

Letter to the Bar regarding the 2024 Revised Magistrates' Court Protocol for the Greater London area

Agreement has been reached between the Bar and the London Criminal Courts Solicitors' Association (LCCSA) to increase the minimum recommended rates for advocacy in the Magistrates' Court Protocol for the Greater London area, which is published today.¹

Fees Background

Prior to 2001 the legal aid fee scheme for defending in the magistrates' court included a separate fee, paid direct to the advocate.² In April 2001 the scheme was changed, to a single fee paid to the solicitor for the entire magistrates' court case, out of which the solicitor pays for the advocacy. There was no longer any regulation stating what the advocacy part of the fee should be in an unassigned counsel case. Therefore, in 2001 the Bar Council and Criminal Bar Association (CBA) agreed a Magistrates Court Protocol with the LCCSA, setting out the responsibilities of solicitor and barrister and minimum rates to be paid to the barrister.

It was expected that in the years that followed, the Government would increase legal aid fees, recognising inflation, and the Protocol rates could similarly be increased. However, the Government never increased legal aid fees for the magistrates' court, and instead cut the fee paid to the solicitor for magistrates' court cases by 8.75%. Consequently, when the Protocol was last updated in 2019, the Chair of the Bar and the Chair of the Young Barristers' Association wrote:

“The minimum recommended fee rates in the revised Protocol are unchanged from the previous Protocol and reflect the unacceptable situation that legal aid fees for solicitors have not increased over this period.”

In December 2021, Sir Christopher Bellamy published his *“Independent Review of Criminal Legal Aid”*.³ This proposed an immediate 15% increase to criminal legal aid fees as, “the minimum necessary as the first step in nursing the system of criminal legal aid back to health after years of neglect.” (Paragraph 1.38). A year later, the Government increased the magistrates court fee paid to solicitors by 15% for cases with a Representation Order dated on or after 30 September 2022.⁴ For Crown Court cases there was a 15% fee increase for advocates, but less for litigators. Solicitors

¹ <https://www.barcouncilethics.co.uk/documents/protocol-instruction-counsel/>

² *The Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989*, S.I. 1989 No. 343.

³ <https://www.gov.uk/government/groups/independent-review-of-criminal-legal-aid>

⁴ *The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2022*. S.I. 2022 No. 848.

received an 11% increase overall, which was recently the subject of a Judicial Review brought by the Law Society.⁵

The new Protocol rates

The LCCSA have agreed with the Bar Council and CBA a 15% increase to the Protocol rates effective from February. These updated rates are in Annex A of the new Protocol.

Other points to remember

i.) Ensure that the full fee is claimed

a.) Provide the full information on hours worked to the solicitor

The Protocol states that, in addition to the minimum rates for advocacy, “Travel disbursements from chambers to court are to be paid in full in addition to the above...”. The solicitor cannot claim the travel fee from the LAA. It is all the more important, therefore, that the solicitor is given the evidence to enable them claim from the LAA an enhanced fee in cases where the total number of ours work takes them over a threshold. Part B of the Protocol sets out responsibilities on Counsel in this respect.

The LCCSA have asked us to highlight:

“We would be grateful if you could remind your members that their notes of the Magistrates’ Court attendance can have an impact on the fee that is paid for the case by the LAA. It is vitally important that all attendance notes explain in detail the work done and clearly state the amount of time spent attending upon others at court (the client, prosecutor, client’s family, probation, PLO etc), preparing the case and conducting the advocacy. Firms record this time against the file and it is counted towards the fee that is payable for it. Travel and waiting are not so counted. Instructing solicitors therefore require counsel attending at court to make every effort to advance the case by engaging fully with all relevant parties at court and drawing all salient matters to the Court’s attention during the hearing.”

b.) The possibility of an application for assigned counsel

The Protocol deals with cases of unassigned counsel in the magistrates’ court, where there is a single fee for the case, paid to the solicitor. In some cases it is appropriate for an application to be made to the court for a Representation Order for assigned

⁵ See paragraph 62 of the Judgment <https://www.judiciary.uk/wp-content/uploads/2024/01/Law-Society-v-Lord-Chancellor-judgment-Final.pdf>

counsel.⁶ In those cases there is a separate fee paid direct to the advocate. Barristers should encourage applications for assigned counsel in suitable cases.

ii.) **Non-payment by the firm**

There remains a long-standing problem of a minority of firms failing to pay the barrister for the advocacy, in breach of the Protocol. We remind barristers/chambers to:

a.) Maintain good communication

There should be regular dialogue between chambers and the firm over fee processing.

b.) Do not discriminate

Fees for junior members of chambers should be chased as actively as those for senior members of chambers. When the Protocol was last updated in 2019 the Chair of the Bar and the Chair of the Bar Council's Young Barristers' Committee wrote a joint letter to chambers, reminding all barristers of their ethical responsibilities towards junior members of their chambers:

"In the past some chambers have been unwilling to offend solicitors who instruct more senior members of chambers regularly [...] the perception has been that chambers are unwilling to press solicitors for the fees. [...] The current BSB Handbook imposes [...] obligations upon chambers:

"rC110 You must take reasonable steps to ensure that in relation to your chambers [...] 3.i. if you are a self-employed barrister, the affairs of your chambers are conducted in a manner which is fair and equitable for all members of chambers"

c.) Non-payment can be reported to the Legal Aid Agency

The *Standard Crime Contract 2022: Standard Terms*,⁷ that the solicitor firm enters into with the LAA, states:

"Your responsibility for third parties

3.3 [...] If you appoint: [...] (b) any person pursuant to this Clause 3 you are responsible for ensuring that: (i) all payments are made to them for their work within 30 days from receipt of a valid invoice;"

⁶ Section 16 of *The Criminal Legal Aid (Determinations by a Court and choice of Representative) Regulations 2013*, S.I. 2013. No. 614. And see Section 5.1 of the *LAA Criminal Legal Aid Manual, 2023* <https://www.gov.uk/government/publications/criminal-legal-aid-manual>

⁷ <https://www.gov.uk/government/publications/standard-crime-contract-2022>

The LAA confirm that a firm who fails to pay the barrister for the magistrates' court advocacy may be in breach of the LAA contract, and the barrister/chambers may report this breach to the LAA.

We recommend that chambers consider this step only after all engagement with the firm has failed. We would then encourage a report to be made. In an unassigned counsel magistrates' standard fee case the solicitor's fee claim with the LAA only involves basic case details and does not include whether external counsel was used, who that advocate was or what fee was agreed with them. The LAA therefore cannot act on non-payment to a third party in breach of the LAA contract if they do not receive a report from chambers providing the information.

Future engagement

Regarding non-payment: the Bar Council and CBA continue to argue that this should be resolved by a return to the pre-2001 position of having a separate fee for advocacy in the regulations, paid direct to the advocate.⁸

Regarding the rates: the Bar Council and CBA recognise that despite this increase to the Protocol rates, the rates remain far too low. This is the fault of the Government, not solicitors. We continue to argue through all channels – including direct to Ministers and via the Criminal Legal Aid Advisory Board - that criminal legal aid fees require an immediate increase, and a mechanism for regular increases thereafter.

7 February 2024

Tana Adkin KC, Chair of the Criminal Bar Association

Zayd Ahmed, Chair of Young Criminal Bar Association

Amrit Dhanoa, Chair of the Bar Council's Young Barristers' Committee

Sam Townend KC, Chair of the Bar.

⁸ See the Bar Council and CBA responses of June 2022 to Q.48 of the Government's consultation on the Criminal Legal Aid Review:

<https://www.barcouncil.org.uk/asset/8B6B8466%2D5B92%2D48DD%2DB48D055A0442BF83/>
<https://www.criminalbar.com/wp-content/uploads/2022/06/CBA-Response-to-Government-Consultation-on-CLAIR-07.06.22.pdf>