CRIMINAL PRACTICE DIRECTIONS 2015 DIVISION VI

TRIAL

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CrimPR Part 24 Trial and sentence in a magistrates' court

CPD VI Trial 24A: ROLE OF THE JUSTICES' CLERK/LEGAL ADVISER

24A.1 The role of the justices' clerk/legal adviser is a unique one, which carries with it independence from direction when undertaking a judicial function and when advising magistrates. These functions must be carried out in accordance with the Bangalore Principles of Judicial Conduct (judicial independence, impartiality, integrity, propriety, ensuring fair treatment and competence and diligence). More specifically, duties must be discharged in accordance with the relevant professional Code of Conduct and the Legal Adviser Competence Framework.

24A.2 A justices' clerk is responsible for:

(a) the legal advice tendered to the justices within the area;

(b) the performance of any of the functions set out below by any member of his staff acting as justices' legal adviser;

(c) ensuring that competent advice is available to justices when the justices' clerk is not personally present in court; and

(d) ensuring that advice given at all stages of proceedings and powers exercised (including those delegated to justices' legal advisers) take into account the court's duty to deal with cases justly and actively to manage the case.

24A.3 Where a person other than the justices' clerk (a justices' legal adviser), who is authorised to do so, performs any of the functions referred to in this direction, he or she will have the same duties, powers and responsibilities as the justices' clerk. The justices' legal adviser may consult the justices' clerk, or other person authorised by the justices' clerk for that purpose, before tendering advice to the bench. If the justices' clerk or that person gives any advice directly to the bench, he or she should give the parties or their advocates an opportunity of repeating any relevant submissions, prior to the advice being given.

24A.4 When exercising judicial powers, a justices' clerk or legal adviser is acting in exactly the same capacity as a magistrate. The justices' clerk may delegate powers to a justices' legal adviser in accordance with the relevant statutory authority. The scheme of delegation must be clear and in writing, so that all justices' legal advisers are certain of the extent of their powers. Once a power is delegated, judicial discretion in an individual case lies with the justices' legal adviser exercising the power. When exercise of a power does not require the consent of the parties, a justices' clerk or legal adviser may deal with and decide a contested issue or may refer that issue to the court.

24A.5 It shall be the responsibility of the justices' clerk or legal adviser to provide the justices with any advice they require to perform their functions justly, whether or not the advice has been requested, on:

(a) questions of law;

(b) questions of mixed law and fact;

(c) matters of practice and procedure;

(d) the process to be followed at sentence and the matters to be taken into account, together with the range of penalties and ancillary orders available, in accordance with the relevant sentencing guidelines;

(e) any relevant decisions of the superior courts or other guidelines;

(f) the appropriate decision-making structure to be applied in any given case; and

(g) other issues relevant to the matter before the court.

24A.6 In addition to advising the justices, it shall be the justices' legal adviser's responsibility to assist the court, where appropriate, as to the formulation of reasons and the recording of those reasons.

24A.7 The justices' legal adviser has a duty to assist an unrepresented defendant, see CrimPR 9.4(3)(a), 14.3(2)(a) and 24.15(3)(a), in particular when the court is making a decision on allocation, bail, at trial and on sentence.

24A.8 Where the court must determine allocation, the legal adviser may deal with any aspect of the allocation hearing save for the decision on allocation, indication of sentence and sentence.

24A.9 When a defendant acting in person indicates a guilty plea, the legal adviser must explain the procedure and inform the defendant of their right to address the court on the facts and to provide details of their personal circumstances in order that the court can decide the appropriate sentence.

24A.10 When a defendant indicates a not guilty plea but has not completed the relevant sections of the Magistrates' Courts Trial Preparation Form, the legal adviser must either ensure that the Form is completed or, in appropriate cases, assist the court to obtain and record the essential information on the form.

24A.11 Immediately prior to the commencement of a trial, the legal adviser must summarise for the court the agreed and disputed issues, together with the way in which the parties propose to present their cases. If this is done by way of pre-court briefing, it should be confirmed in court or agreed with the parties.

24A.12 A justices' clerk or legal adviser must not play any part in making findings of fact, but may assist the bench by reminding them of the evidence, using any notes of the proceedings for this purpose, and clarifying the issues which are agreed and those which are to be determined.

24A.13 A justices' clerk or legal adviser may ask questions of witnesses and the parties in order to clarify the evidence and any issues in the case. A legal adviser has a duty to ensure that every case is conducted justly.

24A.14 When advising the justices, the justices' clerk or legal adviser, whether or not previously in court, should:

(a) ensure that he is aware of the relevant facts; and

(b) provide the parties with an opportunity to respond to any advice given.

24A.15 At any time, justices are entitled to receive advice to assist them in discharging their responsibilities. If they are in any doubt as to the evidence which has been given, they should seek the aid of their legal adviser, referring to his notes as appropriate. This should ordinarily be done in open court. Where the justices request their adviser to join them in the retiring room, this request should be made in the presence of the parties in court. Any legal advice given to the justices other than in open court should be clearly stated to be provisional; and the adviser should subsequently repeat the substance of the advice in open court and give the parties the opportunity to make any representations they wish on that provisional advice. The legal adviser should then state in open court whether the provisional advice is confirmed or, if it is varied, the nature of the variation.

24A.16 The legal adviser is under a duty to assist unrepresented parties, whether defendants or not, to present their case, but must do so without appearing to become an advocate for the party concerned. The legal adviser should also ensure that members of the court are aware of obligations under the Victims' Code.

24A.17 The role of legal advisers in fine default proceedings, or any other proceedings for the enforcement of financial orders, obligations or penalties, is to assist the court. They must not act in an adversarial or partisan manner, such as by attempting to establish wilful refusal or neglect or any other type of culpable behaviour, to offer an opinion on the facts, or to urge a particular course of action upon the justices. The expectation is that a legal adviser will ask questions of the defaulter to elicit information which the justices will require to make an adjudication, such as the explanation for the default. A legal adviser may also advise the justices as to the options open to them in dealing with the case.

24A.18 The performance of a legal adviser is subject to regular appraisal. For that purpose the appraiser may be present in the justices' retiring room. The content of the appraisal is confidential, but the fact that an appraisal has taken place, and the presence of the appraiser in the retiring room, should be briefly explained in open court.

CPD VI Trial 24B: IDENTIFICATION FOR THE COURT OF THE ISSUES IN THE CASE

24B.1 CrimPR 3.11(a) requires the court, with the active assistance of the parties, to establish what are the disputed issues in order to manage the trial. To that end, the purpose of the prosecutor's summary of the prosecution case is to explain briefly, in the prosecutor's own terms, what the case is about, including any relevant legislation or case law relevant to the particular case. It will not usually be necessary, or helpful, to present a detailed account of all the prosecution evidence due to be introduced.

24B.2 CrimPR 24.3(3)(b) provides for a defendant, or his or her advocate, immediately after the prosecution opening to set out the issues in the defendant's own terms, if invited to do so by the court. The purpose of any such identification of issues is to provide the court with focus as to what it is likely to be called upon to decide, so that the members of the court will be alert to those issues from the outset and can evaluate the prosecution evidence that they hear accordingly.

24B.3 The parties should keep in mind that, in most cases, the members of the court already will be aware of what has been declared to be in issue. The court will have access to any written admissions and to information supplied for the purposes of case management: CrimPR 24.13(2). The court's legal adviser will have drawn the court's attention to what is alleged and to what is understood to be in dispute: CrimPR 24.15(2). If a party has nothing of substance to add to that, then he or she should say so. The requirement to be concise will be enforced and the exchange with the court properly may be confined to enquiry and confirmation that the court's understanding of those allegations and issues is correct. Nevertheless, for the defendant to be offered an opportunity to identify issues at this stage may assist even if all he or she wishes to announce, or confirm, is that the prosecution is being put to proof.

24B.4 The identification of issues at the case management stage will have been made without the risk that they would be used at trial as statements of the defendant admissible in evidence against the defendant, provided the advocate follows the letter and the spirit of the Criminal Procedure Rules. The court may take the view that a party is not acting in the spirit of the Criminal Procedure Rules in seeking to ambush the other party or raising late and technical legal arguments that were not previously raised as issues. No party that seeks to ambush the other at trial should derive an advantage from such a course of action. The court may also take the view that a defendant is not acting in the spirit of the Criminal Procedure Rules if he or she refuses to identify the issues and puts

the prosecutor to proof at the case management stage. In both such circumstances the court may limit the proceedings on the day of trial in accordance with CrimPR 3.11(d). In addition any significant divergence from the issues identified at case management at this late stage may well result in the exercise of the court's powers under CrimPR 3.5(6), the powers to impose sanctions.

CPD VI Trial 24C: TRIAL ADJOURNMENT IN MAGISTRATES' COURTS

24C.1 Courts are entitled to expect the parties and other participants to adhere to CrimPR 1.2 (The duty of the participants in a criminal case) and to prepare accordingly for the trial to proceed on the date arranged. The court will expect communication between the parties and with the court regarding any issues which are likely to affect the effectiveness of any trial: CrimPR 3.2(2)(b)-(e). In particular, any revision of the information provided in the preparation for effective trial form must be reported to the court and each other party well in advance of the trial, not at trial or shortly before; and in considering any application to adjourn a trial the court will regard as especially significant any failure in this respect. Any communication should clearly identify the issue and any direction sought and should require reference to a legal adviser or case progression officer. The parties and other participants are entitled to expect the court and its staff to adhere to CrimPR 1.3 (The application by the court of the overriding objective) and to conduct its business accordingly. If relevant Criminal Procedure Rules, Criminal Practice Directions and judicial directions for trial preparation are followed, an effective trial on the date arranged will be the result.

24C.2 In some circumstances during preparation for trial it will become apparent to a party that a trial will not be required. It is in the interests of victims, witnesses, defendants, the court and legal representatives that these decisions are made at the earliest opportunity and that the other party, or parties, and the court are notified immediately. The requirements for an application to vacate a trial fixture are set out at paragraphs 24C.30 to 24C.32 beneath.

24C.3 Where a defendant who previously has pleaded not guilty decides to enter a guilty plea, notice of that decision, and the basis of plea, should be given to the prosecution and court as soon as possible so that a decision can be taken about the need for witnesses to attend (but caution should be exercised before the witnesses' attendance is dispensed with, and usually it will be advisable to set a date for the plea to be taken in advance of the date already set for trial). The sooner that notice of such a plea is given, the greater the reduction in sentence the defendant can expect. The court will

expect an explanation for the change of plea to assess the level of credit to be applied.

24C.4 Where a party is unable to comply with a direction within the time set by the court, and that failure will have implications for preparation by another party or for the likelihood of the trial proceeding within the time allocated, the party concerned should advise each other party and the court immediately of the failure and of the anticipated date for compliance: CrimPR 1.2(1)(c) and 3.10(2)(d). Parties are encouraged to communicate with each other to agree alternative dates consistent with maintaining the trial fixture: CrimPR 3.7.

Application to adjourn on day of trial

General principles

24C.5 The court is entitled to expect that trials will start on time with all case management issues dealt with in advance of the trial date. Early engagement between the parties and communication with the court should mean that it is rare for applications to adjourn trials to be made on the day of trial, except in circumstances that could not have been foreseen. However, there will be occasions on which, on the day set for trial, the court is invited without prior warning to adjourn to another day in consequence of an event or events said to make it unjust to proceed as planned; and in some circumstances it may have been necessary to arrange to hear a contested application to adjourn a trial on the very date on which that trial is due to begin (though before making such arrangements the court should have kept in mind the need to make time available for other cases, too, where the time available for the trial will be abbreviated by the time required to hear the application to adjourn it).

24C.6 Section 10 of the Magistrates' Courts Act 1980 confers a discretionary power to adjourn, and see also CrimPR 24.2(3). The following directions codify and restate procedural principles established in a long line of judgments of the senior courts, to some of which they refer. Therefore these directions supersede those judgments and it is to these directions that magistrates' courts must refer in the first instance.

24C.7 The starting point is that the trial should proceed. The basic approach was explained by Gross LJ in *Director of Public Prosecutions v Petrie* [2015] EWHC 48 (Admin):

" … successive initiatives … have repeatedly exhorted the magistracy and District Bench to case manage robustly and to resist the granting of adjournments. Although there are of course instances where the interests of justice require the grant of an adjournment, this should be a course of last rather than first resort – and after

other alternatives have been considered. … It is essential that parties to proceedings in a magistrates' court should proceed on the basis of a need to get matters right first time; any suggestion of a culture readily permitting an opportunity to correct failures of preparation should be firmly dispelled."

24C.8 A magistrates' court may keep in mind that, if appropriate, the court's decision may be re-opened (see CrimPR 24.18), and that avenues of appeal by way of rehearing or of review are open to the parties, including in a case in which it is later discovered that the court has acted on a material mistake of fact (see *R (Director of Public Prosecutions) v Sunderland Magistrates' Court, R (Kharaghan) v City of London Magistrates' Court* [2018] EWHC 229 (Admin)). The court should not be deterred from a prompt and robust determination therefore. Only if there are compelling reasons for doing so will the High Court interfere with the court's exercise of its discretion.

24C.9 In general, the relevant principles relating to trial adjournment are these:

- the court's duty is to deal justly with the case, which includes doing justice between the parties.
- the court must have regard to the need for expedition. Delay is generally inimical to the interests of justice and brings the criminal justice system into disrepute. Proceedings in a magistrates' court should be simple and speedy.
- applications for adjournments should be rigorously scrutinised and the court must have a clear reason for adjourning. To do this, the court must review the history of the case.
- where the prosecutor asks for an adjournment the court must consider not only the interest of the defendant in getting the matter dealt with without delay but also the public interest in ensuring that criminal charges are adjudicated upon thoroughly, with the guilty convicted as well as the innocent acquitted.
- with a more serious charge the public interest that there be a trial will carry greater weight. It is, however, reasonable for the court to expect that parties should have given especially careful attention to the preparation of trials involving serious offences or where the trial has significant implications for victims or witnesses.
- where the defendant asks for an adjournment the court must consider whether he or she will be able to present the defence fully without and, if not, the extent to which his or her ability to do so is compromised.
- the court must consider the consequences of an adjournment and its impact on the ability of witnesses and defendants accurately to recall events.

- the impact of adjournment on other cases. The relisting of one case almost inevitably delays or displaces the hearing of others. The length of the hearing and the extent of delay in other cases will need to be considered.

The relevance of fault

24C.10 As the starting point is that the trial should proceed, a consequence of doing so without adjournment may be that the prosecutor is unable to prove the prosecution case, or that the defendant is unable to explore an issue. That may be a just consequence of inadequate preparation. Even in the absence of fault on the part of either party it may not be in the interests of justice to adjourn, notwithstanding that an imperfect trial may be the result.

24C.11 The reason why the adjournment is required should be examined and if it arises through the fault of the applicant for that adjournment then that weighs against its grant, carrying weight in accordance with the gravity of the fault. For the purposes of this paragraph, the prosecutor and those who investigated the case usually should be treated as one.

24C.12 If the applicant was at fault, was it serious? A fault will be serious if the relevant act or omission has been repeated, especially where it has caused a previous adjournment, or where there is no reasonable explanation for that act or omission. The more serious the default, the less willing the court will be to adjourn.

24C.13 Where a party has been at fault, did the other party, if aware of it, draw attention to that fault promptly and explicitly? CrimPR 1.2(1)(c) imposes a collective responsibility on participants promptly to draw attention to a significant failure to take a required procedural step. CrimPR 3.10(2)(d) requires each party promptly to inform the court and the other parties of anything that may affect the date or duration of the trial or significantly affect the progress of the case in any other way. If no such action has been taken by a party who could have done so then the court may look less favourably on any application by that same party to adjourn, and especially if that application reasonably might have been made before the trial date.

Length of adjournment

24C.14 Were an adjournment granted, for how long would it need to be? The shorter the necessary adjournment, the less objectionable it will be – although much will depend on the ability of the court to accommodate it without undue impact on other cases. Courts must make every effort to make the adjournment as short as possible, for example by using time vacated by another trial or by conducting the hearing at another court house. In some cases it

may be possible to achieve a just outcome by a short adjournment to later on the same day.

24C.15 If the reason for the application to adjourn is that the applicant party seeks more time in which to raise or explore an issue, has that party reasonable grounds for its late identification despite the requirements of CrimPR 3.3(1) read with 3.2(2) (early identification of issues)? In the absence of such grounds, that failure will constitute a fault for the purposes of these directions.

Particular grounds of applications to adjourn trials

24C.16 The following paragraphs identify some particular factors which may need to be taken into account in addition to those identified in paragraphs 24C.5 – 24C15.

Absence of defendant

24C.17 If a defendant has attained the age of 18 years, the court shall proceed in his absence unless it appears to the court to be contrary to the interests of justice to do so: section 11 of the Magistrates' Courts Act 1980. In marked contrast to the position in the Crown Court, in magistrates' courts proceeding in the absence of a defendant is the default position where the defendant is aware of the date of trial and no acceptable reason is offered for that absence. The court is not obliged to investigate if no reason is offered. In assessing where the interests of justice lie the court will take into account all factors, including such reasons for absence as may be offered; the reliability of the information supplied in support of those reasons; the date on which the reasons for absence became known to the defendant; and what action the defendant thereafter took in response. Where the defendant provides a medical note to excuse his or her non-attendance the court must consider 5C of these Practice Directions (issue of medical certificates) and give reasons if deciding to proceed notwithstanding.

24C.18 If the court does not proceed to trial in the absence of the defendant it is required by the 1980 Act to give its reasons, which must be specific to the case: section 11(7), and see also CrimPR 24.16(h).

24C.19 Where a defendant is under 18, there is no presumption that the court should proceed in absence. In deciding whether it is in the interests of justice to proceed the court should take into account:

- that trial in absence can and sometimes does result in acquittal and that it is in nobody's interests to delay an acquittal;
- that if convicted the defendant can ask that the conviction be re-opened in the interests of justice, for example if absence was involuntary;

- that if convicted the defendant has a right to a rehearing on appeal to the Crown Court;
- the age, vulnerability, or experience of the defendant;
- whether a parent or guardian is present, whether a parent or guardian ordinarily would be required to attend and whether such a person has attended a previous hearing;
- the interests of any co-defendant in the case proceeding;
- the interests of witnesses who have attended, including the age of any such witness;
- the nature of the evidence and whether memories of relevant evidence are liable to fade;
- how soon an adjourned trial can be accommodated in the court list.

When proceeding in absence or adjourning the court must give its reasons.

Absence of witness

24C.20 Where the court is asked to adjourn because a witness has failed to attend, the court must:

- rigorously investigate the steps taken to secure that witness' attendance, the reasons given for absence and the likelihood of the witness attending should the case be adjourned;
- consider the relevance of the witness to the case, and whether the witness' statement can be agreed or admitted, in whole or part, as hearsay, including under section 114(1)(d) of the Criminal Justice Act 2003;
- in the case of a defence witness, consider whether proper notice has been given of the intention to call that witness;
- consider whether an absent witness can be heard later in the trial;
- where other witnesses have attended and the court has determined that the absent witness is required, consider hearing those witnesses who are present and adjourning the case part-heard, provided the next hearing can be held conveniently in a matter of days or weeks, not months, to avoid having to recall all the witnesses.

Failure to serve evidence in time

24C.21 It should rarely be the case that an application to adjourn based on a failure to serve evidence is made on the day of trial. The court is entitled to expect that evidence will have been served in good time and in accordance with the directions of the court. The court should consider whether the party who complains of the failure had drawn attention to it: CrimPR 1.2(1)(c) and 3.10(2)(d), and see paragraphs 24C.10 – 24C.13 above.

24C.22 The court must conduct a rigorous inquiry into the nature of the evidence and must consider whether any of what is sought has been served, and if so when; the volume and the significance of

what is sought; and the time likely to be needed for its consideration. In particular, the court must satisfy itself that any material still sought is relevant and that the party seeking it has a right to it. In some circumstances a failure to serve evidence can be addressed by refusing to admit it instead of by adjourning the trial to allow it to be served: see *R v Boardman* [2015] EWCA Crim 175; [2015] 1 Cr. App. R. 33; [2015] Crim. L.R. 451.

Failure to comply with disclosure obligations

24C.23 The parties' disclosure obligations arise from the Criminal Procedure and Investigations Act 1996. The procedure to comply with those duties is set out at CrimPR Part 15. Disclosure is not a trial issue. It should have been resolved by the parties complying with their statutory obligations and with the Rules in advance of the trial.

24C.24 Where a defendant complains of a prosecution failure to disclose material that ought to have been disclosed the court must first establish whether either party is applying for an adjournment as a result. If an adjournment is sought, the court should consider whether the matter can be resolved by the giving of disclosure immediately. If it cannot, the court should consider whether the parties have complied with their obligations under CrimPR 3.3 and under the provisions listed in paragraph 24C.1 above, and should consider the relevance of fault.

24C.25 If the prosecutor has complied or purported to comply with his or her initial disclosure obligations, no further material is disclosable and consequently no application to adjourn should be entertained unless the defendant has served a defence statement in accordance with section 6 of the Criminal Procedure and Investigations Act 1996 and CrimPR 15.4.

24C.26 If the defendant has served a defence statement and asks for further disclosure, in consequence of the prosecutor's allegedly inadequate response or in consequence of a failure to respond at all, the court has no power to entertain an application for that further disclosure unless it is made pursuant to section 8 of the Criminal Procedure and Investigations Act 1996 and CrimPR 15.5. The court should consider hearing such an application immediately, provided that there is sufficient time available for the application itself and then for the defence to consider any material disclosed in consequence of it.

Managing trials within available court time

24C.27 Where there is a risk of a trials being adjourned for lack of court time the court or legal adviser must assess the priority to be assigned to each trial listed for hearing that day based on the

needs of the parties, whether the case has been adjourned before and the seriousness of the offence; giving priority to any cases in which the defendant is in custody by reason only of a trial due to be heard that day. Where more than one court is sitting to deal with trials, liaison between courtrooms should occur to determine the potential for all listed trials to be heard through movement of cases. Where a case is moved from one courtroom to another and as a result is assigned to a different advocate, the court must allow the fresh advocate adequate time in which to prepare. Courts should always begin a trial by reviewing the need for witnesses and the timetable set during pre-trial case management. The court will be slow to adjourn a trial until it is clear that all other trials assessed as having an equal or higher priority for hearing that day will be effective.

24C.28 The court is entitled to expect that parties will present their case within the time set during pre-trial case management. In entertaining additional applications for which no time has been allowed the court must keep in mind the expectation that the trial will be completed within the allocated time with minimal impact on other cases.

24C.29 While it is preferable to complete a trial on the date allocated, there will be occasions on which it is appropriate to adjourn part-heard, particularly where it is possible to hear the majority of witnesses. If necessary future listings will be moved to accommodate the hearing.

Applications to vacate trials

24C.30 To make the best use of the court's and the parties' time it is expected that applications to vacate trials will be made promptly and in writing, in advance of the date of trial. Any application should be served on each other party at the same time as it is served on the court. As a general rule, such an application will be dealt with outside the courtroom under CrimPR 3.5. An application to vacate a trial will be considered in accordance with the same principles as those identified in paragraphs 24C.5 – 24C.26 of these Directions.

24C.31 Given the binding nature of any decision on an application to vacate and refix a trial, absent a change of circumstances, it is incumbent on the parties to provide full and accurate information to the court to enable it to assess where the interests of justice lie: see *R (on the application of F and another) v Knowsley Magistrates Court* [2006] EWHC 695 (Admin); *R (Jones) v South East Surrey Local Justice Area* [2010] EWHC 916 (Admin), (2010) 174 JP 342; *DPP v Woods* [2017] EWHC 1070 (Admin). Any application

should, as a minimum, include (as should, as appropriate, any response):

- the reason for the application;
- a chronology of the case, recording the dates of compliance with any directions and of communication between the parties;
- an assessment of the interests of justice, addressing the factors identified in these Practice Directions and indicating the likely effect should the court conclude that the trial should proceed on the date fixed;
- any restrictions on the future availability of witnesses;
- any likely changes to the number of witnesses or the way in which the evidence will be presented and any impact on the trial time estimate.

24C.32 On receipt of an application each other party should serve that party's response on the court and on the applicant within 2 business days unless the court otherwise directs. Any request for the matter to be determined at a hearing should be served with the application to vacate the trial or with the response to that application, as the case may be, together with the reasons for that request, to enable the court to decide whether a hearing is needed.

CrimPR Part 25 Trial and sentence in the Crown Court

CPD VI Trial 25A: IDENTIFICATION FOR THE JURY OF THE ISSUES IN THE CASE

25A.1 CrimPR 3.11(a) requires the court, with the active assistance of the parties, to establish what are the disputed issues in order to manage the trial. To that end, prosecution opening speeches are invaluable. They set out for the jury the principal issues in the trial, and the evidence which is to be introduced in support of the prosecution case. They should clarify, not obfuscate. The purpose of the prosecution opening is to help the jury understand what the case concerns, not necessarily to present a detailed account of all the prosecution evidence due to be introduced.

25A.2 CrimPR 25.9(2)(c) provides for a defendant, or his or her advocate, to set out the issues in the defendant's own terms (subject to superintendence by the court), immediately after the prosecution opening. Any such identification of issues at this stage is not to be treated as a substitute for or extension of the summary of the defence case which can be given later, under CrimPR 25.9(2)(g). Its purpose is to provide the jury with focus as to the issues that they are likely to be called upon to decide, so that jurors will be alert to those issues from the outset and can evaluate the prosecution evidence that they hear accordingly. For that purpose, the defendant is not confined to what is included in the defence statement (though any divergence from the defence statement will

expose the defendant to adverse comment or inference), and for the defendant to take the opportunity at this stage to identify the issues may assist even if all he or she wishes to announce is that the prosecution is being put to proof.

25A.3 To identify the issues for the jury at this stage also provides an opportunity for the judge to give appropriate directions about the law; for example, as to what features of the prosecution evidence they should look out for in a case in which what is in issue is the identification of the defendant by an eye-witness. Giving such directions at the outset is another means by which the jury can be helped to focus on the significant features of the evidence, in the interests of a fair and effective trial.

25A.4 A defendant is not entitled to identify issues at this stage by addressing the jury unless the court invites him or her to do so. Given the advantages described above, usually the court should extend such an invitation but there may be circumstances in which, in the court's judgment, it furthers the overriding objective not to do so. Potential reasons for denying the defendant the opportunity at this stage to address the jury about the issues include (i) that the case is such that the issues are apparent; (ii) that the prosecutor has given a fair, accurate and comprehensive account of the issues in opening, rendering repetition superfluous; and (iii) where the defendant is not represented, that there is a risk of the defendant, at this early stage, inflicting injustice on him or herself by making assertions to the jury to such an extent, or in such a manner, as is unfairly detrimental to his or her subsequent standing.

25A.5 Whether or not there is to be a defence identification of issues, and, if there is, in what manner and in what terms it is to be presented to the jury, are questions that must be resolved in the absence of the jury and that should be addressed at the opening of the trial.

25A.6 Even if invited to identify the issues by addressing the jury, the defendant is not obliged to accept the invitation. However, where the court decides that it is important for the jury to be made aware of what the defendant has declared to be in issue in the defence statement then the court may require the jury to be supplied with copies of the defence statement, edited at the court's direction if necessary, in accordance with section 6E(4) of the Criminal Procedure and Investigations Act 1996.

CPD VI Trial 25B: TRIAL ADJOURNMENT IN THE CROWN COURT

25B.1 A defendant has a right, in general, to be present and to be represented at his trial. However, a defendant may choose not to exercise those rights, such as by voluntarily absenting himself and

failing to instruct his lawyers adequately so that they can represent him.

25B.2 The court has a discretion as to whether a trial should take place or continue in the defendant's absence and must exercise its discretion with due regard for the interests of justice. The overriding concern must be to ensure that such a trial is as fair as circumstances permit and leads to a just outcome. If the defendant's absence is due to involuntary illness or incapacity it would very rarely be right to exercise the discretion in favour of commencing or continuing the trial.

25B.3 Proceeding in the absence of a defendant is a step which ought normally to be taken only if it is unavoidable. The court must exercise its discretion as to whether a trial should take place or continue in the defendant's absence with the utmost care and caution. Due regard should be had to the judgment of Lord Bingham in *R v Jones (Anthony William)* [2002] UKHL 5, [2003] 1 A.C. 1, [2002] 2 Cr. App. R. 9. Circumstances to be taken into account before proceeding include:

i) the conduct of the defendant,
ii) the disadvantage to the defendant,
iii) the public interest, taking account of the inconvenience and hardship to witnesses, and especially to any complainant, of a delay; if the witnesses have attended court and are ready to give evidence, that will weigh in favour of continuing with the trial,
iv) the effect of any delay,
v) whether the attendance of the defendant could be secured at a later hearing, and
vii) the likely outcome if the defendant is found guilty.

Even if the defendant is voluntarily absent, it is still generally desirable that he or she is represented.

CrimPR Part 26 Jurors

CPD VI Trial 26A: JURIES: INTRODUCTION

26A.1 Jury service is an important public duty which individual members of the public are chosen at random to undertake. As the Court has acknowledged: "Jury service is not easy; it never has been. It involves a major civic responsibility" (*R v Thompson* [2010] EWCA Crim 1623, [9] per Lord Judge CJ, [2011] 1 W.L.R. 200, [2010] 2 Cr. App. R. 27).

Provision of information to prospective jurors

26A.2 HMCTS provide every person summoned as a juror with information about the role and responsibilities of a juror. Prospective jurors are provided with a pamphlet, "Your Guide to

Jury Service", and may also view the film "Your Role as a Juror" online at anytime on the Ministry of Justice YouTube site www.youtube.com/watch?v=JP7slp-X9Pc There is also information at https://www.gov.uk/jury-service/overview

CPD VI Trial 26B: JURIES: PRELIMINARY MATTERS ARISING BEFORE JURY SERVICE COMMENCES

26B.1 The effect of section 321 of the Criminal Justice Act 2003 was to remove certain categories of persons from those previously ineligible for jury service (the judiciary and others concerned with the administration of justice) and certain other categories ceased to be eligible for excusal as of right, (such as members of Parliament and medical professionals). The normal presumption is that everyone, unless ineligible or disqualified, will be required to serve when summoned to do so.

Excusal and deferral

26B.2 The jury summoning officer is empowered to defer or excuse individuals in appropriate circumstances and in accordance with the HMCTS *Guidance for summoning officers when considering deferral and excusal applications* (2009): http://www.official-documents.gov.uk/document/other/9780108508400/9780108508400.pdf

Appeals from officer's refusal to excuse or postpone jury service

26B.3 CrimPR 26.1 governs the procedure for a person's appeal against a summoning officer's decision in relation to excusal or deferral of jury service.

Provision of information at court

26B.4 The court officer is expected to provide relevant further information to jurors on their arrival in the court centre.

CPD VI Trial 26C: JURIES: ELIGIBILITY

English language ability

26C.1 Under the Juries Act 1974 section 10, a person summoned for jury service who applies for excusal on the grounds of insufficient understanding of English may, where necessary, be brought before the judge.

26C.2 The court may exercise its power to excuse any person from jury service for lack of capacity to act effectively as a juror because of an insufficient understanding of English.

26C.3 The judge has the discretion to stand down jurors who are not competent to serve by reason of a personal disability: *R v Mason* [1981] QB 881, (1980) 71 Cr. App. R. 157; *R v Jalil* [2008] EWCA Crim 2910, [2009] 2 Cr. App. R. (S.) 40.

Jurors with professional and public service commitments

26C.4 The legislative change in the Criminal Justice Act 2003 means that more individuals are eligible to serve as jurors, including those previously excused as of right or ineligible. Judges need to be vigilant to the need to exercise their discretion to adjourn a trial, excuse or discharge a juror should the need arise.

26C.5 Whether or not an application has already been made to the jury summoning officer for deferral or excusal, it is also open to the person summoned to apply to the court to be excused. Such applications must be considered with common sense and according to the interests of justice. An explanation should be required for an application being much later than necessary.

Serving police officers, prison officers or employees of prosecuting agencies

26C.6 A judge should always be made aware at the stage of jury selection if any juror in waiting is in these categories. The juror summons warns jurors in these categories that they will need to alert court staff.

26C.7 In the case of police officers an inquiry by the judge will have to be made to assess whether a police officer may serve as a juror. Regard should be had to: whether evidence from the police is in dispute in the case and the extent to which that dispute involves allegations made against the police; whether the potential juror knows or has worked with the officers involved in the case; whether the potential juror has served or continues to serve in the same police units within the force as those dealing with the investigation of the case or is likely to have a shared local service background with police witnesses in a trial.

26C.8 In the case of a serving prison officer summoned to a court, the judge will need to inquire whether the individual is employed at a prison linked to that court or is likely to have special knowledge of any person involved in a trial.

26C.9 The judge will need to ensure that employees of prosecuting authorities do not serve on a trial prosecuted by the prosecuting authority by which they are employed. They can serve on a trial prosecuted by another prosecuting authority: *R v Abdroikov* [2007] UKHL 37, [2007] 1 W.L.R. 2679, [2008] 1 Cr. App. R. 21; *Hanif v UK* [2011] ECHR 2247, (2012) 55 E.H.R.R. 16; *R v L* [2011] EWCA Crim 65, [2011] 1 Cr. App. R. 27. Similarly, a serving police officer can serve where there is no particular link between the court and the station where the police officer serves.

26C.10 Potential jurors falling into these categories should be excused from jury service unless there is a suitable alternative court/trial to which they can be transferred.

CPD VI Trial 26D: JURIES: PRECAUTIONARY MEASURES BEFORE SWEARING

26D.1 There should be a consultation with the advocates as to the questions, if any, it may be appropriate to ask potential jurors. Topics to be considered include:

a. the availability of jurors for the duration of a trial that is likely to run beyond the usual period for which jurors are summoned;

b. whether any juror knows the defendant or parties to the case;

c. whether potential jurors are so familiar with any locations that feature in the case that they may have, or come to have, access to information not in evidence;

d. in cases where there has been any significant local or national publicity, whether any questions should be asked of potential jurors.

26D.2 Judges should however exercise caution. At common law a judge has a residual discretion to discharge a particular juror who ought not to be serving, but this discretion can only be exercised to prevent an individual juror who is not competent from serving. It does not include a discretion to discharge a jury drawn from particular sections of the community or otherwise to influence the overall composition of the jury. However, if there is a risk that there is widespread local knowledge of the defendant or a witness in a particular case, the judge may, after hearing submissions from the advocates, decide to exclude jurors from particular areas to avoid the risk of jurors having or acquiring personal knowledge of the defendant or a witness.

Length of trial

26D.3 Where the length of the trial is estimated to be significantly longer than the normal period of jury service, it is good practice for the trial judge to enquire whether the potential jurors on the jury panel foresee any difficulties with the length and if the judge is satisfied that the jurors' concerns are justified, he may say that they are not required for that particular jury. This does not mean that the judge must excuse the juror from sitting at that court altogether, as it may well be possible for the juror to sit on a shorter trial at the same court.

Juror with potential connection to the case or parties

26D.4 Where a juror appears on a jury panel, it will be appropriate for a judge to excuse the juror from that particular case where the potential juror is personally concerned with the facts of the particular case, or is closely connected with a prospective witness. Judges need to exercise due caution as noted above.

CPD VI Trial 26E: JURIES: SWEARING IN JURORS

Swearing Jury for trial

26E.1 All jurors shall be sworn or affirm. All jurors shall take the oath or affirmation in open court in the presence of one another. If, as a result of the juror's delivery of the oath or affirmation, a judge has concerns that a juror has such difficulties with language comprehension or reading ability that might affect that juror's capacity to undertake his or her duties, bearing in mind the likely evidence in the trial, the judge should make appropriate inquiry of that juror.

Form of oath or affirmation

26E.2 Each juror should have the opportunity to indicate to the court the Holy Book on which he or she wishes to swear. The precise wording will depend on his or her faith as indicated to the court.

26E.3 Any person who prefers to affirm shall be permitted to make a solemn affirmation instead. The wording of the affirmation is: 'I do solemnly, sincerely and truly declare and affirm that I will faithfully try the defendant and give a true verdict according to the evidence'.

CPD VI Trial 26F: JURIES: ENSURING AN EFFECTIVE JURY PANEL

Adequacy of numbers

26F.1 By section 6 of the Juries Act 1974, if it appears to the court that a jury to try any issue before the court will be, or probably will be, incomplete, the court may, if the court thinks fit, require any persons who are in, or in the vicinity of, the court, to be summoned (without any written notice) for jury service up to the number needed (after allowing for any who may not be qualified under section 1 of the Act, and for excusals and challenges) to make up a full jury.

CPD VI Trial 26G: JURIES: PRELIMINARY INSTRUCTIONS TO JURORS

26G.1 After the jury has been sworn and the defendant has been put in charge the judge will want to give directions to the jury on a number of matters.

26G.2 Jurors can be expected to follow the instructions diligently. As the Privy Council stated in *Taylor* [2013] UKPC 8, [2013] 1 W.L.R. 1144:

> The assumption must be that the jury understood and followed the direction that they were given: ... the experience of trial judges is that juries perform their duty according to law. ...[T]he law proceeds on the footing that the jury, acting in accordance with the instructions given to them by the trial judge, will render a true verdict in accordance with the evidence. To conclude otherwise would be to underrate the integrity of the system of trial by jury and the effect on the jury of the instructions by the trial judge.

At the start of the trial

26G.3 Trial judges should instruct the jury on general matters which will include the time estimate for the trial and normal sitting hours. The jury will always need clear guidance on the following:

i. The need to try the case only on the evidence and remain faithful to their oath or affirmation;

ii. The prohibition on internet searches for matters related to the trial, issues arising or the parties;

iii. The importance of not discussing any aspect of the case with anyone outside their own number or allowing anyone to talk to them about it, whether directly, by telephone, through internet facilities such as Facebook or Twitter or in any other way;

iv. The importance of taking no account of any media reports about the case;

v. The collective responsibility of the jury. As the Lord Chief Justice made clear in *R v Thompson and Others* [2010] EWCA Crim 1623, [2011] 1 W.L.R. 200, [2010] 2 Cr. App. R. 27:

> [T]here is a collective responsibility for ensuring that the conduct of each member is consistent with the jury oath and that the directions of the trial judge about the discharge of their responsibilities are followed…. The collective responsibility of the jury for its own conduct must be regarded as an integral part of the trial itself.

vi. The need to bring any concerns, including concerns about the conduct of other jurors, to the attention of the judge at the time, and not to wait until the case is concluded. The point should be made that, unless that is done while the case is continuing, it may not be possible to deal with the problem at all.

Subsequent reminder of the jury instructions

26G.4 Judges should consider reminding jurors of these instructions as appropriate at the end of each day and in particular when they separate after retirement.

26G.5 Following the judge's direction to the jury, each member of the jury must be provided with a copy of the notice "Your Legal Responsibilities as a Juror". This notice outlines what is required of the juror during and after their time on the jury. It is not a substitute for the judge's direction, but is designed to reinforce what the judge has outlined in the direction. The court clerk should ensure a record is made of service of the notice. Jurors are advised to keep their copy of the notice with their summons and at the end of the trial, they are allowed to retain it for future information.

CPD VI Trial 26H: JURIES: DISCHARGE OF A JUROR FOR PERSONAL REASONS

26H.1 Where a juror unexpectedly finds him or herself in difficult professional or personal circumstances during the course of the trial, the juror should be encouraged to raise such problems with the trial judge. This might apply, for example, to a parent whose childcare arrangements unexpectedly fail, or a worker who is engaged in the provision of services the need for which can be critical, or a Member of Parliament who has deferred their jury service to an apparently more convenient time, but is unexpectedly called back to work for a very important reason. Such difficulties would normally be raised through a jury note in the normal manner.

26H.2 In such circumstances, the judge must exercise his or her discretion according to the interests of justice and the requirements of each individual case. The judge must decide for him or herself whether the juror has presented a sufficient reason to interfere with the course of the trial. If the juror has presented a sufficient reason, in longer trials it may well be possible to adjourn for a short period in order to allow the juror to overcome the difficulty.

26H.3 In shorter cases, it may be more appropriate to discharge the juror and to continue the trial with a reduced number of jurors. The power to do this is implicit in section 16(1) of the Juries Act 1974. In unusual cases (such as an unexpected emergency arising overnight) a juror need not be discharged in open court. The good administration of justice depends on the co-operation of jurors, who perform an essential public service. All such applications should be dealt with sensitively and sympathetically and the trial judge should always seek to meet the interests of justice without unduly inconveniencing any juror.

CPD VI Trial 26J: JURIES: VIEWS

26J.1 In each case in which it is necessary for the jury to view a location, the judge should produce ground rules for the view, after discussion with the advocates. The rules should contain details of what the jury will be shown and in what order and who, if anyone, will be permitted to speak and what will be said. The rules should also make provision for the jury to ask questions and receive a response from the judge, following submissions from the advocates, while the view is taking place.

CPD VI Trial 26K: JURIES: DIRECTIONS, WRITTEN MATERIALS AND SUMMING UP

Overview

26K.1 Sir Brian Leveson's *Review of Efficiency in Criminal Proceedings 2015* contained recommendations to improve the efficiency of jury trials including:

- Early provision of appropriate directions;
- Provision of a written route to verdict;
- Provision of a split summing up (a summing up delivered in two parts – the first part prior to the closing speeches and the second part afterwards); and
- Streamlining the summing up to help the jury focus on the issues.

The purpose of this practice direction, and the associated criminal procedure rules, is to give effect to these recommendations.

Record-keeping

26K.2 Full and accurate record-keeping is essential to enable the Registrar of Criminal Appeals to obtain transcripts in the event of an application or appeal to the Court of Appeal (Criminal Division).

26K.3 A court officer is required to record the date and time at which the court provides directions and written materials (CrimPR 25.18(e)(iv)-(v)).

26K.4 The judge should ensure that a court officer (such as a court clerk or usher) is present in court to record the information listed in paragraph 26K.5.

26K.5 A court officer should clearly record the:

- Date, time and subject of submissions and rulings relating to directions and written materials;

- Date, time and subject of directions and written materials provided prior to the summing up; and
- Date and time of the summing up, including both parts of a split summing up.

26K.6 A court officer should retain a copy of written materials on the court file or database.

26K.7 The parties should also record the information listed in paragraph 26K.5 and retain a copy of written materials. Where relevant to a subsequent application or appeal to the Court of Appeal (Criminal Division), the information listed in paragraph 26K.5 should be provided in the notice of appeal, and any written materials should be identified.

Early provision of appropriate directions

26K.8 The court is required to provide directions about the relevant law at any time that will assist the jury to evaluate the evidence (CrimPR 25.14(2)). The judge may provide an early direction prior to any evidence being called, prior to the evidence to which it relates or shortly thereafter.

26K.9 Where the judge decides it will assist the jury in:

- their approach to the evidence; and / or
- evaluating the evidence as they hear it

an early direction should be provided.

26K.10 For example:

- Where identification is in issue, an early *Turnbull* direction is likely to assist the jury in approaching the evidence with the requisite caution; and by having the relevant considerations in mind when listening to the evidence.

- Where special measures are to be used and / or ground rules will restrict the manner and scope of questioning, an early explanation may assist the jury in their approach to the evidence.

- An early direction may also assist the jury, by having the relevant approach, considerations and / or test in mind, when listening to:

  - Expert witnesses; and
  - Evidence of bad character;

- Hearsay;
- Interviews of co-defendants; and
- Evidence involving legal concepts such as knowledge, dishonesty, consent, recklessness, conspiracy, joint enterprise, attempt, self-defence, excessive force, voluntary intoxication and duress.

Written route to verdict

26K.11 A route to verdict, which poses a series of questions that lead the jury to the appropriate verdict, may be provided by the court (CrimPR 25.14(3)(b)). Each question should tailor the law to the issues and evidence in the case.

26K.12 Save where the case is so straightforward that it would be superfluous to do so, the judge should provide a written route to verdict. It may be presented (on paper or digitally) in the form of text, bullet points, a flowchart or other graphic.

Other written materials

26K.13 Where the judge decides it will assist the jury, written materials should be provided. They may be presented (on paper or digitally) in the form of text, bullet points, a table, a flowchart or other graphic.

26K.14 For example, written materials may assist the jury in relation to a complex direction or where the case involves:

- A complex chronology;
- Competing expert evidence; or
- Differing descriptions of a suspect.

26K.15 Such written materials may be prepared by the judge or the parties at the direction of the judge. Where prepared by the parties at the direction of the judge, they will be subject to the judge's approval.

Split summing up and provision of appropriate directions prior to closing speeches

26K.16 Where the judge decides it will assist the jury when listening to the closing speeches, a split summing up should be provided. For example, the provision of appropriate directions prior to the closing speeches may avoid repetitious explanations of the law by the advocates.

26K. 17 By way of illustration, such directions may include:

- Functions of the judge and jury;
- Burden and standard of proof;

- Separate consideration of counts;
- Separate consideration of defendants;
- Elements of offence(s);
- Defence(s);
- Route to verdict;
- Circumstantial evidence; and
- Inferences from silence.

Closing speeches

26K.18 The advocates closing speeches should be consistent with any directions and route to verdict already provided by the judge.

Summing up

26K.19 Prior to beginning or resuming the summing up at the conclusion of the closing speeches, the judge should briefly list (without repeating) any directions provided earlier in the trial. The purpose of this requirement is to provide a definitive account of all directions for the benefit of the Registrar of Criminal Appeals and the Court of Appeal (Criminal Division), in the event of an application or appeal.

26K.20 The court is required to summarise the evidence relevant to the issues to such extent as is necessary (CrimPR 25.14(3)(a)).

26K.21 To assist the jury to focus on the issues during retirement, save where the case is so straightforward that it would be superfluous to do so, the judge should provide:

- A reminder of the issues;
- A summary of the nature of the evidence relating to each issue;
- A balanced account of the points raised by the parties; and
- Any outstanding directions.

It is not necessary for the judge to recount all relevant evidence or to rehearse all of the significant points raised by the parties.

26K.22 At the conclusion of the summing up, the judge should provide final directions to the jury on the need:

- For unanimity (in respect of each count and defendant, where relevant);
- To dismiss any thoughts of majority verdicts until further direction; and

- To select a juror to chair their discussions and speak on their behalf to the court.

CPD VI Trial 26L: JURIES: JURY ACCESS TO EXHIBITS AND EVIDENCE IN RETIREMENT

26L.1 At the end of the summing up it is also important that the judge informs the jury that any exhibits they wish to have will be made available to them.

26L.2 Judges should invite submissions from the advocates as to what material the jury should retire with and what material before them should be removed, such as the transcript of an ABE interview (which should usually be removed from the jury as soon as the recording has been played.)

26L.3 Judges will also need to inform the jury of the opportunity to view certain audio, DVD or CCTV evidence that has been played (excluding, for example ABE interviews). If possible, it may be appropriate for the jury to be able to view any such material in the jury room alone, such as on a sterile laptop, so that they can discuss it freely; this will be a matter for the judge's discretion, following discussion with counsel.

CPD VI Trial 26M: JURIES: JURY IRREGULARITIES

26M.1 This practice direction replaces the protocol regarding jury irregularities issued by the President of the Queen's Bench Division in November 2012, and the subsequent practice direction, in light of sections 20A to 20D of the Juries Act 1974 and the associated repeal of section 8 of the Contempt of Court Act 1981 (confidentiality of jury's deliberations).

It applies to juries sworn on or after 13 April 2015.

26M.2 A jury irregularity is anything that may prevent one or more jurors from remaining faithful to their oath or affirmation to 'faithfully try the defendant and give a true verdict according to the evidence.' Jury irregularities take many forms. Some are clear-cut such as a juror conducting research about the case or an attempt to suborn or intimidate a juror. Others are less clear-cut – for example, when there is potential bias or friction between jurors.

26M.3 A jury irregularity may involve contempt of court and / or the commission of an offence by or in relation to a juror.

26M.4 Under the previous version of this practice direction, the Crown Court required approval from the Vice-President of the Court of Appeal (Criminal Division) (CACD) prior to providing a juror's

details to the police for the purposes of an investigation into a jury irregularity. Such approval is no longer required. Provision of a juror's details to the police is now a matter for the Crown Court.

JURY IRREGULARITY DURING TRIAL

26M.5 A jury irregularity that comes to light during a trial may impact on the conduct of the trial. It may also involve contempt of court and / or the commission of an offence by or in relation to a juror. **The primary concern of the judge should be the impact on the trial.**

26M.6 A jury irregularity should be drawn to the attention of the judge in the absence of the jury as soon as it becomes known.

26M.7 **When the judge becomes aware of a jury irregularity, the judge should follow the procedure set out below:**

STEP 1: Consider isolating juror(s)
STEP 2: Consult with advocates
STEP 3: Consider appropriate provisional measures (which may include surrender / seizure of electronic communications devices and taking defendant into custody)
STEP 4: Seek to establish basic facts of jury irregularity
STEP 5: Further consult with advocates
STEP 6: Decide what to do in relation to conduct of trial
STEP 7: Consider ancillary matters (contempt in face of court and / or commission of criminal offence)

STEP 1: Consider isolating juror(s)

26M.8 The judge should consider whether the juror(s) concerned should be isolated from the rest of the jury, particularly if the juror(s) may have conducted research about the case.

26M.9 If two or more jurors are concerned, the judge should consider whether they should also be isolated from each other, particularly if one juror has made an accusation against another.

STEP 2: Consult with advocates

26M.10 The judge should consult with the advocates and invite submissions about appropriate provisional measures (Step 3) and how to go about establishing the basic facts of the jury irregularity (Step 4).

26M.11 The consultation should be conducted

- in open court;
- in the presence of the defendant; and
- with all parties represented

unless there is good reason not to do so.

26M.12 If the jury irregularity involves a suspicion about the conduct of the defendant or another party, there may be good reason for the consultation to take place in the absence of the defendant or the other party. There may also be good reason for it to take place in private. If so, the proper location is in the court room, with DARTS recording, rather than in the judge's room.

26M.13 If the jury irregularity relates to the jury's deliberations, the judge should warn all those present that it is an offence to disclose, solicit or obtain information about a jury's deliberations (section 20D(1) of the Juries Act 1974 – see paragraphs 26M.35 to 26M.38 regarding the offence and exceptions). This would include disclosing information about the jury's deliberations divulged in court during consultation with the advocates (Step 2 and Step 5) or when seeking to establish the basic facts of the jury irregularity (Step 4). The judge should emphasise that the advocates, court staff and those in the public gallery would commit the offence by explaining to another what is said in court about the jury's deliberations.

STEP 3: Consider appropriate provisional measures

26M.14 **The judge should consider appropriate provisional measures which may include surrender / seizure of electronic communications devices and taking the defendant into custody.**

- **Surrender / seizure of electronic communications devices**

26M.15 The judge should consider whether to make an order under section 15A(1) of the Juries Act 1974 requiring the juror(s) concerned to surrender electronic communications devices, such as mobile telephones or smart phones.

26M.16 Having made an order for surrender, the judge may require a court security officer to search a juror to determine whether the juror has complied with the order. Section 54A of the Courts Act 2003 contains the court security officer's powers of search and seizure.

26M.17 Section 15A(5) of the Juries Act 1974 provides that it is contempt of court for a juror to fail to surrender an electronic communications device in accordance with an order for surrender (see paragraphs 26M.29 to 26M.30 regarding the procedure for dealing with such a contempt).

26M.18 Any electronic communications device surrendered or seized under these provisions should be kept safe by the court until returned to the juror or handed to the police as evidence.

- **Taking defendant into custody**

26M.19 If the defendant is on bail, and the jury irregularity involves a suspicion about the defendant's conduct, the judge should consider taking the defendant into custody. If that suspicion involves an attempt to suborn or intimidate a juror, the defendant should be taken into custody.

STEP 4: Seek to establish basic facts of jury irregularity

26M.20 The judge should seek to establish the basic facts of the jury irregularity for the purpose of determining how to proceed in relation to the conduct of the trial. The judge's enquiries may involve having the juror(s) concerned write a note of explanation and / or questioning the juror(s). The judge may enquire whether the juror(s) feel able to continue and remain faithful to their oath or affirmation. If there is questioning, each juror should be questioned separately, in the absence of the rest of the jury, unless there is good reason not to do so.

26M.21 In accordance with paragraphs 26M.10 to 26M.13, the enquiries should be conducted in open court; in the presence of the defendant; and with all parties represented unless there is good reason not to do so.

STEP 5: Further consult with advocates

26M.22 The judge should further consult with the advocates and invite submissions about how to proceed in relation to the conduct of the trial and what should be said to the jury (Step 6).

26M.23 In accordance with paragraphs 26M.10 to 26M.13, the consultation should be conducted in open court; in the presence of the defendant; and with all parties represented unless there is good reason not to do so.

STEP 6: Decide what to do in relation to conduct of trial

26M.24 When deciding how to proceed, the judge may take time to reflect.

26M.25 Considerations may include the stage the trial has reached. The judge should be alert to attempts by the defendant or others to thwart the trial. In cases of potential bias, the judge should consider whether a fair minded and informed observer would conclude that there was a real possibility that the juror(s) or jury would be biased (*Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357).

26M.26 **In relation to the conduct of the trial, there are three possibilities:**

1. **Take no action and continue with the trial**
   If so, the judge should consider what, if anything, to say to the jury. For example, the judge may reassure the jury nothing untoward has happened or remind them their verdict is a decision of the whole jury and that they should try to work together. Anything said should be tailored to the circumstances of the case.

2. **Discharge the juror(s) concerned and continue with the trial**
   If so, the judge should consider what to say to the discharged juror(s) and the jurors who remain. All jurors should be warned not to discuss what has happened.

3. **Discharge the whole jury**
   If so, the judge should consider what to say to the jury and they should be warned not to discuss what has happened.

   If the judge is satisfied that jury tampering has taken place, depending on the circumstances, the judge may continue the trial without a jury (section 46(3) of the Criminal Justice Act 2003) or order a new trial without a jury (section 46(5) of the Criminal Justice Act 2003). Alternatively, the judge may re-list the trial. If there is a real and present danger of jury tampering in the new trial, the prosecution may apply for a trial without a jury (section 44 of the Criminal Justice Act 2003).

STEP 7: Consider ancillary matters

26M.27 **A jury irregularity may also involve contempt in the face of the court and / or the commission of a criminal offence. The possibilities include the following:**

- **Contempt in the face of the court by a juror**
- **An offence by a juror or a non-juror under the Juries Act 1974**
  Offences that may be committed by jurors are researching the case, sharing research, engaging in prohibited conduct or disclosing information about the jury's deliberations (sections 20A to 20D of the Juries Act 1974). Non-jurors may commit the offence of disclosing, soliciting or obtaining information about the jury's deliberations (section 20D of the Juries Act 1974).
- **An offence by juror or a non-juror other than under the Juries Act 1974** A juror may commit an offence such as assault or theft. A non-juror may commit an offence in relation to a juror such as attempting to pervert the course of justice – for example, if the defendant or another attempts to suborn or intimidate a juror.

- **Contempt in the face of the court by a juror**

26M.28 If a juror commits contempt in the face of the court, the juror's conduct may also constitute an offence. If so, the judge should decide whether to deal with the juror summarily under the procedure for contempt in the face of the court or refer the matter to the Attorney General's Office or the police (see paragraphs 26M.31 and 26M.33).

26M.29 In the case of a *minor and clear* contempt in the face of the court, the judge may deal with the juror summarily. The judge should follow the procedure in CrimPR 48.5 to 48.8. The judge should also have regard to the practice direction regarding contempt of court issued in March 2015 (Practice Direction: Committal for Contempt of Court – Open Court), which emphasises the principle of open justice in relation to proceedings for contempt before all courts.

26M.30 If a juror fails to comply with an order for surrender of an electronic communications device (see paragraphs 26M.15 to 26M.18), the judge should deal with the juror summarily following the procedure for contempt in the face of the court.

- **Offence by a juror or non-juror under the Juries Act 1974**

26M.31 If it appears that an offence under the Juries Act 1974 may have been committed by a juror or non-juror (and the matter has not been dealt with summarily under the procedure for contempt in the face of the court), **the judge** should contact the Attorney General's Office to consider a police investigation, setting out the

position neutrally. The officer in the case should not be asked to investigate.

Contact details for the Attorney General's Office are set out at the end of this practice direction.

26M.32 If relevant to an investigation, any electronic communications device surrendered or seized pursuant to an order for surrender should be passed to the police as soon as practicable.

- **Offence by a juror or non-juror other than under the Juries Act 1974**

26M.33 If it appears that an offence, other than an offence under the Juries Act 1974, may have been committed by a juror or non-juror (and the matter has not been dealt with summarily under the procedure for contempt in the face of the court), **the judge or a member of court staff** should contact the police setting out the position neutrally. The officer in the case should not be asked to investigate.

26M.34 If relevant to an investigation, any electronic communications device surrendered or seized pursuant to an order for surrender should be passed to the police as soon as practicable.

Other matters to consider

- **Jury deliberations**

26M.35 **In light of the offence of disclosing, soliciting or obtaining information about a jury's deliberations (section 20D(1) of the Juries Act 1974), great care is required if a jury irregularity relates to the jury's deliberations.**

26M.36 *During the trial,* there are exceptions to this offence that enable the judge (and only the judge) to:

- Seek to establish the basic facts of a jury irregularity involving the jury's deliberations (Step 4); and

- Disclose information about the jury's deliberations to the Attorney General's Office if it appears that an offence may have been committed (Step 7).

26M.37 With regard to seeking to establish the basic facts of a jury irregularity involving the jury's deliberations (Step 4), it is to be noted that during the trial it is not an offence for the judge to disclose, solicit or obtain information about the jury's

deliberations for the purposes of dealing with the case (sections 20E(2)(a) and 20G(1) of the Juries Act 1974).

26M.38 With regard to disclosing information about the jury's deliberations to the Attorney General's Office if it appears that an offence may have been committed (Step 7), it is to be noted that during the trial:

- It is not an offence for the judge to disclose information about the jury's deliberations for the purposes of an investigation by a relevant investigator into whether an offence or contempt of court has been committed by or in relation to a juror (section 20E(2)(b) of the Juries Act 1974); and

- A relevant investigator means a police force or the Attorney General (section 20E(5) of the Juries Act 1974).

- **Minimum number of jurors**

26M.39 If it is decided to discharge one or more jurors (Step 6), a minimum of nine jurors must remain if the trial is to continue (section 16(1) of the Juries Act 1974).

- **Preparation of statement by judge**

26M.40 If a jury irregularity occurs, and the trial continues, the judge should have regard to the remarks of Lord Hope in *R v Connors and Mirza* [2004] UKHL 2 at [127] and [128], [2004] 1 AC 1118, [2004] 2 Cr App R 8 and consider whether to prepare a statement that could be used in an application for leave to appeal or an appeal relating to the jury irregularity.

JURY IRREGULARITY AFTER JURY DISCHARGED

26M.41 A jury irregularity that comes to light after the jury has been discharged may involve the commission of an offence by or in relation to a juror. It may also provide a ground of appeal.

26M.42 **A jury irregularity after the jury has been discharged may come to the attention of the:**

- **Trial judge or court**
- **Registrar of Criminal Appeals (the Registrar)**
- **Prosecution**
- **Defence**

- **Role of the trial judge or court**

26M.43 The judge has no jurisdiction in relation to a jury irregularity that comes to light after the jury has been discharged (*R v Thompson*

and others [2010] EWCA Crim 1623, [2011] 1 WLR 200, [2010] 2 Cr App R 27A). The jury will be deemed to have been discharged when all verdicts on all defendants have been delivered or when the jury has been discharged from giving all verdicts on all defendants.

26M.44 The judge will be *functus officio* in relation to a jury irregularity that comes to light during an adjournment between verdict and sentence. The judge should proceed to sentence unless there is good reason not to do so.

26M.45 In practice, a jury irregularity often comes to light when the judge or court receives a communication from a former juror.

26M.46 If a jury irregularity comes to the attention of a judge or court after the jury has been discharged, and regardless of the result of the trial, the judge or a member of court staff should contact the Registrar setting out the position neutrally. Any communication from a former juror should be forwarded to the Registrar.

Contact details for the Registrar are set out at the end of this practice direction.

- **Role of the Registrar**

26M.47 If a jury irregularity comes to the attention of the Registrar after the jury has been discharged, and regardless of the result of the trial, the Registrar should consider if it appears that an offence may have been committed by or in relation to a juror. The Registrar should also consider if there may be a ground of appeal.

26M. 48 When deciding how to proceed, particularly in relation to a communication from a former juror, the Registrar may seek the direction of the Vice-President of the Court of Appeal (Criminal Division) (CACD) or another judge of the CACD in accordance with instructions from the Vice-President.

26M.49 If it appears that an offence may have been committed by or in relation to a juror, the Registrar should contact the Private Office of the Director of Public Prosecutions to consider a police investigation.

26M.50 If there may be a ground of appeal, the Registrar should inform the defence.

26M.51 If a communication from a former juror is not of legal significance, the Registrar should respond explaining that no action is required. An example of such a communication is if it is

restricted to a general complaint about the verdict from a dissenting juror or an expression of doubt or second thoughts.

- **Role of the prosecution**

26M.52 If a jury irregularity comes to the attention of the prosecution after the jury has been discharged, which may provide a ground of appeal, they should notify the defence in accordance with their duties to act fairly and assist in the administration of justice (*R v Makin* [2004] EWCA Crim 1607, 148 SJLB 821).

- **Role of the defence**

26M.53 If a jury irregularity comes to the attention of the defence after the jury has been discharged, which provides an arguable ground of appeal, an application for leave to appeal may be made.

Other matters to consider

- **Jury deliberations**

26M.54 **In light of the offence of disclosing, soliciting or obtaining information about a jury's deliberations (section 20D(1) of the Juries Act 1974), great care is required if a jury irregularity relates to the jury's deliberations.**

26M.55 *After the jury has been discharged,* there are exceptions to this offence that enable a judge, a member of court staff, the Registrar, the prosecution and the defence to disclose information about the jury's deliberations if it appears that an offence may have been committed by or in relation to a juror or if there may be a ground of appeal.

26M.56 For example, it is to be noted that:

- After the jury has been discharged, it is not an offence for a person to disclose information about the jury's deliberations to defined persons if the person reasonably believes that an offence or contempt of court may have been committed by or in relation to a juror or the conduct of a juror may provide grounds of appeal (section 20F(1) (2) of the Juries Act 1974).

- The defined persons to whom such information may be disclosed are a member of a police force, a judge of the CACD, the Registrar of Criminal Appeals (the Registrar), a judge where the trial took place or a member of court staff where the trial took place who would reasonably be expected to disclose the information only to one of the aforementioned defined persons (section 20F(2) of the Juries Act 1974).

- After the jury has been discharged, it is not an offence for a judge of the CACD or the Registrar to disclose information about the jury's deliberations for the purposes of an investigation by a relevant investigator into whether an offence or contempt of court has been committed by or in relation to a juror or the conduct of a juror may provide grounds of appeal (section 20F(4) of the Juries Act 1974).

- A relevant investigator means a police force, the Attorney General, the Criminal Cases Review Commission (CCRC) or the Crown Prosecution Service (section 20F(10) of the Juries Act 1974).

- **Investigation by the Criminal Cases Review Commission (CCRC)**

26M.57 If an application for leave to appeal, or an appeal, includes a ground of appeal relating to a jury irregularity, the Registrar may refer the case to the Full Court to decide whether to direct the CCRC to conduct an investigation under section 23A of the Criminal Appeal Act 1968.

26M.58 If the Court directs the CCRC to conduct an investigation, directions should be given as to the scope of the investigation.

CONTACT DETAILS

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CPD VI Trial 26N: OPEN JUSTICE

26N.1 There must be freedom of access between advocate and judge. Any discussion must, however, be between the judge and the advocates on both sides. If an advocate is instructed by a solicitor who is in court, he or she, too, should be allowed to attend the discussion. This freedom of access is important because there may be matters calling for communication or discussion of such a nature that the advocate cannot, in the client's interest, mention them in open court, e.g. the advocate, by way of mitigation, may wish to tell the judge that reliable medical evidence shows that the defendant is suffering from a terminal illness and may not have long to live. It is imperative that, so far as possible, justice must be

administered in open court. Advocates should, therefore, only ask to see the judge when it is felt to be really necessary. The judge must be careful only to treat such communications as private where, in the interests of justice, this is necessary. Where any such discussion takes place it should be recorded, preferably by audio recording.

CPD VI Trial 26P: DEFENDANT'S RIGHT TO GIVE OR NOT TO GIVE EVIDENCE

26P.1 At the conclusion of the evidence for the prosecution, section 35(2) of the Criminal Justice and Public Order Act 1994 requires the court to satisfy itself that the defendant is aware that the stage has been reached at which evidence can be given for the defence and that the defendant's failure to give evidence, or if he does so his failure to answer questions, without a good reason, may lead to inferences being drawn against him.

If the defendant is legally represented

26P.2 After the close of the prosecution case, if the defendant's representative requests a brief adjournment to advise his client on this issue the request should, ordinarily, be granted. When appropriate the judge should, in the presence of the jury, inquire of the representative in these terms:

> *'Have you advised your client that the stage has now been reached at which he may give evidence and, if he chooses not to do so or, having been sworn, without good cause refuses to answer any question, the jury may draw such inferences as appear proper from his failure to do so ?'*

26P.3 If the representative replies to the judge that the defendant has been so advised, then the case shall proceed. If counsel replies that the defendant has not been so advised, then the judge shall direct the representative to advise his client of the consequences and should adjourn briefly for this purpose, before proceeding further.

If the defendant is not legally represented

26P.4 If the defendant is not represented, the judge shall, at the conclusion of the evidence for the prosecution, in the absence of the jury, indicate what he will say to him in the presence of the jury and ask if he understands and whether he would like a brief adjournment to consider his position.

26P.5 When appropriate, and in the presence of the jury, the judge should say to the defendant:

> *'Now is your chance to give evidence if you choose to do so. If you do give evidence it will be on oath [or affirmation], and you will be cross-examined like any other witness. If you do not give evidence the jury may hold it against you. If you do give evidence but refuse without good reason to answer the*

questions the jury may, as I have just explained, hold that against you. Do you now intend to give evidence?'

CPD VI Trial 26Q: MAJORITY VERDICTS

26Q.1 It is very important that all those trying indictable offences should, so far as possible, adopt a uniform practice when complying with section 17 of the Juries Act 1974, both in directing the jury in summing-up and also in receiving the verdict or giving further directions after retirement. So far as the summing-up is concerned, it is inadvisable for the judge, and indeed for advocates, to attempt an explanation of the section for fear that the jury will be confused.

Before the jury retires, however, the judge should direct the jury in some such words as the following:

"As you may know, the law permits me, in certain circumstances, to accept a verdict which is not the verdict of you all. Those circumstances have not as yet arisen, so that when you retire I must ask you to reach a verdict upon which each one of you is agreed. Should, however, the time come when it is possible for me to accept a majority verdict, I will give you a further direction."

26Q.2 Thereafter, the practice should be as follows:

Should the jury return before two hours and ten minutes has elapsed since the last member of the jury left the jury box to go to the jury room (or such longer time as the judge thinks reasonable) (see section 17(4)), they should be asked:

(a) "Have you reached a verdict upon which you are all agreed? Please answer 'Yes' or 'No'. ";

(b) (i) If unanimous, "What is your verdict?";

(ii) If not unanimous, the jury should be sent out again for further deliberation, with a further direction to arrive if possible at a unanimous verdict.

26Q.3 Should the jury return (whether for the first time or subsequently) or be sent for after the two hours and ten minutes (or the longer period) has elapsed, questions (a) and (b)(i) in the paragraph above should be put to them and, if it appears that they are not unanimous, they should be asked to retire once more and told they should continue to endeavour to reach a unanimous verdict but that, if they cannot, the judge will accept a majority verdict as in section 17(1).

26Q.4 When the jury finally return, they should be asked:

(a) "Have at least ten (or nine as the case may be) of you agreed on your verdict?";

(b) If "Yes", "What is your verdict? Please only answer 'Guilty' or 'Not Guilty'. ";

(c) (i) If "Not Guilty", accept the verdict without more ado;

(ii) If "Guilty", "Is that the verdict of you all, or by a majority?";

(d) If "Guilty" by a majority, "How many of you agreed to the verdict and how many dissented?"

26Q.5 At whatever stage the jury return, before question (a) is asked, the senior officer of the court present shall state in open court, for each period when the jury was out of court for the purpose of considering their verdict(s), the time at which the last member of the jury left the jury box to go to the jury room and the time of their return to the jury box; and will additionally state in open court the total of such periods.

26Q.6 The reason why section 17(3) is confined to a majority verdict of "Guilty", and for the somewhat complicated procedure set out above, is to prevent it being known that a verdict of "Not Guilty" is a majority verdict. If the final direction continues to require the jury to arrive, if possible, at a unanimous verdict and the verdict is received as specified, it will not be known for certain that the acquittal is not unanimous.

26Q.7 Where there are several counts (or alternative verdicts) left to the jury the above practice will, of course, need to be adapted to the circumstances. The procedure will have to be repeated in respect of each count (or alternative verdict), the verdict being accepted in those cases where the jury are unanimous and the further direction being given in cases in which they are not unanimous. The judge may exercise discretion in deciding when to record the unanimous verdict; the circumstances of the case may dictate that it is more desirable to give the majority direction before the recording of any unanimous verdicts. If so, then instead of being asked about each count in turn, the jury should be asked "Have you reached verdicts upon which you are all agreed in respect of all defendants and/or all counts?"

26Q.8 Should the jury in the end be unable to agree on a verdict by the required majority, the judge in his discretion will either ask them to deliberate further, or discharge them.

26Q.9 Section 17 will, of course, apply also to verdicts other than "Guilty" or "Not Guilty", e.g. to special verdicts under the Criminal Procedure (Insanity) Act 1964, following a finding by the judge that the defendant is unfit to be tried, and special verdicts on findings of fact. Accordingly, in such cases the questions to jurors will have to be suitably adjusted.