

Kenya School of Law

ADVOCATES TRAINING PROGRAM

2015-16 ACADEMIC YEAR

Trial Advocacy

CONFLICT OF INTEREST

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OUTLINE

Trial Lawyer
Judicial officer
Cab rank rule.
Applications for recusal.

Conflict between duty to court and duty to client

Whose interest prevails?

Duty to court takes precedence. The advancing of client's interest must be consistent with the advancing of the advocate's role as an officer of the court.

Confession of guilt to one's Advocate

LSK Digest of Professional conduct and etiquette

Rule 20(b): Object of privilege is so that client can confide fully and without reservation to the advocate.

Communications for purposes of defence in a criminal trial are privileged.

In a criminal trial issue is not about innocence, but if offence of which one is charged has been proven.

Burden of proof rest on prosecution.

Constitution protects one against self incriminating evidence.(Art. 50(2)(1))

Confession of guilt-contd.

Mere confession to guilt does not preclude one from having legal representation.

Lawyer under a duty to do all he can for the client without deliberately misleading the court.

Restrictions of guilt confession

Not state what one knows is untrue or substantiate an untruth or a falsehood.

May aver that evidence is insufficient or may rely on a technicality.

Should not set up an affirmative case that is inconsistent with the confession.

Objections after a guilt confession

The advocate may object to:

- a) Competence of the court.
- b) Form of indictment.
- c) Sufficiency of evidence.
- d) Admissibility of evidence.

BUT CANNOT

- ❖ Suggest that someone else committed the offence
- ❖ Call evidence he knows is false.

Limits to attacking prosecution evidence

May challenge evidence to its sufficiency, but will not make a case inconsistent with the confession.

What is not a clear confession

Inconsistent statements by client to advocate before and during proceedings.

Pointers to guilt but which are not a clear confession.

Cab rank rule

Advocate is obliged to accept a brief unless has some good reason for refusing to do so.

Aspects

- ❖ When obliged to accept a brief
- ❖ When may not decline a brief
- ❖ Reason for the rule
- ❖ Why not to assume role of a judge
- ❖ When may refuse a brief.

When obliged to accept a brief

In court where practices

At a professional fee

Cab rank phrase: Coined by Lord Mac Millan

Reason: Every person is entitled to legal representation in a court of law.

Barristers are public servants and may be called upon just as a doctor may be called upon to operate on a man suffering from a loathsome complaint (*Du Cann, Page 34*)

When may not refuse a brief

May not decline the brief simply because:

- a) Thinks client has limited chances of success
- b) Does not think much of the client as a person
- c) Thinks the facts of the case are unsavoury.

Not assume role of a judge

If decline a case because think the person does not have a good case or is guilty assumes the role of a judge.

Such undermines constitutional presumption of innocence.

Duty of deciding on guilt is on the court, not the advocate.

When may refuse brief

- a) If client cannot afford fee
- b) If advocate has been consulted by the other side.
- c) If advocate has confidential info on the other side.
- d) If advocate knows one of the witnesses
- e) If will clash with some office or appointment the advocate holds.
- f) If does not have necessary skill or experience to conduct the case competently.
- g) If has too much work and can see will not handle the brief well.

Recusal of Judicial officers

Advocate needs to consider:

Utmost tact

On basis of :

- ❖ Kinship or previous connection with the case.
- ❖ Bias

Tact

Realise judicial officers are human.

Don't like to be told in open court .

They still need to maintain objectivity in considering application for recusal.

Kinship or previous connection

Reason will be:

Are related to a party or,

Have previously been connected with the case.

This is not hard as normally the court will oblige.

Advisable to point this out in chambers first before raising it in open court.

Bias

Difficult to establish.

Avoid words that reflect adversely on impartiality of the court.

Base of fact.

Use moderate language.

Exaggerated, reckless or incautious language can amount to contempt of court.

Advise the bench beforehand, to give judge opportunity to withdraw beforehand on their own initiative.

Factors

- a) Repeated protests will not make submissions more convincing if have effect of undermining honour and dignity of the court.
- b) Inform the Judicial officer in advance out of courtesy, informally in chambers. Allows the officer time to consider the request and an alternative person to hear the case.
- c) The other counsel must remain completely neutral.

Premature assessment

Can avoid it by:

- ❖ Always preserving independence and detachment that allows them to remain objective.
- ❖ Not act prematurely on basis or a mere transient expression of opinion by the court.
- ❖ Ensure you are right.

Consequences

If abuse right to apply for recusal , and if in doing so wilfully insults the court, may be summarily committed to contempt of court.

Advocates should not use their position to undermine the dignity and reputation of the court.

Q and A

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