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Representing Indigents in Serious Criminal Cases in England's Crown Court: The Advocates' Performance and Incentives


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REPRESENTING INDIGENTS IN SERIOUS CRIMINAL CASES IN ENGLAND'S CROWN COURT: THE ADVOCATES' PERFORMANCE AND INCENTIVES

Peter W. Tague*

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I. INTRODUCTION

While indigent defendants charged with serious criminal offenses can be represented by lawyers in the United States and by barristers and solicitors in England and Wales. Gauging the quality of that help is an important but elusive inquiry. This article has two purposes: to map how the indigent criminal defendant charged with very serious offenses is represented in England's Crown Court, and to examine whether economic incentives can induce the defendant's representatives to perform as expected.

While barristers profess to be skilled advocates, and while many lawyers have likewise extolled the barrister's advocacy, testing the point is extremely difficult.

* Professor of Law, Georgetown University Law Center. I thank the Lord Chancellor's Department in England for permitting me to examine the files and the determining officers and many others who helped me as I studied the compensatory scheme in publicly-funded cases.

Apart from observing trials or reading memoirs, there is scant evidence to study. The information often used to evaluate the effort of lawyers—challenges by disgruntled defendants to the effectiveness of the lawyer's efforts—hardly exists in England.¹ Without a better understanding of how the criminal defendant is represented in England, lawyer-advocates may think themselves as inept as many critics claim they are when compared with their barrister cousins.²

If barristers do perform better than lawyers, why is this so? The compensatory scheme plays a role, and this article's second purpose builds on the truism that economic incentives can affect the defendant representative's preparation and advocacy. Inadequately compensated, advocates will refuse to represent indigent defendants or will be tempted to do less than needed.

Indigent defendants in the United States, for example, may be deprived of the most able advocates because they cannot select the advocate and, even if they could, the advocate might refuse to help because the remuneration is inadequate. The compensation paid to court-appointed lawyers is pitifully low in many state courts, and, although higher, even tolerable, in federal courts, is still too low to entice skilled advocates to represent indigents when they can garner higher fees from other sources. Moreover, typically paid by the hour but with a ceiling on the total award,³ court-appointed lawyers have an incentive either to resolve the matter once their cumulative bill approaches the ceiling or to skimp after exceeding the ceiling because their time is then uncompensated.

Matters are different in England's Crown Court. Indigent defendants can select the barrister who, for two reasons, cannot decline the request. First, the cab-rank rule requires a barrister to represent one who seeks help, no matter how reprehensible that person or his legal position is, so long as the barrister has no conflict of interest and the compensation is adequate. Second, the Bar defines the compensation paid in publicly-funded criminal cases as adequate. Barristers are not chafed by this requirement because the compensation in publicly-funded cases can be quite high, and significantly higher even than in federal courts. Thus, defendants in

1. The criminal defendant, alone among disgruntled litigants, has the opportunity to challenge his barrister's performance. He can appeal against conviction on the ground that his barrister's advocacy was inept, a right recognized by the court of appeal only in the last decade. Lay clients in civil litigation lack a similar right to sue the barrister for his advocacy lapses because he is immune from claims of malpractice. Complaining about the barrister's performance to the Bar bears no fruit either, because a barrister's negligence does not constitute professional misbehavior warranting investigation. *But see New Complaints System for Bar Agreed*, SOLICITORS JOURNAL, Jan. 19, 1996, at 32 (suggesting the Bar may authorize such an investigation). For a discussion of the points in the text and this footnote, see PETER W. TAGUE, *EFFECTIVE ADVOCACY FOR THE CRIMINAL DEFENDANT: THE BARRISTER VS. THE LAWYER* 6-10 (1996).

2. One of the most scathing critics of lawyers was former Chief Justice of the Supreme Court, Warren Burger. See Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 *FORDHAM L. REV.* 227, 234 (1973) (estimating that as many as 50% of the lawyers appearing in serious cases were not qualified). He was also an ardent admirer of barristers' advocacy. See *id.*

3. For the amounts paid in federal courts, see *infra* note 169 and accompanying text.

Crown Court have the unparalleled opportunity, when compared to their counterparts prosecuted in American courts, to retain the most skilled advocates who are available. That having been said, defendants in Crown Court are often disappointed when they learn, often shortly before the trial date, that the barrister initially retained has withdrawn from the case. The barrister's return of the brief (the "returned brief") threatens to undermine this important aspect of English practice.⁴ It will be important to learn how the compensatory scheme affects the barrister's incentive to return or to keep the brief.

If the returned brief dents the attractiveness of English practice, it is also obvious that even skilled advocates may not always perform skillfully. Barristers have a model of advocacy that differs from the criminal defense lawyer's model. They are less partisan than lawyers, less attentive to the defendant, less concerned with the development of the case. They work with the materials they receive, only guiding the solicitor if asked. Thus, it becomes important to learn whether barristers are sufficiently prepared to unfurl their advocacy skills. More particularly, how do the barrister and solicitor work together; how often does each speak with the defendant about the case; and is there tension within the defense camp because, say, the barrister's approach offends the defendant or his decisions clash with the defendant's desires?

Answers to those questions come from a source never previously plumbed. I received permission from the Lord Chancellor's Department, the body with jurisdiction over the system of payments in publicly-funded cases, to examine files that had been or were being reviewed at the Central Criminal Court (the Old Bailey) in London, for the purpose of calculating the fees paid to the defending barristers and solicitors in very serious criminal cases.⁵

These files teemed with interesting facts about those issues.⁶ To presage the

4. The word "brief" has several meanings. It refers to all the written information delivered by the solicitor to the barrister (the official papers, the statements by the defendant and other witnesses, and the evidence the Crown has disclosed). More narrowly, it refers to the document prepared by the solicitor identifying and offering advice about the tactical and legal issues and the defendant's position. The word is also used as a verb, so that the barrister is "briefed" to advocate for a party.

5. These cases were called *ex post facto* (or non-standard) fee cases. The fees were calculated by a "determining officer," a member of the Lord Chancellor's Department, with no legal training, who often began work as an usher in a courtroom. If promoted, in time this employee could choose to become a court clerk for a Crown Court judge and simultaneously a determining officer.

The compensatory scheme in effect at the time this study was undertaken is described in Part II. It was scuttled in 1997, not to reduce the barristers' compensation, but to enable the Lord Chancellor's Department better to predict, and thus to control, the overall cost of paying the professionals in the future. Studying the incentives created by the eclipsed scheme remains useful because they have not been changed much under the new scheme, and because it is important to see how a compensatory system can be designed to create incentives. *See The Legal Aid in Criminal and Care Proceedings (Costs) (Amendment) (No. 2) Regulations (1996)* (Eng.) [hereinafter *1996 Regulations* or the "graduated fee scheme"].

6. I read 63 files, 55 on this occasion and eight others at an earlier session during which time I spoke with determining officers, the member of the Lord Chancellor's Department who chose the fee to pay barristers and solicitors. The 55 were being taxed by determining officers assigned to the Old Bailey whose jurisdiction was

conclusions,⁷ the barristers were in a position to advocate effectively. The briefs found in the files seemed to have been thoroughly prepared and provided an important introduction to the case. The solicitors identified the issues and canvassed the facts, even though they never offered any tactical suggestions. If barristers actually took the time to prepare that they reported having spent, they should have understood the issues and developed a plan to execute the defendant's instructions. The defendants were not ignored, but spoken to frequently, especially by the solicitors. The system of compensation thus seemed to provide incentives for the barrister to prepare and to avoid returning the brief because occupied in representing a different defendant in an unrelated case.

Even if the English system seemed to work, American jurisdictions will not be tempted to adopt it. The costs would be too high. The professionals in these cases were paid thousands of pounds, amounts far exceeding that which court-appointed lawyers typically receive.

Before ending this introduction, it is important to make one reservation. The cases studied were unusual in an important way. Only defendants charged with the most serious crimes received the resources described in this study. In these cases defense advocacy should reach its acme for two reasons. The high level of compensation should entice the ablest advocates available not to find an excuse to avoid representing an indigent defendant. Second, many defendants were represented by three or more professionals: a leader (usually a Queen's Counsel), a junior barrister, and one or more solicitors. Thus, to conclude that these defendants probably received able representation does not mean that the same would be so for the mass of defendants charged with less serious offenses, and represented by a junior and solicitor in what were called standard fee cases.⁸

ordinarily limited to requests of £4000 or less. Requests over that amount were assigned to the Southeast Circuit's Central Taxing team, as had been done with the other eight files. Nonetheless, a Central Taxing team could cede responsibility for requests between £4000 and £8000 to the relevant Crown Court's taxing team, as occurred with many of the 55 cases.

7. These conclusions cannot be expressed as robustly as one might like because information of different sorts was missing from various files. A complete file would include the solicitor's brief, the barrister's answers to questions asked by the solicitor about the solicitor's role in preparing the defense (an "advice on evidence"), the witnesses' statements, court documents, the solicitor's log of his work, a form completed by the barrister indicating how long he had prepared and the amount he sought, and a memorandum written by the barrister explaining his efforts and defending the payment requested. Many files were incomplete, however, with the brief missing or the barrister not having submitted a memorandum. (Barristers were not required to defend their request, but a few did, including one who bound his in a folder.) Barristers' submissions were often self-serving or tantalizingly incomplete: self-serving in that the barrister puffed his performance without explaining precisely what he had done; incomplete in that the hours taken to prepare were reported in summary fashion, without being divided into the time taken to read the brief, research a point of law, or ponder how to examine the witnesses. By contrast, solicitors had to record their efforts as if they were wearing a monitoring device. To illustrate, a solicitor in one murder case needed five single-spaced pages to record his work and that of his assistants. Of course, this detail about visits to the defendant, telephone calls, and the like does not necessarily reveal how well the solicitor performed.

8. For a discussion comparing non-standard and standard fee cases, see *infra* text following note 24. The sharp criticism by a recent observer of advocacy in the Crown Court causes worry about the level of advocacy in what

Part II generally introduces the advocates who represent indigent criminal defendants and the methods of compensating them in effect at the time of this study. Those who represented the defendants in this study are described in Part III, as is their relationship with each other. Part IV asks how prepared the defendants' barristers were. Part V focuses upon the incentives, in representing the criminal defendant, created by the system of compensation, summarizing the earlier discussion and adding new points. Part VI concludes by commenting on the relevancy of this study for lawyers.

II. THE DEFENDING ADVOCATES AND THE SYSTEM OF COMPENSATION IN NON-STANDARD CASES

This Part introduces the defendant's advocates and the mechanics of payment in legally-aided work in the Crown Court that applied to the cases studied. With this information, we can begin to understand how the rules governing compensation can affect the defenders' advocacy under the old system.

As they begin, all barristers are called juniors; ninety percent finish their careers in that status. The other ten percent are elevated to the rank of Queen's Counsel after demonstrating skill as an advocate for ten years or so.⁹ In publicly-funded cases, Queen's Counsel represent only those defendants charged with the most serious offenses.

Solicitors are also classified under the legal aid scheme based on the Lord Chancellor's belief in specialization.¹⁰ Certain aspects of representation are thought to demand more skill and experience than others, and are paid accordingly. As such, only "fee-earners" within a solicitor's office receive recompense for acting on behalf of a defendant. A "'fee-earner' means a solicitor, a legal executive or any clerk who regularly does work for which it is appropriate to make a direct charge to a client."¹¹ Solicitors are further subdivided into "senior solicitors" and solicitors. A "senior solicitor" is one "who has the skill, knowledge, and experience to deal with the comparatively small number of cases which fall within the higher categories of gravity or difficulty."¹² While experience is not dispositive, senior solicitors will usually have acted as an advocate for at least ten years. A solicitor or legal executive will have "good experience [although less than ten years] of the conduct of criminal cases."¹³ A "clerk" is a comprehensive term

were almost surely standard fee cases. See Helga Drummond, *Standards of Advocacy Revisited*, NEW L.J., May 3, 1996, at 655.

9. For a discussion of the process of promotion to Queen's Counsel, see TAGUE, *supra* note 1, at 20-21.

10. The new system of compensation applies only to barristers. The system in effect at the time I reviewed the files continues to apply to solicitors.

11. Lord Chancellor's Department, *Consolidated Regulations*, reg. 2 at 2 (1989) (Eng.). The "client" here is the legal aid authority.

12. Lord Chancellor's Department, *Directions for Determining Officers*, reg. 2B.6 at 20 (1989) (Eng.).

13. *Id.* reg. 2B.7 at 21.

that includes people who are training to become solicitors as well as those with "equivalent experience,"¹⁴ typically no more than two years.

Each fee-earner within the solicitor's office is compensated at a different hourly rate, and receives his rate only if his skill was needed.¹⁵ Were he to undertake work that a less experienced fee-earner could perform, he is paid at the latter's lower rate.¹⁶

Thus, senior solicitors can expect to be paid at their level "only in a small percentage of cases, the most difficult[,] complex or serious"¹⁷ Even when a case qualifies under one of these exacting tests, a senior solicitor must delegate any work that could be performed by one with less experience or skill, "unless to do so would result in an increase in the cost of the work."¹⁸

Not surprisingly, solicitors or legal executives were expected to conduct or supervise most ex post facto cases. Even then, they must delegate "more routine work to a lower grade" (to a clerk). Much of the preparation needed to mount a defense is considered "routine," including, "for example, interviewing and taking statements from witnesses other than key witnesses, perusing statements and other documents, initial work on the preparation of counsel's brief and, where a fee-earner's attendance is necessary, attending court with counsel."¹⁹

Barristers in publicly-funded cases received payments for specific aspects of preparation and advocacy.²⁰ Their largest fee was the basic fee, covering the time

14. See *Consolidated Regulations*, supra note 11, reg. 6(4)(c) at 5. Those in apprentice to become solicitors were called "articled clerks" at the time of this study. They are now known as training solicitors. The older term is used here.

15. The policy also applies to barristers in that they normally will not be compensated for undertaking work that the solicitor should have performed. As an example, see *infra* note 40 and accompanying text.

16. To show the breadth of this rule, the fact that a senior solicitor lacks someone on his staff at the level who should have performed the work does not justify paying him at his higher hourly level. Instead, the solicitor will be compensated at the hourly rate of the sort of fee-earner who should have done the work. See Case no. 10 (1977), DIGEST OF TAXING MASTERS' DECISIONS PART 1: APPEALS BY SOLICITORS (1987) (Eng.). One of the imponderables is how a determining officer decides that a person with less experience could have performed the work.

17. *Directions for Determining Officers*, supra note 12, reg. 2B.6 at 21. Taxing Masters appear more willing to permit senior solicitors to represent the defendant. Senior solicitors can "normally . . . conduct[]" cases where an offense class is one or two and when a class three or four case is "unusually serious or complex." TAXING OFFICERS'—NOTES FOR GUIDANCE, para. 79 at 27 (1979) (Eng.) [hereinafter T.O.N.G.] (While T.O.N.G. was republished in 1995, the parts from the 1979 edition cited in this article remained in effect, unchanged). A defendant charged with a class three or four offense can be helped by a senior solicitor even when the matter is "simple" and imprisonment unlikely if the "consequences to [his or her] livelihood, reputation or standing . . . [are] serious." *Id.* para. 86 at 29. Taxing Masters do agree with the Lord Chancellor's Department, however, that senior solicitors should "normally . . . delegate less important work in the case to subordinates." *Id.* para. 83 at 28. For an explanation of the classes of offenses, see *infra* note 29.

18. *Directions for Determining Officers*, supra note 12, reg. 2B.6 at 21.

19. *Id.* reg. 2B.7 at 22.

20. This remains true under the new compensatory scheme. The chief difference between the old and the new approaches is that the difference between standard and non-standard cases, explained *infra* at note 25, is eliminated. Instead, the Lord Chancellor, in negotiations with the Bar, has created categories of crimes, and payments that are automatically given for each category. One effect is to make the computation of the amount to be paid more mechanical, as determining officers will no longer decide, after the case has ended, the amount the barrister should receive. Also, the amount received by barristers has become a function, in part, of the numbers of

taken to prepare for trial and to confer with the defendant or solicitor before the trial. It also encompassed the trial's five-hour first day,²¹ together with any short conferences with the defendant or solicitor on that first day. For each trial day after the first, the barrister received a separate payment, called a refresher. The refresher also included any short conferences the barrister had with the defendant or solicitor during the trial.²²

Additional payments tempted the barrister to undertake other work, all indispensable, one would think, to proper representation. While the time taken to prepare to speak with the defendant before the trial was part of the basic fee, he was paid separately for the conference itself, and for conferring with the defendant during the trial if the meeting consumed a considerable, although unspecified amount of time.²³ He was also compensated for listening to any tape-recording of the defendant's interrogation by the police, visiting the scene of the crime, or writing an advice on evidence recommending that the solicitor undertake certain work.²⁴

Under the eclipsed compensatory scheme, the barrister's and solicitor's level of compensation was most affected by whether the case was categorized as standard or non-standard. In Crown Court, standard cases were the rule, non-standard the exception. In this study, the reverse was true, with all but four cases qualifying as non-standard.

Cases were regarded as standard if the trial was short; the issues, while not mundane, did not demand special skill; and the potential punishment, although no doubt feared by the defendant, was not the most severe. A case was treated as non-standard whenever the defendant was represented by both a Queen's Counsel and a junior,²⁵ and in three instances when the defendant was represented only by a junior.

A leader (a Queen's Counsel or an experienced junior) is authorized to advocate for an indigent defendant in two instances. Authorization is automatic when the charge is murder. Not surprisingly, then, leaders appeared in all nineteen of this study's cases where the defendant was accused of murder or a variant. In seventeen of those cases, a Queen's Counsel led a junior; in two, a junior led another junior.

witnesses called by the Crown and of pages delivered by the Crown in discovery. Barristers will continue to receive separate payments for speaking with the defendant and listening to the tape-recording of an interrogation.

21. See *Consolidated Regulations*, *supra* note 11, reg. 9(4)(a) at 6. This fee is often colloquially referred to as the "brief fee," but because it encompasses more than preparing the brief the more accurate term is a "basic fee."

22. See *id.* reg. 9(4)(b) at 6.

23. See *Directions for Determining Officers*, *supra* note 12, reg. 3B.4(a) at 53-54.

24. See *generally Consolidated Regulations*, *supra* note 11, reg. 9(4)(c) at 7 (describing "subsidiary" fees). For these types of work a Queen's Counsel in 1996 received an hourly rate of £62.50, and a junior, £33.50.

25. The matter is more complicated than discussed in the text. The legal aid regulations authorize the defendant to be represented by two barristers in the situations described in the text's next paragraph. The two barristers, however, could consist of a Queen's Counsel and a junior, or two juniors, one presumably with more experience than the other. See *The Legal Aid in Criminal and Care Proceedings (General) Regulations*, S.I. 1989, No. 344, reg. 48(3). Whether a case is automatically treated as non-standard when two juniors represent the defendant is unclear. The Lord Chancellor's Regulations do not discuss this point.

Authorization takes more steps when the crime is not murder but the “case is one of [such] exceptional difficulty, gravity or complexity . . . that the interests of justice require . . . the services of two counsel.”²⁶ The solicitor first selects a junior, who is presumed to be sufficiently competent to represent the defendant by himself. If the junior doubts that his skill matches the defendant’s needs, he will write to the solicitor explaining why a leader is necessary. In turn, the solicitor’s request for a leader must be approved by a Crown Court or circuit court judge.²⁷

Under this second test, nine requests were approved, none denied. In each, a Queen’s Counsel led a junior. The crimes charged included one or more of four offenses: rape, robbery, kidnapping, or causing grievous bodily injury. In many of these nine the junior had extensive experience as an advocate in light of the date of call to the Bar.

In the study there were seventeen non-standard cases where the defendant was represented only by a junior, even though the crimes charged were the same as in those nine non-murder prosecutions where a Queen’s Counsel also appeared.²⁸ When representing a defendant by himself, a junior got non-standard compensation in the following three settings: The crime charged was of a particular type,²⁹ the trial lasted longer than three days (or would have, if the defendant had not pleaded guilty) (three of the seventeen),³⁰ or a “standard fee would [have] be[en] inappropriate taking into account all the relevant circumstances of the case . . .” (the other fourteen).³¹ Paraphrased, that last, ambiguous criterion expected a

26. *Id.* reg. 48(2)(a) and (b). When the defendant can be represented by a leader and a junior is not affected by the change in the ways barristers are compensated.

27. The files contained no information suggesting that the request for a leader had ever been denied. Remarkably, the determining officer can disagree with the decision to authorize representation by a Queen’s Counsel, although only in “exceptional circumstances.” T.O.N.G., *supra* note 17, para. 44 at 16. No examples are given, nor is the determining officer told how to select the Queen’s Counsel’s and junior’s fees.

28. It is not clear why one defendant, charged with the same crimes as another, was represented only by a junior when the defendant in the separate prosecution was represented by a leader and a junior. The only apparent answer is that leaders were authorized whenever the junior asked to be led. The implications of such a request are considered in Part III.

29. *See Consolidated Regulations, supra* note 11, reg. 9(3)(a) at 6. Crimes classified as class one or two offenses receive non-standard fees. Offenses are classified to calculate the fees and to choose the level of judge to oversee the trial. Class one offenses include murder and felony treason; class two, manslaughter, rape and sexual intercourse with a girl under the age of 13. Class three offenses are triable only on indictment (other than those in classes one, two, and four). Class four offenses include causing grievous bodily harm with intent and robbery. *See Practice Direction (Crown Court: Allocation of Business)*, 1 W.L.R. 1083 (1995) (Eng.).

30. *See Consolidated Regulations, supra* note 11, reg. 9(3)(b)(i) and (ii) at 6. In calculating whether the trial lasted more than three days, the determining officer uses 24-hour periods. Hence, a trial that begins on Monday afternoon and concludes on Thursday morning would not qualify as a non-standard case under this test. *See Directions for Determining Officers, supra* note 12, part 3C.1* at 61.

31. *Consolidated Regulations, supra* note 11, reg. 9(2) at 6. A finding of this type was often inexplicable. In nine cases the junior made no attempt to justify why the case deserved *ex post facto* treatment, and the defense did not seem objectively to pose any obvious difficulty. In four of the other five the junior’s explanation was not convincing. In one, for example, a junior inflated the skill needed to prevent the victim’s mother, on cross-examination, from blurting out inadmissible evidence. In another the junior complained that the defendant

determining officer to decide whether the demands of representing the defendant made the case unusually different from and more difficult than others in its class (robberies, kidnappings, thefts, and so on).³² When neither the objective nor the subjective test was met, the case received standard compensation.

The designation of a case as standard or non-standard affected more than the number of barristers who could represent the defendant. It also affected the level of remuneration received by the barristers (and solicitors) and the method of calculating the payments. In standard cases, there was no mystery about the level of compensation. Barristers and solicitors were both paid a predetermined amount. In 1995, for example, a junior received £214 as the basic fee in a case set for trial and £153 for each refresher. A solicitor received £242 for the sum of his work.³³ The junior and solicitor received these amounts without regard to the time expended in preparing before or during the trial.

If in standard fee cases the barrister's and solicitor's basic fees were set in concrete, in non-standard cases the fees of each were contingent, with the barrister's even more unpredictable than the solicitor's. The fees were contingent because they were calculated by a determining officer after the case had ended. The difficulty in predicting the overall costs of this system in a fiscal year ultimately drove the Lord Chancellor to scuttle it, and, in negotiations with the Bar, to devise the new system that began in 1997.

To illustrate why planning was difficult, consider how solicitors' and barristers' fees were chosen by the determining officer.³⁴ While solicitors were paid an hourly rate,³⁵ that fee can be increased (an "uplift") if they performed with "exceptional competence and dispatch" or when the case had "exceptional circumstances."³⁶

had deluged him with notes during the trial. In only one did the defense seem to pose a difficulty. The junior was prepared to call several experts and had to decide whether to introduce otherwise inadmissible evidence of the defendant's separate conviction for attempted murder to explain why the police had allegedly arrested him improperly. Bestowing non-standard treatment in most of these cases was a generous decision that arguably unnecessarily increased the cost of the defense.

32. To illustrate the determining officer's responsibility, he was expected to consider the level of skill required to represent the defendant, whether the junior had assumed "special responsibility" because of the "unusual position or standing of the defendant," the gravity of the charges and the complexity of the case. See *Directions for Determining Officers*, *supra* note 12, part 3C.5 at 63-64. The Lord Chancellor conceded that this evaluation involved a "most difficult qualitative judgement." See *id.* Part 3C.5(4) at 64.

33. For this "principal" and other set fees paid to the solicitor and to the junior, see The Legal Aid in Criminal and Care Proceedings (General) Regulations, *supra* note 25, S.I. 1989, No. 343, Sched. 1, Part II.4 (table) (solicitor's) and Sched. 2 (table) (junior's) (Eng.). The solicitor's fee was slightly lower in 1992 (£8), the year of this study, but the junior's was the same.

34. The new regulations apply only to the barristers' fees. Thus, the system in place involving the cases in this study continues to apply to solicitors.

35. In 1991, for example, for trial preparation a senior solicitor received £52 per hour; a solicitor, £44.50; and an articulated clerk (a legally-trained apprentice working to become a solicitor), £32.

36. *R. v. Hussain*, Case S8 (1984), TAXING COMPENDIUM (failing to include facts to help understand test). (The Taxing Compendium is a collection of summarized decisions by Taxing Masters on matters of principle for use by determining officers when assessing solicitors' and counselors' claims for fees.)

Conversely, his effective hourly rate can be reduced if the determining officer decides that the solicitor should have performed more expeditiously.

The barrister's fees in non-standard cases were even more unpredictable than the solicitor's because no baseline applied.³⁷ While the hours expended were important, barristers were not paid an hourly rate. Instead, the determining officer inspected the documents submitted to decide whether it was reasonable for the barrister (and for the solicitor) to have undertaken the work reported. That discretionary test cloaked several questions.³⁸ First, was it proper for the professional to have performed the work? Next, had the work been done with reasonable celerity? Last, what fee was proper, in light of the time properly taken and the "weight, seriousness, importance and complexity of the case . . ."?³⁹ The purpose of these tests was to encourage the higher-paid professionals (the leader) to force the lower-paid ones (the junior, then the solicitor) to perform work, on the assumption that the latter could perform adequately.

The first of the three inquiries posed no problem for the barrister or solicitor who understood the boundaries of his role. Problems arose when the barrister performed work that was the solicitor's responsibility, or a more experienced professional completed work that a less experienced fee-earner could have done.⁴⁰ As examples, a barrister could not pursue an investigation that the solicitor had neglected or refused to undertake unless not doing so would have caused the barrister to breach his responsibility to the defendant.⁴¹ Or, a leader risked not

37. While the Lord Chancellor had set no baseline, determining officers themselves seemed to choose certain ones. For example, a Queen's Counsel was expected to take as much as but no more than 20 hours to prepare to defend in a murder case. In the cases studied, Queen's Counsel received a higher or lower "effective hourly rate" depending upon whether they took less or more than 20 hours to prepare. For a definition of "effective hourly rate," see *infra* note 49.

38. This discussion is culled from materials provided by three sources—the *Consolidated Regulations*, *supra* note 11, the *Directions for Determining Officers*, *supra* note 12, and T.O.N.G., *supra* note 17—no one of which identifies the tests as specifically as is done in the text.

39. See T.O.N.G., *supra* note 17, para. 20 at 8.

From these vague tests, it is clear that determining officers had considerable responsibility to evaluate how the professionals performed. While there were many inconsistencies in the awards made in the 63 cases studied, the problem of having non-qualified officials make such a value-laden decision was apparently not one that contributed to the Lord Chancellor's decision to adopt the new system. It is true, however, that determining officers will continue to make a few discretionary judgments under the new system (when, for example, the barrister seeks a "special preparation fee" because the case "involves a very unusual or novel point of law or factual issue," *1996 Regulations*, *supra* note 5, para. 17).

40. See T.O.N.G., *supra* note 17, para. 107 at 35. A problem could also arise when the solicitor sought reimbursement for an expenditure, like hiring an expert, that the barrister had not recommended (in an advice on evidence). In the cases studied, however, no solicitor's expenditure was questioned.

41. See Case No. 17 (1979), DIGEST OF TAXING MASTERS' DECISIONS PART 2: TAXING MASTERS' DECISIONS ON APPEALS BY COUNSEL (1987) (Eng.). Here, the defendant's solicitor's effort was "deficient," forcing the junior to perform work normally undertaken by a solicitor. (Unfortunately, we are not told the facts.) The determining officer refused to compensate the junior for the extra work, concluding that the junior should press the solicitor to transfer part of his payment to the junior. Reversing, the Taxing Master held that the junior should be paid for work reasonably done to advance the defendant's interest. The junior acted reasonably in undertaking the extra work because otherwise he "would not have discharged his duty to the defendant . . ." *Id.* As the junior's fee should be increased, so the Taxing Master thought that the solicitor's should be cut.

being paid for the extra time he needed to digest papers because the junior and solicitor failed in their responsibilities to review them thoroughly.⁴² And a solicitor risked not being paid, or paid only at the clerk's lower rate, for the time needed to serve a defense witness with a summons to testify.⁴³

One of the barristers in the cases studied may have been penalized for performing work he should have let someone else do,⁴⁴ and many solicitors were also penalized. Several senior solicitors were not paid at their hourly rate because a solicitor could have done the work. Solicitors were penalized for assisting the barrister during the trial by being paid at the lower rate of the articulated clerk. While no barrister was docked for having spoken with the defendant too frequently, one solicitor was (case number thirty-nine).⁴⁵ The determining officer was incredulous that this solicitor had had eighteen conversations with the defendant, even though the solicitor had described the defendant as incessantly demanding.⁴⁶ Even so, the solicitor was paid for fourteen of the meetings.

Next, the determining officer decided whether the barrister and solicitor needed to take the time each said he had worked. In theory, such an evaluation seemed appropriate to ensure that slothfulness was not rewarded. In practice, however, the determining officers' evaluation of the time needed—a blend of the time reported, the seriousness of the charge, and the skill demanded of the advocate—often resulted in unpredictable, unfair awards, especially for barristers.⁴⁷ Certain barris-

42. *See id.* Case No. 10 (1978) (documenting that Taxing Master reluctantly compensated the barrister because of his considerable responsibility in preparing the prosecution).

43. *See R. v. Lowe*, Case S15 (1984), *TAXING COMPENDIUM*, *supra* note 36 (finding it proper to serve the summons, rather than to send it by mail, so long as an articulated clerk, and not a solicitor, had done so).

44. Before seeking a leader, a junior made repeated telephone calls to other countries seeking witnesses and searched newspapers and libraries for a composite description the defendant (whose defense was misidentification) said had been published in a newspaper. Once a leader had been chosen, this junior also typed information for him. The determining officer considered the 221 hours this junior took to prepare an "outrage," caused in part by "extracurricular work" the junior should have left for the solicitor, and concluded that 30 hours should have been enough to prepare. The junior's fee had not yet been selected when this file was examined.

45. The numbering scheme is my own, devised to keep track of the cases and to facilitate cross-referencing within this article. Cases are numbered, however, only if mentioned more than once.

46. Even so, the solicitor was paid for 14 of the meetings. This determining officer's observation marked one of the few explanations for the outcome. Docking the solicitor for four of the visits was nonetheless crude in that the determining officer failed to indicate which ones were unnecessary. Like other solicitors in the study, this solicitor had not explained the purpose or result of each meeting.

47. For example, determining officers simplified their task by comparing the preparation times taken by barristers who returned the brief or by barristers who represented co-defendants. While such a comparison made sense, its application often seemed unfair. In one case two adults and a 13-year old were charged with torturing the victim. The two adults each pleaded guilty to kidnapping immediately before the jury was impeached; the juvenile pleaded guilty after the Crown had ended its direct case, and his barrister's application for a directed acquittal had been denied. The outcome for the juvenile seemed unexpectedly generous: he was permitted to plead guilty to false imprisonment and wounding, and his sentence was supervision for a year. The junior representing the juvenile asked for a brief fee of £2500 for 18 hours of preparation, an amount slashed to £600 as the determining officer noted that the other two barristers had taken only eight hours to prepare. (The junior's effective hourly rate was thus a miserly £26, the lowest received by any barrister in the study.) The award was unfairly low because the

ters were paid a surprisingly high effective hourly rate by working less than others had, while others received a lower effective rate for working longer than expected.⁴⁸

As another way of reducing overall costs, barristers could be compensated more handsomely by shortening the trial or eliminating the need for one.⁴⁹ For example, the barrister's basic fee or refreshers were higher when his stipulation eliminating the Crown's need to call witnesses meant that the trial, expected to last, say, five days ended instead in three. Similarly, the basic fee would be higher when a case set for trial ended instead by a guilty plea. Rewarding barristers for saving resources in instances like these posed several potential problems. In the first instance, the barrister may have helped himself while harming the defendant's tactical position.⁵⁰ In the second, the barrister may have manipulated the compensatory process (but without harming the defendant). For example, to receive the higher basic fee when the trial "cracked" (ended by plea, typically on the day of trial), the barrister may have delayed negotiating with the prosecuting barrister or revealing the defendant's desire to plead guilty until the case was listed for trial.

As the barrister could be rewarded for shortening the proceedings, so too could he be punished for lengthening them.⁵¹ The determining officer was authorized to chop the award of a barrister who conducted the defense "unreasonably, so as to [have] incur[red] unjustifiable expense,"⁵² by, for example, cross-examining verbosely or raising inappropriate applications (motions).⁵³ Barristers were probably incensed to be told by a determining officer, not himself an advocate and not even trained in the law,⁵⁴ that their advocacy was prolix. Only one barrister seemed

juvenile was the most culpable of the three defendants, the case went to trial, the judge complemented the junior for his thorough research and able argument, and the other two defendants probably planned to plead guilty, thus removing each defendant's junior's need to continue to prepare.

48. The "effective hourly rate" is my invention, used to compare the differing amounts received by the barristers in this study. It results from dividing the amount received by the number of hours the barrister says he took to prepare. With a case that went to trial, I added five hours to the time the barrister reported he had taken to prepare in calculating the denominator because the brief fee includes the time spent during the trial's first day (five hours).

49. See *Directions for Determining Officers*, *supra* note 12, reg. 3B.4 at 54-55 ("The fee should be determined on the basis of all the circumstances of the individual case taking into account the value of counsel's contribution in shortening the trial.").

50. For examples, see *infra* note 157 and accompanying text.

51. To counter the manipulation just noted, barristers could be penalized for having failed to try to end the case by plea before the trial date. See Case No. 60 (1981), DIGEST OF TAXING MASTERS' DECISIONS PART 2, *supra* note 41. There, the barrister had prepared for a fight because his instructing solicitor had failed to convince his counterpart to accept a guilty plea to a lesser offense. On the day of trial the prosecuting barrister accepted the plea offer that his instructing solicitor had earlier rejected. Because a prosecuting barrister has the authority to override his solicitor's instructions, a defending barrister has the responsibility to speak with him even though his solicitor had failed in his separate attempt to negotiate a guilty plea.

52. Practice Note [1989] 2 All E.R. 604, 607, part 9.1.

53. See Case No. 3 (1976), DIGEST OF TAXING MASTERS' DECISIONS PART 2, *supra* note 41. (stating that judge recommended reducing the barristers' refreshers by two days because of "repetitive cross-examination").

54. While determining officers could unilaterally dock a barrister, they were advised to consult with the judge

to suffer this ignominy, however, and, in her case, deservedly so. This junior represented a defendant charged with robbery; a Queen's Counsel and junior represented the co-defendant charged with murder and robbery. The junior's lengthy, repetitive cross-examinations might have caused the trial to last the twelve days she had estimated it would run if the judge had not ended the trial by directing the jury to acquit.⁵⁵

The determining officer's last inquiry was to judge the seriousness of the case in light of its effect upon the defendant,⁵⁶ and the "skill, labour, specialised knowledge and responsibility" demanded of the barrister and solicitor.⁵⁷ This last test did not require the determining officer to grade the barrister's performance,⁵⁸ but rather to predict, *ex ante*, the skill needed in light of the expected difficulties posed by the representation.⁵⁹

In translating these difficult, subjective tests into a "reasonable remuneration" for the barrister "for the relevant work" he performed, the determining officer could exceed a pre-determined amount only if the representation posed "exceptional circumstances."⁶⁰ By 1996, the year this scheme ended, a Queen's Counsel's pre-determined maximum remuneration for the basic fee was £5400; the junior's was £545.50. For each refresher, a Queen's Counsel's maximum was £330.50; the junior's, £178.25.⁶¹

Because the compensatory scheme employed in the cases studied has now been replaced, there is no reason to evaluate the determining officers' performance in

when the latter had not criticized the barrister, and to permit the barrister to defend his conduct. *See id.*, Case No. 14 (1979) ("[When] the judge has stopped a trial but has not made any observation on the question of cost, a Taxing Officer should be cautious in taking upon himself, without consulting the judge, a decision which reflects upon the competence of counsel."). This power has been deleted under the current graduated fee scheme.

55. The trial judge and the co-defendant's Queen's Counsel both upbraided the junior. In his note to the determining officer, the Queen's Counsel observed that the trial would have lasted longer if he had not waived the Crown's obligation to adduce considerable evidence. This junior's gross award was less than the award of the co-defendant's junior, as were her refreshers (by £10 a day) and effective hourly rate (£45 vs. £61). It is possible, however, that she was not punished for dilatory conduct. The co-defendant's junior's award is a function of his leader's award, and does not reflect his work. Her effective hourly rate was also not much sharply lower than that received by juniors who represented other defendants charged with the same crime.

56. The point was not whether the defendant would be jailed, but whether the outcome might sully "his livelihood, standing or reputation . . ." T.O.N.G., *supra* note 17, para. 8 at 3.

57. *Id.*

58. Thus, the determining officer was not to consider the barrister's technical skill (for example, in cleverly deciding not to object to the admission of hearsay) or the outcome (for example, in securing an unexpected acquittal of a guilty defendant).

59. *See* T.O.N.G., *supra* note 17, para. 78 at 27 (stating that, in judging the solicitor's efforts, the determining officer ought not to "employ hindsight," but instead ask what a "sensible solicitor" would do in light of what the solicitor knew at the time he acted).

60. *Consolidated Regulations*, *supra* note 11, reg. 9(5)(b) at 7.

61. In the files reviewed, few leaders sought or received the maximum for the basic fee but several received more than the maximum for each refresher. Juniors received far more than their maximum for the basic fee whenever they assisted a Queen's Counsel. They almost invariably received half of whatever the Queen's Counsel received as a basic fee and a refresher. When advocating by themselves, almost every junior also received an amount exceeding the maximum.

working with these discretionary tests.⁶² Nonetheless, this description of the complex old system provides the framework for evaluating certain ways in which defendants were represented, and for analyzing the incentives that induced the professionals to act as expected.

III. THE DEFENDANT'S REPRESENTATIVES

In this Part, we examine who represented the defendant and how the professionals worked with each other and the defendant.

A. *Who Represented the Defendant?*

In many of the non-standard cases in this study, the indigent defendant was represented by a bevy of professionals: a leader (almost always a Queen's Counsel), a junior, and all three levels of fee-earners in the solicitor's firm. By contrast, in the United States, even an indigent charged with murder would be represented by only a single lawyer.⁶³ In public defenders' offices, a lawyer may have no more than a year's experience in representing defendants charged with felonies before receiving his first murder case.

In the Crown Court, several factors—the number of professionals representing the defendant, the extent of the barristers' experience as advocates,⁶⁴ the defendant's control in selecting them—should combine to ensure that the advocacy will be stellar and that the defendant will be satisfied with his representatives. Nonetheless, these results come at a high price. In this regard, of most interest were those nine cases in which juniors asked to be led.

Juniors are presumed to be competent to represent defendants charged with any type or number of offenses other than murder. The test to authorize a leader when the crime is other than homicide reflects this presumption, requiring the case to be one of such "exceptional difficulty, gravity or complexity . . . that the interests of justice require . . . the services of two counsel." Moreover, solicitors are presumed to be able to select a junior whose skill matches the complexity of the defendant's needs. Two of the supposed advantages of the English system are the solicitor's skill in selecting an able and experienced barrister, and the barrister's obligation to appear if chosen (the cab-rank rule).

These two presumptions were burst in the nine instances when juniors asked to be led. There are two ways to regard these requests. One view is that the system failed. These barristers effectively confessed that they lacked experience or

62. It is the case, however, that under the new system, determining officers will continue to evaluate the professionals' performance, although their authority has been reduced considerably.

63. In certain states a second lawyer can be appointed when the defendant is charged with a capital offense. See, e.g., 18 U.S.C. § 3005 (1982 & Supp.).

64. Many of the A- and B-level solicitors also have had considerable experience as advocates, albeit in the magistrates' courts (unless they have also qualified to appear, and do appear, as advocates in the Crown Court).

confidence. The instructing solicitor thus flunked in his duty to select an able barrister. The other view is that, while the defendants received more help than expected, they needed it, as evidenced by the junior's request. In those nine cases the solicitors might have hoped that a leader would appear, but could not select one until the junior conceded that his skills were inadequate. Moreover, each request was approved. As skilled advocates themselves, the judges who review these requests might not approve an undeserving one. Yet they probably interpret the test generously to the defendant. After all, to reject the request in effect orders the solicitor to replace the junior who does not want to represent the defendant by himself with a different junior who will, an insult to both the solicitor and the junior.

In turning to the nine cases, solicitors sometimes did fail to find a confident junior. In one case (number nine), for example, the defendant was charged with robbing a bank and escaping from jail. The junior, a barrister for only two years, plaintively asked to be led. He offered no more compelling reasons than that the defendant, if convicted, could be sentenced to prison for fifteen years and that the Crown's witnesses, many of whom knew the defendant, would need to be challenged. Further illustrating that this junior was overwhelmed by the responsibility, the Queen's Counsel reported spending thirty-six hours to prepare, the junior only twelve. The Queen's Counsel thus assumed virtually all responsibility to prepare the case. This request suggests that the solicitor flunked his responsibility to find an able junior.

In several of the other eight cases, by contrast, the junior surely should have been competent to act on his own if the date of his call to the Bar provides a rough proxy for skill and experience. In these cases, the junior's request to be led suggests either a striking admission of personal insecurity or a forfeiture of responsibility.⁶⁵ In number thirty-two, for example, the defendant, charged with rape, claimed that the two teenage victims had instead consented. The only reported difficulty in preparing the defense was the need to compare the victims' testimony during the old-style committal hearing⁶⁶ (seventeen pages of transcript) with each victim's statement to the police (thirty-four pages). Nonetheless, the representation was apparently too complicated or taxing for this junior, called in 1975, who sought a leader because the charges elevated the case, in the junior's view, to one of utmost gravity. Represented by a Queen's Counsel, the defendant

65. In another case, the defendant was charged with kidnapping a woman, once his girlfriend, and sexually abusing her during the four days of her captivity. The brief was returned twice. The first two juniors were each willing to represent the defendant by themselves. The third, called in 1985, recommended that he be led because of the length of the victim's statement (all of 72 pages), because her cross-examination would inevitably be very long, complex, and detailed, and because the defendant faced a long term in prison if convicted. Again, one would expect a junior with this experience to be able to represent the defendant by himself.

66. An old-style committal resembled a preliminary hearing in an American court, where the prosecution called witnesses or adduced physical evidence to establish probable cause. Formerly not often held, the proceeding has now been eliminated.

was acquitted. Was it necessary, though, to add the cost of the leader?⁶⁷ Could this junior possibly not have had sufficient experience to conduct the two-day trial competently by himself? Surely the features of this case did not transform it into one of "exceptional difficulty, gravity or complexity . . ." ⁶⁸

Despite the juniors' requests to be led in these nine cases, the solicitors apparently did not doubt the junior's ability because none asked the junior to recommend a leader (in writing, at least). Of course, the solicitor has no reason to oppose a leader's appearance. Two barristers, one a leader, will presumably provide better representation for the defendant, a boon for a solicitor who wants to bolster his reputation with the defendant and the defendant's friends. Solicitors are also much more likely to receive an uplift in the hourly rate when a Queen's Counsel appears.⁶⁹

Involving a leader in these cases seems a waste of resources. As lawyers must act alone in representing indigent defendants, so experienced juniors do not ordinarily need help. Indeed, one would expect these experienced juniors to have wanted to conduct the defense by themselves. Advocating by himself, a junior could expect to receive a higher basic fee than if he were led.⁷⁰ Indeed, given their date of call, most of these juniors could have led a less experienced junior, thereby becoming entitled to an even higher basic fee.⁷¹ Moreover, by representing the defendant by himself (or by leading another), a junior develops evidence to

67. For brief fees, the Queen's Counsel asked for £4000 and received £3500 (for 32 hours of preparation); the junior asked for £2750 and received £1750 (he did not indicate how long he had prepared). The Queen's Counsel's refreshers were set at £350, the junior's at half that amount. The Queen's Counsel's effective hourly rate of £95.50 was comparatively quite low.

68. In only one (number six) of these nine cases was the need for a Queen's Counsel marginally justifiable. The defendant was charged with four specimen counts of rape involving the same victim. He had different defenses to each count. On two, the culprit's identity was contested. The defendant said he was in prison when one of those two attacks had occurred. Was it wise to expose this otherwise inadmissible conviction and sanction? On the other two, other men might have participated. Was it wise to call them as witnesses if they could be found? The credibility of the victim, 13 at the time of the first alleged attack, also had to be challenged. Addicted to drugs at one point, she had reported the first alleged rape only after having had a miscarriage. No doubt, sagacious judgment was needed to decide what evidence to lead and how to cross-examine the victim. But were these decisions beyond the ken of this junior, called to the Bar in 1979? The Queen's Counsel was called to the Bar in 1962.

69. An uplift was given in nine of 10 cases in which one was sought. In eight of those nine a leader appeared (in seven, a Queen's Counsel; in the other, a junior led another junior). In the one rejected, number 32 (the case involving the two teenage rape victims), the senior solicitor justified his request for an uplift in part because a Queen's Counsel had been appointed. While denying his request, the determining officer did acknowledge that it was proper for a senior solicitor, as he was, to interview the defendant and write the brief. (The time for which he was compensated was chopped, however, from 38 to 26 hours!)

70. This was not always so, as revealed by case number nine, discussed immediately below in the text. The reason was the erratic nature of the amounts received by the Queen's Counsel, to whose award the junior's fee was almost invariably pegged. Under the graduated fee scheme the junior receives only half the Queen's Counsel's fees. With no bonus for representing the defendant by himself, a junior thus now has a larger incentive to ask to be led.

71. A junior who led another was entitled, according to a determining officer, to two-thirds of the amount that a Queen's Counsel would have received if such a barrister had instead been briefed.

convince the Lord Chancellor that he will one day deserve to be promoted to the rank of Queen's Counsel.

Yet, other reasons suggest why even these experienced juniors would prefer to be led. Perhaps they wanted to protect themselves from recrimination in case the defendant, convicted, complained to the solicitor about the representation. Perhaps they worried about upsetting a solicitor who thought that a leader was needed. Perhaps they honestly thought that the defendant deserved to receive even better representation than they could provide in light of the peril he faced. And perhaps they anticipated earning as much, if not more, if they were led.

That last point deserves elaboration. Despite the policy of paying more to a junior who appears by himself than to one who is led, juniors probably chose to peg their fortune to the award the Queen's Counsel would receive. Several cases vividly suggested the junior's economic advantage in being led. In one (number nine), a junior with two years of experience was led by a Queen's Counsel in representing a defendant charged with robbery and escape. A co-defendant, apparently charged with the same offenses, was represented only by a junior who had twenty years of experience. As a basic fee, the junior who was led received £1875 of the £3500 he sought, for twelve hours of preparation.⁷² The junior who acted on his own received only £1750 of £2500, for sixteen hours of preparation, less in gross and much less as an effective hourly rate (£110 to £83) than that earned by the junior who was led.

The file contains no explanation for this disparity. Even if the defense of the Queen's Counsel's defendant was more elaborate,⁷³ this does not explain the radically different payments to each junior. Comparing the responsibility of each, the junior who acted alone shouldered the entire responsibility; the junior who was led probably had very little. The junior who was led surely would have done nothing during the trial's first day, as the Crown unveiled its evidence and his leader (and the junior acting alone) challenged it. The basic fee is based in part on what the barrister did during the trial's first day, a day when the junior who was led would have sat silently. Moreover, the fact that the Queen's Counsel spent three times longer to prepare than did his junior (thirty-six hours to twelve) suggests that he did not trust the junior's work and perhaps even discouraged the junior from continuing to work on the case. This case suggests that it is far better economically for the junior to be led than to act alone, a lesson the Lord Chancellor would not want juniors to absorb.⁷⁴

72. His fee was half that received by his leader, who sought £7000 for 36 hours of preparation and received £3750. The second junior's refreshers, however, were each £5 more than the first junior's (£180 vs. £175 (half of the Queen's Counsel's refreshers of £350)).

73. His name was listed first on the charging document, an indication that the Crown considered him to be the more blameworthy of the two. Also, a Queen's Counsel did appear, even if an experienced junior could have represented the defendant.

74. The same incentive to ask to be led continues under the graduated fee scheme because half the Queen's Counsel's basic fee far exceeds a junior's fee when acting alone in all but one category of offenses.

No matter why a Queen's Counsel represents a defendant, his appearance should mean that the defendant will receive excellent representation, or, at the least, believe that he has. As illustration, one defendant was so impressed by a junior's efforts during an old-style committal hearing that he wanted the junior to continue to represent him in Crown Court. This decision was unusual because the defendant, charged with murder, was entitled to the help of a Queen's Counsel. In Crown Court this junior was initially supported by another junior. Then, this leading junior unexpectedly asked to be led. Was he overwhelmed by the responsibility or by the difficulty of the representation, or did he defer to a leader for some other reason? The search for an answer, when the file contains no clues, becomes more intriguing when we learn, in another file, that this junior had been promoted to the rank of Queen's Counsel.⁷⁵ Whatever prompted the junior to change his mind, this defendant surely was, or should have thought he was, represented by skilled advocates. Interestingly, despite this junior's knowledge of the complicated case,⁷⁶ he logged no more hours (forty) in preparing than did his leader. This suggests that despite the junior's skill and knowledge, the Queen's Counsel apparently believed he had to repeat much of the work already completed by the junior.

The defendant's control in selecting his representatives is yet another reason why he ought to be pleased by the advocacy undertaken on his behalf. In the United States, the indigent cannot select the lawyer, whether she is in private practice or a member of a public defender's office. Instead, the lawyer is chosen for the defendant.⁷⁷ In Crown Court, by contrast, the defendant can select the solicitor who, in turn, can select the barrister. Displeased with the barrister, the defendant can replace him with impunity. He might be distressed by the barrister's recommendation to plead guilty or upset by a tactical decision the barrister intended to make. He might be offended by an aspect of the barrister's personality. For these or other reasons, the defendant can replace the barrister, under the legal aid scheme, without explaining why. Of course, few defendants will themselves select the barrister. Most will not know enough, and rely instead upon the solicitor to make a discerning choice. In the cases examined, a few barristers were replaced, and without explanation. In one, for example, the defendant fired the solicitor. The new solicitor in turn replaced the barrister briefed by the dismissed solicitor with one whom he knew and trusted. The defendant's right to replace those who represent him, and the solicitor's supposed skill in selecting an able barrister are strengths of the English system.

75. Because in deciding which juniors to promote to Queen's Counsel the Lord Chancellor seeks the views of many judges and Queen's Counsel, juniors might also have an incentive to be led in hope of currying favor with leaders who, in time, would praise their advocacy skills. At the least, exposure to various Queen's Counsel will provide more information about the junior's skills for the Lord Chancellor to consider.

76. The prosecution of a co-defendant was severed when he blamed the defendant who in turn denied having had anything to do with the crime. Unused material totaled hundreds of pages.

77. A court administrator or judge will select a private lawyer; public defender's offices have their own methods of selecting the lawyer(s).

B. How Did the Professionals Work with Each Other?

Through case number nine, discussed in the preceding section, we explored the incentives for a junior to ask to be led. That case raises a second question, one involving the working relationship between the junior and the leader. Because the Queen's Counsel took three times longer to prepare than did the junior, their relationship was skewed inappropriately. Instead, a junior should log more hours than the leader as he reviews and analyzes the information gathered by the solicitor, and advises the leader about the evidence and arguments the leader might stress or could safely ignore. The leader identifies and concentrates on the essentials. The solicitor is expected to do the most work, as he assembles the evidence and writes the brief. This "pyramid" is built upon the Lord Chancellor's expectation that a less-expensive fee-earner will perform whatever work he has the skill to do.

The compensation scheme, however, not only encouraged juniors to ask to be led but, once led, to do little work. Because juniors receive half the amount awarded to the Queen's Counsel for the basic fee and each refresher,⁷⁸ they can garner considerable money, sometimes even more than if they had represented the defendant by themselves, for little effort and responsibility. It is therefore important to determine what juniors do before and after the Queen's Counsel enters the case.

Unfortunately, the files contained very little information about the working arrangements between the barristers.⁷⁹ What did (and did not) exist suggests that the pyramid is not always followed. In five cases, the leader worked more hours than did the junior. Even if the junior performed ably while acting alone, once the Queen's Counsel appears, the junior recedes.

That juniors do comparatively less once a leader appears is suggested by two cases where juniors complained to the determining officer about the unexpected responsibility each had to shoulder. In one, a junior defended his request for a basic fee greater than half that received by his Queen's Counsel because the solicitor's difficulty in finding a leader meant that he had to perform more work than usual.⁸⁰ In number six a different junior complained that because the Queen's Counsel was "reluctant to consult with the defendant," he was forced "to make important assessments and value judgements during conferences, normally expected of leading counsel." If these juniors' remarks imply the usual relationship with the Queen's Counsel, juniors do most of their work as they contemplate how to represent the defendant while reviewing the brief and before asking to be led.

78. Because the same amount is paid under the new compensation scheme, the junior's incentive remains the same. See *1996 Regulations*, *supra* note 5, reg. 23(1)(c).

79. One doubts that barristers would reveal much about their working relationship in a conversation. Any criticism of the other barrister would undermine the Bar's claim that barristers provide superior representation.

80. This junior's request was one of the few granted. He received £2500 when the Queen's Counsel, who received £3500, was not retained until 10 days before the trial and missed the trial's first day.

Having concluded that he needs a leader, the junior bows out as the leader assumes control and repeats the junior's earlier effort to plot the defense. Of course, certain leaders and juniors will work differently. For example, the junior might press the Queen's Counsel to implement his ideas, just as a leader might expect considerable and continuing help from the junior and rely upon the junior's tactical assessments. Nonetheless, the juniors' conduct in the cases studied suggests that the junior's continued presence in the case is an expensive appendage that might be eliminated in favor of having the Queen's Counsel work by himself with the solicitor.

The relationship between the leader and the junior will vary according to the working style of the leader and the trust he has in the junior.⁸¹ At a minimum, one would expect them to confer whenever they travel together to meet the defendant in prison. A leader might more readily rely on a junior when they come from the same chambers, or on one with whom he had worked successfully on another brief. The obvious point is that the more the Queen's Counsel appreciates the junior's skills, the more he is likely to delegate responsibility to the junior.

Nonetheless, with but one exception, the files contained no indication that the two had consulted with each other. This absence may be another telling clue that the junior often does little after the leader enters the case. Only one file contained a memorandum penned by the junior to the leader discussing the case. In that memorandum, the junior listed questions for the Queen's Counsel to consider asking an important witness for the Crown, and proposed arguments for him to make to the jury in the final speech. His effort, however, was as mundane as a lawyer might expect to receive from a law student during a summer internship.

Does the existence of only one memorandum warrant inferring that leaders commonly ignore the junior or at least that the junior recedes when the leader enters? Perhaps not. Juniors might have spoken with the leader without recording their recommendations, or might not have sent the memorandum to the determining officer.⁸²

81. Advices on evidence written by two Queen's Counsel suggest the point. One might expect a Queen's Counsel to write any advice recommending something the defendant would not welcome. For example, in one case a Queen's Counsel wrote that diminished capacity, the defense the defendant wanted to mount, did not apply to the charge of attempted murder. On the other hand, one would expect a junior to write the advices to the solicitor recommending obvious steps to advance the defense. Yet, in one unusual case a Queen's Counsel requested that the solicitor seek, among other points, the tapes of interviews with the defendant and with a former suspect, photographs of the defendant taken at arrest, the results of forensic tests and the criminal convictions of the Crown's witnesses. Because the defendant was charged with murder, this Queen's Counsel might have been briefed early enough to assume total control of the preparation. But one wonders whether the Queen's Counsel, who logged 32 hours of preparation, longer than most, might have distrusted the skill of his junior (who did not indicate how long he had spent to prepare).

82. This last possibility is unlikely, however, given the old scheme under which this study's information was collected. Juniors had an incentive to convince the determining officer of their contribution to persuade him to raise the remuneration above half of the Queen's Counsel's fee. If they prepared a memorandum, one would expect them to submit it. If they did not, one might also expect them to summarize what they had told the leader. On the other hand, the junior might recognize that the likelihood of persuading the determining officer was so small that the effort would be wasted.

If, despite the contrary evidence in these files,⁸³ the leader and the junior do cooperate, it is easy to predict that the representation would improve. The same can be said for the work by the solicitors. In many of the cases, solicitors of all three levels participated in representing the defendant. A senior solicitor initially interviewed the defendant and reviewed the evidence received from the Crown Prosecution Service (CPS). Another badgered the CPS to comply with its obligation to disclose, met with the defendant to review the accumulated information, and reported to the senior solicitor who, in time, wrote the brief. One or the other attended any meeting between the barrister and the defendant. An articulated clerk assisted the barrister during the trial. If each spoke with the others about the intricacies of the case and the work to be done, one would expect them better to arm the barrister to advocate effectively. The more often the professionals exchange information and review the Crown's evidence, the better they will understand and anticipate the Crown's case and fashion the defendant's.

On the other hand, the compensation scheme pulls a senior solicitor away from closely overseeing the work of lower level fee-earners on a case. Because the senior solicitor is responsible for every case, he will not necessarily be compensated for discussing a matter with a more junior fee-earner. Educating or helping such a person is usually regarded as part of the solicitor's overhead.⁸⁴ Despite this economic disincentive, curiosity, and a sense of responsibility, might induce senior solicitors to confer with those other fee-earners who assume control of the defense, although the cases examined provide no evidence to support or destroy this assumption.

If the solicitors share their analyses with each other and with the barrister, the barrister's advocacy should improve. The solicitors are the conduit of information for the barrister. The barrister shoulders no responsibility for investigating the accusation or the defense or for marshalling evidence to attack the former or support the latter. The barrister builds his advocacy upon the work done by the

83. If the junior's efforts do largely end when the leader takes control, his contribution seems an expensive luxury. While leaders could thus be encouraged to appear without a junior, under the old scheme such a change might not have reduced the cost because the savings from eliminating the junior's fees would have been offset by higher fees paid to the Queen's Counsel for his longer involvement. Under the graduated fee scheme, by contrast, this proposal might save money because both the Queen's Counsel and junior are each paid a set amount, no matter how long each takes to prepare. The Queen's Counsel would receive no higher fee, then, if he were forced to undertake work ordinarily completed by the junior. Of course, in certain cases the leader is no doubt helped by the junior, and the defendant's representation will thus improve. At the least, a leader would benefit from a junior who took notes on the testimony, a feature permitting the leader to rivet his attention on the witness's demeanor and answers. Under the old scheme, a note-taking junior received a lower fee than a junior ordinarily garnered.

84. See *R. v. Sandhu*, SJ1 (1984), *TAXING COMPENDIUM*, *supra* note 36. In *Sandhu*, a senior solicitor was denied separate payment for supervising the representation of every defendant by, for example, reading the papers in each case and selecting both the fee-earner within his office to perform the work and the barrister and any replacement. The issues for the determining officer were to decide who should have performed the work and whether a more senior person's efforts were justified. Noting that there were "no unqualified rules," the Taxing Master refused even to give examples to explain how determining officers were to decide these two issues.

instructing solicitor and included in the brief and supporting documents. How well the barristers in this study were prepared is discussed in Part IV.

If barristers eschew responsibility to investigate the controversy, do they or does the instructing solicitor fashion the defense? The answer should be (and in theory, is) the solicitor because he is the contractual representative of the defendant. Through interviewing the defendant,⁸⁵ the solicitor will learn the defendant's position, identify the defense, and include both in the brief prepared for the barrister. In turn, the barrister is restricted by the solicitor's instructions in the brief. He accepts the defendant's position even if a more persuasive defense could be mounted by manipulating the defendant to change his story. In light of this model of the role of each, it was thus interesting to observe, in the cases studied, how carefully certain solicitors worded their instructions to the barrister.

Several solicitors strayed from their model by leaving seminal issues of fact unresolved. It was as if the solicitor did not want to cement the defendant to one story, so that the barrister would not be prevented from developing the most effective defense available in light of the various stories the defendant could tell. In one case,⁸⁶ for example, the solicitor reported in the brief that the defendant, charged with murder, was not clear about the sequence of events. The defendant, according to the solicitor, might claim self-defense or accident. These defenses are very different, and the wisdom, and ethics, of choosing one over the other depends upon the story told by the defendant. Moreover, this solicitor also asked the barristers to consider whether to claim that the defendant had acted recklessly rather than intentionally. This choice would also depend upon pinning the defendant to a particular story. This solicitor thus yielded responsibility to the barristers to fashion the defense. The barristers were invited to question the defendant in a way to channel him to tell a story consistent with the most persuasive defense available.⁸⁷

From the defendant's point of view, leaving the choice of the defense to the barrister is advantageous. As the expert in advocating before juries, the barrister ought to know better which defense, in light of the facts available, would sway jurors. Even if that is so, however, such an approach violates the accepted division of authority between solicitors and barristers. Once the barrister begins to shape

85. Because the Crown Prosecution Service will disclose its evidence to the defense, the defendant has an opportunity to review, and to try to refute, the prosecution's contentions in a way that should enable the solicitor thoroughly to develop the defendant's position.

86. In another case, the barrister arguably acted inconsistently with his role. A junior wrote to the solicitor that he wanted to interview the defendant to evaluate inconsistencies in his various stories. The question is whether the barrister or the solicitor should do this. The answer turns on the goal. To protect the barrister's impartiality, the solicitor should iron out the inconsistencies. To improve the defendant's representation, perhaps the barrister should conduct the interview.

87. The approach taken was not apparent from the file, but it did not succeed. The defendant was convicted as charged of murder. The case exposes an important ethical issue that plagues criminal defense lawyers in the United States: May they interview the defendant in a way that informs him or her of the most effective defense so that the now savvy defendant can shape his story to create the best defense?

the defense, he becomes a partisan, no longer the impartial professional whose role is to present, as effectively as possible, information given to him.

A last area involving the professionals' relationship with each other is the nature of the help the barrister receives from the solicitor during the trial. The instructing solicitor (or his designee) is expected to appear at trial, to minister to his client (the defendant), and to assist his representative (the barrister).⁸⁸ Determining officers usually pay the barrister's assistant only at the hourly rate of the lowest fee-earner (the articulated clerk). Thus, were a senior solicitor or solicitor to appear, he would ordinarily be paid at the lower rate of the articulated clerk rather than at his hourly rate. This policy is obviously designed to discourage the more experienced solicitors from assisting the barrister at trial. The disincentive works. In the cases examined, solicitors almost invariably stayed away from the trial and instead sent someone for whom they sought only an articulated clerk's compensation.

Because of this policy, barristers cannot expect to receive much help from the solicitor's designee. The designee's role is to shepherd the witnesses, telephone the solicitor if substantive help is needed, and perhaps act as scribe to record the testimony.⁸⁹ That last role becomes redundant in those non-standard fee cases where the junior can help the leader.

The reasons why the articulated clerk will provide scant help to the barrister are obvious. He will know little about the case. Even in the unlikely event that he participated in interviewing the defendant, he surely would not have written the brief. At best, he would have read the brief and had brief, casual conversations with his seniors who were more intimately involved in preparing the defense. Also, he would not have much, if any,⁹⁰ experience as an advocate. Because of his lack of experience in advocacy and his lack of familiarity with the facts of the case, any recommendations he might offer about, for example, examining a witness could be safely ignored by the barrister.

C. *The Barrister's Relationship with the Defendant*

Shifting to the relationship between the barrister and the defendant, the barrister is expected to take a vastly different approach to guilty pleas than do many lawyers in the United States. The barrister, acting impartially, should pressure the defendant to plead guilty when appropriate. The lawyer's role, by contrast, is much more

88. According to a second new regulation, the judge must decide whether the solicitor's help is warranted. See *The Legal Aid in Criminal and Care Proceedings (General) (Amendment) Regulations* (1997), reg. 54A.

89. The designee could also be expected to report to the solicitor about the trial's progress at the end of each day, a report that might lead the solicitor to speak with the barrister about some advocacy issue.

Only one file contained a clerk's notes. He had dutifully recorded the testimony, but highlighted nothing and written no marginalia about its substance. In a case like this, where the solicitor had completed the brief only the day before the trial was to begin, the junior might have welcomed more help.

90. Indeed, solicitors are accused of sending "office juniors, retired police officers, [or] out of work actors" as the barrister's helper. Mike McConville & Lee Bridges, *Pleading Guilty Whilst Maintaining Innocence*, New L.J., Feb. 5, 1993, at 160.

difficult. On the one hand, even when a guilty plea makes sense, many lawyers are more likely than barristers to respect the defendant's desire to fight.⁹¹ And lawyers will delay asking the defendant whether he will plead guilty until it is tactically advantageous to do so. On the other hand, the gaping imbalance in the United States between the expected sentences following a jury conviction or a guilty plea may also impel the defense lawyer to drive the defendant toward pleading guilty,⁹² as the barrister would do. The lawyer's reason, though, is to limit the sentencing risk rather than to ensure that a guilty defendant concedes his culpability.

One case illustrates the barrister's approach. In an advice on evidence, the junior noted that in his single meeting with the defendant, he had convinced the defendant to plead guilty, as charged, to several robberies.⁹³ The junior asked his instructing solicitor to learn who would appear for the Crown, so that he could discuss the defendant's decision to plead guilty with the opposing barrister. This junior did not indicate that he intended to condition the defendant's plea upon receiving a concession from the Crown.

This junior's advocacy differs strikingly from the lawyer's approach.⁹⁴ Even if the lawyer expects the defendant to plead guilty, she will not press him to admit guilt until she explores with the prosecution what it will give in return for a guilty plea. The lawyer will not extract an admission of guilt from the defendant until the defendant, informed of the prosecution's position, has agreed to plead guilty. The lawyer is cautious for two reasons. She wants to avoid hamstringing her ability to negotiate with the prosecutor.⁹⁵ She wants to protect the integrity of the defendant's not guilty plea so that she is free to defend at a trial if the bargaining collapses. The junior in this case lost both these points. He elicited the defendant's promise to plead guilty without obtaining any concession from the Crown, and, in doing so, lost the freedom opportunistically to choose the most advantageous

91. One Queen's Counsel's conduct resembled that of many lawyers. Charged with attempted murder, the defendant changed his mind and pleaded guilty to a reduced charge on the day the trial was to begin. In a note to the determining officer, the Queen's Counsel said that he had not tried to pressure the defendant to plead guilty. The Queen's Counsel received an effective hourly rate of £136. That amount was surprisingly generous in that, given the facts and the likelihood of conviction, barristers are expected to press the defendant to plead guilty.

92. See, e.g., Randy Bellows, *Notes of a Public Defender*, in *THE SOCIAL RESPONSIBILITIES OF LAWYERS* 69 (Philip B. Heymann & Lance Liebman eds., 1988) (revealing that public defender would do almost anything to convince a defendant to plead guilty if that was in defendant's interest). *Borderkircher v. Hayes*, 434 U.S. 357 (1978), illustrates why defense lawyers like Bellows will pressure the defendant to plead guilty. There, the prosecutor offered to let the defendant, charged with forging an instrument to obtain \$89, punishable by a prison term between two and 10 years, plead guilty if he accepted a five-year term in prison. Rejecting that offer, the defendant, reindicted as a habitual criminal (for two prior convictions), was sentenced to life imprisonment.

By contrast, defendants in Crown Court can count on a sentencing discount of about 30%, no matter when they plead guilty.

93. The junior did not reveal whether before their conversation the defendant had adamantly opposed a guilty plea or, because of the solicitor's advice, was wavering over whether to plead or to fight.

94. For a second case illustrating the difference, see *infra* note 153 and accompanying text.

95. The lawyer might counsel the defendant in this hypothetical fashion. "Let's be clear. You agree to plead guilty if the prosecutor accepts the disposition we have discussed. If he does, you will need to admit your guilt. If he refuses, we go to trial."

defense on the facts if the discussion over a plea fell through. The defendant was not happy with the outcome, and the junior was forced to write a post-plea advice on evidence defensively counseling the defendant against appealing the sentence of concurrent and consecutive terms. This junior's approach exemplifies the less partisan, more objective stance the barrister adopts in representing the defendant than does the lawyer.

How might we understand this junior's conduct? Barristers cannot expect to be paid for speaking with the defendant very often. The barrister does not develop the information in consultation with the defendant but shapes his recommendation in light of the information given to him in the brief. Thus, the barrister cannot delay making a recommendation, in order to act opportunistically once aware of the full force of the Crown's evidence.

Another locus for potential tension arises when the barrister decides an important tactical point without consulting with the defendant or his instructing solicitor. While the barrister expects to decide every tactical issue, his failure to inform (and perhaps to consult) with the defendant can, in the rare instance, provide an unexpected ground of appeal against conviction.⁹⁶ Even if the barrister's unilateral decision is subject to appeal, arrogation could upset a solicitor who expected to be kept better informed about the barrister's thinking.

Unfortunately, the files studied provided few clues about the division of responsibility over tactical issues. The professionals recorded the number of conversations they had with each other or the defendant, because they are paid separately for each, but did not reveal what was said, presumably because of the lawyer-client privilege. The barristers who made the Crown's work easier by, for example, stipulating to the admission of evidence, did inform the determining officer of this effort to shorten the trial, but there was no evidence that they consulted with the solicitor or defendant about this decision, and obtained their permission.

In two cases, however, the defendants rebelled against the juniors' advice to plead guilty. Each junior recognized that continuing to insist that the defendant plead guilty might result in his dismissal. Indeed, in number two, the junior invited the defendant to "sack" him over this disagreement, an invitation the defendant accepted.⁹⁷

While the barristers rarely documented what they told the defendant, in most of the files, the barrister indicated he had spoken with the defendant at least once. Many juniors spoke with the defendant more than once, with four visits being the

96. See *R. v. Irwin* [1987] 1 W.L.R. 902 (stating that, in this "unusual situation," *id.* at 906, where first jury could not reach a decision, and second jury did, convicting defendant when it did not hear alibi evidence first jury had, the junior's failure to discuss his decision not to lead alibi evidence with defendant was reversible error).

97. This junior refused to present the defendant's defense at a trial because his story was logically inconsistent and provided no defense. Moreover, were the case tried, the junior would limit the defense to an attack on the Crown's proof. The inference was that the junior thought the defendant would commit perjury were he to testify. Ironically, the defendant won an acquittal when the complaining witness did not appear for trial.

most. In only one case (number six) might there have been a problem. A junior complained of having been forced to take over unstated responsibilities normally born by a leader when his leader had refused to meet with the defendant. This junior rued the Queen's Counsel's attitude because the latter had rebuilt the defense entirely differently from his two predecessors who had each returned the brief.⁹⁸

Barristers have various incentives to meet with the defendant before the trial. Whereas at one time the system of payment discouraged barristers from meeting with the defendant,⁹⁹ now they are paid separately for a conference.¹⁰⁰ Barristers must also confer to help themselves prepare the defense or to please a solicitor who in turn wants to impress the defendant with his wisdom in selecting the particular barrister.¹⁰¹ Either way, barristers recognize that they serve at the pleasure of the defendant, and can be replaced on a whim. In number two, as indicated above, a junior was fired for his refusal to accommodate the defendant's desire to fight rather than plead guilty. In two other cases, the junior was discharged when the defendant replaced the solicitor, and the new solicitor wanted a barrister from his own stable.

During the trial, barristers did not confer with the defendants, the files suggest, for any substantial periods of time. Because barristers were not compensated separately for short conferences with the defendant or solicitor on a trial day, they had no reason to report having had such a meeting. Long conferences, however, could merit individual compensation. In only one case (number thirty-five) did the barristers seek this special payment, for a ninety-minute meeting.¹⁰² The plausible inference, then, is that barristers do not spend anywhere near the time speaking with the defendants during the trial that lawyers usually do. Solicitors could have played the lawyer's role, of course, relaying information from the barrister and discussing the events of the day's proceeding with the defendant.

In summary, the defendants in this study probably felt pleased by the advocacy they received, given both their control over selecting the barrister and solicitor and

98. Unfortunately for our purposes, the junior did not name the new defense, nor why the leaders had chosen different defenses.

99. See T.O.N.G., *supra* note 17, para. 73 at 24 ("A pre-trial conference or consultation of substance with the client . . . should, if *justified*, be allowed, provided that an endorsement on the brief . . . shows that it was held.") (emphasis added). Solicitors were presumably expected to carry information between the defendant and barrister.

100. See *Consolidated Regulations*, *supra* note 11, reg. 9(4)(c)(i) at 7. The time taken to prepare for the consultation is folded into the brief fee. In the study, barristers sought different amounts for the meeting, with the most extreme being that of a Queen's Counsel who asked for £250 for a two-hour meeting (he got £62). The hourly rates are now clearly identified in the current scheme, with a Queen's Counsel receiving £62.50 per hour and a junior £33.50. See also *1996 Regulations*, *supra* note 5, reg. 21 (Table).

101. One solicitor also told me that he would refuse to brief a barrister who did not visit the defendant. Barristers may therefore accommodate the solicitor's (or defendant's) wishes for one or more meetings to avoid being denied briefs in the future.

102. The real reason the barristers might have been paid is because they persuaded the defendant to let them make certain admissions that shortened the trial.

the number of professionals who represented many of them. Moreover, they should have received skilled advocacy if experience is an accurate gauge. In truth, however, the request by many experienced juniors to be led shakes the assumption that with experience comes skill and confidence, even if the defendant was better represented once a leader appeared. Moreover, pleasing the defendant and providing skilled advocacy have a high price. It seems a luxury to permit a Queen's Counsel to be assisted by both a junior and a solicitor. Too many juniors arguably asked to be led and, once led, contributed less than one would want. Also, barristers did not ignore the defendants until the last moment, as probably happened regularly in standard fee cases, because they did not anticipate the need to return the brief, and were separately compensated for the few conferences held with solicitors and defendants.

IV. HOW PREPARED WERE THE BARRISTERS?

Two goals of this study were to assess whether the barristers were in a position to make informed decisions in representing the defendant¹⁰³ and to evaluate the difficulty and wisdom of those choices. As expected, the files did not contain sufficient information to achieve the second goal. Barristers were not required to enumerate either the difficulties they face or their solutions. Thus, we cannot grade the barristers' tactical thinking or execution of their (or the defendants') choices.

Two assumptions assuage the disappointment in pursuing the second goal. First, barristers should be, on average, skilled oral advocates, given how often they appear in court.¹⁰⁴ Second, any barrister's choices, while not immune from scrutiny, would rarely result in overturning the defendant's conviction, so long as he was in a position to make an informed choice. That, after all, is the constitutional test for effective representation by a lawyer in the United States.¹⁰⁵ There is no reason to expect more from barristers, given that advocacy is packed with instances requiring judgment, and judgments can defensibly differ.

With those two assumptions, the first, more modest goal becomes vital to pursue. Is the barrister sufficiently prepared to utilize his advocacy skills? The key that unlocks most of the answer is the sufficiency of the instructing solicitor's brief. The answer is completed by examining how often and when barristers meet with

103. The decisions would run the gamut, for example, from the basic decision whether to fight or plead guilty, to the more particular, such as fashioning effective cross-examination and pitching the final speech to the jury.

104. For purposes of setting legal aid fees, the Lord Chancellor's Department assumes that barristers appear in court 210 days a year. See *The Senate of the Inns of Court and the Bar*, STUDY OF REMUNERATION OF BARRISTERS CARRYING OUT CRIMINAL LEGAL AID, para. 2.3(a), at 26 (1985).

105. Under the Sixth Amendment to the United States Constitution, the defendant has a right to be represented effectively. U.S. CONST. amend. VI. In *Strickland v. Washington*, however, the Supreme Court held that the defendant, in attacking his conviction on the ground of his lawyer's performance (here, a failure to investigate), must prove both that the lawyer's conduct deviated considerably from how other lawyers would have performed and that, without the lawyer's ineffectiveness, the outcome probably would have been different. 466 U.S. 668, 686 (1984).

the defendant, whether they prepare early enough to understand the issues and to write an advice on evidence that insightfully focuses the solicitor's investigation, and whether the solicitor, directed by the barrister's advice on evidence, finds whatever information the barrister believes is missing from the brief.

In preparing the brief, the solicitor leans heavily on materials produced by the Crown Prosecution Service. The CPS is obligated to disclose the evidence the Crown will introduce during the trial, together with relevant material that it will not use ("unused material").¹⁰⁶

The Crown's obligation to disclose carries benefits for the defense. The defenders learn what the prosecution considers relevant and persuasive, might find a nugget in the unused materials, and can better understand the defendant's position.¹⁰⁷ The defendant is expected to scour the materials received from the Crown, to confirm or deny what each person says, and to comment about the significance of the physical evidence. Moreover, the professionals can help the defendant, himself aided by discovery, to understand and refine his position. Eventually satisfied that he understands the defendant's position, the defending barrister should be effective in challenging the Crown's witnesses.

The defendant's participation in searching for the seams in the prosecution's evidence could be especially important when the chief issue is credibility. In number twenty-four, for example, the defendant was charged with raping a seventeen-year old French woman who testified through an interpreter at the trial. The solicitor's brief contained the defendant's detailed comments on each page of the woman's statements to the police. While weighing the value of these comments is obviously impossible, one assumes that they helped because the defending barrister, on cross-examination, so demolished the plausibility of the woman's story that the judge directed the jury to acquit after she had completed her testimony.

While the Crown Prosecution Service is expected to disclose a wealth of material, defending barristers often seemed wary that the CPS would not fulfill its obligation. Many reminded the solicitor to press the CPS to deliver unused material.¹⁰⁸ On occasion, they even urged the solicitor to seek items, like

106. For a more extended discussion of the Crown's obligation to disclose, see TAGUE, *supra* note 1, at 196-209 (discussing discovery in federal prosecutions in the United States as well).

107. These three benefits are obvious unless one recognizes how much less discovery the defense receives in many jurisdictions in the United States. In a prosecution in a federal court, for example, the defense does not receive a prosecution witness's "statement," a term that is itself defined restrictively, until the witness has completed his direct examination during the trial. The prosecution's obligation to disclose physical evidence is triggered only by a defense request, a request that in turn obligates the defense to disclose whatever similar material it has. The defense in a federal prosecution cannot refine the defendant's position as thoroughly as the solicitor is in a position to do.

108. In one case, a junior asked his solicitor to write to the CPS to learn of its efforts to find other witnesses. The contrast between the help this barrister expected the prosecution to provide and that expected by a defense lawyer from a federal prosecutor in the United States is stark. In a federal prosecution, the discovery rules do not even authorize the defense lawyer to learn the names of the prosecution's witnesses until each is called to testify.

tape-recordings of interviews with the defendant, together with photographs of the defendant, and the results of forensic tests, that one would assume the CPS would automatically produce.¹⁰⁹ Did these barristers worry that the CPS would deliberately withhold information? Or, did they prod the CPS to disclose in hope of receiving the materials in time to prepare thoroughly? Whatever the reason, the number of requests suggests that the system of discovery does not work as smoothly as one might anticipate.

In the brief to the defending barrister, the solicitor includes the information received from the CPS, together with any information obtained through his own investigation. Of these two sources, the more important is the former.

The defenders' investigation is not as thorough as might be expected. First, the solicitor, not the barrister, performs whatever investigation is done. Since the barrister decides whether to call a witness, and then how to question him, a lawyer in the barrister's position would herself prefer to interview every prospective witness. Yet, until recently barristers were forbidden even to be introduced to a witness. Today, they remain forbidden to talk with any witness, other than experts or character witnesses, about a matter of substance. From a lawyer's viewpoint, the risks are that the witness will surprise the barrister with his answers, or that the barrister will overlook a point because the solicitor failed to explore it.

Second, once retained, the solicitor, one might imagine, would race in search of evidence that might undercut the Crown's position or support the defense's. Instead, they are much more timid. While it is too extreme to say that solicitors act passively, simply collecting and organizing the information disclosed by the Crown, they are not sleuths in search of evidence.

If they do investigate, solicitors in publicly-funded cases rarely begin until the defendant has been committed in the magistrates' court for trial in the Crown Court. An economic disincentive explains why. A solicitor risks not being paid for his time because the legal aid authorities considered investigation to be senseless until after the committal. After all, a finding of no case to answer would cancel the solicitor's effort in seeking information to impeach a Crown witness or to build the defendant's position. Yet, delay could harm the defense. Potential defense witnesses might forget an important point, physical evidence could disappear or lose its relevant feature, and the Crown's witnesses might become more doggedly certain of their recollection simply because the case's progress confirmed, for them, that their stories were accurate.

Moreover, the files suggest that solicitors rarely initiate an investigation, no matter when undertaken.¹¹⁰ Instead, they wait until they receive the barrister's advice on evidence recommending some step. In the files studied, various

109. In another instance, the junior pushed the solicitor to get better information from the CPS about the victim's story so that the defense could comply with its disclosure obligation to file a notice of alibi.

110. In only one case reviewed did a solicitor indicate that he was searching for witnesses without being advised to do so.

barristers recommended that the solicitor interview a specific witness, or search for evidence whose potential value to the defense was self-evident. In one murder prosecution, for example,¹¹¹ the defense was diminished responsibility based on the defendant's alcohol and drug abuse. The barrister urged the solicitor to obtain the defendant's prescriptions for drugs and to interview those who knew the defendant to learn how often he was drunk and how he acted when drunk. Because investigation of this sort was obviously needed, what does one make of the solicitor's failure to do it without an advice on evidence? Does it suggest that solicitors are dullards, unable to identify how to develop a defense? Or that they are laggards, uninterested in developing the defense without instruction? Does it suggest that the defense is stitched together only at the last moment, once the barrister finally begins to prepare? Those unflattering possibilities are probably true some of the time. More likely, perhaps, solicitors waited for an advice on evidence to insure being paid by the determining officer for the time and expense.¹¹²

Last, solicitors are reluctant to interview the Crown's witnesses for two reasons.¹¹³ First, they are warned they risk being charged with obstruction if their inquiry is considered an attempt to induce the Crown's witnesses to change position.¹¹⁴ The Law Society's attempt to minimize that risk by noting that witnesses belong to neither side will not allay every solicitor's concerns.¹¹⁵ Second, an economic disincentive exists here too. Solicitors may not be paid for interviewing a Crown witness unless it is necessary to do so.¹¹⁶ The assumption

111. In another case (number 32), the victim said she had been raped; the defendant claimed she had consented. The barrister asked the solicitor to hire an expert to review the medical report of the victim, and to opine whether one would expect to find any damage to the woman's genitals in light of the descriptions of the event given by the woman and by the defendant—another obvious line of investigation.

112. After the committal, the solicitor can undertake investigation or expend money (for example, to hire an expert) without receiving the barrister's recommendation (in an advice on evidence) so long as it is considered reasonable to do so. Having the recommendation, however, reduces the risk of being denied reimbursement. See Para. No. 73 (1981), DIGEST OF TAXING MASTERS' DECISIONS PART 1, *supra* note 16 (reversing a determining officer's refusal to reimburse a solicitor who, on the barrister's advice, hired a psychiatrist to examine the defendant, because "without a compelling reason," a solicitor cannot "be held to have acted unreasonably" by relying on the barrister). The solicitor must nonetheless negotiate with the expert to insure that the latter will accept the rates paid by legal aid. See *id.* Para. No. 69 (1980).

113. In only one case reviewed did a defending solicitor interview the police officer in charge of the investigation, and in only one other did a solicitor interview any of the witnesses whom the CPS indicated it would not call to testify.

114. See SUSAN BLAKE, A PRACTICAL APPROACH TO LEGAL ADVICE AND DRAFTING 297 (3d ed. 1989) (interviewing witnesses already interviewed by the police "should be avoided"); CHRISTOPHER EMMINS, A PRACTICAL APPROACH TO CRIMINAL PROCEDURE, para. 9.3.1., 118 (4th ed. 1988) (commenting, it is "wrong for defence solicitors to speak with a witness" whom the Crown intends to call).

115. See THE LAW SOCIETY, THE PROFESSIONAL CONDUCT OF SOLICITORS, Prin. 12.05, 12/3 (1986) (authorizing solicitors to interview "any witness or prospective witness . . . whether or not that witness has been interviewed or called as a witness by another party").

116. One determining officer made this remark, but did not explain when an interview might be adjudged necessary. The Lord Chancellor's Regulations did not seem to cover the point. Whether a barrister's advice on evidence recommending that a Crown witness be interviewed would satisfy the burden is unclear.

must be that the police are either impartial as they pursue evidence or, if partisan, are nonetheless willing and able to gather any evidence that undermines their conclusion that the defendant is the culprit. By not interviewing the Crown's witnesses, however, the defenders lose the opportunity to learn of matters the witness did not mention in his or her statements to the police, to clarify ambiguities in those statements, and to develop inconsistencies that could be used to impeach the witness's testimony at trial.

The barrister's advice on evidence can encourage the solicitor to undertake work that he might otherwise hesitate to perform for fear of not being compensated. An advice on evidence can benefit the defense in other ways. The process obviously forces the barrister to become involved in representing the defendant. The barrister begins to assume command of organizing the investigation, and thus to consider how to shape the presentation of facts. He must make provisional judgments about whether to recommend a guilty plea or how to present the defense attractively. He can remind the solicitor to discuss with the defendant certain points that the barrister explored in a meeting, but that the defendant rejected or failed to appreciate.

One case illustrates how effectively the barrister can enrich the analysis of the facts. Two brothers (*X* and *Y*) were charged with murdering and robbing a man who had years earlier sexually assaulted *X*. The three had apparently reconciled, and the crimes occurred inside the victim's (*V*'s) apartment. The evidence pointed to *Y* as having stabbed *V* while they fought after *V* had discovered that *Y* had stolen an item. But *X* conceded that, hearing the fight, he took the murder weapon from the kitchen and unintentionally hit *V* with the knife in a glancing blow.

Working his way through the facts in three advices on evidence, *X*'s junior barrister developed how he anticipated the Crown would prove *X* guilty of murder. In each, the junior also listed many questions *X* had to answer satisfactorily in order to counter the Crown's theory.¹¹⁷ Each question obviously had to be asked. From the solicitor's failure to have posed these questions, one might infer that the solicitor had not thought about the defense very carefully, and had interviewed *X* only superficially. Nonetheless, should that happen, the barrister, as this case illustrates, has the opportunity and incentive to direct the solicitor's efforts. In time, the Queen's Counsel also wrote an advice on evidence. In it, he revealed that he too understood the facts by reviewing the information developed in response to the junior's three advices. He asked the solicitor to search for even more evidence. He reviewed the difficult issues he had discussed in conference with *X*: the need for *X* to testify, the choice whether to expose *V*'s sexual assault on *X*, and the

117. For example, he asked why *X* had visited *V* since they were not friends, whether he had a motive to steal (he was unemployed) or to gain revenge for the sexual assault (especially once he heard *Y* and *V* fighting) and why he had waited two days to surrender to the police. He distrusted *X*'s claim that he had not spoken with *Y* during that two-day interval, and wanted to challenge his denial for fear that the Crown could prove that *X* and *Y* had concocted their relatively consistent stories.

possibility that *Y* would need to be challenged if while testifying he strayed from the story the Queen's Counsel expected him to give. He made no comment about the anticipated outcome, thus distancing himself from the junior who in an advice on evidence had cautiously predicted an acquittal on the murder charge. Whether or not the Queen's Counsel was less optimistic than the junior, the result was favorable as *X* pleaded guilty to robbery when *Y* pleaded guilty to manslaughter and robbery.

Despite the possibility that the defending solicitor might fail to investigate as thoroughly as appropriate, no barrister confided to the determining officer that missing information or undeveloped leads had complicated (or harmed) his advocacy. Are barristers resigned to gaps in the defense case, so that they must adroitly rebuild the defense in light of the evidence adduced by the Crown and available to the defense? Or, were the barristers satisfied with the information obtained by the solicitor? While the barristers might have hesitated to criticize the solicitor before the trial ended (for fear of being fired or of not being briefed again), they had no incentive to protect the instructing solicitor when addressing the determining officer about the advocacy problems caused by the solicitor.¹¹⁸ One assumes, then, that they were satisfied with the effort of the solicitor. If they were not, of course, that would be a sorry indictment of the working relationship between solicitors and barristers. One would expect the defendants in these serious cases to have received the best possible representation. If these barristers were not prepared, one would worry even more about the preparation by juniors in less serious cases, when they often receive the brief, too often shoddily prepared, only shortly before the trial date.

Turning from problems with the defending solicitor's search for information, the solicitors whose briefs were included in the files all analyzed the data in a way that would help the barrister to prepare.¹¹⁹ There are formulas for preparing a brief,¹²⁰ and the briefs inspected were as complete as the convention. Moreover, paid by the hour, solicitors have an incentive to prepare thoroughly even though they must recognize that they will not always be paid for every hour they expend.¹²¹

Of course, even though solicitors ought to know what to include in the brief and how handsomely they will be paid for the task, it does not follow that they have the skill insightfully to analyze the evidence and the decisions the barrister must make. Nonetheless, several of the briefs included impressive analyses of the issues. In

118. So long as the barrister's clerk submits the barrister's papers to the determining officer, the barrister's comments would remain confidential.

119. The briefs in the other cases had been returned to the solicitor because the determining officer had decided the awards to pay.

120. See EMMINS, *supra* note 114, Appendix 2, at 465-79 (providing an imaginary brief) (4th ed. 1988). See TAGUE, *supra* note 1, at 42-44.

121. By contrast, the fixed amount paid in what were known as standard fee cases, set without regard to the time taken, encouraged solicitors to cobble together a brief as quickly as possible.

number twenty four, for example, a prosecution for rape, the solicitor meticulously listed nine facts that undercut the plausibility of the complainant's accusation and five that supported the defendant's claim that no sexual contact had occurred. Armed with this perceptive analysis, even a middling barrister might have convinced a jury to acquit, although this junior did even better, by persuading the judge to direct the jury to acquit.

In one murder prosecution, the solicitor in his twelve-page brief explained how problems with the parade (a lineup) might enable the barrister to apply to exclude the eyewitness's identification of the defendant and, if the application were denied, to challenge the eyewitness's testimony itself. The solicitor also offered credible explanations for the existence of otherwise incriminating evidence and noted the missing evidence that one would have expected to have been found if the defendant were guilty. Moreover, by listing everything that he had done to prepare, the solicitor gave the barrister the information the latter needed to suggest additional preparation.

In a third, the solicitor's rich portrayal of the context of the controversy must have helped the barrister enormously. The defendant was charged with having sexually abused several of the children under his care as a babysitter. The controversy, replete with complicated and clashing facts, involved two feuding families. In an attempt to learn whether the complainants' mother had vindictively and falsely accused the defendant, the defendant's solicitor interviewed twelve witnesses (an effort unique among the files studied). In addition, in the brief, the solicitor summarized and evaluated the statements the complainants and their mother had given to the police and their testimony during an old-style committal hearing. He drew the family tree of each, and described the history of their dispute to identify why the charge could have been false and how this defense might be developed. Building evidence of fabrication, the solicitor reviewed how the victims' family had taunted the defendant's family after the arrest. He characterized why the defendant's mother would make a prickly and unruly witness. Anticipating that she would readily transgress the rules of evidence, he asked the Queen's Counsel whether he should carefully review with her how she should testify. The solicitor seems not to have overlooked anything in preparing the brief. Questions, of course, remained for the Queen's Counsel to answer: whether bluntly to accuse the victim of lying or to develop this defense more circuitously, whether to call the defendant as a witness, and so on. While not learning how the Queen's Counsel molded the information in the brief, the solicitor's analysis was so rich that it must have contributed to the trial judge's decision to direct the jury to acquit at the close of the Crown's case.

In summary, because of their experience, barristers ought to be skilled in the technical and dramatic facets of a trial—framing questions, for example, to satisfy evidentiary rules or to elicit testimony persuasively. The critical question, then, becomes how prepared the barrister is to utilize his advocacy prowess. The

possibility exists that the barrister will not be as prepared as a lawyer would want to be. The lawyer who appears in court would herself prefer to talk with the potential witnesses, to evaluate whom to call, and what to ask. Barristers do not do that. The barrister's advocacy may also falter if the solicitor has not performed his function of developing the defense and gathering information. Solicitors do not search for information as aggressively as a competent lawyer does. The solicitor's reticence, however, is offset by the generous discovery received from the Crown and by the direction the solicitor may receive from the barrister's advice on evidence.

V. INCENTIVES CREATED BY THE ECLIPSED SYSTEM OF COMPENSATION IN NON-STANDARD CASES

In federal prosecutions in the United States, no attempt is made through the system of compensation to induce defense lawyers to perform efficiently or effectively. Remuneration is by the hour (ordinarily \$40 per hour for work out of court, \$60 per hour for work in court, with a cap of \$3500).¹²² This simple system encourages the defense lawyer to aim to achieve an outcome as she approaches the cap. She is not rewarded for ending the proceedings quickly or for performing skillfully.

In non-standard cases in Crown Court, by contrast, the compensatory scheme was much more complicated than the approach in federal prosecutions. The reason, perhaps, was that barristers did not expect to be paid much less in representing an indigent than a defendant who agreed to pay the barrister's basic fee set by negotiation. It was hardly a hardship to represent an indigent defendant when the effective hourly rate could soar as high as £535 per hour (the highest amount in the cases in this study). The compensatory scheme, then, was not an imposing obstacle to attracting skilled barristers. The miserly compensatory scheme in the United States, on the other hand, often leaves the defense in the hands of inexperienced or less able lawyers (where public defenders appear rather than private lawyers). With no express cap on the amount a barrister could receive, the Lord Chancellor obviously had reason to prevent the defense costs from spiraling ever higher. Through the review by determining officers, the now-eclipsed system was designed, however crudely, to encourage barristers to prepare early enough to inform the instructing solicitor of gaps in the investigation, to meet with the defendant in advance of trial, not to return the brief, and to advocate effectively and swiftly.

Of course, this compensatory scheme was not the only, and perhaps not even the most important, factor in goading barristers (and solicitors)¹²³ to act as expected.

122. For more information, see *infra* note 169.

123. Solicitors should be encouraged to gather the relevant evidence from the Crown and through investigation, to write a brief evaluating the evidence and identifying the issues the barrister must decide, to minister to the defendant, and to provide thoughtful assistance to the barrister at trial.

Other vital incentives include a personal commitment to provide effective advocacy and the twin desires of nurturing a reputation and developing a flourishing practice by pleasing the solicitor. Nonetheless, the compensatory scheme was crafted to nudge the defendant's representatives to act as desired.¹²⁴

A. *Incentives for Barristers*

1. *The Incentive Not to Return the Brief*

Bound by the laudatory cab-rank rule, a barrister is expected to advocate on behalf of any party who retains him. In theory, then, the indigent defendant has the chance to select the most skilled advocate available, a right denied to his counterpart in the United States. In practice, however, fully fifty percent of the briefs in publicly-funded criminal defense work are returned.¹²⁵ That appalling and astonishing number exposes the failure of the system of scheduling cases and the indifference of the professionals to the cab-rank rule. Unlike cases in the United States, English cases are not continued if the advocate is unavailable. Barristers are thus considered to be fungible with others at the same level of experience.

The return of the brief has unfortunate repercussions. The solicitor must search, often frantically, for a replacement, or accept a substitute chosen by the clerk from the withdrawing barrister's chambers. Defendants must become alarmed and resentful if a replacement recommends a different approach than that adopted by the barrister they had met earlier. Barristers hesitate to meet with the defendant because the effort may be wasted if the brief is returned. More generally, they are reluctant to prepare for fear of not receiving a basic fee if they must return the brief. If delaying preparation serves the barrister's purposes, it may harm the defendant's. The barrister may not detect the solicitor's omissions in time for the solicitor to patch the problem, or might even miss them altogether.

While the Bar's study of returned briefs did not divide the returns between standard and ex post facto cases, it is more likely that defendants in standard fee cases are affected. Puissant economic reasons motivated barristers, and especially juniors, not to return non-standard briefs.

First, the basic fee and refreshers for the junior who acted alone exceeded the equivalent fees in standard fee cases. And the junior's fees typically jumped even higher when a leader assumed control.

124. The current compensatory scheme makes important changes in the system being discussed. A second article will discuss these changes.

125. See *STUDY OF REMUNERATION OF BARRISTERS*, *supra* note 104, Annex B, Table B5, at B7 (stating 50% of the briefs to defend were returned, 67% of those to prosecute). Nothing had changed by the time of the last study conducted earlier in this decade. See MICHAEL ZANDER & PAUL HENDERSON, *CROWN COURT STUDY 54* (1993) (stating 48% of defense briefs returned) and 45 (stating 67% of Crown's). For a discussion of this upsetting phenomenon, see TAGUE, *supra* note 1, at 128-36.

By returning a brief in a non-standard case because busy with a standard one, then, a junior would lose the difference between the fees paid in the two types of cases. More importantly, he risked losing all of the basic fee in the non-standard case.¹²⁶ A barrister is expected to arrange his schedule to appear in serious cases because they are given fixed dates for trial, even if by so doing he will not appear in court for some time.¹²⁷

Thus, while tempted to work continuously, a junior would be foolish to take a short case that began immediately before the non-standard one was scheduled to start. Nor would the junior try to cram a short, standard fee case into the day or two he would wait when no court was free on the day the non-standard case was listed to begin. In either instance, he might need to return the non-standard brief. In both cases, he risked losing all compensation for any preparation in the non-standard case.¹²⁸

Also, the temptation to take a short case while waiting for a court to open or resolve the serious case was dampened by the payment to the barrister of a refresher for each day he waited.¹²⁹ Of course, that amount was less than the basic fee in a standard case (£214). In the cases studied, the juniors' refreshers ranged from £150 to £185 if they appeared by themselves and from £125 to £200 if they were led.¹³⁰ But by pocketing the difference between even the lowest refresher and the standard basic fee, a junior risked the loss of the basic fee in the non-standard case if he had to return its brief.

Last, by returning the brief, juniors risked much more than the loss of the particular basic fee. Displeased by the need to find a replacement, the junior's instructing solicitor might refuse to brief the greedy barrister in the future.

From this analysis it is predictable that briefs would be returned far less often in non-standard cases.¹³¹ The files examined for this study support that prediction. In only five cases was the brief returned, and in each by a junior acting alone. In two

126. A barrister who must return the brief because he is "part heard" elsewhere (he is appearing in a different court) may forfeit any payment for whatever preparation he undertook. See Para. No. 47 (1980), TAXING MASTERS' DECISIONS PART 2, *supra* note 41 (finding that being part-heard in another case is not necessarily a reasonable ground to return a brief; the barrister who returned the brief should bear the brunt of the loss).

127. Because non-standard cases receive a fixed date for trial, the risk that the case will be continued is less than in standard fee cases. This lower risk helps the barrister to schedule his calendar and thus would justify forcing the barrister to absorb the loss of his time when he must return the brief in the non-standard case.

128. The determining officer might deny him compensation for preparation on the ground that he was to blame for needing to return the brief. See *supra* note 126.

129. While the new regulations specifically authorize such a payment, the old ones did not. See 1996 Regulations, *supra* note 5, Schedule 3, reg. 21 (Table). Nonetheless, in the study, one Queen's Counsel and his junior received a refresher for each of the three days they waited for a court to open. In asking the determining officer for those payments, the junior noted that neither he nor the leader could accept other work.

130. The juniors' refreshers were invariably half the Queen's Counsel's.

131. Briefs were also more apt to be returned in standard fee cases because they were often delivered to the solicitor only shortly before the trial date, and were passed from one barrister to another, as allocated by the chambers' clerk. In such an instance, the junior has acquired neither interest in the issues of the case nor sympathy for the defendant.

of those five, the defendant prompted the barrister's withdrawal by sacking his solicitor, who in turn fired the first barrister and replaced him with one from the solicitor's stable of barristers. In two of the remaining three, the return might have unsettled the defendant because the junior got the brief the day or the weekend before the trial was to begin, and did not meet the defendant until the day of trial.

2. *Incentives to Prepare*

a. *Preparing the Brief*

In *R. v. Davies*,¹³² decided in 1985, a Taxing Master disagreed with the Lord Chancellor's policy of refusing to pay a basic fee for preparation even when the barrister was without fault for returning the brief. The Lord Chancellor begrudgingly accepted *Davies*,¹³³ by limiting payment "for abortive preparation properly carried out" to "certain exceptional circumstances."¹³⁴

Despite the hefty increase in cost of paying barristers for preparing a brief they return, the policy could have salutary effects. Barristers will not shirk from preparing for fear that they will need to return the brief. They have no reason to delay reading the papers until they are certain they will not need to return the brief. This will assist them to prepare, and give the solicitor enough time to complete whatever work the barrister advises being done. Like the junior in one case in the study who returned the brief a month before the trial date, they might even return the brief when first aware a conflict will prevent them from appearing, rather than clutching the brief until the need becomes inevitable.

Certain of being paid for preparation, the barrister also has incentive to meet with the defendant days, and perhaps even weeks, before the trial date. An early meeting will help the barrister develop (or verify) the defendant's story, measure his credibility, and prepare him for the recommendation, either to plead guilty or to fight, that will eventually be given. Barristers have often been scandalously tardy in meeting the defendant. One study,¹³⁵ for example, found that of those defendants who intended to plead guilty, ninety-six percent met the barrister for the first time on the day of the plea. Of those who were to go to trial, only nine percent met the barrister more than a day before the trial was to begin; seventy-nine percent

132. TAXING COMPENDIUM, *supra* note 36, C7 (Aug. 1985). Before *Davies*, the barrister who made the final appearance received the entire basic fee, but could divide it, if he chose, with the barrister whom he replaced. While the Lord Chancellor never publicly defended this position, there were three reasons supporting it: the mounting cost of paying multiple basic fees, the inefficiency of duplicating the departing barrister's effort, and the likelihood that the departing barrister returned the brief for a personal reason.

133. While a Taxing Master can reject the Lord Chancellor's position on paying a defending professional, the Lord Chancellor in turn is not bound to follow the Taxing Master's different position.

134. *Directions for Determining Officers*, *supra* note 12, at 54. While this test was left undefined, given that restrictive adjective it is perhaps surprising that in this study's cases, no barrister who returned a brief was denied a brief fee even though very few explained why they returned the brief or how they had contributed to the defense.

135. A.E. BOTTOMS & J.D. McCLEAN, DEFENDANTS IN THE CRIMINAL PROCESS 158 (1976).

met the barrister on the day of trial.¹³⁶ Although that study did not identify whether the defendants' cases were standard or non-standard, all were apparently standard in light of the charges. These barristers' cavalier attitude about meeting the defendant were probably formed by concern over not being paid for preparing a brief they might need to return.

By contrast to that earlier study, most of the barristers who returned the brief in the files reviewed for this study had spoken with the defendant. They must have done so in part because they were aware that, at least in non-standard cases, they would be paid for preparing even a brief they would return, and in part because they receive a separate payment for consulting with the defendant.

If the separate payment for consultation creates an inducement to see the defendant, the barrister can be denied payment if he sees the defendant too frequently. Determining officers no longer question having one pretrial conference with the defendant, especially with one who wants a trial.¹³⁷ But a determining officer warned that he would probably not pay for a second or additional meeting unless the barrister justified the need. Perhaps this policy explains why no barrister met with the defendant more than four times, and only one did that. Nonetheless, this requirement does not pose much of a hurdle, if one case (number thirty-nine) is an example. A junior was paid for each of three meetings even though he simply said that the defendant had been difficult to deal with. While accepting that unenlightening defense by the junior, the determining officer slashed by a third the time (from eighteen and one-half to twelve hours) for which the solicitor was paid for his meetings with this cantankerous defendant.¹³⁸ If barristers are treated as was this solicitor, this policy of limiting the number of visits for which the advocate is compensated could impinge upon the advocacy in certain cases.

Even with a difficult defendant, however, a barrister is not likely to be paid if the purpose of the meeting was to inform the defendant of the progress of preparation, or to gain his confidence—unless, in this last instance, the conference was necessary to convince a wavering defendant to plead guilty. The solicitor, not the barrister, has the responsibility in those two instances.

In standard fee cases, by contrast, the prospect of being paid for preparation and for speaking with the defendant did not induce juniors to do either. Indeed, juniors did not even seek either payment. With their schedules often controlled by the chambers' clerk, juniors returned the brief for personal advance rather than for a reason beyond their control, and thus did not qualify to be paid for preparing. Moreover, the work taken that forced them to return a brief offset any loss caused by the return. This cycle induced juniors to delay preparing and meeting with the

136. More current data, if equivocal, suggest that many barristers now meet with defendants earlier in the process than was true in that 1976 study. For a discussion, see TAGUE, *supra* note 1, at 47-48.

137. Taxing Masters were once more skeptical of the need for the barrister to meet the defendant. See *supra* note 99.

138. For more information about the determining officer's reaction, see *supra* note 46.

defendant until they were rather certain that they will not need to return the brief.¹³⁹ For this reason too, defendants in less serious cases were likely to receive worse representation than those charged with the more serious crimes, a result partially attributable to the compensatory scheme.

Paying for preparation has one more advantage. The practice ought to buttress the barrister's willingness to take or recommend an unpopular course of action. Barristers, for example, are expected to urge a defendant to plead guilty if they think that is proper. But barristers might hesitate to make such a recommendation, or would not make it firmly and bluntly, if they worried about losing all compensation for their work if they were fired by an unhappy defendant. Payment for preparation, however, removes most of the reason for the barrister cautiously to defer to the defendant rather than to insist on what he thinks is best.¹⁴⁰

One feature of barristers' work, however, undermines much of the advantage of paying for preparing a brief that is eventually returned. Such a payment obviously assumes that the departing barrister contributed something that enabled the next barrister to prepare more thoroughly and efficiently. Remarkably, however, from the cases in this study and conversations with barristers, one infers that the replacement will only rarely learn anything directly from the replaced barrister.¹⁴¹ No departing barrister wrote a note to his replacement indicating how he intended to structure the defense. Nor was there any indication that the two had spoken about the defendant's case. If by contrast the departing barristers had analyzed the case for the replacement in the way they did for the determining officer, the replacement would no doubt have been helped. Granted, even with the departing barrister's help, the replacement might need to repeat some aspect of the former's work.¹⁴² But as a leader is helped by the contribution of the junior, so a replacement ought, occasionally at least, to be helped by the departing barrister. It follows that the Lord Chancellor might consider requiring a barrister, as a condition of being paid a basic fee for abortive preparation, to summarize his

139. In the study done for the Bar, London barristers specializing in criminal cases undertook work of some sort on only 23% of the defense briefs and 33% of the Crown's briefs they returned. See *STUDY OF REMUNERATION OF BARRISTERS*, *supra* note 104, Table B5, at B7. The study did not indicate how often barristers sought and received payment for their case preparations. *Id.* at B6.

140. An illustration might be the junior who intended to limit the defense and not allow the defendant to testify if the matter were tried, and who invited the defendant to fire him when the defendant refused to plead guilty. See *supra* note 97.

141. To my surprise, of the barristers asked, none expressed any interest in discussing the case with the barrister who had returned the file. It is possible, of course, that the replacement will learn something from any advice on evidence written by the replaced barrister and from whatever the solicitor offered in response. The solicitor might also relate the discussions he had with the departed barrister.

142. A recent case involving a successful challenge to the barrister's performance suggests that one cannot always trust the work of a barrister who has returned the brief. In *R. v. Clinton*, 2 All E.R. 998 (1993), the replacement apparently relied on the notes taken by the replaced barrister of the tape-recorded interview between the police and the defendant. Unfortunately, the replaced barrister missed several vital points, which in turn were not used by the replacement during the trial.

thoughts about representing the defendant in a note penned to the replacement.¹⁴³

b. Preparing Thoroughly

If being paid a basic fee when the brief is returned encourages barristers to prepare,¹⁴⁴ a different policy of determining officers might dampen the junior's interest in preparing as thoroughly as possible. A junior who was led almost invariably received half of the amount awarded to the Queen's Counsel.¹⁴⁵ The junior's effort, gauged by time or skill, was almost irrelevant. One junior, for example, took twelve hours to prepare and received an effective hourly rate of £110. In a different case, a second junior needed almost three times longer to prepare (thirty-three hours), and yet received an hourly rate of £52. Juniors received more than half only when the difficulty of retaining a Queen's Counsel forced the junior to carry the load until near the trial, or when one Queen's Counsel was replaced by another close to the trial.

Assured of half payment, the junior has an incentive to cede as much responsibility to the Queen's Counsel to prepare the case as the latter will accept. This violates the determining officers' belief that the junior should shoulder the bulk of the preparation, with the Queen's Counsel spending no more than twenty-five percent of the time taken by the junior. This pyramidal relationship did not exist in many of the files studied. Queen's Counsel often logged more hours than the junior, suggesting either that they did not know how to utilize the junior's assistance or did not trust his work. It also suggested that juniors may have shirked their responsibilities once a leader appeared, unless goaded by the leader.

The half payment also tempts juniors to ask for a leader when they could undertake the defense by themselves. To encourage juniors not to ask to be led, they could expect to be paid somewhat more than half the anticipated fee a leader would receive.¹⁴⁶ The difficulty of calculating these hypothetical fees, however,

143. In public defender's offices in the United States, different lawyers often represent the defendant at different stages of the proceedings. Each lawyer records what she learned and did, and what she thinks ought to be done next. The lawyer who tries the case benefits from this accumulation of information and recommendations.

144. Under the new regulations, barristers will be paid less frequently for preparing a brief which they return. Among the reasons, payment is proper only if the barrister undertakes more than eight hours of work and the trial lasts for at least five days or the prosecution's evidence includes more than 150 pages of materials when the defendant pleads guilty. *See 1996 Regulations, supra* note 5, reg. 18.

145. Under the new regulations, the junior will always receive half of the amount "payable to a Queen's Counsel appearing alone," even when led by a junior. *Id.* reg. 23(1)(c). For an instance when a junior's brief fee exceeded half of the Queen's Counsel's, see *supra* note 80 and accompanying text.

146. This was the opinion expressed in conversation by a determining officer. The cases in the study did not establish the existence of such a policy, although the difficulty of predicting the result in the counterfactual instance—the amount the junior would have received if he had not been led, or the reverse—obviously foiled any comparison. Under the new scheme, this incentive is eliminated. A junior receives much less than half of the Queen's Counsel's basic fee when, appearing alone, he represents a defendant charged with any crime other than a Class A offense (limited to murder, manslaughter, causing explosion likely to endanger life, and the like). For example, with Class B offenses (involving kidnapping, armed robbery, and the like) the junior's basic fee when

seemed to prompt juniors, in the cases studied, to bank on receiving more if led. By doing so, they often caused the cost of legal aid to soar.

While designed to reduce the cost of advocacy, the policy of paying a junior more if he acted by himself could create the wrong incentive if, near the trial, the junior recognized he needed help but refused to ask for a leader because he expected his compensation to drop. One case suggests this problem. In number five, the junior wrote a four-page memorandum to the determining officer describing how thoroughly he had prepared the defense in this complicated manslaughter prosecution before ultimately asking to be led. For the basic fee, he sought £3333 (but unfortunately did not indicate how long he had worked). Undoubtedly relying on the junior's extensive preparation, the Queen's Counsel needed only eight hours to prepare. The determining officer regarded the Queen's Counsel's request for £5000 as exorbitant, and halved it. Rather than rewarding the junior for his efforts, however, the determining officer, locked to the Lord Chancellor's policy, gave the junior only £1250, half of the Queen's Counsel's award. Hence, any junior who was aware of the payment in this example would have been reluctant to ask to be led if he expected that his basic fee would have been higher by continuing to represent the defendant by himself. In this second setting, then, the defendant could have been deprived of the Queen's Counsel's skillful advocacy.

3. *Incentives to Resolve the Controversy Quickly*

In the serious cases examined in this study, barristers were not paid by the hour, and there was no cap on the total amount they could receive. The amount was affected, however, by the way in which and the time when the case ended. A barrister garnered the highest gross basic fee when the matter was resolved by trial, less when the defendant pleaded guilty on the day set for trial (a "cracked" trial) and the least when the defendant announced the decision to plead guilty early in the process.¹⁴⁷ Barristers have incentives, then, either to dissuade the defendant from pleading guilty and, once in trial, to drag out the proceedings to receive more refreshers; or, to delay announcing the defendant's intent to plead guilty until the day of trial.

Could these incentives be blunted, so that trials would be avoided by guilty pleas, with defendants announcing the intent to plead guilty early in the process or, if a trial were necessary, the barrister would act expeditiously in challenging the Crown's evidence and presenting the defense? An attempt was made, through the now-defunct compensatory scheme, to achieve the first and third goals.¹⁴⁸ Barris-

representing the defendant by himself is £311.50. If led, his basic fee jumps to £545, half of the Queen's Counsel's basic fee of £1091. See *1996 Regulations*, *supra* note 5, reg. 8 (table).

147. The same division continues under the new regulations. In the cases in the study, no defendant indicated an intent to plead guilty before the day of trial.

148. In the cases studied, barristers were paid the rate for a cracked trial without proving that the defendant chose to plead guilty only on, or shortly before, the date of trial. There are at least two ways to induce defendants

ters were rewarded for avoiding a trial or for shortening its length, in an amount designed roughly to approximate the remuneration they would have received if the case were tried to its anticipated length.

The barrister was entitled to enhanced compensation when through his "efforts and skill" the case ended sooner than expected.¹⁴⁹ This would happen when the case ended because the barrister presented an unexpectedly persuasive legal argument, convinced "a reluctant and obstinately unreasonable defendant" to plead guilty, or helped the prosecuting barrister amend the indictment to enable the defendant to plead guilty in a case that otherwise would be adjourned. When, by contrast, the case was shortened for a reason "entirely unconnected with the efforts or ability of counsel," no extra compensation was warranted.

In seven of the files, barristers invoked the policy. Their explanations were usually concise, and included conceding the defendant's identification, a concession said to have reduced one trial's length from as many as eight days to four; admitting a substantial part of the Crown's evidence in a murder case that ended in a conviction for manslaughter (number thirty-five); and convincing the defendant in one case (number fourteen), and the Crown in a second case (number twenty-two), to accept a guilty plea.

It is unclear whether these barristers were rewarded for their claims to have shortened the proceedings. With many factors contributing to the trial's length, an accurate prediction of the effect of any one decision is difficult. On the other hand, where a trial was avoided by a successful submission or by a guilty plea, time clearly was saved. Thus, one Queen's Counsel received an effective hourly rate (£230) when the judge was persuaded by a defense submission to order an acquittal on the trial's first day. This was handsomely higher than the hourly rate received by many Queen's Counsel who spent much more time preparing and who labored in trial for several days.

The policy was also applied in two cases where the defendants pleaded guilty. The Queen's Counsel who received the highest effective hourly rate, £535, was undoubtedly rewarded when his defendant pleaded guilty, canceling a trial that would have taken at least a week and perhaps longer (number fourteen).¹⁵⁰ By contrast, a different Queen's Counsel received a comparatively paltry hourly rate

to plead guilty before the date of trial. One is to hold a pretrial hearing to pressure him to decide whether to have a trial. The Lord Chancellor implemented such a hearing in 1994. Called the Plea and Directions Hearing, one of its purposes is to learn whether the defendant will plead guilty. The data are insufficient to learn whether this goal has been achieved. See MICHAEL ZANDER, *CASES AND MATERIALS ON THE ENGLISH LEGAL SYSTEM* 266-68 (1996). A second way is to reward a defendant with a greater reduction in his jail sentence the earlier he pleads guilty. Instead, defendants now receive a 30% discount no matter when they plead.

149. *R. v. Bellas*, C9, *TAXING COMPENDIUM*, *supra* note 36 (involving a Taxing Master's decision about a barrister's appeal of an award). The quotations and illustrations in the text come from *Bellas*.

150. The Queen's Counsel had asked for £8000, but received only £4500, a reduction of 44%. The judge noted that the trial would have lasted over a week; the Queen's Counsel estimated it would have lasted two to three weeks.

of £114 even though he too claimed to have saved considerable court time by convincing the Crown to accept a guilty plea after the prosecuting barrister completed his opening statement to the jury (number twenty-two).¹⁵¹ That he did not contribute to the outcome, however, was exposed when his junior innocently wrote in his fee note that the defendant had surprised the defenders by deciding to change his plea.

Rewarding barristers who convince a defendant to plead guilty makes sense in that the barrister otherwise has an incentive to push the defendant to fight at trial. Nonetheless, this incentive, like the one of rewarding the barrister who shortens the trial, can pit the barrister's interest against the defendant's. One of the most troubling cases in the study suggests this concern.

As part of pleading guilty to importing a large quantity of drugs, the defendant agreed to inform on others. In his note to the determining officer, the Queen's Counsel observed that convincing the defendant not to withdraw from this agreement demanded all of his extensive experience. The defendant had to be assured that the judge would exercise leniency because he would help the police.¹⁵² Nonetheless, because of his ingrained suspicious nature, the defendant would have rejected the agreement if given any opportunity, an agreement that would benefit the public by furthering the apprehension of major drug dealers and eliminating the cost of a trial. Noting that his responsibility was enormous, the Queen's Counsel concluded that the satisfactory way that the case was resolved from the public's point of view illustrated the care he had taken in preparing the brief.

Society no doubt did benefit from this outcome. Yet, viewed from one perspective, this Queen's Counsel's defense of his request for enhanced compensation is alarming. He became an adjunct of the police. Rather than justifying his work as advancing the defendant's interest, he worked to convict the defendant and others. Is that the defending barrister's role?

Although this Queen's Counsel's description of his work is unsettling, it is nonetheless probably wrong to infer that he perfidiously impelled an unwilling defendant to plead guilty, so that he and others would be appropriately convicted. This barrister had to persuade different people, first the defendant, then the determining officer. This Queen's Counsel may have described his purpose differently in light of what each audience considered relevant. Even a sophisticated defendant like the one in this case may fret in calculating whether to fight or plead, vacillate over the decision, and then change his choice. He may also welcome the advocate's vigorous reassurance that pleading guilty is the least risky way to resolve the case. Similarly, the advocate may believe that the guilty plea will

151. Although here the Queen's Counsel did not suggest how long the trial would have lasted, it undoubtedly would have taken a significant amount of time because the defendant was charged with 16 specimen counts of sexual assault stretching over several years.

152. Nothing in the file indicated how the defendant benefited from the arrangement.

benefit the defendant more than the defendant appreciates. The risk of conviction at trial, and of a harsher sentence, may cause the advocate to shove a reluctant defendant toward pleading guilty.¹⁵³

Speaking to his second audience, the determining officer, a barrister may characterize his relationship with the defendant quite differently. While expecting the defendant to waiver in making a decision that would control, and surely would affect, his life for years, the advocate might exaggerate his contribution by arguing that only through his invaluable effort was the defendant persuaded to do what he did not want to do.¹⁵⁴ Even so, this Queen's Counsel's report of manipulating the defendant is disturbing. It suggests that the barrister's (or at least this barrister's) stance is even less partisan than expected.

Even if the criticism of this Queen's Counsel can be softened, if not eliminated, his report of his work also suggests that rewarding a barrister for pressuring a "reluctant," even an "obstinately unreasonable" defendant to plead guilty, in Bellas's words, is a questionable incentive. A defendant who understands that enhanced punishment awaits if he is convicted at trial is nonetheless entitled to take the risk. A defendant who admits his guilt but hopes that the prosecution will falter at trial is similarly entitled.¹⁵⁵ This policy threatened to leech some of the loyalty the barrister owed to the lay client. It created an incentive to save resources rather than to represent the defendant as the latter would like.

The same tension existed when the barrister sought enhanced compensation for shortening the trial. Because the barristers never explained the purpose of not mounting evidentiary objections or of stipulating to some point, one cannot tell whether the defendants benefited from the concession.¹⁵⁶ The barristers might have had a tactical goal in mind. By stipulating to a point, for example, a barrister might have prevented a witness from appearing whose vivid testimony would have

153. See generally *supra* note 92 (describing the impetus of defendant's counsel to pressure their client to plead guilty).

154. Ironically, the Queen's Counsel inflated his contribution. The instructing solicitor reported that in conversations with the police the defendant had confessed and implicated others. In his brief, the solicitor told the barristers that the defendant intended to plead guilty. Thus, unless the defendant changed his mind after the solicitor had completed the brief, the Queen's Counsel did not use or need to use his self-proclaimed skills. In the brief, the solicitor did not suggest that the defendant was vacillating over whether to plead guilty. Instead, the solicitor simply encouraged the Queen's Counsel to do his very best on behalf of this defendant in arguing about the sanction so that he would be treated as leniently as he deserved. On the other hand, if the Queen's Counsel did need to unsheathe his power to persuade, he surely achieved his goal swiftly, because he met with the defendant in a single conference lasting 90 minutes. It is more plausible to infer that in that single meeting the Queen's Counsel reviewed both the defendant's reasons for pleading guilty and his understanding of what he would be required to do by the agreement.

155. For an instance when the defendant's insistence on fighting led to an unexpectedly favorable outcome, see *supra* note 120.

156. Perhaps in recognition of the potential conflict, determining officers were authorized to decide whether it was proper for the barrister to have prepared admissions or not to oppose the admission of evidence. See T.O.N.G., *supra* note 17, para. 33 at 13. They were not told how to exercise this judgment, however, one they were probably very reluctant to undertake.

moved the jury much more than the more muted stipulation. Or, the barrister might have obeyed the Bar's directive to "take all reasonable and practicable steps to avoid unnecessary expense or waste of the Court's time,"¹⁵⁷ by, for example, conceding a point he expected the Crown to prove.

In the absence of those or some other explanation,¹⁵⁸ the barrister's decision to shorten the trial could also have had a dark side. The barrister may have been tempted to sacrifice the defendant's interest in order to complete the trial in time to represent a different defendant whose brief he would otherwise need to return.

The incentive to shorten the proceedings by conceding a point the Crown must prove reveals how much more neutral and detached, how much less partisan an advocate the barrister is than the lawyer. A partisan advocate would probe constantly for advantage, as illustrated by the lawyer's behavior. The lawyer exercises evidentiary objections in hope of causing the prosecution's case to unravel. She concedes little, in hope that opportunity will arise as a prosecution witness unexpectedly falters. While continuing to negotiate with the prosecutor after the trial begins, she would not let the defendant plead guilty without some benefit.¹⁵⁹ She recognizes that a defendant may occasionally benefit from fighting a hopeless case. For example, only by listening to the witnesses might the judge be persuaded that the defendant's conduct, although not defensible, was more plausible or sympathetic than apparent from the papers. Were that to happen, the defendant might actually be sentenced less harshly following a jury conviction than a guilty plea.

B. Incentives for Solicitors

The solicitor's incentives, unchanged by the new regulations governing the barrister's compensation, are more obvious than the barrister's. Paid by the hour for every facet of work performed efficiently, he is indifferent, between talking with the defendant for an hour or reviewing the Crown's exhibits for the same time.

157. *The Senate of the Inns of Court and the Bar*, CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES, GENERAL STANDARDS, standard 5.11 (1990).

158. Under the new graduated fee scheme a barrister is not rewarded for shortening the trial. Were inclusion of this feature reconsidered, the barrister should be required to disclose why he did not require the Crown to lead evidence or did not himself call certain witnesses. Demanding this information does not assume that determining officers have the skill accurately to evaluate the barrister's purpose. Rather, required to disclose, the barrister is more likely to have thought carefully about the decision. That result is important because eliminating the trial by a plea or shortening it by concession does not necessarily serve the defendant's interest. Forgoing an evidentiary objection, conceding the defendant's identity, or failing to persuade a despondent defendant to fight rather than plead guilty might harm the defendant.

159. In one case, the defendant unexpectedly announced he had decided to plead guilty as the junior visited him immediately before the trial was to begin. The Queen's Counsel apparently made no effort to bargain with the prosecuting barrister because the defendant pleaded guilty as charged, to murder. Nor is there any indication that the Queen's Counsel tried to convince the defendant that it was senseless to plead guilty because the same sentence—life imprisonment—would be imposed following a guilty verdict or guilty plea.

As the defendant's representative, the solicitor sees him more frequently than does the barrister. Indeed, several defendants were almost smothered with attention, although one stood alone (number thirty-nine), having been visited by his solicitor eighteen times. The more usual number of visits by the solicitor was four or five.¹⁶⁰ These numbers suggest that the solicitors probably took the time to wring from the defendant every fact he could remember and to inform him about every detail of preparation.

The defendant's representation might suffer, however, because of the Lord Chancellor's policy of compensating a professional at his rate only if his skill level was necessary. This policy ensures that if a senior solicitor wants to maximize his return he will participate only when the case merits a Queen's Counsel's attention,¹⁶¹ and, in such a case, to do no more than conduct the initial interview of the defendant and write the brief.

Although in the cases studied several solicitors felt confident to represent by themselves defendants charged with murder, one would expect the defendant's representation to improve were a senior solicitor to represent the defendant throughout the proceedings. With more extensive experience as an advocate in magistrates' court than a solicitor, a senior solicitor would probably direct the investigation more effectively and swiftly than could a solicitor. His insight about the credibility of potential witnesses might also be more penetrating. Experienced in taking testimony, he could suggest more clever ways to challenge a witness or elicit useful information. While one would expect to find these differences, there was nothing in the files to indicate that any solicitor provided inadequate representation.

The Lord Chancellor's policy might deny a defendant the most effective representation in a second way. The barrister is assisted at trial by the solicitor or his designee.¹⁶² This person could be an invaluable resource about the facts or tactics. Yet, the Lord Chancellor has concluded that the barrister needs the help of a person with no more experience than an articled clerk. If a solicitor or senior solicitor were to appear at trial, he would be paid at the lower hourly rate of the articled clerk unless he could justify the need for his purportedly greater skill.¹⁶³

160. Determining officers tolerate many visits because prison staffs are often understaffed and do not permit solicitors to stay as long as they might like. Yet, other solicitors were also punished for lavishing too much time on the defendant. In number 15, an A-level solicitor was paid for only three of five visits to see the imprisoned defendant who was charged with rape and false imprisonment. In number 32, a different senior solicitor's four visits were one too many, even though the case was sufficiently serious to warrant representation by a Queen's Counsel when the defendant was charged with four counts of rape and two of robbery (two victims). How the determining officer decided that a fourth or a fifteenth visit was one too many remains a mystery.

161. Yet, for no apparent reason, one senior solicitor was paid only at the solicitor's lower rate even though the charge was murder and the defendant was represented by a Queen's Counsel and junior.

162. A new rule may mean that this practice changes, and barristers are not invariably accompanied by the solicitor or his assignee. *See supra* note 88.

163. Determining officers, however, did not apply this rule inflexibly. One senior solicitor (number 15) was paid at his hourly rate (£40) for attending counsel on the trial's first day because he expected the defendant would

The barrister thus loses the advice of those who know the case and who are themselves experienced advocates.¹⁶⁴

Several assumptions must undergird this decision to pay the barrister's helper at the articulated clerk's rate. First, barristers will need little assistance from the helper to understand the facts and issues because they will be thoroughly described and evaluated in the brief.¹⁶⁵ Second, at trial, barristers have the autonomy to make tactical decisions to carry out the defendant's instructions in the brief without obtaining permission. Last, barristers are not apt to ask for advice, for doing so would undercut their reputed prowess as advocates. Whether a cause or a result of the Lord Chancellor's rule, barristers are usually assisted by a minion representing the solicitor who has scant, if any, legal training or experience.¹⁶⁶ The assistant's ministerial role is limited to shepherding any defense witnesses and contacting the solicitor if the barrister seeks help.

C. Summary

The compensatory regime that applied to the cases in this study created an incentive for barristers to try to avoid certain problems—returning the brief and failing to prepare—that threaten to undermine the cab-rank rule and the effectiveness of the defendant's representation. Nonetheless, the cost of remunerating barristers who return the brief for preparation that was not delivered to the replacement seems inappropriately high. Representation would have improved if the departing barrister had been required to share his work with the replacement.

Rewarding barristers for abbreviating the proceedings had the benefit of reducing overall cost but carried the potential of skewing the barrister's interest in protecting the defendant. Aware of the reward for shortening the case, barristers could inappropriately surrender a point during trial or muscle a defendant to plead guilty. The one possible instance of this problem, that involving the Queen's Counsel whose defendant pleaded guilty in a major drug prosecution and agreed to provide information about his cohorts, is a sobering reminder of the potential problem created by this incentive, even if the Queen's Counsel in that case in fact performed properly.

Last, compensating the solicitor at his hourly rate only if his skill was needed

be unsettled by a sudden change of advocates, and he wanted to introduce the defendant to the new barrister. He withdrew after the trial's first day, and was replaced by an articulated clerk.

In 1992, a solicitor was paid £32 per hour, and an articulated clerk £19.50 for helping the barrister at trial.

164. The experience for most solicitors would come from representing defendants in the magistrates' courts. However, solicitors can now qualify to advocate in the Crown Court.

165. In the serious cases in this study, this first assumption was probably accurate. The hourly rate induces the solicitor to craft a complete brief; the high brief fee induces the barrister to study it. In standard fee cases, however, juniors might have welcomed assistance from the solicitor to understand a poorly-drafted, incomplete brief, often delivered immediately before the trial date.

166. Solicitors sometimes send helpers who are much less qualified than even an articulated clerk. *See supra* note 90.

threatens to deprive the defendant of the best possible representation. A senior solicitor, for example, should provide marginally better representation than a solicitor. Nonetheless, the barrister's skills arguably offset any marginal loss the defendant in Crown Court might suffer by having a solicitor prepare the case, and an articulated clerk accompany the defendant to court. And even if the compensatory scheme denied the defendant the best possible representation, the number of professionals who help the defendant in serious cases in Crown Court is a luxury when compared to the single lawyer who represents a publicly-funded defendant in the United States.

VI. CONCLUSION

Although never studied before, materials like those submitted by the barristers and solicitors in the cases examined provide a wealthy source to judge aspects of the advocacy received by criminal defendants in publicly-funded, very serious cases in England's Crown Court. Judging the advocacy itself proved impossible because of the limits of the information. But it was possible to ask whether the barristers were in a position to wield their advocacy skills. Did they receive adequate information about the controversy; had they consulted with the defendant; did they have time and the incentive to prepare thoroughly?

The answer to those questions is yes, but tentatively so because information was missing from a number of files. The briefs were prepared well, even if the solicitors had often not investigated the defendant's (and especially the Crown's) position as thoroughly as a lawyer might. The barristers had all spoken with the defendant at least once, and sometimes as many as four times. Many solicitors, in turn, had visited the defendants frequently, and thus had presumably extracted from him as much as he was willing to say. Almost every barrister whose defendant went to trial took at least fifteen hours to prepare, an amount that may seem inadequate until the limits of the barrister's responsibility are recalled—to learn the competing positions, based on information given to him, and to plot how best to achieve the defense that, usually, the solicitor has already developed with the defendant.

A major problem with the English system—the returned brief—rarely arose in these cases. The cause of several returns—the barrister was dismissed by the solicitor—is itself a strength of the English system of representation, enabling the defendant to choose, with the solicitor's help, an appealing barrister. Moreover, barristers did not refrain from preparing for fear they would be forced to return the brief. The compensation received for preparation aborted by the brief's return no doubt encouraged the barristers to prepare. The handsome remuneration barristers expected to receive in non-standard cases probably led them to strive to avoid conflicts that would require them to return the brief.

Problems did appear, however. Junior barristers asked to be led a surprising number of times in non-homicide prosecutions. While a defendant's representation no doubt improves when a Queen's Counsel joins the junior, the request adds

expense, and, troublingly, unnecessary expense if the junior had the skill to represent the defendant or if the solicitor could have selected a more confident, able junior. Moreover, juniors seemed to contribute little to the defense once a leader appeared, suggesting that the leader should replace rather than join the junior.

Rewarding barristers for shortening the proceedings, while seemingly sensible, could have tempted barristers to act with less devotion and vigor than usual. Reluctant defendants could have been goaded to plead guilty, or points could have been surrendered during trial that might have benefited the defense. The fact that those barristers who took the longest time to prepare often received the lowest effective hourly rates might have discouraged barristers in other cases from preparing as thoroughly as they thought was appropriate. The stress on efficiency risked sacrificing effectiveness, although there was no evidence to infer that any barrister failed in his obligation to the defendant.

The reward for shortening the case did not achieve one of its supposed purposes, that of encouraging defendants to announce their decision to plead guilty long before the trial date. Indeed, the higher payment for a cracked trial than for a guilty plea encourages barristers to delay recommending a guilty plea or announcing the defendant's decision to plead guilty until the day of trial. The cracked trial inconveniences the Crown's witnesses, disrupts the Court's schedule, and undoubtedly contributes to the uncertainties of the system of scheduling cases for trial.¹⁶⁷

Another problem involved the unpredictability of many of the determining officers' awards. Only two barristers were paid what they sought. In all other cases the determining officer shaved (or chopped) the request, presumably by finding that the barrister had not acted with sufficient efficiency. While barristers had reason to inflate the time they said they took to prepare, for those who did not, the consequence of rarely being paid what one expects could have created the perverse incentive not to prepare as thoroughly as needed. There was no evidence that this occurred, however.

There are two lessons for lawyers. The first lesson is how comparatively understaffed lawyers are in representing publicly-funded clients. A single lawyer typically represents each defendant, even when the charges are as serious as those lodged in this study's cases. In Crown Court, by contrast, the defendant was often represented by two advocates experienced in trial work (a Queen's Counsel and a junior), and a number of others (the solicitor's team) who prepared the case and assisted at trial. The second lesson is how much less lawyers are paid in publicly-funded cases involving serious crimes. By comparison to the amount a lawyer receives in federal court, the barristers and solicitors were compensated lavishly.

167. This problem will continue under the graduated fee scheme because the basic fee remains higher for cracked trials.

Consider the fees in three cases. In number thirteen, a five-day murder trial, the Queen's Counsel received £7025, the junior £3654, and the solicitor £6154, for a total of £16,833. In number nine, a five-day prosecution for robbery, a junior asked to be led by a Queen's Counsel. The Queen's Counsel received £5596, the junior £2934, and the solicitor £2646, for a total of £11,176. In number one, a five-day prosecution for kidnapping and blackmail, a junior representing one of the two defendants received a total of £2625, the solicitor £3786, for a total of £6411. These amounts were only marginally higher than the payments in most of the cases.

By contrast,¹⁶⁸ a lawyer representing a defendant charged with those same offenses in federal court could receive \$40 per hour for time reasonably taken to prepare and \$60 per hour for court appearances,¹⁶⁹ with a combined maximum of \$3500, ordinarily without regard to how long she labored, in and out of court. To reveal the differences, the combined cost of representing the defendant in case number thirteen was \$25,249 (£1 = \$1.50), number nine was \$16,764, and number one, \$9616.

Granted, the lawyer's three payments (the hourly rates and the total) can each be increased, but only when the judge before whom the lawyer appeared (and thus not a determining officer who might more readily defer to the advocate's explanations) accepts that the matter was sufficiently "extended or complex," so that an "excess payment is necessary to provide fair compensation"¹⁷⁰ The cases suggest that most judges are reluctant to make such a finding.¹⁷¹

There are other marked differences in these two compensatory schemes. In

168. Because of the limits of the data, comparing the effective hourly earnings of the barristers and solicitors in these three examples with those of lawyers working the same number of hours has proven impossible. Nonetheless, a consideration of the basic fees received by the barristers is instructive. In number thirteen the barristers worked a total of 80 hours to earn a combined basic fee of £9250, or an average of £116 per hour. A lawyer would have received \$3400 (70 hours out of court, 10 in court). In number nine the barristers worked 48 hours to earn a combined basic fee of £5625, or £117 on average; a lawyer, \$2120 (38 hours out of court, 10 in court). In number one the junior worked 20 hours to earn a basic fee of £1600; a lawyer, \$900 (15 hours out of court, five in court).

169. *Crim. Justice Act*, 18 U.S.C. § 3006A(d)(1)-(2) (1982 & Supp.). Both hourly rates can be increased to \$75 per hour in particular circuits or districts within a circuit in light of higher living costs. However, by 1995 Congress had provided sufficient money to fund the higher rate in only one-fifth of the districts in the country. See Lincoln Caplan, *Unequal Loyalty*, A.B.A. J., July 1995, at 54, 56.

170. 18 U.S.C. § 3006A(d)(3) (1982 & Supp.). The chief judge of the circuit must also approve any hike in pay. Reluctant to raise the payments, judges can even decide that, in light of her inexperience or lackluster performance, the lawyer should receive an hourly rate below that provided by the statute. See *United States v. Carnevale*, 624 F. Supp. 381, 386-87 (D. R.I. 1985) (deciding lawyer be paid more than \$3500 ceiling, but at an hourly rate of \$28 (of \$40 specified by the statute) for work out of court and \$40 (of \$60 specified) for work in court).

171. A case is complex only if its facts or legal issues are unusual and extended only when it takes longer than the average time to process. See *United States v. Diaz*, 802 F. Supp. 304, 308 (C.D. Ca. 1992). An earlier decision interpreted the "complex" test even more stringently (the case had to require extraordinary investigation or briefs or pose exceedingly difficult legal issues) but interpreted the "extended" test more generously (trial exceeds three, down from five days). See *United States v. Jewett*, 625 F. Supp. 498, 501 (W.D. Miss. 1985).

federal court, the case's difficulty and the lawyer's speed or skill in representing the defendant are all irrelevant. Like solicitors, but unlike barristers, lawyers are paid an hourly rate, but do not receive an uplift as readily as the solicitors in this study did. Court-appointed lawyers should not expect to be compensated as handsomely as they would be if the client had the resources to pay a fee. In representing indigents, then, the lawyer is expected to forgo part of her earning capacity, a continuation of the now-defunct policy of requiring lawyers to provide their services without compensation at a time when defendants were not constitutionally entitled to representation by a lawyer.¹⁷² While barristers might command higher fees from non-publicly-funded defendants, there was no established cap on the amount of the fee awarded by determining officers in non-standard cases, reflecting the different policy of not expecting barristers to regard their representation as partially pro bono.

In Crown Court, the fees skyrocketed only when a Queen's Counsel appeared. When that happened, three, rather than two, fees were paid: the Queen's Counsel's, the junior's, and the solicitor's. Not only is the cost of an extra advocate added, but the effective hourly fees of Queen's Counsel were extravagant by comparison with those of lawyers who represent indigent defendants in federal district court. In this study, even the effective hourly rates received by juniors who appeared by themselves almost always exceeded the maximum hourly rate lawyers could receive (\$75),¹⁷³ but the difference was nowhere near as great as the difference between the Queen's Counsel's and the lawyer's fees.

We see obvious reasons, then, why the cost of the defendant's legal representation was greater in Crown Court than in federal district court.¹⁷⁴ Cost alone would probably sink an attempt to adopt the English approach in an American jurisdiction. Paying these amounts, however, does improve the representation. Because of the cab-rank rule, a barrister cannot refuse to represent any defendant who seeks his help unless, among other reasons, the fee is inadequate. This ground, however, provides no escape for the barrister who would prefer not to represent indigent defendants, because the Bar accepts as sufficient the fees paid in publicly-funded cases. Thus, in theory, the indigent defendant has the same chance to select the most able barrister as does the wealthiest defendant. By contrast, lawyers with the

172. The Supreme Court first held that every indigent charged with any felony in a state court was entitled to a lawyer in 1963. See *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). Until *Gideon*, those lawyers who were willing to accept appointments would usually work for free.

173. Of those cases that went to trial, the highest imputed hourly rate received by a junior for the brief fee was £110 (\$165) (number nine); the lowest, £53 (\$79.50). The amounts received by these juniors far exceed the lower hourly rates for lawyers in those jurisdictions where the normal fees are paid (and in those cases that are neither "extended [n]or complex"). Consider case number three. There, the junior received the same effective hourly rate for the 33 hours he took to prepare as for the five hours of the trial's first day. His total, then, was £2000 (\$3000). For the same time, the lawyer would have received \$1320 (33 hours x \$40 per hour) and \$300 (five hours x \$60 per hour), for a total of \$1620.

174. This imbalance is expected to continue under the new compensatory rules governing barristers' fees because the Lord Chancellor did not intend to lower the amounts paid.

experience of Queen's Counsel and not bound by the cab-rank rule, typically refuse to represent indigent defendants because the pay is too low (unless the case is notorious, and thus highly publicized). Whether, in the absence of the cab-rank rule, able lawyers could be enticed to represent indigents simply by increasing the remuneration to the levels paid in the serious cases in this study, is an intriguing, but untested possibility. The English system of compensation has the undeniable advantage of attracting (indeed requiring) the most able advocates to represent even the indigent criminal defendant.