Ethics for Criminal Lawyers - Hypotheticals

Convenor: Thomas Spohr

With panel: Shalini Perera, Jane Sanders, and Nick Ashby

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Outline of today

An experiment in interactivity:

- Some talking by me
- Interactive online polls
  - The polls are **completely anonymous**
- Input from an expert panel

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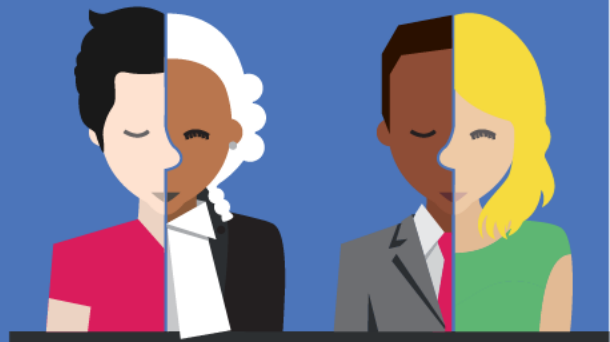

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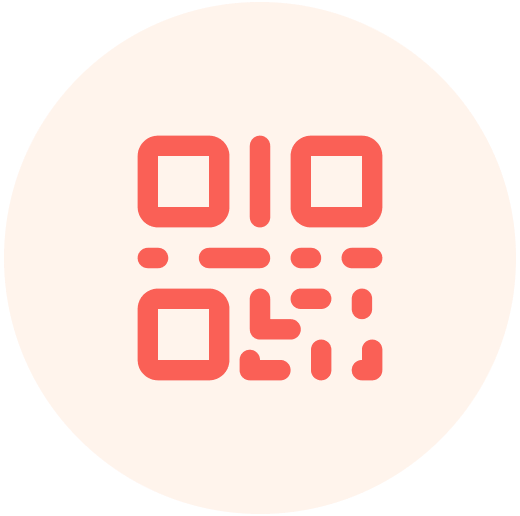

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Hypothetical 1: Marriage troubles

You are a private practitioner. You are approached by a husband-and-wife duo who have been charged with AOABH in company. You've represented the husband before, and he was convicted of a minor assault.

The couple have been refused Legal Aid because of means, but you're told there isn't enough money for separate lawyers; there's barely enough money for one lawyer.

The issue in the hearing is identity. The putative clients say they were not the offenders – they just weren't there. They are desperate for your help, since if you say no, they are likely to remain unrepresented.

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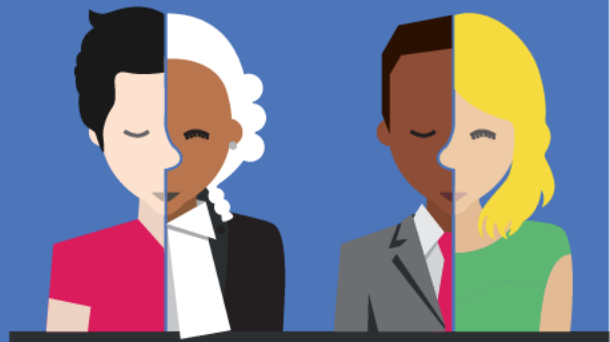

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COULD you (theoretically) represent the couple?

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SHOULD you (realistically) represent the couple?

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Hypothetical 1: Marriage troubles

Rule 11:

1. Must avoid conflicts of duties owed to two or more clients (r 11.1)
2. If there is an actual **or potential** conflict, **must not act unless otherwise permitted** by the rule (r 11.2)
3. Must obtain **informed consent** (r 11.3)
4. If you hold confidential information for one client which might be relevant to the other client, you must have instructions to disclose (or "*information barrier*" – not relevant here) (r 11.4)
5. If an **actual** conflict arises, normally need to cease acting for both, unless (in exceptional circumstances), the client you no longer act for gives in-formed consent and your duty of confidentiality is not put at risk (r 11.5)

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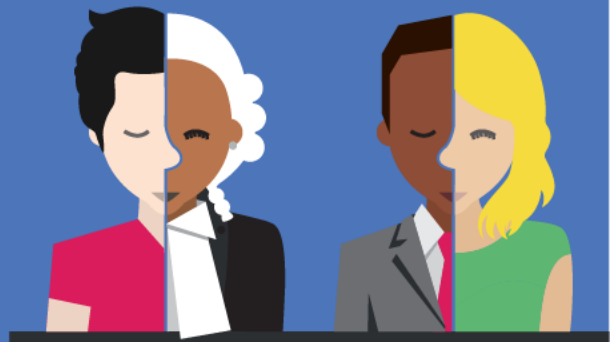

Hypothetical 1: Marriage troubles

Panel question:

What kinds of risks could arise here?

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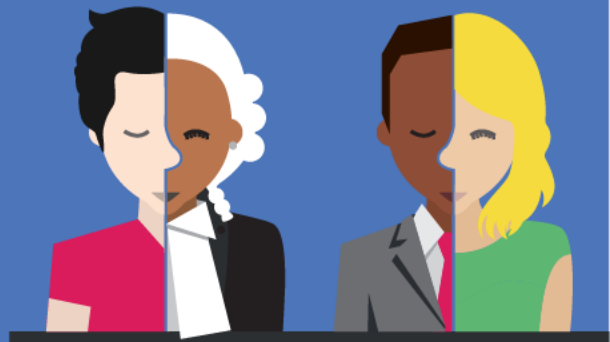

Hypothetical 1: Marriage troubles

Hunter & Sara [1999] NSWCCA 5

Good character direction available for one client, leading to a concern about the **absence** of a good character direction for the other client.

Counsel accordingly didn't raise good character.

Miscarriage of justice on the basis of incompetency of counsel.

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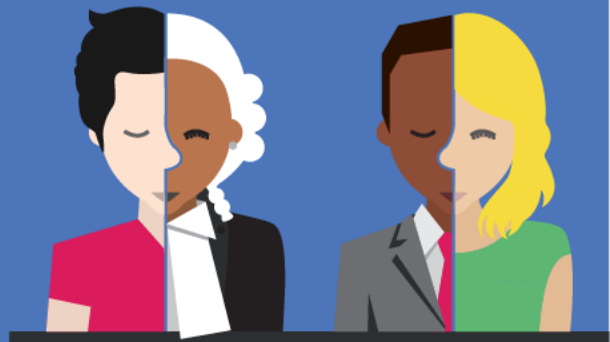

Hypothetical 2: Back-stabbing client

Some time ago you represented a client who pleaded guilty. On sentence, the judicial officer smacked him so hard he is now orbiting the sun. He responds by appealing – not just his sentence, but also his conviction.

He is **self-represented** on appeal.

He asserts that you pressured him to plead guilty; that you told him that he had no choice or you would leave him unrepresented; that he is not guilty of the offence because he never got his day in court; that you are incompetent and a charlatan. None of this is true.

You are approached by the DPP and asked to provide an affidavit about how it came to be that your (thankless) client came to plead guilty.

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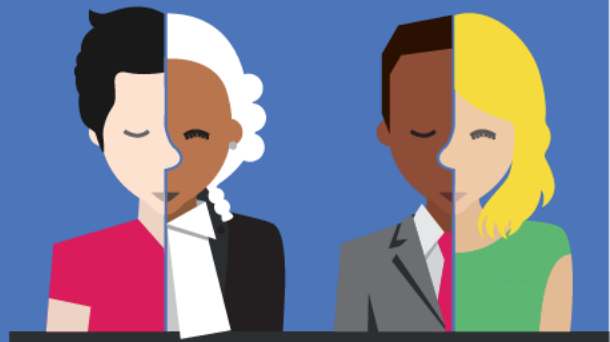

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You are asked for an affidavit. Do you:

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Hypothetical 2: Back-stabbing client

Momoa v R [2020] NSWCCA 328

6. *There was no impediment to the provision of an affidavit in the present case. The solicitor was available and had been provided with a waiver of client legal privilege signed by the applicant. However, for reasons not well explained in her correspondence, she did not provide an affidavit. She did, after being pressed, provide part of her file to the applicant's new solicitor but she did not include conference notes and the like. She was slow even to answer questions asked by the Director of Public Prosecutions directed specifically to the grounds of appeal. …*

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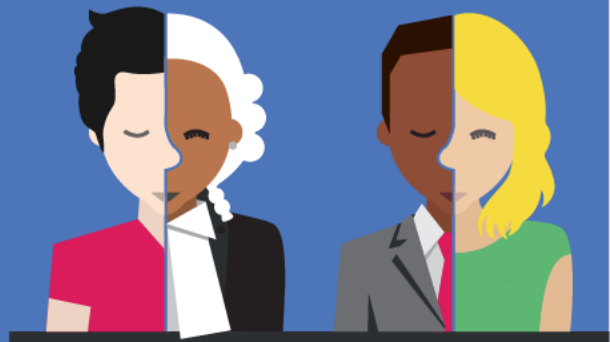

Hypothetical 2: Back-stabbing client

Momoa v R [2020] NSWCCA 328

11. … *The solicitor's correspondence indicates that she was uncertain as to whether she should provide an affidavit in response to a request from the Director of Public Prosecutions.* ***To put that issue beyond doubt, she should have. No issue of client legal privilege arose, the client having waived it. Her overriding duty was to the Court.*** *As already explained, her response to the allegations would have been relevant to determining whether a miscarriage of justice had occurred. That is always an important question; it was important in the present case because it involved the liberty of a young man who is barely an adult and who (as is now clearly established by the evidence tendered by his current representatives) suffers from a mental illness for which he was unmedicated at the time of the offences.*

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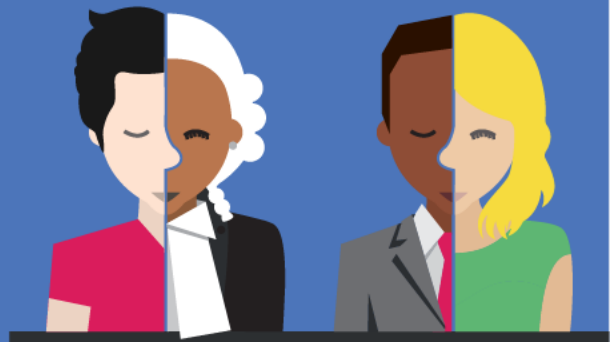

Hypothetical 2: Back-stabbing client

Momoa v R [2020] NSWCCA 328

12. *The correspondence indicates the solicitor may have apprehended that she should be communicating with the new solicitor for the applicant rather than assisting the Crown. That was misconceived. As already explained, it is perfectly proper for the Crown to seek an affidavit in such cases. Indeed, it is arguably more appropriate for such evidence to be presented by the prosecutor, whose primary obligation in such a case is to assist the court, than by the lawyer making the allegation of incompetence.* ***I accept that it might be confronting or uncomfortable for a lawyer to give an account of their conduct of a case in the face of an allegation of incompetence but it should go without saying that such feelings must give way to the interests of justice and the lawyer's higher duty to the Court.***

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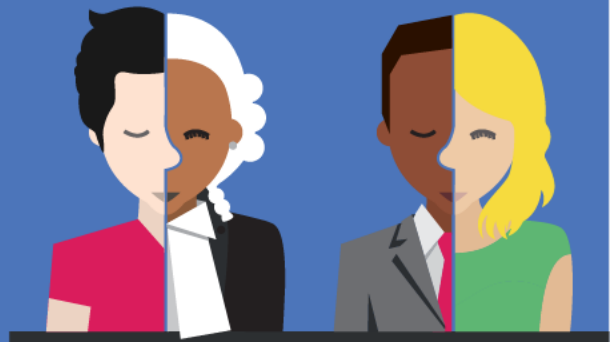

Hypothetical 2: Back-stabbing client

Answer:

If the client has waived privilege you are obliged to provide the affidavit. Waiver may be implied if there is conduct which is inconsistent with the maintenance of the privilege (eg verballing you in an affidavit).

If the client has *not* waived privilege, then unless you are compelled, the most you can do is swear an affidavit saying that the plea was entered voluntarily (without detail).

If you left for Costa Rica, send me a post card.

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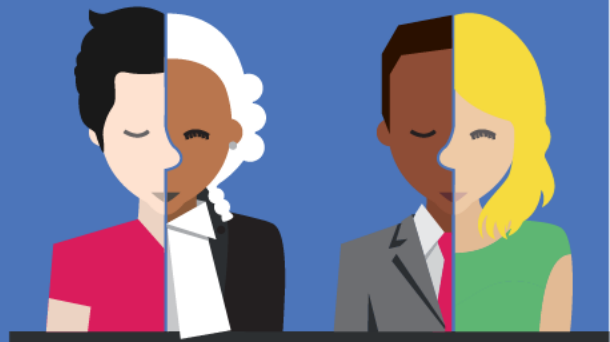

Hypothetical 3: Razor thin margins

You are in the cells at court, talking to your client about the matter which is on for sentence that day. The client has a plastic sleeve with certificates. Because lawyer and client are separated by glass, the sleeve is brought around to you by a Corrective Services Officer.

Upon opening the sleeve and taking out the documents, a very thin razor blade comes out from between the pages of the documents.

You now have the razor blade. You ask the client what it is, and the client just shrugs and smiles, without offering either explanation, excuse, or admission.

The sentence is on in 30 minutes. The client has been in custody for two years, you think he has done more than the appropriate sentence already, and any kind of adjournment will inevitably mean that the matter will need to be adjourned for months.

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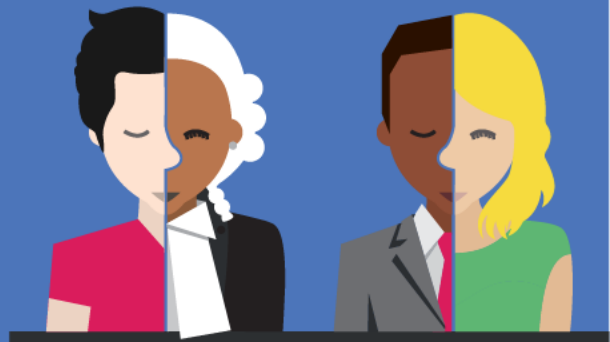

Hypothetical 3: Razor thin margins

Panel questions:

1. What do you do?
2. Are you allowed / obliged to tell anybody what has happened?
3. What should you do with the razor blade?

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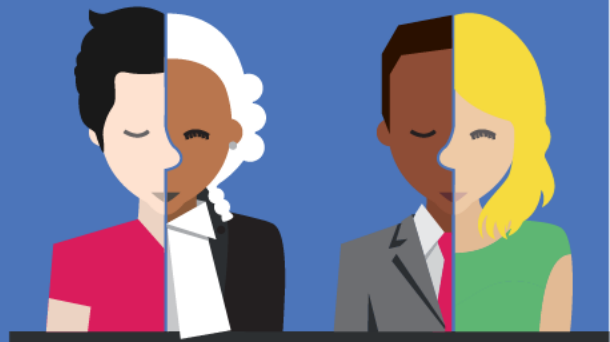

Hypothetical 4: Lies and alibis

You represented a client the day he was arrested for a breach of an ADVO: he allegedly went to his ex-partner's house in breach of a place restriction and assaulted her (also in beach of a no-contact condition). By phone from the cells, he told you (not in response to any particular question), that the allegation is crap because the victim wasn't even home at the time. Nothing in the Facts Sheet particularly suggested this, and it isn't immediately clear to you how the client came to this view.

Subsequently you are to appear as advocate in the hearing of the matter. The week before the hearing you are approached by three apparently-upstanding members of the community, who all earnestly tell you that the client couldn't have committed the offence because he wasn't there – he was with them.

You do still wonder about the fact that the client told you the complainant wasn't there, given really the only way to know that is if he was there.

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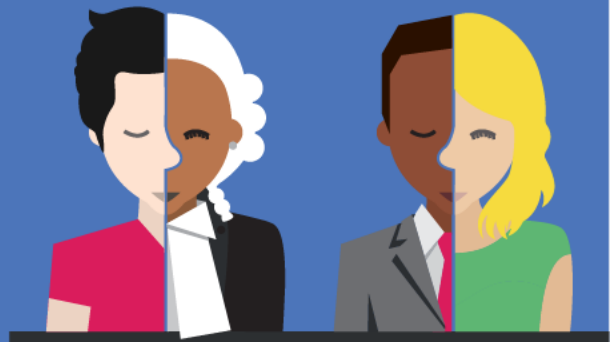

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Given your misgivings, is there any problem with calling the alibi witnesses?

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Hypothetical 4: Lies and alibis

New South Wales Bar Association v Punch [2008] NSWADT 78

23 It would not, however, have been enough to prove professional misconduct if the evidence merely showed that the [advocate] believed that [the client] was at the premises during the armed robbery. [Advocates] will sometimes find themselves in situations where the evidence strongly indicates that the client is not telling the truth. ***The fact that the [advocate's] personal belief is that the client is not telling the truth as to the facts of the case, does not mean that the [advocate] is prohibited from conducting the case in accordance with the client's instructions.*** *That was not what the evidence revealed in these proceedings.*

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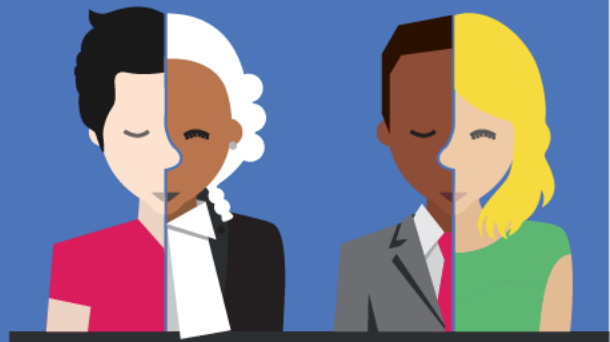

Hypothetical 4: Lies and alibis

New South Wales Bar Association v Punch [2008] NSWADT 78

24 *But if:*

(a) [the advocate] believed that a client was present at certain premises and there committed a serious crime;

(b) the [advocate] held that belief because the client told the [advocate] the client was present and committed the crime; and

(c) the making of the admission by the client took place in circumstances which the [advocate] realised ***strongly supported the conclusion that the client was telling the [advocate] what in fact actually happened, then if the [advocate] later led evidence from the client that the client was not present, the [advocate] would be actively misleading the Court as to the facts*** *– which is something a barrister must not do (see Saif Ali v Sydney Mitchell & Co [1980] AC 198 at 220 – Lord Diplock).* ***That would be professional misconduct.***

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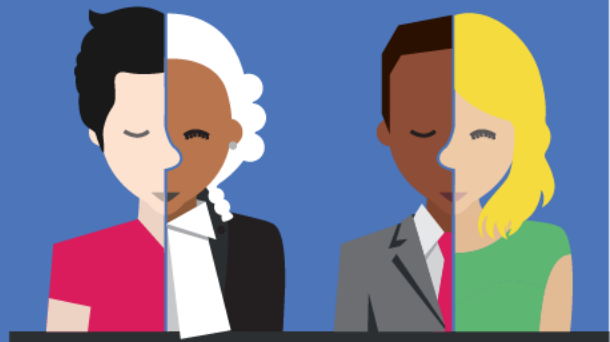

Hypothetical 4: Lies and alibis

Answer:

If you believe (or, arguably, ought reasonably believe) that the version a client has given you was true, then you can't lead evidence to the contrary.

But a mere suspicion that the evidence you're leading is untruthful is not enough.

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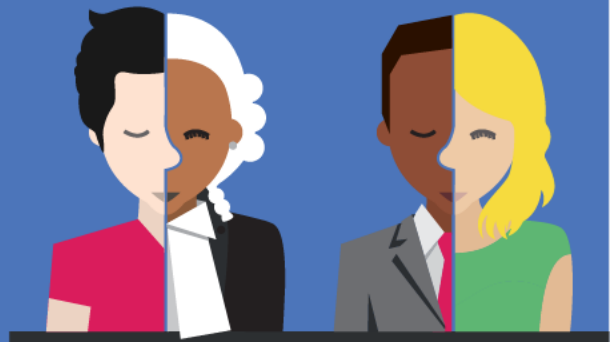

Hypothetical 4.5: Supplying a version

Your client tells you (not really in response to any particular question) that he was never at the scene of the crime; that it's all bullshit made up by the victims.

This strikes you as a bold statement, given his fingerprints and DNA are present at the scene.

On the other hand, in your view the evidence gives a whiff of a self-defence case, so if only the client would admit that he was physically present (as the evidence clearly demonstrates), he might have a case.

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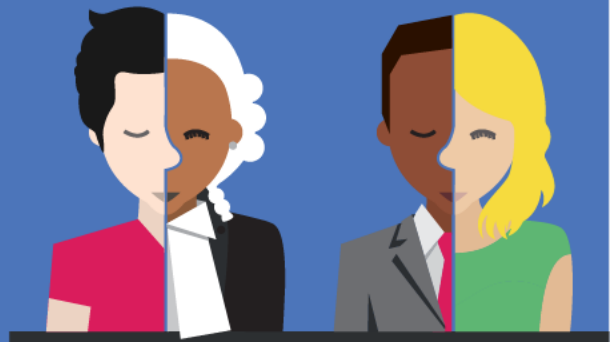
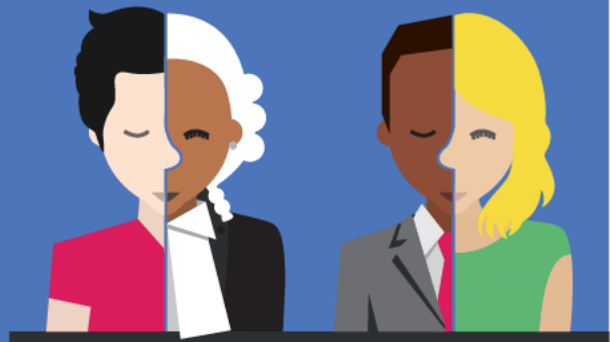


Hypothetical 4.5: Supplying a version

Panel question:

1. Is there a way to save this which doesn't cause problems?



Hypothetical 5: Bound over

Your client is sentenced in the Local Court. You ask for an Intensive Correction Order, and the Magistrate obliges.

The order that the Magistrate announces in open court is an ICO for **18 months**. Your client is happy. You write to them confirming the outcome: an ICO for 18 months.

A few weeks later, the client calls you. They have received the ICO in the mail, and it says the order is for **12 months**. You (or someone at the Registry at your request) check JusticeLink, and confirm that the order on JusticeLink is in fact for a period of 12 months, not the 18 months announced by the Magistrate.

You are absolutely certain that the Magistrate said (and intended) 18 months.

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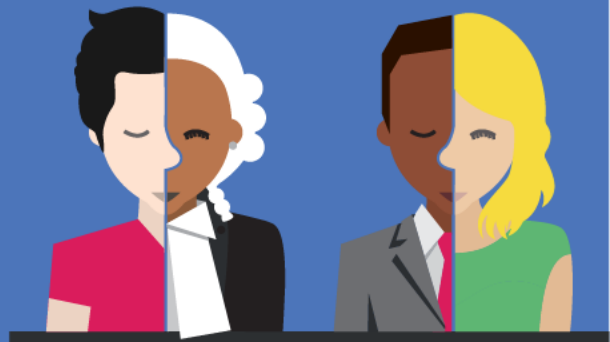

Hypothetical 5: Bound over

Panel questions:

1. What do you do?
2. What do you advise the client as to their obligations?
3. What is the capital of Peru?

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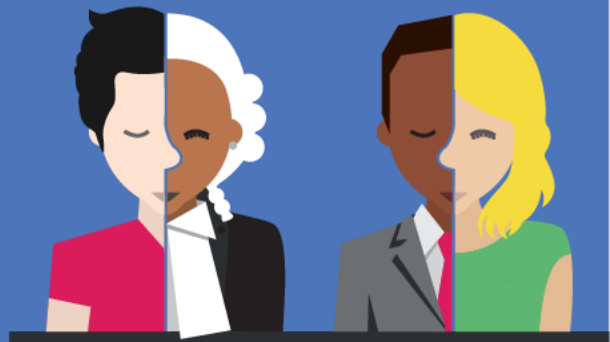

Hypothetical 6: Judicial indiscretion

You are appearing for a client who is in custody and who, having regard to the tariff for the offence they have committed, probably has some more time to serve. But client has nowhere to live, no familial supports, and no mental health arrangements in place despite an illness (which is being well managed in custody).

To see if you can't buy yourself some time, you ask for the matter to be adjourned-part heard. The bench is sympathetic; you get your adjournment.

About a week later, you are at court on a different matter. The court officer asks you to come with them to the judicial officer's chambers; your opponent isn't there. Asking about the part-heard sentence matter, the judicial officer asks you "*What are we going to do about this bloke? How can we get him out?*"

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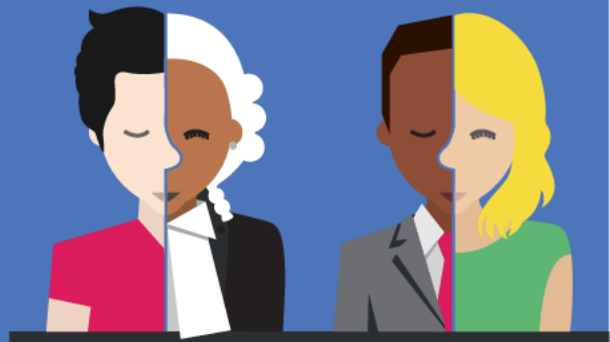

Hypothetical 6: Judicial indiscretion

Panel questions:

1. What do you do?
2. Are you obliged to report the interaction to anybody?
3. What about if the question was asked in open court during a break, but still in the absence of your opponent in the matter being discussed?

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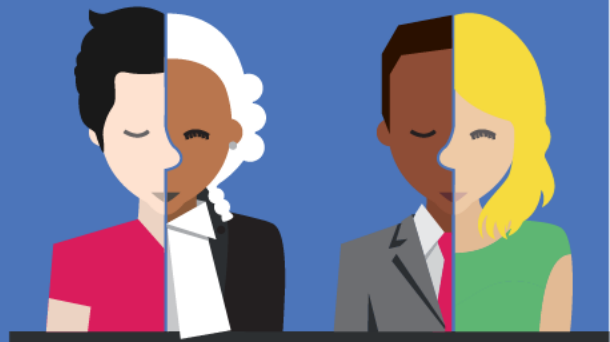

Hypothetical 7: Phoning it in

Your client is in custody, which, he tells you, “sucks”. Whenever you talk to him, he is fixated on his phone, which went into his property upon being arrested.

He wants to make sure he gets the phone back when he gets out. He asks you to get the phone which, you discover, is held by police at a station within walking distance of your office.

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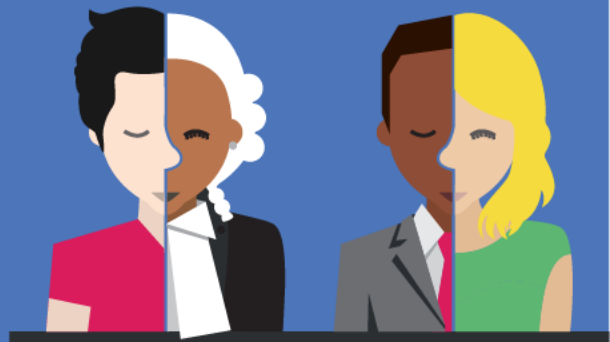

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Would you collect the phone?

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Hypothetical 7: Phoning it in

Have you considered:

1. It is possible that the reason the client wants the phone retrieved is because it contains evidence of this or some other offence
2. Assuming you can convince the police to hand over the phone, you might become a witness in this or some other matter

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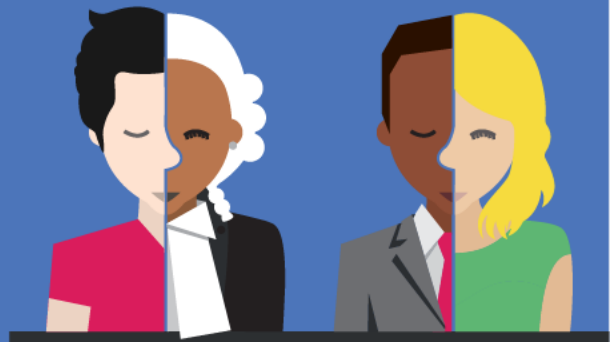

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Having had some of the risks pointed out to you, would you collect the phone?

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Hypothetical 7: Phoning it in

Panel question:

What about if you're told the phone has exculpatory evidence?

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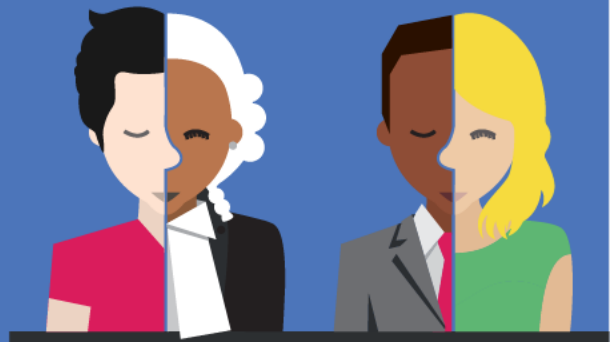

Hypothetical 8: A negotiated outcomes

Your client is charged with an offence which is going through the EAGP process. The client tells you she just wants to plead guilty and get it over with; **she says she will plead to the charge as laid**. Using your knowledge of your opponent (lazy), the OIC (useless), and the law (???), you reckon you might be able to get the matter down to a less serious charge, dealt with in the Local Court.

You go to the EAGP Case Conference. The prosecutor asks you "*Do you reckon she would plead to the existing charge?*"

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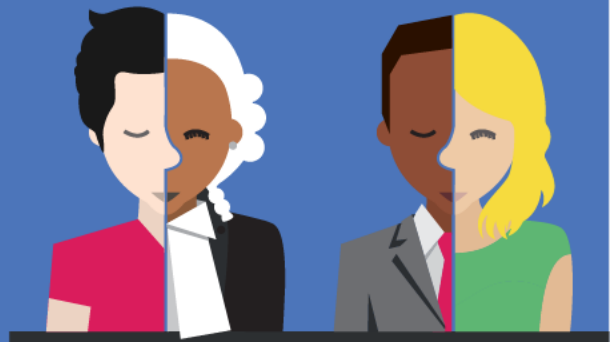

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Do you

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Hypothetical 8: A negotiated outcomes

Legal Services Commissioner v Mullins [2006] LPT 012

29. *When this mediation was held, Queensland barristers could not have approached the exercise on the basis that they were entering an honesty-free zone. For one thing, Rules adopted by the Bar Association of Queensland then included:*

> *"51. A barrister must not knowingly make a false statement to the opponent in relation to the case (including its compromise).*
>
> *52. A barrister must take all necessary steps to correct any false state-ment unknowingly made by the barrister to the opponent as soon as pos-sible after the barrister becomes aware that the statement was false."*

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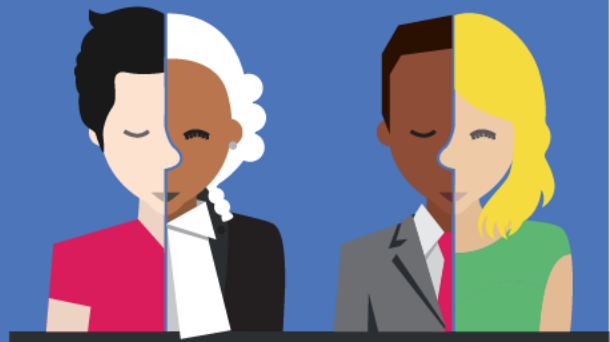

Hypothetical 8: A negotiated outcomes

Rule 22.1: *"A solicitor must not knowingly make a false or misleading statement to an opponent in relation to the case (including its compromise)."*

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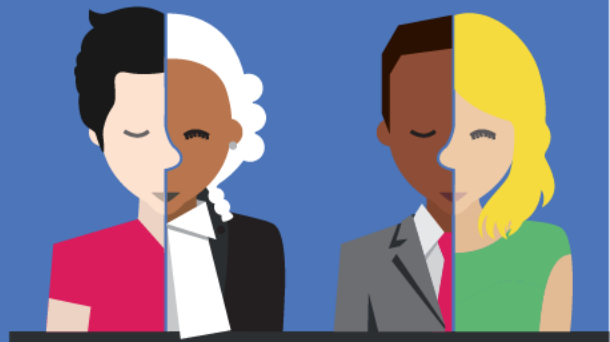

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