



A: Without notice hearings: the obligations

1. This purpose of this guidance note is to outline the core obligations identified in the case-law relating to ex parte (without notice) applications. It is designed above all for legal representatives appearing before the Court of Protection, but will have relevance for those who are instructing them and social workers and medical professionals who are preparing evidence to put before the court on such hearings
2. The grant of an order without notice is an **exceptional remedy**.¹
3. An ex parte application will normally be appropriate only if the case is **genuinely urgent** (and even then some kind of informal notice should be given).²
4. Applicants and the Court should ensure that sufficient appreciation is shown for the exceptional nature of ex parte relief and the impact it has on the "*rights, life and emotions of the persons against whom [and in respect of whom] it is granted.*"³

Editors

Fenella Morris QC
Nicola Greaney
Victoria Butler-Cole

Disclaimer: This document is based upon the law as it stands as at November 2017; it is intended as a guide to good practice, and is not a substitute for legal advice upon the facts of any specific case. No liability is accepted for any adverse consequences of reliance upon it.

The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

¹ *Moat Housing Group South Ltd v Harris* [2005] EWCA Civ 287, [2006] QB 606, [71], cited by Munby J, as he then was, in *R (Lawer) v Restormel Borough Council* [2007] EWHC 2299 (Admin) [62] and CoP PD 10B [5 and 9].

² *X Council v B (EPO)* [2004] EWHC 2015 (Fam), [2005] 1 FLR 341, [53], Charles J, cited by Munby J, in *Lawer* [63].

³ *(B Borough Council v S (By the Official Solicitor))* [2006] EWHC 2584 (Fam), [2007] 1 FLR 1600, [37 and 41], Charles J, approved in *Lawer* [67]).

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5. Those who seek relief ex parte are under a **duty to make full and frank disclosure**.³
 6. The duty to make full and frank disclosure extends to all relevant matters.⁴
 7. The duty to make full and frank disclosure includes a duty to **make proper inquiries** before making the application: full and frank disclosure must be of what is known and what should be known or would be known if proper inquiries had been made.⁵
 8. **The duty involves more than including relevant documents in the court bundle:** it involves specifically identifying all relevant documents and taking the judge to the particular passages in the documents which are material and taking appropriate steps to **ensure that the judge correctly appreciates the significance of what he is being asked to read**.⁶ In a paper application the judge must not be left to consider on his own a pile of undigested exhibits; the representative must draw the significance of a particular document to the attention of the Court, particularly where he has knowledge that enables him to do so.⁷
 9. Representatives must **identify the crucial points for and against the application** and not rely on general statements or the exhibiting of numerous documents. They must identify any likely defences.⁸
 10. Fairness demands that the applicant provide the court with a balanced, fair and particularised account of the events leading up to the application which in many cases should include **a brief account of what the applicant thinks the respondent's case is, or is likely to be**.⁹ It should not be based on largely unparticularised assertions by one side of serious allegations without any third party material to support them.¹⁰

³ *In re S (A Child) (Family Division: Without Notice Orders)* [2001] 1 WLR 211 [216], Munby J.

⁴ *In re S* [222(4)].

⁵ *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350, CA, [1356 and 1358], per Ralph Gibson LJ.

⁶ *Lawer* [69] and *R (Khan) v Secretary of State for the Home Department* [2016] EWCA Civ 416, CA, per Ryder LJ [32 and 40], approving *Lawer*.

⁷ *Khan*[41, 45 and 46] approving *Masri v Consolidated Contractors International Co Sal and others* [2011] EWHC 1780 (Comm), per Burton J, [58].

⁸ *Siporex Trade v Comdel* [1986] 2 Lloyd's Rep 428 per Bingham J, as he then was, [437] cited by Teare J in *U & M Mining Zambia Ltd v Konkola Copper Mines plc* [2014] EWHC 3250 (Comm) [67], and approved by the CA, per Ryder LJ, in *Khan* [41].

⁹ *X Council*[38].

¹⁰ *X Council* [39].

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11. Those who obtain ex parte relief are under an obligation to bring to the attention of the respondent at the earliest practicable opportunity the materials on the basis of which the ex parte injunction was granted.¹¹
 12. The obligation involves **giving proper information about what happened at the hearing**. Representatives should respond forthwith to any reasonable request for information about what took place.¹²
 13. Given this obligation, **it is prudent for representatives to keep a proper note of the proceedings** lest they find themselves embarrassed by a proper request for information that they are unable to provide.¹³
 14. Representatives should keep full and proper records of what is said to the court; **the availability of a transcript does not reduce the duty to keep a full record**.¹⁴
 15. The duty to make full and frank disclosure is separate from the question of whether or not those seeking the ex parte order have a good arguable case or a strong prima facie case.¹⁵
 16. Even if an order might be justified it may be discharged if improperly obtained: this is to deter applicants from failing in their duties and ensure that they realise the consequences of failure.¹⁶
 17. Similarly a failure to make full and frank disclosure also justifies the imposition of a **liability in costs**.¹⁷ The order is essentially penal.¹⁸ An order for costs arising out of a failure to make full and frank disclosure may be made upon an indemnity basis.¹⁹
 18. The Court will consider the propriety of the circumstances of interim relief even where the substantive proceedings have become redundant.²⁰

¹¹ *In re S* [222(7)]. This is an aspect of natural justice: *In re S* [219].

¹² *In re S* [223(12)].

¹³ *In re S* [223(13)].

¹⁴ *X Council* [43].

¹⁵ *W v H (Family Division: Without Notice Orders)* [2001] 1 All ER 300, Munby J, [316].

¹⁶ *Brink's Mat* [1358] and *U and M Mining* [67], per Bingham J.

¹⁷ *Brink's Mat* [1358], *R (I) v Secretary of State for the Home Department* [2007] EWHC 3103 (Admin) [11], per Collins J, *U and M Mining* [95] and CoP Rules 1.4(2)(f) and (3).

¹⁸ *Brink's Mat* [1359B].

¹⁹ *U & M Mining* [96].

²⁰ (*X Council* [3]).

B: Recording

19. It is the responsibility of the advocate to ensure any out of hours hearings is recorded so that a transcript can be obtained.
20. The court's recording system does not enable you to get a transcript other than within working hours Monday-Friday. So, if you have an out of hours hearing on a Friday night and might need to provide the transcript to the other parties (or to appeal the decision) over the weekend, you will have to put in place alternative arrangements (for instance by way of a conference system which enables recording such as Multivoice (www.multivoice.co.uk)).
21. If the court recording system has been used, the court clerk will give you the details required to order a transcript (but you will have to ask).
22. If the court clerk is not available or would prefer not to sit through the hearing on mute, ask the judge to use the conference system and choose the option for the call to be recorded.

C: Useful resources

23. Useful free websites include:

- www.39essex.com/resources-and-training/mental-capacity-law – database of guidance notes (including as to capacity assessment) case summaries and case comments from the monthly 39 Essex Chambers Mental Capacity Law Report, to which a free subscription can be obtained by emailing marketing@39essex.com.
- www.courtofprotectionhandbook.com – website accompanying the Legal Action Group's *Court of Protection Handbook*, including Rules, Practice Directions, precedents and procedural updates
- www.mclap.org.uk – website set up by Alex Ruck Keene with forums, papers and other resources with a view to enabling professionals of all hues to 'do' the MCA 2005 better.
- www.mentalhealthlawonline.co.uk – extensive site containing legislation, case transcripts and other useful material relating to both the Mental Capacity Act 2005 and Mental Health Act 1983. It has transcripts for more Court of Protection cases than any other site (including subscription-only sites), as well as an extremely useful discussion list.
- www.scie.org.uk/mca-directory/ - the Social Care Institute of Excellence database of materials relating to the MCA

Michael Kaplan

Senior Clerk
michael.kaplan@39essex.com

Sheraton Doyle

Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell

Senior Practice Manager
peter.campbell@39essex.com



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clerks@39essex.com • [DX: London/Chancery Lane 298](https://www.39essex.com) • [39essex.com](https://www.39essex.com)

LONDON

81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER

82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE

Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR

#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085

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