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THE CRIMINAL PROCEDURE RULES: THEIR PART IN IMPROVING MAGISTRATES' SERVICE TO THE PUBLIC.

SPEECH TO COUNCIL OF THE JUSTICES' CLERKS' SOCIETY

BIRMINGHAM

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I'm grateful to Graham Hooper (President to of the Justices' Clerks' Society) for inviting me here this morning, especially since I was vague about my theme beyond saying that it would be about *the Rules*. As you'll know, there are around fifty-five of them, so he has been very trusting in not trying to pin me down!

Let me reassure him - and you - that I want to talk about the Rules as a body of law generally and their role in magistrates' courts in getting us - and here I mean principally magistrates rather than legal advisers - to do what we do better. But I'm sure you won't mind if I mention, in the course of my comments, some personal favourites among those 50 or so.

As usual on such occasions I must make clear that the views I am about to express are personal, although they are informed by my membership of the Rule Committee and, of course, by my bench experience.

My starting point is how the Rules are regarded in magistrates' courts. At times, I wonder if the breadth of the continuing debate about what we do - whether it's community engagement, out of court disposals, or other important matters - risks drowning out, or at least deflecting attention from, the thing that matters most: what we do in court on the day. That, of course, is what the Rules are all about.

Our oath describes our function as doing right to all manner of people[1], which means doing right not only to defendants, but also doing right to victims, witnesses and the wider community on whose behalf we dispense justice. In Rule-speak that obligation is summed up in the overriding objective: to deal with criminal cases justly[2].

If you want a fundamental principle, that one is pretty unbeatable, except perhaps by the oath itself. The Rules that follow set out how that objective must be met in every one of the wide range of types of cases that we deal with: whether it's a trial, a statutory declaration, sentencing, and the duty to give

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[1] Judicial oath: I will well and truly serve our Sovereign Lady Queen Elizabeth the Second, in the office of Justice of the Peace and I will do right to all manner of people after the laws and usages of the realm without fear or favour, affection or ill will.
[2] Criminal Procedure Rules 2013 (SI 2013/1554) Rule 1.1 (1) The overriding objective of this new code is that criminal cases be dealt with justly.

our reasons - unless there is no one else in court - or even appeals against the enforcement of foreign driving bans.

Attendance at court is not the venue of choice for most of those who appear before us, particularly if they are witnesses, where their accounts of events is doubted and they may be subject to vigorous and persistent cross-examination. It is not the most pleasant civic duty. They're all entitled to expect from magistrates not only a fair - a just - service, but also an efficient and a professional one. The Rules set out how that should happen. That is why I am concerned that the Rules, which are central to every decision that we take and, therefore, central to our commitment in the oath, seem to struggle to get the wide recognition among my magistrate colleagues that they warrant.

To try to find the reasons for that I think it is interesting to contrast that position with the comparatively intense relationship that each of us has with the sentencing guidelines. That is not to suggest that a close understanding of summary sentencing is excessive. On the contrary, it is absolutely essential. But then so is an understanding of the Rules.

The Rules are the nearest thing we have to a codified criminal process. They are the collation in one volume of innumerable pieces of primary legislation, case law and common law constructed into a clear and logical framework to satisfy the requirements of the Courts Act 2003[3] that there shall be procedural Rules that are both simple and simply expressed. That is pretty basic and pretty important. Why, then, the difference between the Rules and the guidelines? The explanation may go like this:

a. Sentencing guidelines have been around for many years and they are now an established part of our judicial tool kit. The Rules have been around since only 2005. Longevity is an important factor in establishing familiarity: the guidelines have that; the Rules don't – yet.

b. Next, each magistrate has a personal copy of the sentencing guidelines. The Rules are readily and widely available, but not necessarily as personal copies.[4]

c. Each magistrate receives direct local training on the sentencing guidelines. That may be because, traditionally, Judicial College training material has placed great emphasis on them.[5]

d. A fourth possible explanation: in recent years, we have come to refer to magistrates as 'sentencers'. That is entirely appropriate since sentencing is fundamental to what we do. But perhaps wide use of the term has almost made it into a synonym for magistrate with the unintended effect of deflecting attention from our wider court role. I suggest that our broader case management responsibility, as expressed in the Rules, and of which sentencing is a part, is just as important. Perhaps it is more important.

e. Finally, the Rules are law; the guidelines themselves are not. Perhaps there may be an unspoken (and certainly unwritten) assumption that, because the Rules are law – and legal advisers advise on the law – that they, not magistrates are their sole custodians. That is not the case with sentencing guidelines. Nor, in truth, should it be the case with the Rules.

[3] Courts Act 2003 s69 (4)

[4] Each magistrate received (2009/10) a copy of an 'Essential case management' laminate dealing with some of the basics. Also available is a sheet with an extract from Parts 1 and 3 of the Rules. Useful though this material is I suggest that, for context, it should be read with other Rules.

[5] Forthcoming induction material from the Judicial College will contain additional references to the Rules: a welcome development and an important contribution to magistrates' training.

Five possible reasons, then, to explain a significant gap in magistrates' judicial education. Or if not a gap there is certainly a mismatch between the two. Of course, you may feel that it is merely evidence of the growing pains of the Rules. That is the longevity point. That, though, is to speculate. What actually matters is the impact and the consequences of the magisterial knowledge gap.

It will come as no surprise that I want to demonstrate that effect by reference to summary trials. I use them as the obvious example because they consume the greatest amount of time - pre trial and the trial itself – and because they involve the greatest number of people; and because the outcome can have a dramatic effect on victims, witnesses and defendants, including when they don't take place as the court originally arranged.

You will all know that the numbers of ineffective trials remains stubbornly fairly static. Let me remind you of the main figures for 2012/13[6]: around 150, 000 summary trials listed; under 70,000 effective – that is about 44 per cent[7]. To put it another way, there were just over 2,000 ineffective trials a month. That figure does not take into account those trials that do not proceed on the date originally fixed because they were vacated (mainly at short notice) or because they cracked.

Two thousand trials a month is a huge number and it includes the main causes of that undesirable condition: those where everyone has turned up but the court doesn't have time that day to try the case; and those where prosecution witnesses have failed to turn up. But the total does not reflect the number of individuals involved – witnesses, victims and so on - which is obviously far greater than 2,000.

Now, I am not suggesting that a well-thumbed copy of the Rules on each bench would make every trial effective. Plainly it would not: much ineffectiveness, as well as many cracked and vacated trials, arise from things outside the court's immediate control. Even so, I am in no doubt that greater education of, and understanding by, benches of the Rules, and the confidence to apply them, could lead to significant improvements. For example, the Rules, respectively parts 3 and 37, set out the way to deal with trial-fixing and with trials themselves. They are clear, succinct and very helpful.

Then there is part 10, the requirements for initial details of the prosecution cases; and part 22, the duties governing disclosure of material that the prosecution is not relying on and so on. Not forgetting the catch-all 1.2. (1) (c) - known affectionately as the grassers' charter – which requires each participant to let the court know immediately of anything not done by any party that will hamper progress; and nailing so many of the things that go wrong.

These and the other Rules set out in careful, comprehensive and comprehensible detail the approach to every case. I suggest that a clear grasp of those parts alone among all magistrates is enormously valuable in enabling us to engage constructively and knowledgeably with important procedural matters. But even if the Rules themselves don't yet set the blood coursing through magisterial veins - I cannot imagine why they would not - one of the forms that complements them will, or certainly should!

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[6] **Source HMCTS, September 2013**: 152,676 summary trials listed; 67,660 effective; 58,834 cracked; 26,181 ineffective. (44,395 vacated.)

[7] 44.3 per cent. **The aim by the end of the current year is to increase the effectiveness figure to** 49.3 per cent. (**Just under 80,000.)**

The national trial *preparation form* - in common with the many forms that give expression to specific rules - is a product of the Rule Committee, although its formal status is that of a Practice Direction issued by the Lord Chief Justice. Its use is not optional, as Rule 3.11[8] makes clear. However, I am aware that compliance with 3.11 is not universal. For example, where a trial is expected to be short, typically, less than a day, some courts use their own local forms. Since most summary trials last a day or under, where there is non-compliance with 3.11 then there must be a lot of it!

I'm aware of the arguments that have prompted this procedural UDI. People say that the national form is too long; that much of it may be irrelevant to a specific trial; and that copying multiple pages for the parties is time-consuming, fiddly and heavy on copy paper. Unsurprisingly, that is not a view that I support. Actually, the form is very accessible and flexible. Where parts are not relevant to a case they can be left blank. The form is set out clearly in discrete sections for each party and the court to complete, with a final page for the court to list its all-important decisions and directions.

Overall, the form provides a valuable set of prompts for careful consideration of all the components of a trial at this critical stage in the process: evidence to be relied on; disclosure; applications; which witnesses are genuinely necessary; any technical equipment required and so on, leading to an unambiguous record of directions made during the court's all important preparatory exchanges with the parties and their exchanges with each other.

Proper use of each component of the form has the capacity to make the trial effective; and inadequate use, the capacity to confound it. So it is difficult to overstate the importance of detailed fastidious trial preparation. I wonder how often a trial court has observed, '*If only that had been dealt with at the trial-fixing hearing*'? Or perhaps rather more robust language to the same effect! In short, ten or 15 minutes spent up-stream at trial-fixing can save literally hours when things go wrong down stream, by which time it's often too late to put them right without further frustrating – and avoidable - delay. If we are ever asked for an example of the truth of the old saying, '*a stitch in time saves nine...*' this is it!

For example, I'm sure that we have all lost count of the hours wasted when no one has checked beforehand that the DVD player works and there has been a time-wasting foul up on the day because it doesn't, with impact not only on that trial but also on the one that follows. Or when it emerges that there have been insufficient checks to confirm that certain witnesses will turn up and, consequently, they don't. Or that an interpreter has not been confirmed; and that directions had not been given to anticipate such problems.

But unless things go massively wrong and end up in the High Court as in, for example, Drinkwater[9] I'm not aware of any formal machinery for an ineffective trial court to let a trial-fixing court know of failings that could have been avoided if it had done things differently. Equally, I doubt that there is a process for conveying to the trial fixing bench that its directions had been particularly helpful.

That lack of connection is important. A case is likely to be heard in the same building each time, but not automatically. It may be heard in the same court room. But probably with a different legal adviser and almost certainly a different bench for each appearance. So from the court's perspective there is little or no individual continuity.

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[8] Rule 3.11 - (1) The case management forms set out in the Practice Direction must be used...'

[9] Drinkwater, R (on the application of) v Solihull Magistrates Court [2012] EWHC 765 (Admin) (27 March 2012). In this case multiple adjournments of a part-heard s39 trial culminated in the bench's refusal to grant a fourth adjournment, a decision to proceed in absence, and then to convict, only to have the conviction quashed by the Divisional Court. As part of its judgment the court commented on the trial court's not setting a timetable for the trial and managing it actively.

The best we have at present is reviews of the anonymous performance figures long after the events to which they relate - good and bad - at judicial issues groups, or area judicial forums, or maybe at court user group meetings. So I think that we are missing an important trick in getting across – where it really matters - the fundamental importance of thorough case preparation and proper follow-through.

That disconnected arrangement contrasts with the parties' experience. Their cases are a continuum: they are involved from start to finish; their summary trial starts and finishes in the same jurisdiction; probably in the same building and may be even the same court room.

Of course, there are reasons for that lack of continuity, not least of which are the practical ones arising from our part-time roles. Or to a lesser extent arising from concerns about the same bench that, for example, hears a bail application at the trial fixing hearing when any previous conviction may be revealed, then trying the case. Or the bench hearing and rejecting a bad character application also being the trial bench. Although you'll know, for example, the case of Robinson[10] which rather undermines that argument.

But whatever the reasons, the effect of this judicial pass-the-parcel is that an individual bench's responsibility for fixing a trial ends when the court room door swings shut. When it swings open the next time - one hopes that it is just one 'next time' - the bench on duty that day starts to unwrap its layers of the parcel. The figures show that its chances of getting the prize – an effective trial – are more against than for. I had considered using a relay race analogy; but unfortunately there are too many dropped batons to justify that!

Thus, the evidence is all too clear that the present arrangements don't work very well, although I accept that trial ineffectiveness is a shared problem. What's to be done? I certainly think that we need a mechanism to compensate for the lack of judicial continuity, other than by way of a knuckle-rapping from the High Court. Perhaps we could have a simple feedback process that commends the trial-fixing benches for their effective case preparation or explains the consequences to other trial-fixing benches of inadequate trial preparation. I'd like, too, to see the appraisal process for magistrates re-tuned to pick up good and poor case preparation.

Understanding after the event when and why things have gone wrong is valuable - to a point. But actually, what matters is getting it right first time. I feel keenly that there is more that benches could and should do, with their legal advisers, to improve the courts' contribution. Central to that is much greater understanding and application by magistrates of the Rules for trials as well as for all other business.

I have mentioned some examples already. Here are a few more: take the requirement at Rule 3.2 (2) (a) to identify the real issues in every case to be tried. I emphasise the word real, not general. Assuming that a bench has probed carefully and that the probing hasn't prompted a wholly just guilty plea, is it really all right to note on the form simply *factual*, or *self-defence* and not dig into - and record - what facts are disputed, such as the circumstances in which the defendant asserts that he sought to defend himself? Plainly, it is not, but I wonder how consistent and persistent we are in making those and other necessary and legitimate inquiries at trial fixing.

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[10] Robinson, R (on the application of) v Sutton Coldfield Magistrates' Court [2006] EWCH 307 Mr Justice Owen said, '...The fact that they [the justices] know the details of the previous convictions does not disqualify them from discharging their role as finders of fact in the trial.'

And then, as required at 3.2.(2) (d), how well do benches check at any subsequent hearings, such as breaches of bail, or applications to vary bail conditions, and on the day of trial, that directions given at trial-fixing have been complied with. Questions in relation to witness attendance, or on the need for any new directions, are obvious examples. Or in relation to the issue in dispute: whether they are as tight and as clear as they should be.

A reminder en route to trial - and the little time that it takes - can do no harm whatsoever. Who knows, it may even prompt action that would not otherwise have been taken? The result may be one less ineffective trial, or one trial that takes less time than estimated because there has been greater clarity about the issues.[11] None of this should be contentious or even original. Approaching trials in this way is no more than compliance with the Rules – complying with the law. Using the effective case management form is simply an easy way to do that.

Then there is the major question: who in the court uses the form: the legal adviser or the bench? I know that practice varies. But it seems to me that, even if the legal adviser is the principal form-completer on behalf of the court, it is essential that the bench itself is fully engaged in the process. As Rule 1.2 reminds as participants in the conduct of cases, the bench, too, [12]has a duty to prepare and conduct cases and give directions in accordance with the Rules.

In my view, perpetuating an approach where the magistrates are allowed to be little more than bystanders, or, at best rubber-stampers, confirming the exchanges between the legal adviser and the parties is not engagement. It is not satisfactory and it leads me to a further suggestion.

There is much talk these days about additional roles for magistrates. There is indeed an important role which, approached correctly, could have major benefits in improving trial effectiveness. Taken together, the powers of a singe justice at s 49 (1) [13] of the Crime and Disorder Act 1998 to make directions preparatory to trial and the provisions of Rule 3.5[14] would enable a single justice to do that with or without a hearing.
You will know that, for the purposes I am suggesting, under section 148 of the Magistrates' Courts Act 1980[15] that would not require a legal adviser either, although their involvement would not be precluded and would probably be highly appropriate.
But either way, Rule 3.5[16] offers considerable potential for individual magistrates to move the business along by being nominated by the court to manage a case. That magistrate would not have to be part of a tribunal hearing the case.

In parallel I think, too, that there is scope for HMCTS to review the role of case progression officers to confirm that their duties[17] are being carried out consistently in each local justice area.

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[11] Instances arise where the case management form is not available at every hearing. I suggest that the digitisation should rectify that problem.
[12] Rule 1.2.(1) Each participant, in the conduct each case, must – (a) prepare and conduct the case in accordance with the overriding objective (b) comply with these Rules, practice directions and directions made by the court; and… (2) Anyone involved in any way with a criminal case is a participant in its conduct for purposes of this rule.
[13] S49, Powers of magistrates' courts exercisable by single justice etc. In a trial preparation context they cover at 49. (1) (m) the power to give directions for trials, including timetabling, the attendance of the parties, the service of documents and the manner in which evidence is to be given.
[14] Rule 3.5 (2) (e).
[15] Magistrates Courts Act 1980, s148 'Magistrates' Court' (1) In this Act the expression 'magistrates' court ,means any justice or justices of the peace acting under any enactment of by virtue of his of their commissions or under the common law'
[16]Rule 3.5 (2) In particular, the court may nominate a judge, magistrate, or justices' legal adviser to manage the case.

Thus, I think that a single justice, with input from the case progression officer - with or without a legal adviser - seeing through the progress of a contested case from plea hearing to day of trial would provide judicial continuity that is currently lacking. The main tool for that process would be the Rule 3.11 form, of course. Properly completed it would contain all the information necessary to enable the trial to which it related to reach a successful conclusion. In short, hands-on, continuing case management would in my view improve greatly the prospects for greater trial effectiveness.

Let me add here that discussion about the form is timely for two reasons. First, because District Judge Stephen Earl, Rule Committee Secretary, Jonathan Solly, and District Judge Tessa Szagun and I have been working for several months on updating the current version, which is now three years old. The revised edition is due out before Christmas.

The proposed changes include giving more space to, and a requirement for, greater focus on issues in dispute; much more space for witness details – prosecution and defence; space for noting how long oral evidence is likely to take; and an option for a direction that where a party wants to use technical equipment, that that party makes sure, before the trial date, that it all works.

We plan, too, to have space for recording arrangements that may be necessary for witnesses or for the defendant short of special measures, but which will help them with their evidence-giving. That includes things such as access and egress for people who use wheel chairs, or allowing for breaks that may be necessary for people with medical conditions. That bit relates to Rule 3.8(4) where the court itself – not only the parties – has an obligation to do all it can to make sure that witnesses turn up when they are needed, and that when they do the court does all it can to help them to give their best evidence. To underline the intention behind the form to ensure progress, we are likely to change its title to *Preparation for effective trial.*

Discussion of the form is timely also because within the next year it is to be digitised with all the benefits arising from that. It means that eventually, there will be no more paper forms. Electronic versions will have the flexibility to accommodate as much or as little trial preparation information that each case needs; and parties and the court will be able to share them electronically. Stephen Earl is talking to the digitisation team to ensure that that version works from a judicial standpoint.

I return finally to the central point: the role of magistrates in understanding and applying the Rules. I have attempted in the last few minutes to set out why the Rules are so important to the bench; and to suggest why that importance appears not to be as well recognised as I believe it should. But more constructively, I hope, I have offered some thoughts about how the position could be changed; and how we can use the Rules to improve performance.

I believe that the magistracy has reached an important point in its evolution. I suggest that as a public service - committed to doing right to all manner of people – its performance of that principal responsibility must improve. The proficient use by the magistracy of the Criminal Procedure Rules is at the heart of that aim.

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[17] Rule 3.4.