

Public Defenders Conference 2019

Panel session: “Pleas of Convenience, Charge Negotiation and Other Ethical Conundrums under the EAGP scheme”

Extracts of relevant legislation and Barrister’s Rules

Rule 24 (cf 19.1 Solicitors’ Rules)

A barrister must not deceive or knowingly or recklessly mislead the court.

Rule 49 (cf 22.1 Solicitors’ Rules)

A barrister must not knowingly make a false or misleading statement to an opponent in relation to the case (including its compromise).

s72 Criminal Procedure Act:

72 *Obligations of legal representative of accused*

(1) The accused person’s legal representative is to seek to obtain the accused person’s instructions concerning the matters to be dealt with in the case conference before participating in the case conference.

(2) The accused person’s legal representative must explain the following matters to the accused person before the case conference certificate is completed:

- (a) the effect of the scheme for the sentencing discount applied under Part 3 of the *Crimes (Sentencing Procedure) Act 1999* for a plea of guilty to an offence,
- (b) the penalties applicable to the offences certified in the charge certificate and to any other offences the subject of offers made by the accused or the prosecutor in the committal proceedings,
- (c) the effect on the applicable penalty if the accused person were to plead guilty to any offence at different stages of proceedings for the offence.

Rule 37 (cf Rule 7 of Solicitors’ Rules)

A barrister must seek to assist the client to understand the issues in the case and the client’s possible rights and obligations, sufficiently to permit the client to give proper instructions, including instructions in connection with any compromise of the case.

Rule 38 (cf Rule 7.2 of Solicitors’ Rules)

A barrister must (unless circumstances warrant otherwise in the barrister’s considered opinion) advise a client who is charged with a criminal offence about any law, procedure or practice which in substance holds out the prospect of some advantage (including diminution of penalty), if the client pleads guilty or authorises other steps towards reducing the issues, time, cost or distress involved in the proceedings.

Rule 39 (no exact equivalent but see Rule 7.2 of Solicitors’ Rules)

It is the duty of a barrister representing a person charged with a criminal offence:

- (a) to advise the client generally about any plea to the charge, and
- (b) to make clear that the client has the responsibility for and complete freedom of choosing the pleas to be entered.

Rule 40 (no equivalent in Solicitors’ Rules but reflects the common law)

For the purpose of fulfilling the duty in rule 39, a barrister may, in an appropriate case, advise the client in strong terms that the client is unlikely to escape conviction and that a plea of guilty is generally regarded by the court as a mitigating factor to the extent that the client is viewed by the court as co-operating in the criminal justice process

Rule 41 (no equivalent in Solicitors’ Rules but reflects the common law)

Where a barrister is informed that the client denies committing the offence charged but insists on pleading guilty to the charge, the barrister:

- (a) must advise the client to the effect that by pleading guilty, the client will be admitting guilt to all the world in respect of all the elements of the charge,
- (b) must advise the client that matters submitted in mitigation after a plea of guilty must be consistent with admitting guilt in respect of all of the elements of the offence,
- (c) must be satisfied that after receiving proper advice the client is making a free and informed choice to plead guilty, and
- (d) may otherwise continue to represent the client.

Case Example

We will be considering a number of practical, tactical and ethical issues arising from this case, based upon different instructions and at different stages of the proceedings:

- You are representing Fred under the EAGP scheme.
- Fred is charged with break, enter and steal in company.
- The Crown case is that:
 - Fred was in company with an unknown alleged co-offender;
 - they forced open a window and entered an empty house;
 - they stole \$10,000 worth of jewellery and nothing else.
- Fred has no connection with the residents and DNA matching his profile was found on a Coke can inside the house.
- The DNA of an unidentified male was found on the outside of a window which was not the point of entry.
- The unidentified male DNA has been found at the scene of other break and enters.

References

Legal Profession Uniform Conduct (Barristers) Rules 2015 (“Barristers’ Rules”)

Legal Profession Uniform Australian Solicitors Conduct Rules 2015 (“Solicitors’ Rules”)

On pleas of convenience

Meissner v The Queen (1995) 184 CLR 132

Maxwell v The Queen (1996) 184 CLR 501

KCH (2001) 124 A Crim R 233

R v Allison (2003) 138 A Crim R 378

Wong v DPP (NSW) (2005) 155 A Crim R 37

Kanakaradnam v R [2018] NSWCCA 282

On agreed and disputed facts

R v Olbrich [1999] HCA 54; 199 CLR 270

R v Radic (2001) 122 A Crim R 70

Weininger v R (2003) 212 CLR 629

GAS v The Queen; SJK v The Queen (2004) 217 CLR 198

Australian Competition and Consumer Commission v Pratt (No.3) (2009) 175 FCR 558

Loury v R [2010] NSWCCA 158

Korgbara v R [2010] NSWCCA 176

CL v R [2014] NSWCCA 196

Dowling v R [2017] NSWCCA 98

Selected secondary materials:

“Some Ethical Problems for the Criminal Advocate” The Honourable Justice Hidden AM – September 2011.

“Ethics – Recent Developments” Jason Watts – February 2015

“Pleas and Traversals” Will Tuckey – June 2018