"Play on!" – If and when changing instructions require you to withdraw

PART A: INTRODUCTION

1. The question of what to do when your client changes their instructions is one that all practitioners, particularly in criminal law, will encounter during their career.
2. As with many ethical issues there is no bright line demarcating between situations where a decision to continue representing a client who changes their instructions strays from the proper to improper.
3. This paper attempts, drawing on the limited caselaw available, to provide some guidance on how to approach such situations.
4. This issue is not heavily litigated and there are not many cases where a practitioner's decision to withdraw (or not) has been interrogated by a Court. Some guidance can be taken from matters where a practitioner's decisions in dealing with changing instructions has been argued to have occasioned a miscarriage of justice.
5. This paper refers to three decisions: *New South Wales Bar Association v Punch* [2008] NSWADT 78 (***Punch***); *Moustafa v R* [2019] NSWCCA 89 (***Moustafa***); and *Ahmu v R; Director of Public Prosecutions v Ahmu* [2014] NSWCCA 312 (***Ahmu***). These matters provide different insights into the appropriate way to approach changes to instructions.
6. Broadly speaking, whether a practitioner is obliged to withdraw as a consequence of their instructions will be answered by an assessment of whether or not, in their continued representation of the client, they are complying with their duties to the Court and to the client.
7. As will be seen from *Ahmu*, at least one judicial officer has applied a fairly narrow interpretation of what constitutes a 'misleading statement' for the purpose of Bar Rule 25.

PART B: RELEVANT RULES

8. The starting point for any ethical question is either the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015; or Legal Profession Uniform Conduct (Barristers) Rules 2015 (**Bar Rules**). For ease of reference the Bar Rules will be referred to in this paper.
9. A barrister has an overriding duty to the Court, to act with independence in the interests of the administration of justice: Bar Rule 23.
10. Further an advocate must not knowingly or recklessly mislead the Court (Bar Rule 24) and must take all necessary steps to correct any misleading statement made by the barrister to the Court as soon as possible after they become aware the statement was misleading: Bar Rule 25.
11. Notably these duties owed to the Court and prevail over other duties. For example, your duty to promote the best interests of your client does not extend to misleading the Court in order to secure an acquittal or a lesser penalty.
12. Barristers have a duty to promote and fearlessly protect their client's best interests, without regard to their own interests or consequences (Bar Rule 35). However, they must not act as a mere mouthpiece for the client and must exercise their own forensic judgments after due consideration is given to the client's and solicitor's wishes: Bar Rule 42.
13. A barrister who is informed by a client or witness during a hearing or after judgment is reserved, that the client or witness has lied to the Court, has falsified evidence, or has suppressed evidence they are obliged to disclose, must refuse to take further part in the matter unless the client authorises the barrister to inform the court of the lie. Such a disclosure may only be made with the permission of the client: Bar Rule 79
14. Bar Rule 80 sets out the circumstance sin which a barrister may continue to act for a client who admits guilt. Relevantly, the barrister is:
    a. Prohibited from falsely suggesting that someone else committed the offence;

b. Prohibited from setting up an affirmative case inconsistent with the confession; and

c. Prohibited from continuing to act if the client insists on giving evidence denying guilt or requires the making of a statement asserting the client's innocence.

PART C: NEW SOUTH WALES BAR ASSOCIATION v PUNCH [2008] NSWADT 78

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15. *New South Wales Bar Association v Punch* [2008] NSWADT 78 (**Punch**) is not so much a case about dealing with conflicting instructions, but a matter about wilfully misleading the court by adducing evidence directly in conflict with clear instructions from the client.
16. Mr Punch was found guilty of professional misconduct by virtue of adducing 'alibi evidence' from five witnesses, knowing that evidence to be untrue.
17. This came about during Mr Punch's representation at trial, of a client charged with armed robbery. Mr Punch had spoken with his client and a co-accused long before the trial in the cells of Bankstown Police Station. The police lawfully recorded the conversation using a listening device.
18. In that conversation Mr Punch's client provided instructions that acknowledged that he had been present during the course of the armed robbery at the victim's house and it was clear that Punch understood those instructions essentially be a confession of guilt.
19. Mr Punch was recorded telling the client, 'now if you're not actually, physically in there. You are out the back but you're still guilty you know, if they can prove that. But your whole case is just centred on if the prosecution can identify you. If you knock that out that's the end of the case. They've got nothing else.'
20. However, when it came to the conduct of the trial Mr Punch did not simply put the Crown to proof on the issue of identification or seek to exclude on legal grounds aspects of the identification evidence. He proceeded to call evidence from his client to the effect that he was at home in bed at the time of the offence. This was corroborated by a further four

witnesses called by Mr Punch who supported the alibi and the accused was ultimately acquitted.

21. The tribunal concluded that, given the instructions received in the cells, Mr Punch knowingly adduced false evidence from his client and witnesses. This was a breach of rule 33 (now Rule 80) of the New South Wales Barristers' Rules. It was also an extremely serious breach amounting to professional misconduct and had dire consequences for Mr Punch's career.

22. Mr Punch's counsel sought to argue that the tribunal should infer that Mr Punch's instructions had changed and that is why he adduced the alibi evidence. It was argued unsuccessfully that this should be inferred simply from the fact that Mr Punch adduce the conflicting evidence.

23. However, Mr Punch did not give evidence in the proceedings so there was no direct evidence as to why the alibi evidence was adduced. For example, was it Mr Punch's idea or did the client change his instructions and instruct Mr Punch to adduce that evidence?

24. However, particularly in circumstances where Mr Punch declined to give evidence the tribunal accepted that the contrary argument, that there was no change in instructions by the client and Punch adduced evidence he knew to be false.

25. Let us assume for a moment that having received the initial instructions from the client that the client had been present at the robbery, the client nonetheless instructed Mr Punch to adduce alibi evidence from the 4 witnesses, as well as a version from the client denying his presence. This would have breached rule 24 and 25 because **at the time** of the conduct, the barrister knew it to be false.

26. The Court held that the state of knowledge required to found or support a finding of professional misconduct in these circumstances was something more than a bare belief in the truth of the instructions:

23 It would not, however, have been enough to prove professional misconduct if the evidence merely showed that the respondent believed that Haddad was at the premises during the armed robbery. Barristers will sometimes find themselves in situations where the evidence strongly indicates that the client is not telling the truth. The fact that the barrister's personal belief is that the client is not telling the truth as to the facts of the case, does not mean that the barrister is prohibited from conducting the case in accordance with the client's instructions. That was not what the evidence revealed in these proceedings.

24 But if:

(a) a barrister believed that a client was present at certain premises and there committed a serious crime;

(b) the barrister held that belief because the client told the barrister the client was present and committed the crime; and

(c) the making of the admission by the client took place in circumstances which the barrister realised strongly supported the conclusion that the client was telling the barrister what in fact actually happened, then if the barrister later led evidence from the client that the client was not present, the barrister would be actively misleading the Court as to the facts – which is something a barrister must not do (see *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 220 – Lord Diplock). That would be professional misconduct.

27. As discussed above, Mr Punch unsuccessfully attempted to argue that the tribunal should draw an inference that his instructions changed and in adducing the impugned evidence, he was not misleading the Court. As will be seen below, had this been the case he may not have been in breach of his ethical duties.

PART: D *MOUSTAFA v R* [2019] NSWCCA 89

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28. *Moustafa v R* [2019] NSWCCA 89 (**Moustafa**) provides an example of an ethically proper way to navigate a complex ethical issue of this kind. Moustafa is an appeal asserting a miscarriage of justice occasioned by the incompetence of counsel.

29. Whether counsel's conduct was in breach of the bar rules was not a specific question which the Court addressed, however the factual matrix of the appeal is instructive on the issue of how one can approach the issue of changing instructions.

30. The appellant was convicted of robbery armed with an offensive weapon. During the course of his trial, the appellant gave different versions of his instructions at different times to his lawyers. These included that:

    a. The appellant did not commit a robbery and that he had never been in the complainant's unit. On this basis trial counsel unsuccessfully attempted to have identification evidence excluded.

    b. After the evidence was ruled admissible the appellant instructed that although he was present in the complainant's unit, he did not assault the complainant or remove any property from the unit, and there had been no aggressive interactions with the victim. On the basis of those instructions, trial counsel conducted his cross-examination of the complainant.

    c. After the close of the Crown case the appellant instructed trial counsel that in fact the complainant had produced a knife in an attempt to force him out of the unit. When asked why the appellant had not mentioned this critical detail earlier, the appellant made a face, shrugged his shoulders and did not give an answer. The appellant did not tell Mr Lucas that he had forgotten to mention the critical fact earlier or that he had made a mistake in not mentioning it earlier.

31. According to Punch, this last point would allow for the practitioner to continue appearing for the appellant and adduce the evidence from the appellant which conflicted with a) the prior instructions and b) the way in which the case had been run to that point. Because there is no suggestion that counsel knew that either the old or the new instructions were misleading, there is no ethical breach.

32. After receiving the third set of instructions, trial counsel advised of the forensic disadvantages which would flow from the appellant giving this evidence before the jury, including that it would be attacked as recent invention. Nonetheless the appellant chose to

give evidence. His evidence to the jury was consistent with the third set of instructions provided to trial counsel.

33. In cross-examination the Crown suggested that the appellant had fabricated his evidence and the issue of the knife wielding complainant was a product of recent invention. It is noted that since *Hofer v The Queen* [2021] HCA 36; 274 CLR 351 such questioning may be severely limited or precluded entirely: *Hofer v The Queen* [2021] HCA 36; 274 CLR 351, [32]-[49]

34. In his affidavit on the appeal trial counsel deposed that:

> "…after the appellant gave his version of events, he took the view that there was no basis to seek to withdraw the evidence, to stop the trial for the purposes of obtaining instructions, or to seek a discharge the jury. He took the view that there was no basis to seek a direction from the trial judge that the appellant's version of events was anything other than a recent invention. Mr Lucas took the view that no useful purpose would be served by recalling the complainant for further cross-examination because it was likely that the complainant would simply deny the allegation. He believed that, in any event, an application to recall the complainant would have involved disclosing to the court why the appellant's allegation had not already been cross-examined upon."

35. As is apparent from the timeline of the instructions, trial counsel, at different times ran his case in different ways based on the instructions he was provided. No criticism is made of trial counsel for continuing to represent the appellant in circumstances where his instructions continued to change in a way which may have been perceived as beneficial to the appellant.

36. Importantly, at no time did trial counsel have any knowledge of what the truth of the appellants actions were. Even if he had a suspicion or personal belief that the appellant was not being truthful in his instructions, the reasoning in *Punch* extracted above suggests that in the absence of something confirmatory of this belief from the appellant, trial counsel was not likely to be in a position where continuing to act on his instructions placed him in danger of breaching his duties to the Court.

37. To the contrary, trial counsel may well have been ethically obliged to continue representing the appellant whilst making appropriate forensic decisions with how to approach the issue of the appellant's evidence: Bar Rules 35 and 42.

38. This is ultimately what occurred in Moustafa. Trial counsel continued to appear for the appellant who gave his evidence consistent with the third set of instructions. Trial counsel made an informed decision not to make an application to recall the complainant to put the new version to her. In closing addresses, very little was made of the allegation of recent invention made in cross-examination of the appellant. The Crown essentially invited the jury to reject the appellant's evidence because it was not believable. The judge did not mention the issue in summing up.

39. The appellant argued that his trial counsel was incompetent for failing to make an application to recall the complainant; or failing to seek a discharge of the jury; or failing to seek a direction that a failure to cross examine should not lead to an adverse inference against the appellant.

40. In analysing trial counsel's conduct of the trial Payne JA (Wilson and Ierace JJ agreeing) said that:

> [42] The context here is that a critical part of the Crown case was that it was the appellant who attacked the complainant with a knife which he held to her throat. No knife was ever recovered by the police. The complainant had been cross-examined to suggest that there were no aggressive interactions between the complainant and the appellant on the relevant evening. The appellant's change of instructions, after the Crown had closed its case, raised obvious forensic challenges. Highlighting the difference between the way the complainant had been cross-examined and the evidence given by the appellant about the knife was potentially forensically disastrous for the appellant. The objective circumstances make clear that counsel for the appellant, acting competently, was perfectly entitled to conclude that each of the suggested strategies suggested in this Court to address the appellant's change of instructions would only have highlighted the difference between the way the complainant had been cross-examined and the evidence given by the appellant about the knife. Not pursuing the issue further was, objectively, in the appellant's interests.

41. What can be seen here is that far from being obliged to withdraw once the appellant began changing his instructions, the Court accepted that trial counsel was perfectly entitled to continue representing the appellant and make considered forensic choices about how to conduct the case having received those instructions. This is a practical example of counsel adhering to Bar Rule 42:

> A barrister must not act as the mere mouthpiece of the client or of the instructing solicitor and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's wishes where practicable.

42. This rule is given practical application in the law by the authorities dictating how one is to determine whether or not forensic decisions by counsel have led to a miscarriage of justice. It is not determined by adherence to instructions but, as summarised in *Xie v the Queen* [2021] NSWCCA 1:

> With this ground, the relevant inquiry is whether what occurred or did not occur at the trial occasioned a miscarriage of justice (*TKWJ* at [79] per McHugh J; *Ali v R* [2005] HCA 8; (2005) 214 ALR 1 at [18] per Hayne J; "Ali"). In some cases the alleged failings of counsel are of such magnitude that they cause the trial to become unfair, such as a failure to cross-examine a critical witness or a failure to address the jury (*TKWJ* at [76]; *Nudd v R* [2006] HCA 9; (2005) 225 ALR 161 at [19] per Gleeson CJ and [87] per Kirby J; "Nudd"). The alleged failings in this case are not of that kind. Otherwise a determination of whether the alleged failings of counsel give rise to a miscarriage of justice requires a consideration of what ultimately did or did not occur at the trial, whether there was some material irregularity in the trial and whether there is a significant possibility that the acts or omissions of which complaint is made affected the outcome of the trial (*Nudd* at [24] per Gummow and Hayne JJ; *TKWJ* at [31]-[33] per Gaudron J, at [79] and [97] per McHugh J, at [101] per Gummow J and at [103]-[108] per Hayne J). **In assessing the conduct of counsel, the relevant standard is whether or not the conduct was "incapable of rational explanation on forensic grounds**" (*Nudd* at [16]; *Hanna v R* [2017] NSWCCA 168 at [17]).

PART E: *AHMU v R; DIRECTOR OF PUBLIC PROSECUTIONS v AHMU* [2014] NSWCCA 312

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43. *Ahmu v R; Director of Public Prosecutions v Ahmu* [2014] NSWCCA 312 (***Ahmu***) involved an appeal against the appellant's conviction and an appeal by the Crown against the inadequacy of his sentence. Only the appeal against conviction is relevant to this paper.

44. The single ground of appeal in conviction was:

> There was a miscarriage of justice because of the incompetence of counsel at trial. Counsel for the applicant adduced irrelevant and incurably prejudicial evidence from the complainant in cross-examination and failed to make an application to discharge the jury

45. There is no doubt that prejudicial information about the appellant was introduced to the jury by his trial counsel during cross-examination of the complainant, however the circumstances in which that occurred were highly unusual.

46. The evidence adduced from the complainant in cross-examination by the appellant's trial counsel was described as demonstrating that the accused was 'violent, sexually predatory and a child molester with a sexual interest in children, including his 2-year-old son".

47. On any view, even where the client instructs you to adduce such evidence (as he did in this case), it is a brave advocate that accedes to that instruction with a view towards advancing their client's case and any request to do so needs to be viewed in light of the fact that an advocate is not a mere mouthpiece for their client.

Background

48. To understand the issues, it is necessary to set out in some detail the background of the trial and the factual background of the offences.

49. The appellant was charged with multiple counts of sexual intercourse without consent and two counts of indecent assault against the complainant, his ex-wife, and proceeded to trial

before a judge and jury. This was the third trial that had taken place in respect of these allegations.

50. At an earlier stage the prosecutor had told the Court that if questioned about the history of their relationship, the complainant would likely say that the parties met in 2007 and had a child, D, in 2008. D was 2 years old in 2009 when the complainant obtained an AVO against the appellant alleging fears for herself and for D. A final order was made in May 2010. However, the appellant and the complainant resumed their relationship in July 2010.

51. The prosecutor identified to the Judge that the complainant claimed she had resumed the relationship because she had concerns about the appellant having unsupervised access to D. Apparently the complainant had told police that Mr Ahmu had made disclosures to her that he was having sexual thoughts about children and in particular their son D, in support of the AVO application in 2009.

52. Due to this disclosure by the prosecutor, the appellant and his legal representatives were on notice of what the complainant was likely to say if she was examined about the resumption of their relationship in 2010.

53. In the previous two trials counsel for the appellant had stated that they wished to cross-examine the complainant on areas relating to the 2010 AVO and the resumption of the relationship in 2010. During discussions prior to the second trial counsel for the appellant told the Court that:

> "[T]he accused has carefully considered his position and there won't be any resistance to the full complaint as made by the complainant."

54. In the third trial, Counsel for the appellant cross-examined on the application for the AVO in 2009 which led from the complainant details of non-consensual sexual activity, including on one occasion in front of D who was less than 2 years old.

55. It was further put to the complainant that she had told police that the appellant had told her he had touched other children, and that she had told police that the appellant has masturbated over her whilst D was asleep next to her.

56. In a break in cross-examination the trial judge raised concerns with trial counsel about the potential prejudice to the appellant's case if these lines of examination continued and the evidence the prosecutor foreshadowed earlier was forthcoming.

57. The next day trial counsel continued to cross-examine the complainant about the AVO application and put it to her that she had fabricated the allegations in it to benefit her in the family law proceedings which were going on at the time.

58. Further cross-examination was conducted on the issue of the complainant's fears of leaving the appellant alone with D.

59. At the end of the day the Crown sought leave to file and serve a short service subpoena on Campbelltown Mental Health Service, explaining that:

> It has been put to the complainant today in evidence that she had told police that the accused had told her that he was having sexual thoughts towards children and also [D]. It was put to her [that] that was fabricated[,] that the accused never said that to her in her evidence today. The Crown has evidence available from the complainant which is already in the brief where she says that the accused told her that he had spoken to a counsellor at that [S]ervice about his sexual thoughts towards children. Now, the Crown has not previously sought that material because it wasn't admissible - it was agreed to be not admitted in the last trial.
>
> But it has now been squarely put to the complainant that she is fabricating that, that the accused never said that.

60. Counsel for the appellant sought that determination of the issue of whether leave should be granted for the subpoena, and subsequent cross examination of the complainant be delayed until counsel had sought advice in relation to an ethical dilemma.

61. Two days later counsel for the appellant continued cross-examining the complainant. The questions now implicitly accepted that the appellant had a sexual interest in children,

particularly D, and sought to adduce from the complainant, an explanation for that behaviour. For example, the following exchange took place:

> Q. So do you agree that you had some discussions, more than one it would seem, with Mr Ahmu about this topic of him having feelings towards children and [D]?
>
> A. Yes.
>
> ...
>
> Q. And it was in the context, wasn't it, of Mr Ahmu relaying to you that he had been sexually interfered with by his uncle, do you recall that was part of that conversation?
>
> A. There was a lot more to it than that.
>
> ...
>
> Q. And part of the conversation was and this is my word but that they were intrusive thoughts that Mr Ahmu was having, do you agree?
>
> A. No.
>
> Q. And that he felt repulsed by having these thoughts, do you agree that was something that you and he discussed?
>
> A. I don't want to talk about this, I don't see the relevance.

62. There was an exchange with the trial judge where it became clear that trial counsel was suggesting that his instructions had changed and that he now accepted that there had been conversations between the complainant and the appellant in relation to his sexual thoughts about children and D, that the appellant thought they emanated from his own abuse as a child and, far from wishing to act upon them, he was seeking help from the complainant to overcome them.

63. That line of cross examination then ceased and the Judge directed the jury that these issues were only relevant to the credit of the complainant and not in proof of the elements of the allegations charged.

Admissibility of trial counsel's affidavit

64. The single ground of appeal asserted a miscarriage of justice arising from the incompetence of counsel in his cross examination of the complainant and subsequent failures to seek a

discharge of the jury. The Crown sought to adduce evidence from trial counsel to explain certain forensic decisions.

65. The law relating to the admissibility of this type of evidence on an appeal is beyond the scope of this paper. Briefly, whether a miscarriage of justice had occurred should be assessed by reference to the objective features of the trial to the extent which is reasonably possible: *Nudd v The Queen* [2006] HCA 9; 80 ALJR 614 at [10].

66. In this case, Basten JA took the view the affidavit of counsel took the matter of miscarriage no further than the inferences available from the course of the trial and otherwise was only responsive to issues not in dispute, and therefore not relevant. Accordingly, his Honour rejected the tender of the affidavit and did not comment on the ethical issues it raised.

67. Fullerton J agreed with Basten JA and Adams J that there was nothing in the conduct of counsel which gave rise to a miscarriage of justice. Her Honour did not find it necessary to express a view on the admissibility of the affidavit or its contents.

68. However, Adams J found the affidavit was relevant and admissible as the evidence took the matter considerably further than the inferences available from a review of the course of the trial. It explained the change in instructions and also why counsel took the course he did. Having formed that view, Adams J engaged in an assessment of whether the matters deposed to in the affidavit gave rise to a breach of the Bar Rules.

Contents of the affidavit

69. In his affidavit trial counsel referred to a number of matters relevant to the question of whether he should have withdrawn or continued to represent the appellant.

70. Firstly, trial counsel stated that the cross-examination of the complainant in respect of her statement to the police in support in her application for an AVO that she had "fabricated all of the allegations that are the subject of [the] statement" was made pursuant to specific

instructions. In particular, a denial of the allegation that the offender had said that he "had sexual thoughts about children and your son".

71. Secondly, following the Crown's application for a short service subpoena for certain records, the appellant disclosed to counsel:

> "that the records sought by the Crown were indeed likely to reveal that he had discussed with the complainant and a counsellor that the offender had a sexual interest in children, including the children of the union... [and] conceded that he had lied... to [trial counsel] and his solicitors"

72. Thirdly, that trial counsel was of the view that he was obliged to withdraw the allegation of fabrication which he made against the complainant. Accordingly, he cautioned the appellant that if he were to continue appearing him, trial counsel was under an obligation to correct the lie. If the client's consent was not forthcoming, counsel would have to withdraw.

73. The appellant was advised he could terminate the services of counsel, that if he chose to allow counsel to correct the lie and continue appearing he would likely be found guilty, and that the trial judge had already expressed a view that he was unlikely to discharge the jury even if it meant that Mr Ahmu went unrepresented.

74. It appears that trial counsel consulted with a senior counsel who had sat on the Bar Association Ethics committee for 10 years in respect of what to do should the appellant instruct him not to disclose the lie. On that basis trial counsel formed the view that in those circumstances he would have to withdraw.

The view of Adams J

75. From [48] to [52] Adams J engages in an assessment of whether the instructions of Mr Ahmu to trial counsel were such that they:

    a. Obliged counsel to correct 'the lie'

    b. Obliged counsel to withdraw in the event he was not instructed to correct 'the lie'.

76. At [48] Adams J described the ethical advice apparently received by trial counsel from senior counsel and consequently given by trial counsel to the appellant as ‘quite wrong’. In coming to the view that there was nothing for trial counsel to ‘correct’, His Honour said:

> 48 As the matter stood, [trial counsel] had put to the complainant that she had fabricated an allegation made by her to police, which she denied. At the time the question was asked, [trial counsel] had acted properly, as it accorded with his instructions as they then stood. There was therefore no "lie" to be corrected. What counsel puts to a witness is not, and cannot be regarded as, evidence and it should be expected that, in due course, the trial judge would have explained this to the jury. Thus, the matter before the jury would be that the allegation had been put and the only evidence on the point was that it was untrue.
>
> …
>
> 50 It will be seen that rule 78 [79] did not apply to the situation here, since neither [trial counsel’s] client nor any witness called on his behalf had lied. Nor, in my view, is a question asked on instructions (even if, at a later stage, those instructions are significantly changed) a "statement made by the barrister to a court" under rule 27 [25]). It is true, of course, that a statement which is made to the court, truthful at the time it was made, may become misleading because of further information of which the barrister becomes aware and, accordingly, will require correction under this rule. **However, it is fundamental, as it seems to me, that a question to a witness, even if it implies a fact which subsequently the barrister discovers to be untrue, is not such a statement as requires correction**. Of course, once his instructions had changed, it would not have been proper for [trial counsel] to have conducted the case, whether by further cross-examination of the complainant or otherwise, on the basis of his earlier instructions.
>
> 51 **It seems to me, therefore, that [trial counsel’s] advice to his client about the position was plainly wrong. He was not bound to give up the brief if the offender had refused to instruct him to inform the judge and jury of the change in instruction; to the contrary, he was ethically obliged to continue to represent the offender even if those instructions were not forthcoming, providing of course, the offender did not instruct him to conduct the case in any way inconsistent with the later disclosure. I should also point out, by the way, that although [trial counsel] was obliged to inform his client of the step that he proposed to take, his client's permission was not necessary. Counsel are not under an ethical (or other) obligation to conduct a case as the client wishes it to be conducted or, conversely, not to conduct the case as the client wishes it not be conducted. If the client does not like the way counsel conducts the case, the retainer can be withdrawn. This is an essential characteristic of counsel's independence.**

77. Interestingly, not only does Adams J strongly take the view that Bar Rules 24 (not to mislead the Court) and 25 (to correct any misleading statement) are not engaged in the circumstances of this case but also that there is no conflict with counsel's duty to the Court.

78. Consequently, his Honour's view is that the duty to the client continues and obliges counsel to continue representing the client to the best of their ability provided the client does not instruct you conduct the matter on a premise you **now know** is false.

79. Although Basten JA did not engage in an assessment of the material contained in the affidavit, his Honour did make passing reference to the ethical issues raised in argument on the appeal:

> 36 Although there was some discussion in the course of the hearing in this Court as to counsel's ethical obligations, those did not appear to arise from the objective circumstances of the course of the trial. Such a dilemma may have occurred if the applicant had given instructions requiring counsel to continue to pursue an allegation that the complainant had fabricated part of her application for an AVO, whilst acknowledging to counsel that this was not so. However, there was no indication that any such instructions had been given. Accordingly, the matter resolved itself into a strategic issue for counsel as to how to continue the trial to the best advantage of his client, given the change in instructions.

80. Whilst not addressing it head on, his Honour seems to take the broad view that an ethical issue would only have arisen if the appellant, having acknowledged the allegation alleging the complainant had fabricated her 2009 statement was false, continued to instruct counsel to run the case on that now admittedly false basis.

81. This is consistent the position of Adams J and is presumably premised on the rationale that first, putting questions based on instructions which expressly or impliedly assert a particular fact is not a 'statement' for the purpose of Bar Rule 25 and therefore does not require correcting.

82. And secondly, if after the fact you become aware that the premise of those questions was false you have not deceived, or knowingly, or recklessly misled the court for the purpose

of Bar Rule 24 because you did not know at the time that the instructions you were acting upon were false.

83. As with Moustafa, this matter became less about the potential ethical issues and more about whether or not counsel's forensic decisions were such as to result in a miscarriage of justice.

Questionable but 'rational' forensic strategies

84. The question of whether a miscarriage of justice was occasioned involved an assessment of whether the decision to embark upon the various areas of cross examination were rational forensic decisions. Basten JA did so with reference to counsel's duties to both the client, and independence.

85. In relation to the first impugned line of cross examination (whether the allegations in AVO application were fabricated) Basten JA said:

> 32 The only basis upon which counsel's initial cross-examination could form the basis of a miscarriage was if, exercising his responsibility to conduct the trial as best he could on the material available, in the interests of the accused, and regardless of the express instructions of the accused, he should not have embarked upon the line of cross-examination at all.
>
> 33 The strategy was, as the trial judge pointed out on more than one occasion, fraught with risk and difficulties. Nevertheless, it was not irrational and if, as the applicant instructed, the complainant had manufactured false and damaging accusations against the applicant in order to prevent him obtaining custody of, or indeed access to, their child, it was open to him to contend before the jury that the allegations of sexual assault were also fabricated. One would assume it was not embarked upon in the face of clear instructions not to pursue it: the affidavit from counsel did not contradict this assumption.
>
> 34 In the present circumstances, the objective features, as set out above, may cast doubt on the wisdom of the approach adopted, but do not render it demonstrative of such incompetence as would cause a miscarriage, particularly when carried out in accordance with the instructions of the accused. If, objectively assessed, the cross-examination was an available forensic strategy, neither it nor the consequent failure to apply for a discharge of the jury gave rise to a miscarriage of justice.

86. On the issue of whether the second line of cross-examination (which contradicted the first) was productive of a miscarriage of justice, Basten JA said:

> 35 On the basis of the events recounted above, one may readily infer that the accused's instructions to his counsel changed when the prosecution sought to subpoena his records from the Campbelltown Mental Health Service. The records were in fact not subpoenaed and their content is not in evidence. All that matters for present purposes is that the applicant apparently gave instructions to counsel conceding that the conversations which the complainant had referred to in her application for an AVO had in fact occurred. The change in instructions undoubtedly created a strategic dilemma for counsel, and possibly an ethical dilemma.
>
> 36 **Although there was some discussion in the course of the hearing in this Court as to counsel's ethical obligations, those did not appear to arise from the objective circumstances of the course of the trial. Such a dilemma may have occurred if the applicant had given instructions requiring counsel to continue to pursue an allegation that the complainant had fabricated part of her application for an AVO, whilst acknowledging to counsel that this was not so. However, there was no indication that any such instructions had been given. Accordingly, the matter resolved itself into a strategic issue for counsel as to how to continue the trial to the best advantage of his client, given the change in instructions**…
>
> 37 …The problem for the accused was that, having opened up these allegations as a basis for attacking the credit of the complainant, he had not only failed in that attempt (and may even have bolstered her credibility) but had also cast himself in a bad light. In these circumstances, counsel took a step which was, like the first step, risky and fraught with difficulty. Rather than leave the jury with the impression that the accused harboured paedophilic desires, he sought to defuse the issue by placing them in the context of his own abuse and his wish to overcome, rather than succumb to, the intrusive thoughts.
>
> 38 Again, that was not an irrational strategy… However, whatever the wisdom of the forensic strategy, it may be inferred that the factual basis was to be found in instructions from the applicant. The applicant did not seek to suggest otherwise.
>
> …
>
> 40 Such doubts are confirmed by the overall circumstances of the trial. The most substantial harm had been caused by the fact of the initial cross-examination followed by the retraction of the instructions on which it was based. In this sense, the accused was the author of his own difficulties. Once it is accepted, as explained above, that the line of cross-examination had a rational basis and was not improper, there was no obligation on counsel to decline to conduct the trial on that basis. A baseless attack on the complainant's creditability failed, no doubt with the common consequence in such circumstances that her credibility was probably enhanced in the eyes of the jury. The further result was that the accused was revealed as someone who harboured paedophilic

desires. However, it was not the applicant's case that in such circumstances there could be no fair trial: rather, his case depended on the manner in which the prejudice arose, namely through the incompetence of counsel in pursuing his instructions. That complaint has not been made good.

PART F: CONCLUSION

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87. On the basis of the cases discussed above, it would appear that a change of instructions in and of itself is not a basis for returning a brief or withdrawing from a matter. Indeed, it appears that even where a case has been commenced and conducted on the basis of shifting instructions that conflict with each other in material ways, the question for the advocate is not, “can I continue to appear?”, but “what is the best forensic way to deal with these instructions within the bounds of my duties?”.
88. Moustafa and Ahmu provide examples of different approaches, albeit in very different situations. In Moustafa counsel made independent forensic decisions resulting in the conflicting version coming out in the client’s evidence and then all but ignored it in closing. This was found to be a forensically sound approach.
89. In Ahmu, counsel took greater heed if the client’s instructions and attempted to mitigate the damage done by the cross-examination conducted on the basis of the false instructions by changing tack and continuing to cross examine on the new instructions. Again, the Court of Criminal Appeal found this course was at the very least rational and had a legitimate forensic purpose. No doubt the approach one takes will be dictated by the circumstances if each matter.
90. If one allows for the factual assumptions above, Punch provides an obvious example of where one should withdraw, or at least refuse to conduct the defence on the basis of your client’s instructions, that being where the client insists on you conducting the case in a manner which you know is false.

91. Again, there is no bright line demarcating when instructions oblige you to withdraw, however at the very least what seems to be developing in the cases is that:
    a. Where you conduct a cross examination on the basis of instructions which you later find out are wrong or a lie, you have not knowingly or recklessly misled the court, nor have you made a statement misleading the court so long as at the time of questioning you are not aware of the falsity of the instructions.
    b. A question with an implied factual premise is not a statement, therefore if you become aware the implied factual premise is not correct, you are not required to correct it.
    c. The Court affords practitioners a robust ability to take forensic approaches even where the client does not agree to such an approach.
92. Aside from the single judgment of Adams J in Ahmu, the cases referred to do not directly deal with when one is obliged to withdraw, and they are not authoritative statements of the law on the issue.
93. Where ethical issues like the ones discussed above arise, I would always advise a cautious approach, and where possible, that you consult with a more senior practitioner.