Conduct Column

by Michael Sandor

In the November edition of *Hong Kong Lawyer* Michael Sandor set out the Law Society's view on whether it was ethically proper to accept instructions to represent an accused for only part of a criminal trial. This note discusses the matter further.

Discussion

The author wishes to express his *personal opinion* that the accepting of such limited instructions should be regarded, *prima facie,* as misconduct by all involved, solicitor and barrister. The client is entitled to expect adequate and competent representation for the whole of his trial and the lawyers involved have, in effect, crippled the accused's defence by any plan to limit their appearance.

Michael Sandor believes that accepting limited instructions should be a disciplinary offence

The Guidance Committee properly says, that if the client genuinely wishes to limit the appearance of his lawyers, that is his right. But that wish, and these instructions, must be the result of *full* advice about the consequences.

That advice must be absolutely honest and candid. It must include the advice that if (as in the case discussed in the November edition) the challenge in the *voir dire* is unsuccessful and a new solicitor and a new counsel are retained via legal aid for a continuing trial, then the new lawyers will not have the benefit in the main trial of having been present during the *voir dire.* Even if a transcript and another solicitor and counsel were immediately available, that could not make up for the lack of 'experiencing' the *voir dire.* A new legal team that is challenging the reliability of the confession could not easily or quickly be aware of or 'recall', that the police witnesses in the main trial have modified their testimony since the *voir dire* or that when he testified in the *voir dire* their client altered or adjusted his testimony when compared with his instructions.

It might be argued that the situation is the same if, during his trial, the client dismisses his legal representatives unexpectedly, or 'embarrasses' his representatives by demanding they put forward a positive assertion of a fact when he has admitted the opposite to them, so that ethically they are *obliged* to resign. However, there is a vital difference. Solicitors and barristers are bound to do their utmost for the client when they take on the retainer and brief to defend. They are bound to act competently. If the instruction and brief is limited in such a way that the client will inevitably be ill-served by the limitation, the lawyer must not take it on without being able to satisfy himself that the client has genuinely been informed about the consequences and then consents.

The legal representative whose retainer is unexpectedly terminated by the client, or who terminates for good cause, has not *planned* to abandon the client. Counsel's duty is "to ensure that the accused person is never left unrepresented at any stage of his trial" (para 151(a) *Bar Code*). The same duty is implicit for the instructing solicitor (*Circular 30/90*).

It is difficult to see a judge accepting a withdrawal for this cause as 'good', unless he is satisfied that the client *does* fully understand the consequences and has acquiesced or instructed accordingly. And even if it is 'good' cause, it is difficult to see a judge accepting that the continuing trial will be fair, if the departure of the *voir dire* representatives will undermine his defence.

Every late change of representative can seriously affect the accused's case. A particularly instructive case is *R v Clinton* [1993] 1 WLR 1781.

Also, it could well found a ground of appeal against conviction if there has been a change of the defence legal team during the trial, resulting from the first team's deliberate plan of action, and it is not absolutely clear that the client was fully informed when he agreed or instructed. Such behaviour by the lawyer could well be labelled grossly negligent if it results in the serious diminution of the defence case.

Furthermore, the lawyers who do not inform the judge and crown counsel beforehand are close to committing contempt by their limited appearance. They could be seen as trying to fetter the judge's discretion to grant an adjournment or not, by presenting the judge with a *fait accompli*. In the interests of a fair trial the judge can deny the adjournment and order them to continue, unless they have genuine good cause to withdraw. Non-payment of fees is not a good ground, particularly since solicitors at least have an obligation to continue at legal aid rates (and if they are not on the legal aid list they had better apply!): *Circular 30/90.*

The abiding suspicion is that the lawyers involved, in their own interests, have persuaded the client who would otherwise be eligible for legal aid, that 'private' help for the *voir dire* is a good investment and better than legal aid will provide and that if the challenge fails and his money is exhausted, legal aid will have to do. There is a heavy onus on the lawyers involved to show that they have done as the Guidance Committee sets out in its letter, referred to in the November edition. ❖

Michael Sandor is the co-ordinator of the professional conduct course at the Faculty of Law, University of Hong Kong.

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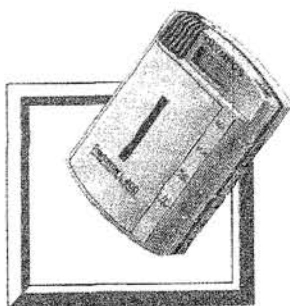

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