



The Bar Council

Documents disclosed to Counsel by mistake

Purpose:	To draw barristers' attention to issues relating to this topic.
Scope of application:	All practising barristers
Issued by:	The Ethics Committee
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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.

Documents Disclosed to Counsel by Mistake

1. It sometimes happens that confidential documents are sent to an opposing barrister by mistake.
2. If you realise that you have received such documents by mistake you should not read them (or not read them any further) and should return them.
3. You should also note that where you become aware of confidential or privileged information or documents of another person which relate to the matter on which you are instructed, you may become professionally embarrassed as a result of such knowledge. Consequently rC26.6 provides that in such circumstances you may cease to act on the matter and return you instructions.
4. The BSB Handbook at gC86 provides that, when considering whether or not you are required to return your instructions in accordance with rC26.6, you should have regard to relevant case law including: *English & American Insurance Co Ltd & Others -v- Herbert Smith* [1988] FSR 232; (1987) NLJ 148 and *Ablitt -v- Mills & Reeve (A Firm) and Another*; ChD (Times, 24th October 1995). It is suggested that reference should also be made to *Al-Fayed v Commissioner of Police and the Metropolis* [2001] EWCA 780

and to *R v. B. & G.* [2004] EWCA Crim 1368. See also *Rawlinson & Hunter Trustees S.A. (as Trustee of the Tchenguiz Family Trust) and others v. Director of the Serious Fraud Office (No. 2)*; *Tchenguiz and others v. Director of the Serious Fraud Office* [2015] 1 W.L.R. 797, C.A. (Civ. Div.).

5. The above case law establishes that where you read a confidential document disclosed to you by mistake, then you may come under a duty of confidence (enforceable by order of the court) to your opponent or to another person not to use that document or the information contained in it for any purposes or to disclose the same to any other person including your lay client.

6. If the information contained in the document is relevant to the matter upon which you are instructed, then you may decide that you are professionally embarrassed by reason of that duty of confidence in that you are no longer able to act in the best interests of your lay client (CD2) and/or to maintain your independence (CD4). For guidance on non-disclosure to clients, see the Bar Council document “Non-Disclosure of information to your own client”. In these circumstances, it may be that you should cease to act and return your instructions.

7. The BSB Handbook at gC83 provides that in deciding whether to cease to act and to return existing instructions in accordance with 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 assistance. Accordingly, where the document is seen very shortly before trial it may be appropriate to act as set out in the Written Standards for the Conduct of Professional Work at paragraph 7.3.2:

“If, however, to return his brief or instructions would prejudice his lay client (for example, by reason of the proximity of the trial) he should not return his brief or instructions and should, unless the Court otherwise orders, make such use of the document as will be in his client’s interests. He should inform his opponent of his knowledge of the document and of the circumstances, so far as known to him, in which the document was obtained and of his intention to use it. In the event of objection to the use of such document it is for the Court to determine what use, if any, may be made of it.”

[Please note that as of 6 January 2014 the Written Standards are no longer in force. They can, however, be found on the Bar Standards Board website and may be of interest for the purposes of good practice: <https://www.barstandardsboard.org.uk/regulatory-requirements/the-old-code-of-conduct/written-standards-for-the-conduct-of-professional-work/>

8. If you are going to cease to act, and the lay client does not consent to you ceasing to act, then you must clearly explain to the lay client or to the professional client the reason for doing so (rC27.1).

9. In the context of the inadvertent disclosure of a privileged document in civil litigation, CPR Rule 31.20 provides that where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it or its contents only with the permission of the court. If such permission is refused, the court may also restrain by injunction the further use or disclosure of the document in question (see *Al-Fayed v Commissioner of Police and the Metropolis* [2001] EWCA 780). As regards confidential material inadvertently disclosed in the course of criminal proceedings, the Crown Court also has jurisdiction to grant an injunction restraining further use or disclosure of the material in question (see *R v. B. & G.* [2004] EWCA Crim 1368).

10. Where consideration of material that may be affected by public interest immunity arises, it is ultimately for the court to decide the question of disclosure and subsequent use in the proceedings. The person in possession of a document subject to public interest immunity is not entitled to disclose it at will, but has a duty to protect the public interest, if necessary by an application to the court; public interest immunity is concerned with maintaining the confidentiality of documents that would harm the public interest if they were allowed to enter the public domain; once the question is raised whether it is in the public interest that production of a document, otherwise disclosable, should be withheld, it is necessary to balance the public interest in maintaining confidentiality against the public interest in the due administration of justice; if the need for confidentiality outweighs the need to promote the administration of justice, the document must not be disclosed. It follows that, if a document to which public interest immunity properly attaches is disclosed by mistake, and an objection is raised to its use in the proceedings, it is necessary for the court to decide whether its use should be allowed. (see *Tchenguiz (op cit)*, digest in Criminal Law Week 2015/08/01).

11. Practitioners are also directed, where applicable, to the guidance given in relation to evidence obtained illegally in civil and family proceedings, see <http://www.barcouncilethics.co.uk/documents/evidence-obtained-illegally-civil-family-proceedings/>.

Important Notice

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