



The Bar Council

Absconding Clients – what to do if your defendant has absconded

Purpose:	To provide assistance to barristers who conduct hearings where their client has absconded
Scope of application:	All practising criminal barristers
Issued by:	The Ethics Committee
First issued:	October 2017
Last reviewed:	August 2023
Status and effect:	Please see the notice at end of this document. This is not “guidance” for the purposes of the BSB Handbook I6.4.

Introduction

1. The Bar Council’s Ethical Enquiries Service receives regular requests for assistance from barristers who attend court only to find that their lay client has absconded. The requests tend to concern whether the barrister can continue to act on behalf of the lay client, and if so the extent to which s/he can participate in the hearing.
2. The object of compliance with the ethical requirements set out below is to ensure that instructions are not returned in circumstances which adversely affect the administration of justice, access to justice or (so far as compatible with these) the best interests of the client (oC16).
3. For the purposes of this document, “absconded” denotes circumstances where a defendant has deliberately chosen not to exercise their right to be present at court, whether they have absconded before or during a trial. It is essential to establish whether non-attendance is voluntary, in which case the advice in this document applies. If there are other reasons for non-attendance, it does not.

4. If you are working on a referral basis and your instructing solicitor withdraws from conduct of the case, then you cannot continue to act on behalf of your lay client, unless you receive instructions from a new firm of solicitors, or other professional client.

Relevant Law

5. There is a presumption that you should continue to act for an absconding client. The courts have considered the ethical responsibilities of counsel in circumstances where their client has absconded on a number of occasions. The key principles to be derived from the authorities are:

- if a defendant has absconded, instructions are not deemed to be withdrawn;¹
- it is generally desirable that a defendant is represented, even if s/he has absconded.²

6. You should note the requirements of r25.2(1)(b) of the Criminal Procedure Rules 2015 and Criminal Practice Direction III 14E & VI 25B (as amended October 2020 & February 2021) in relation to trials in absence in the crown court: a court must not proceed to trial in the absence of the defendant unless it is satisfied that they have waived their right to attend and that the trial would be fair despite the defendant's absence. In respect of trials in the magistrates' court you should note the provisions of CrPR r24.12(2)(b) and Criminal Practice Direction III 14E & VI 24C (as amended October 2020 & February 2021). Advocates dealing with a client who has absconded should remind themselves of the legal principles and the checklist approved by the House of Lords in *R. v. Jones (Anthony)*.

7. Note also the position provided for appellants from the Magistrates' Court to the Crown Court by s.122 of the *Magistrates' Court Act 1980*: an appellant from the Magistrates' Court to the Crown Court who is represented by counsel in the Crown Court is deemed to be present. The lay client's attendance is not required for the appeal to be heard.

¹ See *R. v. Shaw* [1980] 2 All ER 433; *R. v. Pomfrett* [2009] EWCA Crim 1939; [2010] 2 Cr App R 28

² See *R. v. Jones (Anthony)* [2003] 1 A.C. 1, H.L.

Relevant Core Duties

8. When the defendant has absconded, the Core Duties likely to be engaged are:
- 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, and
 - CD7 You must provide a competent standard of work and service to your Client.

Discussion

9. As a general rule, the more instructions you have from your lay client, the more likely it is that you should continue to act. You should therefore assess the extent to which your instructions allow you to continue to represent your client.

10. If a defendant absconds during a trial, courts frequently encourage legal representatives to continue to act on their client's behalf. The decision whether or not to continue to act in those circumstances engages CD1, and continued representation can provide an important safeguard against error and oversight occurring during the trial.

11. You will have to use your best endeavours to find out why your client has failed to attend court. If you are unable to contact your client to find out where they are, then in the absence of specific instructions preventing you from doing so, your duty to assist the court in the administration of justice obliges you to provide such information as you are able to, in order that the court can determine whether or not to proceed in your client's absence.

12. Your decision whether to continue to act on your client's behalf may be approached in two stages, since your instructions may allow you to represent your client for the purposes of the court's determination whether to proceed in their absence, whilst being inadequate for the purposes of allowing you to continue to act during the trial itself. If there are grounds to argue, consistent with your instructions, that your client has not waived their right to attend and/or that a trial in absence would not be fair, it is likely to be in your client's best interests that you continue to act in order to advance those arguments. If the court rules that the trial should be held in your client's absence, you should then review whether you are in a position to continue to act.

13. If you decide to continue to act on your client's behalf, you must continue to promote fearlessly and by all proper and lawful means their best interests. The duty to act in the best interests of your lay client is subject to your duty to the court, and your obligations to act with honesty and integrity and to maintain your independence: rC15.
14. There may be rare occasions when a defendant who has absconded maintains contact with their legal representatives during a trial and continues to provide them with instructions. In those circumstances you may accept those instructions and you should continue to act in the best interests of your lay client.
15. Where you have no instructions to put forward, it is unlikely that any decision to withdraw from proceedings would be criticised, depending on how far the trial or hearing has proceeded before the defendant absconded.
16. Any decision to withdraw from proceedings will engage rC26.8 (a barrister may withdraw if there is some other substantial reason for doing so).
17. If you decide to withdraw from proceedings 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 adequate legal assistance. Where you have no instructions it is unlikely that your client's interests would be adversely affected if they are represented or not: any new advocate would be in exactly the same position, with no instructions to put forward.
18. You should record in writing your decision to continue or withdraw and the reasons for it. This should be provided to your instructing solicitor.
19. You must not return instructions unless you have either obtained your lay client's consent (which will be unlikely to arise where s/he has absconded), or you have clearly explained to your lay client or professional client the reasons for withdrawal: rC27.

Scenarios

The scenarios that are set out below are not exhaustive, nor are they intended to be prescriptive.

1. You have a signed proof of evidence.

In these circumstances you should continue to act on behalf of your client.

- 2. You have no proof of evidence, but you do have a defence statement signed by your lay client.**

The defence statement complies with the statutory requirements in respect of its contents. Your client has approved the instructions contained within the defence statement. You should continue to act.

- 3. As 2 above, but the defence statement is either signed by the solicitor or it is unsigned.**

You should check with your solicitor to understand the basis upon which the defence statement was drafted. You may wish to know if the lay client has provided instructions that form the basis of the defence statement, or has otherwise approved the content of the document. Unless the defence statement is based upon the lay client's instructions, or has otherwise been approved by them, you may wish to consider if it is appropriate for you to continue to act. Bear in mind that a solicitor who signs a defence statement on behalf of a client is deemed to have the client's authority.

- 4. Your client has not provided a proof of evidence, but they gave a full comment interview in which s/he denied the offence.**

Unless they have provided instructions to your solicitor approving the contents of the interview, you may wish to consider if it is appropriate for you to continue to act.

- 5. Your client went no comment in interview, and has not provided a proof of evidence or a defence statement.**

You may withdraw from the case, subject to informing your professional client of your reasons for doing so. It should be noted that even where you have no instructions from your lay client, that does not create a situation where you **must** cease to act in the case. It may be that although there is no contribution that you can make to proceedings, you remain to ensure that the trial is conducted fairly and without error.

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

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