TEN TALES FROM COUNSEL WHO PROSECUTE

Tale 1.

I wonder if you could help with a problem that has been rearing itself amongst those who prosecute cases in ****? It has become increasingly common for the CPS to ask Counsel instructed in straightforward matters to draft bad character applications. I recently questioned that with the **** CPS as our local view is that the CPS Scheme C (at paragraph 83) does not cover the drafting of such applications. Our brief fee covers preparing such an argument for trial. That is not the same thing. In a current case, however, the CPS have indicated an intention to withdraw instructions if I persist in my refusal to draft the application itself.

I would value some assistance on this matter as we would like to diplomatically iron this matter out with the local CPS and it is coming up again and again with counsel generally just agreeing to do it.

Tale 2.

Rape lists

Having managed to get onto the CPS rape list I was expecting to be instructed to prosecute rape cases. I understand anecdotally that there is a substantial reduction in such cases getting to trial. (My understanding being that the CPS are not charging unless they have social media material, which the police are not providing). My query is whether the CPS earnings thresholds for such work, which have stayed constant, will be reduced to reflect the reduction in such cases getting to court. It is a challenge to meet an earnings threshold for a particular type of work when the type of work has reduced substantially over the same period. This is an issue which will come to a head early next year when applications to stay on various lists are invited - and passported - if the thresholds are met.

Tale 3.

In September I was to prosecute a trial (S.18) listed at a venue 12 miles or so from Chambers. The trial was adjourned at defence request, counsel being concerned re his mental well being (the defendant not counsel!) The trial was relisted in January, on a date that I could not do as I was committed to a re-trial. I received the sum of £55 for preparing that trial, driving to court with no other work for the rest of the week ("Non-effective trial on application".) By December the defendant was onto his third counsel and the case was listed for mention. The defence application was to adjourn the rescheduled trial, since the defence expert would not come to court for the derisory £116 per hour that had been allowed by the Legal Aid Board. (The irony will not be lost-given the daily fee for counsel on these cases). If the case had been adjourned I could have done it. Instead of conceding the adjournment, I spent three hours drafting and agreeing admissions: thus avoiding the need to adjourn the trial and ensure that the complainant (who had cancelled an operation to attend the first aborted trial) did not have to wait any longer. It meant that the expert did not have to come to court at all,

saving fees to the public purse and overcame the difficult situation the defence were in, trying to get someone to come to court. Did I do it for £116per hour? Or even £80 an hour – the fee occasionally allowed by CPS? No I did it for free, receiving the mention fee of £46.50. I don't want a gold star, I am by no means alone in putting the needs of justice above our own, barristers do this daily and it is something that the CPS should be conscious of. In effect I earned £101.50p for those four days and the hearing and additional three hours work. (Incidentally at the rescheduled trial covered by a colleague, the defendant pleaded guilty!)

Tale 4.

CPS payment. I am currently prosecuting a significant **** case - I am instructed as QC. There are in excess of 50 complainants and 15 defendants, over 200,000 pages of served evidence and 2 other linked operations of a similar size. This is a complex case by any standards and I was instructed pre charge. I was granted a junior some time ago but last year when it was clear that there were these connected operations and a huge amount of disclosure made an application for disclosure junior. This was granted. The CPS asked for a grade 3 prosecutor to be instructed and someone of this rank in my chambers was found. The case has been split in 2, trial 1 a 16 week time estimate, and trial 2 a 10 week time estimate. 4 weeks before the first trial it was made clear by the CPS that they expected that my disclosure junior would be at court every day of the prosecution case - we were listed for 16 weeks and this would mean that they would be there for at least 12 weeks. They informed us that this would be at the disclosure junior rates of £150 per day. Understandably this was unacceptable - far more money could be earned by them if the disclosure junior did their regulatory work or accepted the 6 week brief as a junior in a murder in the CCC (a walk from where they live as opposed to a 4 hour daily commute at a cost £100 each day, they would have to fund until settlement). My clerks and I asked if the disclosure junior could be instructed as a 2nd junior if counsel was to be required at court every day, this was refused.

Being left with no choice I have agreed to top them up. What this means is of £570 per day daily refresher I receive (I am in court at 9 and leave at 5) I give my disclosure junior £70. I do this because this case matters, for the complainants, for the defendants to ensure that someone who actually knows the case and understands the ramifications of each and every document to their defence, to ensure fairness, to ensure that the public gets value for money, to ensure my chambers are treated fairly. My disclosure junior is outstanding in their job, we have had 40 disclosure applications each including multiple requests - but no single section 8 applications. There has been no single complaint in this case about disclosure, that alone makes us rare but we have taken a very open handed approach to disclosure. This is utterly unacceptable behaviour by the CPS fees unit.

My disclosure junior has left the bar to go in house, I am bereft but I absolutely supported them - what future do they have in this profession when now they are on a guaranteed salary of £120,000 per year, maternity/paternity leave, sick pay, pension, paid holidays and oh yes a guaranteed income.

Tale 5.

As prosecution fees are finally being looked at, I have an example which illustrates one of the flaws in the current system. A more senior member in chambers returned a prosecution brief and I received it. It was a low value fraud (around £28k, so £480 brief fee to include the preparation and the first two days of trial), but involved a defendant within the NHS stealing money from vulnerable people's accounts to spend on her own lifestyle. The witness statements were voluminous, as were the exhibits: there were hundreds of cheques and bank statements. I booked myself out of court for 3 days to prepare the trial. At the time I had other disclosure work, and limited time, and this wasn't the sort of case that could be prepared at night or over the weekend. While preparing the case, I found out that the police schedules had numerous inaccuracies. They would have opened the door to the defence showing that the prosecution case was unreliable. Some further evidence was required so I drafted the appropriate advice. I prepared my own schedules and agreed facts, and reduced the near 80 pages ROTI to a summary.

On the eve of trial, listings adjourned the case for over 6 months.

Before the 2nd listing, I reread the papers, prepared an opening and cross-examination, and notes for every witness.

The case was moved again, to a date when I couldn't do it.

The result is that I spent 3 full days - probably close to 40 hours - preparing a trial for which I received £NIL. Because of the type of case, the CPS had no facility to pay for wasted preparation.

Even if I had been able to do it, the first two days would have earned less than £500. Goodness knows what the hourly rate would have been, including prep.

I know the CPS will say it is a listings issue, but it is not that simple. If they want cases prepared properly, then that should attract appropriate remuneration.

I hope that example helps. I have many more (a recent case I prepared for trial in a difficult DV case in which it was adjourned and I was paid £55) is one such example.

Tale 6.

I know the CBA under your watch has taken up the issue of CPS fees and whilst I barely ever prosecute myself a situation has come to my attention that I thought I should pass onto you. My junior in the current case that we are defending in (she is 7 years call) has been instructed / asked to be a ‘disclosure’ junior in a CPS case. I know nothing of the facts other than that it is a firearms case and I think we can infer from the circumstances that it must be reasonably complex and paper heavy.

Apparently a 'disclosure' junior is expected to attend every day of the trial (i.e. it isn't a disclosure exercise where junior junior barristers are seconded to peruse thousands upon thousands of documents like in SFO cases), take a full note and basically do what we all know is the job of a 'proper' prosecution junior which is one of the hardest and most thankless tasks at the Bar.

The going rate for this is a derisory £150 per day. Whilst it is true that there is a prep fee of £50 per hour we shouldn't be fooled by that as of course there is no brief fee. Let's assume that 50 hours prep is allowed, that is a full week out of court preparing the case for £2500, which is, give or take, what a junior could expect to earn from a 5 day Crown Court trial for which they would typically spend perhaps 10 hours preparing.

We should also remember that this arrangement allows the CPS to pay their lead counsel (for that is what they are) at 'junior alone' rates thus making a further significant saving out of this artifice. Finally, the CPS were offered a Grade 1 prosecutor but had the cheek to refuse it and demand a Grade 2 or even 3 (out of 4…).

I merely wanted to bring this to your attention. I have done one case where the Crown had this setup and it may be that if the Bar and chambers continue to accept this it will in time become the norm.

Perhaps the CPS should be pressed not to instruct disclosure juniors unless there are already 2 counsel instructed by them? I know that a consistent position is hard to achieve but I was wondering if this issue was brought to people's attention there may be a collective will amongst chambers and counsel to refuse these cases.

Many thanks again for you continued hard work on behalf of us all.

Tale 7.

I write in anticipation of the CBA meeting with Max Hill – and in particular in relation to the first of the matters which the CBA seeks to raise with him: the vexed question of when a trial is said to start for the purposes of CPS remuneration. I have had a recent experience of how this has worked in practice, an experience which has also thrown into sharp relief the somewhat arbitrary treatment of counsel at the hands of the CPS, and the sense that the "rules" seem to be applied inconsistently.

I was instructed in **** 2018 at very short notice to prosecute a (professional) in a complex and involved fraud on the NHS. The page count ran to more than 10,000 pages. There were a number of complexities, including difficult and highly technical expert evidence. The case was not by any means sufficiently prepared when I inherited it. It was taken as a late return "favour" to another Chambers and to the **** CPS Fraud Unit – a unit for which my Chambers very rarely works. I worked around the clock for a number of days in the run up to the trial so that I was able to be sufficiently prepared for the trial by the Monday morning of the hearing. Needless to say, I had given up the whole of the weekend immediately in advance of the trial and other pressing work was dropped so as

to be able to meet my commitment to the case. By the time of trial I had done a great deal of preparation under very significant pressure of time.

On the Monday of the trial, at the behest of the Court and defence counsel, a jury was sworn and put in charge. I needed a conference with my expert and a statement had to be taken from him to plug a significant hole in the Crown's case (without which, in my view, the prosecution was not viable). An adjournment was granted until 2pm. I then sat with my expert and the Prosecution Team for a 3 hour conference. A statement from the expert was then provided following the matters which were clarified in the conference. Both conference and statement were essential to the viability of the Crown's case. Had I not identified the need for both, then the case would almost certainly have collapsed. The statement was made available in the afternoon. The jury was then sent home overnight for all parties to review it. I left Court late on Monday afternoon, having conducted lengthy further discussions with both the defence and the prosecution teams.

On Tuesday morning, all parties again assembled. Defence counsel applied to discharge the jury to obtain defence evidence to deal with the new prosecution expert statement. The application was granted and the case re-fixed for December. The Court made a number of criticisms of the CPS preparation of the case up to my involvement, but specifically did not make any criticism of me – indeed I was thanked for putting the case in something like serviceable order.
The Court specifically directed that the two days were to be classed as a "trial" for the purposes of billing and remuneration.

Acting on that direction, my clerks billed the case as a trial immediately thereafter. Although there was initial reluctance from the CPS to paying the case before it had finally resolved, there was no objection in principle to the case being billed and paid as a trial. Shortly thereafter, the case was in fact paid as a two-day trial.

The re-fixed trial came back to Court in ****2018. Again, I did a lot of preparation for the case, including an extensive re-write of the Opening, a review of the jury bundle, a review of the Batting Order and other essential further work.

An almost identical scenario then played out however. The jury was sworn on day 1, matters were adjourned overnight to day 2, and on day 2 a matter arose which prompted an application to discharge the jury, which was granted.

A third trial is now fixed for **** 2019.

On materially similar facts, my clerks then billed the second trial also as a two-day trial – as they had done before. Despite having paid the July 2018 hearing as a trial, this time the CPS objected and claimed that the matter should attract no more than a stand-out fee. My clerks reminded the CPS that they had designated the July hearing as a trial and had paid it without demure on that basis. At that point the CPS wrote back to say that the July trial had been *wrongly* paid and that they now requested the repayment of the whole July fee!

And so I now find myself in the following position:-

1. Although there was a legitimate and reasonable expectation of a trial fee for July 2018 and a 25% reduced trial fee for December 2018 (both of which would be paid if defending under legal aid), not only is December now to be paid as a stand-out, but the monies already paid for July have to be returned.

2. If I do not do the *** 2019 third trial, then I will have no right to remuneration at all for the dozens of hours of work that I have done on the case, other than two derisory stand-out fees.

3. There is a substantial sum of money at stake from the July 2018 trial. It has been spent. I am in no position immediately to repay, on demand, the sum involved.

4. The money has been demanded by the CPS after a hiatus of some 6 months (when are counsel's fees "safe" – are fees paid 12 months, 18 months, 24 months ago still at risk on the arbitrary whim of the CPS fees department?).

5. If the position was reversed, counsel would have 20 working days to query a costs determination of the CPS – no such courtesy appears to be extended the other way round.

6. There is no provision *at all* in the CPS regulations for this sort of demand and yet it is being made, without regulatory authority, 6 months after another arm of the CPS fully approved the fees as proper and legitimate.

7. The payment was agreed by the CPS fees department in July 2018 without any demur – indeed the only issue raised in July was as to early payment.

8. The demand has been made, it seems, only because my clerks reminded the CPS of a position it had taken in July of last year and requested –wholly reasonably- that a consistency of approach be adopted now. The price to be paid for our straightforwardness and consistency of approach is that the CPS have dealt us what seems to be an entirely arbitrary financial blow.

9. Above all, I feel utterly exploited by an organisation whose reputation and credibility was protected by me as a result of the hours I invested in getting the case into something like proper condition for the July 2018 trial. The thanks I have received for that commitment is that not only is my work not remunerated, but insult is added to injury and I am asked to repay funds accepted as legitimately paid 6 months ago.

10. The dozens of hours that I worked on getting the first trial ready are now to go wholly unremunerated. The conferences that took up the great part of Day 1 of the July trial go almost entirely unremunerated – not to be paid as part of a proper trial fee, and not as a separate conference fee, but subsumed within a derisory stand-out fee.

    The CPS seems to be able simply to ignore the direction and ruling of a Judge that the July 2018 hearing was a trial – in what other field of law is a body simply able to say: "we entirely disregard the direction of the court when it does not suit us"?

Even the LAA recognises that such circumstances amount to a trial. If defence counsel was participating in a trial, and we were both either side of the same activity, it seems to be extraordinary, and utterly counter-intuitive and arbitrary, that the prosecution is not, in exactly the same circumstances, determined to be in a "trial"! The public would find this utterly and totally extraordinary.

Can anything be done about this? It is the sort of thing that utterly destroys goodwill. In the end, the system depends upon counsel not standing on their rights, but instead prioritising their duties and obligations when the case demands it. That will only continue to happen if counsel has a sense of goodwill towards the CPS, which sense, in turn, will only survive if we feel properly treated.

That sense, I fear, is evaporating steadily. There have been a number of ups and downs in the 24 years of my practice. This is the first time that I have started to feel some sense of despair. Not to be paid for work properly done is the stock in trade of a criminal barrister these days. However, to have to *pay back* money properly earned already, is reaching a new low.

Tale 8.

I am at **** crown court. I am prosecuting, and have spent all day here, the sentence of a poor man who stabbed his wife, all his family in public gallery etc....three consultant psychiatrists have been called regarding disposal under the mental health act. The judge is giving a judgment full of details and legal issues. My fee for this £60…..this is a disgrace .

@ court at 9 leaving at 3.30 massively serious..., only here out of sense of duty but this is a joke.

= £9/hr for time at court and nothing for the hours of preparation (obviously nothing for travel)

Tale 9

<u>Our value to the system</u>

Over recent years I repeatedly read of the value that the Bar is said to bring to the criminal justice system.

I am a junior barrister of 20 years call. I have just finished prosecuting a 5 day historic sex case alleging the rape by a boy, then aged 11-17, of his sister, aged 8-12 (Category J). My fee (to include all of the prep, re-drafting a 14 count indictment and volumes of disclosure) is:

Prep: £0
Brief: £1330

Refreshers x 3 (£520): £1560

£2,890.

The intermediary (who had nothing to do as the defendant refused to leave the cells) was paid a daily rate of £495 (plus travel). She was also paid 2 hours prep at £60 per hour. Her fee (and I have the invoice) was thus:

Prep: £120
5 days: £2,475
Travel: £600

£3,195.

Of note, of course, this also means that an intermediary is worth more to the system per day than prosecution counsel in all cases bar Cat A (Murder), Cat J (The most serious sexual allegations) and Cat K (Fraud over £100k). The intermediary is paid more per day than prosecution counsel gets for 2 days in Cat E and F cases (£480)!

Furthermore, intermediaries are paid more than the refresher for defence counsel in all standard cases and in most cases alleging dishonesty, simple arson, drug trafficking, armed robbery and aggravated burglary (Scheme 10).

Actions speak louder than words. The system in which we work does not fairly reflect the value of that which we contribute. Surely a system that pays more to those who repeat the questions than to those asking the questions needs to take a long hard look at its priorities.

Tale 10.

My leader and I are conducting a murder trial which is very substantially overrunning its original time estimate. This is not anything to do with us but is the result of substantial amounts of other business being listed before our judge, and the fact that several of the defendants are being held in distant prisons and we are routinely delayed by an hour or more every day.

As a result we are rapidly approaching Day 40, and the CPS will cut our refreshers almost in half from Day 41 onwards

I think this particular rule came in with grad fees Scheme C and I am not sure what justification there can possibly have been for it. Without psychic powers it is impossible to know before a trial starts whether it will run past 40 days and ought to be treated under the CPS scheme as a VHCC.

At Day 41 we will still be in the defence case, and will go on to deal with some complicated legal directions, speeches and summing up. The practice of slashing the refresher at Day 41 does not reflect any diminution of the work done by prosecution

counsel later in the trial and it is hardly our fault if a trial unexpectedly overruns. I am sure that we are not the only ones suffering under this rule and I wonder if it might be brought to Max Hill's attention.

Tale 10+

There are many more I could give you, for example the QC who was paid £155 for a half day hearing in a nationally important multi-handed terrorist case, and an inadequate number of hours to prepare it at very low rates. Every single one of you who prosecute could add to this list.