



**THE CHAIRMAN
TIMOTHY DUTTON QC**

Heads of Chambers
Senior Clerks
Practice Managers

13 March 2008

Dear Colleagues,

VHCC Cases

I have written to Richard Collins of the LSC dealing with matters which arise from his letter sending out the revised draft contracts on 5th March (copy attached).

I am also attaching a Draft Protocol which the Bar Council has prepared for consideration by any barrister who may be offered an ad hoc VHCC case. This is advisory and not obligatory. It principally seeks to ensure that barristers are able properly to discharge their duties under the Code, the Lord Chief Justice's Protocol, and the Criminal Procedure Rules should they choose to accept a case on an ad hoc basis.

*Yours sincerely,
Tim Dutton.*

THE BAR COUNCIL

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**THE CHAIRMAN
TIMOTHY DUTTON QC**

Mr Richard Collins
Legal Services Commission
85 Gray's Inn Road
London
WC1X 8TX

Our ref: VHCCs

13th March 2008

Dear Richard,

**Bar Council response to:
LSC Amendments to Very High Cost Cases (Crime) Contract Consultation Response**

Following the Legal Services Commission's 5th March letter of clarification to Panel Members, Panel Advocates, the publication of new contracts and the LSC's response to the consultation on amendments to those contracts, please accept this letter as the Bar Council's response to the subsequent changes and to the amended scheme you have introduced.

I will not reiterate here the Bar Council's continuing fundamental objections to the LSC's Panel scheme in principle. These objections have been aired on numerous previous occasions. I note from what you have said in public over recent weeks that you are seeking to save about 12% in the budget by making hourly rate and appearance fee cuts. What Lord Carter recommended (para 4.23) was that you should consider the "potential to generate a 5% saving on current spending through the combination of competition on rates and tighter management of very high cost criminal cases in the financial year 2008-09". This was in the context of an established table of RAGFS, the cost of which was calculated at the time on the basis of current case throughputs. The Bar Council responded to Lord Carter in October 2006 again re-iterating what has been its consistent position that cases must be efficiently run, and so far as possible without the perverse incentives of hourly rates which reward inefficiency, increase cost, and lengthen trials. Unfortunately, you have been quoted in the press as saying that the Bar Council agreed what you are now proposing and that barristers themselves negotiated the rates. Not only is this inaccurate, it is seriously counterproductive. The objectives of obtaining quality practitioners, for fees which do not contain perverse incentives, and running these complex cases with great efficiency are all, I had thought, common ones.

THE BAR COUNCIL

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Some of the amendments, as itemised in the 5th March letter, deal principally with two concerns: distant travel and diary checking. However, there remain significant problems with the proposed scheme and the amended arrangements.

1. Responsibility for conduct of the defence case

The responsibility for the conduct of a case rests with the advocate once the case is in Court. Further, the Lord Chief Justice's Protocol and the Criminal Procedure Rules impose this duty on the advocate from an early stage. This is so for good case management reasons.

Yet, Paragraph 1.5 of Annex 9 to the revised Panel Members contract states that:

"The Case Manager is responsible for managing an Advocate's contribution to the work of the Defence Team."

This does not refer to the Lord Chief Justice's Protocol for Control and Management of Heavy Fraud and other Complex Criminal Cases (April 2004), which forms part of the Criminal Procedure Rules, and sets out how the Court manages these cases. The Rules are statutory and must therefore be followed.

The LSC will therefore need to make it clear that the contract is to be read subject to the Protocol and the Criminal Procedure Rules. That Protocol states:

"(iii)

The prosecution and defence teams

(b)

The Defence Team

In each case, the lead advocate for the defence will be treated by the court as having responsibility to the court for the presentation and general conduct of the defence case."

I would be grateful if you would immediately make it clear to all solicitors and advocates with whom the LSC may contract that the Protocol and the Rules must be followed and that the contracts must be read subject to the Protocol and the Rules. Not to do so will put solicitors and counsel in an impossible position: they may find they owe one statutory duty whilst the LSC has required a different arrangement through its contract.

The Bar Council has drafted a Protocol dealing with this and other issues, a copy of which I attach.

2. Permissibility of the Panel Member retaining the difference between the advocacy fees, as set out in the Criminal Defence Service (Very High Cost Cases) Regulations 2008, and any lower fee agreed with non-Panel advocates.

The Bar Council's view is that any such retention is totally unacceptable. To permit an advocacy fee to be reduced so that a solicitor can keep the difference is an irresponsible approach to the use of tax payers money. You seem to accept that a solicitor can keep a sum of money for himself for no better reason than that he has managed to drive the advocate downwards and not for any legal service he has provided to the client or indeed the funder. May I ask if you have put this curious idea past the National Audit Office? I have noted that

one firm of solicitors at least has written to you refusing to contemplate any such arrangement on the grounds that they would regard it as unethical and possibly unlawful. The Commission's motive seems to be to drive barristers into signing the panel contract for fear that solicitors may otherwise drive the fee down and keep the difference.

All advocacy fees legitimately incurred must be paid to the advocate in full. Not to do so, undermines the professed priority of maintaining the quality of advocacy in these cases. A large number of experienced and able advocates decided not to sign the original Panel Advocates Contracts. Feedback indicates that the fees on offer were a relevant factor. It now appears that entirely negative pressure is being exercised by the LSC, which offers the safeguard of direct payment from the LSC at the rates set in the Funding Order, provided advocates accept these fees after all.

Whilst the instruction of non-Panel advocates is presented as very much the option of last resort for Panel Members under the revised arrangements, the risk of yet lower fees will not attract advocates of the required calibre to this important and complex work. It is hardly the equal partnership that the LSC envisaged with the original terms being designed to foster joint working and cohesion within the defence team.

The amendments are intended to enable the new system to function even if insufficient numbers of advocates sign-up second time around. The new arrangements appear to remove any consideration of quality at all.

3. Panel B Arrangements

The revised contractual arrangements do not make clear how the Panel B Advocate arrangement is supposed to work if there is insufficient capacity on Panel A. The original June 07 'Information for Applicants' paper said:

Dependent on the outcome of the selection process, Contracts are likely to be awarded firstly on the basis of Panel A membership. Applicants that are not awarded a Panel A Contract but still meet the essential criteria may be awarded a Panel B Contract if they made a capacity bid at the final accepted price.

Will the details of these arrangements emerge post 14th March?

The new contract definition simply says:

'Panel B Advocates' means self-employed Advocates who have been offered membership of a second panel to provide criminal defence work to clients in relation to VHCCs where there is insufficient capacity on the Panel'

It is simply unclear what the proposed Panel B arrangement is. I would be grateful for some clarification.

4. Reduction of client choice

As well as the effects on 'quality' highlighted above, the new arrangements clearly represent a further reduction in client choice. The original proposals, of course, began this process deliberately limiting the pool of advocates available to be instructed in such cases. They

reflected a lack of understanding about the process of instructing specific advocates based upon their reputation for expertise in these complex and often specialised cases. The new arrangements go even further, as can be seen by the amendments to paragraph 1.5 of Annex 9 of the Panel Members Contract (largely mirrored in para 4.2 of the Panel Advocates Contract) in which the consent of the CCU must be sought at every stage before instruction of a non-Panel advocate (as stated above, it seems this is the option of last resort):

'When instructing Advocates:

(a) the Panel Member must firstly use all reasonable endeavours to instruct a Panel Advocate who is local to the court where the trial is likely to take place. Contact details for all Panel Advocates will be provided with the VHCC Advocate List.

(b) If you are unable to instruct a Panel Advocate under paragraph 1.5(a) above with the appropriate level of skill, expertise, capacity and ability to conduct the case in accordance with the terms of the Panel Advocate's Contract, you must provide the following information to the CCU on the prescribed request form set out at Annex 20:

- (i) Details of the Court at which the trial is likely to be held;*
- (ii) Brief details of the nature of the case (e.g. murder/terrorism/fraud);*
- (iii) The number of defendants to be represented;*
- (iv) The geographical location of the Panel Member;*
- (v) The geographical location of the Defendant; and*
- (vi) The level of Advocate required.*

The CCU will then email all Panel Advocates to request that any Panel Advocate interested in joining the Defence Team contact you within 21 days.

(c) If no (or an insufficient number of) Panel Advocates with the appropriate level of skill, expertise, capacity and ability to conduct the case in accordance with a Panel Advocate's Contract respond within this deadline, you must inform the CCU. The CCU will then contact all Panel B Advocates. The CCU will contact you to advise whether there are any Panel B Advocates with the appropriate level of skill, expertise, capacity and ability to conduct the case in accordance with the terms of the Panel Advocate's Contract;

(d) If there is no such Panel B Advocate then you may instruct a Non-Panel Advocate, provided that the CCU has given prior written agreement.

1.5A In any request for prior written agreement under paragraph 1.5(d) above, the Panel Member must demonstrate to the reasonable satisfaction of the CCU:

- (a) that the Panel Member has complied with the requirements of paragraph 1.5 above (including satisfying the CCU that no Panel Advocates have responded to the email or that any Panel Advocates who did respond do not meet the requirements of 1.5(c) in relation to skill, expertise, capacity and ability); and*
- (b) that the chosen Non-Panel Advocate has the level of skill, expertise and*

capacity required for the particular case, in accordance with the terms of this Contract.

1.5B Where instruction of a Non-Panel Advocate is agreed by the CCU under clause 1.5(d) above, the Panel Member must:

(a) ensure that any instructions to the Non-Panel Advocate comply with the requirements set out in Annex 4; and

(b) ensure that the Non-Panel Advocate is aware of the terms of this contract; and

(c) use all reasonable endeavours to ensure that the Non-Panel Advocate complies with the requirements placed on Advocates and Defence Team members in this Contract.

1.5C You cannot instruct a Panel Advocate as a Non-Panel Advocate.

Such constraints may deny the client the ability to instruct the advocate of choice and the person considered appropriate for the case because that advocate is not a Panel Advocate and a Panel Advocate is available to conduct the case, albeit not of suitable, calibre and experience. The new arrangements also extend the role of the LSC in the selection of the advocate – something which hitherto the LSC have carefully avoided doing. I have noted that one prominent firm of solicitors has written to you expressing grave concerns about these proposals. The Bar Council shares them.

I am grateful to Lord Hunt for his indication given at our meeting on Tuesday that the Ministry will encourage the Commission, the Bar Council and the Law Society to discuss a better scheme. I agree that this is now becoming an urgent requirement. I will make sure that the Bar Council team is immediately available to work with you to achieve a better scheme within financial constraints as I have previously said.

Yours sincerely
Justin Swain

VHCC'S: PROTOCOL FOR NON-PANEL ADVOCATES

INTRODUCTION TO THE PROTOCOL

- 1 This is the Bar Council's Protocol for the conduct of VHCC's by Non-Panel Advocates. It gives guidance to advocates and provides suggested Terms of Business (Annex A to the Protocol).
- 2 Annex 9 of the LSC's revised Panel Member's Contract permits the instruction of a Non-Panel Advocate in circumstances where no Panel Advocate is available. Annex 9 is set out at Annex B to this Protocol.
- 3 A Non-Panel Advocate may only be instructed with the consent of the Complex Cases Unit ("CCU"). The CCU will only allow the selection of a Non-Panel Advocate who "...has the level of skill, expertise and capacity required for the particular case".

Paragraph 1.5 of Annex 9 states that:

"The Case Manager is responsible for managing an Advocate's contribution to the work of the Defence Team."

- 4 This term must be read subject to the duties and responsibilities of the Lead Advocate, which are set out in the Lord Chief Justice's Protocol for Control and Management of Heavy Fraud and other Complex Criminal Cases (April 2004), which forms part of the Criminal Procedure Rules. That Protocol states:

"(iii)

The prosecution and defence teams

(b)

The Defence Team

In each case, the lead advocate for the defence will be treated by the court as having responsibility to the court for the presentation and general conduct of the defence case."

- 5 Where a Non-Panel Advocate is instructed, the advocacy fee will be paid to the Panel Member who is permitted by the LSC to pay a lesser amount to the Non-Panel Advocate, and to retain the difference.
- 6 All advocacy fees agreed must be paid to the advocate in full.

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CONDUCT OF THE CASE

- 7 The Lead Advocate will be responsible for the presentation and general conduct of the defence case, as required by the Lord Chief Justice's Protocol.
- 8 The Panel Member (who is the solicitor with the conduct of the case) and the Lead Advocate will work together to reach agreement in respect of work to be done by the Panel Member and the advocate(s) (tasks and hours).
- 9 The Panel Member and the Lead Advocate will prepare an agreed Case Plan or Plans for submission to the LSC in accordance with the requirements of the Panel Member's Contract.
- 10 The Lead Advocate will have free access to the Contract Manager at the LSC.
- 11 The Lead Advocate will be present at discussions between the LSC and the Panel Member where appropriate.
- 12 The Panel Member will take all such steps as may be necessary in his dealings with the LSC, the CCU and the client to ensure that the advocates are able to work the hours required for the proper discharge of their duties to the client and to the Court under the Bar Code of Conduct, the Lord Chief Justice's Protocol 2004 and the Criminal Procedure Rules.

ADVOCACY FEES

- 13 The advocate will keep a full case log of all work done in accordance with the agreed Case Plan.
- 14 The advocate will work at a rate for advocacy at [the rates provided for in the Criminal Defence Service (Very High Cost Cases) Regulations 2008 (S.I. 2008 No.40 14 January 2008) for the category into which the case is placed by the LSC for the Panel Member,] or...[if you agree an alternative rate please specify it here].
- 15 The advocate will submit that case log and a fee note to the Panel Member in good time for their submission to the LSC at the end of each Case Stage.
- 16 The Panel Member will submit a fee note for advocacy to the LSC at each appropriate stage as required by the Panel Member's Contract and will append the advocate's log and fee note to it.

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- 17 Subject to paragraph 14, the Panel Member will account in full to the advocate for all monies paid by the LSC as the advocacy fee in respect of work done by the advocate ("the full advocacy fee").
- 18 The Panel Member will pay the full advocacy fee to the advocate within seven days of its receipt.
- 19 The Panel Member will treat the full advocacy fee as client monies and account for them as such.

**The General Council of the Bar of England and Wales
March 2008**

VHCC'S: PROTOCOL FOR NON-PANEL ADVOCATES: ANNEX A

**TERMS OF WORK IN VHCC'S CONDUCTED
BY NON-PANEL ADVOCATES**

Dear [Sir],

Thank you for sending me instructions in the case of [],
which I note is a Very High Cost Case ("VHCC").

I note that my instruction as a Non-Panel Advocate has been approved by the Complex Cases Unit ("CCU" of the Legal Services Commission ("LSC")) and I have been provided with a letter from the CCU to that effect.

It is a term of my acceptance of these instructions that the terms and provisions of the Bar Council's Protocol for the conduct of VHCC's by Non-Panel Advocates apply. The Protocol provides, amongst other things for compliance with the Lord Chief Justice's 2004 Protocol, the need for access to the Contract Manager, the rate of fees, and that you must account to me in full for the advocacy fees agreed by you for the work done by me. A copy of the Protocol ***is attached**, or ***has been provided to you by my clerk**, or ***is available on my Chambers/Bar Council website**.

Yours sincerely,

Barrister A"

VHCC'S: PROTOCOL FOR NON-PANEL ADVOCATES: ANNEX B

ANNEX 9 OF THE PANEL MEMBERS CONTRACT

ANNEX 9

INSTRUCTING ADVOCATES

1. General

1.1 VHCC Work can only be carried out by:

- (a) Bid Team members and other employees of the Panel Member (which may include employed Advocates); and/or
- (b) Panel Advocates; and/or
- (c) Panel B Advocates; and/or
- (d) Non-Panel Advocates where the CCU has given permission under clause 1.5 of this Annex 9.

Other than this, anyone else who is self-employed cannot conduct VHCC Work without the CCU's express prior written permission.

1.4 Advocates who are solicitor-advocates must have a current Practising Certificate. Advocates who are Barristers must be registered with The Bar Council of England and Wales as practising barristers. You are obliged to inform us whenever a solicitor-advocate Bid Team member's Practising Certificate is revoked or whenever you become aware that a barrister Defence Team member is 'disbarred'.

1.5 Responsibility for identifying and instructing Advocates lies with the Panel Member. The Case Manager is responsible for managing an Advocate's contribution to the work of the Defence Team. When instructing Advocates:

- (a) the Panel Member must firstly use all reasonable endeavours to instruct a Panel Advocate who is local to the court where the trial is likely to take place. Contact details for all Panel Advocates will be provided with the VHCC Advocate List.
- (b) If you are unable to instruct a Panel Advocate under paragraph 1.5(a) above with the appropriate level of skill, expertise, capacity and ability to conduct the case in accordance with the terms of the Panel Advocate's Contract, you must provide the following information to the CCU on the prescribed request form set out at Annex 20:

- (i) Details of the Court at which the trial is likely to be held;
- (ii) Brief details of the nature of the case (e.g. murder/terrorism/fraud);

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- (iii) The number of defendants to be represented;
- (iv) The geographical location of the Panel Member;

- (v) The geographical location of the Defendant; and

- (vi) The level of Advocate required.

The CCU will then email all Panel Advocates to request that any Panel Advocate interested in joining the Defence Team contact you within 21 days.

(c) If no (or an insufficient number of) Panel Advocates with the appropriate level of skill, expertise, capacity and ability to conduct the case in accordance with a Panel Advocate's Contract respond within this deadline, you must inform the CCU. The CCU will then contact all Panel B Advocates. The CCU will contact you to advise whether there are any Panel B Advocates with the appropriate level of skill, expertise, capacity and ability to conduct the case in accordance with the terms of the Panel Advocate's Contract;

(d) If there is no such Panel B Advocate then you may instruct a Non-Panel Advocate, provided that the CCU has given prior written agreement.

1.5A In any request for prior written agreement under paragraph 1.5(d) above, the Panel Member must demonstrate to the reasonable satisfaction of the CCU:

(a) that the Panel Member has complied with the requirements of paragraph 1.5 above (including satisfying the CCU that no Panel Advocates have responded to the email or that any Panel Advocates who did respond do not meet the requirements of 1.5(c) in relation to skill, expertise, capacity and ability); and

(b) that the chosen Non-Panel Advocate has the level of skill, expertise and capacity required for the particular case, in accordance with the terms of this Contract.

1.5B Where instruction of a Non-Panel Advocate is agreed by the CCU under clause 1.5(d) above, the Panel Member must:

(a) ensure that any instructions to the Non-Panel Advocate comply with the requirements set out in Annex 4; and

(b) ensure that the Non-Panel Advocate is aware of the terms of this contract; and

(c) use all reasonable endeavours to ensure that the Non-Panel Advocate complies with the requirements placed on Advocates and Defence Team members in this Contract.

1.5C You cannot instruct a Panel Advocate as a Non-Panel Advocate.

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1.6 The courts will remain responsible for decisions on the number and level of Advocate(s) that can be appointed to act on any VHCC. This will be formalised in the Representation Order for that client. Both you and the CCU must operate within these decisions. The CCU does not have any discretion to go behind the Representation Order and therefore can only pay Advocates at the appropriate rates for their level as specified on that Representation Order at the date the Advocate conducted the work.

1.7 Alongside the general requirement to instruct Advocates with the necessary experience and expertise, the Panel Member must also take account of the need, as far as is reasonably possible, to ensure that the Advocate(s) selected will be available throughout the VHCC.

1.8 The Panel Member should conduct regular reviews of the work conducted by the instructed Advocate(s), to ensure they are providing the required quality of advice and level of service. Where issues arise, you are expected to address these with the Advocate(s), and, between you, identify why these issues have arisen and, where appropriate, agree what must be done to prevent these issues arising in the future.

2. Trial Stage

2.1 Advocates must carry out all reasonable and necessary work to represent the lay client properly. They will be paid daily advocacy rates during the trial. This includes two hours' preparation during a full court day and one hour during a half-day (see Annex 7 'Rates of pay' for information on full and half days). It is acknowledged that such time will regularly be expended during the trial in consulting with the lay client, instructing solicitors, prosecution counsel, codefending counsel and others. All such preparation will be deemed to have taken place between 9.00 am and 5.00 pm (the court day).

2.2 Any preparation for the trial stage that can be identified before the start of the trial or during the trial can and should be negotiated and agreed in advance with the Contract Manager. Preparation that is necessary during the course of the trial should be undertaken either during the court day or after the court day. Work that might be undertaken during the court day includes (this list is not exhaustive):

- the reading of served material requiring immediate attention;
- conferences with the client;
- meetings with instructing solicitors; and
- meetings with the prosecution.

2.3 Work that might be undertaken after the court day might include preparation which requires drafting or research, or is likely to require a long period of uninterrupted preparation or the use of a computer.

2.4 Advocates should prepare work logs for all preparation undertaken during the trial, including preparation undertaken during the course of the court day. The

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CCU agrees that all work properly and reasonably undertaken by the Advocate and accounted for in their work log will be paid at the appropriate rate, subject to its being satisfied that such work could not have been included when planning their trial stage Task List.

2.5 The specific agreement of the Contract Manager to any significant item of additional work may be sought at any time throughout the trial stage. The Case Manager (or Leading Advocate, if the two are not the same) should contact the Contract Manager every four weeks during the trial to discuss changes to the VHCC arising from the trial and to highlight additional work being undertaken.

3. Substitute Advocates

3.1 Where it is necessary for a Substitute Advocate to undertake any VHCC Work, that Advocate will be treated as a subcontractor.

3.2 Claims for any work undertaken by a Substitute Advocate must be submitted, by separate invoice, with the instructed Advocate's claim for work as part of the Defence Team's Audit Bundle (see Annex 4). A template invoice for this purpose will be provided by the CCU. A claim in any other format will not be considered by the CCU and will not be paid.

3.3 The CCU will make a total payment to the instructed Panel Advocate, inclusive of VAT (assuming s/he is VAT registered).

3.4 The instructed Advocate will be liable to account to HMRC for that VAT, but may deduct any VAT which is paid by him/her to a Substitute Advocate, as input tax.

3.5 Appropriate records must be kept for VAT inspection, including copies of VAT invoices issued by the instructed Advocate and VAT invoices issued to the instructed Advocate by any Substitute Advocate.

4. Return of Brief

4.1 Where the Contract Manager decides it is reasonable for an Advocate to return a brief all reasonable costs will be paid upon production of an Audit Bundle. Please refer to Annex 4 for further information on auditing requirements.

4.2 A reasonable return of brief might include:

- where the Advocate withdraws due to professional embarrassment;
- where the trial dates of the VHCC 'clash' with a case upon which the Advocate was instructed prior to the instruction on the VHCC;
- where the Advocate is sacked by the client but not as a result of improper behaviour on the part of the Advocate; or

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- where the Advocate succumbs to a serious illness. This should be substantiated wherever possible or reasonable with a doctor's note or similar.

4.3 If the CCU concludes that it was unreasonable for an Advocate to return a brief, costs may be withheld or, if already paid, recouped.

4.4 An unreasonable return of brief might include:

- where the trial dates of a new case 'clash' with a VHCC upon which the Advocate was instructed prior to the instruction on the new case. To do so might be unreasonable as the Advocate should return the brief of the case that was accepted last;

- where the Advocate is sacked by the client as a result of improper behaviour and this can be proven - for example, failure to turn up to court without reasonable justification;

- where the Advocate takes a planned sabbatical (i.e. the Advocate has planned to take a length of time off knowing they are holding the brief for a VHCC);

- where the Advocate does not accept the category assigned to the case and returns the brief as a result; or

- where the Advocate does not accept the hours agreed by the Contract Manager (or CCU) and returns the brief as a result.

4.5 The CCU will consider each return of brief on a case-by-case basis in line with the CCU and Bar Council guidelines.

4.6 If the CCU decides that an Advocate has unreasonably returned a brief, you will be deemed to be in breach of this Contract if that Advocate is employed by the Panel Member (or is a partner in the Panel Member firm). Please refer to Annex 13 on breaches of contract for further details. Where the Advocate is a Panel Advocate, the Panel Advocate only will be deemed to be in breach of his/her contract.