Ethical Aspects of the Defence of Criminal Cases

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1. This is a wide subject. I will approach it by making a selection of the main governing principles along with references to the appropriate authorities. I hope in this way to cover the main important principles, but inevitably there are bound to be some aspects of the subject that will not be covered in the limited time that is available.

2. The base document of course, is the Legal Profession (Canons of Professional Ethics) Rules, published in The Jamaica Gazette Supplement, 29th December 1978, as amended by the 1983 rules published in The Jamaica Gazette Supplement 29th November 1983.

3. Where the code does not deal with the specific point some guidance can be got from **Bolton's Conduct and Etiquette at the Bar**, but of course, because our profession is fused there are aspects of the ethical issues which will require us to look outside of that publication. It should also be remembered that for some time prior to fusion in 1972 a Barrister in Jamaica did not have to be briefed by a Solicitor in a criminal matter. She could deal directly with the lay client, take instructions, interview witnesses and complete the entire process as if practising as a solicitor. This therefore meant that many of the principles set out in **Bolton's** would be inapplicable to the Jamaican Barrister in criminal matters from prior to 1972.

Cab rank rule

4. The rule requires counsel to accept any brief to appear before any court in which she practises, to accept any instructions and to act for any person on whose behalf she is briefed or instructed irrespective of

   1. the party on whose behalf she is briefed or instructing
   2. the nature of the case

   or

   3. any belief or opinion which she may have formed as to the character, reputation, cause, conduct, guilt or innocence of that person

5. This rule is a fundamental rule of a profession which claims and exercises the exclusive right to appear on behalf of persons who are parties to proceedings before the court. It is of course a rule which applies to practice at both the civil and criminal Bar.

6. However the rule was developed in the United Kingdom where there was strict application of the rules of the divided profession. The old rule has been somewhat modified by the wording of Canon III (a) which reads

   "An attorney is under no obligation to act on behalf of every person who may wish to become his client, but in furtherance of the ethics of the profession to make legal services fully available, he shall not lightly decline a proffered retainer."

   Paragraph (c) states

   "An attorney shall not be deterred from accepting proffered employment owing to the fear or dislike of incurring disapproval of officials, fellow attorneys or members of the public."

General obligation to Client in criminal matters

7. Canon III (g) reads

> *"An attorney in undertaking the defence of persons accused of crime shall use all fair and reasonable means to present every defence available at law, without regard to any personal views he may hold as to the guilt of the accused."*

This obligation is reinforced by the governing paragraph of Canon IV which reads

> *"An attorney shall act in the best interest of his client and represent him honestly, confidently and zealously within the bounds of the law. He should preserve the confidence of his client and avoid conflicts of interest."*

Taking instructions

8. These must be in writing and signed by the lay client. In **Christopher Bethel vs The State,** Privy Council appeal from Trinidad & Tobago (10th of December 1998) Lord Hoffman said

> *"(Their Lordships) are bound to say that they are surprised that in a capital case no witness statement was taken from the petitioner or other memorandum made of his instructions. In view of the prevalence of allegations such as those now made, they think that defending counsel should as a matter of course make and preserve a written record of the instructions he receives. If this appeal serves no other purpose, it should remind counsel of the absolute necessity of protecting themselves from such allegations in the future."*

Duty to accused in custody

9. It should always be borne in mind that the duty that a counsel owes to an accused person is particularly important where that person is either in custody immediately after arrest or has been refused bail and is

awaiting trial. In those circumstances the practical consequences of failing to honour any of the ethical obligations is likely to have much more serious effect and in the Jamaica of today's experiences it is important that the Counsel should be resolute in observing the ethical obligations that guide the profession. For a useful guide as to both the ethical and practical considerations see **Defending Suspects at the Police Station** *by Ed Cape, London, Legal Action Group 1993.*

Duty to advise client of her rights in relation to giving evidence

10. The attorney has a duty to advise the client of the four options available to an accused person. They are

a. to give sworn evidence

b. to give an unsworn statement

c. to remain silent

or

d. to rest on a submission of no case without offering any evidence of any kind.

These rights are of course rights of the client and the decision is primarily a decision which the client must make. Very likely the client will rely very heavily on the advice given by the attorney. However, it is important that the attorney should make it clear that in the end it must be the client's own decision. Once the client has arrived at a decision it is the duty of the attorney to respect the client's wish. Where the attorney does not respect the defendant's wishes or fails to consult with him adequately on the course to be taken, the appeal courts may very well intervene and allow an appeal, as failure to honour those minimum standards may amount to flagrant incompetent advocacy within the rule in **R v Irwin** [1987] 1 W.L.R. 902, **R v Ensor** [1989] 1.W.L.R. 497 and **Sankar vs The State** (1994) 46 W.I.R. 452 and thereby justify the quashing of a conviction on appeal.

11. Whenever an accused decides not to give sworn evidence, it is advisable that counsel should take written instructions from the accused acknowledging that the advice has been given and the decision made by the accused. See **R v Dean Clinton** 97 Cr.App.R. 320. In **R v Bevan** 98 Cr.App.R. page 354, the U.K. Court of Appeal held that where a defendant takes a decision not to go into the witness box it should be the invariable practice of counsel to record that decision and to cause the defendant to sign that record, indicating clearly first, that he has, of his own free will, decided not to give evidence and, secondly, that he has so decided bearing in mind the advice, if any, given to him by counsel.

Duty to your client to the exclusion of all else

12. This duty is of course subject to your obligation to respect the law and the canons of ethics. That apart, the duty means that counsel should not compromise her client's interest in order to assist another counsel or in order to run a common defence. It also means that counsel should not accept a brief to represent a co-accused if there is any possibility of conflict with her obligation to her client.

Duty to call any relevant witness

13. It is the duty of counsel for the defence to advance any admissible evidence relevant to the case of his client. This duty persists whether or not it prejudices anyone else, see **R v Miller** 36 Cr.App.R. 169, **Lowery vs R** 58 Cr.App.R. 35 at 50 per Lord Morris.

Duty to consult accused in relation to the calling of potential witnesses

14. There is some doubt as to the extent of this duty. See **R v Irwin** [1987] 2 All.E.R. 1085, [1987] 1 W.L.R. 902, **R v Ensor** [1989] 2 All.E.R. 586, [1989] 1.W.L.R. 497, **R v McLoughlin** [1985] 1 N.Z.L.R. 106.

Duty to challenge witnesses

15. As is the case for all counsel, defending counsel has a duty to challenge the testimony of any witness where, on her instructions there is a dispute as to any aspect of that witness' testimony. There is a concomitant duty to put to that witness essentials of the account on which it is intended to lead evidence and a duty at the appropriate time to lead that evidence. Questions arise as to whether it is permissible to put suggestions to a witness where there is no written instruction or no real chance of being able to call a witness in support of the suggestion. There is a difference of opinion on this. On one view it is considered that it is permissible to put the suggestion if it is a reasonable inference to be drawn from the surrounding circumstances even if it is not possible to call evidence in support of a particular proposition. There is also a view that it is improper to make suggestions attacking the credibility and in particular the honesty of a witness if it is not intended to call evidence to support such a suggestion. A practical situation in which defending counsel is often faced with this dilemma is where there is a challenge to the conduct of police officers particularly based upon allegations of beatings where the accused for some legitimate reason may not wish to go into the witness box.

16. In **Daken v R** 7 W.I.R. 442 Chief Justice Wooding at page 447 approved the comments of Chief Justice Goddard in **R v O'neill and Ackers** 34 Cr.App.R. at 108. Among the comments approved were:

> *"It is one thing to cross-examine a witness about credit, in which case one is bound by the answer of the witness. It is quite wrong and improper conduct on the part of counsel to make a charge against the police or against any other witness by way of defence ... if he does not intend to call his client to give evidence to support the charge."*

Some of the difficulties involved in both the decision of counsel as to how to conduct the cross-examination in this situation and also what is the

extent of the comment which the trial judge can make was explored in the Jamaican case **R v Owen Donaldson & Seymour Edwards** 17 J.L.R. 43 where Kerr, J.A. between pages 48 and 52 examines some of the competing contentions. Included is a quotation from the rules approved by the Bar Council in the United Kingdom in 1950 which were issued as a result of the decision in **R v O'neill and Ackers** above. It is the view of the U.K. Bar Council that

> *"If an accused person instructs his counsel that he is not guilty of the offence or offences with which he is charged but decides not to give evidence upon his trial, it is nevertheless the duty of counsel to put his defence before the court to the extent, if necessary, of making positive suggestions to witnesses.*
>
> ***Cross Examination which goes to a matter in issue***
>
> *In such cross-examination it is not improper for counsel to put questions suggesting fraud, misconduct or the commission of any criminal offence – (even though he is not able or does not intend to exercise the right of calling affirmative evidence to support or justify the imputation they convey), if he is satisfied that the matters suggested are part of his client's case and has no reason to believe that they are only put forward for the purpose of impugning the witness's character."*

Despite the controversy over the above points there can be no doubt that it is both improper to put a suggestion that is inconsistent with counsel's instructions and to lead evidence which counsel knows to be unreliable. Generally on this see also see **Bolton's Conduct and Etiquette at the Bar** 4th Ed. Pages 74-75.

Duty to the court and generally

17. Canon V (o) states

> *"An attorney shall not knowingly make a false statement of law or fact"*

and

Canon VI (cc) states

> *"An attorney shall not knowingly represent falsely to a judge, a court or other tribunal or an official of a court, or other tribunal that a particular state of facts exist."*

Similarly once counsel discovers that information put before the court is incorrect there is a duty to correct that information.

Duty to assist the court on law

18. It is the duty of counsel on all sides to place before the court any decisions on the issues of law that arise. What was said by Hamel-Smith, J.A. in **Young vs Morales** 50 W.I.R. 433 at 435 to 436 also flows from the above duty

> *"... I wish to remind attorneys that it is the duty of an attorney, when referring to any authority in support of his case, to ensure that the decision relied on has not been overruled by a superior court. In this case, not only did the attorney for the respondent rely upon the dissenting judgement but he failed to disclose that the majority judgement in the same matter had been upheld by the Privy Council."*

Duty not to appear if counsel is likely to have to give evidence

19. Not only must counsel not go into the witness box and still remain as counsel in the case but it is not permissible for counsel to inform the court of any fact he has personally investigated in the course of preparation of the matter. If such a situation arises and can only be met by counsel giving evidence then he should not accept the brief, or if

already in the case he should make arrangements for another counsel to have conduct of the case.

It flows from the above that counsel has a duty to present the case for the accused without endorsing any proposition as being his personal opinion, see Canon V (j)

> *"An attorney shall endeavour always to maintain his position as an advocate and shall not either in argument to the court or in address to the jury assert his personal belief in his client's innocence or in the justice of his cause or his personal knowledge as to any of the facts involved in the matter under investigation."*

Counsel should remain impersonal in the sense that he should not advance either legal argument or a view of the facts as counsel's personal opinion or belief.

Duty to correct errors of the court

20. There is a strong division in the authorities as to whether or not there is such duty on the part of a defence counsel in criminal matters. It is the view of the General Council of the Bar in the United Kingdom that there is no such duty. See the annual statement for 1963 page 24 and Vol. 3(1) **Halsbury's Laws of England**, page 377, para. 470, footnote 4. There is no doubt that it is the duty of the prosecuting counsel to draw the judge's attention to any omission or failure to give adequate and proper directions to the jury on the law (see **Ashby vs The State** 45 W.I.R. at 369).

Counsel's duty in relation to sentence

21. The Court of Appeal in England has recently restated in **R v Street** [1997] Crim.L.R. 364 that

> *"The court has emphasised on a number of previous occasions and wished to re-emphasise in unambiguous terms, that it is the clear*

duty of both counsel to familiarize themselves with the relevant sentencing powers of the court, and to direct the sentencer's attention to those powers where it was appropriate to do so, and in particular to draw the attention of the sentencer to relevant legislation if the sentencer passed a sentence which did not take account of the appropriate maximum penalties."

Duty of counsel to remain in court and not to withdraw

22. There is some controversy as to the circumstances in which it is permissible for counsel to withdraw and the way in which such as a withdrawal may be effected. One of the paramount duties of defending counsel is to ensure that an accused person is never left un-represented at any stage of his trial unless there are compelling reasons of conflict or inability on the part of counsel to continue representing the accused for some exceptional reason. On the general proposition see Vol. 3(1) **Halsbury's Laws of England** 4th Ed. Page 382, para. 475 and **Bolton's Conduct and Etiquette at the Bar** 4th Ed., 1989, para. 24.7.1.

Conclusion

23. I have attempted to identify principles that apply particularly to the conduct of the defence in criminal cases. As I indicated at the start this is not a comprehensive list and in any event I have not dealt with the general rules of conduct which would also apply to all counsel, whether civil or criminal, and on either side.