



## **The rationale for this approach**

The criminal justice system relies heavily on the traditional practice of barristers working cooperatively with their colleagues by covering hearings when the court has listed other cases for the same barrister at the same time.

Barristers are all sole traders, but the system of “returns” is the goodwill that maintains the smooth and efficient running of the criminal courts. Every day, in every court in England and Wales, barristers appear in hearings at every stage of the life of a case on behalf of colleagues.

The Ministry of Justice has consistently failed to show any goodwill towards criminal practitioners by failing to engage meaningfully with the profession particularly on the suggestions we have made to find alternative ways to achieve savings. At the same time, the MoJ have engaged in a high profile media campaign to brief against the profession generally as well as individuals, by publishing statements and statistics which are, even on the most generous interpretation, misleading.

The criminal Bar demonstrated on 6th January 2014, by its day of action, its unity and strength of opposition to the proposed further cuts to legal aid and hoped that the MoJ would recognise the force of the argument. It has not done so. The determination of criminal barristers is now even greater and in the face of the absence of goodwill from the MoJ, many practitioners have resolved to withdraw their goodwill from the criminal justice system.

By refusing to accept returns, criminal barristers will not be refusing to work. They will simply undertake their own work. They will fulfil their professional obligations and act in the best interests of their clients in every case in which they are instructed, but will do so when they are able to do so.

This withdrawal of goodwill will be a further demonstration of the way in which the criminal justice system relies on the cooperation of criminal barristers and the way in which every day, barristers ensure the smooth and efficient running of the criminal courts. Without this goodwill, the criminal justice system will grind to a halt.

## **What are returns?**

Under the AGFS, only the *instructed advocate* can make a claim for payment. The instructions are theirs. In this context, a “return” is any instructions to appear on any hearing (including preliminary hearings, PCMH, mentions, sentences and trials) on any defence case IN THE CROWN COURT where there is a Representation Order in force in which another member of the Bar is nominated as the ‘*instructed advocate*’.

### **What does no returns policy mean?**

**The “no returns” policy means that from 7th March 2014, criminal barristers who adopt the “no returns” policy will not accept a return from another member of the Bar on any legally aided defence case in the Crown Court.**

This will mean in the event that the instructed advocate is unable to attend his own hearings, due to diary clashes, trial overruns, warned list cases coming in, court ordered mentions etc, they would return the instructions to their instructing solicitor. In the usual course of things, such a solicitor would simply ‘return’ this work to another barrister. If the criminal Bar is of one voice that they will not accept returns, the solicitor will not be able to find anyone to cover such work. Cases will grind to a halt with unrepresented defendants appearing up and down the land.

In short, barristers will therefore simply cover all of their own work, where possible and no-one else’s work.

### **How will this affect the running of the courts?**

Goodwill is the oil in the machine which is the CJS. It is also something which for far too long has been taken for granted. The courts will no longer be able to rely on barristers appearing in cases where another member of the Bar is the instructed advocate.

It is anticipated that unless the courts acknowledge the problem and accommodate the instructed barrister by agreeing to list cases for the professional convenience of the instructed barrister, there will be considerable disruption to the normal smooth running of the criminal courts. Judges will be faced with the prospect of dealing with defendants in person or adjourning matters off for counsel’s availability.

### **How long will the ‘no returns’ action last for?**

The length of this action will be kept constantly under review and we suggest that those wishing to return their work should consider their diary commitments in the first instance, for the **4 weeks from the 7th March**.

### **What are the professional conduct implications?**

Providing the protocol is followed, there should be no professional conduct implications should any individual barrister, of their own volition, determine that they will no longer accept returns.

The BSB handbook states that barristers may return instructions if “a hearing becomes fixed for a date on which you have already entered in your professional diary that you will not be available” [Rule rC26.3]. Provided that such work is returned in accordance with the protocol, which reflects the guidance to the handbook in that you “ensure that the client is not adversely affected because there is not enough time to engage other adequate legal assistance” [Rule rC83 Handbook] there ought to be no professional conduct repercussions.

In practical terms, this will mean once a diary clash has been identified, efforts should be made to have matters relisted so that a clash does not arise and failing that, work is returned to the solicitor well in advance of the hearing.

As for those determining not to accept work which is in the name of another counsel, the matter is equally straight forward. Since November 2003 graduated fee cases have been 'undeemed', in other words they are expressly stated not to provide adequate remuneration. This is important as it means the cab rank rule does not apply to such cases. Barristers are permitted to refuse instructions which do not provide adequate remuneration. The new BSB handbook expressly states this to be the position at rule rC30 which states that the cab rank does not apply if "you have not been offered a proper fee for your services".

It will be a matter for each individual barrister to determine but should one decide that the 'return' does not provide a proper fee, there is no professional reason why any new instructions cannot be refused. In short, you cannot be compelled to work.

### **What are the solicitors intending to do about this?**

The LCCSA and CLSA support the bar's no return policy as part of wider efforts to demonstrate the perils of restrictions to access to justice.

### **What should I be doing if I need to return work?**

In short, you should be following the protocol issued by the CBA. This requires you to:

1. Identify any possible diary clashes as soon as they arise.
2. Inform your instructing solicitor of any problems.
3. Attempt to have one of the cases moved so that you can attend both.
4. If the case cannot be moved such that the clash remains, return the case to your instructing solicitor, explaining to him the reasons for doing so [required by Rule rC27]

### **FAQ**

- **I have two trials listed at same time**

*You should immediately make an application to vacate and relist one trial for your professional convenience. If that is unsuccessful, apply to vacate and relist the other. If the court declines to relist either trial, you should determine which trial has priority and notify your instructing solicitor in the other trial that you will be unable to attend notwithstanding efforts to have had the case moved and accordingly you need to return the instructions.*

- **I have a trial listed and a warned list case which if it comes in will clash**

*Warned list trials should be treated as fixtures for these purposes. You should notify the court list office of your commitment to each of the trials in the warned list and request one (or more) be removed from that list and refixed for your professional convenience. In the event that the Court declines to refix the warned trial, that trial should be returned to the solicitors in accordance with the suggestion above.*

- **I am in a trial which is looking to overrun, if so it will clash with another trial**

*As soon as you become aware of the difficulty, make an application to refix the second trial. In the event that the application is unsuccessful, the second trial should be returned to the solicitors in accordance with the suggestion above.*

- **I have several warned list cases in at the same time. What should I do?**  
*Treat all cases as if they were fixtures. Identify the trial which has priority and make applications to relist the remainder in accordance with the suggestion above.*
- **A case I am instructed in has just been listed by the CPS/court for mention. I shall be elsewhere. What do I do**  
*Make an application by email to the court to refix the hearing for your professional convenience. If the application is refused notify your instructing solicitors returning your instructions in accordance with the suggestion above.*
- **I am planning on going on holiday / Dr appointment /personal matter and my case has a mention during that period.**  
*Provided that such matters are entered within your professional diary as dates upon which you cannot work, in advance of the matter being listed upon such date, instructions should be returned in accordance with the suggestion above.*
- **A case involving a vulnerable witness has been returned to me, do I accept it**  
*You are not obliged to accept any return. You are not instructed unless and until you accept the brief.*
- **I only prosecute, does this apply to me**  
*The “no returns” policy does not apply to prosecution briefs. However as in all other circumstances your response is a matter of personal choice.*
- **The case is instructed privately, can I accept a return**  
*The “no returns” policy only applies to legally aided cases. However as in all other circumstances your response is a matter of personal choice*
- **If I have to return work to solicitors, as I cannot do it, won't someone else simply be instructed**  
*It is for each barrister to decide whether he or she will accept returns. No-one is compelled to refuse work. However, there is very strong support for this policy across the country and it is anticipated that there will be unity of approach from the criminal Bar across the country.*
- **I am part heard in a trial, the defendant in another matter I am instructed in has been arrested for breach of bail. A bail application needs to be made for him but I cannot do it. Can someone else?**  
*You should apply to your trial judge to be released from the trial to conduct the bail application or, if it is in the same court centre, that the bail application is listed before your trial judge. In the event that those applications are refused, you should notify your instructing solicitor and return the bail application in accordance with the suggestion above.*
- **I have just finished a trial in which the defendant was convicted, his case was adjourned for PSR with a sentence hearing in the middle of my next trial.**  
*You should make an application to the sentencing judge to relist the sentence for your professional convenience and if that application is refused, apply to your next trial judge to release you to conduct the sentence. In the event that such application is refused, notify your instructing solicitor for the sentence that you will be unable to cover it and return it in accordance with the suggestion above.*