



The Bar Council

# Scenarios for Handling ethical dilemmas at the Young Bar seminar - 21 February 2024

## Civil law scenarios

### Scenario 1

Your chambers is regularly instructed by a large insurer, particularly in defending high-value Bermuda form arbitrations and you yourself have received frequent lucrative instructions from this source. As a result you have a close personal relationship with the claims handlers there, and they have let you know that you, or if you are unavailable other members of your chambers, will be their preferred counsel for all such claims.

You have now been approached by a large UK-based pub chain who wishes to make a very large COVID business-interruption insurance claim against your favourite insurer. (If the pub-chain had not come to you first, it is very likely that you would have been instructed to defend the claim).

You cannot discuss the matter with your friendly claims handlers, because the fact that a claim will be made is confidential. But you have a shrewd suspicion that taking the case will very seriously damage your relationship with the claims handlers and the insurer, and you may no longer be their most-favoured counsel.

**Question: Can you decline to take the case?**

### Scenario 2

You have previously acted for an insurer in relation to the potential avoidance of a long-term liability insurance cover. On the basis of your advice, the insurer affirmed the cover, and decided not to avoid.

You have now been approached by a building owner in relation to the making of a claim on one of the relevant insureds, a firm of architects. It follows that your former client, the firm's insurer will have an interest in the claim.

**Question: Must you take the case, or can you refuse on the basis conflict of interest between your former client and your prospective client?**

**Scenario 3**

You have been instructed by one of three brothers who are equal shareholders in a family company. The company has entered into valuable contracts with a number of companies purportedly run and owned by third parties, but of which his other two brothers are the real owners. A pre-action letter has been sent alleging that the two brothers have unfairly prejudiced the interests of your client and acted in breach of fiduciary duty. Your client has arrived at a conference with a file of emails that appear to be between the two brothers and the third parties. He asks you to read them to assess whether they support his case.

**Question: Should you continue reading the emails to assess their value, or stop reading and ask how he has obtained them?**

**Scenario 4**

You have been acting as junior counsel in a high-profile piece of litigation in which your client, an environmental campaign group, obtained a small shareholding in a major energy company and has been trying to obtain permission to bring a derivative claim. You have just lost at first instance and are considering an appeal. Your client thinks it would generate helpful publicity for the group and elicit financial support for the litigation, for you to write an online blog, and share it via social media, explaining the issues, the legal difficulties and why the client should succeed. Your client also says he has a contact on the Today programme who is interested in interviewing you.

**Question: Should you agree to do any of this?**

# Criminal law scenarios

## Scenario 5

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: Are there grounds to return instructions?**

## Scenario 6

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:**

- Can the barrister take instructions from them?
- Can the client participate in the trial in this state?
- What should the barrister do?
- What can the barrister tell the court?

## Scenario 7

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.

The judge is impatient and I am worried that if I return instructions they will demand that I continue to represent the client anyway.

**Questions:**

- Should counsel withdraw from the case and return the client's instructions?
- If they return instructions, can the judge compel them to continue to act?

## Family law scenarios

### Scenario 8

A barrister is representing a mother in care proceedings. The mother's lifestyle has been chaotic and she has had substance abuse issues. She told the barrister she had been clean for 6 months and this is noted in her witness statement. However, in a conference she took a call that sounded a lot like she was discussing the purchase of drugs.

**Question: Will the barrister be misleading the court if she does not correct the position?**

### Scenario 9

A barrister has recently been instructed in a financial remedies case arising from divorce proceedings. Not long after accepting the instructions, the barrister's sink breaks, and she calls a plumber to her house. In conversation she brings up that she is a barrister, and the plumber then tells her at length about his ongoing divorce. As he is leaving, the two exchange business cards, and she then realises that the plumber's ex-wife is her client. The plumber does not know the barrister is involved in the case.

From correspondence she has seen between her client's solicitor and the plumber, the barrister knows he can be quite aggressive and there are allegations of abusive behaviour. The barrister is concerned the plumber will not react well when he finds out that she is representing his former partner and is worried that he has her home address. She thinks her worries will mean she cannot act in the best interests of the client.

**Question: Are the barrister's worries for her own personal safety in conflict with her ability to act in the best interests of the client?**

### Scenario 10

My cousin wants me to represent him in his messy divorce. I see him occasionally at family get togethers but am not that close to him.

**Question: can I represent him on a pro bono basis without a solicitor? I am not public access qualified.**

