

STATUTORY GUIDANCE

QUALIFIED LEGAL REPRESENTATIVE APPOINTED BY THE COURT

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Section 1 – Introduction

1. Introduction

1.1 What is in this Guidance?

The Lord Chancellor has issued this statutory guidance about the role of qualified legal representatives appointed by the court under section 31W(6) of the Matrimonial and Family Proceedings Act 1984 (the 1984 Act) and section 85K(6) of the Courts Act 2003 (the 2003 Act). This guidance is published pursuant to the Lord Chancellor's powers under section 31Y(1) of the 1984 Act and section 85M(1) of the 2003 Act. This guidance will apply in all family and civil proceedings where a qualified legal representative is appointed by the court, and such representatives must have regard to its provisions pursuant to section 31Y(2) of the 1984 Act and section 85M(2) of the 2003 Act. Provisions in the 1984 Act referred to in this guidance relate to family proceedings and those in the 2003 Act relate to civil proceedings, but the role of the qualified legal representative is the same in both court jurisdictions.

Under Part 4B of the 1984 Act and Part 7A of the 2003 Act, perpetrators or alleged perpetrators of abuse and victims or alleged victims of abuse are prohibited from conducting in-person cross-examination of each other in family and civil proceedings, in limited, specified circumstances. If certain criteria are met, the court may appoint one or more qualified legal representatives to conduct the cross-examination in the place of the perpetrator or alleged perpetrator or in place of the victim or alleged victim. The role of the qualified legal representative, as set out in the 1984 Act and 2003 Act, is substantially different from that of a lawyer instructed by a party and operates subject to specific limitations. This document is intended to provide guidance about the role, including about the fact that the qualified legal representative is not responsible to the prohibited party. This document also sets out guidance on how the role will operate in practice.

Whilst the qualified legal representative appointed by the court must have regard to this guidance, the guidance does not seek to restrict the exercise of the qualified legal representative's professional judgment. However, it does set out principles and limitations which are distinctive to this statutory role and which must be reflected in the qualified legal representative's actions and decisions.

The guidance will also help to provide clarity about the qualified legal representative's role for the benefit of the court, the parties and their representatives in cases where such a qualified legal representative may be or has been appointed by the court.

1.2 Glossary of Terms

The following key terms will be used throughout this guidance.

1984 Act	Matrimonial and Family Proceedings Act 1984
1999 Act	Youth Justice and Criminal Evidence Act 1999
2003 Act	Courts Act 2003
2021 Act	Domestic Abuse Act 2021
Civil proceedings	As defined at section 85(E) of the 2003 Act: (a) proceedings in the county court; (b) proceedings in the High Court, other than: (i) proceedings in the Family Division of the High Court which are business assigned, by or under section 61 of (and Schedule 1 to) the Senior Courts Act 1981, to that Division of the High Court and no other, and (ii) proceedings in the exercise of its jurisdiction under the Extradition Act 2003; and (c) proceedings in the civil division of the Court of Appeal arising out of civil proceedings within paragraph (a) or (b)
ECHR	European Convention on Human Rights

Family proceedings	As defined at section 31Q of the 1984 Act: (a) proceedings in the family court; (b) proceedings in the Family Division of the High Court which are business assigned, by or under section 61 of (and Schedule 1 to) the Senior Courts Act 1981, to that Division of the High Court and no other; and (c) proceedings in the civil division of the Court of Appeal arising out of proceedings within paragraph (a) or (b)
Perpetrator	Encompasses both perpetrators and alleged perpetrators
Prohibited Party	In family proceedings, the party prohibited from cross-examining in person the witness/es by: <ul style="list-style-type: none"> • any of sections 31R, 31S, or 31T of the 1984 Act; or • a court direction given under section 31U(1) of the 1984 Act. In civil proceedings, the party prohibited from cross-examining in person the witness/es by: <ul style="list-style-type: none"> • any of sections 85F, 85G, or 85H of the 2003 Act; or • a court direction given under section 85I(1) of the 2003 Act.
Qualified Legal Representative	As defined at section 31W(8)(b) of the 1984 Act and section 85K(8)(b) of the 2003 Act: a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience (within the meaning of that Act) in family and civil proceedings respectively
Victim	Encompasses both victims and alleged victims

Witness	“Witness”, in relation to any proceedings, includes a party to the proceedings as defined at section 31Q of the 1984 Act and section 85E of the 2003 Act
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1.3 Legislation

Family and Civil Proceedings

Section 65 of the 2021 Act inserts new Part 4B into the 1984 Act. Part 4B prohibits perpetrators or alleged perpetrators of abuse from personally cross-examining their victims¹ or alleged victims in family proceedings. The prohibition (where automatic) also applies in reverse, to prevent a victim from having to cross-examine his or her abuser or alleged abuser.

Section 66 of the 2021 Act inserts a new Part 7A into the 2003 Act which makes similar provision in civil proceedings.

The Part 4B and Part 7A prohibitions of cross-examination in person automatically apply in the following situations:

- In family proceedings, where a party has been cautioned for, charged with or convicted of a specified offence against the victim or alleged victim, they cannot cross-examine in person the victim or alleged victim of that offence and vice versa (that is, if the victim or alleged victim is also a party, they cannot cross-examine in person the perpetrator) (section 31R of the 1984 Act);
- In civil proceedings, where a party has been cautioned for, or convicted of a specified offence they cannot cross-examine in person the victim of that offence and vice versa (that is, if the victim is also a party, they cannot cross-examine in person the perpetrator) (section 85F of the 2003 Act);
- In family or civil proceedings no party to the proceedings against whom an on-notice protective injunction is in force may cross-examine in person a witness who is protected by the injunction and vice versa (that is, no party to the proceedings who is protected by an on-notice protective injunction may cross-examine in person a witness against whom

¹ We have used the term “victim” throughout this guidance to refer to a person who has been subject to abuse. Sections 31R and 31T of the 1984 Act and sections 85F and 85H of the 2003 Act refer to “victim”. We acknowledge that some prefer alternative terms.

the injunction is in force) (section 31S of the 1984 Act and section 85G of the 2003 Act);
or

- In family or civil proceedings where specified evidence is adduced that a person who is a witness has been the victim of domestic abuse carried out by a party to the proceedings, that party to the proceedings may not cross-examine the witness in person and vice versa (that is, where specified evidence is adduced that a person who is a party to the proceedings has been the victim of domestic abuse carried out by a witness, that party may not cross-examine the witness in person (section 31T of the 1984 Act and section 85H of the 2003 Act).

The lists of specified offences, on-notice protective injunctions and specified evidence are set out in the Prohibition of Cross-Examination in Person (Civil and Family Proceedings) Regulations 2022².

Where none of the automatic prohibitions set out above apply, the court has the power to direct that a party be prohibited from carrying out in person cross-examination where it appears to the court that allowing cross-examination in person would be likely to affect the quality of the witness' evidence or is likely to cause either the party or the witness significant distress and it would not be contrary to the interests of justice to give such a direction. This is a wide discretion and might apply, for example, in situations where domestic abuse is alleged but the allegations do not trigger any of the automatic prohibitions, where litigants in person have to cross-examine expert witnesses, or for reasons other than domestic abuse. The court must state its reasons for giving a direction, refusing an application for a direction, revoking a direction given or refusing an application to revoke a direction (section 31V(4) of the 1984 Act and section 85J(4) of the 2003 Act).

The “**quality condition**” is met if the quality of evidence given by the witness on cross-examination:

- is likely to be diminished if the cross-examination (or continued cross-examination) is conducted by the party in person, and
- would be likely to be improved if a direction were given by the court.

The “**significant distress condition**” is met if:

- the cross-examination (or continued cross-examination) of the witness by the party in person would be likely to cause significant distress to the witness or the party, and
- that distress is likely to be more significant than would be the case if the witness were cross-examined other than by the party in person.

² [The Prohibition of Cross-Examination in Person \(Civil and Family Proceedings\) Regulations 2022 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

Consideration of Alternatives to Cross-Examination in Person

Prohibiting a party from undertaking cross-examination in person has the potential to impact that party's ability to effectively put their case to the court. Articles 6 and 8 of the ECHR must be observed – the right to obtain a fair hearing and the right to family life. Part 4B of the 1984 Act and Part 7A of the 2003 Act therefore include certain protections which apply where a prohibition operates, whether automatically or following a direction given by the court:

- Before appointing a qualified legal representative, section 31W of the 1984 Act and section 85K of the 2003 Act require the court to first consider whether there is a “satisfactory alternative” means for the witness to be cross-examined, or of otherwise obtaining the evidence that the witness might have given under cross-examination. It should be noted that cross-examination by the judge on behalf of a party would not be a satisfactory alternative for these purposes³.
- If the court concludes that there is no satisfactory alternative under section 31W of the 1984 Act or section 85K of the 2003 Act, it must invite the prohibited party to arrange for a qualified legal representative to conduct the cross-examination and require the party to notify the court within a specified time whether a qualified legal representative is to so conduct the cross-examination.
- If the party does not appoint such a representative or notifies the court that no such representative is to act for the party, then under section 31W(5) of the 1984 Act or section 85K(5) of the 2003 Act, the court must consider whether it is necessary in the interests of justice for the court to appoint a qualified legal representative to conduct the cross-examination (section 31W(6) of the 1984 Act and section 85K(6) of the 2003 Act). If the court decides that it is, it must appoint a qualified legal representative, chosen by the court, to cross-examine the witness.
- Where the court makes an appointment pursuant to section 31W(6) of the 1984 Act or section 85K(6) of the 2003 Act, the qualified legal representative is publicly funded and paid from central funds as set out in section 31X of the 1984 Act and section 85L of the 2003 Act. They will be paid in accordance with the remuneration scheme set out in the Prohibition of Cross-Examination in Person (Fees of Court-Appointed Qualified Legal Representatives) Regulations 2022⁴.

It is this last scenario (where the court appoints a qualified legal representative, having taken the prior necessary steps and come to the required conclusions) which this guidance is concerned with. It does not apply where a party appoints their own qualified legal representative at the invitation of the court.

³ See paragraph 5.3 of the FPR Practice Direction 3AB.

⁴ S.I. 2022/567.

1.4 Policy Background

The amendments to the 1984 Act arose from a growing recognition amongst the judiciary, practitioners, domestic abuse specialists and Government that existing court procedures did not adequately protect victims of abuse in the family and civil courts.

Prior to the passing of the 2021 Act, the family court and the Family Division of the High Court had utilised a range of powers to ensure difficult courtroom situations were handled sensitively for vulnerable parties. This included, where appropriate, a judge putting questions to a witness directly, or accepting pre-recorded cross-examination from prior criminal proceedings. However, there were some cases in which these alternate forms of evidence or carrying out of cross-examination were insufficient to thoroughly test the evidence in the case. In these instances, family courts were unable to appoint a qualified legal representative who would be paid out of central funds to conduct the cross-examination in place of a party. This led to situations where a party would be cross-examined in person by their abuser, situations which could, in the words of the former President of the Family Division, “*sometimes amount, and on occasion quite deliberately, to a continuation of the abuse.*”⁵ The provisions of section 65 of the 2021 Act were designed to address these concerns.

In relation to civil proceedings, in April 2018, the Independent Inquiry into Child Sexual Abuse (CSA) recommended that victims and survivors of CSA in civil court cases, where they are claiming compensation in relation to the abuse they suffered, should be afforded the same protections as vulnerable witnesses in criminal court cases. Following that, the Government commissioned the Civil Justice Council (CJC) to consider the issues raised by this recommendation. After a public consultation and views from experts, the CJC published their report: “Vulnerable Witnesses and parties within civil proceedings – current position and recommendations for change”, in February 2020. The Government accepted the CJC’s recommendations in relation to the prohibition of cross-examination by a self-represented party, which it has now legislated for by the provisions in section 66 of the 2021 Act.

Similar protections to prohibit inappropriate in person cross-examination exist in criminal proceedings under sections 34 - 38 of the 1999 Act. These provisions have been in force for over twenty years, at the time of publication. Sections 34 and 35 of the 1999 Act automatically prohibit persons charged with certain offences from cross-examining in person the complainant or witness to the offence, while sections 36 and 37 empower the court to make a direction prohibiting the defendant from personally cross-examining a witness in prescribed circumstances. Section 38 outlines the steps the court is to take where the prohibition applies including, as is the case under Part 4B of the 1984 Act and Part 7A of the 2003 Act, the court appointing an advocate to conduct the cross-examination. In exactly the same way as is now the case in family and civil proceedings, such advocate appointed to conduct the cross-examination is not responsible to the accused. Sections 65 and 66 of the 2021 Act therefore, to a large extent, replicate the provisions in sections 34 - 38 of the 1999 Act to provide broad parity in the cross-examination protections in the family, civil, and criminal court jurisdictions.

⁵ *Unheard voices: the involvement of children and vulnerable people in the family justice system*, lecture by Sir James Munby P (as he then was), Swansea University, 25 June 2015.

1.4.1 Prohibiting cross-examination in person

The first element of the provisions is the prohibition itself, the primary purpose of which is to ensure that no victim of abuse should endure being cross-examined in person by their abuser or have to endure cross-examining their abuser themselves in a courtroom setting. Such cross-examination can cause severe distress, re-traumatise the victim and has the potential to form a continuation of abuse including controlling behaviours. It can often involve confrontational exchanges, and heightened anxiety, all in an unfamiliar environment with strangers present. There will very frequently be a lot at stake for the victim both in terms of their own safety and that of any children. It can affect the quality of the evidence given, thereby impacting on both parties' ability to put their case forward and, in turn, the court's ability to effectively render justice. The purpose of the provisions is to ensure that every victim has confidence that the court will be able to offer them every protection needed to allow them to give their best evidence and participate in proceedings safely.

The prohibition can arise automatically in specified situations or at the court's discretion (see above at 1.3). The automatic prohibitions, together with the court's discretion, ensure that adequate protections can be provided to all who need them.

1.4.2 Procedural protections

The second element of the provisions are the procedural protections set out at section 31W of the 1984 Act and section 85K of the 2003 Act which are intended to protect the Article 6 and 8 rights of all parties in cases where a prohibition applies, whether automatically or following a direction given by the court. The application of these protections is intended to work in a sequenced way. First, the court considers whether there is a satisfactory alternative means for the witness to be cross-examined or of obtaining the evidence that might have been given under cross-examination. If there is not, the court invites the prohibited party to arrange for a qualified legal representative to cross-examine the witness. It is only if no such appointment is made, that the court must consider if it is necessary, in the interests of justice, for the witness to be cross-examined by a qualified legal representative appointed by the court to represent the interests of the party. If the court decides it is in the interests of justice, the court must itself appoint a qualified legal representative to cross-examine the witness in the interests of the party.

Article 6(1) of the ECHR guarantees the right to a hearing which is procedurally fair, and this includes affording each party a reasonable opportunity to present their case and evidence under conditions which do not place them at a substantial disadvantage as compared to the other party.⁶ Further, an individual has the right to confront a party or witness who makes an allegation.⁷ Whilst this is not the right to ask "*unlimited questions of a witness merely with a view to testing the evidence*", the Court of Appeal has held that a court must be "*alert to ensure that no parent (and therefore any party) is denied the right to put the essence of their case to witnesses on those parts of their evidence that may have a significant impact on the outcome.*"⁸

⁶ *Regner v. the Czech Republic* App No 35289/11 at [146].

⁷ Per Sir James Munby P (as he then was) in *Re S-W (Children) (Care Proceedings: Final care order at case management hearing)* [2015] EWCA Civ 27 at [57].

⁸ *ibid* at [58].

Article 8 of the ECHR guarantees the right to private and family life shall not be interfered with except as is necessary and in accordance with the law. The courts have held that, in the context of family court matters, the parties' Article 8 rights "*can only be vindicated by their having an effective and correct determination*" of the factual issues before the court.⁹

The intention of the procedural protections in Part 4 of the 1984 Act and Part 7A of the 2003 Act is to give the court a range of tools to ensure that the prohibited party's Article 6 and 8 ECHR rights are protected. The provisions set out a path for the court to find the tool that will protect these rights in each case. Before a court can consider whether to appoint a qualified legal representative, it must first consider whether the evidence can be elicited by alternative means. It must then offer the prohibited party an opportunity to arrange their own legal representation for the purposes of the cross-examination.

It is only after those options have been explored and determined to be insufficient that the court will turn its mind to the possibility of appointing a qualified legal representative to cross-examine the witness in order to protect Article 6 and 8 ECHR rights. The rights of a party under Articles 6 and 8 of the ECHR are more likely to be protected if a qualified legal representative is appointed in cases, for example, which involve complicated evidential matters, complex medical evidence or other expert evidence, or where questioning of a witness is required that may be distressing or potentially challenging. In such instances, questioning by a qualified legal representative is more likely to elicit evidence that will enable the court to reach a properly informed decision, which itself is in the best interests of the parties.

⁹ Per Lord Dyson MR (as he then was) in *Re K and H (Children)* [2015] EWCA Civ 543 at [47].

Section 2 - Role of the Qualified Legal Representative

2. Court-Appointed Qualified Legal Representative: Remit and Responsibilities

2.1 Purpose of the Role

The purpose of the cross-examination provisions in the 2021 Act is to ensure that no victim or alleged victim will be directly cross-examined by their abuser or alleged abuser or have to cross-examine their abuser or alleged abuser themselves. For this reason, the cross-examination provisions automatically prohibit cross-examination in person by a 'prohibited party' (as defined in section 1 of this guidance) in specified circumstances. Where the automatic prohibitions do not apply, the provisions give the court the power to make a direction prohibiting cross-examination in person if certain criteria are met.

Where cross-examination in person is prohibited, either automatically or following a court direction, the 2021 Act provisions enable the court to appoint a qualified legal representative (as defined in section 1 of this guidance) to conduct the cross-examination if certain conditions are met. The appointment of a qualified legal representative by the court will only occur in cases where there are no satisfactory alternative means of eliciting the evidence, where the prohibited party has not appointed their own qualified legal representative and where the court considers it to be in the interests of justice to make its own appointment.

The court-appointed qualified legal representative's central purpose is to ensure that the fairness of the proceedings is maintained, by carrying out the cross-examination which the prohibited party is prohibited from performing.

In determining whether to appoint a qualified legal representative, the court must consider whether it is in the interests of justice for the witness to be cross-examined by a qualified legal representative appointed by the court to represent the interests of the party. Where the court decides to make an appointment, it is important for the qualified legal representative to remember that:

- they are not a representative of the court which appoints them but they are accountable to the court;
- they are appointed to cross-examine in the interests of the party (section 31W(6) of the 1984 Act and section 85K(6) of the 2003 Act); and
- they are not responsible to the party (section 31W(7) of the 1984 Act and section 85K(7) of the 2003 Act). As qualified legal representatives are not appointed to act for the prohibited party in the way that ordinary legal advocates do, they do not have the traditional 'lawyer-client' relationship with the prohibited party and therefore are not responsible to the prohibited party. Although they will advance the interests of the prohibited party' during the cross-examination, the qualified legal representative must not attempt to present the prohibited party's entire case and should not take instructions from the prohibited party in the manner that a party's own lawyer ordinarily would. However, the qualified legal representative is expected, in most cases, to meet with the prohibited party to elicit relevant information that will form the basis of the cross-examination and inform the drafting of the position statement.

Qualified legal representatives do not have a free-ranging remit. They are not appointed to act as an 'advocate to the court' (also known as 'amicus curiae') who are most commonly appointed to assist the court on specific legal issues by furnishing information or advice regarding questions of law or fact. A qualified legal representative appointed by the court sits somewhere between these two more traditional roles, and they must remain conscious of the limited and unique purpose of their role in family and civil proceedings.

The role of the qualified legal representative in family and civil proceedings is a new role but is not unlike the role of an advocate appointed by the court in criminal proceedings under the provisions of section 38 of the 1999 Act (see section 1). However, while the advocate in the equivalent criminal scheme is only ever appointed to cross-examine the witness in the interests of the accused, the qualified legal representative in family or civil proceedings may be appointed by the court to cross-examine a witness on behalf of *either* party. There may also be instances in family or civil proceedings where the court may need to appoint more than one qualified legal representative in the case, for example, one to cross-examine in place of the perpetrator and the other to cross-examine in place of the victim. So, the circumstances in which a qualified legal representative may be appointed in family and civil proceedings are wider than in the criminal courts.

The parameters of the role of a qualified legal representative appointed by the court in criminal proceedings were examined in the case of *ABBAS v Crown Prosecution Service*¹⁰ where Lady Justice Hallet stated:

'The role of a section 38 advocate is, undoubtedly, limited to the proper performance of their duty as a cross-examiner of a particular witness. Sections 36 and 38 of the 1999 Act are all about protecting vulnerable witnesses from cross-examination by the accused. Therefore, it should not be thought that an advocate appointed under section 38 has a free-ranging remit to conduct the trial on the accused's behalf. Their professional duty and their statutory duty would be to ensure that they are in a

¹⁰ [2015] EWHC 579 (Admin) at [44] .

position properly to conduct the cross-examination. It means also that their appointment comes to an end, under section 38, at the conclusion of the cross-examination, save to the extent that the court otherwise determines. Technically the lawyer no longer has a role in the proceedings thereafter.’.

Thus, there are unlikely to be ethical complexities for court-appointed qualified legal representatives who are not responsible to the prohibited party and who do not have a contractual relationship with them.

2.2 Eligibility

It is essential that court-appointed qualified legal representatives are sensitive and understanding with regard to the needs and vulnerabilities of the witness when conducting the cross-examination. They must be adept at using techniques for cross-examination to help enable vulnerable witnesses to give their best and most accurate evidence. This is in the interests of the witnesses themselves and in the interests of justice.

All court-appointed qualified legal representatives must have a current practising certificate and have undertaken advocacy and vulnerable witness training (or have made a commitment to attend such training within six months of having registered on the court list of qualified legal representatives – see section 2.3) that is provided or approved by their professional body. They must also have the necessary skills and experience in cross-examining vulnerable witnesses in contested hearings. Qualified legal representatives with additional specialist domestic abuse training on matters such as coercive and controlling behaviour, economic abuse, psychological abuse and post-separation abuse are also eligible to undertake this work.

Solicitors do not need to have a Higher Rights of Audience qualification to appear or conduct cross-examination in either the family court or the county court. However, a Higher Rights of Audience qualification will be needed to appear in proceedings in ‘higher courts’, which for these purposes are:

- the High Court (the Family Division for family proceedings, or the Queen’s Bench Division or Chancery Division for civil proceedings); and
- the civil division of the Court of Appeal.

2.3 Appointment of the Qualified Legal Representative by the Court

Qualified legal representatives with the appropriate training as set out in section 2.2 will need to register their interest in undertaking this work with Her Majesty’s Courts and Tribunals Service (HMCTS). Local courts will maintain a list of qualified legal representatives available to undertake the cross-examination work in family and civil proceedings. HMCTS will be responsible for managing and keeping the list up to date. Further information on registering onto the court list of qualified legal representatives can be found at:

HMCTS will contact the first qualified legal representative on the list and if that qualified legal representative is unable to accept the appointment, HMCTS will then contact the next qualified legal representative as it appears on the list and, if necessary, will work down the

list until a qualified legal representative who can accept the appointment is found. This system allows for good practice and ensures that qualified legal representatives can be quickly engaged when required in a transparent manner. Once the qualified legal representative is contacted by the court and has agreed to accept the appointment, a court-generated order will be provided outlining the extent of his or her appointment and in particular that:

- the qualified legal representative is accountable to the court and not to the prohibited party;
- the appointment of the qualified legal representative terminates at the conclusion of the proceedings or when the court so orders;
- the appointment is personal to the qualified legal representative appointed by the court and not to the Chambers or solicitor's firm of that representative; and
- the qualified legal representative may only claim for the costs of preparing for and conducting the cross-examination.

2.3.1 Extent of Appointment

As the qualified legal representative is appointed by the court specifically to protect the prohibited party's Article 6 and 8 rights, their appointment extends only as far as the prohibition affects those rights. In practice, this means that the qualified legal representative's role will be limited to the cross-examination of the witness or witnesses whom the prohibited party is prevented from questioning in person. The witness or witnesses that are to be cross-examined will be specified in the same court order which appoints the qualified legal representative.

The statutory appointment of the qualified legal representative will begin when this is made by the court. This appointment will terminate at the conclusion of the proceedings or when the court so orders. This is aimed at ensuring that the qualified legal representative's appointment concludes at the end of the entire proceedings, rather than at the conclusion of individual hearings. This means that the judge will not need to revert to the start of the process of prohibiting the cross-examination each time and appointing a qualified legal representative when a ban on cross-examination in person is necessary. If further cross-examination affected by the prohibition is required, the court will recall the same qualified legal representative, or (where that is not possible) appoint a new qualified legal representative.

2.3.2. Declining and Terminating Appointments

It is important that the court-appointed qualified legal representative does not have a conflict of interest in the case. Should there be a conflict of interest, the qualified legal representative must inform the court immediately that they are unable to accept the appointment. Should a situation arise where a court-appointed qualified legal representative is unable to undertake the cross-examination at any time during the proceedings, they will also need to inform the court immediately. In such instance, the court will terminate the qualified legal representative's appointment and appoint a new qualified legal representative. The

termination of a qualified legal representative's appointment in a case will be confirmed by a court order.

3. Duties and Responsibilities

Cases requiring the appointment of a qualified legal representative will differ from each other, therefore this guidance does not set out a prescriptive list of duties the appointed qualified legal representative must undertake as the work required will vary according to the facts of the case. However, qualified legal representatives should be guided throughout their involvement by the key principles identified in the essence and significant impact test.

3.1 Applying the Essence and Significant Impact Test from the Outset

Sir James Munby P (as he then was) in the Court of Appeal case *Re S-W (Children) (Care Proceedings: Final care order at case management hearing)*¹¹ set out the importance of putting the essence of the prohibited party's case to witnesses on those parts of their evidence that may have a significant impact on the outcome of the proceedings.

To effectively protect the prohibited party's Article 6 and 8 rights, the qualified legal representative must put the essence of the prohibited party's case to the witness, on those parts of the witness' case that may have a significant impact on the outcome of the proceedings. The prohibited party may suggest questions to the qualified legal representative that he or she wishes to be put to the witness. Although the qualified legal representative may take such suggestions into consideration, ultimately questions should only be put to the witness if they relate to the essence of the prohibited party's case, and they are on those parts of the witness' case which may have a significant impact on the outcome of the proceedings. The qualified legal representative must be prepared and equipped to be able to carry out cross-examination so as to achieve this purpose.

To carry out the cross-examination role effectively, and in line with their professional responsibilities, the qualified legal representative will need to undertake such preparatory work as is necessary to conduct the cross-examination, such as reading court papers. The qualified legal representative must ensure that he or she is fully conversant with the evidence and issues in the case and has obtained sufficient information about the prohibited party's case to be able to cross-examine and test the evidence effectively. The qualified legal representative must ensure that the cross-examination carried out provides the court with sufficient information to reach a conclusion on the issues that arise during the case.

3.2 Reviewing the Bundle

The court will direct that the qualified legal representative (or qualified legal representatives in instances where there are more than one court-appointed qualified legal representative) has access to the full court bundle, or such parts of the bundle as directed by the court and

⁽¹¹⁾ [2015] EWCA Civ 27 at [57].

by when access is to be given. Where there is no court bundle, HMCTS will prepare and provide the qualified legal representative with a court bundle. The court-appointed qualified legal representative must ensure that he or she is fully familiar with the contents of the court bundle and evidence so as to be able to cross-examine the witness or witnesses effectively, and to ensure that the essence of the prohibited party's case is properly put to the witness or witnesses.

3.3 Working with the Court and Prohibited Parties

From the outset of the appointment, the court and the appointed qualified legal representative should clearly establish the practical extent of the prohibition. The court will issue an order in accordance with paragraph 2.3, in particular, identifying the witness or witnesses to be cross-examined by the qualified legal representative.

The qualified legal representative will need to meet with the prohibited party to understand the essence of the prohibited party's case and agree with the prohibited party and the court the issues that will be covered in the cross-examination. Establishing the issues that will be covered in the cross-examination can be done, for example, during a preliminary hearing if the qualified legal representative is appointed sufficiently early. The qualified legal representative should seek such further information as is required from the court and the prohibited party in order to be able to properly discharge his or her responsibilities. This may include obtaining and considering additional papers relevant to the prohibited party's case prior to the hearing with the cross-examination. The qualified legal representative may also seek guidance from the judge as to the apparent issues in the case. As part of this process, the qualified legal representative may need to make submissions to the court regarding the key issues relevant to the interests of the prohibited party's case.

It is recommended that the qualified legal representative should prepare a brief position statement to help identify and narrow the issues that will be the focus of the cross-examination.

The court will make clear to the prohibited party that the qualified legal representative is not their lawyer and that they are appointed by the court only to cross-examine a certain witness or certain witnesses. The qualified legal representative must also clearly communicate the limited nature of their role and their relationship with the prohibited party. They must make clear that they do not have a contractual relationship with the prohibited party. Additionally, the qualified legal representative must make clear that they cannot give advice or represent the prohibited party throughout the case but are appointed by the court to carry out a very limited role. The qualified legal representative cannot help with preparing documentation or assist in complying with directions. The court-appointed qualified legal representative will need to explain to the prohibited party that they cannot promise the confidentiality that usually attaches to lawyer-client relationships (legal professional privilege) and that there are obligations in family and civil proceedings to disclose material that is unhelpful to the prohibited party's case.

The prohibited party may suggest questions he or she wishes to be put to the witness or witnesses and the qualified legal representative may take such suggestions into consideration. Ultimately, however, questions should only be put to the witness if they relate to the essence of the prohibited party's case, and they are likely to provide the court with

information to enable it to reach a conclusion on the issues that it has to determine. Whilst the qualified legal representative should ascertain details of the case that the prohibited party wishes to advance, so as to inform his or her approach to the cross-examination, at no stage should the qualified legal representative take instructions from the prohibited party.

There may be instances that arise where the prohibited party may not cooperate with the court-appointed qualified legal representative and may decline to provide required information that will form the basis of the cross-examination. Where this occurs, the qualified legal representative may have to confine the cross-examination to matters that the judge directs are relevant as far as can be ascertained from the court papers in the proceedings. The qualified legal representative should then relay what these matters are to the prohibited party. There may also be instances where a prohibited party's refusal to cooperate with the qualified legal representative is due to their lack of capacity. This may mean that the qualified legal representative is unable to elicit any assistance or information from the prohibited party. In such situations, the qualified legal representative may only be able to cross-examine the witness on issues that are apparent from the case papers. Where this arises, the qualified legal representative must bring to the court's attention any issues relating to the prohibited party's capacity to participate fully in and understand the proceedings. The qualified legal representative must also alert the court to the potential need for participation directions or special measures such as a registered intermediary.

In most cases the need for the qualified legal representative to deal directly with the **other party** on substantive issues will be limited. Particular care should be taken when the other party is not legally represented, or where the other party is also the witness to be cross-examined. In any direct dealings with the other party or their representative, the qualified legal representative should clearly communicate the limited nature of their role and their relationship to the prohibited party and the court.

3.4 Attendance at Court

The qualified legal representative will, of course, need to attend the substantive fact-finding hearing where the cross-examination is to take place. There may be other hearings which take place between their appointment by the court and the cross-examination/re-examination that require the qualified legal representative's presence. In deciding whether it is necessary to attend these hearings, the qualified legal representative should apply the essence and significant impact test as set out at paragraph 3.1.

For example, a qualified legal representative would need to attend a preliminary hearing scheduled to determine the issues which are to be covered in cross-examination. By comparison, they would not need to attend a hearing of an application made by either party which does not relate to the issues for cross-examination or is unlikely to affect the conduct of the cross-examination.

The qualified legal representative should use their judgement to determine the relevant hearings that will require their attendance. Where evidence is to be given over several days by various witnesses (other than the witness the qualified legal representative has been appointed to cross-examine), the qualified legal representative will likely only need to attend when evidence which may touch on the essence of the prohibited party's case, or when a key part of the witness' evidence, is being heard. The judge may consider the extent to

which the qualified legal representative's attendance is required and give directions on which hearings the qualified legal representative must attend.

3.5 Conducting the Cross-Examination

The qualified legal representative should prepare questions which put the 'essence' of the prohibited party's case to the witness, on those parts of the witness' case which may have a significant impact on the outcome of the proceedings. Questions put in cross-examination must be for the purpose of testing the evidence of the witness or witnesses, of putting the prohibited party's case to the witness and enabling the court to be provided with evidence to enable it to make a properly informed decision on the issues that it has to determine.

The qualified legal representative retains the discretion to manage the cross-examination as it develops (i.e. to formulate questions and act dynamically in response to answers given by the witness), so that the cross-examination satisfies the essence and significant impact test. But the court-appointed qualified legal representative must always keep in mind the limited nature of their role and avoid the instinct to act as advocate for the prohibited party's wider case. The qualified legal representative must be cognisant of the fact that the cross-examination of a witness must always be conducted with sensitivity and with due regard to any vulnerabilities of the witness known to the qualified legal representative.

The qualified legal representative is not expected to make submissions to the court on behalf of the prohibited party for whom they are conducting the cross examination.

4. Termination of the Appointment of the Court-Appointed Qualified Legal Representative

The appointment of a qualified legal representative appointed by the court will be terminated at the conclusion of the proceedings or when the court so orders. Following termination, unless the court otherwise directs, the qualified legal representative will be notified of the outcome of the hearing by the court.

5. Further Guidance

5.1 Applying to be on the Court List and Registration for Work

As set out earlier in this guidance, local courts will maintain a list of qualified legal representatives available to undertake the cross-examination work in family proceedings and civil proceedings. This system allows for good practice and ensures that qualified legal representatives can be quickly engaged, when required, in a transparent manner. Qualified legal representatives interested in undertaking cross-examination work and wishing to be registered on the court-maintained list of qualified legal representatives should write to their local courts. Similarly, qualified legal representatives who wish to come off the list should also write to their local courts in good time to notify that they wish to be taken off the list. The list will be reviewed on a quarterly basis by the courts.

All court-appointed qualified legal representatives will need to be registered with the Legal Aid Agency in order to undertake cross-examination work in family and civil proceedings, though this work is not limited to lawyers who currently undertake legal aid work.

5.2 Remuneration for Court-Appointed Qualified Legal Representatives and Registration with the Legal Aid Agency (LAA)

The remuneration scheme for qualified legal representatives has been designed to incentivise the right activities that the cross-examination function necessitates and to reduce the likelihood of qualified legal representatives going beyond their very specific remit which is limited by statute. The fee rates, structure and rules are set out in regulations the Prohibition of Cross-Examination in Person (Fees of Court-Appointed Qualified Legal Representatives) Regulations 2022¹². Fees will be paid out of central funds and payments will be administered by the LAA. Claims for payment must be made within 3 months of the hearing, subject to any exceptional circumstances laid out to LAA.

In order to receive payment for work undertaken as a qualified legal representative under the remuneration scheme, qualified legal representatives must be registered with the LAA and have a legal aid account number. For the purpose of clarity, the remuneration scheme is not a legal aid scheme, but payments will be issued by the LAA through a legal aid account number.

Qualified legal representatives with existing legal aid accounts do not need to apply for a new account. Only qualified legal representatives with no active legal aid account need to apply.

Detailed guidance on applying for an account with the LAA is published at:

Update your details with the LAA - GOV.UK (www.gov.uk)

Solicitors

Qualified legal representatives who are solicitors who are part of an existing firm with an active legal aid contract and account do not need to apply for a new account. Only solicitors who are not part of an existing firm with an active legal aid contract and account need to apply for an account.

Solicitors who do not have a legal aid account or a certificate of High Rights of Audience must complete and send the following form and documents. You must tick the box for 'committal hearings' on the form.

- A completed AC1A form.
- A copy of their indemnity insurance.
- A copy of their Vat Certificate (If Vat registered).

¹² [The Prohibition of Cross-Examination in Person \(Fees of Court-Appointed Qualified Legal Representatives\) Regulations 2022 \(legislation.gov.uk\)](http://www.legislation.gov.uk)

- Confirmation that you do not have a certificate of Rights of High Audience and you are applying for an account under the 'Prohibition of Cross-Examination in Person Qualified Legal Representative Scheme'.

Solicitor-Advocates

Qualified legal representatives who are solicitor-advocates with existing legal aid accounts for either themselves as an individual or as part of a contracted legal aid firm, do not need to apply for a new account. Only solicitor-advocates with no active legal aid account need to apply for an account.

Solicitor-advocates who do not have a legal aid account must complete and submit the following form and documents without which the LAA will not be able to create and issue a legal aid account number:

- Form AC1A.
- A copy of their indemnity insurance.
- A copy of their Vat Certificate (if Vat registered).
- A copy of their certificate of Higher Rights of Audience (where applicable).

Barristers

Qualified legal representatives who are barristers with existing legal aid accounts do not need to apply for a new account. Only barristers with no active legal aid account need to apply for an account.

Barristers in independent practice must complete and submit the following documents without which the LAA will not be able to create and issue with a legal aid account number:

- Form AC1B.
- A copy of their practising certificate or a letter from the Bar Standards Board confirming that they have completed their first six months of their pupillage.
- A copy of their VAT certificate (if VAT registered) (the individual VAT certificate and not that of their company).

CILEX Practitioners

Qualified legal representatives who are CILEX Practitioners (CILEX Litigator & Advocate) with existing legal aid accounts do not need to apply for a new account. Only CILEX Advocates with no active legal aid account need to apply for an account.

CILEX practitioners who do not have a legal aid account must complete and submit the following form and documents without which the LAA will not be able to create and issue a legal aid account number:

- Form AC1A.
- A copy of their Rights of Audience Certificate (Family or Civil Proceedings)

All completed application forms and documents should be submitted by email to:

ProviderRecords-London@justice.gov.uk

Further details on how to claim payment for work undertaken is set out in costs guidance produced jointly by MoJ and the LAA which is available at: