

# Agenda

## Committee on Resources for Self-represented Parties

April 21, 2017  
12:00 to 2:00 p.m.

Administrative Office of the Courts  
Scott M. Matheson Courthouse  
450 South State Street  
Education Room, Suite N31

Welcome, approval of minutes, recognition of exiting member, filling the community member position	Tab 1	Judge Barry Lawrence, Chair
Law school outreach and Bar panel discussion		Judge Barry Lawrence
Subcommittee updates	Tab 2	All
Self Help Center	Tab 3	Mary Jane Ciccarello, Jessica Van Buren
Education/Outreach Subcommittee		Professor Hernandez Jaclyn Howell-Powers Lisa Collins Nancy Sylvester Mary Jane Ciccarello Tyler Cameron Shaunda McNeill Jessica Van Buren Judge Elizabeth Knight
Rural Services Subcommittee	Tab 4	Leti Bentley Mary Jane Ciccarello Sue Crismon Carol Frank Susan Griffith Judge D. Thomas Jessica Van Buren
Rule 16 Subcommittee		Nancy Sylvester Mary Jane Ciccerello Chris Martinez Virginia Sudbury Judge Lawrence Commissioner Sagers Commissioner Conklin

		Commissioner Patton
Short discussion on potential new priorities		Judge Barry Lawrence
Other Business		All

[Committee Web Page](#)

**Proposed Bimonthly Meeting Schedule:** Matheson Courthouse, 12:00 to 2:00 p.m.  
unless otherwise stated.

June 9, 2017

August 11, 2017

October 13, 2017

December 8, 2017

Tab 1

# **Minutes of the Committee on Resources for Self-represented Parties**

February 10, 2017

Draft. Subject to approval

## **Members Present**

Judge Barry Lawrence (chair), Christopher Martinez, Jessica Van Buren, Judge Douglas Thomas, Mary Jane Ciccarello, Shaunda McNeill, C. Sue Crismon, Professor Carl Hernandez, Judge Catherine Roberts, Judge Elizabeth Knight, Carol Frank (phone), Leti Bentley (phone), Virginia Sudbury, Susan Griffith, Jaclyn Howell (phone)

## **Members Excused**

Tyler Cameron, Lisa Collins, Judge Douglas Thomas

## **Guests**

Commissioner Joanna Sagers, Jacob Kent, Commissioner Thomas Patton (phone)

## **Staff**

Nancy Sylvester

### **(1) Welcome, approval of minutes, recognition of exiting member, and rescheduling the April meeting.**

Judge Barry Lawrence welcomed everyone to the meeting. He then entertained a motion on the minutes. Professor Hernandez made the motion and Shaunda McNeill seconded it. The December minutes were approved unanimously. He then noted that Eric Mittlestadt had resigned from the committee due to his no longer staffing the OCAP Committee and also due to the end of his term. He thanked him for his service and introduced Jacob Kent, who will be taking over for him. The committee members then introduced themselves to Mr. Kent.

The committee discussed the best date for the next meeting and settled on April 21, 2017.

### **(2) Recognition of Self-Help Center**

Judge Lawrence next noted that the Self-Help Center had been recognized by the Moab Valley Multi-Cultural Center for the work they've done together. He congratulated the Self-Help Center for their work.

### **(3) Strategic Plan**

Judge Lawrence raised the discussion the committee had at its last meeting regarding amending the strategic plan or acting on the current opportunities before it. He said his preference is to not amend the strategic plan at this point and instead work from the list of individual needs and opportunities.

#### **(4) Subcommittee Updates**

Judge Lawrence then went through the subcommittees listed in the meeting materials. He said he is thinking of things in terms of tangible projects that everyone could do. He asked for feedback on the reworking of the subcommittees and also asked whether anything needed to be added or deleted from the list. The committee had a discussion on the items listed.

Ms. Crismon suggested that access to justice issues may need to be better divided out and maybe a separate subcommittee. Virginia suggested that the pro se calendar may need to be its own category. Judge Lawrence noted that there are so many different pro se calendars, he asked whether we should have supervisory authority over them. Ms. Sudbury suggested that the unbundled services section could have some supervision over this.

#### **Rule 16**

Commissioner Sagers said they are working on 5 calendars and are working on adding a 6<sup>th</sup>. She said she is bringing in the double pro se cases at 90 days in, attorneys are working with them, they are finalizing paperwork, they are having mediated conferences, and doing income verification. Ms. Sudbury said it is going really well but they always need more volunteers. Com. Sagers said she thinks this is one of the more effective tools in terms of getting litigants through the process. Mary Jane tracks information on the pro se calendars. Each week, Mary Jane gets from court services a list of those cases assigned to Commissioner Sagers. Ms. Ciccarello sends the list to the clerks and they put the cases on Commissioner Sagers's special calendars if the specific indicators are present.

Ms. Ciccarello tracked July-filed domestic cases in January. In the normal course of things, these cases should have been done by January. Of 92 cases filed and assigned to Commissioner Sagers, 54 of the cases had all pro se parties (over 50% totally pro se is consistent with other statistics). Ms. Ciccarello did not track those cases where a lawyer started on the case, including those cases where one lawyer is representing a party. As of January, in 35 of 54 cases, findings and decrees had been entered. People finished. Of those 35, 16 had been asked to come to the special calendar, they came, they got help, and they finished. Many pro se's are using OCAP and never appear in court. But 16 got help. 8 are pending and had not received help. 5 cases pending where they had gotten help and mediation was occurring. There was one case where a lawyer entered on a limited scope basis, and one case where a lawyer entered and the case completely finished.

Commissioner Sagers said in the first month they did this in July, she had 15 scheduled with 4 no-shows. 11 out of the 15 submitted final documents. Four needed extensions and help with alternate service. One needed help with findings, and one needed help on divorce education. One came back and asked for help once they got stuck. Judge Lawrence clarified that this is in addition to the pro se calendars, which Commissioner Sagers confirmed was true. Commissioner Sagers said she thinks her dismissal calendar numbers are going down because they are getting help up front. She is having Rule 16 calendars once a month and only for pro se litigants. Eventually, she anticipates there will be a shift and the clerks on the frontline are going to have fewer questions. There will be fewer phone calls. Ultimately, there will be fewer minute entries saying this party needs to bring in this, or didn't do alternative service right.

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Judge Lawrence asked whether this was able to be duplicated. Ms. Sudbury said yes, but there was a need for more volunteers (attorneys and mediators). Ms. Ciccarello said this has a huge impact on people's lives. They get finality and clarity on the process.

Judge Lawrence noted that this is also happening in the Fourth District and asked Ms. Griffith and Commissioner Patton to weigh in on it. Ms. Griffith said in Fourth District where there are defaults, she talks to the attorneys regarding amending the petition to make sure it's the way it needs to be. She has found through looking back at the petition that a default is not necessarily what the parties wanted and can lead to problems down the road.

Commissioner Patton said for purposes of the Rule 16 conferences, he is ignoring stipulated divorces. He assumes they are going to get through okay. But in every divorce where an answer is filed, they have a scheduling conference. If a case has at least one pro se litigant, he asks if they want to go on the pro se calendar. Commissioner Patton said Ms. Griffith's assistance in getting attorneys to the pro se calendars has been invaluable. They've been getting 90% of contested pro se divorce cases settled and on the others they are narrowing the issues and having a two hour trial, for example, on custody.

Regarding her own special calendars, Commissioner Sagers going to do one more month of this and then report back. She said the report from the Domestic Case Process Improvements Committee is due in July. One of the recommendations will be to have Rule 16 conferences in all domestic cases, which will reduce the burden on the courts and clerks over time. Commissioner Patton said the feedback from attorneys at scheduling conferences is that they appreciate it when the court tells the pro se litigant what they need to do. He said some of the challenge with a few pro se litigants is that they don't want to be divorced so they don't comply. The committee also noted that there are few mediators who volunteer in both 3<sup>rd</sup> and 4<sup>th</sup> district, which is tremendously helpful.

Ms. Crismon said down in St. George this could be duplicated because there are retired Las Vegas attorneys living down there who can volunteer through the inactive attorney rule. Ms. Griffith said in her experience there are a lot of volunteer attorneys who come back because the work is satisfying. Commissioner Patton noted that the attorneys are drafting the needed documents in court and emailing them to the clerks who are printing them out and they're getting signed right there.

Ms. Crismon said there has been a proposal to give CLE credit for volunteering, but it's not been without controversy. They hope to get 1 hour of CLE credit for 5 hours of pro bono work. This has been floated in Rule 6.1. There seems to be some traction on this after three years.

## **(5) Summary of New York's Court Navigator Report**

Mary Jane Ciccarello gave a synopsis of New York's Court Navigator report. In essence, New York's efforts have been successful in helping pro se litigants in landlord-tenant cases. In 2014, the chief judge of New York looked at using non-lawyers to help with the high amount of pro se litigants there. Tom Clark, National Center for State Courts, and Rebecca Sandefur wrote the report and did the evaluation. This was centered in the city of New York even though it was statewide. There are over 200,000 non-payment of housing people in the system. There are housing courts there and even though the navigator is not there

representing the person, they can speak for the court patron if the judge asks questions. Another type of navigator helps with case management. The principle findings are: 1) with non-payment of rent navigators – patrons were 56% more likely to say they were able to tell their side of the story. They had better faith in the system if they got their day in court; 2) they were also 84% more likely to have defense recognized by court. The reality is if 200,000 people get evicted, they are on the streets, so there is an impact beyond the court.

With holistic case management, 0% who got helped experienced eviction. This is having a huge impact on these people in these cases. General conclusion: this is worth doing. There are limited resources, so what can be done without spending a lot of money? There is a need for ongoing supervision. Nothing can happen without a court staff person. The New York state system has administrative judges and staff attorneys staffing these programs. There are always multiple staff on site. Navigators should be supervised by on-site staff during all hours. Court staff must be educated about how this works. Other conclusions include that there is a need for better plain-language forms, and them making better known to the public. People without formal training can provide meaningful assistance to those who don't have a lawyer. The researchers recommend sustaining the program and replicating it.

Judge Lawrence asked Ms. Ciccarello whether this was something that could be duplicated here in Utah. Ms. Bentley said they are doing this down in Moab and getting more English speaking people asking for the navigator help (in the past, it's only been Spanish speakers). Even though this is the report of NY, Ms. Ciccarello said they have senior navigators in Elder courts in CA, for example, helping older people through the system. The law library here having student interns helping with OCAP is one example of a navigator in Matheson. Judge Lawrence noted that if it's successful in Moab, this should be duplicatable, especially in the rural areas where there are few lawyers. The Self-Help Center has been in Moab and done training down there at the Moab Multicultural Center. The Center is also in constant contact with the Self-Help Center, so when someone is in their office, they can get help more immediately. The training and support is very important. Ms. Bentley said they are now attracting people from Monticello, Green River, Blanding, etc. She said people are coming because they have hear about the success of the program. With the collaboration and help, it's been very successful. Mary Jane suggested bringing in the group, Grand Families, which is part of Children's Services and is a non-profit social services agency. It provides a lot of help to grand families who are raising children. The Self-Help Center is involved with them because the grandparents are having to go to court to get guardianship, for example. Wherever the Self-Help Center can train volunteers with these organizations, it is helpful.

Judge Lawrence asked Ms. Bentley for statistics, but Ms. Van Buren said she'd provide them. Judge Lawrence said he wanted to track the progress on this and asked that they be brought to the next meeting.

## **(6) Other Subcommittee Updates**

### **Self-Help Center**

Ms. Ciccarello noted that the Self-Help Center started a training program for the court clerks because they were asking for the assistance from the 7<sup>th</sup> district. Since e-filing, their roles are changing dramatically. They want to be relevant to the court and more helpful. Lawyers aren't at counters any more; it's only pro se litigants. Because of the new courthouse in Price and remodeling the courthouse in Moab, they wanted to shift and reinvision how they physically relate to people coming to their counters. There would be traffic flow where there are work stations: computers, printers, telephones with privacy walls, and clerks can sit down and do OCAP, find things on website, sit with them and put paperwork together. It's fascinating that the clerks brought up that they want the barriers to come down. Regarding the self-help training program, there are 13 modules based on available materials and a self-study unit. When ready, the clerk signs up on a shared Google sheet calendar. A staff attorney or Ms. Ciccarello then calls and tests them and goes through the unit. It's not meant to be pass-fail. Clerks feel empowered. They now understand the process and pro se litigants' perspectives. Ms. Ciccarello said she just completed the virtual piece with a Moab clerk yesterday, who shadowed Mary Jane in the Center.

Another change down in the 7<sup>th</sup> District is that clerks now have laptops, which means they can shift the computer around to show a litigant what's on the screen. They also have flex time and work a day from home one day per week. A pro se litigant at a station in 7<sup>th</sup> District can now connect to an at-home clerk. The Self-Help Center is now training clerks in 6 of 8 districts and is particularly interested in very rural areas. Clerks are now part of the process and they are not a hindrance to the pro se litigant. They are engaging with them instead.

### **Self-Help Webpage**

Ms. Ciccarello then went through the new Self-Help webpage on [www.utcourts.gov](http://www.utcourts.gov), which is much more user friendly. It has bigger icons and less white space and small print.

### **Outreach**

Judge Lawrence discussed that there is some effort that will be made to reach out to retired and inactive attorneys and make sure they know they can participate in the pro se calendars.

Regarding parental termination cases, Judge Lawrence said Lokken and Associates, which has the Salt Lake contract in juvenile court parental termination cases, last week said they'd handle the privately initiated cases in district court if the litigant fills out the affidavit of impecuniosity. Judge Knight noted that there is a hodge podge of contracts in areas outside of Salt Lake. Ms. Ciccarello said Parental Defense Alliance may be good to reach out to. Judge Lawrence said he'd look into what the Judicial Council was doing on this issue.

### **AAA Taskforce**

Ms. McNeill said she has statistics on how many lawyers have signed up on Licensed Lawyer. She then discussed that Ron Bowmaster, IT director, came to the last AAA meeting to talk about the ability to do remote hearings. The Bar is going to publicize this more. Ms. Sylvester discussed that there is a pilot project that will initiate in 7<sup>th</sup> district. Ron Bowmaster will talk to Terri Yelonek about the kind of cases in which it is suitable for remote hearings to happen. MJC said a list of standards is needed for dealing with



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remote hearings and pro se litigants. Ms. Griffith gave the example of a woman who had to appear in a modification after moving out of state following her husband almost killing her. The committee had a discussion on the need for standards since remote hearings can be prejudicial to pro se litigants. Jessica Van Buren and Susan Griffith said they would work on them for next meeting.

#### **Rural services**

Ms. Griffith talked about the Bookmobile in rural areas idea, which has stalled a bit, but is a really good idea.

#### **Lawyer of the Day**

Ms. Ciccarello discussed Lawyer of the Day program statistics. This fiscal year to date (July 1, 2016 to February 8, 2017) there were 330 referrals to the program. 28 lawyers are volunteering. Ms. McNeill is one of the volunteers.

#### **(7) Other Business/Future Meetings**

The next committee meeting will be April 21, 2017.

The meeting adjourned at 2:05 p.m.

# Tab 2

**UTAH JUDICIAL COUNCIL**

**STANDING COMMITTEE ON RESOURCES FOR SELF-REPRESENTED PARTIES**

**WHERE WE ARE / April 2017**

<b>SUBCOMMITTEE &amp; STRATEGIC PLAN PRIORITY</b>	<b>WHO</b>	<b>WHAT</b>
<b>Support Self-Help Center</b>	All	<ol style="list-style-type: none"> <li>1) Navigator</li> <li>2) Pro Se Calendars</li> <li>3) Court staff training</li> <li>4) Drafting Orders</li> </ol> <ul style="list-style-type: none"> <li>• Renew funding request to Judicial Council in April.</li> <li>• Idea of putting on notice attorney may be present (for Pro Se Calendars)</li> <li>• Idea of texting for notices (SL City grant money and CORIS rewrite)</li> <li>• Lawyer of the Day</li> <li>• One-on-one clerk training</li> </ul>
<b>Education/Outreach Subcommittee (combined with Rules/Legislation/ Funding and Lawyer Directories)</b>	Professor Hernandez Jaclyn Howell-Powers Lisa Collins Nancy Sylvester Mary Jane Ciccarello Tyler Cameron Shaunda McNeill Jessica Van Buren Judge Elizabeth Knight	<ul style="list-style-type: none"> <li>• Presentations to Law Schools on opportunities for students to assist pro se litigants</li> <li>• Presentation to Bar at summer convention on pro bono opportunities</li> <li>• Article on highlighting inactive rule for retired attorneys and other inactive rule promotion.</li> <li>• Survey monkey on needed training? (Spanish; judges; clerks; law school providers)</li> <li>• Analyze and improve the third year practice rule</li> <li>• Appointment of counsel in termination of parental rights in district court cases</li> <li>• Support opportunities for educating those who interact with self-represented parties (1-on-1 clerk training).</li> <li>• Take an informal survey of which districts accept email/faxes &amp; which don't.</li> <li>• AAA Taskforce Updates</li> <li>• Monitor progress of Lawyer Directory</li> </ul>

<b>Rural Services Subcommittee</b>	Leti Bentley Mary Jane Ciccarello Sue Crismon Carol Frank Susan Griffith Judge D. Thomas Jessica Van Buren	<ul style="list-style-type: none"> <li>• Support the development and implementation of virtual services in rural areas</li> <li>• Develop and implement a court navigator program (New York program as model?)</li> <li>• Virtual Clinic grant – Susan &amp; Sue</li> <li>• Survey gathering on navigator pilot project in Grant County – Jessica</li> <li>• Increase virtual connection between courts self-help center/library. Tried Vidyo (didn't work so well) - Carol</li> <li>• Use of phone appts./State Law Library - Jessica</li> <li>• Standards for remote access</li> </ul>
<b>Rule 16 Subcommittee</b>	Nancy Sylvester Mary Jane Ciccerello Chris Martinez Virginia Sudbury Judge Lawrence Commissioner Sagers Commissioner Conklin Commissioner Patton	<ul style="list-style-type: none"> <li>• Streamline domestic case processes</li> <li>• Bring in litigants earlier (when attorneys are still involved)</li> <li>• Proposed changes in required hearings</li> <li>• Proposed language changes on notices</li> </ul>

# Tab 3



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# BC Provincial Court adopts Support Person Guidelines

**Posted to: Court, Help** | 04/11/2017

Going to court can be a terrifying experience, especially if you're presenting your case on your own, without a lawyer. Many self-represented litigants find that having a trusted friend or family member with them to provide emotional support, take notes, and organize documents can be a big help. The BC Provincial Court recognizes this, and we've adopted guidelines to make it easier to bring a support person to court. Today's **eNews** outlines our Support Person Guidelines and offers tips on choosing a support person.

## Court adopts Guidelines

The concept of a support person for people without lawyers is not new – they have been used in British Columbia for many years. Self-represented litigants have identified the ability to have someone attend court with them as an important aspect of access to justice. The purpose of the Guidelines is to provide people with a measure of certainty about when they will be permitted to have a support person help them in Provincial Court, and the scope of that help.

As part of its efforts to improve meaningful access to justice for self-represented litigants, the Provincial Court of BC has developed and adopted [Guidelines for Using a Support Person in Provincial Court](#). The Guidelines make it clear that the Court welcomes support persons to provide quiet help to self-represented litigants in civil and family court trials, although individual judges may decide that a support person's presence would be disruptive or unfair in a particular case.

The [National Self-Represented Litigants Project](#) (NSRLP) has promoted the use of support persons in Canada as a significant aid to people struggling with all the challenges of representing themselves in an unfamiliar system. They have called for a "clearer, more consistent, and more credible approach to McKenzie friends or navigators (to be) implemented in Canadian courts".

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The Provincial Court of BC hopes these Guidelines will provide that clarity, consistency and credibility.

Dr. Julie MacFarlane, NSRLP Project Director, welcomed the Court's initiative, saying:

"Legitimizing and clarifying the role of a courtroom companion or McKenzie Friend is a welcome step forward for those of us working with self-represented litigants (SRLs). Many SRLs are still unaware that they are permitted to ask for a support person in court – and others are unclear about just how to ask. Yet a court hearing is also the part of the process that SRLs are most anxious about, and having a companion to take notes and provide moral support is invaluable. The publication of these new guidelines will make the experience of going to court less intimidating, more humane, and more consistent for SRLs in BC Provincial Court. I hope that other provincial courts will follow BC's excellent example!"

Jennifer Muller, an Access to Justice BC committee member with experience as a self-represented litigant, agreed:

"The experience of appearing before a judge and attending court without legal counsel is a very isolating and overwhelmingly stressful experience for many self represented litigants. The Guidelines for Using a Support Person in Provincial Court, adopted by the Provincial Court of BC, will give self represented litigants the much needed opportunity to have the emotional support of someone they choose to accompany them in the courtroom. These guidelines will have a positive and significant impact on the experience of many SRLs in BC Provincial Court."

### Guidelines

A litigant is a person who is suing or being sued in a lawsuit.

A self-represented litigant is one who does not have a lawyer and is presenting their own case in court. A support person is someone who sits beside a self-represented litigant at the front of the courtroom to quietly help them during their trial. A support person is sometimes called a courtroom companion or a "McKenzie friend", referring to the name of an English court case that dealt with support persons.

The Court's Guidelines say that unless the judge orders otherwise, a self-represented litigant may have a support person sit with them in a **family or Small Claims trial or hearing** to provide this help:

- take notes
- organize documents
- make quiet suggestions to the litigant
- provide emotional support
- do any other task approved of by the judge

A litigant can only have one spokesperson during a trial, so the support person may not speak to the judge, or speak for the litigant, except in exceptional circumstances where the judge has given permission in advance.

A person who will be a witness in the trial or is being paid for their services cannot act as a support person.

### **Choosing a support person**

You'll want someone you can trust with the private information that may be disclosed in court, someone who will remain calm, and who doesn't have their own agenda or an emotional stake in the proceedings. A person who has helped you prepare for court may be a good support person because they're already familiar with your case.

Avoid a person who has a personal or political agenda, or is a member of an advocacy group. They may not put your interests first or be well-received by the judge. A person with a grudge against the other party, or who's in conflict with them, will also not be an appropriate support person. The risk that their conflict with the other party will become distracting or disruptive during the trial is too great.

The best kind of support person is someone who will help you stay focused on the judge, the court procedure, the evidence, and the issues in your trial.

The National Self-Represented Litigants Project offers a guide to [Choosing and Presenting a Courtroom Companion](#). See especially pages 4 to 14 for more information on choosing the right support person.

### **How should I introduce my support person?**

When your case is called, walk to the front of the courtroom. The judge will likely ask you to identify yourself. Give your name and tell the judge you have a support person with you who understands the Court's Guidelines. Give the support person's name and say whether they are a friend or family member. The judge may ask the other party if they have any objection. If they object, listen to their reasons. When you reply, you can explain that your support person knows the Court's Guidelines, knows they cannot speak aloud during the trial, and will remain calm. It would also be helpful to tell the judge why you need your support person. See pages 17 to 19 of [Choosing and Presenting a Courtroom Companion](#) for tips on how best to explain why you need a support person.

### **Why might a judge refuse to permit a support person?**

The judge will want to hear you and understand your case clearly. However, the judge must also hear the other side and ensure that both parties feel fairly treated. Judges need to concentrate on the real issues and the evidence presented in a trial. To do this, they need to maintain control over the courtroom and preserve a calm atmosphere.

A support person can help a self-represented person stay calm and focused. But in some cases their behaviour has been distracting or disruptive. The Court's Guidelines explain that a judge may refuse to allow a support person to sit with a litigant where their presence could be, or becomes, disruptive to the proceedings or would otherwise be unfair to an opposing party. For example, if your new partner and your ex-spouse don't get along, the judge might not permit your new partner to act as your support person in a family court hearing because it would be disruptive or unfair.



[Choosing and Presenting a Courtroom Companion](#) suggests you let the other litigant know in advance that you intend to bring a support person to your trial. You could refer them to the Court's Guidelines too. By giving them time to learn about support persons and decide whether to bring one themselves, you may avoid objections at the trial.

### **Can I have a support person at a Small Claims settlement or trial conference, or at a family case conference?**

These conferences are usually private meetings to discuss possible settlement. Therefore, the Guidelines don't authorize support people to attend them. However, the Guidelines explain that a judge may allow a support person to sit with you in a conference if you ask permission. Usually, a judge will only give permission if the other party agrees. Still, if the support person is not allowed to be with you in the conference room, you may ask the judge for a break during the conference to speak to them outside the room.

### **Where can I get more information?**

The National Self-Represented Litigants Project has other helpful information on its [website](#), in addition to the [Choosing and Presenting a Courtroom Companion](#) guide. Remember, however, that this guide does not cover a situation like ours, where the Court's Guidelines permit support persons unless there's a reason to disallow them. You can also get information about support groups for self-represented litigants from the [National Self-represented Litigants Support Network](#).

The Court has also issued [NP11](#), a 'Notice to the Profession' to tell lawyers about the Guidelines.

## **Key Online Resources**

Family Court	Small Claims Court	Criminal Court	Other Links
Family Law Act	Online Help Guide	Criminal Code	BC Courts
Justice BC	Rules	Forms	Court Services Online
Forms	Forms	Daily Court List	Traffic Disputes
Family Maintenance	Daily Court List	Justice BC	Useful Links

# The McKenzie Friend: Choosing and Presenting a Courtroom Companion

Judith M. DaSilva & Julie Macfarlane  
for the National Self-Represented  
Litigants Project, March 2016



Windsor Law  
University of Windsor

## Acknowledgements

Many thanks to the judges who gave their time for an interview, and shared their valuable thoughts and opinions. Thanks also to the friendly professionals who offered useful and helpful feedback on various initial drafts.

Special thanks to Julie Macfarlane, who offered the idea and opportunity to do this important research, and whose guidance, knowledge, unparalleled expertise, and positive support is integral to this guide. Her commitment to access to justice is an inspiration, and this guide exists because of it.

Judith M. DaSilva, B.A., B.H.Sc.O.T., M.A.  
March 2016

### **Praise for “The McKenzie Friend: Choosing and Presenting a Courtroom Companion”**

"This is a helpful effort to assist self-represented litigants to recognize issues arising from a request to allow a support person to sit with them in the courtroom, to anticipate concerns that an opposing litigant, the litigant's counsel, or the judge, may have in connection with the request, and to prepare the litigant to address those concerns."

Justice David Price of the Ontario Superior Court, *in his personal capacity*

"Thoughtful advice for SRL's on help in court. Court is stressful for everyone, and especially for SRLs. Judy DaSilva's approach makes sense."

Malcolm Mercer, Benchers, Law Society of Upper Canada

"With their clear, straight-forward guide to choosing and presenting a courtroom companion, Judith DaSilva and Julie Macfarlane will help thousands of people to assess whether they need a McKenzie friend, how to choose a McKenzie friend, and how to explain their needs to judges. Equal service to self-represented litigants is the next frontier in making Canada's justice system fair to all."

David Merner, Executive Director, Dispute Resolution Office, British Columbia  
Ministry of Justice

# **The McKenzie Friend: Choosing and Presenting a Courtroom Companion**

**Judith M. DaSilva & Julie Macfarlane  
for the  
National Self-Represented Litigants Project**

*March 2016*

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## 1. What is a McKenzie Friend?

As a self-represented litigant, you may bring someone to sit with you at the front of a courtroom when you are appearing before a judge or a master. You must ask the judge for permission for this person – often a friend or family member - to sit beside you and help you through the process (for example by taking notes, passing you materials, helping you to stay calm and centred).

This person is called a “**McKenzie Friend**” (shortened in this guide to MF). This name came from a case in England in 1970, called McKenzie v McKenzie. For more information on this case, see Robert Spon-Smith “McKenzie Friends” at <http://www.familylawweek.co.uk/site.aspx?i=ed1568>.

Although the MF is a term used regularly since the 1970's in England and Australia, in Canada this is a new concept. There are still few Canadian cases that mention a MF (<http://representingyourselfcanada.com/2016/03/10/canadian-cases-on-mckenzie-friends/>). However, the idea of having a friend in court with you is not new, and most judges have experience with a person representing themselves and who is otherwise alone in the courtroom asking for someone to sit beside them at the front of the courtroom or hearing room.

The case that established the concept of the MF gives a self-represented person the right to ask a judge to allow them to bring a McKenzie Friend into the courtroom with them. The judge has ultimate discretion to agree to or to refuse this request – in other words, the judge has the final say.

## 2. About this Guide

Because the concept of the MF is new to Canada, there are no specific or official guidelines for how judges may allow their use. This means that whom you bring, and how you make your request, is very important.

This NSRLP Guide has been written to enable you to make the best choice of a MF, and the best argument for your MF to the judge, if you wish to bring a MF with you to court. It also describes some of the reasons you might consider bringing a MF.

For the purposes of creating a Guide that would be useful in our Canadian court system, nine Canadian judges were interviewed to gather their opinions and thoughts on:

- How they would feel about being asked for permission for a MF;
- What they would expect from a MF in the courtroom;
- Why they would refuse a request for a MF;
- Their thoughts generally about the role of a MF in a courtroom.

Their comments and thoughts have been integrated into this Guide, to give some additional context.



### **3. What Can a McKenzie Friend Do?**

In the courtroom, a McKenzie Friend or MF can:

- Help organize your legal documents, and hand you documents when you need them in the course of your presentation to the court
- Take notes to review with you later

- o Observe the courtroom discussion
- o Provide emotional and moral support
- o Occasionally communicate with you in the courtroom through notes, or whispering, but both of these things need to be done in a way that does not interfere with or take attention away from the court process. Some judges don't like this, and some may tell you not to do it at all.



An MF does not have to do all of these things. He or she may do only one task, or any combination of the above. For example, you may feel that you only need someone to be there with you to help you feel more calm and less afraid and do not want them to take notes or handle your materials. This is something you should discuss with your MF before you go into the courtroom with them.

In addition to what a MF can do, you should also be clear about what they cannot do:

1. **A MF cannot give legal advice.**
2. **A MF is not allowed to address the court.** Only in exceptional circumstances will a judge allow a friend to address the court. Often this has to do with cultural, language comprehension, or mental health issues, but this is allowed on a case-by-case basis only, and is completely at the discretion and decision of the judge. You cannot count on a judge to allow this. It is rare, and so we advise you not to expect that this will happen.

#### 4. How to Choose a McKenzie Friend



a. *What will the MF role involve for the person you ask?*

It is important to choose the “right” person to be your MF, so here are some initial tips:

- Depending upon how complex your case is, choosing a MF might be about more than the hours you will spend inside the courtroom. If you have a case that is ongoing and more complex, the MF you choose may be a support for you during your case preparation, and outside the courtroom. You may want their feedback after your hearing, especially if your case is continuing.
- You may already have a person or group of people whom you use for support. Perhaps they may have already helped you outside the courtroom with case preparation, helped you write or edit letters or forms, listened to you, and possibly given input on how to problem solve and strategize about your next steps. It may be a good idea to choose to use one of these people as your MF in court since they are already familiar with your case. Of course, they may or may not feel comfortable extending their role to coming with you to court.



b. *What personal characteristics of a MF might be important?*

So, who is the best person to bring to court with you?

**TRUST:** This person needs to be someone you trust with your personal and financial information, with any issues or topics that might be discussed in court, as well as anything the other side may say about you in court.



Remember:

- Things may be stated in court by the other side that your friend has not heard or does not know.
- There may be potentially new, surprising, and shocking information disclosed, and this may affect your relationship with your MF – so if this person is someone who may be shocked or surprised, you may want to reconsider. One judge spoke in an interview about a case in which this unfortunately happened. You need your MF to be someone who will remain calm and supportive.

**AGENDAS: Make sure the person you bring is there to support you**

Judges do not respond well to other people in the courtroom who are there to further their own personal or political agendas, such as members of advocacy groups for fathers or mothers. As well, it is important to consider if your support person has a personal agenda (for

example, feeling aggrieved about how their own case turned out) that may create more conflict with you or the other party.



**PAST RELATIONSHIPS:** Will past or current relationships your friend has with the other side affect how supportive this person can be for you? Is there any conflict between them? Is this going to distract you from giving your complete attention to your case and the judge?

c. *Some special considerations in choosing a family member*

Choosing a family member to be your MF can be simple or complicated, and will reflect the unique context of your family dynamics.

- **CHILDREN:** one of the judges interviewed suggested that using a child of the marriage as a MF in a divorce case is not a good idea. There is a risk that the child will become aligned with one or other parent, exacerbating the dispute. However, another judge spoke about an experience where an adult child consistently helped calm down an angry parent, and helped him to listen to the other side, his mother. Both parents appreciated his presence. In this judge's opinion, this MF was very helpful. However, presenting an adult child as a MF will raise additional concerns for some judges.
- **GRANDPARENTS:** One judge said in an interview that if they saw a grandparent sitting beside a party they would always counsel the self-represented litigant against it, particularly if custody issues are at stake and the grandparent wants to ensure they have contact with the grandchildren in the future, regardless of the outcome. However, for the same reasons given in the example above, having issued this warning the judge might allow a grandparent as a MF if the family dynamics suggest that their presence would be beneficial.

Ultimately, whomever you choose to be your MF, every judge interviewed, regardless of their different opinions on a particular choice of MF, expressed a consistent theme: if this person helps keep you focused on the judge and the process, that is the best kind of MF to have in the courtroom, whatever their background or combination of skills.

*d. Courtroom tasks: Speaking, Thinking, Listening and Responding*

In a courtroom you have four tasks. You need to **SPEAK, THINK, LISTEN**, and **RESPOND**.

Looking at the tasks you have to accomplish in a hearing may help you to decide who is best suited to help you as a MF.

**SPEAKING & RESPONDING: Performing**

If you had a lawyer, speaking and responding in a courtroom would be their tasks. These are also the “performing” tasks, and are often the hardest to do under stress, especially while you are also trying to process what is happening.

**LISTENING & THINKING: Processing**

**LISTENING** and **THINKING** are processing tasks; you need to process what is happening in order to respond.

After you **SPEAK**, you need to **LISTEN** to what is being said to you and around you, **THINK** about it, and then figure out the best way to **RESPOND**.

**RESPONDING** may involve finding items to refer to from your documents and notes, and/or **SPEAKING**.

As a SRL, all four of these tasks are your responsibility.

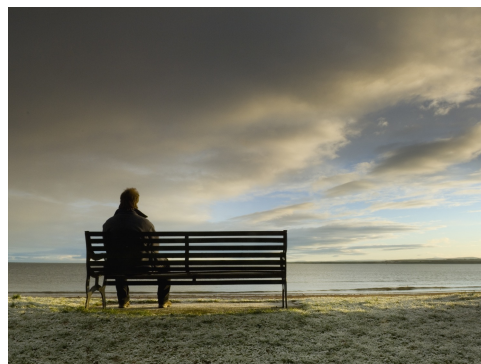
Ask yourself the following questions:

- Which of these four tasks am I good at?

- Which of these things am I generally better at, and which do I normally need help with?
- Would having fewer tasks help me to manage stress?
- How important is it for me to handle my own documents in the hearing, or might it be helpful for me to have someone who can organize and pass me documents while I pay attention and hear what is being said to me or asked of me?
- Do I need someone beside me to help me feel calmer, but would I prefer to remain in charge of these four tasks myself?

Once you have identified what you feel you need the most support with, ask yourself the following questions:

- Whom do I know and trust enough who will make it easier for me to SPEAK and RESPOND?
- This person is very organized and great with documents, but will this person also help me feel calmer and listen better, or will I be worried about how they are managing the stress of the courtroom?
- Whom do I know who is good at LISTENING and THINKING (for example, finding items in my documents)?
- Do I want or need someone to take notes?
- Do I want someone to give me feedback on how they thought I sounded or how things went in court? Do I trust this person's observations? Do I need their feedback?
- Do I need someone who is good at all or most of these tasks, or do I just need someone who helps me feel calm, and then I can handle all, or most of it, myself?



e. *The McKenzie Friend Worksheet (Appendix A)*

A Worksheet is offered as a summary of the information contained in this Guide and is designed to be used alongside it (Appendix A). The Worksheet asks you a series of guided questions to help you choose the right MF for you.

## **5. Professionals as McKenzie Friends**

a. *What if your friend or family member is a lawyer or paralegal?*

Although technically the profession of your friend or family member should not matter, there appears to be a reluctance to allow a friend to sit beside you if they are a lawyer or a paralegal, even though as a MF they are not retained to act as your lawyer or paralegal.

Most judges interviewed assumed a MF should never be a lawyer or paralegal. Their reasoning was that the temptation for the friend to give legal advice in these circumstances is too great. From a lawyer's perspective, another reason for this concern may be that in a time of transition and change, many judges are still adjusting to the increase in self-represented litigants, and it would be safest to ask for support that is not potentially contentious. Therefore, if you feel it is essential for you to have support in court, try to find a support person who is not a lawyer or paralegal.

If you are in a position where your chosen MF is legally trained, you should be prepared to defend this choice and also – based on interviews with judges – be aware that your request is at greater risk of being denied.

Some things you can say in making your request for a MF that may help the judge feel more comfortable granting permission include:

- Be clear about how critical it is for you to have a support person in order for you to state your case.
- State clearly that the lawyer or paralegal you are requesting as your MF is not retained to represent you. You need to really emphasize this point.

- If your friend or family member practices a different area of law than the case at hand, it is important to stress this and make it clear that they are not giving you legal advice.
- Provide details about your *personal* relationship with your lawyer or paralegal friend, and how they were your best choice. If your relationship began before they became a lawyer or paralegal, you should state this.
- Be clear about how their profession is incidental to your choice of them as your moral and organizational support.
- Essentially, this is similar to asking for special circumstances. This is much like a judge allowing a MF to speak under special circumstances.
- Explain to the judge that you feel you would be more steady, and organized, and you feel the court process will go more smoothly if your MF could sit with you at the front table.

*b. What about choosing another professional as a McKenzie Friend?*

What if you feel that you need support, but you don't have a friend or family member who fits the bill?

You may have friends who know your case, but who are likely to be anxious in a courtroom. Or, their relationship with the other party may cause problems. You may have someone who would be great at helping you stay calm, but there are issues or facts that may surface in the proceeding that you don't want them to know, or you don't feel comfortable with them knowing, or you may simply not want to burden someone with the degree of responsibility and involvement that being your McKenzie Friend might require. However well-meaning, supportive, and loving, you may wonder if your friend or family member will keep what happens in the courtroom private.

You may prefer to bring another kind of support person into the courtroom with you. Other choices include:

- A member of the clergy or a religious leader in your community
- A therapist or counselor
- A support worker (for example from a shelter)
- A community volunteer

### *c. Fee-charging McKenzie Friends*

In England, there are fee-charging MFs. They are as yet unregulated, but have formed a professional association called the Society of Professional McKenzie Friends (<http://www.mckenziefriends.directory>), They have a Code of Conduct which is based on a McKenzie Friends Practice Guidance for the Courts and Tribunals (2010). You may want to review this Code with your McKenzie Friend.

Recently the UK judiciary has proposed a ban on fee-charging McKenzie Friends “in order to protect ‘vulnerable litigants’ from unregulated and uninsured individuals” (Smith, 2016).

The idea of fee-charging McKenzie Friends in Canada raises familiar arguments about the regulation of legal services and is likely to be contentious.

## **6. Asking Permission for a McKenzie Friend**

When asking a judge for permission to have a McKenzie Friend with you in the courtroom, there are three parties with interests, needs, and expectations: you, the other side, and the judge.

It is the judge’s job to balance these three elements, and the goals of each, when he or she is considering your request for a MF.



a. *The judge's perspective*

Few Canadian judges are familiar with the term “McKenzie Friend”, so asking for one using that name may surprise the judge. However, most judges are familiar with the concept of bringing a friend to court. All judges interviewed for this study said they had experience with a SRL asking for someone to sit beside them in the courtroom.

i. What is important to the judge?

Ensure a sense of fairness for both sides  
Maintain control over the courtroom  
Preserve the dignity of the proceedings  
Hear you and your case clearly

Every judge interviewed said that they understood their job as facilitating a SRL to present their case, while still appearing fair and impartial to both parties. Every judge is going to interpret how this is done differently, but ultimately, they do need to show that they have given you every opportunity to feel that you can speak, hear and respond.

Every judge interviewed said that if the SRL thinks that having a friend or family member sitting beside them will help them, as long as they agreed to be quiet and if the other side didn't object, they would always agree to it, with exceptions (see below). However, there are rules to follow. To quote another judge:

“The courtroom is supposed to be a fair, controlled, special place for arguing disputes. Rules apply. So, any element that comes into the courtroom must assist in preserving that atmosphere in the court.”



Because judges understand their job to be being in charge of the courtroom, it is very important to remember in making your request for a MF that you do not have a guaranteed right to have a friend sit beside you.

As one judge stated:

“...my approach is very different if (a SRL) *asks* or if they *presume* [to have a friend]. (our italics) Sometimes they presume. I am more generous if they ask.”

Ultimately, a judge wants you to be able to speak clearly, have your complete attention on them and the proceedings, be able to respond to questions, and focus.

With this in mind, you need to be clear, respectful and reasonable in making your request. You should also consider the perspective of the other side.

ii. When might a judge not allow a McKenzie Friend?

From the interviews we conducted, we learned that a judge may deny your request for a MF or a support person if they think that she or he:

- Is an agent of a special interest group and is there in that capacity
- Is really a legal agent who will give legal advice but presenting themselves as a friend
- Has a history of disruption in a courtroom and is known to the court as such
- Appears visibly mentally ill
- Appears visibly aggressive
- Is a minor
- Is a witness in your proceeding
- Wants to be part of a private or confidential proceeding (for example, some settlement meetings do not permit members of the public to attend)

Another reason why a judge may deny a request for a MF or support person is if given the context or history of the case, the judge feels

allowing this MF would be or might feel unfair to the other side; for example, if the proposed MF has a history of conflict with the other side.

Be prepared: there is a wide range of opinion and practice on the use of support people.

*b. The other side's perspective*

Some judges may ask the other party if they have any objections to the presence of your MF. Most judges interviewed said they would not allow your MF if there are any objections from the other side. Another judge said it was rare that there were objections. Yet another said they would take objections into consideration, but allow or disallow according to their own discretion.

Therefore, try to anticipate what the other side might say, and be prepared to respond to this. This is another reason why carefully choosing your MF can make an important difference.

*i. What is important to the other side?*

Transparency

Ensure fairness to client or self

Avoid client or self being distracted or agitated by the MF

It is good practice to notify the other side that you intend to ask for a support person to sit beside you. The moment a person moves from the gallery to the table, that person becomes a part of the court process. Anyone sitting beside you is no longer simply a spectator. For this reason, transparency (and advance notice) is very important to the other side. Notifying them shows them and the judge respect. It has the additional advantage of demonstrating that you understand procedure.

If the other side is also a self-represented litigant, they may appreciate the information, and then may decide to also bring a support person. The judge may see this as your having given the other side an

opportunity for fairness, and it can be a way of establishing your good faith and credibility with the judge.

- ii. What if you feel that the objection of the other side is just “tactics”?

It is possible that, the other side may object to your support person as a tactic: whatever helps you, is bad for them. If you think they may object simply as a tactic, you should be prepared to respond. State why you think the other side is using their objection as a tactic and address the details of their objection.

In these circumstances, you may feel tempted not to notify the other side that you want to bring a support person to court because you do not want to give them an opportunity to formulate objections. Resist the urge to use this element of surprise. Most judges will appreciate full disclosure. You can also state you suspected the other side would object, but still felt it important to be transparent in giving them advance notification of your wish to bring a MF.

*c. A sample statement asking permission for a McKenzie Friend*

Your statement to the judge for a friend can either describe them as a “support person”, or you can choose to use the term “McKenzie Friend” in your request, anticipating that some judges are unfamiliar with this expression (in which case you could refer to the legal case that established the principle, *McKenzie v McKenzie* (1970) 3 W.L.R. 472, which you would read out in court as “year 1970, volume 3, Weekly Law Reports, page 472”).

What follows is an example of how you might make your request to the judge for a MF or support person. Your particular circumstances will determine the details of your statement, but you could adopt this basic format.

**“Your Honour, I would like to request a McKenzie Friend to help me today.**

**I understand that McKenzie Friends are usually friends or family members who can sit beside self-represented litigants in a courtroom.**

**I know they aren’t allowed to address the court, and he/she is not here to give me legal advice.**

**My McKenzie Friend is ...(name). S/he is ....(relationship to you, and occupation if relevant).**

**S/he will help me with ....” (role: try to be as specific as possible to show that you have thought about this. For example, “I need someone to help me organize my notes because, I get flustered and they know my case and can hand me them when I need them”; or “They help me to feel calmer and stay focused because appearing in court as a self-represented person is quite intimidating and nerve-racking” etc.)**

**“It is important for (name) to sit beside me instead of in the public seating because ....” (For example, “I feel better having my friend sit beside me upfront”; or, “I would like my friend to be able to sit up front so they can hear what is being said clearly and take some notes for me”; or “I need them to sit beside me so that they can pass me my documents when I need to refer to them.”)**

## **7. Can a McKenzie Friend be dismissed by the court?**

Once a judge has allowed a McKenzie Friend, they will only dismiss them at a later time if they are considered to be “disruptive” to the proceedings.

Being disruptive does not only mean speaking out in court. Body language and behaviour can also be seen as disruptive: for example, eye rolling, sighing, huffing, snickering, laughing out loud or any other behaviour or sound that the judge interprets as disrespectful.

Some judges may only dismiss your MF to the public seating, while others might ask them to leave the courtroom altogether.

Some judges may give one warning and then dismiss. Others may give a few reprimands or warnings before they would dismiss a MF.

## **8. In Conclusion**

The use of McKenzie Friends is relatively new in Canada, but we can assume that it will develop rapidly given the rising numbers of self-represented litigants in Canada, and the experiences of other countries, such as the United Kingdom and Australia, to which Canada often refers for ideas on justice system reform (see further reading and resources at Appendix B below).

This Guide draws on a small sample of judges to gauge current judicial attitudes towards the use of a MF. It also offers some practical advice for considering how a MF might be helpful for a person appearing alone in court, and who might be a good choice for a MF or support person.

As with all NSRLP resources, we welcome comments and feedback on the usefulness of this Guide.

## APPENDIX A

# Choosing a McKenzie Friend A Worksheet

NSRLP 2016

**You may find it might be helpful to work through the following questions in order to decide *if* you would like a McKenzie Friend, and *whom* that could be.**

### **QUESTION ONE: DO I NEED OR WANT SOMEONE TO SIT WITH ME IN COURT?**

- Am I confident about handling my matter in court/ at a hearing?
- Do I feel comfortable having sole charge of my matter?
- Would it be helpful for someone to sit beside me in court even if they cannot speak on my behalf?
- How important is it for me to handle my own documents in the hearing, or might it be helpful for me to have someone who can organize and pass me documents while I pay attention and hear what is being said to me or asked of me?
- Would having fewer tasks help me to manage stress?
- Would it be useful to have someone else listen to the court proceeding so that they can debrief with me afterwards?
- Or, would I prefer to remain in charge of tasks myself?

### **QUESTION TWO: WHAT TYPE OF SUPPORT DO I NEED AND WANT IN COURT?**

**How good am I at each of the four tasks that I shall face *in court*: SPEAKING, RESPONDING, LISTENING & THINKING?**

- Which of these tasks am I good at?

**SPEAKING & RESPONDING** (performance skills)

---

**LISTENING & THINKING** (processing skills)

---

- Which of these tasks do I sometimes/ often need help with?

**SPEAKING & RESPONDING** (performance skills)

---

**LISTENING & THINKING** (processing skills)

---

### QUESTION THREE: WHO MIGHT BE AN APPROPRIATE PERSON TO BE MY MCKENZIE FRIEND?

Begin with as long a list as possible.

Name	Relationship	Occupation	Skills/ type of support they could offer	Time known	Level of trust? (high, OK, low)	Any personal agendas? (yes, no, maybe)	Relationship to the other side



#### **QUESTION FOUR: WHICH OF THESE INDIVIDUALS MIGHT BE THE BEST CHOICE FOR MY MCKENZIE FRIEND?**

- Is the person you are considering a child of the marriage or a grandparent? This may run into objections, or it may still be the best choice (see The Guide to Choosing and Presenting a McKenzie Friend, page X)
- Is the person you are considering a lawyer or paralegals by profession? Judges sometimes object to lawyers or paralegals acting as “support persons” (see The Guide to Choosing and Presenting a McKenzie Friend, page X)
- Is the person you are considering someone whom the other side may object to? How would you deal with those objections? Are they reasonable?
- How do you think this person will be seen by the judge and other court officials – are they calm, reasonable and dignified?
- Is the person you are considering likely to be upset by anything they hear in court? Might they hear information that you would prefer them not to know about?
- How much time does this person have to give to supporting you as a McKenzie Friend? How flexible are their hours, if they are working?
- Bottom line: whom do you feel has the most skills and/or whom you would feel most comfortable with?

## APPENDIX B

### Further readings and resources

David Mossop “Bring a Friend to Court: A Guide” available at  
[http://d3n8a8pro7vhmx.cloudfront.net/clatest/pages/79/attachments/original/1401251986/Bring\\_a\\_Friend\\_to\\_Court\\_Guide.pdf?1401251986](http://d3n8a8pro7vhmx.cloudfront.net/clatest/pages/79/attachments/original/1401251986/Bring_a_Friend_to_Court_Guide.pdf?1401251986)

<http://www.mckenzie-friend.org.uk> (UK McKenzie Friends Association)

McKenzie Friends practice guidance published by the England & Wales Courts and Tribunals Judiciary, July 2010  
(<https://www.judiciary.gov.uk/wpcontent/uploads/JCO/Documents/Guidance/mckenzie-friend>)

<http://www.mckenziefriends.com.au/guide-to-a-mckenzie-friend.pdf>  
(Australian McKenzie Friends Club)

Robert Spon-Smith “McKenzie Friends” available at  
<http://www.familylawweek.co.uk/site.aspx?i=ed1568>

Law Society of England and Wales, Litigants in Persons, Guidelines for Lawyers (June 2015)  
<http://www.lawsociety.org.uk/support-services/advice/articles/litigants-in-person-new-guidelines-for-lawyers-june-2015>

Cases on McKenzie Friends from England & Wales: A selection of relevant cases (England & Wales): June 2015 (PDF 109kb)

Canadian cases on McKenzie Friends  
<http://representingyourselfcanada.com/2016/03/10/canadian-cases-on-mckenzie-friends/>

# Tab 4



Utah State Courts

# Remote Hearings in Justice Courts

April 14, 2017

Nancy Sylvester

# What do we mean by remote hearings?

- Hearings by phone
- Hearings by video
- Scheduling conferences by phone
- Scheduling conference by video
- Virtual reality trials?

# What are the benefits of remote hearings?

- Attorneys in more populated districts can assist in rural ones.
- Cost savings to parties and attorneys
- More help for pro se litigants
- Better access to justice

# What are the drawbacks of remote hearings?

- Imperfect technology
- Delays in communication
- Body language not captured
- Credibility difficult to determine
- Jurisdictional issues with remote witnesses

# Which rules are we talking about?

- Rule 4-106 of the Utah Code of Judicial Administration
- Rule 9-105 of the Utah Code of Judicial Administration
- Rule 17.5 of the Utah Rules of Criminal Procedure
- Rule 43 of the Utah Rules of Civil Procedure



# UCJA Rule 4-106

## **Rule 4-106. Remote conferencing.**

### **Intent:**

To authorize the use of conferencing from a different location in lieu of personal appearances in appropriate cases.

To establish the minimum requirements for remote appearance from a different location.

### **Applicability:**

This rule shall apply to all courts of record and not of record.

### **Statement of the Rule:**

- (1) If the requirements of paragraph (3) are satisfied, the judge may conduct the hearing remotely.
- (2) If the requirements of paragraph (3) are met, the court may, for good cause, permit a witness, a party, or counsel to participate in a hearing remotely.
- (3) The remote appearance must enable:
  - (3)(A) a party and the party's counsel to communicate confidentially;
  - (3)(B) documents, photos and other things that are delivered in the courtroom to be delivered previously or simultaneously to the remote participants;
  - (3)(C) interpretation for a person of limited English proficiency; and
  - (3)(D) a verbatim record of the hearing.

## UCJA Rule 4-106

If the requirements of the rule are met, who can participate remotely?

- a witness
- a party
- counsel

## UCJA Rule 4-106

To conduct a remote hearing, you need:

- Good cause
- A party and the party's counsel must be able to communicate confidentially
- Documents, photos and other things that are delivered in the courtroom must be able to be delivered previously or simultaneously to the remote participants
- There must be interpretation for a person of limited English proficiency
- And you must be able to make a verbatim record of the hearing

# UCJA Rule 9-105

## **Rule 9-105. Justice Court hours.**

### **Intent:**

To establish minimum court hours for Justice Courts.

### **Applicability:**

This rule shall apply to all Justice Courts.

### **Statement of the Rule:**

- (1) Every Justice Court shall establish a regular schedule of court hours to be posted in a conspicuous location at the court site.
- (2) Justice Courts shall be open and available to transact judicial business every business day, Monday through Friday, excluding holidays as defined in Utah Code section 63G-1-301, and unless specifically waived by the Judicial Council. During the scheduled hours of court operation the Justice Court judge or clerk shall be physically present or immediately available remotely.
- (3) Justice Courts shall provide, at a minimum, the following hours of operation:

Number of Average Monthly Filings	Hours Per Day
0-60	1
61-150	2
151-200	3
201-300	4
301-400	5
401-500	6
501 or more	8

- (4) The Justice Court judge may schedule the court hours to meet the needs of the litigants and the availability of bailiff and clerk services.
- (5) Court hours shall be set at least quarterly and the Justice Court judge shall annually send notice to the Administrative Office of the Courts of the hours which have been set for court operation.

## UCJA Rule 9-105

- Why is this rule in here?
- Because of this provision:

(2) Justice Courts shall be open and available to transact judicial business every business day, Monday through Friday, excluding holidays as defined in Utah Code section 63G-1-301, and unless specifically waived by the Judicial Council. **During the scheduled hours of court operation the Justice Court judge or clerk shall be physically present or immediately available remotely.**

## UCJA Rule 9-105

- What does this look like?

**“The Justice Court judge or clerk shall be physically present or immediately available remotely.”**

- Phone
- Video screen
- Virtual reality headset?

## URCrP 17.5

### **Rule 17.5. Hearings with contemporaneous transmission from a different location.**

- (a) The court, in its discretion, may conduct the arraignment, bail hearing, and/or initial appearance with a defendant attending by contemporaneous transmission from a different location without the agreement of the parties or waiver of the defendant's attendance in person.
- (b) For any other type of hearing, the court may conduct the hearing with a defendant attending by contemporaneous transmission from a different location only if the parties agree and the defendant knowingly and voluntarily waives attendance in person.
- (c) For good cause and with appropriate safeguards the court may permit testimony in open court by contemporaneous transmission from a different location if the party not calling the witness waives the right to confront the witness in person.
- (d) Nothing in this rule precludes or affects the procedures in rule 15.5.

## URCrP 17.5

- **Arraignments, bail hearings, and initial appearances:** do not require the parties to agree to remote hearing or the defendant to waive attendance in person.
- **All other hearings where the defendant appears remotely:** the parties must agree and the defendant must knowingly and voluntarily waive attendance in person.
- **Remote testimony is permitted under these circumstances:**
  - For good cause
  - with appropriate safeguards (due process and those outlined in Rule 4-106)
  - The party not calling the witness must waive the right to confront the witness in person.
- The procedures in Rule 15.5, Out of court statement and testimony of child victims or child witnesses of sexual or physical abuse - Conditions of admissibility, will apply with child victims and witnesses. You'll most likely see this in domestic violence in the presence of a child cases.



# URCP 43

**Rule 43. Evidence.**

- (a) Form. In all trials, the testimony of witnesses shall be taken in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. For good cause and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.
- (b) Evidence on motions. When a motion is based on facts not in the record, the court may hear the matter on affidavits, declarations, oral testimony or depositions.

## URCP 43

- Testimony of witnesses may be taken in open court under these conditions:
  - Good cause
  - Appropriate safeguards (due process, Rule 4-106 protections)

# URCP 43

## Advisory Committee Note

Federal Rule of Civil Procedure 43 has permitted testimony by contemporaneous transmission since 1996. State court judges have been conducting telephone conferences for many decades. These range from simple scheduling conferences to resolution of discovery disputes to status conferences to pretrial conferences. These conferences tend not to involve testimony, although judges sometimes permit testimony by telephone or more recently by video conference with the consent of the parties. The 2016 amendments are part of a coordinated effort by the Supreme Court and the Judicial Council to authorize a convenient practice that is more frequently needed in an increasingly connected society and to bring a level of quality to that practice suitable for a court record. **As technology evolves the methods of contemporaneous transmission will change.**

# What are the Courts' Capabilities Technology-wise

- Conference calls
- Vido
- Google video (hangouts)

# What are lawyers saying about remote hearings?

Subject: Remote Hearings

Dear LicensedLawyer-participating attorney:

Thank you again for being available to people searching for attorneys on LicensedLawyer.

One of our hopes is that LicensedLawyer can help us offer legal services to rural Utah and we encourage members to offer as wide a geographic range as possible.

We are also working with the Utah courts to make remote hearings more common.

If you have had a remote hearing in the last year, please let us know about your experiences. If you have ideas about how we can make remote hearings more helpful to offering legal coverage in rural Utah, please tell us.

Thank you.

*Sean Toomey*

Communications Director

# What are lawyers saying about remote hearings?

“Last month I participated in a remote hearing, a status and scheduling conference, with the judge in Loa (Wayne County), the respondent’s attorney in Richfield, and the petitioner’s attorney in Provo. In my experience the judges are very willing to allow such procedural hearings to be conducted remotely. In years past I have participated in a few evidentiary hearings where a witness participated by telephone. I would do anything I could to avoid that for any important witness. Perhaps it would work with a video connection, but it was very ineffective by telephone.”

“I have had some remote hearings in Manti. The court there does not have the ability to do a conference call, so the attorneys have to conference with each other before they call the court. Otherwise, no problems.”

# What are lawyers (and judges) saying about remote hearings?

“I had an experience within the last few months with a hearing held in Logan. I filed a motion to appear telephonically, which was granted. During the hearing the opposing attorney was present in the courtroom. I could hear the Judge quite well, but could hardly hear the opposing attorney. This was a very uncomfortable experience because of concern that I was missing part of what was being said.”

“Remote hearings are great. They're even better when they involve audio-visual. Anyone who claims remote hearings are somehow insufficient to meet the needs of a hearing is being disingenuous. Yes, audio quality can be a pain, but that can and will be improved. There are some protocols that need to be refined for remote hearings, but remote hearings are a great way to improve access and save time and money.”

“I am the Justice Court Judge in Wasatch County. I regularly utilize remote hearings and I am happy to continue to do so. We use Vidyo for our remote hearings and it has been working really well. I am happy to help with improving remote hearings and participating in any way I can help.” -Judge Brook Sessions

# What are lawyers saying about remote hearings?

“For me, the general refusal of the courts to permit an attorney's remote attendance at hearings is the number 1 impediment to my accepting cases outside the Wasatch Front. I have no problem with appearing in person for trial in some remote location. But it is simply cost prohibitive to be required to appear for every motion hearing on consumer cases.

Last week, I sat at my desk and conducted a video deposition of an expert witness in Las Vegas. I believe the deposition was as effective as if I had been there personally. I have a camera on top of my computer monitor and I could see and hear the witness with no problem. And I believe the witness would say the same thing.... “

Continued.



# What are lawyers saying about remote hearings?

“A word of caution. A few years back I was counsel in a case where the court ordered that the plaintiff’s only witness could appear by telephone from a location 1,200 miles away. It was a disaster. The witness was situated in his office cubicle and people in other cubicles around him could be heard whispering and laughing while he testified. Although there were frequent pregnant pauses and mid-sentence corrections in his testimony, there was no way of knowing whether notes were being passed to the witness. The witness could not be positively identified. And of course there was the jurisdictional issue of to what extent the witness was under the jurisdiction of the Utah court, and whether the court of his home state would have any jurisdiction over any dispute arising from that witness's participation in those trial proceedings. There were other problems I won’t take the time to elaborate on at this time.

In short, I believe attorney remote appearance by video should be encouraged for all pre-trial proceedings. Trial itself should be conducted at the remote location with all parties, their counsel, and witnesses present at that location (with the exception of deposition read-ins).”

# What are lawyers saying about remote hearings?

“I have had a number of remote hearings over the past year. I have a major concern that the remote hearings are not being put on the record. I know that in at least one of my cases, the judge held several telephonic hearings that were not recorded. This was contrary to the judicial code and has created a serious problem for me in my case now that there is no record of what was said in the hearing aside from the order resulting from the hearing.

So, when you talk to the court system, please ensure that they are training their judges and staff on the importance of recording telephonic hearings and also how to use the equipment in order to accomplish that task. Additionally, technology is such that we should be having hearings by video, not telephone.”

# What are lawyers saying about remote hearings?

“I recently had a scheduling conference that was held as a remote hearing. I find scheduling conference by remote hearing to be very convenient. My observation about remote hearings is that they function best when the court initiates the phone call to the attorneys. That way, if the judge is running behind, the parties are not stuck on the phone. It is much easier to accommodate the judge's schedule if the court is initiating the call when he is ready.”

“I've been doing remote hearings in a Utah court for the first time. I practice immigration law where telephonic appearances are much more common. In short I found it extremely convenient. I live in Salt Lake City and had a low means client with a case before the Santa Clara Justice Court. I've managed to keep my costs way down not having to drive there for every small hearing. Also, it was not so easy for my client to find a Spanish speaking, Criminal/Immigration attorney near him. So it's been a great benefit for the client as well. I've had no negative issues by appearing remotely at all. Thank you.”

Which kinds of hearings are you comfortable holding remotely?

Questions?  
Comments?

Thank you!