

Private FDRs – Best Practice

These suggested best practice points are put forward with the aim of promoting diversity and equality in the selection of evaluators for private FDR hearings.

Private FDRs are a vital tool for many family law practitioners to try to bring about an early resolution to financial remedy claims. This alternative means of progressing matters is virtually entirely self-regulated. This lack of formal regulation is helpful to clients in many respects, meaning practitioners can be flexible and can meet their clients' needs in ways that may suit them better than if they remain within the constraints of the public court service. But a need has been identified to ensure that private FDR practice, and particularly the selection of private FDR evaluators, is non-discriminatory and allows equality of opportunity.

Listing Private FDRs

When listing Private FDRs, the following approach is recommended for application nationally.

1. Reflect on the appropriate level of seniority for the private FDR evaluator and agree this on both sides. Bear in mind that senior solicitors as well as counsel (of all levels) are able to conduct private FDRs.
2. Identify a window within which the private FDR should take place.
3. Obtain client, solicitor, and representing counsel's availability for that window.
4. Agree which party is to be responsible for drawing up the shortlist.
5. The shortlisting party to obtain a non-exclusive list of potential private FDR evaluators at the agreed level of seniority available on that date.
6. The shortlisting party to propose at least 2 potential evaluators from that list, which shortlist it is expected should contain at least one individual of each gender.
7. The selecting party to choose an evaluator from that list. If the list does not contain at least one individual of each gender and no compelling reason has been given for this, the selecting party may propose an alternative shortlist which does contain at least one individual of each gender from which new list the evaluator may then be selected.

Talking about Private FDRs

It is suggested that the following points should be borne in mind when discussing Private FDRs with colleagues, peers, and clients.

- Be conscious about the language used when describing the hypothetical judge or evaluator – use gender neutral or alternative references (the judge, the evaluator, they, he or she).
- Explain to clients that the job of a Private FDR evaluator is to try to eliminate all personal subjectivity, to establish what are the range of likely outcomes, and to indicate where the judge most likely to fall, within that bracket, at a final hearing.
- Be objective about what qualities you want the evaluator to have and resist making assumptions about an evaluator's personal views. No evaluator should allow their personal views to cloud their judgment when it comes to giving their indication.
- Share knowledge and experience of Private FDR evaluators with peers so you can be confident when recommending someone to a client.

The role of solicitors

Solicitors in a position of shortlisting and selecting Private FDR evaluators have a central role to play in ensuring that their approach to that shortlisting and selection is inclusive, and non-discriminatory. Whilst it is acknowledged that very often solicitors will want to recommend evaluators who are tried and tested, those in the position of appointing Private FDR evaluators must be conscious about the choices they make and be aware of the potential for bias in that process.

Solicitors also have a role to play in raising awareness among their peers and questioning and challenging selections where appropriate.

Solicitors are also encouraged to collect data, as set out below, to monitor progress.

The role of chambers, counsel's clerks, and counsel

Chambers, counsel's clerks, and counsel play an important role in promoting individual evaluators within their chambers and supporting the shortlisting and selection process as follows.

- Encouraging the recommended approach above to the listing of Private FDRs and asking questions when that approach is not followed.
- Supporting individual barristers to develop and promote their Private FDR practice by marketing that capability within chambers and externally.
- Creating a culture whereby more members of chambers (and in particular junior members) are encouraged to develop their Private FDR practice and receive mentoring from senior members.
- Publishing their own diversity and inclusion policies on their website and a mission statement addressed to Private FDRs in particular.
- Collecting data as set out below to monitor change.

A brief note on the data

Broadly speaking, 44% of the family finance bar in London are women. Women make up 52% of the juniors. At silk level it drops to 16%.

From this data, and bearing in mind that almost but not all barristers conduct pFDRs, we might statistically assume that between a third and half of pFDRs before a junior barrister should be conducted before a woman, and one in five pFDRs before a silk should be conducted before a woman.

However, as at Spring 2021, only around 1% of private FDRs in London were conducted before a woman based on sample research. Whist the research was not exhaustive, it has been supported anecdotally.

This data has prompted the development of this best practice. It is clear that there has been a significant lack of shortlisting or selection of women evaluators for Private FDRs in stark contrast to the representation of women at the bar and in the judiciary as a whole.

All firms and chambers are encouraged to cross check their own data against the statistics set out above and to record their own data over the next six months. The aim would be to revisit the research in 6 months' time and then a year's time to see if there has been an improvement in the statistics as a result of these best practice suggestions.

It would also be helpful for a record to be kept by counsel's clerks where requests are made for Private FDR evaluators of whether those requests follow the Best Practice guidance set out above in order that an assessment can be made as to whether this guidance is being carried into effect.

This data-gathering exercise, and the resultant guidance above, did not seek to address inequality affecting groups other than women and did not seek to address any other area than Private FDR practice. Inequality affecting any protected characteristic within any area of family law practice should be urgently addressed through evidence and recourse. All efforts to expand this work to address all inequality wherever it is found is wholeheartedly endorsed and supported.