to assist self-represented persons.
(*Burwood Municipal Council -v- Harvey* (1995) 86 LGERA 389).
- Criminal matters - no, or refusal of, legal assistance.
Kay (1998) 100 A Crim R 367
Batiste (1994) 77 A Crim R 266
Dietrich v R (1992) 177 CLR 292
(www.austlii.edu.au/au/cases/cth/HCA/1992/57.html)
- DPP Guidelines
www.odpp.nsw.gov.au/guidelines/guidelines.html
- Re F: Litigants in person Guidelines (Family Law) (2000) 22 FamCA 348.
www.austlii.edu.au/au/cases/cth/family_ct/2001/348.html



Information for self-represented parties in non-litigious matters

(Matters such as conveyancing, probate, commercial matters)

As a general principle, each party involved in the 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 to assist you in conducting your own matter.

What you can expect from the solicitor appearing 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 must 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 must be entered into in good faith.
- Where agreement is reached, it will be binding on both parties. It 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 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.

Useful sources of information

Court websites

Start at www.nsw.gov.au

Click on to Law & Justice

Click on to NSW Courts and Tribunals

Click on to Courts and Tribunals in NSW

Then select relevant Court website

- Administrative Decisions Tribunal
- Children's Court
- Compensation Commission
- Consumer, Trader and Tenancy Tribunal
- Coroners Court
- District Court
- Dust Diseases Tribunal
- Land and Environment Court
- Local Courts
- Supreme Court

The same site lists Federal Courts and Tribunals, including

- Administrative Appeals Tribunal
- Family Court of Australia
- Federal Court of Australia
- Federal Magistrates Courts

Community Legal Centres

Start at the Law Society website www.lawsociety.com.au

Click on to Information for the Public

Under the heading – Find a solicitor, select from

- Pro bono scheme
- Aboriginal Legal Services (also lists other specialist community legal services)
- Legal Aid – lists Legal Aid Commission offices, and conditions of representation
- Community Legal Centres in NSW

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The New South Wales Bar Association

174 Phillip Street, Sydney 2000

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Information for self-represented parties in litigation

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 the litigant must be able to demonstrate to the court how the facts of their 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.

It is in the interests of the administration of justice that courts and tribunals 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 in the jurisdiction.

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 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.

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 includes the obligation to bring to the court's attention any case law or legislation which might not support their client's case, but which might support your case. However in civil cases (that is, non-criminal cases) the solicitor does not have to bring to the court's attention any evidence (such as an expert's report) which does not support their client's case, or evidence which supports your 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.

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