



Ministry
of Justice

**Criminal Procedure Rule Committee
Secretariat**

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Criminal Procedure Rule Committee: an invitation to comment on potential amendments to procedure on an application by a defendant with legal aid to change the representative assigned

Introduction

1. The Criminal Procedure Rule Committee would be grateful for your views on potential amendments to the procedure for making an application to the court to substitute the representative named in a legal aid representation order. Please reply by post to the address above, or by email to CriminalProcedureRuleEnquiries@justice.gov.uk, **by Friday 21 April, 2023**, so that the Committee can consider your comments at its meeting shortly after.

2. I enclose:

- (a) as Annexe 1 to this invitation an extract from CrimPR Part 46 (Representatives) showing potential amendments to rule 46.3 and two new rules, 46.4 and 46.5;
- (b) as Annexe 2 extracts from the Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013.

3. Your views are sought generally and on these two features of the potential rule amendments in particular:

- (a) addition of a requirement for a proposed new representative to communicate with the current representative before a defendant's application is made, and
- (b) omission of the present requirement for the current representative to provide a detailed account of the circumstances even where that representative does not oppose the defendant's application.

4. This invitation is addressed to the Law Society, the Criminal Law Solicitors' Association, the London Criminal Courts Solicitors' Association, the Criminal Bar Association, Presiding and Resident Judges, the Council of HM Circuit Judges, the Chief Magistrate, the Council of HM District Judges (Magistrates' Courts), the Magistrates' Leadership Executive, the Magistrates' Association and the Justices' Legal Advisers' and Court Officers' Service. The Committee would welcome, too, the views of any others whom those consulted may know to have an interest in the subject matter of this invitation.

5. I should be grateful if you would note these important points about this invitation:

a) the Ministry of Justice provides the Committee with its secretariat but the proposal that is the subject of this invitation is not a government proposal, it is a Committee initiative.

b) although the Committee does not intend to publish a list of those who comment or the content of their comments, please bear in mind that responses will be treated as public documents in accordance with the Freedom of Information Act 2000 and may be made available to enquirers on request.

Current rule 46.3

6. The current rule derives from proposals made in late 2014 and early 2015 in response to what then was perceived to be frequent disregard for the requirements of the 2013 Regulations. Like other Criminal Procedure Rules, it incorporates as procedural requirements for information to be supplied the requirements that must be satisfied before the court can allow an application under regulation 14 of the Regulations. It requires the applicant and the current representative to explain how, in their respective views, the criteria of regulation 14(3) are satisfied (if that is their view), and requires the current representative to explain whether, and if so how, the criteria of regulation 14(4) are satisfied (if that is the latter's view: those being criteria that only that representative can address). The result is a repetition of paragraphs of the rule, but that was not intended to require a repetition or elaboration of the information supplied. If the current representative agrees with the applicant's assertions about breakdown in their relationship then that representative need say only that. Whether the court agrees that such a breakdown indeed has occurred and is sufficiently serious to justify a change of representative will depend on the information supplied by the applicant, perhaps supplemented by information apparent from court records. CrimPR 1.3 requires the court to further the overriding objective that criminal cases be dealt with justly "when ... exercising any power given to it by legislation". Regulation 14(2) is permissive and gives the court a discretion. Therefore rule 1.3 applies. An application made shortly after the legal aid representation order is issued and which is unopposed by the current representative is more likely to succeed than one from which both those features are absent.

Suggested changes

7. The Rule Committee has been told that still now, as in 2014, the requirements of the Regulations sometimes are overlooked, or ignored, and that occasionally the procedure appears to have been abused. The Committee's power is limited to making and amending procedure rules. It cannot change the 2013 Regulations, or change features of the Criminal Legal Aid (Remuneration) Regulations 2013 which, some have suggested, encourage ill-founded applications for a change of representative. The Committee can, however, adjust the procedure, in the light of experience, to help avoid reported difficulties; to confine to a minimum the administration required of representatives and courts; and to encourage those involved at least to define their concerns, if they cannot resolve them, before any application for a transfer of representation is made.

The potential rule amendments

Arrangement of rules

8. Current rule 46.3 conflates distinct criteria for the potential transfer of representation. Regulation 14(3) of the 2013 Choice of Representative Regulations can be satisfied with information from the applicant defendant (though the court may require supplementary

information or confirmation). Only for the information required by regulation 14(4) must the court rely primarily or entirely on the current representative. The Committee thinks that rules should distinguish more clearly than now between those two sets of circumstances.

9. Therefore the suggestion is to retain in rule 46.3 general procedural requirements only and to remove to two separate new rules distinct procedural requirements for (i) an application by a defendant to change legal representative (regulation 14(3); new rule 46.4), and (ii) an application by a current representative to withdraw (regulation 14(4); new rule 46.5).

Communication between proposed new and current representative

10. If to apply for a transfer of representation required, as a matter of procedure, a statement confirming that the proposed new representative had communicated with the current representative then there would be a better chance than now that assertions which are mistaken or ill-conceived would be identified and could be contradicted, or resolved, before the court was required to adjudicate: hence new rule 46.4(1)(h)(iv), (v).

Explanation of waiver of privilege

11. Current rule 46.3(3)(f) requires the applicant defendant to declare whether legal professional privilege is waived and, if not, to recite that the applicant “declines to waive that privilege and acknowledges that the court may draw such inferences as it thinks fit in consequence”. To supplement that rule the current application form includes an explanation of what is meant by legal professional privilege. Although the application is made by the defendant it is permissible in principle, and likely in practice, that it will be prepared for the defendant by the proposed new representative. That being so, the Committee thinks it appropriate to require the proposed new representative as a matter of procedure to confirm that they have explained the effect of waiver and the consequences of withholding it: hence new rule 46.4(h)(vi).

Comments in response to defendant’s application

12. Current rule 46.3(5) requires the current representative to comment even though the information required by the court under regulation 14(3) ought to be contained in the application independently of any narrative in the response. That imposes on the current representative in every case significant burdens of explanation that supplement what the applicant defendant and his or her prospective new representatives ought to, and are required to, explain anyway.

13. The Committee thinks that the rule governing an application to change legal representative could and should require of the current representative a narrative explanation only if (i) the current representative believes that the regulation 14(4) circumstances obtain, or (ii) the current representative opposes the application. Hence new rule 46.4(5); though nothing will prevent the current representative from giving a full account if they wish to do so, even if not opposing the application.

Notice to the prosecutor

14. The Committee thinks that the prosecutor ought to be notified by the court if legal aid is withdrawn: hence new paragraph 46.3(7)(c).

The application form

15. If these rule amendments are made then the current application form will need to be brought up to date. The Committee thinks that the current explanation of legal professional privilege should be simplified anyway, along the lines of the explanation in the [notice of appeal to the Court of Appeal “Easy Read” edition](#).

Invitation to comment

16. See paragraph 3 above. May I extend the Rule Committee’s thanks to you for considering this invitation.

*Yours sincerely,
Jonathan*

Jonathan Solly
Secretary to the Criminal Procedure Rule Committee