Albion Chambers, Broad Street, Bristol BS1 1DR
Telephone 0117 927 2144 **Fax** 0117 926 2569
DX 7822 Bristol **Email** clerks@albionchambers.co.uk
www.albionchambers.co.uk

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Albion Chambers CRIME TEAM NEWSLETTER

Conflicted out?

For self-employed barristers, the role of Counsel when accepting instructions is set out in the Bar Code of Conduct. The rule, known evocatively as the *cab rank rule* means that a Barrister must not refuse instructions on the basis that the nature of the case or the opinions or beliefs of the client are contrary to the personal beliefs of the Barrister. This rule is designed to ensure that everyone, no matter what their crime or belief is able to seek and obtain representation.

The Code also sets out the circumstances in which a Barrister may be professionally embarrassed and thus, must not accept instructions. Of those, paragraph 603(e) confirms this to be *'if there appears to be a conflict or risk of conflict either between the interests of the Barrister or between the interests of any one or more of clients (unless all relevant persons consent to the Barrister accepting the instructions)' paragraph 603(f) also assists stating 'if there is a significant risk that information confidential to another client or former client might be communicated to or used for the benefit of anyone other than that client or former client without their consent'.*

Finally, once instructions have been accepted, paragraph 608 confirms that a Barrister must withdraw from a case *'if having accepted instructions on behalf of more than one client there is or appears to be:*

(i) a conflict or risk of conflict between the interests of any one or more of such clients; or

(ii) risk of a breach of confidence'.

Again, as with the *cab rank rule*, the purpose of those paragraphs is clear; it is to prevent clients, whether lay or professional, from compromise or potential damage.

For solicitors there is a similar Code which governs the conduct of solicitors on behalf of their clients. Because of the volume of instructions taken, the number of repeat clients and in many areas the fact that there may only be one or two firms to represent those seeking assistance in a particular location, the matter is more often a 'live issue' for solicitors than for the Bar. In many of those cases, the issue is clear and the solicitor will have no difficulty in deciding that there is a conflict or potential conflict and either refuse to take instructions at the earliest stage, such as the police station or return the papers to another firm once the issue has arisen. For instance, the representative called to the police station to act for a man arrested for an assault on his partner, will have no difficulty in refusing to accept instructions, if, upon his arrival, the representative recognises the partner as someone for whom he regularly acts and indeed, has advised in relation to the aggressive behaviour of the suspect. Clearly, in those circumstances, he would be privy to information about the partner; her criminal history and/or lifestyle that would potentially assist the accused man were the matter to proceed to trial. However, he would only have come by much of that information, through his acting for the Complainant and would breach her confidence by disclosing it to the suspect. More than that, he would also, by virtue of his having advised about previous instances of violence by the accused, be potentially hampered from acting in the best interests of his new client were the matter to be contested.

Similarly, when a number of people are arrested for an affray, some said to be on one side, the others on the opposing side, a representative called to the police station in those circumstances would clearly not agree to assist in the interview of all parties.

However, the position becomes harder when the initial stance taken by the client, for instance at the interview stage changes as the proceedings progress, the issues become defined, and fuller instructions are provided. Just as in relation to other matters that arise during the course of proceedings, the duty in relation to conflict or potential conflict is a continuing one and as such should be kept under review throughout the life of a case. Thus, if instructions change or the nature of the case changes, new witnesses, previously thought to be irrelevant, become relevant; a Defence Statement is served from a Co-Defendant who had previously answered *'no comment'* in interview; so the matter of representation may have to be reviewed.

That fact is one that the courts have recently underlined in a number of cases, all of which serve to demonstrate the view the courts take in relation to the undesirability of acting in circumstances of even potential conflict. The case of *R v David George Morris* (2005) EWCA Crim. 1246 is one such case. In that case, the Court of Appeal had to decide the fate of a solicitor instructed in the defence of a man charged with murder. Prior to the arrest and charge of that client, the solicitor had acted for two other potential suspects. They were not charged but it is clear from the judgment that there remained *considerable material potentially incriminating them*. The solicitor when he attended the police station to represent the third suspect (M) was told of the potential conflict by the custody officer. He therefore, obtained the permission of his two previous clients, albeit in a different capacity, to act for M. However, that agreement was on the basis that in conducting the defence of M, no suggestion was made that one of the two previous suspects had committed the murder. Unfortunately, as well as continuing to represent the previous two suspects, albeit the solicitors had represented them for some time before and was aware of the material incriminating them. He was also aware

that if anyone else (such as M) were to be charged with the murder a substantial part of their defence was likely to involve the incrimination of the two previous suspects. That being the case the Court of Appeal held that with that knowledge alone the solicitor should not have agreed to undertake M's defence there being an inescapable conflict of interest inherent in the situation.

In *R v Connolly v Law Society* (2007) EWHC 1175 (Admin), whilst confirming that the existence of a conflict of interest was a matter of professional judgment and that the honest and genuine decision of a solicitor on such a question did not give rise to a disciplinary offence, the court held that that did not mean that for a solicitor to act where there was a significant risk of conflict of interest could not amount to an offence.

Thus whilst the decision as to whether a conflict exists which would prevent the solicitor acting is a matter for the individual solicitor and his or her professional judgment, that decision has to be informed by his or her knowledge of the matters that give rise to the potential for conflict. It is very much a matter of justice being seen to be done as well as in fact being done. A further important matter to be borne in mind and one that has been highlighted as a consequence of more trials being conducted by solicitors in the Crown Court is the position of the Higher Court Advocate who also acts for the accused in the police station. It has been the case for sometime, as a result of the consequences that flow from such advice that, having given advice at the police station to answer *'no comment'* to any questions put, the representative who gave that advice may be called to explain to a jury the reason behind that decision. This article does not seek to deal with the practical difficulties that arise when the decision is taken to adduce that evidence in the ordinary course of events. However, when the Advocate at trial is also the representative who gave that initial advice, it is clear that any such difficulties will be compounded. In the case of the solicitor who takes initial instructions at the police station, then represents the accused in interview, takes a proof of evidence and then acts as Advocate at trial, the position can easily become difficult. If the Defendant, during cross-examination asserts that he told his solicitor a certain fact at the police station, that he gave specific instructions on a particular point when he provided his proof of evidence or was advised not to mention something, the Trial Advocate may well find himself or herself in an embarrassing and potentially impossible position in relation to the relationship with that client. Time constraints and a lack of resources, particularly in modern times make it difficult for any firm to provide a division of labour for the various processes required in the life of a case. It is also hard, once a large amount of work has been put into a case, or the case is a high profile or newsworthy one, to relinquish control and return it to a potential rival firm. However the courts have made plain the consequences that flow from a failure to do so. There may be cost implications. More than that, any firm that seeks to retain instructions in the face of a conflict, real or potential, risks prejudicing or damaging not only their client's case but also the good name of the firm. For those firms who have achieved it, it is the good name that is harder to come by than the work (that will undoubtedly continue to flow in) and it is therefore, in the interest of the firm, as much as the client, that any conflict of interest is resolved at the earliest opportunity.

Sarah Regan

No prosecution witnesses equals acquittal? Think again.

A young woman accuses Mr X of indecently assaulting her during a first dinner date at her apartment. There is no other evidence against him. By the time of the trial she says that she has received death threats from friends of Mr X (who she won't name) and refuses to give evidence. Can the prosecution proceed, using her written statement?

Mr Y is accused by an elderly woman of trying to con her out of £13,000 by pretending her roof needs major repair. He denies it, saying he only asked for £130. Although she was mentally sound when she spoke to the police, by the time of trial her dementia is so advanced that she can no longer give evidence. Can the prosecution continue?

Traditionally, hearsay evidence came into court only if you could squeeze it through one of a tiny number of exceptions to the forbidding "rule against hearsay". If it was a confession, a dying declaration, part of the res gestae, etc, you were just about okay; otherwise, forget it. The reason was set out by Lord Bridge in *Blastland* [1985] 2 All ER 1095: '[There is] great difficulty, even more acute for a juror than for a trained judicial mind, of assessing what weight can properly be given to a statement by a person whom the jury have not seen or heard and who has not been subject to any test of reliability by cross-examination. The danger against which this fundamental rule provides a safeguard is that untested hearsay evidence will be treated as having a probative force which it does not deserve'.

Not any more. The Criminal Justice Acts of 1988 and 2003 opened up a number of new exceptions to the rule, most significantly the 'safety valve' provision in s.114(1) of the 2003 Act, which allows any hearsay evidence to be adduced if the court is satisfied that it is in the interests of justice for it to be admissible.

Most commentators welcomed the move. Why shouldn't juries be trusted to hear all such evidence and give it such weight as they think appropriate? The more cynical doubted the change, arguing that it would give scope to prosecuting authorities to seek convictions based on dubious evidence.

As in many areas, the law has shifted in favour of the prosecution. The paradigm, perhaps, is shown by the two examples set out at the beginning of this

article. Should the prosecution be able to secure a conviction based on hearsay evidence which is the *sole or decisive* evidence in the case? If the maker of a statement that implicates a defendant does not, or will not, come to court and face cross-examination, how can that defendant have a fair trial? Before 2003 the answer was axiomatic; the Defendant must be acquitted.

The starting point now is Article 6 of the European Convention for the Protection of Human Rights. It provides, at 6(c), that everyone charged with a criminal offence has the right 'to examine or have examined witnesses against him'. At first blush, you might think, if the witness does not or will not come to court to be examined, that fundamental right is breached.

Not so fast, say the English courts. In *Xhabri* [2006] 1 Cr App R 26, the Court of Appeal decided that s.114 of the CJA 2003 is not incompatible with the Convention. Article 6 is not an absolute right. The question to be asked is this: does the fairness of the trial require the availability of the relevant witness for cross-examination?

Many people would argue that it is impossible for a defendant to have a fair trial if the evidence of the only witness against him is read. In the example of Mr X above, how can a jury assess the complainant's response to his allegation that sexual activity was consensual if she isn't there to answer that question? For Mr Y, how can the jury assess whether the complainant might be mistaken about the sum of money demanded from her?

In the recent case of ***Keet*** [2007] EWCA 1924, the Court of Appeal - on similar facts to our Mr Y – upheld the (very junior) Recorder's decision to allow the witness statement to be read. The Lord Chief Justice said that the absence of cross-examination of the elderly house-owner 'did not make the trial process unfair. 'If the defendant calls or gives oral evidence, that evidence, if it withstands cross-examination, is likely to carry more weight than the statement relied on by the prosecution'.

Some would see that as a perceptible shift in the burden of proof. Others would claim it as the only means of obtaining justice for those who are genuine victims, but through fear or incapacity can no longer speak for themselves. Either way, we have clearly come a long way from Blastland.

Adam Vaitilingam

'Everything you say to your solicitor may be written down in evidence and used against you.'

The potential pitfalls of bases of plea.

The recent decision of *R v Johnson [2007] EWCA Crim 1651* confirmed that a basis of plea is a confession for the purposes of admissibility upon the application of a co-defendant pursuant to Section 76A PACE. The result of that decision will doubtless leave many reluctant to embark upon the process of reducing any plea to a written basis. In addition, if that plea is subsequently vacated, the new legal team (for undoubtedly there would have to be one) will have to consider at trial the consequences and mechanics for avoiding the admission of the previous basis.

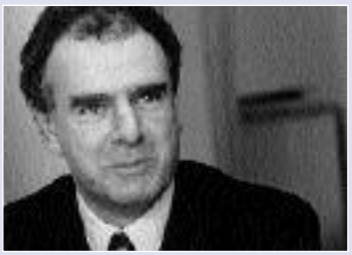
The facts of Johnson are that the co-accused, Ms Alfaruqi, who was acquitted at trial, was arrested as she collected a parcel, known to contain drugs and addressed to her. Johnson was an employee at the parcel depot where she collected the drugs and he was subsequently arrested when links between the two were established. At trial Alfaruqui stated that that she had been asked to collect the parcel for Johnson who had told her that it would contain innocuous items, and that he was unable to collect it himself.

In a written basis of plea, it was expressly stated by Johnson that he had received full advice from his legal team, and that he pleaded guilty of his own volition, Johnson accepted that his role had been that of delivery man, and that he did not know the gravity and seriousness of what he was involved in. He was subsequently permitted to vacate that plea. At trial Alfaruqi's representatives unsuccessfully sought to admit in evidence both the fact of and the basis of that plea. The Court of Appeal held that the decision to exclude the document, which did not enjoy any special status or immunity, was wrong: a fair trial required that Alfaruqi be entitled to adduce the written basis given its obvious relevance to proving her innocence. The court stated that on an application by the prosecution to adduce a confession contained within a basis of plea on the basis of it being an inconsistent statement the defence may have recourse to the higher threshold of 'fairness' contained within Section 78 to prevent its admission.

One way of resolving the situation, at least for the co-accused at risk of having a basis of plea admitted would be for that defendant to argue severance. However, if successful, that would leave the defendant wishing to rely upon the basis of plea unable to do so; a defendant cannot admit evidence of confession by a third party not called as a witness *(R v Turner 61 Cr. App. R. 67)*. So as with many aspects of the Criminal Law, this decision proves that what is fair to one may not be fair to another.

Anna Midgley

Neil Ford QC Call 1976 QC 1997
Recorder **Clerk** Bonnie Colbeck



Michael Fitton QC Call 1991 QC 2006
Recorder **Clerk** Bonnie Colbeck

Christopher Jervis Call 1966 Deputy District Judge (Crime) **Clerk** Bonnie Colbeck

Timothy Hills Call 1968
Clerk Bonnie Colbeck

Nicholas O'Brien Call 1968
Clerk Bonnie Colbeck

Paul Grumbar Call 1974 Recorder
Clerk Bonnie Colbeck

Nicholas Fridd Call 1975
Clerk Bonnie Colbeck

Martin Steen Call 1976 Deputy District Judge (Crime) **Clerk** Bonnie Colbeck

William Hart Call 1979 Recorder
Clerk Bonnie Colbeck

Ignatius Hughes Call 1986 Recorder
Clerk Bonnie Colbeck

Stephen Mooney Call 1987
Clerk Bonnie Colbeck

Adam Vaitilingam Call 1987 Recorder
Clerk Bonnie Colbeck

Fiona Elder Call 1988 Assistant Deputy Coroner for Avon **Clerk** Bonnie Colbeck

Virginia Cornwall Call 1990
Clerk Bonnie Colbeck

Michael Cullum Call 1991 Recorder
Immigration Judge **Clerk** Bonnie Colbeck

Simon Burns Call 1992
Clerk Bonnie Colbeck

Paul Cook Call 1992
Clerk Nick Jeanes

Alan Fuller Call 1993
Clerk Nick Jeanes

Jason Taylor Call 1995
Clerk Nick Jeanes

Kirsty Real Call 1996
Clerk Nick Jeanes

Kate Brunner Call 1997
Clerk Nick Jeanes

Sam Butterfield Call 1999
Clerk Nick Jeanes

Sarah Regan Call 2000
Clerk Nick Jeanes

David Chidgey Call 2000
Clerk Nick Jeanes

Richard Shepherd Call 2001
Clerk Nick Jeanes

Anna Midgley Call 2005
Clerk Nick Jeanes

Gemma Borkowski Call 2005
Clerk Nick Jeanes