**South Eastern Circuit Response to the Consultation**

**Entitled "Reforming the Courts' Approach to McKenzie Friends" (February 2016)**

## Introduction

1. The South Eastern Circuit represents over 2,000 employed and self-employed members of the Bar with experience in all areas of practice and across England and Wales. It is the largest Circuit in the country. The high international reputation enjoyed by our justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners.

2. This is the response on behalf of the South Eastern Circuit ("the SEC") to the consultation entitled "Reforming the Courts' Approach to McKenzie Friends", dated February 2016 and issued by a working group chaired by Asplin J. on behalf of the Lord Chief Justice and the Judicial Executive Board.

3. The SEC is wary of the adoption of terminology such as "professional McKenzie friends", since the same may be understood to suggest that such people are legally-qualified and/or generally act to a certain standard or in accordance with a particular set of obligations. McKenzie friends are (largely) legally-unqualified, (all) unregulated and not required to abide by a code of practice. This response document uses the phrase "paid McKenzie friends".

## The issues

4. It is important to identify the issues. Five questions can be posited.

    (a) Should McKenzie friends be permitted at all?

    (b) If yes to (a), should a court have to give permission for a litigant to have a McKenzie friend?

(c) If yes to (b), with what information should a court be provided in order to determine whether to give permission?

(d) Is there a requirement for a (relatively short but) rigorous examination of an application by a McKenzie friend for temporary rights of audience?

(e) Should the court system permit a McKenzie friend to receive payment or remuneration in return for 'acting' in that capacity?

5. The SEC answers:

(a) yes;

(b) yes;

(c) a minimum, non-onerous amount of information, such as a *curriculum vitae* or a short note (possibly on a standard form made available by the court) explaining how the proposed McKenzie friend knows the litigant and what support he or she proposes to provide during the hearing (such as 'moral support' or 'assistance with organising papers', etc.), in order that the court may satisfy itself that the person is a suitable and appropriate person to be present in that capacity;

(d) yes, and such rights should not routinely be granted; and

(e) no.

6. Three questions – those of (i) remuneration; (ii) granting rights of audience to McKenzie friends; and (iii) whether and how a court ensures that suitable and appropriate persons are acting as McKenzie friends – are separate and care should be taken not to conflate them.

**McKenzie friends as a concept**

7. The SEC strongly supports the principle that a litigant-in-person may avail him- or herself of the reasonable assistance of a friend or acquaintance when he or she is in court. Access to justice includes the ability fully to engage with proceedings, and a party's ability to engage may be assisted or augmented by the practical help of another person. That help may be simple moral support or a more involved role such as marshalling documents or reminding the litigant of points he or she had planned to make.

**The remit of McKenzie friends**

8. It has been said that the role of a McKenzie friend is "to sit and advise and quietly to offer help".[1] An old authority states that "[a]ny person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice."[2] "Provided that [a] McKenzie friend acts with restraint, he is often a useful assistant to the conduct of litigation."[3] The SEC agrees.

9. The activities set out under paragraph 3 of the Practice Guidance seem accurately to set out the appropriate remit of a McKenzie friend: they "may: i) provide moral support for litigants; ii) take notes; iii) help with case papers; [iv]) quietly give advice on any aspect of the conduct of the case. ... [They] may not: i) act as the litigants' agent in relation to the proceedings; ii) manage litigants' cases outside court, for example by signing court documents; or iii) address the court, make oral submissions or examine witnesses."

10. The SEC sees no reason to expand or reduce that remit. As it is currently expressed in the Practice Guidance, the remit furthers the proper aim of permitting McKenzie friends: to allow litigants to have practical or moral assistance or support when appearing in court unrepresented.

11. In the majority of cases, there is no role for a McKenzie friend outside court. That person is not the litigant's agent or legal advisor and should not be acting (or purporting to act) or agreeing matters on the litigant's behalf. The McKenzie friend is unable to give legal advice. The litigant remains the party to the proceedings and remains the only person with whom the other parties may legitimately negotiate. If the McKenzie friend purports to agree something with another party, what position does the litigant find him- or herself in? Either the McKenzie friend has no authority to act on the litigant's behalf (in which case the exercise is useless and wastes time) or the litigant finds him- or herself bound by the McKenzie friend's agreement but, in the case of a bad agreement, has no regulatory recourse against the McKenzie friend and, in any event, the McKenzie friend is uninsured.

12. It may be possible for a litigant in person to be warned of the issues set out in the preceding paragraph by way of an information sheet or the inclusion of particular wording on a

[1] *Re H (Chambers Proceedings: McKenzie Friend)* [1997] 2 F.L.R. 423, per Ward L.J. It is taken that "advise" in this context means informally to advise and not to offer legal advice.
[2] *Collier* v. *Hicks* (1831) 2 B. & Ad. 663.
[3] *Re M (Contact: Family Assistance: McKenzie Friend)* [1999] 1 F.L.R. 75, per Ward L.J.

standard form to be completed in all cases by a litigant who seeks the court's permission to be accompanied by a McKenzie friend.

**Ensuring that McKenzie friends are suitable and appropriate persons**

13. The SEC has no objection in principle to a suitable and appropriate person accompanying a litigant into court for moral and/or practical support and/or to provide quiet assistance to the litigant. Indeed, the SEC supports the ability of a litigant, in an appropriate case, to have the assistance of such a person if that is likely to assist him or her in being able more cogently to present his or her case.

14. In the majority of cases in which a McKenzie friend attends with a litigant, that McKenzie friend is an acquaintance, friend, colleague or supporter of the litigant. In such cases there will rarely be any challenge to the McKenzie friend providing quiet assistance to the litigant. Objection is more likely to be taken when a litigant attends with a McKenzie friend who is in receipt of remuneration for that attendance, because in such circumstances it is less likely that that McKenzie friend is a prior acquaintance of the litigant. Allowing unqualified persons to assist a litigant for reward formed no part of the original rationale for permitting their attendance at court hearings.

15. The SEC has received anecdotal evidence that parties are reluctant to raise the suitability or appropriateness of a litigant being accompanied by a McKenzie friend because, on occasion, they have been chastised by the court for (apparently) hindering the fast progress of court business or unnecessarily standing on strict procedure to the (apparent) detriment of an unrepresented litigant. Courts should be encouraged, as a matter of course:

    (a) to consider whether to give permission for a McKenzie friend to sit with a litigant;

    (b) to be informed if that McKenzie friend has received, or has made an agreement under which he or she will receive, payment or remuneration for his or her attendance as a McKenzie friend; and

    (c) to insist upon an application, and to consider appropriately any such application, in the event that a McKenzie friend seeks a temporary right of audience.

    It is accepted that adherence to such procedure may increase the amount of time a court must spend on a case, but that time can be reduced with the use of the standard form notices

proposed in the consultation. Further, in a case in which only stage (a) above (giving permission for a McKenzie friend to sit with a litigant to provide quiet assistance) must be considered, it is unlikely that much or any objection will be taken by any reasonable opposing party.[4]

**McKenzie friends as advocates**

16. There is a significant difference between, on the one hand, providing moral support and/or practical help and, on the other hand, acting in the capacity of a representative advocate. The role of McKenzie friend lends itself to the former and not to the latter.

17. Historically, and presently, rights of audience have generally been limited to professional lawyers. There are good reasons for that. Professional lawyers, whether barristers or solicitors, are qualified advocates who are required to hold insurance and who are obliged to fulfil their professional obligations. Those obligations include requirements not to mislead the court, to act with honesty and integrity, to hold appropriate insurance cover and to abide by relevant rules of court. McKenzie friends are, for the most part, not qualified lawyers. They have no obligation to hold insurance. They are not regulated and they have no obligation to abide by any code of conduct. They have no duty to the court. These facts are not (especially) problematic when a McKenzie friend attends a hearing simply to give practical or moral assistance, because he or she does not advance a case or speak on behalf of a party.

18. The SEC accepts that there are circumstances in which a person who does not otherwise have rights of audience ought to be granted them, on a limited basis, for a specific good reason. The law should allow for such rare circumstances by permitting judges to grant a right of audience to a person who would not otherwise have them. It is not impossible to imagine circumstances in which it may be desirable and appropriate to grant such rights to a McKenzie friend.[5] Those circumstances are, however, limited; and in practice it should be rare for a judge to take that step. Any right of audience so granted should be limited to the hearing at which it was granted.

[4] Further force is given to this likelihood in light of the position, under current case law, that "the presumption in favour of the litigant being allowed the assistance of a McKenzie friend is a strong one": *Re O'Connell* et al. [2005] EWCA Civ 759 at [67], per Wall L.J.

[5] One example is a company director who attends a hearing in an action against his company where that company does not have legal representation.

19. Anecdotal evidence, however, suggests that where a McKenzie friend requests rights of audience for a hearing, he or she is routinely permitted to address the court on behalf of his or her 'client'. Busy District Judges appear not to have the time (or, in some cases, the inclination) during a busy list to go through the steps required by the Legal Services Act 2007 and those set out in the Practice Guidance. Counsel (often junior counsel) who raise the question of whether the McKenzie friend ought so readily to be granted a right of audience are, anecdotally, seen as being unhelpful and unnecessarily standing on procedure.

20. It *may* be the case that the status of the Practice Guidance as guidance, rather than a practice direction, gives the impression that less weight should be given to considering the issues therein. The formulation and implementation of rules of court will prevent such a risk.

**Paid McKenzie friends**

21. There is a concern that some paid McKenzie friends present or market themselves as a cheaper alternative to qualified lawyers. It is possible to see how such an offer is attractive to a litigant in person. From surveying the websites of paid McKenzie friends, however, it appears that their fees approximate to those which a litigant might expect to pay junior counsel for the same work. With junior counsel, perhaps on a direct public access basis, a litigant would have the benefits set out above (a qualified, regulated, insured professional representative). With a paid McKenzie friend, the litigant is paying the same, or more, and receiving less.

22. As a result, the growth of the use of paid McKenzie friends appears to be a false economy as far as litigants are concerned. Further, it reduces consumer protections offered by the legal profession, disturbs the market and undermines proper regulation.

23. There have been reports in the legal press which suggest that legal professionals are offering their services as paid McKenzie friends, apparently with the intention of maintaining their work profile (and the attendant income) without the burdens of regulation or being required to carry insurance.[6] Such conduct does nothing to ensure that

[6] C. Smith, "Solicitors becoming McKenzie friends to avoid regulatory costs, CMA told", *The Law Society Gazette*, 26th April 2016. Available at http://www.lawgazette.co.uk/practice/solicitors-becoming-mckenzie-friends-to-avoid-regulatory-costs-cma-told/5054974.article (accessed 28th April 2016). There is some suggestion that the Law Society may be encouraging such an approach: "Unbundling Civil Legal Services", The Law Society, 4th April 2016, available at *http://www.lawsociety.org.uk/support-services/advice/practice-notes/unbundling-civil-legal-services/* (accessed 17th May 2016).

litigants are provided with a proper service and proper protections against the negligence of their agents. If the reports are accurate, they are further reason why the courts should not routinely permit unregulated, uninsured persons to act as legal representatives.

24. Further, there is the risk that by permitting (passively or explicitly) McKenzie friends to be remunerated the justice system is seen to condone or sanction unqualified, unregulated and uninsured people as appropriate individuals to be conducting reserved legal activities.

25. There is a wealth of information available online which evidences attempts by groups of paid McKenzie friends to allay some of the concerns set out above. In particular, there appear to be attempts to 'self-regulate'.[7] Such 'regulation' is nothing of the sort because there is no independent oversight and no effective sanction. Expulsion from an unregulated private organisation or loss of membership privileges of a website does not amount to any meaningful sanction and does not prohibit the expelled person from continuing to attend hearings as a McKenzie friend.

## Answers to specific questions in the consultation

**Question 1: Do you agree that the term 'McKenzie Friend' should be replaced by a term that is more readily understandable and properly reflects the role in question? Please give your reasons for your answer.**

There is no objection in principle. To a layperson, "McKenzie friend" is not a term which has any particular meaning, and the role could be clarified by the use of a more readily-understandable term. The opportunity could also be used to clarify the remit of such a person.

**Question 2: Do you agree that the term 'court supporter' should replace McKenzie Friend? If not, what other term would you suggest? Please give your reasons for your answer.**

As noted in the answer to question 1, there may be merit in replacing the term "McKenzie friend" with a term which means something to laypeople. The SEC is not sure that "court

[7] See, for example, http://www.mckenziefriends.directory/service%20standards.html (accessed 27th April 2016).

supporter" is the best replacement, because the use of the word "court" may be taken to suggest that the court is sanctioning the attendance and assistance of the particular person involved. Further or alternatively, it may suggest that the person has been provided by the court (and he or she is, in fact, some form of court official).

Another option, which the SEC prefers and suggests, is "friend in court", which avoids any impression of court sanction or provision, and has the benefit of describing accurately the role of such a person.

**Question 3: Do you agree that the present Practice Guidance should be replaced with rules of court? Please give your reasons for your answer. Please also give any specific comments on the draft rules set out at Annex A.**

Yes. Please see above in respect of the SEC's concerns that courts appear routinely to be permitting McKenzie friends to exercise rights of audience without careful/structured consideration of how appropriate it is to give such permission.

As set out in the answers to questions 7 and 8, the SEC considers that it would be of greatest assistance for new rules to be drafted in terms which are understandable to laypersons. That will hopefully reduce the likelihood of a requirement for a freestanding guide. The draft rules appear largely to be understandable (in that sense), although the Civil Procedure Rules Committee may wish to consult on the terminology used in advance of adopting any draft.

Comments upon particular draft rules are set out below.

Draft rule 3.22(7) should be re-drafted to include the word 'must',[8] to emphasise that there is no discretion and the court will not permit a McKenzie friend to sit with or assist a litigant where that McKenzie friend has received, or has made an agreement under which he or she will receive, payment or remuneration for his or her attendance as a McKenzie friend. The SEC prefers that formulation of wording because draft rule 3.22(7) applies only where the McKenzie friend *is* being remunerated.

The SEC queries whether there should be a presumption, under draft rule 3.22(9), that the McKenzie friend may assist the litigant unless and until the court decides that such assistance

[8] It is noted that draft rule 3.23(6) uses the word 'must'. 'Must' imposes a requirement; 'will' may appear to be guidance or to indicate a usual approach.

may not be given. For the reasons set out in this response above, the SEC considers that the better approach is for the court positively to give permission in every case. As noted, in the majority of cases that is unlikely to be a contentious issue. As such, the SEC supports the adoption of the procedure set out in draft rule 3.22(2) and (3) in all cases. As set out in this response above, the SEC considers that the court should be supplied with sufficient information to establish: (i) how the McKenzie friend knows the litigant; (ii) that the McKenzie friend is a suitable and appropriate person; and (iii) that the McKenzie friend has not received, and has not made an agreement under which he or she will receive, payment or remuneration for his or her attendance as a McKenzie friend.

Draft rule 3.22(11)(a) is sensible and avoids the requirement for an additional order in every case.

The SEC queries whether draft rule 3.22(12) is required, given that it reflects the current law, although there is no objection to its inclusion in order to avoid doubt.

Draft rule 32.22(13) is dangerous and should not be adopted. A McKenzie friend is a person present to provide a litigant with moral and/or practical support. In the majority of cases a McKenzie friend does not provide any assistance with litigation and it is not appropriate for such a McKenzie friend to be saddled with the responsibilities of a litigator. Further, it is unlikely that a McKenzie friend will be aware of the detail or extent of the duties imposed by rule 32.22(13), which is likely to make it difficult to enforce those duties without a (justified) complaint by the McKenzie friend that he or she could not comply with a duty about which he or she did not know. Yet further, it is likely to be unfair in principle to impose the duties of a solicitor upon a person who is not, and has not trained to be, a solicitor. That will be especially true where the McKenzie friend is doing no more than marshalling papers or quietly reminding a litigant of points that litigant intended to make. A solicitor's duties are extensive. They include, for example, notifying the court as to issues regarding capacity: a requirement which would not be appropriate to expect of a person merely providing quiet assistance in court.

The SEC supports the adoption of a specified procedure by which a McKenzie friend may apply for a right of audience and/or the right to conduct litigation. That will avoid the need for a court to have regard to the primary legislation and it will also mean that the procedure is readily-available (in the White Book).

The SEC supports the approach in draft rule 3.23(4). It has no particular observations to make about the remainder of draft rule 3.23.

As to the proposed amendment to Practice Direction 3C, the SEC notes in respect of paragraph 1(b)(ii) that draft rules 3.22 and 3.23 do not establish a bar on a McKenzie friend acting for remuneration. Rather, draft rule 3.22(7) provides that permission to attend as a McKenzie friend will be withdrawn if remuneration is involved. That is not the same as a ban upon it happening in the first place. It may be necessary, therefore, in order for proposed paragraph 1(b)(ii) to operate, for the draft rules explicitly to impose a ban upon McKenzie friends attending court with a litigant where remuneration is involved.[9]

Further, a civil restraint order prohibits the issuing of claims and/or applications. The litigant, not his or McKenzie friend, issues a claim or an application. Therefore if the civil restraint order regime is to be extended to McKenzie friends, there will have to be an amendment to rule 3.11 and Practice Direction 3C will also have to be amended to include a prohibition on attending hearings as a McKenzie friend.

The SEC, or representatives from the SEC, would be willing to provide more detailed comments upon the draft rules if that were requested.

**Question 4: Should different approaches to the grant of a right of audience apply in family proceedings and civil proceedings? Please give your reasons for your answer and outline the test that you believe should be applicable. Please also give any specific comments on the draft rules.**

The test should be the same (for consistency, which aids understanding by laypersons), but in determining such an application a family court will necessarily have to take into account different or additional factors. Perhaps the most obvious additional factor will be that family proceedings are generally held in private and documents in those proceedings are confidential to them. It is likely that the question of whether a McKenzie friend is a suitable and appropriate person will have been considered at an earlier stage, namely when the court determined whether it was appropriate for him or her to attend the hearing.

[9] As above, the SEC suggests that the rules use language in the form of "has received, or has made an agreement under which he or she will receive, payment or remuneration for his or her attendance as a McKenzie friend".

**Question 5: Do you agree that a standard form notice, signed and verified by both the LiP and McKenzie Friend, should be used to ensure that sufficient information is given to the court regarding a McKenzie Friend? Please give your reasons for your answer.**

Yes. It will ensure three things. First: there will be a 'paper trail' evidencing who was present, when and for what purpose. Secondly: it will ensure that the litigant must take an active step in recommending/requesting the assistance of a McKenzie friend, which will put the onus on the litigant rather than permitting a 'regular' McKenzie friend to take over the process. Thirdly: it will streamline the process, ensuring that the relevant information is before the judge at the outset of the hearing; hopefully that will reduce the length of any investigation into (i) the suitability of a proposed McKenzie friend and (ii) whether it is appropriate to grant that person a right of audience and, in turn, that will cause courts to be more willing properly to consider the correct test in the rules regarding granting temporary rights of audience.

Further, in practice, the completion of a notice will permit the other litigant, or his or her legal representative, to take a view before the commencement of the hearing on whether he or she will challenge the suitability of a proposed McKenzie friend. It is hoped, particularly if paid McKenzie friends are prohibited, that that will result in fewer challenges and less court time being taken up on such matters.

**Question 6: Do you agree that such a notice should contain a Code of Conduct for McKenzie Friends, which the McKenzie Friend should verify that they understand and agree to abide by? Please give your reasons for your answer.**

The SEC is wary of the introduction of a code of conduct. Although superficially it may appear to be a step taken in order to ensure that McKenzie friends understand their responsibilities, such a code would have no legal force. Further, an unintended consequence may be that McKenzie friends will appear to be regulated. Even with a code of conduct there will be no official regulation. Unscrupulous persons acting as McKenzie friends may point to a code of conduct to give the misleading impression that they are the subject of official oversight akin to that imposed by the Bar Standards Board or the Solicitors Regulation Authority.

If the code of conduct were, in reality, simply a restatement of the present obligations upon any person who attends a court hearing, it may have some merit (if it were called something other than a 'code of conduct'). If nothing else, by signing it a McKenzie friend would confirm that

he or she understands what is expected of him or her (to give the court and other parties confidence that he or she is a suitable person to sit in court with the litigant) and also permits comeback should that McKenzie friend act in an inappropriate manner. Sanctions are available pursuant to the usual powers of the court, but delineating what is expected of a McKenzie friend (and what is likely to happen if that McKenzie friend fails to fulfil those expectations) will ensure that there is no complaint, by the litigant or his or her McKenzie friend, that there was inadequate warning or insufficient understanding of the consequences.

It should be made clear that such a code of conduct does not constitute regulation of McKenzie friends.

**Question 7: Irrespective of whether the Practice Guidance (2010) is to be revised or replaced by rules of court, do you agree that a Plain Language Guide for LIPs and McKenzie Friends be produced? Please give your reasons for your answer.**

The concern about a plain language guide is that it stands alongside the rules. It would be far better if the new rules themselves were drafted in a readily-understandable way – then a litigant in person could be given a copy of the relevant rules on arrival at court and refer to them if necessary. The potential problem with a separate/freestanding document is that any inconsistencies, whether they are substantive or apparent, are likely to confuse a litigant and give rise to disputes. If the guide apparently permits something, because it is written in broader or looser language, which the rules do not, that is not likely to assist in the smooth administration of justice.

The SEC considers that a preferable course would be to produce rules – which are perhaps drafted in 'less legal' language than the other parts of the relevant Procedure Rules – to which a litigant in person may be referred and which the court may apply.

**Question 8: If a Plain Language Guide is produced, do you agree that a non-judicial body with expertise in drafting such Guides should produce it? Please give your reasons for your answer.**

The SEC agrees that, if a document is to be produced, such a body should be *involved in the process* of creating it, but it should not *produce* it. The document should be produced (in the

sense of creating its substance) by a legal entity, such as a working party comprising representatives from the judiciary and the legal profession, as such an entity will have first-hand knowledge of the procedures, rules, law, etc., as well as the day-to-day practical considerations, which are applicable. A body with expertise in drafting plain language guides should then be invited to review the draft of the document to ensure that it is written in understandable language and presented in an accessible format. In other words, the *substance* should come from the legal profession (which has expertise in the issues involved) and the *form* should be informed by a body with expertise in presenting specialist information to a general audience.

Should the involvement of such a body be required, the SEC suggests the Advocacy Training Council as a candidate. The Council has considerable experience in simplifying legal terms and concepts, developed as part of its work in producing toolkits to assist barristers in dealing with (for example) vulnerable witnesses.

As noted above in the answer to question 7, a plain language guide would be (presumably) unnecessary if the new rules were written sufficiently simply.

**Question 9: Do you agree that codified rules should contain a prohibition on fee-recovery, either by way of disbursement or other form of remuneration? Please give your reasons for your answer.**

Yes. The rules should go further. They should not simply prohibit a litigant in person to recover any fee he or she has paid to a McKenzie friend (and neither the Civil Procedure Rules nor the Family Procedure Rules appear currently to allow for that in any event). The rules should prohibit a person from acting as a McKenzie friend if he or she has received, or has made an agreement under which he or she will receive, payment or remuneration for the 'service' of so acting. The rule can be enforced by including in the standard form notice (in questions 5 and 6 above) a requirement that a proposed McKenzie friend declares that he or she has not received, and has made no agreement under which he or she will receive, such payment or remuneration

**Question 10: Are there any other points arising from this consultation on that you would like to put forward for consideration? Please give your reasons for your answer.**

There are no further points. The SEC's position is set out above.

**The South Eastern Circuit**

**June 2016**