LEGAL AID AGENCY: NEW CROWN COURT FEE GUIDANCE (PUBLICATION DATE 31.12.18)

TNPs v DAFs and Special Preparation.

SUBMISSIONS ON WHEN A TNP IS PAYABLE (2.16)

The TNP issue is perhaps more straightforward to deal with so I'll start with that.

This new guidance surely provides the opportunity to deal with this issue once and for all. There have been so many appeals based on a complaint that an arbitrary and unjust decision has been made not to pay a DAF mid-trial when a juror fails to attend for reasons of sickness or otherwise, or a witness doesn't turn up, etc. The regulations are quite clear '*D is number of days or parts of a day on which the advocate attends at court by which the trial exceeds one day*'. This means that once a trial starts each listed day qualifies for a DAF. The financial difference is not as stark as it was previously for juniors now that the TNP fee has been raised to £380 but the principle remains the same.

TNPs were devised to deal with a situation where a case is listed for trial but does not start for whatever reason. If the trial does not start it is 'an ineffective trial', and this is the subheading of the relevant paragraph in the Regulations - para 16 'Fees for ineffective trials' (not 'ineffective' trial days). TNPs were not designed to deal with a determination that 'not much happened so you don't deserve a DAF', but this ingenious interpretation which has made the profession very unhappy has crept up on us. It never used to be the case. If counsel attends mid-trial expecting it to be a trial day with or for legal argument or sorting out without the jury then a DAF is payable. The one exception to this I can see is if the matter is listed mid-trial simply for a conference in the cells and nothing else. But if the case is listed at the direction of the Judge for all counsel to attend to deal with admissions or otherwise managing the future course of the trial then a DAF is payable. It should not depend upon all parties assembling to tell the Judge good progress has been made but there is no need for the Judge to get involved. Both progress the trial (and save court time and money) but only if the charade of assembling takes place do counsel get paid properly. We need to get away from such an approach.

Similarly, if in a trial which is anticipated to last several or many weeks, a jury panel is chosen on the first day but not sworn so that the potential jurors can confirm overnight with family, employers etc, that they really are available for the full period of the trial, to deny that first day as a trial day is wrong and completely unreasonable. It is unarguably the start of the trial process, and certainly 'trial progressive'. You can't have a trial without a jury, and the alternative (which I have direct experience of) is that if this step isn't taken there is a risk that a few days into the trial problems arise leading to the discharge of a juror which means the whole thing has to start again with a huge waste of money. I had this in Cardiff recently. The Judge wouldn't take the precaution with the result three days were wasted when we had to start again. This is not remotely a TNP situation.

The approach now set out in the guidance does not bring clarity to this issue and it should. It should not depend upon counsel making sure the court log records something 'trial

progressive'. There is often no clerk available in court to do this which causes further problems. There will always be a discussion about what to do if a juror is sick e.g. should we come back tomorrow or give them two days, when should that juror be spoken to, should the Judge contact their GP, should we discharge that juror if this isn't the first time, is there anything else we can do., etc. There will always be a discussion about the future course of the trial if a problem arises. This conversation is 'trial progressive'. what else could it be? The barristers and judge don't stand in court silently for two minutes and then leave, they discuss the implications for the future management of the trial. It might have knock on consequences for witnesses or other commitments of the parties.

A few months ago I attended a costs appeal on behalf of a barrister who had been paid TNPs not DAFs when jurors were sick or other problems arose. Helen Rutherford attended for the LAA. In fact the LAA conceded precisely these points before the hearing so there was no formal decision on the public record. Nevertheless, there was a general discussion with the Costs Master who made it very clear that if a juror or Judge is sick the DAF was payable not a TNP. If the case is listed part heard and counsel attends a DAF is payable. (Budlai is an old and unrepresentative case, which many decisions since have disagreed with).

Please can we take this opportunity to deal with this issue properly. Otherwise we will be back to endless disputes on the issue which is demoralising, time consuming and expensive. The difference in some cases might now be modest, but not always, for example leading juniors would lose a significant amount. This issue matters to advocates.

SUBMISSIONS ON SPECIAL PREPARATION (2.17)

In relation to special preparation claims, the latest guidance will result in advocates having little confidence that the work necessary in 'very unusual' cases will be paid. This is now a serious issue in the high volume of evidence cases because top end brief fees have fallen by more than 80% in many categories. More explicit detail is required to explain what will qualify as a 'very unusual' factual or legal issue. It is perhaps also worth observing that a 'novel factual or legal issue' is defined in such a way – '*one that has **never*** [previously] *been raised or decided*' - as to make it so exceptionally rare as to be irrelevant for all practical purposes. (It would be interesting to know how many times a claim under the 'novel' principle has been allowed over the past 2 or 3 years).

So returning to 'very unusual' this is the only route that is potentially available to obtain extra payment for more serious, complex and preparation heavy cases within a particular category, but which have PPE falling short of 10,000. Under the current regime advocates will have to judge (or more accurately guess) whether the many more hours of preparation time these cases require, will qualify for extra remuneration, albeit at the extremely low hourly rate. The guidance simply is not adequate to enable advocates to make reliable decisions. To take an example, would a 6000 page sexual grooming case with multiple complainants qualify as very unusual? Would a similar 4000 page case with 3 complainants, or 2000 pages with very young complainants? If they would qualify then the guidance should explicitly say so. There is no question that such cases are unusual within the category and require substantially more time to prepare, which under the current flat brief fee

structure is not reflected in the remuneration. The current fee is designed to deal with a 3 or 4 day rape trial, but not a case lasting 2 weeks, 4 weeks, 6 weeks or more. But would such a case, or any of the example cases, qualify as 'very unusual'? And how much preparation time would be allowed even if the 'very unusual' definition was satisfied? The same is true in all categories, (with the possible exceptions of cat 1.1, 1.2, cat 2.1, and cats 6.1 and 6.2; but even cat 6 cases with high PPE, less than 30,000, but more than 15,000 might be considered very unusual. It is impossible to know).

Human trafficking might involve a single victim on a single occasion, or might involve multiple victims over a period of several years. Perhaps the latter would qualify, but the adjudication might be that this is the stuff of human trafficking and does not qualify. Presumably a Hatton Garden type burglary would qualify, but would a conspiracy to burgle country houses of antiques? Supplying a single firearm compared to being a major national wholesaler of illegal firearms? Blackmailing a supermarket chain? I perhaps don't need to go through every category giving similar examples. The simple point is it is impossible for an advocate to know.

There are two possible solutions. The first would be to provide a very full list of examples in every category of cases that have been adjudicated to qualify as 'very unusual'. This would go some way to giving an advocate a basis for forming a view. The financial risks of coming to the wrong conclusion are very great for an advocate, who will have committed very significant amounts of time to a very difficult and substantial case, which will ultimately be unpaid.

The second, and in the CBA's view better and more realistic solution would be for hours to be negotiated and agreed in advance, and be subject to increase if necessary. This is the only practical way to meet the problem. There are now a significant number of top end cases within each category for which remuneration is completely inadequate. Unless something significant changes there is a very high likelihood that advocates will not take on these cases, or, and perhaps worse, advocates of insufficient experience and skill, and/or who do not devote sufficient time to preparation, will take on these cases. It is as stark and serious as that.

The LAA culture in relation to special preparation claims needs to be strongly supportive of advocates being properly remunerated for necessary work, and to be working in partnership with advocates from the outset, so that advocates can have confidence and certainty that they will be paid properly for these cases. The alternative is that advocates will face a choice of risking being refused remuneration for many hours of necessary preparation time or not taking that risk by not taking the case. On the current guidance it is impossible to know when taking on a case what the adjudication will ultimately be. This is not a modern or efficient way of addressing this extremely important and pressing issue. It is frankly ridiculous. To be absolutely clear if the guidance is not expanded in the way suggested, or radically revised so that hours can be agreed in advance in qualifying cases the only safe conclusion for advocates to come to is that there is a deliberate policy to restrict payment as tightly as possible, and that there will be many financial casualties as a result.

CHRIS HENLEY QC
CHAIR OF THE CBA

2.16 Fees for ineffective trials

1. Paragraph 16, Schedule 1 of the Remuneration Regulations states that the ineffective trial fixed fee *is payable in respect of each day on which the case was listed for trial but did not proceed on the day for which it was listed, for whatever reason.*

2. The LAA processing officers will use their discretion when assessing whether an ineffective trial fee or a daily attendance fee is payable for a listed trial day. A daily attendance fee will be payable if the court record shows:
-There was some trial progression or case management activity, or
-The parties attended and no other activity is shown, but a linked case describes case progression activity.

3. An ineffective trial fee is payable when the court record shows:
-The case was called, but nothing happened to progress the case because a party or juror was not there and the case was adjourned.
-The parties were present, but the case was not called because the judge, or another person required for the case to proceed, was not present.
-The judge stated that the trial would not sit on the day listed, but would remain listed for conference purposes.

4. These principles for assessing the fee payable are supported by the decisions of R v Budai (SCCO 70 - 2010) and R v Sarfraz (SCCO 122 - 2016)

2.17 Fees for special preparation

1. Paragraph 17, Schedule 1 of the Remuneration Regulations sets out the circumstances where special preparation may be claimed and how it is to be calculated.

2. An hourly rate fee is paid for special preparation in any case on indictment when:

a) It has been necessary to do work by way of preparation substantially in excess of the amount normally done for cases of the same type because the case involves a very unusual or novel point of law or factual issue.
b) The number of PPE exceeds 10,000, or 15,000 in drugs cases, or 30,000 in dishonesty cases

and for b) the LAA considers it reasonable to make a payment in excess of the graduated fee, given the circumstances of the case.

3. The appropriate officer must consider:

a) The number of hours in excess of the amount considered reasonable for cases of the same type where 2(a) applies.
b) the reasonable number of hours to read the evidence where 2(b) applies.

4. Advocates must supply justification of what made the case very unusual or novel and supply details of al

the work that was carried out. Special Preparation can be claimed where a substantial amount of additiona work was necessary because of the very unusual or novel factual or legal issue. As decided in R v Ward- Allen (2005), a novel factual or legal issue is defined as one that has never been raised or decided. A very unusual factual or legal issue is one which is outwith the usual professional experience. When a determining officer is comparing a very unusual/ novel case to a normal case of the same type, "type" should be employed to identify the kind of case to which a sensible comparison can be made. Only excess work can be claimed as special preparation. The Appropriate Officer must be able to be satisfied that all the work claimed is eligible preparation and be able to assess what preparation would be "normal" in such a case.

5. Where a claim for Special Preparation does not satisfy the criteria, or has insufficient supporting documentation then the claim will be rejected. The advocate will be informed in writing of any decision no to pay.

6. Each case should be treated on its own merits when considering what satisfies the criteria.

7. As held in Meeke and Taylor v DCA (2005) Special Preparation cannot be claimed to make up a perceived shortfall in graduated fees due to a trial going short.

8. Claims that are based on a unit of time per page read over 10,000 pages will not be accepted and the same will apply to claims for evidence served in an electronic form.

9. A running log is required of all the work an advocate does on a case, giving dates, times and the nature of the work and in the case of perusal of prosecution evidence particulars of the documents. In this way, the advocate when formulating their claim and the Appropriate Officer when considering it will be able to identify the work that is the subject of a special preparation claim. A best practice pro forma of a work log is set ou in Appendix F of this document.

10. As held in the decision of the Honourable Mr Justice Penry-Davey in the matter of The Lord Chancello v Michael J Reed Ltd (2009) video or audio footage cannot be claimed under special preparation as moving footage does not fall within the context of "any document".

11. As upheld in the decisions R v Adeniran (2015 SCCO 50/15) and R v Elnmendorp (2016 SCCO Re 459/14), special preparation cannot be claimed for work during Proceeds of Crime Act proceedings.