



The Bar Council

## Returning Instructions in Criminal Cases: R v Daniels [2021] EWCA Crim 44

<b>Purpose:</b>	To assist counsel in criminal cases to determine in what circumstances they must or may return instructions to appear at trial on grounds of professional embarrassment (and cognate grounds).
<b>Overview:</b>	Relevant core duties, conduct rules, practical considerations, if you decide to withdraw, very late instructions, scenarios.
<b>Scope of application:</b>	All barristers practising in the field of criminal law
<b>Issued by:</b>	The Ethics committee of the Bar Council
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<b>Status and effect:</b>	<b>Please see the notice at end of this document. This is not “guidance” for the purposes of the BSB Handbook I6.4.</b>

### Introduction

1. Recent authority has highlighted the difficulty faced by counsel in deciding, after having accepted instructions, whether circumstances have arisen which either oblige them to withdraw from representing their lay client, or permit them to do so. Difficulty arises most acutely when that situation arises very shortly before, or during, a trial.
2. This guidance has been prepared to assist counsel in such a position. It sets out the relevant core duties, rules of conduct and the most recent statements of the Court of Appeal (Criminal Division) in R v Daniels [2021] EWCA Crim 44, in particular paragraphs 75-79. This case is essential reading. It offers guidance on how to approach the issues that you are likely to face, some practical

considerations and some illustrative examples of the kind of situations that may arise and how they should be dealt with.

### **Relevant Core Duties**

3. If circumstances arise which make you consider returning your instructions, the following Core Duties may be relevant:

CD1 You must observe your duty to the court in the administration of justice;

CD2 You must act in the best interest of your client;

CD3 You must act with honesty and integrity;

CD4 You must maintain your independence;

CD6 You must keep the affairs of each client confidential; and

CD7 You must provide a competent standard of work and service to your client.

### **Rules of Conduct**

4. The rules which require or permit you to return instructions, and thereby withdraw from representing your client, are set out at rC21, rC25 and rC26 of the Handbook. It is important to note that the rules provide for circumstances when you **must** withdraw, and circumstances when you **may** do so.

#### Circumstances when you **must** withdraw

5. rC21 sets out the circumstances which, if they occur, mean that you **must** refuse to accept instructions in the first instance, or if they arise after accepting instructions, means you **must** return them. As enumerated in rC21, those circumstances are as follows:

*“.1 due to any existing or previous instructions you are not able to fulfil your obligation to act in the best interests of the prospective client; or*

*.2 there is a conflict of interest, or real risk of conflict of interest, between your own personal interests and the interests of the prospective client in respect of the particular matter; or*

*.3 there is a conflict of interest, or real risk of conflict of interest, between the prospective client and one or more of your former or existing clients in respect of the particular matter unless all of the clients who have an interest in the particular matter give their informed consent to your acting in such circumstances; or*

*.4 there is a real risk that information confidential to another former or existing client, or any other person to whom you owe duties of confidence, may be relevant to the matter, such that if, obliged to maintain confidentiality, you could not act in the best interests of the prospective client, and the former or existing client or person to whom you owe that duty does not give informed consent to disclosure of that confidential information; or*

*.5 your instructions seek to limit your ordinary authority or discretion in the conduct of proceedings in court; or*

*.6 your instructions require you to act other than in accordance with law or with the provisions of this Handbook; or*

*.7 you are not authorised and/or otherwise accredited to perform the work required by the relevant instruction; or*

*.8 you are not competent to handle the particular matter or otherwise do not have enough experience to handle the matter; or*

*.9 you do not have enough time to deal with the particular matter, unless the circumstances are such that it would nevertheless be in the client's best interests for you to accept; or*

*.10 there is a real prospect that you are not going to be able to maintain your independence."*

6. There are three other circumstances, which can only arise after you have accepted instructions, in which you **must** return your instructions: rC25.1-.3. The first of these is dealt with in paragraph 9 below. The other two are:

*.2 the client refuses to authorise you to make some disclosure to the court which your duty to the court requires you to make; or*

*.3 you become aware during the course of a case of the existence of a document which should have been but has not been disclosed, and the client fails to disclose it or fails to permit you to disclose it, contrary to your advice."*

7. Where you are instructed on a referral basis and your professional client withdraws, you can no longer represent your lay client as your instructions have been withdrawn: gC84. In those circumstances you cannot represent your lay client unless:
  - a. you receive new instructions to do so from a professional client, or
  - b. you are able to represent your lay client on a public access basis, or
  - c. you are appointed to represent your lay client by the court.
8. If you are instructed to represent a client for the purposes of an appeal, or if your lay client has absconded, please refer to the document on the Bar Council's Ethics Hub entitled "*Absconding clients: what to do if your defendant has absconded.*"

*Remuneration: Publicly Funded Cases*

9. In respect of legally aided cases, rC25 provides that you **must** return your instructions where:

*“.1 in a case funded by the Legal Aid Agency as part of Criminal Legal Aid or Civil Legal Aid it has become apparent to you that this funding has been wrongly obtained by false or inaccurate information and action to remedy the situation is not immediately taken by your client;...”*

*Remuneration: Other Cases*

10. Where there is a fundamental change to the basis of your remuneration, you should treat your original instructions as having been withdrawn: see gC87. You must then consider whether the Cab Rank rule means that you must accept the new instructions. If not, you may decline to accept them. In these circumstances you have not returned your instructions: your client has withdrawn their original instructions, and you have refused to accept the new ones.

Circumstances where you **may** withdraw

11. rC26 sets out a non-exhaustive list of circumstances in which, after having accepted instructions, you **may** return your instructions:

*“.1 your professional conduct is being called into question; or*

*.2 the client consents; or*

*.3 you are a self-employed barrister and:*

*.a despite all reasonable efforts to prevent it, a hearing becomes fixed for a date on which you have already entered in your professional diary that you will not be available; or*

*.b illness, injury, pregnancy, childbirth, a bereavement or a similar matter makes you unable reasonably to perform the services required in the instructions; or*

*.c you are unavoidably required to attend on jury service;*

*.4 you are a BSB entity and the only appropriate authorised individual(s) are unable to continue acting on the particular matter due to one or more of the grounds referred to at Rules rC26.3.a to rC26.3.c above occurring;*

*.5 you do not receive payment when due in accordance with terms agreed, subject to Rule rC26.7 (if you are conducting litigation) and in any other case subject to your giving reasonable notice requiring the non-payment to be remedied and making it clear to the client in that notice that failure to remedy the non-payment may result in you ceasing to act and returning your instructions in respect of the particular matter; or*

*.6 you become aware of confidential or privileged information or documents of another person which relate to the matter on which you are instructed; or*

*.7 if you are conducting litigation, and your client does not consent to your ceasing to act, your application to come off the record has been granted; or*

*.8 there is some other substantial reason for doing so (subject to Rules rC27 [the duty to inform your client of your reasons] to rC29 [the Cab Rank Rule] below)."*

12. In any case where circumstances arise **after** you have accepted instructions which would either oblige you, or permit you, to return your instructions, you must nonetheless comply with rC27:

*"Notwithstanding the provisions of Rules rC25 and rC26, you must not:*

*.1 cease to act or return instructions without either:*

*.a obtaining your client's consent; or*

*.b clearly explaining to your client or your professional client the reasons for doing so; or*

*.2 return instructions to another person without the consent of your client or your professional client."*

"Some other substantial reason for" returning instructions: rC26.8

13. It would be impossible to list all the circumstances within rC26.8 which could give rise to "*some other substantial reason for* [returning your instructions]".
14. One reason sometimes advanced is if it emerges that your client's case is likely to require you to challenge the integrity or credibility, or otherwise to impugn the conduct, of someone with whom you have a family or personal relationship. If this does occur – and provided you are satisfied that there is at least a serious risk that you will have to take those steps – you should withdraw as soon as possible, to allow other counsel to replace you.
15. Another reason sometimes advanced by counsel is "*professional embarrassment*". In *R. v. Daniels* Fulford LJ characterised professional embarrassment as a truly material change of instructions whereby a defendant resiles from an earlier acceptance of one or more significant elements of the prosecution case.<sup>1</sup> Conversely, the acceptance by a defendant of a significant part of the prosecution case will not, absent exceptional circumstances, amount to professional embarrassment.<sup>2</sup>
16. It follows that any significant change of instructions should be carefully analysed in order to see whether or not it brings your client's case closer to the prosecution's case. For example, where your client's defence to a charge was alibi, but s/he now accepts s/he was present at the scene of the alleged offence but says that s/he acted in lawful self-defence, that will probably not constitute professional embarrassment: the client has not resiled from a part of the prosecution case previously accepted. If, however, the defence was originally self-defence but your client now says that s/he was not present at the scene and wishes to put evidence of an alibi before the court, then, depending on when in the process the change of instructions occurs, advancing that new case may well be professionally embarrassing.

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<sup>1</sup> [2021] EWCA Crim 44 at para 75

<sup>2</sup> Ibid, para 76

17. The stage at which the change of instructions occurs is however of critical importance. If counsel has already publicly associated himself or herself with the acceptance of the part of the prosecution case from which the client now seeks to resile – e.g. (in the example given above) by serving a Defence Statement or a Statement of Agreed Facts or by cross-examining on the basis that the defence was self-defence – then it is unlikely that he or she will be able to advance the inconsistent case of alibi while maintaining, and appearing to maintain, professional independence. But if the change of case comes before counsel has acted publicly on the original instructions, there is unlikely to be any professional embarrassment in advancing the inconsistent case.

### **Practical Steps**

18. It is important to recognise that returning instructions when not under a professional obligation to do so should always be a matter of last resort, particularly when your lay client may not have sufficient time to arrange for alternative representation: see the Guidance to rC26 at gC83. In *Daniels*<sup>3</sup>, Fulford LJ described withdrawal by counsel mid-trial as a “grave step”.
19. You should discuss the matter with your lay client, with your instructing solicitor present if possible. You should ask your client for their reasons for the change of instructions. It may be that the reasons that they give provide an understandable basis for the change of instructions which do not necessitate your withdrawal. For example, the new account may be that they gave their original instructions under pressure from a co-defendant; and if that will be part of the new case, there may be no professional embarrassment in continuing.
20. Accurate, full, and contemporaneously timed notes should be kept, explaining in detail why you consider it is necessary to withdraw. The notes should include details of the change of instructions. Invite your lay client to sign your notes to signify their agreement. Note down if they refuse to sign the note, and any reasons given for their refusal.
21. You should inform your lay client that a judge may decide to allow proceedings to continue after you have withdrawn without granting an adjournment for a new barrister to be instructed. The effect of that could be that your lay client would have to represent themselves.
22. You should consider contacting the Bar Council’s Ethical Enquiry Helpline, and/or a more senior member of the Bar, to discuss the matter.

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<sup>3</sup> Ibid, para 77

## If You Decide to Withdraw

23. It may be that after you inform the court of your decision to withdraw from proceedings the court will want to know more about the reasons behind the decision. You should answer any such questions as far as possible, bearing in mind that even after you have decided to withdraw your representation, your duty of confidentiality to your lay client and the rules relating to legal professional privilege still apply. It is often sufficient simply to inform the Court that you are unable to assist.
24. If you decide to withdraw from proceedings relying on one of the provisions listed at rC26 you **must** comply with gC83: you should, where possible and subject to your overriding duty to the court, ensure that your client is not adversely affected because there is not enough time to engage other legal assistance.
25. If you do decide to return your instructions, you **must not** withdraw without either obtaining your client's consent, or explaining to your professional client your reason for withdrawing: rC27.
26. Whether or not to withdraw from a case is a matter for you, not the court, although the court can make observations on the matter.

## Very Late Instructions

24. If you have accepted instructions to represent a lay client at a very late stage (perhaps after another barrister has withdrawn their representation immediately before or part way through a trial), the refusal of a court to adjourn proceedings to allow you time to prepare the case does not provide a sufficient reason to return your instructions: see the observations of Judge LJ in *R. v. Ulcay*<sup>4</sup> also essential reading. In those circumstances you should continue to act on behalf of your lay client, doing the best that you can.
27. See, moreover, rC21.9 for considerations in a situation in which you *are considering* whether to accept instructions in such circumstances:

*"You must not accept instructions to act in a particular matter if:*

*.9 you do not have enough time to deal with the particular matter, unless the circumstances are such that it would nevertheless be in the client's best interests for you to accept."*

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<sup>4</sup> [2007] EWCA Crim 2379 at para 41



It will, in the circumstances under discussion here, often be in the client's best interests to have some representation, even you have not had the time that you would usually require to prepare the case. In those circumstances, unless there is another proper reason from refusing the instruction, the Cab Rank Rule (rC29; and see also rC30) will oblige you to accept the instructions. In this respect rC21.9 has a positive aspect: you should accept instructions even if you do not have enough time to prepare the matter as fully as you usually would, if it would nonetheless be in the client's interest to have such representation.

## **Scenarios**

### *Scenario 1*

1. Your client is charged with driving with excess alcohol. She pleads guilty, and discloses to you that she has a previous conviction for driving with excess alcohol, and that the previous conviction was three months ago. The mandatory minimum period of disqualification from driving therefore increases from twelve months to three years. The prosecutor opens the facts and tells the court that your client has no previous convictions or cautions. What should you do?

First, ask the court for some time to take instructions. Speak to your client and tell her that you cannot be a party to misleading the court, and ask for her consent to disclose the fact of the previous conviction to the prosecution and the court. Inform her that if she refuses to allow you to disclose the information then you will have to withdraw. Make a note of your discussions and ask your client to sign it. If possible, discuss the situation with your instructing solicitor. If she refuses to allow you to disclose the information then you must withdraw. You should not disclose the information to the court or the prosecution. See gC11, gC12, rC21.2, and rC21.3.

### *Scenario 2*

2. During his trial, your client tells you he thinks you are an idiot, and he could have cross-examined the last witness much more effectively than you did. He then says he thinks you did it because you are working with the prosecutor to get him convicted. What should you do?

If your client cannot be persuaded from his views, then ask him if he wants you to continue to represent him. Explain to him that if he sacks you, then the judge may require him to represent himself for the remainder of the trial. Make a note of your discussions and ask him to sign it. If he does sack you then you should explain to the court that you can no longer represent your client. You have not returned your instructions – your client has removed them.

*Scenario 3*

3. Your clerk calls you and asks you to prosecute a mention as a colleague in chambers has been taken ill. The clerk provides you with the name of the court and the defendant. On the way to court you recognise the name of the defendant as someone you have represented in criminal proceedings on a previous occasion. What should you do?

Phone your clerk to check that it is the same person. If it isn't, then you must prosecute the case. If it is, then you should explain to your clerk that there is a professional reason why you cannot continue to prosecute the case. Speak to your instructing lawyer and explain the position. If no suitable replacement advocate can be instructed in time to conduct the hearing, you should explain to the court that you were instructed to prosecute the case but for professional reasons you cannot do so.

*Scenario 4*

4. Your solicitor instructs you to make an application which you consider has no merit whatsoever. You politely decline to do so, pointing out that the rules of professional conduct mean that you cannot make submissions which, in your view, have no merit. The solicitor nevertheless insists that you make the application. What do you do?

If your instructing solicitor will not relent and insists on instructing you to make the application and you feel that as a result you cannot properly continue to represent the client then you should withdraw from proceedings. You should explain to your solicitor that his/her instructions seek to limit your discretion in the conduct of proceedings in court (rC21.5), and that they require you to act otherwise than in accordance with the provisions of the Handbook (rC21.6). It may be that your refusal to act upon the solicitor's instructions will lead to your instructions being withdrawn.

*Scenario 5*

5. Your client is charged with fraud. The prosecution have served evidence of telephone calls made by the fraudster. Your client's defence is that, although he made the calls, he did not make any fraudulent misrepresentations. Amongst the agreed facts in the case is an admission that your client is the person who is recorded making the calls. You have cross-examined witnesses on this basis. Just before he is about to give evidence your client tells you that in fact he did not make the calls, and he knows nothing about them. What do you do?

Ask the judge for sufficient time to take instructions. If they are not present or represented at court, you should contact your solicitor to advise them to come

to court for an urgent conference. You should ask your client to clarify just what their instructions now are, and why they have changed them. If the client says they feared the defence run this far would fail, or they panicked, and is willing to withdraw the new instruction, there will be no difficulty in continuing to represent them. But if they maintain a truly material change of instructions which involves resiling from their earlier acceptance of one or more significant elements of the prosecution case, you would be obliged to withdraw, as the client has moved away from the crux of the case rather than towards it. If after taking instructions you are satisfied that that has happened, this would amount to 'some other substantial reason' (rC26.8) for you to be obliged to withdraw.

You should inform your client that you intend to withdraw, and that the judge may require him to conduct the rest of the trial on his own. You should write a thorough note of what has happened, timed and dated, and ask your lay and professional client (if present) to sign it as accurate. You should inform the court that you can no longer represent your client.

### **Important Notice**

This document has been prepared by the Bar Council to assist barristers on matters of professional conduct and ethics. **It is not “guidance” for the purposes of the BSB Handbook I6.4, and neither the BSB nor a disciplinary tribunal nor the Legal Ombudsman is bound by any views or advice expressed in it.** It does not comprise – and cannot be relied on as giving – legal advice. It has been prepared in good faith, but neither the Bar Council nor any of the individuals responsible for or involved in its preparation accept any responsibility or liability for anything done in reliance on it. For fuller information as to the status and effect of this document, please see [here](#).