"*Working to Rules*": looking for breaches of the Criminal Procedure Rules by the CPS and using them to your advantage.

Stage 1: Are you simply demonstrating withdrawal of your goodwill or do you want costs?

Withdrawal of goodwill:

If legal aid has not been granted, consider whether you are even able to act?

In any case where you are required to proceed or put under pressure to do so because of your duty under the overriding objective (CrimPR Rule 1.1 (2)(e)) to deal with a case efficiently and expeditiously, remind the court of your duties under the Solicitors Code of Conduct: not to allow your independence to be compromised (principle 3); to act in the best interests of the client (principle 4), to provide a proper standard of service to your client (principle 5), and behave in a way which maintains the trust the public places in you and in the provision of legal services (principle 6).

Breaches by the other side and costs:

If legal aid has not been granted, and you can identify a breach of the Criminal Procedure Rules, consider applying under section 19 of the Prosecution of Offences Act 1985 and Regulation 3 of the Costs in Criminal Cases (General) Regulations 1986, 1986/1335 made under that section, for an order that one party (the CPS) pay all or part of the costs of the other party (your client) to the criminal proceedings.

Judge must be satisfied that the costs in question have been incurred by party A as a result of "an unnecessary or improper act or omission by or on behalf of" party B.

Not wasted costs (section 19A - the individual lawyer's fault) but costs thrown away by the fault of the CPS.

Consider whether your client will need to sign a potentially enforceable retainer to cover your costs prior to the application for legal aid.

Consider if there is a breach and/or there are likely to be more breaches, and a costs application would be a strong one, is it even worth applying for legal aid?

Stage 2: What breaches should you be looking for?

Before the first hearing

CrimPR Rule 10.2 requires the prosecution to serve initial details of its case in summary only and either way matters where the defence requests them, as soon as practicable, and in any event no later than the beginning of the day of the first hearing. And initial details means a summary of the evidence, or any statements or both and the defendant's previous convictions. Consider – have all of those been served? If not, they are in breach of that Rule. Are they also in breach of Rule 1.1 (e) of the overriding objective – dealing with the case efficiently and expeditiously?

At the first hearing

If the prosecutor at the first appearance has no authority to negotiate pleas or taken any other decision, are they again in breach of Rule 1.1 (e)? Also mention the Stop Delaying Justice initiative, the Narey Initiative and Simple Speedy Summary Justice, or whatever is the latest of these initiatives.

Service of unused material

Section 12 of the CPIA 1996 says that all the relevant periods (including for service of unused under section 3) shall be set out in regulations. The regulations do not set out a specific time limit for service of unused in the Mags.

However, you do have 14 days after service of unused to lodge a defence statement if you wish.

According to the notes to Part 22 (here: http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2012/crim-proc-rules-part-22.pdf), the CPS simply have to serve it as soon as is reasonably practicable after the defendant has pleaded not guilty.

It is unlikely that the day of trial would satisfy that test, so there is likely to be a breach anyway.

Do you want to adjourn the trial as a 'withdrawal of goodwill' gesture? Consider why an application might properly be justified – if you serve a defence statement asking for the police to do something – investigate phone records, speak to a particular witness, in the light of a failure under the CPIA Code to investigate all reasonable lines of enquiry whether these point towards or away from the suspect (Code 3.5, *Criminal Procedure and Investigations Act 1996, Code of Practice under Part II*).

Service of witness statements

If a written witness statement is sought to be relied on, it must be served before the hearing at which the party wishes to introduce it. (Crim PR Rule 27.4). Has that been done?

Expert evidence

Is the CPS expert report compliant with Rule 33.3 (1)? Does it:

(a) give details of the expert's qualifications, relevant experience and accreditation;

(b) give details of any literature or other information which the expert has relied on in making the report;
(c) contain a statement setting out the substance of all facts given to the expert which are material to the opinions expressed in the report, or upon which those opinions are based;
(d) make clear which of the facts stated in the report are within the expert's own knowledge;
(e) say who carried out any examination, measurement, test or experiment which the expert has used for the report and—

(i) give the qualifications, relevant experience and accreditation of that person,

(ii) say whether or not the examination, measurement, test or experiment was carried out under the expert's supervision, and

(iii) summarise the findings on which the expert relies;

(f) where there is a range of opinion on the matters dealt with in the report—

(i) summarise the range of opinion, and

(ii) give reasons for his own opinion;

(g) if the expert is not able to give his opinion without qualification, state the qualification;
(h) contain a summary of the conclusions reached;
(i) contain a statement that the expert understands his duty to the court, and has complied and will continue to comply with that duty; and
(j) contain the same declaration of truth as a witness statement.

But note: Only sub-paragraphs (i) and (j) of rule 33.3(1) apply to a summary by an expert of his conclusions served in advance of that expert's report.

Has it been served as soon as is reasonably practicable (Rule 33.4) and have you been given a copy of or a reasonable opportunity to inspect any records on which the finding was based or anything on which a test, measurement or experiment was carried out?

Hearsay and bad character

The hearsay and bad character rules apply in the Magistrates Court. Have the prosecution served a hearsay or bad character notice within 28 days of the defendant's not guilty plea? If not, they are in breach of Rule 34.2 (3) (a) or Rule 35.4 (3) (a) respectively.

But be careful of the court's right to waive the time limits under Rule 34.5 (1) and Rule 35.6 (1)

At trial

At the trial – are the prosecution ready, and do they have all their witnesses. Under Crim PR Rule 3.9 (2) (b) the Crown must take every reasonable step to ensure their witnesses will attend when needed; (c) make appropriate arrangements to present any written or other material, and (d) promptly inform the court and the other parties of anything that (i) may affect the date or duration of the trial or (ii) significantly affect the progress of the case in any other way.

Stage 3: When you have identified the breach of the Rules, what should you do about it?

(1): You identify the name of the case progression officer at the court and in the CPS (and of any other defendant).

Rule 3.4 requires the Court and the parties to nominate case progression officers. A case progression officer must have a name and contact details – rule 3.4 (1) (b).

Insist on a name in order to avoid CPS and court buck-passing. If you can target an individual in the court and the CPS, then the failure to acknowledge and the failure to reply will have a name and a face.

A case progression officer who fails to reply promptly and reasonably in response to communications about the case is in breach of Rule 3.4 (4) (d).

Unavailability is no excuse, because if a case progression officer is unavailable, he has a duty to appoint a substitute and inform the other case progression officers (Rule 3.4 (4) (e)).

(2): Then you inform them of all the failures, by email – separate emails may be appropriate - on a daily basis until the breaches are remedied.

Criminal Procedure Rule 1.2.1(c) requires each participant in a criminal case to inform the court and all parties of any significant failure to take any procedural step required by the rules, any practice direction or any direction of the court.

(3): Remember - a failure to acknowledge an email is a further breach. You are required to send another email.

Stage 4: Your costs application. Why should you apply for costs?

Rule 3.5 (6) says that where a party fails to comply with a rule or a direction, the court may exercise its powers to make a costs order.

This rule applies in the context of the exercise of the court's case management powers. There is no reason to adjourn costs to the end of the case. Indeed it defeats the point of the Rule which is to enforce compliance with orders and case management.

Where legal aid has not been granted, you are not required to turn any costs you receive over to the LAA. Nor are you capped on a section 19 application to legal aid rates (see below).

If you are litigating a costs issue on legal aid – consider whether the exception provisions are triggered justifying an enhanced fee.

Stage 5: How to make the costs application.

CrimPR Rule 76.8 says that an application for costs under section 19 must be made in writing, and as soon as practicable after becoming aware of the grounds for doing so.

The CPS must respond in not more than 7 days (Rule 76.8 (6) (b)).

There is a two page official form to be completed – attached.
Keep a stack of them.

Rule 76.2 says that the court must not make a costs order unless each party is present or has had an opportunity to attend or make representations. But a costs order may be made without a hearing. Reasons for accepting or rejecting an application must always be given (Rule 76.2 (5)).

Stage 6: How much are you entitled to if you get costs?

If no grant of legal aid has been made at the time of the costs order, you are not limited to legal aid rates.

Your bill can be taxed, or you can apply for a specific (liquidated) sum.

Costs may be assessed on the indemnity rather than the standard basis

See *HMRC v Viewtopia* [2006] 2 Costs L.R. 344.

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HYPERLINK "http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2012/crim-proc-