

Memorandum

REQUESTS FOR THE APPOINTMENT OF AN ADVOCATE TO THE COURT

1. The memorandum has been agreed between the Attorney General and the Lord Chief Justice. It gives guidance about making a request for the appointment of an Advocate to the Court (formerly called an "*amicus curiae*").
2. In most cases, an Advocate to the Court is appointed by the Attorney General, following a request by the court. In some cases, an Advocate to the Court will be appointed by the Official Solicitor or the Children & Family Court Advisory Service (CAFCASS) (see paragraphs 11 and 12 below).

The role of an Advocate to the Court

3. A court may properly seek the assistance of an Advocate to the Court when there is a danger of an important and difficult point of law being decided without the court hearing relevant argument. In those circumstances the Attorney General may decide to appoint an Advocate to the Court.
4. It is important to bear in mind that an Advocate to the Court represents no-one. His or her function is to give to the court such assistance as he or she is able on the relevant law and its application to the facts of the case. An Advocate to the Court will not normally be instructed to lead evidence, cross-examine witnesses, or investigate the facts. In particular, it is not appropriate for the court to seek assistance from an Advocate to the Court simply because a defendant in criminal proceedings refuses representation.
5. The following circumstances are to be distinguished from those where it will be appropriate for the court to seek the assistance of an Advocate to the Court:
 - i. where a point of law which affects a government department is being argued in a case where the department is not represented and where the court believe that the department may wish to be represented;
 - ii. where the Attorney believes it is necessary for him to intervene as a party in his capacity as guardian of the public interest;
 - iii. where the court believes it is appropriate for a litigant in person to seek free (pro bono) assistance;

- iv. where, in a criminal trial, the defendant is unrepresented and the Advocate to the Court would be duplicating the prosecutor's duty as a minister of justice "to assist the court on all matters of law applicable to the case";
 - v. where in a criminal case in relation to sentencing appeals there are issues of fact which are likely to arise and the prosecution ought to be represented, or it would be reasonable to ask the prosecutor to be present and address the court as to the relevant law.
6. In the first of these five cases, the court may invite the Attorney to make arrangements for the advocate to be instructed on behalf of the department. In the second, the court may grant the Attorney permission to intervene, in which case the advocate instructed represents the Attorney. In neither case is the advocate an Advocate to the Court.
7. In the third case the court may grant a litigant in person an adjournment to enable him or her to seek free (pro bono) assistance. In doing so, the court should bear in mind that it is likely to take longer to obtain free (pro bono) representation than funded representation. In contrast to an Advocate to the Court, a free (pro bono) legal representative will obtain his or her instructions from the litigant and will represent the interests of that party. His or her role before the court and duty to the court will be identical to that of any other representative of the parties. Accordingly it will not be appropriate for the court to take such a course where the type of assistance required is that provided by an Advocate to the Court.
8. In the fourth case the prosecutor's special duty is akin to an Advocate to the Court. In the fifth case, in relation to appeals against sentence where the defendant is represented, it may be preferable to request the attendance of the prosecutor who will be able to address the court on issues of fact and law. It would not be proper for an Advocate to the Court to take instructions from the prosecuting authority in relation to factual matters relating to the prosecution. An Advocate to the Court should only be asked to address the court as to the relevant law.

Making a request to the Attorney General

9. A request for an Advocate to the Court should be made by the Court as soon as convenient after it is made aware of the point of law which requires the assistance of an Advocate to the Court. The request should set out the circumstances which have occurred, identifying the point of law upon which assistance is sought and the nature of the assistance required. The court should consider whether it would be sufficient for such assistance to be in writing in the form of

submissions as to the law, or whether the assistance should include oral submissions at the hearing. The request should ordinarily be made in writing and be accompanied by the papers necessary to enable the Attorney to reach a decision on the basis of a proper understanding of the case.

10. The Attorney will decide whether it is appropriate to provide such assistance and, if so, the form such assistance should take. Before reaching a decision he may seek further information or assistance from the court. The Attorney will also ask the court to keep under review the need for such assistance. Where the circumstances which gave rise to the original request have changed, such that the court may now anticipate hearing all relevant argument on the point of law without the presence of an Advocate to the Court, either the Court or the Attorney may ask the Advocate to the Court to withdraw.

Requests to the Official Solicitor or CAFCASS

11. A request for an Advocate to the Court may be made to the Official Solicitor or CAFCASS (Legal Services and Special Casework) where the issue is one in which their experience of representing children and adults under disability gives rise to special experience. The division of responsibility between them is outlined in Practice Notes reported at [2001] 2 FLR 151 and [2001] 2 FLR 155.
12. The procedure and circumstances for requesting an Advocate to the Court to be appointed by the Official Solicitor or CAFCASS are the same as those applying to requests to the Attorney General. In cases of extreme urgency, telephone requests may be made. In some cases, the Official Solicitor himself will be appointed as Advocate to the Court. He may be given directions by the Court authorising him to obtain documents, conduct investigations and enquiries and to advise the Court. He may appear by counsel or an in-house advocate.

The Attorney General
Lord Goldsmith QC

The Lord Chief Justice
The Right Hon. The Lord Woolf

19 December 2001

Requests for an Advocate to the Court should be addressed as follows:

The Legal Secretary,
The Legal Secretariat to the Law Officers,
Attorney General's Chambers,
9, Buckingham Gate,
London SW1E 6JP
Telephone: 020 7271 2417 (criminal)
 020 7271 2413 (civil)
Fax: 020 7271 2434

Official Solicitor to the Supreme Court,
81, Chancery Lane,
London WC2A 1DD
Telephone: 020 7911 7127
Fax: 020 7911 7105

CAFCASS (Legal Services and Special Casework)
Newspaper House,
8-16, Great New Street,
London EC4A 3BN
Telephone: 020 7904 0867
Fax: 020 7904 0868/9

For information about free (pro bono) services:

Bar Pro Bono Unit
7 Gray's Inn Square,
London,
WC1R 5AZ
Telephone: 020 7831 9711
Fax: 020 7831 9733
Email: enquiries@barprobonounit.f9.co.uk