

PHASE II. CROWN COURT

1. Solicitors have achieved extraordinary unity with great impact upon the criminal Justice system over the last few weeks in refusing to work at the new rates. Between 1st July and 22nd July the majority of solicitors firms across England and Wales have operated under an agreed Protocol (or variation thereof) whereby they ceased to undertake non-Duty Solicitor work under the rates that have been subject to a second 8.75 % cut.

2. In the absence of the Bar that was entirely the right thing to do. We shouldered the burden alone. Now the Bar has voted in favour of adopting a "no returns" protocol from 27 July 2015, it is time to re-focus the action to affect Crown Court work, where action adopted simultaneously by both the Bar and solicitors would be most effective..

3. After three weeks there is, sadly, an increase in unrepresented defendants in the Crown Court, from the most serious charged with Murder to the minor offenders committed to the Crown Court for sentence. This will continue for the foreseeable future as the Protocol suggests that firms continue to refuse to apply for Representation Orders in post July 1st cases destined for the Crown Court.

4. This new Protocol works in tandem with the CBA's commencement of no returns and their policy of not accepting briefs under Representation Orders dated post 1st July 2015.

5. Over the time that this dispute continues, the new Protocol will enable us to return to lower crime work to maintain firms' cash flow, which covers staff wages and will ensure that their clients are not misappropriated by the few firms who dishonour the profession by intentionally flouting the Protocol and poaching clients in breach of SRA rules. That does not mean that the reduced fees for lower crime are acceptable, but merely that the protest is more targeted on Crown Court work.

6. Although firms will still lose Crown Court litigator and advocacy fees (alongside counsel), please bear in mind that junior counsel will not in the main be able to earn a great deal from lower crime fees to keep them 'ticking over'. To sustain the commitment of the local bar to this fight and to promote mutual goodwill it is suggested that solicitors may wish to consider solely instructing counsel or freelancers to cover Magistrates' Court trials and full contested hearings such as 'Newtons' (unless part heard), so the junior Bar also have some relief from the drying up of income. It is a small price to pay for unity and bringing this dispute to as rapid a conclusion as possible.

7. It should be stressed at all times that our sole aim is to ensure the survival of access to Justice which is threatened by the level of cuts. The

disruption to defendants and the courts is deeply regrettable but the solution is in the hands of the Lord Chancellor who should engage.

The new Protocol:

1. It is agreed to continue not to apply for legal aid in any indictable case which is sent to the Crown Court or any case where jurisdiction is highly likely to be declined or a client committed for sentence:

a) the solicitor should not apply for legal aid or create a retainer - on the basis that under the new rates is impossible to discharge his or her professional duties on such serious matters.

b) to avoid creating a retainer, firms may consider the appropriate course would be to ask for the case to be dealt with by the Duty Solicitor whose involvement terminates at the first Magistrates' Court hearing.

c) firms will nevertheless wish to be mindful of whether or not the Duty Solicitor is a trusted follower of the Protocol. A firm may choose to create a limited pro bono retainer with a client to advise on relevant issues, but should ensure that the client is fully informed as to the limited scope of any retainer, including, where appropriate, the fact that there is no intention to submit an application for legal aid during the period that the Protocol is operating

d) the only other exception to this Protocol will be where, in good faith, the solicitor has lodged legal aid for a matter in the magistrates' court only for the court to decide at a later date to commit for sentence. Such a circumstance is limited to those rare occasions when the court commits for sentence after summary trial or, following a guilty plea, has adjourned for sentence but following reports decides at a second hearing the matter must be committed.

2. On either way matters it might be irresponsible to advise clients to elect Crown Court trial knowing clients might be unrepresented. So after perusal of the evidence, and without further advice, the defendant may be referred to the Duty Solicitor who 'acting as such' (to quote the Duty Solicitor rules) will be the only lawyer representing the defendant formally offering such advice 'as such' and not therefore creating a retainer for future hearings.

3. Where a client is facing an indictable only charge or a matter where jurisdiction will be declined automatically the duty solicitor might be instructed to act from the outset at the first hearing (subject to 2c above in terms of the reliability of the Duty Solicitor in complying with this Protocol).

4. Solicitor Advocates (SA) will observe no returns in exactly the same way as the Bar. That is very important to maintain the trust of the Bar. So for avoidance of doubt if an instructed SA is unable to cover a hearing the case will not revert to another member of the firm, thus replicating the position that should be in place across both professions. The same applies to the use of freelance solicitor advocates or even accepting a case in house where counsel has refused a return. The Associations do not advise breach of professional duties but reflect the undoubted fact that sometimes it is impossible to cover returns at short notice in house or outside the firm.