Criminal Appeals – Duties to the Court to Make Enquiries

Purpose:	To draw barristers' attention to their duties to the Court in criminal appeals to make enquiries as to the factual basis for grounds of appeal, and to give practical advice as to how to comply and as to how to respond to such enquiries
Overview:	Criminal appeals – duties to the court – duties of barristers to make enquiries in all cases – duties in relation to criticisms of former legal representatives – confidentiality and privilege in discussions with former legal representatives – duties in relation to Grounds of Appeal – waivers of privilege – duties of barristers asked to respond to enquiries – how to respond to enquiries – dealing with failures to respond – consequences of failure to respond – settling Grounds of Appeal – relevant case extracts – checklist of relevant issues
Scope of application:	Barristers involved in Criminal Appeals
Issued by:	The Ethics Committee
Published:	June 2016
Last Reviewed:	January 2021
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.**

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Introduction

This document has been issued by the Bar Council following the decisions of the Court of Appeal in *R. v. James (Wayne George)* [2018] EWCA Crim 285, *R. v. Grant-Murray & Others*, [2017] EWCA Crim 1228, *R. v. Lee* [2014] EWCA Crim 2928, *R. v. McCook* [2014] EWCA Crim 734 and *R. v. Achogbuo* [2014] EWCA Crim 567.

It takes account of the advice of the Registrar of Criminal Appeals in *Archbold News*, 15th September 2014, the procedures recently adopted by the Criminal Appeal Office for sending 'McCook letters', and the general expectations of the Registrar.

Annexure 1 contains passages from those five cases. Annexure 2 comprises a checklist, based on the contents of this document.

The Obligations of Counsel Newly Instructed in Relation to an Appeal to the Court of Appeal, Criminal Division

1. In any case in which a new legal representative is instructed in connection with a criminal appeal, and before Grounds of Appeal are settled and lodged, the new representative must do two things:

   1.1 Make specific inquiries of the legal representative(s) who appeared and acted at the trial in order to ensure that the factual basis for each of the grounds of appeal (actual or prospective) is correct, and

   1.2 Seek to obtain other objective independent evidence to substantiate the factual basis for those grounds.

2. Those duties apply whether or not the grounds of appeal may make express or implied criticisms of those former legal representatives.

3. Those duties will require you to ensure either:

   a) That you make the necessary enquiries in relation to all grounds of appeal; or

   b) That those enquiries are made by those instructing you.

4. This document sets out what these requirements are likely to involve in practice, together with some supplemental suggestions.

Newly Instructed Counsel – Initial Duties

5. Before deciding to settle and lodge any Grounds of Appeal on behalf of your client, you must take the steps set out below.

6. At the outset, you must consider the obligations that arise from your duty to the court, as explained by the Court of Appeal Criminal Division in the cases

mentioned at the beginning of this document. The most important passages are quoted in Annexure 1 to this document. You must satisfy yourself that you have correctly identified and understood those duties, and you must then apply them to your instructions.

7. In short, as explained by Court of Appeal in *Lee* (above), you owe a "*fundamental duty*" to the court to conduct due diligence in relation to the accuracy of what you are told by your client.

8. This means that you cannot accept instructions to act on a criminal appeal if:

a) Your client will not permit you to discuss even non-confidential matters with his former legal representative(s); or

b) Your client will not permit you to discuss confidential matters with his former legal representatives, save in exceptional circumstances.

9. Exceptional circumstances will only be found to exist where they give rise to good and compelling reasons. In McCook the Court of Appeal declined to set out what could be considered to amount to exceptional circumstances but did venture the potentially instructive observation of the Court that "*we imagine that they will be very rare*".

10. In order to be able comply with your duties, you must make your client aware of them. This is likely to involve telling your client that, before any grounds are settled and lodged:

a) You are obliged to ensure that the factual basis for each of the proposed grounds of appeal is correct, and

b) This requires you to make enquiries of his former legal representatives, and to seek other objective evidence, for that purpose.

11. Your client needs to know that this duty is mandatory, save in the exceptional circumstances referred to above.

12. You will need your client's consent in order to be able to discuss confidential matters with the former legal representatives: without that, they will be obliged to keep such matters confidential, even from you. In order to deal with this, you should at least ensure that your client instructs you to discuss the proposed grounds of appeal with those representatives, or agrees to you doing so, knowing that you may need to discuss matters which are confidential between him and his former legal representatives. That would usually be sufficient for your client to have given consent impliedly.

13. It would be good practice to go further, however. Ideally, you would also:

a) Obtain your client's specific consent to you discussing confidential matters with the former legal representatives; and

b) Obtain that consent in writing, or at least to make a contemporaneous written record of it.

14. You may also find that the former representatives insist on seeing written consent from your client: see further below.

Newly Instructed Counsel – Practical Considerations

The necessary enquiries in relation to all grounds of appeal

15. The essence of your duty is to make the enquiries necessary to ensure that your instructions about any relevant factual allegations can be supported on an objective and independent basis. Except in rare circumstances, you cannot settle Grounds of Appeal solely on the basis of the untested assertions of your client.

16. Relevant factual allegations for this purpose are allegations included in a ground of appeal, on which a ground of appeal depends, or which may be relied on in support of a ground of appeal.

17. In *R v Grant-Murray & Others*, [2017] EWCA Crim 1228, the Court of Appeal, the Lord Chief Justice presiding, sought to make clear the level of enquiry that is expected of newly instructed counsel:-

> "133 We would emphasise that it is a wholly inadequate compliance with this duty to send the lawyers instructed at the trial the grounds of appeal and to ask for comments. Inevitably the application will be made sometime after the trial and those representing the applicant at the trial must have identified for them the issues that relate to the conduct of the trial which are relevant to the appeal. **Specific questions must be formulated and specifically put**. Some questions will simply be for information that is not apparent from the papers. In other cases there will be implicit criticism; in such a case there can be no shying away from putting fairly and squarely the implicit criticism of those then acting for the applicant at the trial so that the appellate court has all the information before it when it commences the consideration of the application. The fact that a trial lawyer might have retired or left the profession to take up office or for some other reason does not excuse the newly instructed advocate from pursuing such inquiries with that person."

18. You should note that your obligation is not confined to checking with your client's former legal representatives that what your client has told you is correct:

you must also find out whether there is any other objective and independent material that supports your client's assertions as to what transpired when the case was being conducted by his previous legal representatives lawyers. Accordingly, in addition to making enquiries of those representatives, you must consider whether other independent support is, or ought to be, available to support your client's instructions. If support ought to exist, then enquiries should be made as to whether it does exist: the absence of support that ought to exist will be a matter relevant to the court's consideration. Similarly, if independent support does or might exist from particular sources, then your duty to your client and to the court requires the necessary enquiries to be made.

19. In some circumstances, you may need to go so far as to ascertain whether a particular fact is correct (e.g. whether a particular witness was called); in others, it will require you to ascertain that a particular assertion is at least properly arguable. How far you need to go will depend on the nature of the factual assertion and what is reasonably practicable.

20. The Registrar has expressed the view that the necessary enquiries should not be unduly burdensome. The type of enquiry that you are required to undertake is one that arises clearly and obviously from your instructions, accords with the application of common sense, and is reasonable and proportionate to the grounds being pursued. In the Registrar's view it will usually be sufficient for you to make enquiry of your client's former legal representatives, review the hearing transcripts (if available) and consider the core court documents (e.g. the indictment and the jury bundle). On the other hand, all of the necessary enquiries must be made unless there are exceptional circumstances that give rise to good and compelling reasons not to do so.

21. In *Grant-Murray & Ors* (*Op.Cit.*), the Court of Appeal noted,

> "131 For the avoidance of doubt, new advocates instructed in a case, whether or not they believe the grounds involve criticism of the trial representatives, must make all proper and diligent enquires of previous counsel, advocates and solicitors, so that they have all the information properly to understand what took place prior to and during the trial. This will also be necessary in every case involving an application to call fresh evidence. They must then expressly certify in the grounds of application for leave to appeal submitted to the court on form NG that that has been done. The court will not entertain an application without such a certification."

Who should conduct the enquiries?

22. It would not usually be appropriate for you, as counsel, to make evidential enquiries other than enquiries of your client's former legal representatives.

23. If more extensive enquiries are needed, you should advise those who instruct you what is needed, and ask them to ensure that those enquiries are made.

24. Where you are instructed on a Public Access basis you may have to consider whether the nature and extent of those enquiries, and your client's ability and facilities to deal with them, are such that it would be in the best interests of your client, or in the interests of justice, for your client to instruct a solicitor: see Rules C120.3, C122 and C123 in the Code of Conduct.

Confidentiality and privilege in discussions with former legal representatives

25. Your client will need to consent to his former legal representatives discussing with you matters that were confidential between him and them. This has already been covered in paragraphs 12 and 13 above.

26. Your discussions with former legal representatives will themselves be confidential (at least so far as they cover confidential matters[1]) and are likely to be covered by legal professional privilege ("privilege") until such time as that confidentiality and privilege is waived by your client. As suggested below, it would be good practice to confirm this expressly at the outset of any such discussions.

Refusal of consent to discussing confidential matters: exceptional circumstances

27. As mentioned in paragraphs 8 and 9 above, you cannot accept instructions to act on a criminal appeal if your client will not allow you to discuss confidential matters with his former legal representatives, save in exceptional circumstances.

28. If you consider there are exceptional circumstances which enable you properly to continue to act and to put forward Grounds of Appeal despite your client's refusal, then your client's refusal should be drawn to the court's attention in the Grounds of Appeal. The circumstances said to justify an exception being made should also be set out, apart from any circumstances which are privileged and in relation to which your client refuses to waive privilege. Suggestions are made below about how to deal with privileged matters.

[1] This may not apply to the whole of such a discussion, however. For example, the contents of the indictment, any ruling of the judge, and statements made or evidence given in open court, are unlikely to be confidential in nature, and information you are given about them is itself unlikely to be confidential; but any information you are given about discussions which former legal representatives had about such things with your client *is* likely to be confidential and, indeed, privileged.

Contact with former legal representatives

29. Once you have obtained your client's consent, you should make contact with your client's former legal representatives to:

a) Tell them that you have been instructed, and that you wish to discuss the proposed appeal on a confidential and legally privileged basis.

b) Ask about all matters that occurred whilst they were acting in the case, so far as relevant to the appeal. You must do more than simply send the former legal representatives the grounds of appeal and ask for their comments. "*Specific questions must be formulated and specifically put*" in relation to the issues at trial that are relevant to the appeal (*Grant-Murray & Ors*).

c) Check the accuracy of what you have been told by your client, so far as relevant to the appeal. This must include obtaining a response (if any) to any factual assertions made by your client which are intended to form the basis for allegations of incompetence against them, actual or implicit.

d) Seek to obtain objective and independent evidence to support your client's factual allegations, which may include identifying other sources from which that evidence might be obtained.

e) Provide them with an opportunity to consider and comment upon the draft grounds, allegations and supporting facts.

f) Where the proposed grounds include criticism of the former legal representatives, whether express or implied, there should be, *"no shying away from putting fairly and squarely the implicit criticism of those then acting for the applicant at the trial so that the appellate court has all the information before it when it commences the consideration of the application" (Grant-Murray & Ors).*

30. You should keep a careful record of all communications with your client's former legal representatives and of all steps taken in furtherance of your instructions.

What to do with the information you obtain

31. You should give careful consideration to any response received from the former legal representatives to the enquiries made, along with any other objective and independent evidence that is available or is lacking but which would have been expected to exist.

32. You should then consider and decide whether the allegations made are capable of sustaining a ground or grounds of appeal.

Waivers of confidentiality and legal professional privilege

33. In some circumstances, your client may need to waive privilege in respect of communications between him and his former legal representatives in order for you to be able to lodge settled Grounds of Appeal.

34. The same may apply in relation to matters which are confidential to your client, but not privileged. (A waiver of privilege would carry with it a waiver of any client confidentiality as well.)

35. To give a typical example, a waiver of privilege is likely to be needed in many, if not most, cases in which allegations of incompetence are being made in respect of the conduct of former legal representatives.

36. A waiver of confidentiality is likely to be implied if confidential material is referred to in the Grounds of Appeal or in open court. Where privilege is not involved, the Court of Appeal is unlikely to require any further confirmation. The Court of Appeal does, however, need to know expressly whether privilege is being waived.

When will a waiver of privilege be needed?

37. Whether and when a waiver of privilege is needed is a matter of law for you to consider. The Bar Council cannot advise you on this. In simple terms, however, this is most likely to arise where criticisms are being made of former legal representatives. The Court of Appeal has indicated that a failure to waive privilege will usually mean that the single judge and/or the court will be unable to determine whether complaints made against former legal representatives constitute an arguable ground of appeal, and such grounds may be dismissed on that basis: see, for example, *R. v. Frost-Helmsing* [2010] EWCA Crim 1200 at [14]-[15].

38. This may also be an issue in any case in which your client's appeal requires a statement from one of his former legal representatives to be put in evidence. If that statement would need to include privileged material, then a waiver of privilege will be needed. Indeed, putting such a statement in evidence is likely *in itself* to involve such a waiver. As a result, it would be prudent in such situations to take the same approach as for a formal waiver.

How to deal with the need for a waiver of privilege

39. If a waiver of privilege is necessary, then you must advise your client fully about the need for waiver and the consequences of that waiver.

40. He will need to be made aware that a general waiver of privilege removes all confidentiality from the communications that he had with his former legal

representatives. He will need to understand that, as a consequence of this, those former representatives will be free to respond to what he says about his case in the way that they see fit, to communicate directly with the court and, if required, to give evidence, all without any constraint on what they are allowed to tell the court about their privileged dealings and discussions with him. This will permit his former legal representatives to deal directly with any criticism that he may make of them. It will also mean that your communications with those former representatives will no longer be protected by privilege or confidentiality.

41. You should also advise your client as to the consequences of *refusing* to waive privilege. In particular, if it will preclude you from settling some of the proposed grounds of appeal, is likely to lead to those grounds being dismissed, or will have an adverse impact on the prospects of success, then you should explain that. You may also be asked about it at any eventual hearing.

42. If, having been so advised, your client instructs you to waive privilege, then you should obtain a written waiver of privilege, signed by him, and covering all relevant communications with, instructions to and advice given by each of the affected former legal representatives.

43. The advice that you give to your client in relation to a waiver of privilege issue, and his instructions upon it, are vitally important and both should be recorded in writing.

What to do if your client declines to waive privilege when needed

44. If your client declines to waive privilege, you should make a contemporaneous note of that decision. It would be best practice to ask the client to sign that note.

45. You should then consider the effect of the refusal on the Grounds of Appeal. The court's inability to know information that a waiver of privilege would otherwise have enabled it to consider may affect whether it would be proper for you to settle particular grounds of appeal (for example, grounds which criticise former legal representatives). The effect of the absence of a waiver of privilege is a question of law, and you are referred to paragraph 36 above in this regard. The question for you, as a matter of professional conduct, is whether the affected grounds of appeal are properly arguable in the absence of a waiver of privilege. In reaching a view about this, you might be assisted by considering the matters set out in sub-paragraphs 49(a)-(c) below. You would also need to ensure that the court is not misled: see paragraph 47 below.

46. If you consider that, despite the absence of a waiver, you are able to submit proper grounds, then you must draw the refusal to the court's attention in the Grounds of Appeal.

Your duties of inquiry if privilege is not waived

47. A decision by your client not to waive privilege does not affect your duty to make inquiries of former legal representatives. A waiver of privilege is concerned with what the court can know, not what you can know.

48. Accordingly, you must still make enquiries with the former representatives as to the specific matters in issue, including anything covered by the former representatives' duty of confidentiality to your client (which will include all privileged matters). This does mean, though, that your discussions could lead to you no longer being able settle grounds of appeal that you initially thought you could settle. For example, you cannot submit a ground of appeal in which it is asserted that advice was not given on a particular point where the results of your enquiries have demonstrated that advice was given on that point. To do otherwise would be to mislead the court, as you would know that the factual basis of that ground of appeal was untrue. You should take care, however, not to be 'the judge' on factual disputes that have a proper basis and are genuine: it is for the court to decide such disputes, not you.

What to do if former legal representatives either fail or refuse to respond

49. If one or more of your client's former legal representatives refuses to assist, or just does not respond, then you must reach a decision as to what grounds of appeal you can settle on the basis of the material available to you. The refusal of previous representatives to assist may be relevant to your decision, and (for the reasons given in *Achogbuo*, below) you should exercise particular caution where there is no other objective or independent support for the assertions being made by your client.

50. The Bar Council takes the view that Grounds of Appeal, including those criticising a former legal representative, may be put forward in circumstances where a previous legal representative refuses or fails to assist, but in order for it to be permissible to do so you would first need to consider:

a) any other independent, objective evidence you have been able to obtain as to whether your client's assertion is true and/or justified;

b) whether there are any other reasonable enquiries that should be made, and to advise that those enquiries are carried out;

c) whether there is an absence of other evidential support that you would have expected to be available; and

d) the extent to which the court might properly draw inferences from the refusal or absence of assistance from your client's former legal representatives.

Settling and submitting the Grounds of Appeal

51. The Court of Appeal has stated that "Fresh Grounds advanced by fresh counsel must be particularly cogent.", *R. v. James (Wayne George)* [2018] EWCA Crim 285, §38 (ii) & (x).

52. Any criticisms of your client's former legal representatives should be clearly set out in the Grounds of Appeal. The Grounds should state (assuming this is correct) that they have been provided to the former legal representatives and that they have had an opportunity to comment upon them. Where there has been no response from them, the Grounds should say this. Both the Grounds of Appeal and any waiver of privilege should be lodged without delay; the Grounds may be perfected in due course, if necessary.

The Court of Appeal's own 'waiver process'

53. The Court of Appeal has its own 'waiver of privilege process'. This may be implemented if you lodge Grounds of Appeal and it is unclear whether you have complied with your due diligence obligations. It may involve taking some aspects of the situation out of your hands. The Court of Appeal's approach will depend on the circumstances, as follows.

54. If the Grounds of Appeal include express criticisms of your client's former legal representatives, then the Registrar is likely to implement the Court of Appeal's own procedure without giving you an opportunity to correct any failings. This will involve sending your client the Court of Appeal's own waiver of privilege form, which your client will be invited to sign, and you will be notified that you should advise your client about this. If privilege is waived, the Registrar will then communicate directly with the former legal representatives for two purposes: to confirm whether they were approached to verify that the factual basis upon which the Grounds are premised was correct, and to seek their formal response to the criticisms. You will be given a copy of any response for comment.

55. In other cases, the Registrar may direct you to address any failures and to lodge amended Grounds of Appeal which confirm that you have complied with your obligations. If this requires you to make inquiries of former legal representatives which have not already been made and/or if they are being

criticised in the Grounds of Appeal, then you will need to address any need for a waiver of privilege and ensure that the Grounds of Appeal deal with this. Even if your client refuses to waive privilege, then the Registrar may still invoke the formal procedure described in paragraph 53 above.

56. If the grounds of appeal are regarded as making implied criticisms of trial counsel and/or solicitors, then the Registrar and/or the single Judge may, if it is thought necessary, invoke the procedure described in paragraph 53 above in any event.

Taking over a case after Grounds of Appeal have been submitted

57. If you have been instructed after the Grounds of Appeal have been settled and submitted, then it is your duty to satisfy yourself that they have been put forward properly. The first step will be to identify whether the process set out above has been complied with, and (if so) to review for yourself the material obtained so that you can be satisfied that the grounds can properly be pursued. If they cannot be, then you must seek to withdraw them at the first appropriate opportunity. Where the required process has not been carried out, is incomplete or has not been done properly, you should to seek to remedy those deficiencies by following an equivalent approach at the first available opportunity.

Pursuing criticisms made in Grounds of Appeal

58. When criticisms of former legal representative(s) are properly made, then they must be pursued properly and in your client's best interests. You are obliged to promote fearlessly and by all proper and lawful means your client's best interests without regard to others, including fellow members of the legal profession, and you should not shrink from this duty (see rC15.1 in the Code of Conduct).

Former Counsel Asked to Respond to Enquiries

First Steps

59. On being contacted by the new legal representative for a former client, you must satisfy yourself:

a) of their identity,

b) that they are your former client's legal representative, and

c) whether your former client has consented to you discussing confidential matters relating to his case with them.

A Duty to Respond?

60. It is likely to be in your interests to respond to such enquiries (for example, where there are criticisms of your actions, particularly if they are inaccurate or misleading) rather than leave them unanswered before the Court of Appeal. That aside, the Bar Council takes the view that responding to such enquiries may be more than a matter of mere courtesy.

61. You have a number of duties under the Code of Conduct that might be said to require you to respond, although the impact of these duties is likely to be affected by the fact that you are no longer instructed:

a) You are under a Core Duty to assist the court in the administration of justice (CD1) and you have a duty to the court to act in the interests of justice (rC3).

b) You must not allow the court to be misled (rC3.1 & rC6) and should take reasonable steps to avoid the court's time being wasted (rC3.3), by, for example, ensuring that the court is given accurate information and that only properly arguable grounds of appeal are submitted. Your duties not to mislead the court continue for the duration of a case (gC4).

c) You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession (CD5).

62. An important regulatory Outcome which your duties support is that the court is able to rely on information provided to it by those conducting litigation and by advocates who appear before it (oC1).

63. A refusal to respond to enquiries made by a newly instructed legal representative could lead to circumstances in which the court is misled by your former client as regards the factual basis for one or more grounds of appeal. The Bar Council takes the view that, if you if are aware that the Court of Appeal has been or will be given an incorrect version of events and you fail to correct it (where it is possible and lawful for you to do so), then you could be considered to have failed in your professional duty not to mislead the court. Whether this is so would depend on all the circumstances.

64. You should also note that the Guide to Commencing Proceedings in the Court of Appeal (Criminal Division) states, at paragraph A2-7.2, that inferences may be drawn "*from any failure to participate in the process*"; the types of inference do not appear to be restricted, and so might include inferences about the conduct of former legal representatives, including inferences from a failure to respond in relation to the conduct of the earlier proceedings.

65. If criticisms are being made of your conduct which may amount to allegations of negligence, then you may also wish to discuss the request with Bar Mutual Indemnity Fund Ltd ("Bar Mutual"), and you may need to notify them of a possible claim against you.

Settling your response to new representatives

66. You should not discuss matters which are confidential to your former client without being satisfied that your client has consented to this. Where consent has been obtained from the lay client, you will be able to respond to the new legal representatives and to discuss confidential matters with them without your former client's confidentiality and privilege being lost.

67. Confidential aspects of your discussions with your former client's new legal representative will also remain confidential – and probably subject to privilege – unless and until your client decides to waive privilege, or confidentiality is waived or overridden in some lawful way.

68. You do not have the right to waive your former client's confidentiality or privilege. These are matters for your client, advised by his new legal representatives. Even if you have been contacted by those new representatives, you must not disclose any privileged or confidential matters to the court if your client has not waived his privilege or confidentiality.

69. You should keep a careful record of your communications with new counsel and of all steps taken by you in relation to their approach to you.

70. You are entitled to ask the new representative for copies of documents that might assist you in answering their questions, such as any transcripts that may have been obtained since a trial. If you ask for such documents and they are not supplied it is perfectly proper to mention this in any response.

Settling your response to a request from the Court of Appeal

71. You may also find that you are contacted directly by the Registrar, seeking your response to Grounds of Appeal that have been filed: see paragraphs 52 to 55 above. This will only happen if privilege has been waived. In this event, your response will necessarily be in writing, and the Registrar has indicated that it need not be lengthy.

72. Where you settle a formal response this should be sent to the Registrar. On receipt, the Registrar will send the response to any new legal representative who may, in turn, reply to it. The Grounds of Appeal and the responses will go before the single judge and/or the full Court in due course.

Counsel Appointed by the Registrar

New counsel

73. Where you are appointed by the Registrar, this will usually be to represent an appellant has previously been acting in person. It might also follow a reference from the Criminal Cases Review Commission. The Court of Appeal confirmed in *R v Evans* [2016] EWCA Crim 452 at [61] that in such cases, you will still owe the usual due diligence obligations.

74. When assigning counsel, the Registrar will provide a full brief including copies of any waiver already obtained, the Grounds of Appeal, any response from the former legal representative(s) and relevant transcripts and documents from the proceedings. The Criminal Appeal Office ("CAO") would be able to assist in providing you with any further relevant transcripts and documents from the proceedings and any relevant correspondence to assist you in verifying the facts. If the CAO cannot assist, you can apply to the Registrar for a Representation Order for fresh solicitors to carry out specific tasks.

Former counsel

75. On receipt of a waiver and Grounds of Appeal from an unrepresented applicant, the Registrar will send both to any affected former legal representatives, with an invitation on behalf of the court to respond to the allegations made.

76. If you receive these from the Registrar and wish to respond to the Grounds, but consider the time for doing so insufficient, then you should ask the Registrar for further time. The Registrar has stated that former legal representatives will be given adequate time to respond.

The Consequences of a Failure to Comply With the Duty to Make Enquiries

77. You should note that in each of *Achogbuo* and *McCook*, the Court of Appeal referred the responsible practitioner to their regulatory body. The court indicated that it will take a strict line with regard to breaches of the above obligations and may well refer errant counsel directly to the Bar Standards Board (BSB).

78. You should also bear in mind your obligations to report yourself to the BSB in cases of serious misconduct, and to report serious misconduct on the part of other barristers.

79. The Court of Appeal in *Achogbuo* also indicated that it will henceforth make greater use of its power summarily to dismiss groundless appeals and applications for leave to appeal pursuant to s.20 of the *Criminal Appeal Act* 1968.

Annexure 1

The Guidance Issued by the Court of Appeal in *Grant-Murray*, *McCook*, *Lee* and *Achogbuo*

R v Grant-Murray & Others, [2017] EWCA Crim 1228

> "131 For the avoidance of doubt, new advocates instructed in a case, whether or not they believe the grounds involve criticism of the trial representatives, must make all proper and diligent enquires of previous counsel, advocates and solicitors, so that they have all the information properly to understand what took place prior to and during the trial. This will also be necessary in every case involving an application to call fresh evidence. They must then expressly certify in the grounds of application for leave to appeal submitted to the court on form NG that that has been done. The court will not entertain an application without such a certification.
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> 132 As the present applications have shown, a failure to make proper inquires before the application is made can result in very significant extra time and cost being expended and grounds being pursued which are found to be unsustainable.
>
> 133 We would emphasise that it is a wholly inadequate compliance with this duty to send the lawyers instructed at the trial the grounds of appeal and to ask for comments. Inevitably the application will be made sometime after the trial and those representing the applicant at the trial must have identified for them the issues that relate to the conduct of the trial which are relevant to the appeal. Specific questions must be formulated and specifically put. Some questions will simply be for information that is not apparent from the papers. In other cases there will be implicit criticism; in such a case there can be no shying away from putting fairly and squarely the implicit criticism of those then acting for the applicant at the trial so that the appellate court has all the information before it when it commences the consideration of the application. The fact that a trial lawyer might have retired or left the profession to take up office or for some other reason does not excuse the newly instructed advocate from pursuing such inquiries with that person."

R. v. Lee [2014] EWCA Crim 2928,

"8. In Doherty & McGregor [1997] 2 Cr App R 218, it was made clear that it was perfectly proper for counsel newly instructed to speak to former counsel as a matter of courtesy before grounds were lodged but counsel were provided with a discretion in the matter. More recently the position has been taken further in a series of decisions of this court, and in particular in R v Davis and Thabangu [2013] EWCA Crim 2424, R v Achogbuo [2014] EWCA Crim 567 and R v McCook [2014] EWCA Crim 734. Thus these decisions make it clear that fresh lawyers recently appointed must take steps to ensure that they are fully appraised of all that occurred while the case was in the hands of previous lawyers in so far as that is relevant to the new proceedings.

9. Where an allegation of actual implicit incompetence is made, enquiries should be made of those prior lawyers, said to have acted improperly, and it is equally important that other objective independent evidence should be sought to substantiate the allegations made. These principles apply not only where there is an allegation of previous lawyers have erred or failed in some way but also in any case where it is essential to ensure the facts are correct: see McCook in paragraph 11."

R. v. McCook [2014] EWCA Crim 734

"11. This case illustrates, however, two matters. First, it is always desirable to consult those who have acted before in a case where fresh counsel and solicitors have been instructed. In R v Achogbuo [2014] EWCA Crim 567 we stated that it was necessary to do so where criticisms of previous advocates or solicitors were made, or grounds were to be put forward where there was no basis for doing so other than what the applicant said. Second, it is clear from this case that we must go further to prevent elementary errors of this kind. In any case where fresh solicitors or fresh counsel are instructed, it will henceforth be necessary for those solicitors or counsel to go to the solicitors and/or counsel who have previously acted to ensure that the facts are correct, unless there are in exceptional circumstances good and compelling reasons not to do so. It is not necessary for us to enumerate such exceptional circumstances, but we imagine that they will be very rare."

R. v. Achogbuo [2014] EWCA Crim 567,

*"**Applications made on the basis of allegations of incompetence against the trial advocate and solicitor***

16. Of late it has become the habit for a number of cases to be brought on appeal to this court on the basis of incompetent representation by trial solicitors or trial counsel. As in this case, many such cases proceed without any enquiry being made of solicitors and counsel who acted at trial. That means that the lawyer who brings such an application acts on what [are], ex hypothesi, *the allegations of a convicted criminal—and in this case a convicted paedophile. For a lawyer to put forward such allegations based purely on such a statement, and without enquiry, is in our view impermissible. Before applications are made to this court alleging incompetent representation which is based upon an account given by a convicted criminal, we expect lawyers to take proper steps to ascertain by independent means, including contacting the previous lawyers, as to whether there is any objective and independent basis for the grounds of appeal.*

17. As long ago as 1997 in R. v. Doherty and McGregor [1997] 2 Cr. App. R. 218, this court drew attention to the fact that it was proper for fresh representatives as a matter of courtesy to speak to former counsel before grounds of appeal are lodged. Today circumstances have changed. The frequency of this kind of appeal makes it clear to us that counsel and solicitors would be failing in their duty to this court if they did not make enquiries which would provide an objective and independent basis, other than complaints made by the convicted criminal, as to what had happened.

18. The failure in this case has caused significant costs to be incurred by this court. For example, the transcript of the summing-up alone cost £388.80. In addition, there are the costs of running the office, the lawyers' time and the delay to other cases. It is, therefore, essential that counsel and solicitors in this kind of application, which has become more frequent, take the steps we have outlined.

…

20. The court will henceforth consider exercising this power [s.20 CAA 1968] more frequently if cases of the type referred to us today occur again. The court expects not only the highest standards of disclosure but also strict compliance with the duties of advocates and solicitors. It is the fundamental duty of advocates and solicitors to make applications to this court after the exercise of due diligence. In cases where the incompetence of trial advocates or solicitors is raised, the exercise of due diligence requires, having made enquiries of trial lawyers said to have acted improperly, taking other steps to obtain objective and independent evidence before submitting grounds of appeal to this court based on allegations of incompetence."

R. v. James (Wayne George) [2018] EWCA Crim 285

"38 (ii) Fresh Grounds advanced by fresh counsel must be particularly cogent."

Annexure 2

New Counsel Checklist

Generally

1. Have you considered and understood the nature of your duties to the Court as referred to in *R v Grant-Murray & Others*, [2017] EWCA Crim 1228, *R. v. Lee* [2014] EWCA Crim 2928, *R. v. McCook* [2014] EWCA Crim 734 and *R. v. Achogbuo* [2014] EWCA Crim 567 and R v James (Wayne George) [2018] EWCA Crim 285?

2. Have you made your lay client aware of the obligation upon you to make contact with and enquiries of his former legal representatives?

3. Have you made your lay client aware of the obligation upon you to seek objective and independent evidence that supports his factual assertions?

4. Have you informed the client that you cannot accept his instructions if he refuses to allow you to discuss non-confidential matters, or, save in exceptional circumstances, confidential matters with his former legal representatives?

5. Have you obtained your client's written confirmation that he agrees to you discussing confidential matters with his former legal representatives, and obtained or made a contemporaneous written record of those instructions?

Newly Instructed Counsel: All Cases

Due Diligence

6. Have you complied with your "*fundamental duty*" to the Court to conduct proper due diligence in relation to your instructions?

7. As part of that duty, and in so far as it is relevant to the new proceedings, have you taken steps to ensure that you are fully appraised of everything relevant that occurred while the case was in the hands of your client's previous lawyers?

8. As a further part of that duty, and in any case where it is essential to ensure that your instructions are correct or where there is an allegation of incompetence, have you sought to substantiate your instructions by reference to objective and independent evidence?

Contact with Former Legal Representatives

9. Have you contacted your client's former legal representatives to:

a. inform them of the allegations made and the supporting facts,

b. verify the accuracy of what you have been told by your client, by way of making specific enquiries in relation to the issues at trial that are relevant to the appeal and

c. provide them with an opportunity to consider and comment upon the draft grounds, allegations and supporting facts?

10. Have you kept a careful record of all communications with former representatives and of all steps taken in furtherance of your instructions?

Waiver of Privilege

11. In order for you to settle and pursue appropriate Grounds of Appeal, is a waiver of privilege needed in relation to communications with, instructions to and advice given by all affected former representative(s)?

12. If a waiver of privilege is needed, have you advised your client fully about the need for waiver, the consequences of waiver, and the consequences of a refusal to waive?

13. If your client has agreed to waive privilege, have you obtained a signed written waiver that covers all relevant communications with, instructions to and advice from each of the relevant former legal representatives?

14. If your client declined to give you a waiver, have you made a note of that decision and advised your client that this may:

a. preclude you from pursuing the proposed grounds of appeal that are affected by that decision, and

b. adversely affect any appeal grounds that can be brought?

15. If you have reached the conclusion that the refusal to waive privilege means that you cannot properly settle the required Grounds of Appeal, have you informed your client of this in writing?

Newly Instructed Counsel: Criticism of Previous Legal Representatives

16. Where a previous legal representative refuses to assist your enquiries, and prior to lodging any Grounds of Appeal, have you:

a. sought to substantiate your instructions by reference to objective and independent evidence;

b. advised your client as to whether there are any other reasonable enquiries that should be made; and

c. considered the implications of:
    i. the absence of any such evidential support that you would have otherwise expected to be available; and
    ii. the extent to which the Court might properly draw inferences from the refusal or absence of assistance from the former representatives?

Grounds of Appeal

17. Have you formed the view that the grounds that you have settled are reasonable, have some real prospect of success and are such that you are prepared to argue them before the Court?

18. Have you certified in the Grounds of Appeal that all proper and diligent enquires of previous counsel, advocates and solicitors have been made such that you have all the information properly to understand what took place prior to and during the trial?

19. If you have settled Grounds of Appeal that criticise former legal representative(s) in circumstances where the client has refused to waive privilege, has that refusal been made clear in the Grounds of Appeal?

20. Where the former representative(s) have not responded to the enquiries made, do the grounds state this?

21. If you have been instructed after the Grounds of Appeal have been settled and submitted, have you identified whether the correct process as set out in the guidance has been complied with?

Former Counsel asked to Respond to Enquiries from New Counsel

22. Have you satisfied yourself as to the identity of the person making the enquiry of you, and that they are your former client's new legal representative?

23. Have you satisfied yourself that your former client has consented to you discussing privileged and confidential matters with that new legal representative?

24. In considering whether to respond, have you considered your obligations under the Code of Conduct, including the guidance given and the regulatory outcomes that are being pursued?

25. Have you kept a careful record of your communications with new counsel and of all steps taken by you in relation to his approach to you?

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