



The Bar Council

Court Appointed Legal Representatives

Purpose:	To draw barristers' attention to issues relating to this topic
Scope of application:	All practising criminal barristers
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Introduction

1. The Bar Council has provided the following information to assist with the such issues as may arise when a criminal court appoints a legal representative to act on behalf of an unrepresented defendant pursuant to s.38(4) of the Youth Justice and Criminal Evidence Act 1999.
2. In practice, the appointment of counsel by the court to act as a legal representative is not likely to be a frequent occurrence. Where it does occur, it is likely to involve a case of some seriousness and a defendant who is unwilling to cooperate with the trial process. Counsel will be appointed by the Court and not the defendant and may be required to act with only limited information as to the nature of the defence case and the matters in issue. Accordingly, counsel will be placed in a situation that will be alien to normal practice and additional considerations will apply.

Background

The Issue and Initial Judicial Guidance

3. The problems created by the occurrence of unrepresented defendants cross-examining complainants in criminal trials, and in particular in rape trials, was the subject of authoritative comment¹ and judicial consideration. The Court of Appeal addressed the difficulties that this gave rise to in two cases in which a defendant acting in person cross-examined the complainant on an allegation of rape.² The Lord Chief Justice gave guidance in the case of *R v Brown (Milton)* [1998] 2 Cr.App.R. 364 to assist trial judges confronted with such a problem:

“It will often be desirable, before any question is asked by the defendant in cross-examination, for the trial judge to discuss the course of the proceedings with the defendant in the absence of the jury. The judge can then elicit the general nature of the defence and identify the specific points in the complainant's evidence with which the defendant takes issue and any points he wishes to put to her. If the defendant proposes to call witnesses in his own defence, the substance of their evidence can be elicited so that the complainant's observations on it may, so far as it is relevant, be invited.”

4. Further guidance was provided as to the steps to be taken to restrict repetition or the intimidation or humiliation of the witness by way of the defendant's dress, bearing, manner or questions.

Statute: The Youth Justice and Criminal Evidence Act (1999)

5. In September 2000 section 34 of the Youth Justice and Criminal Evidence Act (1999) (“the Act”) introduced statutory restrictions on the cross-examination of a complainant by a defendant in person charged with a “sexual offence” (as defined by s.62 of the Act). At the same time s.35 of the Act prohibited cross-examination in person of child witnesses in certain sexual offence cases and in cases of kidnapping, false imprisonment, abduction, slavery, human trafficking and child cruelty. Both prohibitions extended to any other offence (of whatever nature) with which the defendant was charged in the same proceedings (ss.34(b) & 35(b) of the Act).

6. Section 36 (as supplemented by s.37) of the Act prohibited a defendant in person from cross-examining any witnesses not covered by ss. 34 & 35 where the court is satisfied, that (a) the quality of the witness's evidence is likely to be diminished if the defendant is allowed to proceed and improved if he is prohibited from doing so and (b) that it would not be contrary to the interests of justice to give such a direction.

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¹ Peter Rook QC 27 January 2001 and Nicholas Price QC March 2002.

² *R. v. Brown (Milton)* [1998] 2Cr.App.R.364 and *R. v. Ralston Edwards* (at first instance).

7. In circumstances where one of the statutory prohibitions applies, s.38 of the Act makes provision for the instruction by the accused or, in default, the appointment by the Court of a qualified legal representative for the purposes of cross-examination of a witness.

8. The Act provides the defendant with the opportunity under s.38(2)(a) of instructing his own legal representative to conduct the cross-examination of the witness on his behalf. Where the defendant does not do so, s.38(4) provides that if the court considers that it is necessary in the interests of justice for the witness to be cross-examined, the court must appoint a qualified legal representative³ (chosen by the court) to cross-examine the witness in the interests of the accused. The Act further provides, at s.38(5), that a person so appointed *shall not* be responsible to the accused.

9. By virtue of s.38(8)(b), any reference to cross-examination includes (in a case where a direction under s.36 has been given after the accused has begun cross-examining the witness) a reference to further cross-examination. Following the appointment by the court under s.38(4) of a qualified legal representative, the accused may arrange for that legal representative to be appointed to act for him and it is then as though he had done so at the outset under s.38(2)(a) of the Act.⁴

10. It is therefore apparent from the statutory scheme that in relation to the appointment of qualified legal representative:

- 10.1. your appointment is made in the interests of justice,
- 10.2. you are not the representative of the court that appoints you, and
- 10.3. whilst not responsible to him, you are appointed to represent the interests of the accused.

The Criminal Procedure Rules

11. The procedure for the appointment of legal representatives under s.38 has been codified in Part 23 of the Criminal Procedure Rules 2015 (“CrimPR”). CrimPR r.23.2 provides that where the prohibition upon cross-examination in the Act applies:

- “...(2) The court must, as soon as practicable, explain in terms the defendant can understand (with help, if necessary)—
- (a) the prohibition and its effect;
 - (b) that the defendant is entitled to arrange for a lawyer with a right of audience in the court to cross-examine the witness on his or her behalf;

³ Defined at s.38(8)(b) *YJ&CEA 99* as a legal representative who has a right of audience (within the meaning of the *Courts and Legal Services Act 1990*) in relation to the proceedings before the court.

⁴ *Crown Court Rules 1982* (1982/1109), R.24D.

(c) that the defendant must notify the court officer of the identity of any such lawyer, with details of how to contact that person, by no later than a date set by the court;

(d) that if the defendant does not want to make such arrangements, or if the defendant gives no such notice by that date, then—

(i) the court must decide whether it is necessary in the interests of justice to appoint such a lawyer to cross-examine the witness for the defendant, and

(ii) if the court decides that that is necessary, the court will appoint a lawyer chosen by the court.

(3) Having given those explanations, the court must—

(a) ask whether the defendant wants to arrange for a lawyer to cross-examine the witness, and set a date by when the defendant must notify the court officer of the identity of that lawyer if the answer to that question is 'yes';

(b) if the answer to that question is 'no', or if by the date set the defendant has given no such notice—

(i) decide whether it is necessary in the interests of justice for the witness to be cross-examined by an advocate appointed to represent the defendant's interests, and

(ii) if the court decides that that is necessary, give directions for the appointment of such an advocate."

12. Section 38(6)(b) of the Act provides that the Criminal Procedure Rules may make provision in particular for securing that the legal representative will be provided with "evidence or other material relating to the proceedings", including disclosure of material in connection with criminal proceedings under Pt.1 of the Criminal Procedure and Investigations Act (1996), (s.38(7)(a)). In giving effect to these provisions CrimPR r.23.2 provides that where the court decides to appoint an advocate to represent the defendant's interests, the court must give directions for the appointment of such an advocate (CrimPR r.23.2(3)(b)(ii)), and must also direct what material is to be supplied to that advocate, including "by whom and when it must be supplied" (CrimPR r.23.2(4)(a)).

13. In addition to the provisions of CrimPR Part 23 you should note that, in order to prepare for the trial, the court must take every reasonable step to facilitate the participation of any person, including the defendant (CrimPR r.3.9(3)(b)). The Notice of appointment by the court can be found here:

<https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2015/crim-proc-rules-2015-part-46.pdf>

The Duties of a Court Appointed Legal Representative

14. The parameters of the appointment by the court were considered in the CA case of *Abbas v CPS* [2015] EWHC 579, in which Hallett LJ stated that:

“48. The role of a section 38 advocate is, undoubtedly, limited to the proper performance of their duty as a cross-examiner of a particular witness. Sections 36 and 38 are all about protecting vulnerable witnesses from cross-examination from the accused. Therefore, it should not be thought that an advocate appointed under section 38 has a free-ranging remit to conduct the trial on the accused’s behalf. The professional duty and their statutory duty would be to ensure that they are in a position properly to conduct the cross-examination. Their duties might include therefore applications to admit bad character of the witness and or applications for disclosure of material relevant to the cross-examination. That is as far as one can go. All these matters must be entirely fact specific. The important thing to note is that the section 38 advocate must ensure that s/he performs his/her duties in accordance with the words of the statute.

49. It means also that their appointment comes to an end, under section 38, at the conclusion of the cross-examination, save to the extent that the court otherwise determines. Technically the lawyer no longer has a role in the proceedings thereafter. However, if the lawyer is prepared to stay and assist the defendant on a pro-bono basis, I see nothing in the act and no logical reason why the court should oblige them to leave. The advocate may well prove beneficial to the efficient and fair resolution of the proceedings.”

The ‘Scope of Practice’ Rules and Core Duties

15. The ‘Scope of Practice’ Rules in the Bar Standards Board Handbook, at B3, rS24, allows for a barrister in self-employed practice to be appointed by the court. As a court-appointed advocate, you will not have a contractual relationship with the client and so the Bar Council standard contractual terms (or chambers’ equivalent terms) will not apply.

16. Your Core Duties will continue to apply. In particular, those of most relevance to you as a court-appointed legal representative are your duties to the court (CD1), to act with honesty and integrity (CD3) and to maintain your independence (CD4). As noted below at paragraph 20, in certain circumstances the principle of client confidentiality (CD6) may also be engaged.

The Cab-rank Rule and the Suitability of court-appointed legal representatives

17. As the court is not a professional client within the meaning of rC29, the cab-rank rule does not apply to the acceptance of instructions to act as a court-appointed advocate. However, where Counsel is sufficiently experienced to accept the instruction and it is within his or her field of practice, Counsel will bear in mind that the interests of justice requires the appointment of the court-appointed advocate in the first place.

18. As previously set out, "qualified legal representative" is defined in Section 38(8)(b) as a "legal representative who has a right of audience (within the meaning of the Courts and Legal Services Act 1990) in relation to the proceedings before the Court".

19. Whether the legal representative is a barrister or a solicitor, it is, in the Bar Council's view, **essential that only legal representatives with appropriate experience should be appointed.** The BSB Handbook provisions prevent counsel from accepting any instructions if to do so would cause him to be professionally embarrassed, which includes having insufficient experience or competence to handle such a matter (Handbook, rC21.8).

Conflicts and Confidentiality

20. There may be occasions when defence counsel is sacked by the defendant, or is forced to withdraw in accordance with the Code of Conduct, and is then asked to act in the same case as the defendant's court-appointed representative. Consideration should be given in that context to whether any conflict of interest arises as between the duties inherent in the new role and the duties (including the duty of confidentiality) owed to the defendant as a former client (Handbook, rC21.1, rC21.3, rC21.4).

The "proper performance" of Cross-Examination

21. In carrying out your duties to the accused, it is important that you are clear as to the purpose and the parameters of any questions you ask of the witness. It is not difficult to foresee a situation where questions asked without the benefit of instructions from the defendant may receive answers which may either harm his case or open up previously unexplored and unhelpful areas of evidence. Given the limitations upon your role and the degree of input that you receive from the defendant this situation may, in some cases, be unavoidable. However, if both you and the trial judge are fully aware of the nature of the questions to be asked, the danger of this arising will be mitigated. Where it does then occur, you are less likely to be at fault.

Duration of Appointment and Remuneration

22. Where you are appointed by the court, your appointment “terminates at the conclusion of the cross-examination of the witness” (CrimPR r.23.2(4)(b)). However, there is provision for the court to determine otherwise, as was noted by Hallett LJ in *Abbas v CPS (Supra.)*, the “appointment comes to an end, under section 38, at the conclusion of the cross-examination, save to the extent that the court otherwise determines”. It follows that you may need to be available for the duration of the evidence (including defence evidence) as opposed to simply cross-examination of the nominated witness. This will be a matter for the trial judge, and there remains the possibility that the judge may intervene during the trial to make a direction under Section 36 preventing the defendant from cross-examining other witnesses. Where the task of a court-appointed legal representatives is extended, it is important that you obtain certainty from the trial judge as to the basis on which you are appointed to act. You must be careful to ensure that you remain within the scope of the duties and obligations of a court-appointed legal representative and do not become the instructed advocate in the ordinary sense. You should also ensure that the defendant is aware and understands that this is the case.

23. The rate of remuneration under s.38 is determined by the National Taxing Team.⁵ The level of remuneration was considered in the costs appeal case of *R v Andrews* (2016) SCCO Ref 66/16, 23.06.16. In *Andrews* the costs judge ruled that there was no provision, statutory or otherwise, for payment for counsel to remain after the essential evidence. The ruling went on to give helpful guidance as to the levels of rates that might constitute reasonable and appropriate remuneration.

24. Remuneration should be appropriate⁶ to the work undertaken. It will be necessary for counsel to familiarise themselves with the case papers, including any relevant unused material provided by way of the disclosure process.

Further Practical Considerations

25. It may be helpful to give a non-exhaustive list of possible scenarios where the appointment of counsel by the court and the scope and duration of the appointment may need to be considered.

Appointment at an early stage of the proceedings

26. If the appointment is made at a sufficiently early stage in the proceedings, there may be a case for you to be present at any pre-trial or preparatory hearings at which there is to be a ruling on the admissibility of evidence that relates to cross-

⁵ “court appointees” see <https://www.justice.gov.uk/courts/national-taxing-team>.

⁶ s.40 YJ&CEA 99, inserting s.19(3)(e) into the *Prosecution of Offences Act 1985*.

examination of the witness or other legal issue such as a bad character application or the provision of disclosure (per Hallett LJ in *Abbas, Supra.*). This may assist you in understanding the issues in the case. **It should be borne in mind, however, that the role of the legal representative is clearly intended to be limited to the cross-examination of witnesses whom the defendant is prohibited from cross-examining and although it may be thought that such a representative could be useful to the court in other areas, that is not what appears to be intended by the legislation** (per Hallett LJ in *Abbas, Supra.*). Where there is a point of law or admissibility which can be properly taken within the scope of your appointment under the Act you should make the appropriate submissions, whether of your own volition or at the invitation of the trial judge. Where such areas are identifiable to you at an early stage in the proceedings you should bring them to the attention of the court.

Post a comment interview under caution

27. Where the defendant has given a full interview to the police setting out his defence you should ask whether he wishes to stand by the account given. If he does so, you will be entitled to put a positive case to the witness. If the defendant will not confirm that this is his defence, the witness's evidence should be tested on that basis but not as a positive case.

Where there is a defence statement setting out a defence

28. Again, the defendant should be asked to confirm whether he stands by the account given. As the defence statement will have been drafted by a previous representative upon instructions that you are unlikely to have access to, care will need to be taken in putting that case forward. If the defendant has provided a comment interview under caution you should consider whether there are any significant differences between the content of the interview and the defence statement.

Where there is a no comment interview and no defence statement has been served

29. The defendant may be asked by the judge to set out the points on which he takes issue in the case. However, the defendant may be uncooperative, and may decline to provide this information. In such circumstances, you may find yourself restricted to a cross-examination upon the issues that the trial judge directs are relevant as far as can be ascertained from the case papers. You should expect your input to be sought in relation to this matter. Once the relevant issues have been identified, you should explain them to the defendant. You should consider asking the defendant if he is willing to indicate his defence.

30. It is for the court to decide whether it is necessary in the interests of justice for the witness to be cross-examined by a court-appointed legal representative and it is only if the court has so decided that a legal representative must be appointed. In reaching that conclusion the court would have determined that there *were* matters that the witness was required to be cross-examined upon. At the very least these matters should be ascertained from the trial judge and may be capable of forming the basis of testing the evidence of the witness.

Mental Health Issues

31. A defendant's refusal to be represented may have its origin in mental health issues. In such cases you may not be able to obtain any assistance from the defendant and may also not be assisted by comments in interview or a completed defence statement. In such circumstances you may not be able to do more than advance such submissions and put to the witness such lines of defence as are apparent to you from the papers and are appropriate to your appointment.

Wider issues in the case

32. Once the relevant areas of cross-examination have been identified, you should consider whether there are submissions of law to be made that are relevant to the proposed cross-examination (per Hallett LJ in *Abbas, Supra.*). This would include, for example, questions relating to the sexual history of the witness for which leave must be given or whether a particular line of cross-examination may lead to an application to adduce the defendant's previous convictions in the event of him giving evidence. **However, it is outside the scope of the role of a court-appointed legal representative to raise legal arguments that are not relevant to the envisaged cross-examination.** It may be that you raise the existence of such issues with the court and the prosecution in order to serve the wider interests of justice and the overriding object of the CrimPR, but pursuing such matters does not fall within the limited confines of your duty to cross-examine under the Act. There may be a tendency for the court-appointed legal representative to be treated as something akin to *amicus* in the trial generally. This is not appropriate and should be resisted as such a role does not fall within the scope of the Act. It may also be confusing for the jury who may conclude that the defendant has the benefit of full representation where he does not.

Where the defendant chooses to instruct you

33. You may wish to inform the defendant at the end of the cross-examination that they can instruct you to thereafter act on their behalf. If you are so instructed you should ask the court for the opportunity to take instructions from the defendant. Where you are instructed you will become responsible to the defendant in the ordinary sense with all the attendant professional duties and responsibilities. Such

representation would not be covered by the court appointment, so legal aid would need to be applied for and confirmed in the usual way.

34. Many of the issues that may arise can only be taken on a case by case basis. You should bear in mind the limitations of your role and be alert not to stray into acting as the defendant's representative generally. The two roles are different and latter falls outwith the cope of your appointment. Where, as court-appointed counsel, you agree to thereafter act for the accused in the ordinary sense, it will be incumbent upon you to disclose the basis of your representation to the court. The precondition for your appointment will have been removed, and the court will withdraw the appointment and you will not be remunerated as appointed counsel for any work that goes beyond that which was intended by the court and the statutory provisions.

Summary of Information for Court Appointed Legal Representatives

35. Your role as a court-appointed legal representative is neither to conduct the defendant's defence nor to act as *amicus curiae*. It is solely to conduct the cross-examination of the witness(es) whom the defendant is prohibited from cross-examining.

36. As a court-appointed legal representative you should seek such further information as is required (from the court, the prosecution and the defendant) in order to be able to properly fulfil your role. That will include obtaining, and familiarising yourself with the relevant papers in the case, both used and unused. It will also require the issues in the defence case to be identified with sufficient clarity to enable you to discharge the duty of putting that case to the witness(es). You may seek guidance from the trial judge as to the apparent issues in the case.

37. Information sought from the defendant should be limited to such matters as will be relied upon in evidence during the defence case. You should not seek instructions from the defendant as to the conduct of the case more generally.

38. Where the defendant does not co-operate in identifying the issues in the case, you are entitled to rely on an account given in interview, or on the content of a defence statement, insofar as the defendant has confirmed that its contents reflect his or her defence.

39. The extent to which a positive case can or should be put in cross-examination is to be assessed in accordance with the usual principles and is a matter in respect of which you must exercise your judgment.

40. The overall extent of the cross-examination is likewise a matter for you to assess in light of all relevant circumstances.

41. It will be your duty to raise in advance any points of law relevant to the conduct of the cross-examination, such as whether there are relevant and admissible questions on the witness's sexual history or whether the defendant's character may be put in issue in the trial.

42. Whilst in the normal course of events, your engagement as a court-appointed legal representative terminates at the conclusion of the cross-examination of the particular witness, you should consider whether there is a need for the appointment to remain in place until a later stage in the trial (for example where the witness may have to be recalled), and if there is such a need, to make the appropriate application to the judge.

Important Notice

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