

ADVOCACY TIPS – MATTERS ARISING IN THE CROWN COURT

During the course of the case the Judge discloses that he knows one of the witnesses whose non-contentious evidence has been given to the jury, he has just realised this and says that he presumes this causes no difficulties for the Prosecution and the Defence. Your opponent immediately says that he cannot see any objection and the case should continue immediately. The Judge turns to you, clearly inviting you to agree with the Prosecution. What should you do?

It is very easy to feel under pressure to agree that there cannot be any possible prejudice to your client. If an issue like this arises you should seek a short adjournment saying that you need to discuss it with your client. Consider the authorities and explain the position to your client. It may be that there is no objection or that your client wishes the trial to continue in any event, but you must be satisfied that you have explained the position fully to him and you have his clear instructions before indicating the position to the Judge.

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Your client, Mr Smith has told you he has no previous convictions. As you are about to go into court he says that his real name is Brown under which he is wanted under an arrest warrant for an unrelated matter. He insists on using the name Smith. The case is called on. What should you do?

The first thing to do is to ask for a short adjournment. The Judge may not like it. You can say a matter has only just arisen. If the Judge will not grant the adjournment, then ask again immediately. If that incurs his wrath say that reluctantly you feel you will have to withdraw for “professional reasons” and suggest that might be avoided if he does accede to your request.

You know that you cannot mislead the court and must explain this to your client. If his real name is Brown but he has let the court believe it is Smith you

cannot represent him knowing the true position. You must tell him that you can continue, and he can use the name Smith provided the position is made clear to the court. You must tell him that if he insists his true identity is not revealed you will have to withdraw, citing to the court “professional reasons”.

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Your client faces a charge to which he pleads Not Guilty. The prosecution’s case is one of identification. A man fitting his description is seen in the area. Your client remained silent in interview but says to you this man was not him. You cross-examine on the basis that the prosecution witnesses are mistaken. At the end of the prosecution’s case there is a short break. You consider you can make a submission of “no case”. Your client suddenly says the man in the area is in fact him, he committed the offence but still wishes to plead not guilty. What do you do?

A number of points arise. First you need to examine carefully how you have cross-examined the prosecution witnesses. If you have done so only on the basis that they cannot be sure that the man fits the same description as the defendant then you can properly make a submission of “no case”. If the prosecution cannot prove the case then the defendant has to be acquitted irrespective of any admissions to you. If on consideration your cross-examination has been to suggest your client was not there you must withdraw immediately. It may not, of course, be clear-cut. If in doubt you should withdraw for “professional reasons”.

If you are satisfied that you can stay in the case but your submission fails what do you then do? Ask for another break. Do so before being forced to indicate whether you are calling your client. Explain to him that you cannot in any circumstances call him or witnesses who might maintain a story you know to be false. If he wishes to give evidence you will have to withdraw. If he agrees not to give evidence you can continue to act, but only addressing the court on the limited basis of whether the prosecution have proved their case.

You cannot suggest any evidence that might indicate your client is innocent. You should make this clear to him. He might feel that you are so constrained that he does not wish you to continue to represent him.

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During the course of a hearing you are asked to give an undertaking on behalf of your client. The Judge says that he assumes you will do so and looks to you. What should you do?

Do not give an undertaking without considering the consequences. You must appreciate if it is given by you it is a “solicitor’s undertaking”. If not complied with it is likely to result in a possible allegation against you personally of professional misconduct. If you are asked for an undertaking consider it carefully. If it involves your client, or you are asked to give it on behalf of your client, you cannot do so professionally without consulting with him, explaining to him what it involves and getting his express agreement. If necessary ask for an adjournment to take instructions. Explain the reasons to the Judge. Consider also whether it would be more appropriate for your client formally to give the undertaking. If, for example, your client is asked to undertake to produce some documents in court the next day you cannot agree on his behalf unless you have discuss it with him and he agrees to give that undertaking; you cannot agree without his express instructions.

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Your client has pleaded guilty and you have mitigated on his behalf. The tribunal retire. Your client reminds you that you have forgotten to hand up a character reference on his behalf. You say it is too late. Are you correct?

No. It would probably be best to ask the tribunal to come back. You should explain that it was your oversight and the client should not be prejudiced. The other way would be for you to hand the character reference to the clerk and

ask him to take it to the retiring room. The first option would look far better for your client. If it is the second then when the tribunal returns make sure that they have received the character reference and have taken it into account.

Prepared on behalf of SAHCA