

Barristers' Selfish Incentives in Counselling Defendants over the Choice of Plea

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LT Barristers; Cracked trials; Guilty pleas; Trials

Defending barristers are accused of extracting guilty pleas from unwilling defendants who prefer to contest guilt at trial.¹ If true, the barrister's motive might be to prevent a defendant from making a choice that will end disastrously, with jury conviction certain and a much harsher sentence to follow. Critics allege, however, that the barrister's motive is not paternalistic, but rather to further his interests even at the defendant's expense.²

No doubt, barristers can benefit from guilty pleas. For example, a barrister might welcome a guilty plea from the next defendant if, having finished a long, gruelling trial, he lacks the stamina for another protracted fight. Or the defendant might be prickly or demanding, or his instructions unpleasant to execute. In these idiosyncratic instances the barrister's and defendant's interests could nonetheless overlap. If it is in the defendant's interest to plead guilty, the barrister does not belie the adversarial spirit by recommending a guilty plea even as he also benefits.

But do barristers betray the defendant's interest, to pursue their own, when their interests are not congruent? Barristers arguably have three pervasive, selfish incentives³: to attract briefs, avoid sanction and maximise remuneration. If in counselling defendants over the choice of plea we assume barristers pursue those three interests, would they prefer guilty pleas or trials? Perhaps surprisingly, all three incline barristers to prefer trials over guilty pleas. If that conclusion is accurate, it follows that when barristers do press defendants to plead guilty they may actually believe it is in the defendant's best interest to avoid the risk of a trial.

¹ See Mike McConville, Jacqueline Hodgson, Lee Bridges and Anita Pavlovic, *Standing Accused* (Clarendon Press, Oxford, 1994), pp.256, 257 ("Determined" to obtain a guilty plea, barristers "manipulated" defendants to that end); John Baldwin and Michael McConville, *Negotiated Justice* (Martin Robinson, 1977), p.46 (defendants claimed barristers gave them "no alternative but to plead guilty," and had "instructed' or 'ordered' or 'forced' . . . [them to do so]").

² *Standing Accused*, fn.1 above, p.188; *Negotiated Justice*, fn.1 above, pp.84–85.

³ Alternatively, a barrister might believe in an altruistic model of representation: he should support the defendant's desires, and work to achieve the defendant's interests, even if such an approach harmed his immediate financial interests, or his future success. While critics allege that barristers do not follow such a model, see *Standing Accused*, fn.1 above, p.130, many of the barristers with whom I have spoken claim to embrace it. Whether truthful or not, if it is in the barristers' self-interest to have trials, the result (more trials) will be the same.

Earlier critiques of barristers' incentives were flawed by the lack of interviews with the subjects.⁴ That lacuna is now partially filled. Over the last few years I have spoken with 37 barristers, running the gamut of experience from Queen's Counsel to pupils, concerning the way they talk with defendants about the choice of plea, and how they understand their incentives.⁵ This study has its limits, too, because the barristers were not chosen at random, and all practised from chambers in London, an area with the lowest rate of cracked trials in England and Wales.⁶ With two assumptions,⁷ however, the barristers' interviewed, given the uniformity in their views,⁸ arguably represent, at the least, the views of the many barristers who practice in the London area.⁹

These barristers were vividly aware of the first and second interests. Calculating the plea that results in the higher remuneration, the third interest, requires an analysis of the Graduated Fee Scheme ("GFS"),¹⁰ the present formula for compensating barristers who represent defendants on legal aid. That undertaking many interviewees had not done. With the barrister's fee historically regarded as an honorarium, one barrister considered it unseemly to make the comparison. Another feared he would be tempted to favour his interests if he learned of the financial advantage of his advice. Others thought the calculation would yield no useful information because their compensation, over time, would be about the same no matter how their defendants pleaded. But others were acutely aware of the economic implications of the choice of plea. Several actually estimated the amounts they expected to earn from a guilty plea or for a trial in representing particular defendants. Because of this division about learning the particulars of this most important selfish consideration, we look at the GFS itself, not at the barristers' understanding of it. Interestingly, while this calculation usually favoured a trial, at the least it disposed barristers to be indifferent over the defendant's choice.

⁴ Barristers refused to co-operate with the authors of *Negotiated Justice*. See *Negotiated Justice*, fn.1 above, p.8. In *Standing Accused*, the focus was on the performance of solicitors, not barristers, but barristers were observed counselling defendants over guilty pleas. Vociferously critical of the barristers' motives in those conferences, the authors apparently did not attempt to speak with the barristers, to learn what the barristers thought they were doing.

⁵ When only two barristers answered an extensive questionnaire (available from me) distributed to all members of the Criminal Bar Association, the Queen's Counsel with whom I conferred about the project invited me to interview the barristers in his chambers. The interviews expanded to include barristers (8 Queen's Counsel, 27 juniors, and 2 pupils) from 4 chambers in London. The clerks of those chambers also shared their views with me, as did one judge, two Crown prosecutors, two senior members of the Crown Prosecution Service ("CPS"), and members of the Bar Council. While not scripted, the interviews covered the topics in the questionnaire.

⁶ A "cracked trial" is a case listed for trial that ends, often on the day of trial, when the defendant pleads guilty. Recently, the lowest rate was in London (44.9%) and the highest in the North Eastern Circuit (68.9%) (and 65.3% in the circuit that includes Birmingham, the city in which the defendants in *Negotiated Justice* had pleaded guilty). See Department of Constitutional Affairs, *Judicial Statistics 2002*, p.71, table 6.8.

⁷ The assumptions are that London solicitors expect barristers to provide a certain sort of representation, as discussed in the part about sanctions below, and that barristers, aware of solicitors' expectations, and in competition for briefs, will try to satisfy those expectations.

⁸ Also, several barristers who read an earlier draft of this paper agreed with my analysis.

⁹ Several interviewees cautioned that barristers practising outside London might not regard the three incentives as they did.

¹⁰ Criminal Defence Service (Funding) Order 2001 (SI 2001/855), as amended by Criminal Defence Service (Funding) (Amendment) Order 2005 (SI 2005/2621).

The three incentives are discussed in sequence. The alternative explanations of barristers' incentives offered by critics are, when germane, woven into each part.

Reputation

One supposes that barristers would value a reputation for prising favourable plea agreements from the Crown. Solicitors might be expected to flock to such a barrister who, in turn, could capitalise upon it to end cases by guilty pleas, thus receiving the highest basic fee, that for cracked trials. Attempting to develop such a reputation, however, seems to yield little advantage because solicitors will be unsure of its value. With limited information,¹¹ solicitors will rarely know whether the defendant who pleaded guilty did benefit from the barrister's supposed reputation for adept negotiation. Solicitors, and their defendants, would thus rely on a reputation that was not deserved or played no role in ending the case.

Burnishing a reputation is important for barristers, but for adversarial prowess rather than for ingenuity in negotiation.¹² The London barristers' aim was to become known for skill at advocacy.¹³ While a barrister might prefer not to try a particular case, a barrister's career soars or founders on his adversarial adroitness rather than on his ability to wheedle attractive bargains from the Crown. Barristers welcome trials.

One aspect of a reputation as a negotiator that American lawyers trade on is of no use to barristers. American lawyers sometimes seek a competitive advantage over other lawyers by claiming to have personal connections with prosecutors that will oil the way for a bargain.¹⁴ Anxious defendants in American courts, beguiled by the hope that the defence lawyer can exploit her purported contacts with the prosecutor, might turn to her for help, and trust that the outcome obtained is favourable as a result. Reliance on personal relationships seems ostensibly more likely among barristers than American lawyers. The number of barristers specialising in crime is small enough, even in London, for them to become acquainted with each other. It is also not uncommon for barristers within the same chambers to oppose each other. To be pitted against a fellow member of chambers is the obvious instance

¹¹ Except in serious cases, solicitors do not often attend the barrister's conference with the defendant on the day of trial. See Peter W. Tague, "Representing Indigents in Serious Criminal Cases in England's Crown Court: the Advocates' Performance and Incentives" (1999) *Am.Crim.L.Rev.* 171 at p.216. Nor do they observe the defending barrister as he discusses with the prosecuting barrister whether and how to resolve the case by guilty plea.

¹² Of the four chief clerks (of chambers) interviewed, only one knew of a barrister who might have attracted defence briefs because of a reputation for negotiation. The area was complex business frauds, and the clerk conceded that he could not explain the basis for this Queen's Counsel's reputation.

¹³ One barrister thought I exaggerated the importance of developing a reputation for adversarial skill. Except in serious cases, he thought solicitors valued "hard work and reliability" more than "super advocacy." But developing at least a minimal proficiency in advocacy is a condition of obtaining work. No clerk will trust a novice junior who continuously bumbles in court, nor will a more experienced junior who manages to eke out a living attract many briefs from solicitors. Of this barrister's illustrations of those two values—"churning out . . . responses [to the solicitor's request] for an advice on evidence", and conferring with and listening to the defendant—the latter two are covered in the next section, on sanctions.

¹⁴ For example, former prosecutors expect to be treated better than would inveterate defenders who have never prosecuted.

when barristers might be tempted to help each other at the expense of the client (whether the defendant or the CPS).

The London barristers, at every level of experience, said they would resist this temptation. The reason is understandable. Relatively inexperienced barristers want trials: they gain training and display their proficiency to two important audiences, their clerks and the solicitors. Moreover, as independent contractors, each barrister competes with every other barrister, even those in his own chambers. Solicitors commonly brief barristers from only a few chambers. In selecting the barrister, the solicitor has incentives to choose the most able advocate. When the solicitor authorises the chambers' clerk to select the barrister, the clerk is inclined to use the same criterion, to ensure that the solicitor is pleased by the clerk's choice (and thus will continue to rely on the clerk to choose a replacement from chambers when a brief is returned). Barristers thus have an incentive not to accommodate competitors even within the same chambers.

Also, even if the barrister briefed to prosecute (the prosecuting barrister) wanted to help the defender, the case might not crack. It is the Crown prosecutor who must approve the agreement,¹⁵ and the defending barrister will not necessarily know him or even try to speak with him.¹⁶ Moreover, even if friendly with the defender, the prosecuting barrister may not be enthusiastic about persuading the CPS to accept a guilty plea. If, for example, the prosecuting barrister is comparatively inexperienced, she has reason to oppose a guilty plea. By trying the case, she can observe her opponent's tactics, so she can counter them when next prosecuting or emulate them when next defending. Lastly, a prosecuting barrister, no matter how willing to help the defender, cannot supply the most valuable benefit promised by the American prosecutor, a favourable sentence. In the United States, the parties can agree on the sentence for a guilty plea.¹⁷ While not required to accept their agreement,¹⁸ the judge will often be swayed, in considering the sanction, by the prosecutor's concurrence that an outcome is appropriate. In the Crown Court, the prosecution is forbidden from offering an opinion about the appropriate sanction.

¹⁵ Conversations with Crown prosecutors and prosecuting barristers. At some indeterminate point after receiving the brief, barristers do have the authority to decide not to proceed or to accept a guilty plea. If the CPS disagrees, however, the barrister is advised to apply for an adjournment. See the General Council of the Bar, *Code of Conduct*, "Standards Applicable to Criminal Cases" (7th edn, 2000), para.11.6(b) and (c); Crown Prosecution Service, *Code for Crown Prosecutors* (2002), paras 4.1–4.10.

¹⁶ No barrister when defending said he had participated in the conversation between the prosecuting barrister and the Crown prosecutor, or bypassed the former to speak directly with the latter. Crown prosecutors confirmed that they would speak only with the prosecuting barrister.

¹⁷ Prosecutors can offer a wide array of benefits to the defendant over the sanction. For example, they can agree that a particular sentence should be imposed, or promise to recommend a particular sentence or to take no position as the defence lawyer urges the judge to impose a lenient one. The difference between the first and the last two is important. If the judge rejects the parties' choice of sentence, the defendant can withdraw his guilty plea. With the others he is stuck with the guilty plea if disappointed (even stunned) by the sanction. See Fed. R. Crim. P 11(c)(1)(B) and (C). For other benefits, see Douglas Guidorizzi, "Should We Really Ban Plea Bargaining?" (1998) 47 Emory L.J. 753 at p.757, fn.17. In the Crown Court as in American jurisdictions, the parties can indirectly limit the judge's discretion by agreeing on the facts of the offence (the "basis of plea").

¹⁸ See Fed. R. Crim. P 11(c)(5).

Barristers thus lack the American lawyer's reason for seeking the potentially misleading reputation for achieving favourable plea agreements.¹⁹ The defendant in the United States does not have a solicitor to judge the lawyers' different reputations and the sort of skills needed for the defence. The defendant in the United States, then, might be misled about what the lawyer can deliver. The solicitor can protect the defendant in the Crown Court from this mistake. As an advocate, the solicitor knows that successful negotiations in criminal cases result from adversarial skill. A barrister known for exploiting at trial the weaknesses in the Crown's case is more apt to persuade the prosecuting barrister to dispose of the case by bargain. Because in most criminal cases there are so few issues to negotiate,²⁰ it is the prosecuting barrister's realisation that a trial will result in the outcome the defender seeks that induces her to agree that a negotiated outcome is proper.²¹

Also, because of the cab-rank rule, the CPS draws its barrister from the same pool as does the defending solicitor, and because it has an equal incentive to brief the best barrister available, the defending solicitor recognises that, on average, the barristers will be about of equal talent. The prosecuting barrister will not be intimidated to try the case against the defender. Nor, because paid by the brief rather than on salary, will she need to resolve cases by guilty pleas to escape a crushing caseload. The defending solicitor thus has reason to hire the best advocate, in case the matter must be tried.

Solicitors themselves often attract defendants by promising to fight for them. A solicitor whose clients plead guilty, barristers observed, might be regarded as being in the pocket of the police and not to be trusted. Even if excessively optimistic about a particular trial's outcome, solicitors commonly do not want the barrister to dampen the defendant's enthusiasm for trial.²² After all, the solicitor could himself have negotiated a guilty plea in the magistrates' court, at least in either-way cases, or persuaded the defendant to plead guilty, under the novice barrister's care, at the Plea and Case Management Hearing ("PCMH"). Indeed, a solicitor who has buoyed the defendant's resolve to fight might be embarrassed if the barrister recommended a guilty plea at their first conference.

Yet even a barrister with a reputation for adversarial skill, so some critics contend,²³ might pressure defendants to plead guilty to protect that reputation. This might occur, it is said, when a barrister is embarrassed to try a case because he is not prepared or because there is no defence. Neither claim seems likely.

Granted, no litigator wishes to appear inept during a trial. Even if the courtroom did not overflow with solicitors, the barrister's bumbling performance before the jury could imperil his reputation among judges and his fellow barristers.

¹⁹ The American defence lawyer's claim is misleading because, unless the prosecutor betrays her obligations, personal relations are unlikely to achieve much more than the agreement any lawyer would receive.

²⁰ The range of negotiation in Crown Court seems standardised, too. A defendant charged with s.18 will be permitted to plead guilty to s.20, but not to a s.47 assault.

²¹ Because (or so long as) barristers are not partisan when prosecuting, they are apt to accept the defending barrister's observations about the weaknesses of the Crown's case.

²² That said, solicitors can safely feign support for the defendant's unrealistic expectations of an acquittal in anticipation that the barrister's detached, candid assessment of a trial's prospects will douse the defendant's desire for one.

²³ See Frank Belloni and Jacqueline Hodgson, *Criminal Justice* (St Martin's Press, 2000), p.156; Andrew Sanders and Richard Young, *Criminal Justice* (Butterworths, 1994), p.343.

But a barrister's lack of preparation is no reason to urge a guilty plea.²⁴ If the reason was the inadequacy of the instructing solicitor's investigation,²⁵ that solicitor at least would not blame the barrister for failing to persuade the jury to acquit. Barristers, moreover, are inured to work with what they receive in the brief, no matter how inadequate. They tout their ability to prepare on short notice, the night before or even while travelling to the court.²⁶ They have the Crown's evidence, after all, and that is itself enough to launch an attack on the prosecution's allegations even if the defence investigation is incomplete. And they could always resort to formulaic questioning and arguments that would be sufficient to hide a lack of exhaustive knowledge of the brief's finer points.²⁷

Even if the defence is risible, there is no reason for the barrister, to protect his adversarial reputation, to urge the defendant to plead guilty. Advocates must learn how to argue hopeless cases. They do not feel abashed by contending only that the prosecution has failed to meet its burden of proof.²⁸ It is not the barrister, but the defendant, who fails to provide a plausible alternative to the Crown's version of the controversy. Barristers may flinch at putting to a Crown witness a spurious interpretation of his evidence, but they are required to confront the witness with the defendant's version.²⁹ In this sense a mouthpiece, they are not responsible for the defendant's fanciful contentions about the evidence.

Last, barristers are not apt to recommend guilty pleas to avoid the embarrassment of fumbling at trial with a case that is too difficult for them. Barristers will not have briefs that much exceed their experience and apparent talent. Solicitors with a complex case have reasons to select a barrister of sufficient skill. If the junior chosen is unsure whether he can defend adequately, he can ask to be led by a Queen's Counsel or more experienced junior. Nor will inexperienced barristers who rely on the chambers' clerk be given briefs that far exceed their ability. The clerk wants to provide opportunities for young barristers to expand their skills by assigning briefs of ever greater difficulty. But the clerk also recognises the repercussions of irritating a solicitor by giving a brief to a barrister who does not do the job adequately. The clerk, then, has reason not to assign a brief to a young barrister who might be overwhelmed by its difficulties.

²⁴ Barristers sometimes recommend a guilty plea after no more than a hasty review of a returned brief. Is this evidence, as critics allege, that they "look for an easy way out by persuading the client to plead guilty"? Belloni and Hodgson, fn.23 above, p.157. The more likely interpretation is that these barristers, though curt in dealing with defendants, know better than the optimistic solicitor the defendant's chances at trial. It takes little time for an experienced litigator to assess the likelihood of conviction.

²⁵ See Peter W. Tague, *Effective Advocacy for the Criminal Defendant: the Barrister vs. the Lawyer* (William S. Hein, 1996), pp.197–204.

²⁶ Barristers said they lacked the time to prepare only 7% of defence briefs received the day before the hearing, and 5% of prosecution briefs. See Michael Zander and Paul Henderson, *Crown Court Study* (HMSO, London, 1993), pp.30–31.

²⁷ Litigators devise workable formulae for discussing recurring issues (like the burden of proof). Moreover, it does not take much experience to learn how to cross-examine many types of witnesses effectively.

²⁸ Indeed, one barrister spoke of his pleasure in defending those who admit guilt to him. Not curtailed by such a defendant's instructions about his conduct or state of mind, the barrister was free to attack the Crown's case wherever he chose, so long as he did not imply that the defendant was innocent.

²⁹ See Keith Evans, *Language of Advocacy* (Blackstone Press, 1995), pp.33–37.

Sanctions

The London barristers expected to be sanctioned—by denied briefs—if a solicitor caught them sacrificing the solicitor's client, by inducing him to plead guilty, in order not to return a brief from a different solicitor. But they were also concerned about being sanctioned even for recommending a guilty plea they thought was in the defendant's interest. That concern pits the barrister's own interests against his obligation to advise the defendant about the plea, and in "strong terms" if appropriate.³⁰

The relationship between barrister and solicitor, in London at least, differs from what it appears to have been in Birmingham in the early 1970s as described in *Negotiated Justice*. In that study the barristers whose behavior was criticised acted with impunity: they were briefed repeatedly by the same solicitors, even as the solicitors' defendants apparently seethed with discontent at the barristers' behaviour. By contrast, the London barristers recognised they risked being sanctioned in several ways over their counsel concerning the choice of plea.

They did not worry about being sued for malpractice by defendants disgruntled over their discussion of the plea.³¹ Nor were they concerned about being accused of wrongly pressuring a defendant who sought to withdraw his guilty plea or overturn it on appeal.³²

The London barristers were nonetheless wary of the defendant's reaction to their advice about guilty pleas,³³ and of the solicitor's response to the defendant's reaction. They did not want to be fired by the defendant, denied briefs by the solicitor in the future or sanctioned by the Bar Council—and they recognised that these consequences could result.

Above all, the barristers were concerned that a defendant dismayed by their behaviour would complain to the Bar Council. While the risk here of being found to have acted inappropriately is very small, one barrister said she was

³⁰ See "Standards Applicable to Criminal Cases", fn.15 above, para.12.4. Barristers agree they should explain the potential benefit of a guilty plea (the sentencing discount) even to a defendant who insists on a trial. But, worried about being sanctioned for recommending a guilty plea, barristers might interpret the standard's vague admonition (to provide "strong advice" if necessary) to apply rarely, as they take a neutral stance about the wisdom of a guilty plea or trial.

³¹ Although barristers have lost immunity from malpractice lawsuits, see *Arthur JS Hall & Co v Simons* [2000] 3 All E.R. 673, HL, their risk of being sued successfully is quite small. A criminal defendant will probably need to have his conviction reversed as a condition of suing; otherwise, the malpractice suit might be dismissed as a collateral challenge to the conviction. See *Secretary of State for Trade and Industry v Birstow* [2003] 3 W.L.R. 841; *So Masundaram v M Julius Melchior & Co* [1988] 1 W.L.R. 1394 (civil law suit against solicitors for allegedly pressuring defendant to plead guilty was dismissed as a collateral attack on criminal conviction).

³² No barrister could recall a defendant making such an allegation. If one did, he would face a daunting challenge in establishing that the barrister acted ineffectively in advising a guilty plea. See Peter W. Tague, "Faulty Adversarial Performance by Criminal Defenders" (2001) 12 K.C.L.J. 137.

³³ Barristers are especially careful when dealing with a defendant who claims to be innocent but nonetheless wants to plead guilty. To protect themselves from a charge of having pressured such a defendant, they ask the defendant to endorse a statement on the brief indicating he rejected the barrister's advice not to plead guilty. See "Standards Applicable to Criminal Cases", fn.15 above, para.12.5.3(c).

“petrified” of being accused of pressurising guilty pleas. If a barrister’s personal circumstances provided any corroboration of the defendant’s claim, in this barrister’s view a professional inquiry could result, causing the barrister, at the minimum, embarrassment.³⁴

The barristers also recognised they could be fired if the defendant feared that, given their recommendation to plead guilty, they would not advocate effectively if the defendant insisted on a trial. Barristers accordingly adjusted their behaviour by trying to learn whether the CPS would accept a particular resolution of the case before asking the defendant about pleading guilty. It was senseless to risk upsetting the defendant by broaching the topic with him if the CPS would not accept the guilty plea the barrister thought was beneficial. Moreover, the terms eventually rejected by the CPS could preclude the barrister from defending in a way inconsistent with the defendant’s acceptance of them.

More important than the loss of a particular brief, the barristers were aware that a defendant’s complaint to the solicitor of being bullied to plead guilty could jeopardise their relationship with the solicitor. Solicitors attract business by building a reputation of satisfying clients. Their service includes assurances that the barrister will perform ably and not treat defendants imperiously. Because they themselves do not oversee barristers very closely, they must trust that the barrister will not rile the defendant. They do not want the burden of mollifying a defendant upset by the barrister’s discussion of a guilty plea.

Even if the defendant was not angered by the barrister’s conduct that (he said) induced him to plead guilty, the solicitor might be. Guilty pleas could undermine the solicitor’s effort to create, or to protect, a reputation of aggressively contesting accusations. Or the barrister’s bleak evaluation of the defendant’s prospects at trial could make the solicitor look foolish in light of his much more optimistic view.

Solicitors confirmed that if they or the defendant were upset by the barrister’s advice over plea they might try to embarrass an inexperienced barrister to change his behaviour by complaining to his head of chambers, or punish an experienced one by not briefing him in the future. Aware that loss of a solicitor’s business was possible, the London barristers foreswore acting as the barristers in *Negotiated Justice* were said to have done. Instead, they would try to treat defendants with respect, and not dismiss their stories peremptorily nor manipulate them to plead guilty. Indeed, an observer might say their attitude bordered on being too accommodating because they would go to trial if the defendant offered any resistance to their advice about pleading guilty.³⁵

To avoid being sanctioned by solicitors, barristers have an incentive, then, not to pressure defendants to plead guilty. But might it be true that barristers have a conflicting incentive to induce guilty pleas to avoid being sanctioned by the judge

³⁴ While acknowledging that defendants have complained about the barrister’s behaviour in counselling guilty pleas, the Bar’s administrator of ethics matters could recall no instance when a barrister was found to have acted improperly.

³⁵ As support, one barrister complained that London barristers were forfeiting their role of providing independent advice, and instead were slavishly following the “strict lines laid down by the solicitor”, even when the solicitor’s choice was not necessarily in the defendant’s interest. He was especially concerned that prosecuting barristers were hewing too closely to the CPS’s instructions, particularly when Crown prosecutors insisted on a trial if the defendant would not plead guilty as charged.

or prosecuting barrister? Critics say yes,³⁶ adopting a thesis originally offered to explain the behaviour of criminal defence lawyers in the United States.³⁷

Not particularly apt in describing the incentives of criminal defence lawyers in the United States,³⁸ this thesis is wholly inaccurate as a description of barristers' motives. When defending, barristers cannot manoeuvre tactically, as can American lawyers, to increase the cost of prosecution, and thus induce the Crown to accept a guilty plea.³⁹ Moreover, prosecuting barristers lack the arsenal of ways to punish a defender who does not persuade the defendant to plead guilty.⁴⁰ Nor is it in the interest of prosecuting barristers to sanction a defending barrister. Because of the cab-rank rule, the barristers' roles may change the next time they face each other: the prosecutor refrains from punishing the defender to avoid being sanctioned herself when she defends.⁴¹

Compensation

Having developed a reputation for adversarial prowess, and confident of avoiding sanction, a barrister might press a defendant to plead guilty in expectation of earning more by ending the case in that way than by trial. Were such a barrister to study the GFS,⁴² however, he would conclude that he will usually earn more by trying the case.

³⁶ See *Negotiated Justice*, fn.1 above, p.111.

³⁷ See Abraham S. Blumberg, "The Practice of Law as a Confidence Game: Organizational Co-optation of a Profession" (1967) 1 *Law and Soc. Rev.* 15. Blumberg's alternative claim that defence lawyers co-operate with prosecutors and judges to induce guilty pleas also inaptly describes the barristers' incentives. As explained in the section involving reputation, barristers, as independent contractors, have reason to distinguish themselves as advocates, to attract briefs.

³⁸ As an example, American judges can pressure only those lawyers whom they select to represent an indigent defendant. Thus, public defenders and retained lawyers are free of this pressure. Crown Court judges have no similar sway over barristers who are instead selected by solicitors.

³⁹ As an example, American lawyers try to manipulate the calendar to postpone the case in the hope that the prosecution will lose interest. Such a manoeuvre is much less likely to succeed in the Crown Court because the barrister, if occupied in another court, will return the brief, and the case will be tried with a different barrister defending.

⁴⁰ With its disclosure obligation set, for example, the Crown cannot deny informal discovery to a barrister who does not seek guilty pleas, as can an American prosecutor whose disclosure obligation is much more niggardly.

⁴¹ Blumberg's thesis is so inapplicable as a description of barristers' incentives that one of its proponents (Michael McConville) now rejects its fit. See *Standing Accused*, fn.1 above, pp.186–188 (confining the discussion, however, to solicitors in magistrates' court). Nonetheless, others do embrace it. See Sanders and Young, fn.23 above, p.315.

⁴² In 2005 the Bar's simmering discontent over the failure to increase the size of fees since the GFS was introduced in 1997 threatened to erupt into a strike by barristers unless the fees were increased. Although at the time of writing the controversy has not been resolved, the Department of Constitutional Affairs ("DCA") has endorsed the revision in fees proposed by Lord Carter of Coles, set for adoption in April 2007. See Department of Constitutional Affairs, *Legal Aid: a Sustainable Future* (July 2006); Lord Carter's Review of Legal Aid Procurement, *Legal Aid: a Market-based Approach to Reform* (July 2006). While assured by a member of the DCA that the revised fees would not alter the barristers' incentives, it is not clear that that is so, as suggested by an example of how the fees will change. See fn.57 below. For a consideration of barristers' financial incentives under the payment regime replaced by the GFS, see Peter W. Tague, "Ex Post Facto Payments in Legally-aided Criminal Cases in the Old Bailey" (1999) *Anglo-American L.Rev.* 415.

There are two other settings where the barrister's financial interests could clash with the defendant's. If the defendant has decided to plead guilty before meeting the barrister, does the barrister prefer that he enter that plea at the PCMH or on the day of trial? Secondly, if the case should be continued (a witness is missing, for example), does the barrister request an adjournment (or not oppose the Crown's request for one), or push the defendant to plead guilty?

These three settings will be discussed in turn, together with other salient reasons why a barrister might conclude that his interests warrant supporting (or not opposing) the defendant's (to try the case, and, in the second and third settings, to make the decision that was more likely to result in a better end for the defendant).

1. *Trial versus cracked trial*

Under the GFS a barrister earns a "basic fee" for preparation and for the first day of trial or of the hearing at which the defendant pleads guilty. No matter the process chosen (trial or guilty plea), the barrister also receives a payment for the number of pages of prosecution evidence (the "evidence uplift").⁴³ If the matter progresses to trial, the barrister also receives three additional payments: two for each day of trial after the first (a "refresher" and a "trial uplift") and one for prosecution witnesses when their number exceeds 10.⁴⁴

The basic fee is a function of two factors. Each crime adjudicated in the Crown Court is assigned to one of nine classes, with different basic fees for various classes.⁴⁵ Within each class, the basic fee varies according to the time when the case is resolved. The basic fee is the same for trials and cracked trials within each class, and those fees are substantially higher than the fee for a guilty plea.⁴⁶ First explored, in the examples that follow, are the incentives of a junior barrister, then of a Queen's Counsel.

Reading the brief a day or two before the trial date, the junior ponders whether, to maximise his compensation, he hopes the case will be tried or ended by guilty plea. If the trial of a Class C offence will last two days,⁴⁷ beginning on Monday, he will earn a total fee of £529.⁴⁸ If this defendant instead pleads guilty, the barrister

⁴³ This amount is different for each method of ending the case (trial, cracked trial or guilty plea). In trial, the defending barrister is not paid for the first 50 pages of prosecution evidence or for the first 10 of its witnesses. With guilty pleas or cracked trials, there is a payment for each page of prosecution evidence, with the amount greater for a cracked trial. Although these evidence uplifts could affect the barrister's decision whether to recommend a trial or guilty plea, see fn.61 below, I usually omit this calculation because a meaningful evaluation of its impact depends on too many assumptions (the number of pages).

⁴⁴ Aspects of this scheme will change if Lord Carter's proposals are adopted. See fn.57 below.

⁴⁵ Queen's Counsel receive the same basic fee (£853.13) for trials and cracked trials for all classes other than the most serious (£1,618.75). The fees for juniors are more complicated, with the same fee paid in four classes (£250) and in two other classes (£210) and other amounts paid in the other three classes.

⁴⁶ To illustrate, for a Class C offence (e.g. unarmed robbery), a junior barrister's basic fee for a trial or cracked trial is £250, and for a guilty plea, £188. Before the 2005 amendments to the GFS, the fee for cracked trials often exceeded that for trials by a sizeable amount. To illustrate, with Class D offences (e.g. serious sexual offence), the basic fee for a cracked trial was £467.50, and for a trial £390.

⁴⁷ Examples of Class C offences include unarmed robbery, unlawful wounding (s.20 of the Offences against the Person Act 1861) and possession of a firearm without a certificate.

⁴⁸ The basic fee is £250; the refresher, £136, the trial uplift, £143. See Criminal Defence Service (Funding) (Amendment) Order 2005, fn.10 above, Sch.4, Pt 2, para.7(2) and the

will receive a basic fee of £250. If the barrister is fortunate to have a second brief scheduled for Tuesday, also of a Class C offence, his collective fee will be £500 if that second defendant also pleads guilty. The marginal difference inclines the barrister to prefer a trial of the first case unless he values the time saved by not being in trial.⁴⁹

Other benefits reinforce his interest in a trial. It must be hectic to prepare a new brief every night, with the inevitable search for a way to inveigle each defendant to plead guilty. Rather than ceaselessly reviewing new cases and travelling to different courts, barristers might find it less stressful, and more rewarding, to live with a case by being in trial. In trial, the barrister can also judge his skill as an advocate by observing whether the trial unfolds as he expected.

The junior's preference for a trial becomes more pronounced if the trial of Monday's brief is expected to last longer than two days. For a 3-day trial, the total fee would be £808. If the barrister instead acquired briefs of Class C offences for Monday, Tuesday, and Wednesday, and persuaded each defendant to plead guilty, his collective earnings would be £750. The barrister, considering the two possibilities, would probably prefer the three-day trial over the prospect of three guilty pleas. He has reasons other than the greater fee. Although there are no data on the number or source of cases barristers carry, it seems uncommon for barristers to be briefed by solicitors for trials on three consecutive days. When this occurs, the barrister could be nervous over whether he can persuade each defendant to plead guilty. He of course must hide from each solicitor (or his representative) his plan to persuade each defendant to plead guilty. If he fails—if, that is, the first defendant refuses to plead guilty—the barrister must return the brief of the second or third defendant. Although solicitors seem remarkably tolerant of returned briefs, there could come a point when the solicitor tires of the need to find replacements or becomes upset if yet another defendant is not pleased by the replacement provided by the barrister's clerk. In either instance, the solicitor might stop briefing the barrister, and perhaps every barrister in the chambers.

However, our barrister will likely have acquired the second and third (and perhaps even the first) brief from the chambers' clerk rather than from a solicitor. The clerk doles out briefs received from solicitors for distribution or briefs returned by other barristers in chambers. While junior barristers must rely on the clerk for business in their fledgling years, they want to wean themselves from the clerk's control as quickly as possible, understanding that if they lose the clerk's favour, he might deny them briefs.⁵⁰ Even with good relations with the clerk, barristers want to attract business on their own, achieved by gaining a reputation for skilful advocacy. Procuring guilty pleas from defendants is not the way to develop this reputation; trying cases is.

Consider, then, the more likely setting. On Sunday, the barrister ponders whether, in a case expected to last three trial days, to press the defendant to plead

accompanying table. There appears to be no payment for the Crown's paper evidence or witnesses unless the numbers exceed 50 and 10, respectively.

⁴⁹ He might have paperwork to complete, a future brief to prepare or a movie to attend.

⁵⁰ One former barrister told me he was forced to leave practice because his clerk refused to assign briefs to him, and another hinted that a rift with the clerk was an important factor in causing him to leave practice. Neither asked the head of chambers to intervene for fear of further upsetting the clerk.

guilty or to support his desire for trial. He has been told by his clerk that he might receive a second brief, also of a Class C offence, for a trial of three days to begin on Wednesday. If Monday's case is tried, he will not be given, or will be forced to return, Wednesday's brief. Does he prefer to try the first case or to end both by guilty pleas? Given the imbalance in fees (£808 versus £500), he opts for the trial.

Our barrister, however, is tempted in a different way. What if he persuades the first defendant to plead guilty and the second one to risk a trial? Here, for a week's work, with Tuesday free, he earns £1,058 (£250 for Monday's cracked trial, £808 for Wednesday's trial). In mulling over this possibility, the barrister faces the difficulty of predicting what will happen if Monday's trial proceeds (rather than ends by guilty plea). He might be idle on Thursday and Friday. If the chambers attracts many briefs, however, and if many of them are returned, the barrister might snag a returned brief for Thursday or Friday. In that case, he would earn as much (if the second case ended by guilty plea) or more (if it were tried) than would be so if he pressured Monday's defendant to plead guilty to enable him to try Wednesday's case.

Of importance also is the class of the offences. Say Monday's three-day trial is of a Class D offence (e.g. serious sexual crime), and Wednesday's is of a Class C offence. With a total fee of £1,122,⁵¹ trying Monday's case and returning Wednesday's brief is more lucrative than a guilty plea in both cases.⁵² And a guilty plea on Monday and a trial on Wednesday (£1,198⁵³) are only slightly better than a trial on Monday (£1,122). Best of all is to try Monday's and to obtain other work on Thursday or Friday. Should that happen, his weekly earnings would exceed £1,198, whether the second defendant pleaded guilty or went to trial.

The barrister's preference for a trial increases the longer the case is expected to last. Assume seven days have been set aside to try a crime of handling stolen goods valued at more than £30,000, a Class G offence. If tried, the more experienced junior briefed for such a case would receive £2,506.⁵⁴ If the trial cracked, the basic fee would be £370.

It is not likely that this barrister could find ways to earn the difference (£2,136). Serious cases of such a length will have received a fixed date for trial long in advance of their scheduled commencement. The barrister's clerk will have built the barrister's calendar around that commitment. To ensure that the barrister receives that lucrative fee, his clerk might accept no briefs, even for a short trial, scheduled immediately before its trial date that could run so long as to risk requiring the brief's return. Similarly, the barrister might be reluctant to accept a different well-paying brief that must be returned if this case lasts longer than expected.⁵⁵ Thus, the

⁵¹ The basic fee is £390; the refresher, £146; the trial uplift, £220.

⁵² The collective fee would be £640 (for cracked trials the basic fee for a Class D offence is £390 and £250 for a Class C offence).

⁵³ The cracked trial yields £390, the trial £808. Before 2001, the fee for a three-day trial of a Class D offence was £1,301, enough to reduce even more the incentive to crack the case.

⁵⁴ The basic fee is £370; the refresher, £146; the trial uplift, £210; £370 + (6 x £356) = £2,506.

⁵⁵ Given the barrister's likely skill—he would not otherwise have attracted our hypothetical seven-day trial—that second brief most likely would involve a case that also would last for several days. Despite the temptation, the barrister has reason to refuse it, to avoid jeopardising his relationship with the solicitor if it must be returned. If he did accept this brief, he probably would have spoken with the solicitor, and perhaps with defendant, about the defence. From

barrister approaches the trial with no insurance in case it cracks. Were it to crack, the barrister would need to rely on his clerk to find returned briefs to offset the loss of income for six days. Clerks reported that this burden is not easy to meet.⁵⁶ The briefs for highly remunerative cases are not often returned. Cases that are commonly returned command lower fees, and the clerk may prefer to parcel out these cases attracting less remuneration to the younger barristers in chambers who clamour for work.

Queen's Counsel have even more reason to prefer trials to cracked trials. Before the GFS was amended in 2005, the basic fee for a trial (£1,850) of a Class A offence (i.e. murder and related grave offences) exceeded that for a cracked trial (£1,694). Magnifying that difference were the fees for each additional day of trial (£1,138.38, consisting of a refresher of £458.25 and an uplift of £685.13). Those fees would be lost if the trial cracked, and not offset by other basic fees because, appearing only in very serious cases, Queen's Counsel are not likely to be booked for a second trial in the same week, let alone trials on successive days.

With five of nine classes of offences, by contrast, the basic fee for a cracked trial was greater than that for a trial before 2005. With class D offences (serious sexual offences), for example, a Queen's Counsel received £650 more as a basic fee if the case cracked (£1,625 v £975). But a Queen's Counsel would resist any momentary temptation to persuade such a defendant to plead guilty by the loss of the daily fees from a trial (a total of £915), as explained in the preceding paragraph.

The amendments to the GFS in 2005 eliminated any monetary preference a Queen's Counsel might have for a cracked trial. The peculiar and unexplained disparities in the basic fees for cracked trials of different classes of offences were eliminated, as fees for Queen's Counsel were made uniform, and reduced. The basic fees for trials and cracked trials are now the same within each class (£1,618.75 for Class A offences, £853.13 for all other classes).

Thus, despite the critics' beliefs, it is usually more lucrative for barristers, juniors as well as Queen's Counsel, to be in trial than to persuade defendants to plead guilty on the day of trial. That said, the monetary incentive for trials over cracked trials is less than it might be for three reasons.⁵⁷ First, the basic fees for trials

other cases, the barrister would know what to expect from the solicitor and what was expected of him. To return the brief, then, would disappoint, even distress, the solicitor who had banked on that barrister to appear for the defence. Returning the brief might not end, but would test, their relationship.

⁵⁶ Of the chief clerks with whom I discussed this problem, one said his chambers attracted enough briefs that he could not think of an instance when a junior barrister was out of work for as long as a week. But he conceded that the barrister might suffer several days without a brief. Another clerk judged that first clerk's efforts as a signal achievement, because he had had difficulty finding alternative work for experienced juniors. Both agreed that finding substitute work for a Queen's Counsel, given the fewer instances when they can appear in criminal cases supported by legal aid, was immeasurably more difficult.

⁵⁷ If implemented, the changes in the GFS recently proposed by Lord Carter of Coles could also alter the barristers' incentives. The uplift for the second day of trial would be eliminated, and the uplift for every day after the second would be reduced. In return, the basic fee for a trial (and for a cracked trial) would be increased. The fees would thus be "front-loaded, with the avowed purpose of "reward[ing] early preparation and resolution of cases." Lord Carter's Review of Legal Aid Procurement, fn.42 above, Ch.4, para.58, p.78. As an example, take the trial of a Class C offence expected to last two days. The basic fee for a junior barrister would skyrocket from today's £250 to £1,038, but today's uplifts for the second day of trial (£279) would be included in that proposed figure (a total of £529 v £1,038). For a cracked

of all categories of crime, at the inception of the GFS, were mostly markedly higher than for cracked trials. To illustrate, for juniors the comparative numbers are not much different for Class C offences,⁵⁸ but for Class D offences they are.⁵⁹ Secondly, a cracked trial's allure depends upon the number of pages of Crown evidence. The uplift for paper evidence is strikingly higher for cracked trials than for trials. Reconsider the example of the two-day trial of a Class C offence. Ignoring the evidence uplift, the barrister would probably prefer to try the case than have it end by guilty plea.⁶⁰ Before the 2005 amendments, however, if there were 50 pages of Crown evidence, the barrister's monetary preference for a trial shrank considerably.⁶¹ The obvious way to eliminate this temptation to end the case by guilty plea is to pay the same evidence uplift for a trial as for a cracked trial. Until that remedy is adopted, barristers might consider informing the defendant of their monetary incentives.⁶²

trial the basic fee would increase from today's £390 to £755. Depending upon the alternative work available for the second day, the barrister might continue to prefer a trial. If the case was predicted to last a third day, the basic fee for a trial would be £1,510 (a "daily fee" of £472 for the third trial day added to the basic fee). That amount is identical to what the barrister could earn by cracking two offences of the same type (2 x £755), set for Monday and Wednesday. Thus, with Tuesday off, and less invested in preparing for guilty pleas (even as some effort must be spent to persuade the defendants to plead guilty), a barrister earns the same amount (ignoring the evidence uplifts for trials) as for what could be a gruelling trial. Nothing in Lord Carter's report, or in the accompanying Consultation Paper published by the Department of Constitutional Affairs, fn.42 above, explicitly reveals that a purpose of these proposed changes (to be implemented in April 2007) is to encourage more cracked trials. Both documents also blithely ignore how the changes could affect barristers' monetary preferences for a trial or cracked trial.

⁵⁸ The first number is the original fee, the second the current one: basic fee (£240, £250), refresher (£123.50, £136), trial uplift (£166, £143), evidence uplift (£2.42, £1.48), witness uplift (£15.75, £12.22). Thus, for a 2-day trial the fee would be the same (£529, ignoring the evidence and witness uplifts). For the original numbers, see the Legal Aid in Criminal and Care Proceedings (Costs) (Amendment) (No.2) Regulations 1996, Sch.3, table following para.8.

⁵⁹ The original and current fees are: basic fee (£446, £390), refresher (£145.50, £146), trial uplift (£282, £220). Thus, for the three-day trial mentioned in the text paragraph at fn.47 above, the fee under the original scheme would have been £1,301; today it is £1,122. For the 7-day trial of the Class G offence discussed in the text, fn.54 above, a junior barrister would have earned £2,912 under the original payment scheme, £406 over today's payment of £2,506.

⁶⁰ For the figures, see text at fn.48 above.

⁶¹ Seemingly arbitrarily, the barrister would receive no evidence uplift because there was no payment for the first 50 pages of Crown evidence. If the case cracked, there was no payment for the first 10 pages, but a handsome payment of £6.37 per page for the next 40 pages. In this example, then, the evidence uplift if the case cracked (£254.80) was not much less than the trial uplift for the second day of the two-day trial (£279). The trial would thus pay only £22.70 more than a cracked trial (£529 versus £506.30). In 2005 the uplift for each page of the Crown's evidence dropped to £3.17 (for the first 150 pages). The uplift would thus be £158.50, thereby preserving the barrister's monetary preference for a trial. Why the evidence uplift differs between trials and cracked trials is not clear. Perhaps the larger payment for cracked trials is a disguised way to compensate the barrister for losing the refresher and trial uplift for each day of trial after the first. With trials there is also a payment for each Crown witness, but not for the first 10.

⁶² This is the radical proposal suggested by one barrister. Graham Cooke, "On Graduated Fees" [2002] 10 *Archbold News*, p.4. Cooke's reason is the barrister's potential conflict, created by the payment scheme, with the defendant over his advice to plead guilty or contest

The third monetary incentive for a cracked trial was created by the 2005 amendments to the GFS. Previously, a barrister earned the higher basic fee for a cracked trial only if the defendant pleaded guilty shortly before the trial was scheduled to begin. Now, the lower fee for a guilty plea is reserved for pleas during the first third of the case's tenure in the Crown Court. After that line is crossed, the barrister receives a cracked trial basic fee no matter when the defendant pleads guilty.⁶³ Thus, if at the PCMH the barrister senses that the defendant's intent to contest guilt is irresolute, he has an incentive to schedule a mention (under the guise, say, of questioning the Crown's failure to satisfy its disclosure obligations), to test whether the defendant's resolve is crumbling.⁶⁴ If the defendant can be persuaded to plead guilty, the barrister pockets the higher fee for a cracked trial, and thus avoids the problem of juggling the briefs of that and another defendant as discussed above.

However one assesses the monetary incentives, many barristers of those interviewed denied making these sorts of economic computations. Their reasons were both normative—the effort smacked of chicanery—and practical—if caught they feared being sanctioned by the solicitor. Barristers like these should study the GFS. By doing so they will recognise they often benefit financially more from trials than guilty pleas.

That said, those who had studied the GFS disavowed being affected by the calculation of alternative fees when their interests differed from the defendant's. For example, several disdainfully criticised other barristers who were suspected of pushing defendants to trial when a guilty plea would have served the defendant better.⁶⁵ These barristers thus conceded the monetary temptation, even while steeling themselves to resist helping themselves to the defendant's detriment when recommending a guilty plea.

2. *The timing of the guilty plea*

After the case is committed to the Crown Court, there are typically two opportunities for the defendant to plead guilty: a pre-trial hearing designed to learn the defendant's plea and to settle discovery and trial issues in case the defendant pleads not guilty, or the day of trial (the cracked trial). In 2005 the

guilt at trial. In his examples, Cooke assumes that the Crown has 70 pages of evidence and 12 witnesses. Cooke's defending barrister receives marginally more in defending a s.20 assault for a two-day trial than for a cracked trial (£583 v £554), but less for a trial of the same length of a s.18 assault than for a cracked trial (£583 versus £639).

⁶³ With a Class D offence, the basic fee for a guilty plea is £293, and £390 for a cracked trial. If there were 200 pages of Crown evidence, the evidence uplift would be £1,244 for a cracked trial (£6.22 per page), but only £290 for a guilty plea (£1.45 per page). See Criminal Defence Service (Funding) (Amendment) Order, fn.10 above, Sch.4, para.9 (tables of fees and uplifts).

⁶⁴ Interim hearings, between the PCMH and the trial, called mentions, can be scheduled to thrash out issues over disclosure, for example, or to take the defendant's guilty plea if he were to change his mind about a trial. But barristers were shocked by the suggestion they might schedule a mention for the undisclosed purpose of softening the defendant's resolve not to plead guilty.

⁶⁵ The barristers criticised were said to oppose guilty pleas so they could earn trial refreshers and uplifts. Their alleged purpose, then, was to earn as much from each case as possible, because they were said to have too few briefs to offer disinterested advice about a defendant's choice of guilty plea or trial.

pretrial hearing known as the Pleas and Directions Hearing (“PDH”) was replaced by a new hearing, the PCMH. Like the PDH, the PCMH’s purposes are to reduce the number of cracked trials and to increase the efficiency of adjudicating those cases that are tried.⁶⁶

Studying the barrister’s incentives in choosing between a cracked trial and a guilty plea at the PCMH, however, suggests the complexity of meshing the barrister’s interest with those of the defendant. Of the two stages to end the case by guilty plea, the PCMH and the trial date, the barrister might well prefer the latter. The basic fee for a cracked trial is much higher than for a guilty plea at an earlier point.⁶⁷ The reason is obvious. With the case listed for trial, the barrister is expected to prepare to litigate it. It is only at the last moment that the trial is aborted, as the defendant changes his mind. The barrister deserves to be compensated for the time taken to prepare the case for trial, a time longer than that expended in assisting a defendant who has decided at an earlier stage to plead guilty. Indeed, the barrister’s incentive, were he not compensated rather handsomely when the trial cracks, would be to skimp on preparation or not to recommend a guilty plea.

The barrister’s preference for cracked trials over guilty pleas at the PCMH presents two possible conflicts, one with a second barrister and the other with the defendant. The barrister might vie with another barrister over the basic fee. Say barrister No.1 has been briefed to represent a defendant in a serious case. From a conversation with his clerk, or from a quick perusal of the brief, he expects the case to be tried. A successful advocate, this barrister is occupied elsewhere on the date of the case’s PCMH. The clerk assigns barrister No.2, a very junior barrister in chambers, to appear with the defendant at the hearing. Barrister No.1 anticipates the hearing to be routine: barrister No.2 will assure the defendant that No.1 will confer with him later, the defendant will plead not guilty, and the case will be listed for trial. If the PCMH goes as barrister No.1 anticipates, No.2 will receive a basic fee of £100 for his mundane responsibility at the PCMH.⁶⁸

Unbeknownst to barrister No.1 (and also to his instructing solicitor), the defendant has been mulling over whether to admit guilt. At the PCMH, to the surprise of barrister No.2, the defendant elects to plead guilty. Who now receives the basic fee for the guilty plea? Clerks in two chambers reported that this setting caused tension between barristers. In theory, barrister No.1 should receive

⁶⁶ See Lord Chief Justice of England and Wales, *The Consolidated Criminal Practice Direction* Pt IV.41.8 (2005). The PCMH will be scheduled about 14 or 17 weeks after the case is sent to the Crown Court for trial, depending upon whether the defendant is in or out of custody: *ibid.*, Pt IV.41.5. In most cases the PCMH will be the only pre-trial hearing: *ibid.*, Pt IV.41.12 (“additional pre-trial hearings should be held only if needed for some compelling reason”).

⁶⁷ For a Class C offence, the junior’s basic fee for a guilty plea is £188; for a cracked trial, £250. (The evidence uplift per page is also larger for cracked trials than for guilty pleas, £3.17 v £0.74 for pages one to 250 of the Crown’s evidence.) For a Class D offence, the fees are £293 and £390; for a Class G offence, £278 and £370. There is no constant ratio between these two basic fees for different classes of offences. Why this is so is not known.

⁶⁸ See Criminal Defence Service (Funding) Order 2001, fn.10 above, Pt 4, table following para.22. Apparently to no avail, barristers complained that for the “many hours” needed for the PCMH their fee should be increased from that for the PDH (£100 for any junior, no matter his experience). See “Lord Chancellor plans to cut juries and costs criticised” (2005) S.J. 586 (comments of Guy Mansfield Q.C.).

nothing;⁶⁹ he had the brief but did not contribute to the defendant's decision to plead guilty and was not present when the defendant entered the plea. Barrister No.2 was representing the defendant at the critical juncture. But for barrister No.2, the receipt of the basic fee for the guilty plea is a windfall.⁷⁰ He does not deserve it either. Having no protocol for resolving the issue, one clerk said the controversy had to be resolved by the head of chambers.⁷¹

The lessons are two. If the barrister with the brief expects the defendant to plead guilty,⁷² and if he has no other work that attracts a greater fee, he ought to appear at the PCMH to protect his fee. But in that barrister's absence, the junior barrister assigned to the PCMH, while tempted, will be wary of counselling the defendant about a guilty plea. To do so might spark a dispute, and even a rift, between him and the briefed barrister over the fee. And he might irritate the chambers' clerk as well, if the latter must negotiate the dispute, and the clerk is not a person whom a young barrister seeking to prosper should alienate.

Barrister No.2's reluctance to confer with the defendant over the wisdom of pleading guilty also creates a possible conflict between the two barristers' interests and those of the defendant. With the sentencing discount justified by the resources saved through guilty pleas, an early guilty plea garners the highest discount.⁷³ Waiting until the trial date to plead guilty jeopardises part, if not all, of the discount.⁷⁴ And the defending barrister cannot reveal that he or the defender who

⁶⁹ A fee for wasted preparation can be paid, but only in limited instances and not here because the case did not crack (and the number of pages of Crown evidence must also exceed 150). See Criminal Defence Service (Funding) Order 2001, fn.10 above, para.18.

⁷⁰ For a Class C offence, the basic fee of £170 for a guilty plea is £70 more than the fee for the PCMH. For a Class D offence the windfall increases to £193. One clerk defended giving the fee to barrister No.2 on the equitable principle of the "swings-and-roundabouts": barrister No.2 benefits here, but will not receive a fee somewhere else. However, the principle does not seem to apply because barristers of sufficient skill to attract briefs will not compete for business with less experienced barristers who rely on fees from PCMHs.

⁷¹ I was not told the resolution, but inferred that the two barristers divided the basic fee. A barrister who asked various colleagues how each's chambers solved this problem reports that he "found almost as many different practices as people I have asked." Cooke, fn.62 above, p.5. Cooke does not offer a solution. Addressing this problem, a Bar Committee left it to the barristers within each chambers to choose a system to obey their duty, when in receipt of money for work done by another barrister, to pay that other barrister for his efforts. See Bar Council, (July 1998) *Bar News*, at p.11 (report of the Legal Aid and Fees Committee). Lord Carter of Coles would solve the problem by paying the "case fee . . . to a single trial advocate as identified at the outset of the case . . .", fn.42 above, p.76, para.46. Presumably, that advocate would appear in every judicial proceeding, including the PCMH, or himself pay a substitute some negotiated fee.

⁷² Even in cases that attract large fees—the only ones where a dispute is likely—it is rare for the barrister briefed to have a conference with the defendant before the PCMH. Should that happen, however, and should he detect that the defendant's resolve to fight is crumbling, he would be wise to attend the PCMH, to protect his fee.

⁷³ The maximum reduction of one-third (the guilty plea is entered at the "first reasonable opportunity") is reduced to one-fourth if entered after a trial date is set, and one-tenth if made "at the 'door of the court' or after the trial has begun". Sentencing Guidelines Council, "Reduction in Sentence for a Guilty Plea" (2005), Pt D, 4.2.

⁷⁴ The legal limit on the discount can be circumvented by ruse, however. Barristers said judges sometimes awarded the maximum discount by accepting the barrister's argument that until shortly before the trial he had no time to confer with the defendant, a conference that led to the defendant's change of plea.

appeared at the PCMH persuaded the defendant to wait to plead guilty for the barrister's benefit.

Nonetheless, the barrister's financial interest in postponing the guilty plea could mesh with the defendant's interests. Although the discount declines as the defendant delays entering a guilty plea, the risk of forfeiting most of it may be exaggerated. The key is the sanction that would be imposed were the defendant to be convicted at trial. It is from that figure that the courts calculate the discount. Guidance exists about the sentencing tariff for certain crimes. Yet in a particular case a judge could hide his deviation from that tariff in choosing a sentence that, as he scolded the defendant for wasting resources in delaying his plea, was in effect the same as if he had used the full discount.

As the risk from delay to the defendant might be exaggerated, so delay might also bring a benefit.⁷⁵ A guilty plea at the PCMH is likely to be to the charges. The inexperienced junior who represents the Crown at that stage would not have the status to persuade the CPS to accept a guilty plea to a lesser-included offence or to fewer than all of the counts.⁷⁶ Indeed, the CPS probably regards a defendant's decision to plead guilty at the PCMH as ratifying the accuracy of its selection of the charges.

For several reasons, the defending barrister briefed for trial often prefers to wait until near its date to negotiate for a guilty plea. For one, defending barristers want to bargain only with the prosecuting barrister. If approached much before the trial, the CPS, barristers believe, will invariably refuse to accept a plea except to the charges in the indictment. The CPS resists reconsidering its choice of charges, except upon advice of the prosecuting barrister, because it has graded itself more by the accuracy of its decision to charge than by the percentage of convictions.⁷⁷ Thus, defending barristers fear that if the CPS refuses the defence offer, it will not change its position, even if the prosecuting barrister later thinks it should. But, because the CPS might not have found a barrister to brief (or one who will keep the brief) until the trial is imminent, bargaining is delayed. It will also be delayed if the defence, although perhaps having received the Crown's evidence at the PCMH, has not completed its investigation. Next, even as the CPS does not seem inclined to negotiate a guilty plea to salvage a conviction for some offence, as the Crown's case deteriorates, defendants might hope that this will happen. And there is always the chance the Crown's case will collapse (e.g. a witness disappears) and an acquittal

⁷⁵ For other reasons to recommend a trial over a guilty plea, see Peter W. Tague, "Tactical Reasons for Recommending Trials Rather than Guilty Pleas in Crown Court" [2006] *Crim. L.R.* 23.

⁷⁶ Because the PCMH's success is said to depend upon the presence of the "trial advocate or an advocate who is able to make decisions . . . which the trial advocate could be expected to give," *Practice Direction*, n.66 above, Part IV.41.8, more experienced barristers may appear for both sides at the PCMH than typically was so at the PDH. Exhortation will not guarantee attendance, however, but a substantial increase in the compensation might.

⁷⁷ Conversations with CPS lawyers. See CPS Inspectorate, "The Inspectorate's Report on the Review of Adverse Cases" (June 1999), para.1.5, p.2 ("A good casework decision is one that results in the right defendant being charged with the right offence in the right tier of court . . ."). The current Government's concern over improving the criminal justice system might cause the CPS to shift its focus to reduce the risk of erroneous acquittals. Relatedly, one senior barrister told me, after reading a draft of this paper, that the Government is obsessed by the belief that too few defendants are pleading guilty, and that those who do are encouraged by barristers to delay entering the plea until the last possible moment before trial.

will be ordered. Last, if the CPS is persuaded to let the defendant plead guilty to a lesser offense or fewer than all offenses, the plea may limit the sentence that can be imposed, reducing it to the level that would otherwise be obtained from a full discount. Thus, the barrister's preference for a cracked trial dovetails with certain tactical reasons for delaying the point when the defendant pleads guilty.

3. *Fees for an appearance or a cracked trial*

The barrister's temptation to protect his interests at the defendant's expense is acute when the alternatives are a fee for an appearance versus one for a cracked trial. If the case is continued rather than resolved, the barrister earns only an appearance fee, and suffers in two ways. First, the fee is a paltry £110 when the postponement occurs because no court is open and only £55 when one or both parties ask for the adjournment.⁷⁸ Secondly, the barrister might even lose the brief if, occupied elsewhere on the date of the rescheduled hearing, he must return it.⁷⁹

With the prospect of earning only a miserly amount if the case's resolution is postponed, the barrister must fortify himself to protect a defendant who often will be unaware of the barrister's conflict. Several anecdotes suggest the settings where barristers might be seduced to pressure the defendant to plead guilty. In one, a defending barrister chose not to apply to exclude evidence upon learning, after the defendant had tentatively agreed to plead guilty, of a basis to argue the Crown was not entitled to use the evidence. A postponement would have been necessary to explore the issue. In another, the opposing barristers had a summary of the defendant's interview with the police, but neither had seen the video of the interrogation. The defender refused to agree to seek an adjournment so each could watch it. The prosecutor thought the defender had rebuffed his suggestion because motivated by a desire to resolve the case (by guilty plea) to earn more than an appearance fee.

A third anecdote is told in *Standing Accused*. The authors criticise a barrister's behaviour without noting why he might have pressed the defendant to plead guilty.⁸⁰ Before meeting the defendant, the barrister was said to be sarcastic in discussing with his solicitor's clerk the defendant's denial of intent. In conference, he stressed the futility of contesting guilt as the defendant explained his conduct. Only after the defendant refused to capitulate did the barrister reveal that the case would be adjourned because the Crown's two principal witnesses were not in court. The barrister hid this information even as he might have expected the trial judge, as he did, to warn the prosecution that an acquittal would be ordered if the witnesses did not appear on the next date. This barrister's behaviour, the critics say, illustrates their claim that barristers urge defendants to trust their judgment as a way of manoeuvring them to plead guilty. What they overlook is the barrister's possible motivation. Might he have wanted the basic fee for a cracked trial rather than an appearance fee for an adjournment, even though the better tactical choice would have been to postpone the case?⁸¹

⁷⁸ Criminal Defence Service (Funding) Order 2001, fn.10 above, Sch.4, Pt 4, table after para.22.

⁷⁹ When a case is rescheduled, the brief is normally returned to the solicitor, barristers said, so that the solicitor is free to choose the barrister he wants.

⁸⁰ *Standing Accused*, fn.1 above, pp.258–260.

⁸¹ Pleading guilty might be wise if the defendant received a greater discount for admitting guilt when the case could not be tried. But barristers told me that they did not think that

Barristers have other than financial reasons to avoid the trial's postponement. The most important is their desire to protect the instructing solicitor who has failed in his responsibilities.⁸² Witnesses have not been interviewed, a lead not pursued, even a defence left unexplored. There is no time to rectify the omission before the court date. An adjournment is needed so that the solicitor can finish preparing the case. For the barrister to request one, however, would expose the solicitor's inadequacies.⁸³ Embarrassed,⁸⁴ the solicitor might retaliate by not briefing the barrister in the future. To protect this source of briefs, the barrister darkly predicts, in conferring with the defendant, that, on the evidence in his brief, conviction is certain. Better, then, to plead guilty. The defendant acquiesces, unaware that conviction is assured only because of his solicitor's inadequacies.

Not surprisingly, the London barristers ruefully conceded being tempted to disguise their desire that the trial crack rather than be continued. While not divulging to the defendant their conflict, to a person they indignantly denied yielding to the temptation.⁸⁵ The claim by one that it would be "grotesquely inappropriate" to seek a basic fee for a cracked trial when the case should be continued was more adamant than, but illustrative of, the reactions of every barrister interviewed.

Two points indirectly support their denials. The first is the number of cases that do not crack.⁸⁶ If barristers were determined to obtain guilty pleas, it is surprising, given their array of manipulative techniques,⁸⁷ that they cannot persuade more defendants, many of whom are vulnerable and frightened, to do what they want. Secondly, and relatedly, of the staggeringly high percentage of briefs that are returned, the cause in many instances must be that the case cannot proceed to trial rather than that the barrister is occupied elsewhere. With both points, it is safe to infer that the barristers interviewed do rebuff the temptation to end every case by guilty plea and do accept that cases must be rescheduled, even as they suffer financially.

defendants were given credit in this instance. Hence, the better tactical choice would be to delay pleading guilty so as to learn whether the Crown's witnesses would be missing on the next trial date.

⁸² Barristers might try to protect other barristers, too. In a setting similar to the one in the text, a defending barrister refused to agree to an adjournment in order to protect a colleague in chambers, against whom a wasted costs order might be levied for having failed to request to view the defendant's complete interrogation.

⁸³ A guilty plea will also probably protect the barrister from that admittedly rare charge of having acted ineffectively. See Tague, "Faulty Adversarial Performance", fn.32 above.

⁸⁴ While the defendant might not learn why a postponement is sought, the solicitor knows the barrister has spotted a flaw in his work.

⁸⁵ When prosecuting, barristers also agreed that it was unfair to earn only an appearance fee for advising that the case should be continued, but they denied ever misleading the CPS by claiming that a guilty plea was advantageous in such a circumstance.

⁸⁶ 57% of cases are listed for trial. Of those, more were tried (31%) than ended by guilty plea (26%) (the cracked trial). See Zander and Henderson, fn.26 above, p.95, table 4.1.

⁸⁷ Critics say that barristers manipulate defendants to believe that conviction is inevitable, that the offer of a plea is favourable, that the jury is hostile and that the barrister is wise and experienced in assessing cases. See *Standing Accused*, fn.1 above, pp.257-261.

Conclusion

Of the barristers interviewed, many carped that the levels of remuneration for the different ways of resolving a case (a guilty plea, cracked trial and trial) were inadequate, even though not many calculated the amounts they would receive for each resolution as carefully as was done in our discussion of the GFS. Had they made the calculations, they would recognise that trying the case often resulted in more remuneration than did cracking it. That recognition would reinforce their other two financial reasons to prefer trials over guilty pleas. A reputation as an effective negotiator is of far less value than a reputation as an effective advocate. The risk of formal sanction for improperly inducing a defendant to plead guilty is small, but the concern of being sanctioned by solicitors who withdraw or withhold business (briefs) is sufficient to dissuade barristers from counselling over the plea in ways that might upset defendants and thus upset their solicitors. If barristers learn they have no selfish reason to prefer guilty pleas, one result is a reinterpretation of a barrister's motives when he does try to persuade a defendant to plead guilty. Rather than seeking his own ends at the defendant's expense, as critics allege, he may be gauging what is best for the defendant rather than for himself.