



The Bar Council

## Bar Council seminar on Ethical dilemmas at the Criminal Bar

### Pre-reading

27 June 2022 17.15-18.45

#### Panel

- **Chair:** James Hines QC (Ethics Committee Vice Chair, Three Raymond Buildings)
- Francis FitzGibbon QC (Ethics Committee Vice Chair, 23ES)
- Caroline Carberry QC (Ethics Committee member, Furnival Chambers)
- Steven Bailey (Ethics Committee member, Crown Prosecution Service)

#### Bar Council Ethical Enquiries Service

The Bar Council runs the confidential Ethical Enquiries Service for barristers and, where appropriate, clerks and other staff, to assist with identifying, interpreting and complying with their ethical obligations under the BSB Handbook. Information about the Ethical Enquiries Service can be found on the Bar Council's website [here](#).

To further support members of the Bar, the Bar Council has created the Ethics & Practice Hub, a dedicated online library with ethical guidance documents which discuss common dilemmas on a variety of topics. The Ethics & Practice Hub can be accessed [here](#).

#### Seminar

The session will focus on absconding clients, client incapacity and returning instructions with reference to the following case studies:

## Absconding clients

- a. A barrister is instructed in a multi-handed drugs conspiracy. She has had two full conferences with her client and has drafted a defence case statement (DCS) based on his instructions, which he has signed. In essence, he denies the allegation and says there was a conspiracy but it related to the supply of Class B drugs, not Class A drugs.

Since that date he has contacted her instructing solicitors and indicated that he would in fact plead guilty to substantives. Enquiries were made of the Crown who have indicated that only a plea to conspiracy is acceptable.

The trial is coming up and it is suspected that he may have fled overseas. Assuming his absence at trial, ordinarily she would feel fine remaining at trial to represent his interests and to test the Crown's case, especially given the two full conferences and signed DC. However, given the most recent communication via her instructing solicitors she does not know where she stands.

### Questions:

- a. Does she work on the basis of the signed DCS, i.e., wrong drug but there is a conspiracy **or** does she work on the basis of the verbal communication between him and her instructing solicitor and challenge the conspiracy, but accept that it is the right drug?
  - b. Are there any other considerations?
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- b. A barrister has been instructed in a criminal case, defending. He has been to court for this client ten times over the past few months, but D refuses to leave his cell each time (he stages dirty protests and assaults prison officers when they try to get him to court). The barrister doesn't have any instructions or proof and there is no interview. The hearing keeps being postponed. It is legal aid funded, so each time he attends court he earns a tiny fee and loses out on other potentially higher paying work.

### Question:

- a. Are there grounds to return instructions?

## Client incapacity

3. The client has a history of drug misuse and turned up at court for trial with dilated pupils and seems "out of it". They deny being under the influence of drugs.

### Questions:

- a. Can the barrister take instructions from them?
  - b. Can the client participate in the trial in this state?
  - c. What should the barrister do?
  - d. What can the barrister tell the court?
4. A barrister is representing a man charged with multiple counts of fraud. The allegation is that D falsely represented that he was a successful businessman; that he had offices in Bond Street; that he had a flat in Hampstead and a net worth in millions. The prosecution case is that he is, in fact, a penniless con artist who lives in a council house in Somerset. The prosecution have seized all his computers and there is no trace of any business dealings at all.

D has pleaded not guilty and continues to say that he is a wealthy businessman. The solicitor and counsel have attempted to pin him down about disclosing his finances. He is evasive. There is no evidence of bank accounts or evidence of trading. The flat that he says is his in Hampstead does not exist. The business premises which he says are his are not tenanted by anyone connected to him.

He has a previous conviction for an identical offence from October last year. He instructs us that he was framed for this offence and convicted after an unfair trial. Part of that case depended upon the Defendant's answers in interview where he said when asked about his claims of 422 staff in the UK, .....and his claims of hitting 10 million, that it was "ALL A LIE". Asked about "holding a fund value of 1.4 billion". He replied that it was "ABSOLUTE RUBBISH".

After his conviction for the previous matter the Defendant submitted to psychiatric treatment and was sectioned. He agreed to be assessed. However, he discharged himself before an assessment could be concluded. He continues to instruct counsel that he is not mentally ill.

Counsel thinks he is delusional and that he his mental health should be assessed. However, his representatives are concerned that if they go down that route, the client will terminate their instructions.

Questions:

- a. In circumstances where there is clear evidence that the client is seriously mentally ill, are you obliged to seek a psychiatric report even though the client instructs you not to?
- b. If the client attempts to sack you before the court has determined fitness to plead, what do you do?
- c. Are you in breach of client confidentiality if you disclose to the Court the reasons why we think he lacks capacity?
- d. If the court subsequently determines that he is unfit to plead, can he sack you?

## Returning instructions

5. A barrister had a conference in the cells with his client, a defendant in assault proceedings. D got agitated, pulled a blade that was concealed under their clothing, got up from their chair and moving towards the barrister, threatened the barrister with it. The barrister managed to talk them down and extract themselves from the situation without coming to physical harm but now has an update from the court that is adverse to D's interests that he must deliver to D in another conference in his cell. The barrister is terrified of D's reaction, and has not yet told anybody about the blade incident.

### Questions:

- a. Does the barrister have to continue to act?
  - b. Does the barrister have an obligation to inform the prison guards/police about the possession of a blade? Is this a breach of confidentiality?
6. Counsel's public access client is accused of wounding with intent to do GBH in a pub brawl. The prosecution is providing a dozen witnesses prepared to swear that they saw the client in the pub dashing a broken glass over the victim's head. They can also show the client's fingerprints on a broken beer glass, heavily stained with the victim's blood.

The client's initial account in his police interview says "He was getting up my nose. I wanted to teach him a lesson, just to give him a fright. I didn't mean to spill blood." In conference subsequently he claims "Really, I was so drunk that I didn't know what I was doing. I certainly didn't mean to spill blood." Just before the trial he says "No, you've completely misunderstood what I told you. I might have been a bit drunk, but I kept right out of the way of the violence. My fingerprints must have got on the glass when I was helping to clear up the mess."

Counsel has asked the client to explain the change in his story, but the client refuses to give counsel any more information. Counsel is worried that the client's changing story has created a breakdown of trust and confidence between the client and counsel.

### Question:

- a. Should counsel withdraw from the case and return the client's instructions?

### **Additional scenario (time permitting)**

7. At the start of a rape trial, counsel for the defendant is reminded that he had represented the victim five years earlier in an unrelated matter where the victim was accused of fabricating an allegation of rape.

Question:

- a. What should counsel do?

### **Background reading**

The key ethical guidance documents that will be relevant to the above scenarios and will be discussed at the seminar on 27 June 2022 are:

- [Absconding Clients: what to do if your defendant has absconded](#)
- [Client Incapacity](#)
- [Returning Instructions in Criminal Cases: R v Daniels \[2021\] EWCA Crim 44](#)

We would encourage you to read these in advance of the seminar.

The source of all rules is the [Bar Standards Board Handbook](#)