



LORD CHIEF JUSTICE OF THE KINGDOM OF TONGA

Practice Direction 1 of 2021

RIGHTS OF APPEARANCE, LAY ADVOCATES AND 'McKENZIE FRIENDS'

Rights of appearance

1. At common law, a party to any proceeding appears as of right.
2. In Tonga, both the Supreme Court and Magistrates' Court Acts and Rules permit appearances only by parties and their lawyers (meaning a law practitioner enrolled and holding a valid practising certificate under the *Law Practitioners Act*).
3. The *Law Practitioners Act*:
 - (a) permits any law practitioner to appear as counsel (s.8, subject to any restrictions on his or her practising certificate pursuant to s.7);
 - (b) prohibits any person from practising as a law practitioner unless his or her name is on the Roll of Law Practitioners and the practitioner has a valid practising certificate (s.3(1));
 - (c) creates an offence of practising as a law practitioner or in any way holding him/herself out as entitled by law to practise as a law practitioner, without having a valid practising certificate in force (s.10); and
 - (d) deems a person to be practising as a law practitioner if for gain or reward whether directly or indirectly he or she, among other things, appears for or represents any person or party in any proceedings before any court, enquiry or commission (s.3(2)).
4. Subject to any relevant statutory provision, the Court has an inherent power to control its own proceedings which extends to controlling legal representation.

Lay advocates

5. A person who is not a law practitioner (within the above terms of the *Law Practitioners Act*) and who seeks to appear on behalf of a party to a proceeding (as a lay advocate), has no right of audience other than that conferred by statute or permitted in the exercise of the court's discretion.

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6. Any party who wishes a lay advocate to appear for the party must apply to the Court for leave for the lay advocate to appear.
 7. Applications for leave must include sworn evidence, including, but not limited to the following:
 - (a) that the party has not been requested to provide, nor provided, nor will provide any reward, directly or indirectly, to the lay advocate for appearing for, or advising, the party in relation to the proceeding;
 - (b) that the lay advocate has not and will not request, receive or retain, directly or indirectly, any reward for appearing for, or advising, the party in relation to the proceeding;
 - (c) an undertaking by the lay advocate that he/she has not, and will not, request, receive or retain, directly or indirectly, any reward for appearing for, or advising, the party in relation to the proceeding;
 - (d) whether the party is incapable of appearing for themselves before the court, and if so, the nature of, and reasons for, any such incapacity or inability;
 - (e) any relevant qualifications and/or experience of the lay advocate; and
 - (f) any other reason it is considered necessary for the party to be represented by the lay advocate.
 8. In determining applications for leave to appear, relevant considerations include:
 - (a) exercise of the discretion is informed by the party's right to a fair trial;
 - (b) whether the party suffers from some relevant disability which may adversely affect the party's ability to engage in or receive a fair trial;
 - (c) a party's impecuniosity and/or lack of legal knowledge, on their own, are unlikely to ever be sufficient reasons to grant leave;
 - (d) a lay advocate does not owe the same legal and ethical duties to the party or the court as that owed by a qualified and licensed lawyer;
 - (e) a lay advocate is unlikely to owe any duty of care to the party in respect of advice provided or the conduct of the party's case when appearing in court;
 - (f) the court is unlikely to be able to ascertain or monitor the correctness or otherwise of any advice given by a lay advocate to a party or whether the party understands and/or agrees with any advice given by the lay advocate out of court or the manner in which the lay advocate conducts the party's case through documents prepared by the lay advocate or statements made during hearings in court;

McKenzie friends

9. A lay advocate is to be contrasted with a 'McKenzie friend' (*McKenzie v McKenzie* [1970] 3 WLR 472).
10. The Court has a discretion whether to permit an unqualified person to attend in court with the party in person to assist the party. In the ordinary case, the discretion will usually be exercised.
11. It is the party, however, who 'appears' and addresses the court.
12. The court has a broad discretion as to the precise role which the McKenzie friend may play. Commonly, it will be limited to sitting with the party in court, taking notes and affording assistance including quietly making suggestions to the party.
13. Although it is generally undesirable, in exceptional circumstances, a McKenzie friend may be permitted to address the court on behalf of the party.
14. This Practice Direction takes effect from the date hereof.



Michael Whitten QC
Lord Chief Justice of the Kingdom of Tonga

Nuku'alofa

10 June 2021