The New South Wales Bar Association

Guidelines for barristers on dealing with self-represented litigants

October 2001

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Foreword

The preparation of these guidelines reflects the increasing phenomenon of litigants appearing without legally qualified representation.

The courts have recognised the considerable increase in numbers of self-represented litigants. In 2000, the Family Court issued a Research Report, *Litigants in Person in the Family Court of Australia*, which highlighted the difficulties caused by increasing self-representation before that court. More recently, the Australian Institute of Judicial Administration issued a report, *Litigants in Person Management Plans: Issues for Courts and Tribunals*, which also explored the issue.

The need for guidelines such as these was brought home to me when talking with barristers, particularly in the family law jurisdiction, who noted how stressful it was to deal with litigants in person. I hoped that a preparation of guidelines such as these would enable members of the Bar to identify clearly the parameters within which they should work when dealing with self-represented litigants.

The guidelines have been prepared under the auspices of the NSW Bar Association's Family Law Committee, but principally though a great deal of hard work by Brian Knox. Knox consulted widely in undertaking the exercise. In addition, the penultimate version of the guidelines was distributed for comment to the High Court, the Supreme Court of NSW, the NSW Industrial Relations Commission, the NSW Land and Environment Court, the District Court of NSW, the Compensation Court of NSW, the Local Court of NSW, the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Service for comment. The Association is grateful to those courts for the input from them we received in relation to the guidelines.

I commend a thorough reading of these guidelines to all members. I congratulate the Family Law Committee and, in particular, Brian Knox, on producing a work of outstanding assistance to the Bar.

Ruth McColl S.C.
President

New South Wales Bar Association

Guidelines for barristers on dealing with self-represented litigants

Objective and functions

1. The NSW Barristers' Rules ('the Rules') made pursuant to s57A of the *Legal Profession Act 1987* (NSW) ('the Act') set out the duties and responsibilities of barristers in dealing with, amongst others, the courts and other parties. The guidelines should be read subject to those rules and should be viewed, not as additional rules imposing obligations, but as a method of assisting barristers in those circumstances where particular issues may arise out of their dealings with self-represented litigants. Under s38G of the Act, practice is subject to the rules, it is not subject to guidelines.

Duties of barristers

2. Subject to the paramount duty of honesty to the court (rule 21), a barrister's primary duty is to his or her client (rule 16). These guidelines suggest that the long term interests of clients are best served by a barrister observing rules which facilitate a fair hearing. There is little point for a client in achieving a result which, for example, is set aside on appeal on the basis that the self-represented litigant was denied natural justice or, for example, in a family law context, that the guidelines established by the Full Court of the Family Court in *Johnson v Johnson* (1997) FLC 92-764; (1997) 22 Fam LR 141 for dealing with self-represented litigants were not followed. For similar guidelines in other jurisdictions, see *National Australia Bank v Rusu* (1999) 47 NSWLR 309; *Santamaria v Administrative Appeals Tribunal; Department of Human Services* [1998] VSC 107.

3. Various rules may have the potential to raise problems for barristers in dealing with self-represented litigants, for example, the general obligation on a barrister not to confer or deal with directly the party opposed to the barrister's client (rule 55). Similarly, there is an obligation on a barrister to avoid doing anything which might make the barrister a witness in the case. This may cause difficulties where a barrister deals directly with a self-represented litigant (rule 76), for example, in the conduct of settlement negotiations if there is an issue about what was or what was not said (see – 'Settlement negotiations' paras. 76-79).

Barrister's assessment of the self-represented litigant

4. In large measure, the way in which a barrister pursues his or her various duties will depend on his or her assessment of the litigant, the litigant's understanding of the case, the nature of the case, the stage to which the hearing has progressed and the implications for the barrister's client - and the client's interests - of the course of action pursued by the self-represented litigant.

5. Such factors are appropriate matters to be taken into account by a trial judge in dealing with a self-represented litigant – see *Abram v Bank of New Zealand* [1996] ATPR 41-507. The courts will also take into account the requirement to prevent the unnecessary expenditure of public and private resources – see Mahoney AP in *Corporate Affairs Commission of NSW v Eddie Solomon Holdings Inc.* (Unreported CA NSW 1 November 1989 at 8).

Barrister's assessment of the impact of the self-represented litigant

6. A barrister needs to be aware of the impact that the self-represented litigant is having, or is likely to have, on the other participants in the court process. It is almost impossible to predict either the circumstances or the reactions of the various parties and in most cases the ability to judge these issues will depend on the experience of the particular barrister.

7. A summary of some of the common areas for complaint and difficulty are set out below. Much of this material is taken from the 'Litigants in person in the Family Court of Australia', in *Family Court of Australia research papers*, by Professor John Dewar, Barry Smith and Cate Banks, pages 49-54.

Impact on the barrister's client

8. Usually a barrister will be aware of the reactions of her or his own client, particularly where, in the family law/domestic relations jurisdictions, the proceedings may be seen as 'the continuation of war by other means'. Commonly the reaction is one of frustration and anger, particularly when the self-represented litigant seeks to cross-examine the barrister's client and has used the knowledge gained over the years of the marriage/relationship to hone to perfection the ability to 'press the buttons' of his or her spouse (see below: 'Harassment/embarrassment of a party/witness', paras 50 - 51).

9. In the context of a case where inflammatory material has already been filed or belligerent or offensive behaviour has previously been manifested, a barrister should explain the likely procedures of the court. It may be advisable that the barrister prepare his or her client well in advance on the desirability of not over-reacting to questions clearly designed to antagonise or upset the client.

10. A barrister should also be aware of a possible resentment by his or her client that he or she is having to pay legal fees (which are often increased by the activities and attitudes of the self-represented litigant), while the court is perceived as bending over backwards to be more than fair to the self-represented litigant. These perceptions, and questions from the client such as 'Why is the judge helping them so much?', can be minimised by proper communication with the client at the first available opportunity.

11. There can also be frustration and annoyance at the fact that settlement chances are usually significantly reduced in cases where a self-represented litigant is involved. In the family law jurisdiction the starting point as to costs under s117 (1) of the *Family Law Act 1975* (Cth) is that each party meets his or her own costs. It is suggested that a barrister, when faced with an unreasonable self-represented litigant, take particular steps to be acquainted with the provisions of paragraph 117 (2A) (c) ('the conduct of the parties to the proceedings…') and s118 (frivolous or vexatious proceedings). Similar discretionary considerations can arise in dealing with costs matters in other jurisdictions.

Impact on the judicial officer

12. The principal effect on the judicial officer of a matter involving a self-represented litigant is to increase the time spent on the case before and during the hearing. Other effects reported (Family Court Research Paper, op cit., p. 51) include more delays, more adjournments, more judicial work, cases not being heard, frustration, anger at staff (errors in documents, lost documents) increased stress and raised blood pressure for judges.

Impact on the court system

13. The general impact is one of increased demand on time, costs and resources. Often decisions involving self-represented litigants need to be documented to a greater degree. There is a problem for all court personnel - ranging from judges to counter officers to court officers - of not being able to give legal advice while still explaining procedures. Cases involving self-represented litigants frequently involve more mentions and return dates as well as more administrative tasks. When asked to estimate the length of a future hearing or trial, counsel should bear in mind that a self-represented litigant will often add to the length of the hearing

14. Barristers should also be aware of whether the particular case is likely to involve a party who is, or is perceived to be, either vexatious or violent and, where necessary, make sure the appropriate notifications are made through the proper channels and at the appropriate time. Most courts have a protocol which should be followed in such situations.

15. Different courts and tribunals have different approaches to, and expectations of, self-represented litigants. Kirby P (as he then was) referred to the trend towards the 'creation of expert tribunals with specialised judges and other members, novel standing rights and modified procedures aimed to facilitate, if not actually encourage, persons to pursue, or defend, their legal rights without the necessity of securing qualified legal practitioners to represent them.' *(Burwood Municipal Council v Harvey* (1995) 86 LGERA 389; [CLS 1995 NSWSC CA 51]).

16. Some tribunals, such as the Administrative Appeals Tribunal, were established to deal with significant numbers of people who were not expected to obtain legal advice and representation before approaching the tribunal. Such tribunals have often designed different systems specifically for cases involving self-represented litigants. One of the rules for survival for any barrister is to be aware of the culture, systems, expectations and rules (written and unwritten) for the court or tribunal in which he or she appears. In this area, it is doubly important for a barrister who ventures into a court or tribunal, new to him or her, where opposed by a self-represented litigant, to check whether there are any different approaches or systems for self-represented litigants which might affect the conduct of the case.

Impact on the self-represented litigant

17. Most research indicates that self-represented litigants experience stress, frustration, desperation, heightened emotions, feeling intimidated and frightened, disadvantaged, angry, fearful, anxious and bitter. It is suggested that a barrister needs to be aware that, in these circumstances, the need to act professionally and courteously – often to the extent of 'turning the other cheek' – is necessary to avoid both confrontation and complaint.

18. Often, self-represented litigants are suspicious of the independence of judges and lawyers and are resentful that they are unable to receive help from legal aid, the legal profession or from the court itself (which is often perceived as a publicly funded body which should be there to provide assistance).

Impact on the barrister

19. Generally cases involving self-represented litigants are more difficult and require more inter-personal skills of patience and adaptability on the part of the barrister. Barristers need to retain their objectivity and commitment to their various duties and obligations notwithstanding the frustration experienced, for example, when the motives of a self-represented litigant may be seen to be other than the pursuit of justice. This can occur, for example, in a migration case where the objective of the self-represented party may be to purely delay the proceedings to delay and/or frustrate a final decision.

20. Similarly, where a self-represented litigant is obsessed by the litigation and is unable to exercise rational judgment in relation to the dispute, great care needs to be taken not to become embroiled in apparently personal attacks or criticisms which may emanate. In such circumstances, it is suggested that any refutations of comments made occurs in as professional and non-personalised way as is possible.

Assessment or comment on motive of a self-represented litigant

21. As is noted at page 36 of the Research Paper referred to above (para 7), the reasons for not employing a lawyer are both complex and cumulative and, in the majority of cases, at least one of the reasons is usually financial. There can be a tendency to draw a distinction between those who choose to represent themselves and those who are forced to represent themselves. In a recent English decision, *In re an Inquiry into the Mirror Newspaper Group Newspapers PLC* [2000] Ch 194, Sir Richard Scott V-C said (at 218 – G)

> There is no relevant difference, in my view, between the position in which he [the self-represented litigant] is unable to fund his legal representation and the position in which he is unwilling to do so, preferring to keep his money for other things.

That case apparently proceeded on the basis of an assertion that the self-represented litigant could not afford legal representation, although there was no evidence to that effect.

22. It is not the function of the barrister to be influenced in his or her conduct of the case by any judgment he or she might make about the motives the self-represented litigant may be pursuing in appearing at court without legal representation. Not all self-represented litigants are a problem and should not be seen as such. Such judgments and any consequential submissions, if they are to be made at all, should be left to an appropriate stage of proceedings – for example, on a costs application.

23. Moreover, self-represented litigants have a right to appear in that manner and capacity - see *Judiciary Act 1903* (Cth) s78 and *Collins (aka Hass) v The Queen* (1975) 133 CLR 120 per Barwick CJ, Stephen, Mason and Jacobs JJ at 122; *Burwood Municipal Council v Harvey* (1995) 86 LGERA 389 per Kirby P.; Federal Court Rules O4, r 14(1); NSW Supreme Court Rules Pt 4 r 4.4. In some areas, while the individual may appear for himself or herself, a related party may not so appear as of right. For example, in commercial litigation where an individual and his or her company are parties, there may be a requirement that leave to appear be obtained for the corporation.

Decline of offer of legal assistance: criminal cases

24. Moreover, in a criminal context, it is to be remembered that an accused does not become disentitled to a fair trial because he or she has declined (even perversely) an offer of legal assistance: *MacPherson v R* (1981) 147 CLR 512 at 525. See also L Byrne and CJ Leggat, 'Litigants in Person' (1999) 19 Aust Bar Review 41. When considering an application for a *Dietrich* stay, the court will take into account whether the defendant has made reasonable attempts to obtain legal representation: *Kay* (1998) 100 A Crim R 367. If the defendant cannot satisfy the court that the absence of legal representation has occurred through no fault of their own, a stay will not be ordered: *Batiste* (1994) 77 A Crim R 266.

Dealing with self-represented litigants: stages of proceedings

25. Litigants may choose to be or become self-represented or obtain representation at different stages of proceedings. That can cause difficulties for a barrister who, for example, relies on an assurance or undertaking given to him or her by a professional opponent who then no longer appears for the party. The self-represented litigant may then deny knowledge of, or claim not to be bound by, the undertaking or assurance - for example, that a witness need not be called at the final hearing for cross-examination. Once a barrister learns that a party is no longer represented, it can be advisable to review the brief and notes of proceedings etc., and, if appropriate, confirm any such undertakings or assurances or have a copy of the transcript available when such an undertaking /assurance was given, hopefully with the (now unrepresented) party then in court.

26. Some of the stages and circumstances in which a barrister may be involved with self-represented litigants, which may lead to difficulties, are as follows:

Before hearing

Failure to comply with case management/procedural orders

27. Sometimes self-represented litigants are either ignorant of, or contemptuous of, the effect of interlocutory orders made by way of case management. Those are no less orders of the particular court and 'it is not for litigants, appearing in person or otherwise, to pick and choose which orders they will obey, or when they may condescend to comply with them': *Tate* (2000) 26 Fam LR 731 at 746. That decision also provides a comprehensive outline of the relevant rules relating to discovery of the High Court, the Federal Court, the Family Court and the English Supreme Court (at pp.741-744) and the penalties for non-compliance for an order for discovery. In that case, the non-compliance with the orders for discovery, delays and other behaviour of the self-represented litigant had led to orders being made for the ultimate hearing to proceed on an undefended basis. When the self-represented party arrived at the hearing and sought to appear and cross-examine, that application was refused and the refusal upheld on appeal.

28. Where a self-represented litigant refuses to comply with procedural orders, and particularly where there is a demonstrable flavour of truculence or contempt about the non-compliance, experience (as well as the barrister's client's interests) suggests that those actions or inaction be brought to the attention of the relevant court sooner rather than later. It is suggested that the barrister arrange for his or her solicitor to have the self-represented litigant notified in writing of the orders which have been made, the non-compliance alleged, the impact on the litigation to both the client and the court program, that costs will be sought against the self-represented litigant and the quantum of those costs.

29. As a general proposition, it is prudent to communicate by way of an open letter to minimise any potential disputes as to the content of communications and so that the matter can be tendered and quickly summarised in court.

Anticipation/notification of issues which may arise at hearing

30. The fact that an opponent is self-represented does not mean that the conduct of the case will be made easier or the issues less complex. Often the reverse is the case. The best service a barrister can render to his or her client when opposed to a self-represented litigant is to ensure that every stage of the litigation is meticulously prepared and presented. It is particularly necessary in such cases to avoid any suggestion, let alone reality, of 'trial by ambush'.

31. By way of example, there is probably no strict requirement that a barrister notify a self-represented litigant of submissions which may be made or evidentiary matters which may arise in a hearing prior to the hearing. In criminal trials, there is no obligation on a prosecutor to advise an accused of a legal issue which may arise during the hearing – see *Dietrich v R* (1992) 177 CLR 292. However, common sense would dictate that a trial judge is likely to grant an adjournment where the submission or issue, when raised, will obviously be new to the self-represented litigant. A barrister should anticipate such an application by providing the self-represented litigant with notice of any major matters to ensure the hearing proceeds as expeditiously as possible. For example, in the event that a barrister is to refer to an authority in the hearing, it is suggested that he or she have his or her solicitor provide the self-represented litigant with a copy of that authority to forestall an inevitable adjournment for the self-represented litigant to consider the authority.

Service of material: criminal matters

32. In criminal matters it is necessary for a prosecutor to serve on an accused all material which may be relevant to the guilt or innocence of an accused (rule 66 of the NSW Barristers' Rules). However, when providing such material the prosecutor should be particularly careful to ensure that inappropriate material (such as the address of a witness under the witness protection scheme) is not made available to a self-represented accused. Prosecutors should also be careful to ensure that a self-represented accused in custody will be able to access the material provided. For example, if cassette tapes are provided, the accused must have access to a cassette player. If the self-represented accused does not speak English, documents should either be translated, or the accused should have access to an interpreter.

Likely non-appearance of self-represented litigant

33. In some cases it may be anticipated that a self-represented litigant will not appear at the hearing or that there will be non-compliance with any orders made. In such circumstances a barrister might suggest that machinery provisions will be necessary as part of the orders sought, for example, to have a registrar appointed to sign documents on behalf of the other party. In that event, it would be particularly advisable to notify a self-represented litigant of any proposed amendments to the orders sought, as well as the effect of the orders sought, well in advance of the return date and to be able to prove service of that notification.

Confirmation of non-representation: criminal matters

34. In criminal matters, it is advisable for a prosecutor appearing against an unrepresented accused to have the matter listed for mention so that the accused can confirm that he or she does not desire legal representation. This enables the Bench to advise the accused of the desirability of obtaining legal representation and avoids an application for an adjournment on the day of the hearing based on that ground. For a practical guide, see R Cogswell and P White, *Prosecuting a Case where there is an unrepresented defendant or accused*, (Unpublished paper, 3 November 1992) (copy in Bar Association Library).

35. The prosecutor should also check that there has been no appeal against any decisions to withdraw legal aid which could operate as a statutory stay if not noticed before the hearing date.

Interlocutory proceedings

36. Research shows that, in cases involving self-represented litigants, a great deal of time of the courts (and often that of the opposing party) is taken up at preliminary /interlocutory stages when the self-represented litigant's lack of legal knowledge and, on occasions, lack of judgment about the case and the evidence become apparent.

37. It is suggested that to avoid future problems in the litigation pathway, the barrister ensure the self-represented litigant is sent a copy of the orders which have been made. Depending on whether there has been a history of difficulties either experienced or caused by the self-represented litigant – for example, of non-compliance with existing orders – it may also be advisable to ensure that the orders be accompanied by a letter setting out what action, orders etc., will be sought on the next occasion that the matter is before the court.

38. In criminal matters, the trial judge must inform the unrepresented accused of his or her right to a *voir dire* where an issue arises that should be determined in the absence of a jury (such as voluntariness of a confession): *MacPherson v R* (1981) 147 CLR 512. Prosecuting counsel should peruse the evidence carefully before the opening address in order to ascertain whether there are any issues that would be appropriately dealt with on a preliminary *voir dire*.

39. Where the barrister comes to the view that the entire action by a self-represented litigant is misconceived or, for example, that there is no evidence to support the action being maintained by the self-represented litigant, a barrister may be asked to advise on whether a strike-out application should be brought. The barrister should be aware that the reluctance on the part of some judges to entertain such actions is often increased when the opposite party is a self-represented litigant. Depending on the circumstances, it may be better in such cases to seek that the hearing be expedited.

40. The barrister should be aware that some judges may suggest an amendment to a pleading necessary to establish a cause of action – for example, on a strike out/ summary dismissal application – see *Wentworth v Rogers* (No 5) (1986) 6 NSWLR 534 at 536; *Morton v Vouris* (1996) 21 ACSR 497 at 513-4. The latter case also contains (at p. 520) a practical outline of the difficulties barristers may experience when faced with a self-represented litigant who

> is prepared to make extravagant allegations without deigning to provide particulars (including allegations of misconduct on behalf of judicial officers). He is effectively immune from the constraints imposed by a potential or actual costs order. On his own evidence, he has no means to satisfy a costs order.

In that case the trial judge, Sackville J, made orders granting the plaintiff leave to apply to amend a statement of claim, provided the application for leave was accompanied by affidavits in appropriate form showing there were facts which could probably be proved and which, if proved, would support the general statements made in the statement of claim.

41. An analogous situation can occur in the commercial list where, for example, a party with a dubious defence may be required at an early stage to put on an affidavit of all relevant facts and circumstances comprising that defence to 'flush out' a defendant who simply wants to deny everything. A suggestion has been made that it is appropriate to seek an order that an objectionable application/pleading etc. be stayed until the amendment is certified as having been settled by a legal practitioner. Such an application may well conflict with the right of a party to appear on a self-represented basis.

Adjournment applications

42. Self-represented litigants often ask for an adjournment either prior to or during proceedings in circumstances where it may be thought that the reason for the adjournment is very much the fault of the self-represented litigant himself or herself. Barristers should be aware that the discretion to grant an adjournment is very much an unfettered one, which must be exercised judicially and not according to whim or fancy – *Watson v Watson* [1968] 2 NSWR 647 at 652. The determination of an adjournment application is likely to be made more expeditious (and possibly more successfully for the barrister's client) if the barrister prepares for tendering to the court a chronology of past orders, directions and breaches which have occurred supported, for example, by relevant correspondence.

43. Some courts will apparently grant an adjournment application more readily when such an application is made by a self-represented litigant. – see *Jarrett v Westpac Banking Corporation* [1999] FCA 425 (Unreported, Federal Court (Full Court) 16 April 1999), Appellate courts are particularly concerned to ensure that self-represented litigants are given every opportunity to explore the rights which they may appear to have – see *Dawson v DCT* (1984) 56 ALR 367 at 368 (Full Court of the South Australian Supreme Court).

44. A barrister acting for the other party should be prepared to argue the merits of the application in terms of the notice the self-represented litigant had of the proceedings and, for example, any requirements to file evidence and the prejudice to his or her client arising from the adjournment.

45. As to whether a self-represented litigant should be allowed an adjournment to call witnesses - and whether there is an obligation on the court to inquire of a self-represented litigant as to the reasons for the failure to properly prepare his or her case - see *Titan v Babic* (1994) 49 FCR 546 at 554-5.

During hearing

46. The overwhelming obligation is on the court to ensure a fair hearing. In meeting that obligation, the role of the court is to:

> prevent destruction [to self-represented litigant] from the traps which our adversary procedure offers to the unwary and untutored. But the court should be astute to see that it does not extend its auxiliary role so as to confer upon a litigant in person a positive advantage over the represented opponent… an unrepresented party is as much subject to the rules as any other litigant:

per Samuels JA in *Rajski v Scitec Corporation Pty Ltd* (Unreported, NSWCA, 16 June 1986). See also Mahoney JA:

> But the court will be careful to examine what is put to it by a party in person to ensure that he has not, because of the lack of legal skill, failed to claim rights or to put forward arguments which otherwise he might have done.

(approved by the Full Federal Court in *Minogue v Human Rights and Equal Opportunity Commission* (1999) 166 ALR 129)

Raising irrelevant matters/submissions not justified on the evidence

47. A common complaint is that judges extend too much leniency to self-represented litigants in making submissions. There is sometimes a perception that judges take the line of least resistance and let the self-represented litigant 'get it off his or her chest' in circumstances where the barrister's client has been advised that the very matters which are the subject of address by the self-represented litigant are irrelevant or inadmissible. In appropriate cases it is part of a barrister's function to draw the court's attention to an attempt to raise irrelevant issues or to seek to put on evidence or make submissions which go outside the terms of the pleadings or the evidence.

48. It is suggested that where a self-represented litigant goes beyond the evidence in making submissions, a barrister should bring that to the attention of the court. The Rules (rule 36) prevent a barrister making any such submission (which exceeds the evidence) on his or her client's behalf. That rule is designed to protect the administration of justice in ensuring that courts are not misled and that court time is not wasted. In appropriate cases, a barrister should seek that a similar obligation be enforced in relation to self-represented litigants. For example, the court might be asked to remind the self-represented litigant that submissions, unless supported by admissible evidence, will not be taken into account by the court in reaching its decision.

49. It has been held that a judge is entitled to object to evidence on behalf of a self-represented litigant rather than simply advising the self-represented litigant of his or her right to object – see *National Australia Bank v Rusu* (1999) 47 NSWLR 309 at 311. Conversley, it has also been held in *Re F: Litigants in Person Guidelines* 27 Fam LR at 544 and 551 that a judge may provide general advice to a self-represented litigant that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise. In that case, the judge pointed out that the self-represented litigant's affidavit was replete with clearly inadmissible material, largely of a hearsay nature and gave examples. The judge said that, rather than go through with the whole of the affidavit, he preferred to proceed upon the basis that he would take no notice of other matters that were clearly inadmissible. On appeal, the self-represented litigant argued that he was entitled to know which portions of his affidavit were inadmissible. The Full Court held that the judge's obligation did not extend that far and that it was sufficient if the judge advises the self-represented litigant generally as to the sort of evidence that would not normally be admitted. A barrister faced with an affidavit containing such inadmissible material may consider it advisable to take a general objection at the commencement of the relevant part of the hearing and specific objection areas of the evidence which are substantial importance to the cases that there can be no suggestion that the self-represented litigant did not know the evidentiary basis on which the case is proceeding.

Harassment/embarrassment of a party/witness by a self-represented litigant

50. There are frequently situations, particularly in the family law/domestic relationships jurisdictions, where self-represented litigants use the court proceedings as an opportunity to embarrass/harass their former spouse/partner. This may not be deliberate. However, regardless of the intention of the self-represented litigant, cross-examination of the spouse/partner is likely to have this effect.

51. It is suggested that the rules which prevent barristers 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) ie. 'unduly annoying, harassing, intimidating offensive, oppressive or repetitive'.

Excessive time taken in submissions or addresses

52. Again, there are specific rules requiring barristers to limit evidence including cross-examination 'to that which is reasonably necessary to advance and protect the client's interests' and to 'occupy as short a time in court as is reasonably necessary to advance and protect the client's interests which are at stake' (rules 42(d) and (e)). While it is a matter of judgment as to when the issue of delay, excessive length of submissions is brought to the attention of the trial judge, the maxim 'people who live in glass houses etc.,' is of particular relevance in this area.

Failure to call evidence

53. It has been suggested that a barrister should bring to the court's attention the fact that the self-represented litigant has not called evidence essential to his or her case prior to the conclusion of the case *Laferla v Birdon Sands Pty Ltd*. (Unreported, SCNT, per Mildren J, 21 August 1998 at 14). However, it has been suggested that this decision does not represent the law in NSW and should not be followed – see 'Litigants in person: procedural and ethical issues for barristers', Louise Byrne and Craig Leggat, (1999) 19 Aust Bar Rev 41. A judge's sympathy may be aroused if he or she forms the view that the self-represented litigant may have a sound case but that there are some gaps in the pleadings or presentation caused by a lack of knowledge of legal procedures. However, if it can be pointed out to the judge that the gap simply cannot be filled, that will be to the benefit of the barrister's client.

54. In criminal proceedings, it has been held that an unrepresented accused is obliged in certain circumstances to comply with the *Browne v Dunn* rule, but such an accused must be warned about the existence of the rule before comment: *R v Zorad* (1990) 19 NSWLR 91. In that case, the Court of Criminal Appeal (Hunt, Enderby and Sharpe JJ) also referred to the fact (at p. 99) that the judicial duty was to make the choice of rights apparent to the accused but not to tell him how to exercise those rights.

55. A counsel is under no obligation to volunteer information favourable to a self-represented litigant unless, by not doing so, the court is left with an erroneous view of the evidence or the law. Rule 23 sets out the obligation on counsel to correct express concessions made by an opponent (including a self-represented litigant) in relation to any material fact, case-law or legislation if the barrister believes the concession was in error and there is knowledge or reasonable belief of that error.

56. A prosecutor's duty in a criminal matter is more stringent, requiring counsel to 'assist the court to arrive at the truth' (NSW Barristers' Rule 62). In particular, prosecuting counsel does have a duty to correct any error made by an accused (represented or unrepresented) in submissions on sentence (NSW Barristers' Rule 71).

Confusion between evidence and submissions

57. Many self-represented litigants do not appreciate the distinction between making submissions and giving evidence. The Court of Appeal in *Randwick City Council v Fuller* (1996) 90 LGERA 380 made it clear that the procedure of allowing a litigant in person, even without objection, to say in court what he or she wants to say by way of evidence, from the bar table and without oath or affirmation, is irregular and should not be permitted. The Court also said that the litigant should be made to understand that if the course of giving sworn evidence is adopted, he or she will be exposed to cross-examination to test whatever they have said by way of evidence.

Duty of a barrister both to the court and to his or her client

58. A barrister's paramount duty is to the court which may operate to the potential disadvantage to his or her client, for example, not misleading the court or withholding documents and authorities which detract from the client's case - see *Giannarelli v Wraith* (1988) 165 CLR 543 at 556. See also the authorities where silence may be characterised as misleading – see *Commonwealth Bank of Australia v Mehta* (1991) 23 NSWLR 84 at 88; *Demagogue Pty Ltd v Ramnesky* (1992) 39 FCR 31 at 32.

59. This can cause difficulties if, for example, a judge, in a case involving a self-represented litigant asks a barrister representing the other party to explain the self-represented litigant's case as well as his or her own case. A barrister is under no obligation to make any representations on behalf of, or take action on behalf of, the other party.

Duty of barrister: conduct and language

60. It is suggested that a barrister should avoid conduct and language which indicate a familiarity with the judge to an extent where there is an appearance of unfairness or imbalance (rule 61). That duty needs to be observed punctiliously where a self-represented litigant is involved.

61. In similar vein, care needs to be taken to ensure that the language used does not confuse a self-represented litigant. For example, the use of abbreviated terms suggesting a form of 'insider' knowledge is inappropriate or, indeed, any legal jargon which a self-represented litigant would find confusing and which may often incur resentment both to the party and to the judge who then has the task of translating the jargon into comprehensible language.

(Language such as 'Your Honour, we're here today on a Form 8 application coupled with a Form 49, which should take precedence' can only lead to the complete mystification of a self-represented litigant or, probably, anyone. The problem is exacerbated where the self-represented litigant does not speak English and an interpreter is required.)

Duty of barrister: role of the court in case involving self-represented litigant

62. Various appellate courts have set out the duties of judges and tribunal members at first instance in dealing with and giving assistance to self-represented litigants. One of the factors which will determine the extent of these duties is the existence of any particular evidentiary requirements binding on the court or tribunal – for example, if a tribunal or commission is bound by the rules of evidence or in the words of a formula often used, the court or tribunal can 'inform itself of any matter in such manner as it considers just.' – see s110(2) of the *Workplace Relations Act 1996* (Cth).

63. The Full Bench of the Australian Industrial Relations Commission set out guidelines for members as to the assistance which could be provided by members of the Commission in *Davidson and Aboriginal and Islander Child Care Agency* (Unreported, AIRC, 12 May 1998) 534/98 as follows (at p 9):

> The assistance provided by a member may, depending on the circumstances, include:
>
> (i) identifying the issues which are central to the determination of the particular proceedings;
> (ii) drawing a party's attention to the relevant legislative provisions and key decisions on the issues being determined;
> (iii) asking a party questions designed to elicit information in relation to the issues which are central to the determination of the particular proceedings;
> (iv) assisting a party to conform to the *Brown* v *Dunn* principle and other procedural rules designed to avoid unfairness; and
> (v) drawing a party's attention to the relative weight to be given to bar table statements as opposed to sworn evidence.
>
> A member may also intervene, to an appropriate extent, by asking questions of witnesses. Such a role is appropriate in the following circumstances:
>
> (vi) to clear up a point that has been overlooked or left obscure;
> (vii) to obtain additional evidence to better equip the member to choose between the witnesses' versions of critical matters;
> (viii) to exclude irrelevancies and discourage repetition;
> (ix) to ask admissible questions which a party is unable, for the moment, to formulate; and
> (x) to facilitate expedition in the progress of the proceedings.

64. It was also stated that the role of a member in asking questions of a witness may be 'greater where a party is unrepresented or ineptly represented'.

65. The duties of trial judges in Family Court proceedings involving a self-represented litigant were set out by the Full Court in *Johnson v Johnson* (1997) FLC 92-764; and *Re F: Litigants in Person Guidelines* (2000) 22 FamCA 348; 27 Fam LR 517. A barrister needs to be familiar with those obligations as it is clear that, unless they are complied with, a judgment emanating from a hearing carried out contrary to those guidelines is liable to be set aside on appeal.

66. Essentially those steps as outlined by the Full Court are:

(i) 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.

(ii) 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.

(iii) A judge should explain to the litigant in person any procedures relevant to the litigation

(iv) A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation.

(v) 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 unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object that course.

(vi) A judge may provide general advice to a litigant in person that he or she has the right 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.

(vii) 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 priviledge, to inform the litigant of his or her rights.

(viii) 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 obfuscated: *Neil v Nott* (1994) 121 ALR 148 at 150.

(ix) 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.

67. The Full Court added that the list was 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.

68. The increasing trend towards self-representation is one of the pressures leading to the suggestion that a judge's role may need to change from that of 'an umpire presiding over an adversarial contest' to a more interventionist or inquisitorial role – see 'Litigants in person, unreasonable and vexatious litigants', in *Review of the civil and criminal justice system*, Law Reform Commission of Western Australia, p. 154.

69. The adoption of a more inquisitorial role in cases where there is one or more self-represented litigants is more likely to be the case where a specific duty is imposed on the judge to look to protect interests beyond those of the parties to the proceedings. For example, in children's matters the court must look to the best interests of the child. Where there is no separate representative for the child, and particularly where there are one or more self-represented litigants, the court's role may need to go beyond that of 'the umpire in an adversarial dispute'.

Duty of barrister: conduct of judicial officer in case involving self-represented litigant

70. The judge's obligation is to ensure that he or she does not intervene to such an extent that he or she cannot maintain a position of neutrality in the litigation - see *Minogue v Human Rights and Equal Opportunity Commission* (1999) 166 ALR 129.

71. The judge should not give legal advice to a self-represented litigant. This is because such an approach may not only give the appearance of unfairness to other parties but also it may be given without full knowledge of the facts - see *Johnson v Johnson* (op cit.)

72. There is a distinction between explaining procedural choices available and advising what decisions to make. For example, a judge may explain the form of questions to be asked but should not put the questions into that form – see *McPherson v R* (1981) 147 CLR 512; *R v Gidley* [1984] 3 NSWLR 168

73. Excessive intervention by the trial judge may breach the judge's duty to observe procedural fairness to both parties, so constituting an error of law – see *Burwood Municipal Council v Harvey* (1995) 86 LGERA 389 per Kirby P. But what a judge must do to assist a self-represented litigant depends on the litigant, the nature of the case, and the litigant's intelligence and understanding of the case – *Abram v Bank of New Zealand* [1996] ATPR 41-507.

74. Failure to object to excessive intervention may constitute a waiver or may estop a subsequent complaint. The objection should be taken at the earliest opportunity. See *Vakauta v Kelly* (1989) 167 CLR 568 at 572, 577; *Livesey v NSW Bar Association* (1983) 151 CLR 288.

75. Making a disqualification application can be one of the most difficult and stressful tasks for a barrister. The difficulty can be exacerbated in a case where a self-represented litigant is involved, as the judge may feel compromised (even to the extent of 'walking a tightrope') by the need to help self-represented litigants and at the same time remain, and appear to remain, impartial – see Research Paper pp 45-49. It is suggested that this is one area where, if time permits, a barrister might outline the scenario in which he or she is involved to a senior colleague before making such a submission.

Settlement negotiations

76. The Rules do not contemplate a barrister normally conferring with or dealing with an opposing party (rule 55). However, it is extremely difficult for a barrister opposed by a self-represented litigant not to deal with the opposing party during the course of a hearing. On occasions, a barrister may be directed to do so by the judge, for example, to explain a matter or to see if some aspect of the proceedings may be settled.

77. A barrister should ensure that a solicitor or clerk is present during any settlement negotiations and that a record is kept of what was said. There are particular difficulties in this area where a barrister appears on a direct access brief.

78. If there is any doubt about the self-represented litigant's understanding of the situation or where it might appear to the barrister that, for example during settlement negotiations, there are misunderstandings as to the terms or any implications, then it is suggested that the matter be raised in court before the terms are approved so that the basis of the self-represented litigant's understanding can be noted on the transcript.

79. However, the barrister should also be aware that such an approach may lead to the judge disqualifying himself or herself once the terms are outlined if the settlement breaks down. A barrister should also be aware of the need to draft terms of settlement in clear and unambiguous (and, if possible, layperson's) language.

Other representation

81. Self-represented litigants may ask for a friend or other person to represent them or assist them. Depending on the personalities and issues involved, this may be of assistance in settlement negotiations. However, when that request extends to a hearing, different principles and issues apply. A judge or magistrate normally has the power to permit a self-represented party to be represented by a lay person as an element or consequence of the inherent right to regulate the proceedings in his or her court – see *O'Toole v Scott* (1965) 65 SR (NSW) 113; [1965-66] 39 ALJR 15 at 19.

82. This power is not normally exercised in favour of a litigant in a superior court – *Hubbard Association of Scientologists International v Anderson and Just* [1972] VR 340. It should be noted that what the Full Court of the Victorian Supreme Court said in that case (at p.343) was that:

> it has long been regarded in the higher courts as proper to refuse to exercise the discretion in favour of allowing the appearance of non-qualified persons (other than on merely formal matters such as adjournments) *when the assistance of qualified persons is available to give the courts help in the administration of justice.* (emphasis added).

Whether that principle applies in the face of evidence that the assistance of qualified persons is not available, for example, due to the absence of legal aid, is beyond the scope of these guidelines.

McKenzie Friend

83. The extent of the role of a 'McKenzie Friend' has generally been to 'take notes, quietly make suggestions and give advice' *McKenzie v McKenzie* [1970] 3 All ER 1034 at 1036. It does not extend to taking part in proceedings. However, in a recent decision - *Cooke v Stehbens* (1998) 24 Fam LR 5 - a party's mother was permitted to act as advocate for the party both at the hearing and on appeal where:

    (i) the represented party did not object;
    (ii) it was clear to the court that the party, by virtue of her emotional state, was unable to represent herself; and
    (iii) to act otherwise may have necessitated an adjournment which would not have been in the best interests of the children the subject of the proceedings.

84. A barrister, in deciding whether or not to oppose such an application, will need to make a judgment as to the circumstances of the case and how justice will best be served, his or her client's interests, the options available and the likely attitude of the court. In *Re B* [1981] 2 NSWLR 372 at 385-6, Moffit P viewed such friends as being 'potentially undisciplined and disruptive and beyond direct access in a disciplinary and controlling sense'.

85. An example of the rejection of an application by a self-represented litigant to be represented by another person was *KT v KJ and TH* (2000) 26 Fam LR 289. That decision was made even though the self-represented litigant 'appeared unable to make any submissions whatsoever without [the other party] writing out word for word the submissions to be made'. It should be noted that the other party in that case had already been declared a vexatious litigant.

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