

Legal Aid NSW Criminal Law Conference 2021

Ethics in Practice – A Discussion

Scenarios

Scenario One

Your client is charged with an offence of armed with intent to commit an indictable offence contrary to s 114(1)(d) of the *Crimes Act 1900*.

The police case is that your client threatened the complainant whilst armed with a knife. An independent witness has made a statement asserting that he saw your client facing the victim whilst holding a knife.

Immediately before the start of the defended hearing at Manly Local Court, you speak to the independent witness on your own and without telling the prosecutor or the police. The witness volunteers, unprompted, that he is not sure if he actually saw a knife. At the time of making his statement, he was just telling the police what he thought they wanted to hear.

- Gut reaction – ethical conduct?
- What are the ethical issues?
- What could you have done differently?

Scenario Two

Your client is charged with common assault.

High quality CCTV footage depicts a person, alleged to be your client, getting out of a car registered in your client's name and then pushing a stationary cyclist over. The cyclist has made a statement indicating that he did not consent to being pushed.

Your client gave a "no-comment" record of interview. In that record of interview, your client was shown the CCTV footage. He said to police *"that could be anyone. That could be my brother, he drives my car sometimes. Anyway, no comment."*

The police obtained a statement from your client's brother. He denied that he was the driver of the vehicle and denied that he was the person captured on the CCTV footage.

Your client will not provide you with an account and he does not want to give evidence at the hearing.

You give the client advice that, in the absence of him providing an exculpatory account, the prosecution case is overwhelming – the prosecution can prove that an assault occurred and that your client was the perpetrator. You strongly encourage him to consider pleading guilty.

He instructs you that he will not accept your advice. He wants to defend the case. He also tells you *"why can't we say it was my brother that did it? I can't believe he made a statement against me, he's a dog, so fuck him. I'm paying you and I want you to say that he did it."*

You speak to a colleague. She says that you should withdraw because the client will not accept your advice to plead guilty and you are not obliged to run a hopeless case.

You decide to stay in the matter. In accordance with his instructions, you cross-examine the brother on the basis that he was the driver of the vehicle and that he assaulted the cyclist.

- Gut reaction – ethical conduct?
- What is the ethical issue?
- What could you have done differently?

Scenario Three

Your client has a criminal record for serious domestic violence offending against his partner. You are aware that his offending generally occurs when he is living with the victim and whilst he is drunk.

He is arrested for a further offence of serious violence against that partner. He is bail refused. You appear on the release application. You succeed in getting the client bail on strict conditions which includes a condition that he must reside with an Aunt in Newcastle. Further conditions restrict him from returning to Sydney unless he is attending court or attending a pre-organised conference with his lawyers.

Two months after the release application, you organise a conference with the client to obtain instructions on the brief of evidence. During that conference, you smell alcohol on his breath and you think that his eyes look a little bloodshot. He tells you that he is living with his partner contrary to his bail. You tell the client that he is breaching a court order and that he must not live with the complainant.

He says *“I don’t care what the Court says. We love each other and the Courts can’t keep us apart. I’m not going anywhere.”*

You end the conference. Immediately after ending the conference, you notify the court and the police that your client has breached his bail by residing with the victim.

- Gut reaction – ethical conduct?
- What is the ethical issue?
- What could you have done differently?

Scenario Four

You are representing a client charged with sexual intercourse without consent contrary to s 61I of the *Crimes Act 1900*.

There is a live question about whether the Crown can prove the act of penetration; you have instructions to offer a plea of guilty to attempt sexual intercourse in full satisfaction.

You are conducting the case conference. The Crown is represented by a newly appointed trial advocate and a junior solicitor. The solicitor-advocate indicates that, subject to the requisite consultation, he will support the defence offer because “*it has the same maximum penalty and standard non-parole period anyway*”. You do not respond to that comment.

After the case conference, the DPP solicitor-with-carriage writes to you by email confirming acceptance of the defence plea offer because the Crown notes that a plea to attempted sexual intercourse will still attract the same maximum penalty and standard non-parole period as the completed offence contrary to s 61I. You respond to the email confirming that your client will adhere to the defence offer.

At all times, you are aware that the prosecution may be operating under a misapprehension about the law; that is, you know there is authority that an offence of attempt sexual intercourse does not attract a standard non-parole period (see *R v DAC* [2006] NSWCCA 265 at [10]). You make a deliberate decision during and after the case conference not to correct that error because you are concerned the Crown will refuse the plea deal.

- Gut reaction – ethical conduct?
- What is the ethical issue?
- What could you have done differently?

Scenario Five

You are representing the accused in a defended hearing. She is facing a single charge of intimidation contrary to s 13 of the *Crimes (Domestic and Personal Violence) Act 2007*.

At the defended hearing at Penrith Local Court, the police prosecutor intends to rely on conduct that pre-dates the alleged offence to prove that your client must have known that her alleged behaviour would have intimidated the complainant.

At the outset of the hearing, you indicate that you will object to the evidence of prior conduct. The Magistrate asks the prosecutor how the prior conduct could possibly be admissible in the absence of a tendency or coincidence notice. After the Magistrate hears the prosecutor's submissions, the Magistrate tells you "*I don't need to hear from you*". The Magistrate excludes the evidence.

Neither the Magistrate, the prosecution, or you are aware of s 7(2) of the *CDPV Act* which permits a court to take into account any pattern of violence for the purpose of determining whether the alleged behaviour amounts to intimidation. No submissions were directed to this provision and the Magistrate did not refer to it.

The hearing is adjourned part-heard mid-way through the prosecution case. During the adjournment period, you come across s 7(2).

When the matter returns for hearing, you decide not to advise the Court about this provision because you are concerned that the Court may re-visit its ruling and admit the evidence of prior conduct.

- Gut reaction – ethical conduct?
- What are the ethical issues?
- What could you have done differently?

References

- *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*
- *Legal Profession Uniform Conduct (Barristers) Rules 2015*
- *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015*
- G E Dal Pont *Lawyers' Professional Responsibility* 7th Ed, Lawbook Co 2021

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