

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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Judith M. DaSilva, B.A., B.H.Sc.O.T., M.A.
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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, Bencher, 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

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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

- Observe the courtroom discussion
- Provide emotional and moral support
- 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/clastest/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/>