



**Summary of proposed changes to CPR by the Rules Committee. Please consider the changes and let us know your thoughts.**

The draft amendments apply mainly to [Part 3](#) ( case management) and [Part 18](#) (measures to assist a witness or defendant to give evidence *and participate*) of the CPR, some of which apply to Registered Intermediaries too.

The first 3 changes apply to Registered and independent intermediaries.

These are about:

- Ground rules hearings (proposed Rule 3.29) (and how we intervene 3.9(7)(b) )
- (Registered) Intermediary's duty to the court (proposed Rule 18.30)
- The content of the (Registered) Intermediary's report (proposed Rule 18.32)

## THE PROPOSED CHANGES

### 1 New Rule 3.9(7)(B) (v) about **how the intermediary is to intervene:**

The court..must set ground rules for the conduct of the questioning which may include..." directions about the means by which any intermediary may invite the court's intervention in questioning, if necessary."

The drafting is interesting as it emphasises that we are not to intervene but we may invite the court to intervene. This is what we were taught in our (City Law School) training but many courts which are less formal have not objected to intermediaries directly advising the barrister who is trying to ask the question which is cognitively or linguistically inappropriate for example, a question which does not comply with the ground rules agreed eg complex or multipart sentence, use of figurative language or a question about time or distance.

### 2 New proposed Rule 3.29 ; "**Ground Rules Hearings**"

The Committee's proposal is to specify that:

- There **must** be a PCMH when the Ground Rules Hearing takes place. *(If this were introduced it should mean that less time is needed for ground rules hearing discussions on day 1 of the hearing. It may possibly give advocates and intermediaries more time to work together on the questions.)*  
The parties and the Intermediary **must** be at this PCMH.
- At the hearing, the Judge must set the ground rules for **the conduct of the questioning** for witnesses and defendants

- Where an intermediary for a defendant has been appointed the court must give **other directions as required for the defendant to be able to participate effectively.**

*point 1: We think this last point should also apply to witnesses. Whilst most of the recommendations we make as RI's relate to the **conduct of the questioning**, we do also recommend other measures: e.g we may recommend ways that the oath should and should not be taken, we may recommend that the person has someone available to them to give them emotional support in breaks or that a room is set aside to separate them from other witnesses in the Witness service space waiting to give evidence, for example. All measures to enable effective participation but not necessarily falling within the 'conduct of the questioning'.*

- Each party and the intermediary to **actively assist**
- The court can ask the parties to make a note of the ground rules and directions and to serve this note upon each other
- When setting the ground rules, the Judge must have regard to the Intermediary report, representations made by the parties' advocates and the court can ask the intermediary for additional information/advice **"as the court requires"**

*Commentary: seems like again the intermediary is only invited to speak if the court wants to hear from us. This is a change from the information given to us before that this is to be a discussion.*

*Point 2: we consider that this may have the opposite effect of what we think the Committee wants to codify, namely a proper consideration of all the information that the Intermediary has re the communication issues. We wish to propose that the parties should be encouraged to discuss the recommendations before the GRH begins and that the Judge hears from all parties (including the intermediary) where matters are in dispute or the Judge takes a different view.*

### 3 New Part 18 **definition of intermediary** for witnesses and defendants:

Either

- A Registered Intermediary, or
- A suitably qualified person asked to assess a defendant's communication needs, or
- A suitably qualified person "appointed by the court to facilitate a defendant's effective participation in the trial where otherwise that defendant's communication needs would impede such participation" (words taken from the part of the YJCEA legislation not yet enacted for intermediary's to assist defendants, and from the case law governing the area.)

### 4 New Part 18 **definition of Intermediary's report**

which is 'a report by such a person that complies with the new section ("contents of an intermediary's report.')

## 5 New Part 18.27: 'Intermediary for a defendant'

where the rules committee has taken the Judge made case law (common law) and the Article 6 ECHR (right to a fair trial) provisions and tried to put something in these rules which clarifies the procedure, in line with the law that is out there already.

The covering letter sent to us makes it clear that the Judge will still take the objective decision about whether it is necessary for the defendant to have an intermediary. It then lists factors which the Judge should consider, such as who they can appoint as an intermediary, the fact that the appointment can be for a part or the whole of the hearing and that the appointment includes helping the defendant to communicate with his legal team "for the duration and for the purpose of the appointment' unless the court directs otherwise.

It also specifies the grounds upon which a judge can discharge the appointment of the intermediary and a procedure that needs to be followed if one of the parties wants to apply to have the intermediary appointment discharged.

Commentary: this is a direct response to the point we raised about being appointed by one judge and then being discharged without proper consideration by the trial judge.

Point 3: We consider that this is a positive step forwards particularly as it says there has to be a change in communication needs or 'other material circumstances change'. What are your thoughts?

## 6 New Rule 18.30 Duties of Intermediaries

This applies to RI's too.

There is a new requirement (along with what you would expect to see) that we are to actively assist the court in its case management in particular by meeting court deadlines and telling the court at once of any significant failure by us or by someone else to take any of the steps directed by the courts.

Point4: Please comment on these duties. Good bad or indifferent?.

## 7 new 18.32: Contents of Intermediary report

Again, not many surprises in the list although we propose that (ii) should read: "for example to include" as for some clients there will be other issues that are less or more relevant.

The reference to mental health is only to diagnosed conditions. We propose removing the word 'diagnosed'.

We propose adding in to (h):

The impact for example of any mental health, age-related or neurodevelopmental conditions and the impact of trauma on the witness' or defendant's ability to communicate. or possibly something less specific such as "The impact of any conditions that would adversely affect the witness or defendant's ability to communicate. "

Section 18.32(m)(ii) asks us to include a statement in the report that we understand our duty to the court and that we will comply with that duty if approved or appointed.

Elsewhere, in 18.30 (3) the rules say that the duty to the court overrides any obligation to the witness or to the defendant, or to the person who pays the intermediary.

Commentary: Could this be an attempt to stop intermediaries declining to act if the decision is 'evidence only' where this will not enable the defendant to take part in his own trial? What if it is? Do you think this puts you in conflict with the role for which you are appointed if working with a defendant?

*"appointed by the court to facilitate a defendant's effective participation in the trial where otherwise that defendant's communication needs would impede such participation"*

*Point 5: What if we consider that the defendant would not be able to participate effectively and we cannot carry out the work required in any meaningful way?*

*The duties outlined here only apply once you are appointed/approved by the court. They don't apply if you are asked to assess and before you are appointed or approved by the court. Any thoughts/concerns?*

***Any other thoughts welcome***

***IFJ Team: Working with Defendants March 2020***