

Asbestos Contextualised Scenario

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Learning Outcomes

- To help students examine the relationship between lawyer and client and explore the boundaries of the relationship;
- To sensitise students to the potential conflict between client instructions, effects on third parties and personal integrity;
- To enable students to consider the practical action a lawyer should take when faced with ethical or moral dilemmas.

Teaching Structure/Format

The scenario provides the opportunity for active analysis of ethical issues which have been introduced to a group of students at an abstract or conceptual level. The ideal size for the group would be 16. In a 60 minute seminar, the scenario would be preceded by a short discussion of the nature of the solicitor-client relation and a debate on a quotation:

"An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion". [Lord Brougham, in 1820, defending Queen Caroline against King George IV's charge of adultery].

The scenario (or scenarios) should be discussed in groups of four. Their views would be presented to the whole group for discussion with the tutor acting as facilitator.

Students are being asked to adopt the role of a practising solicitor during the discussion of the scenario. Thus they are asked to prepare for the seminar by reading selected extracts from The Guide to the Professional Conduct of Solicitors (www.guide-on-line.lawsociety.org.uk).

The Scenario:

Your client is a multi-national company based in the UK but with extensive interests in Africa. The company is

threatened with a class action brought by Kenyan workers for negligent exposure to asbestos resulting in a number of asbestos related diseases including mesothelioma. The claim is potentially worth hundreds of millions of pounds.

Proceedings are issued and the client, acting through the senior in house lawyer, tells you to contest vigorously the jurisdiction of the English courts to try the action. You ask why this approach is being adopted as although you can see some merit in the argument, you believe that ultimately it will fail.

He tells you two things. Firstly, if successful the class action will be dropped altogether since there is no legal aid in Kenya. Secondly, even if unsuccessful, the delay will result in a substantial saving to the client company. Although it may have to pay some costs for the unsuccessful attempt to contest jurisdiction, the delay will mean that many potential claimants will have died.

Moral Context/Underlying Ethical Issues:

The underlying dilemma is between the duty to the client, the notion of fairness in society and a solicitors own moral position .A solicitor is required to exercise some care in litigation when dealing with a weaker litigant, at least where the litigant is unrepresented. See also the "overriding objective" under the Civil Procedure Rules (rule1.1-1.4).

Is the strategy legitimate? (Reflect on the adversarial system of justice)

Whose is the dilemma; solicitor or client? See Rule 1.01 of The Guide. Is there a conflict between the different duties in Rule 1.01? What is meant by "integrity" in Rule 1.01?

Who is the client? Is this strategy emanating from one person in the client company? Can you ask for confirmation of the instructions from the Board of Directors where non executive Directors might oppose the strategy?

How should the solicitor advise the client?

Assessment of Learning Outcomes

It is not necessary to assess summatively each learning opportunity and an exercise such as this should be successful if all students have participated, shared their understanding and reflected upon the experience. Further feedback can be given or more focused reflection encouraged utilising a variety of methods that could be adopted for assessing the learning outcomes of the scenario, a few of which are described below.

1. Simple self assessment

For each learning outcome below (a. - c.) invite the students to reflect upon the extent which they agree that their understanding/achievement of the outcome has occurred on (e.g.) a five-point scale such as:

Outcome has been achieved:

- Very well
- Well
- Somewhat
- Not well
- Not at all

Learning outcome:

- Understanding of lawyer/ client relationship
- Potential for conflict between client instructions, effects on third parties and personal integrity understood

- Practical action to be taken when faced with ethical or moral dilemmas identified

If any students records a 'not well' or 'not at all', ask them to reflect why this was so?

2. Simple peer and self assessment

Ask students to evaluate their own and the rest of their group's performance according to the following (on a scale of 1 -5; 1 = outstanding, 5 = has much more to offer):

- Active participation/contribution
- Ideas and imagination
- Leadership/direction
- Reflection/insight

Create other topics to suit your own objectives.

3. Tutor feedback

Provide brief comments verbally or in writing based upon defined criteria (such as those above).

4. Reflective comment

Ask students to record their observations, thoughts and key insights or dislikes from the exercise.

5. Traditional essay or analytical account

The exercises can also form the basis for a more traditional propositional knowledge based enquiry. This would be achieved by asking the student to write a brief essay focusing on the subject in some contested form. For example,

"Lawyers should only comply with their professional Code. Their personal morality is more than irrelevant, it is a positive impediment to representing the client's interests fully and effectively." Discuss.

Relevant Professional Codes:

The Guide to the Professional Conduct of Solicitors (<http://www.guide-on-line.lawsociety.org.uk>) and the Code of Conduct of the Bar of England and Wales (<http://www.barcouncil.org.uk>). Guidelines on fair prosecuting are in the Code for Crown Prosecutors at <http://www.cps.gov.uk/Home/CPSPublications/Scheme/code.htm>

Further Reading:

See generally the journal Legal Ethics published by Hart. There are many texts on legal ethics and professional responsibility. The following are a representative collection:

- Boon A and Levin J, (2004), The Ethics and Conduct of Lawyers in the United Kingdom, Hart, Oxford
- Cranston R, (ed.) (1995) Legal Ethics and Professional Responsibility, Clarendon Press, Oxford
- Economides K, (ed.) (1998) Ethical Challenges to Legal Education and Conduct Hart, Oxford
- Koehn D., (1994), The Ground of Professional Ethics, Routledge, London
- Luban D., (1983), The Good Lawyer: Lawyers' Roles and Lawyers' Ethics, Rowman and Allenheld, Totowa, NJ,

- O'Dair R., (2001) Legal Ethics: Text and Materials, Butterworths, London
 - Schwartz M.D. at al. , (2003), Problems in Legal Ethics, West
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