



The Bar Council

## Change of Plea

<b>Purpose:</b>	To draw barristers' attention to their obligations when a client wishes to change their plea from Guilty to Not Guilty.
<b>Scope of application:</b>	All practising barristers
<b>Issued by:</b>	The Ethics Committee
<b>First issued:</b>	June 2018
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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>

1. Barristers in criminal practice occasionally encounter a situation where the client has indicated that they intend to plead Guilty, pleads Guilty and then, at some time before sentence is passed, changes their mind and seeks to vacate their plea and have a trial. This document offers guidance to practitioners on their professional obligations in such a situation.

2. The relevant case law is set out in Blackstone's Criminal Practice and in Archbold. It is trite law that the judge has a discretion to allow the accused to withdraw a plea of Guilty at any stage before sentence is passed, but that the discretion should be sparingly exercised, particularly where the defendant is legally represented. It may however be suggested by the defendant that they were placed under undue pressure to plead guilty. That may include an allegation made against their legal representatives. Usually, the judge will wish to hear evidence before deciding the issue and that may include evidence from the defendant's legal representatives. It is therefore imperative that counsel keeps a proper note of

discussions leading up to the original decision to plead Guilty (and any change of instructions thereafter) and it may be a sensible precaution for counsel to make and keep a written note, signed by the lay client and ideally witnessed by the professional client, of the decision to enter a guilty plea. In paper cases this can be endorsed on the brief; in any event a copy should be retained; for instance by the professional client.

3. The following professional Core Duties are specifically engaged (although others may also be engaged):

CD 1 You must observe your duty to the court in the administration of justice.

CD 2 You must act in the best interests of each client.

CD 3 You must act with honesty and with integrity.

CD 5 You must not behave in any way which is likely to diminish the trust and confidence placed in you or in the profession.

CD6 You must keep the affairs of each client confidential.

4. The following professional Rules are specifically engaged (although others may also be engaged):

rC6 duty not knowingly to mislead the court

rC15 and rC16 Re acting in the best interests of each client...

rC26 You may cease to act on a matter... if:

.1 Your professional conduct is being called into question; or

.2 The client consents;

5. It is the duty of counsel to advise the client on the strength of the evidence and, where appropriate, the advantages of pleading Guilty (particularly regarding sentence). The Court of Appeal has condoned such advice being given in forceful terms if necessary, as long as the advice does not have the effect of taking away the free choice of the client. Counsel should not therefore go beyond giving clear (and if appropriate forceful) advice and avoid improperly exerting pressure on the client to plead Guilty. Counsel will usually emphasise that the client should not plead Guilty unless they have committed the offence, but there is nothing in principle to stop a defendant, having taken proper legal advice and having carefully considered their position, from exercising their free will and deciding to plead guilty for reasons that

are not necessarily consistent with a full acceptance of guilt. There may as a result be limits to the submissions that counsel can properly advance in mitigation before sentence and the client should be made aware of the position before entering their plea. You should ask your client to endorse your advice in writing.

6. Where a client wishes to change their plea from Guilty to Not Guilty and the judge wishes to hear evidence on the issue, that will usually include hearing evidence from the defendant and their legal representatives. In which case, the client will need carefully to consider waiving privilege. If they do decide to waive privilege, you may then not only give evidence but also produce any document or endorsement evidencing the advice given and decision taken, that the court considers necessary in interests of the justice to see.

7. The following scenarios assume that the advice you gave the client was correct and appropriate. There may be situations in which you recognise, in hindsight, that you ought to have advised differently and that, had you done so, the client would have pleaded not guilty. That situation does not give rise to any ethical issue since your Core Duties are not in conflict one with another. Subject to the client agreeing to waive privilege, you should assist them and the court with such information and documentation as necessary to explain the context in which the guilty plea was entered. Withholding such information on the basis that you do not wish to disclose your own professional error would be in breach of CD5 (duty not to behave in a way likely to diminish the trust and confidence placed in you or the profession).

8. It is standard practice for you to obtain a written endorsement of your brief, or written note to be retained as suggested at paragraph 2 above, from any client who wishes to plead guilty. This should include reference to the fact that the client has been advised both as to the strength of the evidence, and, where appropriate, as to the advantages and consequences of pleading guilty.

### Scenarios

**1. Q. My client provided clear instructions before arraignment that they were guilty of the offence and wished to plead guilty, but, after their co-defendants were acquitted after a trial, decided to change their plea before sentence.**

A. Assuming you had clear instructions and gave clear advice, you should discover the basis for their decision. If they have no good reason and they accept your advice that they will be unable to vacate their plea, that will usually be the end of the matter. But if they seek to blame their legal representatives, you should advise your

client that their only option is to apply to the judge to vacate their plea; but, if they choose to do so, you would have to withdraw (as your professional conduct is being called into question) and may well be asked to give evidence to the judge considering the matter; and that will require a waiver of privilege. If they seek to blame others or some other pressure not mentioned to you before, the court may still wish to receive evidence from you. It may be that the client would be best served by instructing fresh counsel in any event, but you should not withdraw unless your professional position is compromised or your client consents.

**2. Q. Yesterday, my client instructed me that they wished to plead guilty to an offence. We went carefully through all the defences available to them and they signed instructions saying they wished to plead guilty. They did so. Today they have written to the judge indicating that they wish to change their plea because they were under pressure from others to plead guilty.**

A. Your duty is to ensure that the court is not knowingly or recklessly misled (BSB Handbook CD1, oC1 and rC3.1).

In this situation, it would be appropriate to ask the client:

- a) why this was not raised with you originally, and
- b) why they chose to write to the judge about it.

It may be that they can provide an explanation for the sudden change, which satisfies you that you will be able to represent them.

If they do not provide a satisfactory explanation, then you should withdraw.

If the explanation is satisfactory, then it would be sensible to explore why they thought it right to approach the judge rather than deal with this through their legal advisers. The action suggests a lack of confidence in you, which, of itself, might be reason either for you to withdraw or for them to seek to instruct new counsel (however, see the guidance at gC83: in deciding whether to cease to act and to return existing instructions in accordance with rule rC26, you should, where possible and subject to your overriding duty to the court, ensure that the client is not adversely affected because there is not enough time to engage other adequate legal representation.

If your client is minded to pursue the application, you should advise them that you will have to withdraw, that the judge would need to hear evidence on the matter (from the client and most likely also from you) and that they may therefore have to waive privilege. If the client persists with their application, you should withdraw and assist the court with its investigation of the issue. If the client refuses to waive

privilege, however, any assistance you could give will necessarily be limited in scope as you must not breach confidentiality (see rule rC5 and guidance gC8; rule rC6).

3. Q. My client was very much in two minds about whether to plead guilty; I advised them on the strength of the case and suggested that there was a strong chance of conviction and therefore a longer sentence, but that they should not plead Guilty unless they accepted their guilt; or at least that they understood that by entering a Guilty plea, they would be sentenced based on accepting guilt (and in those circumstances mitigation might be limited); they then considered their position and, reluctantly, pleaded Guilty. They now want to change their plea, saying that they felt under pressure from their legal team to do so.

A. You will no doubt have kept a careful note of the position before your client entered their guilty plea and most likely have had your brief endorsed. You should advise your client about the change of plea procedure and that if they wished to pursue any application to vacate their plea, based on undue pressure from you, you would have to withdraw. Before deciding, you should advise the client that the judge is likely to want to hear evidence from them and their legal representatives and that the client would likely be asked to waive privilege. If the client persists with their application, you should withdraw and assist the court with its investigation of the issue. If the client refuses to waive privilege, however, any assistance you could give will necessarily be limited in scope as you must not breach confidentiality (see rule rC5 and guidance gC8; rule rC6).

### **Important Notice**

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