

## Appendix C – Ethical Vignettes

### Family Law Scenarios

#### Family 1

You are acting for Wendy in financial provision proceedings after an acrimonious, but eventually undefended divorce from her husband Harry.

Harry is sole Director and shareholder of a very successful company. It provides him with substantial income and perks but your client believes it has a large capital value.

Harry is the only child of very wealthy parents, and the business was set up with large loans from his father. The valuation of the business by the single joint expert has disappointed Wendy, because the expert has concluded that it is unsaleable because so much depends on the personal clientele and goodwill of Harry, and also that if the loans had to be repaid, the business would not be viable.

Wendy insists that the loans are “soft” (i.e. would never be called in), and that the business could easily be sold or merged if Harry retained a consultancy/directorship with appropriate restraint clauses.

Ten years ago you were working as a paralegal in a different firm of solicitors [from those instructing you] who acted for Harry in business matters. To the best of your recollection you only sat in on one meeting about company formation, and later assisted a partner on a debt-collecting matter for Harry’s company. However you now receive a letter from Harry’s present solicitors demanding that you cease acting for Wendy “as you have privileged information about our client’s business and finances”

**How should you respond to Harry’s solicitors’ demand to cease acting for Wendy?**

#### Family 2

You continue acting for Wendy. The parties have been given permission to file narrative statements “relevant to contribution and needs”. Wendy insist that she wishes to put in hers allegations about Harry’s expenditure on adulterous liaisons and prostitutes, and says that she will forward a copy to Harry’s notoriously puritanical father “to see if that changes his view of his darling son”.

Wendy instructs you that she intends to be difficult about contact between their children (aged 12 and 9) and Harry “to see if that makes him consider

the welfare of the family and give me my fair share". Harry can only have them on Saturdays and she says that both children could begin sporting activities then which she considers better for them, and it is up to Harry to be flexible.

**What do you do about the narrative statement and the contact issues if she sticks to her position on that?**

**Family 3**

You receive several hundred pages of documents on disclosure from Harry and give them to a pupil to sift and annotate.

That afternoon she comes to you in some excitement, gives you a document and says "looks like they'll cave in once we summon father-in-law!" You read the document and only after almost finishing it does it dawn on you that it is the rough draft of an attendance note by Harry's solicitor in which Harry's negotiating position is fully described.

He intends to make minimal offers; behave obstructively at a forthcoming mediation; refuse to participate in a FDR; and only make a modest offer just before trial; but acknowledges that if you witness summons his father, who is extremely reluctant to get involved and idolises his grandchildren, he will be compelled to settle on a lump sum and transfer of the former matrimonial home on virtually the full terms that Wendy is seeking.

**What ethical issues are raised?**

**If not raised probe on:**

- (i) what were your duties in relation to this document?**
- (ii) Are you entitled to withhold disclosing that you have it from Harry's solicitors?**
- (iii) Should you inform Wendy that you have it?**
- (iv) Can you act on the information contained in it?**

**Family 4**

Wendy has claimed to lead a very frugal lifestyle and given you for disclosure a copy of her credit card statements (showing only modest household expenditure), with HSBC.

By accident however she has enclosed a page of a different statement with Santander, showing expenditure on a hotel spa, restaurants, and other luxury items. She admits that she has access to a second credit card but instructs

you not to disclose this. She tells you the card is that of her sister (who has the same initial as her) and who, to improve Wendy's morale is letting her use it for treats which she (the sister) will pay for.

**What do you do?**

- **Assume you retain doubts about the credit card explanation. Does that make any difference?**

**Family 5**

Wendy has obtained entry to Harry's flat while he is away on business because she knows his cleaner. She has searched and found evidence of a substantial Investment Trust holding that Harry has concealed on disclosure. She instructs you not to reveal this in advance but to use it to take Harry by surprise in cross-examination.

**Should you?**

**Family 6**

At the final hearing Wendy is exposed as lying in cross-examination about the credit cards. She suddenly says in the witness box that it was your advice to conceal the truth.

**What action should you take?**

## Criminal Law Scenarios

### Crime 1

Your client, Mr Shepherd, was convicted of assaulting his girlfriend. The print-out of his previous convictions only contain some minor theft offences from several years ago. Your client now tells you for the first time that he was given a suspended sentence 3 months' earlier for an assault on a previous girlfriend. He thinks he got six months in prison which was suspended for a year .

Prosecuting counsel stands up and, when asked by the judge, says the client has no previous convictions for violence.

#### **What would you do?**

**If you say nothing, how far can you go in mitigation with your client's previous criminal record as disclosed by the Crown?**

**If after, you've spoken, the District Judge says [to you] so I see Mr Shepherd has not convictions for violence, and then immediately asks you if there is any ongoing connection with the girlfriend- do you do anything?**

**Do you do anything about the suspended sentence?**

### Crime 2

Your client is a local councillor charged with dangerous driving. A prosecution witness will say that he saw your client in the driver's seat and driving dangerously. That is an accusation vigorously denied by your client who says the witness is lying. No s 100 Bad Character application has been made up to this point.

At Court the client instructs you to put to the witness that:

- (a) He is a notorious local drunk who cannot be relied upon to see anything except with double vision;
- (b) He is known to frequent brothels;
- (c) He has a grudge against your client ever since he beat him in the local elections; and
- (d) He is a freemason who is friendly with the investigating police officer who is also a freemason.

**Do you follow these instructions?**

### **Crime 3**

Whilst going through the night before a short trial on possession of stolen goods, you discover in material disclosed late by the CPS a note from the lead investigating police officer which appears to be passing comment on the reliability of the main prosecution witness. It also discloses that the witness was investigated for drug dealing several years ago, but that case was dropped in return for cooperation in ongoing police work.

You have read the note before realising that it is probably part of the CPS brief to their advocate. Earlier, as part of your preparation, you had asked for a list of antecedents of the prosecution witnesses and he is shown as having none.

#### **What do you do, and why?**

### **Crime 4**

Continuing with the last scenario, assume that you continue to act. Your client says [via instructing solicitors] during an adjournment that he thinks the witness is a member of a local drugs gang and has it in for him because your client once raised suspicions that he was a police informant. The client makes clear that if you hint to the court that he is grass he thinks the witness will become more sympathetic to the defence.

#### **Does this change or reinforce what you would do in any way?**

### **Crime 5**

Your client is about to be tried for actual bodily harm arising out of a fight in a pub. A prosecution witness (who knows your client) identified him as the assailant shortly after the incident. Your client's instructions are that he was defending himself, having been racially abused and threatened by another man in the pub.

On the morning of the trial, your client says he has a feeling that the witness will say he was mistaken in his identification and that it was someone else fighting, not your client. He now says he was elsewhere on the evening in question and that a friend of his can act as an alibi witness. He says he only said it was self-defence because he had to say something, knowing he was innocent, and that he is now telling the truth.

#### **What do you do?**

When pushed the client tells you his girlfriend knows the witness and she told him the witness had changed his mind. You cross examine the witness hard on identification but in fact he does identify your client. You then hear the

alibi witness will not attend. You hear your client say, "I will say whatever it takes" in the witness box.

**How would you decide whether to call him?**

### **Crime 6**

Continuing with the above scenario, assume that the client is in the witness box. During cross-examination he now says for the first time in evidence that he was at the pub and begins to give his original story about having been threatened and racially abused. The prosecution barrister gives your client a hard time about your failure to ask the prosecution witness about these threats and insults. Your client says, "It was my brief's decision not mine".

**What do you do?**

## Civil Law Scenarios

### Civil 1

You are acting for Claire in an acrimonious partnership dispute. Sally is the other partner. The business was set up with large loans from Sally's parents.

The valuation of the business by the single joint expert has disappointed Claire, because the expert has concluded that it is unsaleable because so much depends on the personal clientele and goodwill of Sally, and also that if the loans had to be repaid, the business would not be viable.

Claire insists that the loans would never be called in, and that the business could easily be sold or merged if Sally retained a consultancy/directorship with appropriate restraint clauses.

Ten years ago you were a paralegal at a different firm of solicitors [from those instructing you] who acted for Sally in business matters. To the best of your recollection you only sat in on one meeting about partnership formation, and later assisted a partner in the solicitors' firm on a debt-collecting matter for Sally's business.

However you now receive a letter from Sally's present solicitors demanding that you cease acting for Claire "as you have privileged information about our client's business and finances"

**How should you respond?**

## Civil 2

You are instructed to appear in a business dispute between two former partners in a chiropractor's business. The former-partner, who you act for, has set up a back clinic franchise which is very successful and is leading to a lot of business for you/your chambers. Your client's case rests on breaches of the partnership deed and some allegations of fraud.

He is a charismatic individual, always in the press, and in conference he almost persuades you there is something in the fraud charges, but on reflection – before the trial – you come to the view that he is likely to lose the partnership dispute and that there is no evidence to support the fraud allegations beyond your client's claim that his opponent lived a more lavish lifestyle than the business would permit.

You have explained to the client the likelihood of him losing. Your client indicates he accepts he may not win, and all that he is asking is that make a strong attempt to win the case for the future of your professional relationship with him.

### **How should you respond?**

## Civil 3

You receive several hundred pages of documents on disclosure from your opponent (who is acting for a defendant company) and give them to a pupil to sift and annotate.

That afternoon she comes to you in some excitement, gives you a document and says "looks like they'll cave in once we summon the Managing Director!"

You read the document and only after almost finishing it does it dawn on you that it is the rough draft of an attendance note by your opponent's solicitor indicating they intend to make minimal offers; behave obstructively at a forthcoming mediation; and, only make a modest offer just before trial; but acknowledges that if you witness summons the Managing Director, who is involved in negotiating a merger, he would rather settle this claim at close to what your client wants than divert his attention from merger negotiations.

### **In relation to this:**

- (i) What were your duties in relation to this document?**
- (ii) Are you entitled to withhold disclosing that you have it from your opponent's solicitors?**
- (iii) Should you inform your client that you have it?**
- (iv) Can you act on the information contained in it?**



#### Civil 4

You act for Mr Gurney, a coach for the local League One football club. He is a claimant following a serious accident at work which has left him with a severe back injury. Part of his claim is for loss of earnings. You meet him in the week before trial and during conference Mr Gurney says he'll be glad to get the trial over and get on with his life. He's written a book which he's keen to sell. He thinks a publisher is interested.

You tell him that you must disclose this to the defendants and he says that actually the book's not finished and the publisher told him they liked it so far but no promises and he should come back to them when he was finished. He's also worried that the football club, which is run by a notorious local businessman, might try and stop the book as it will contain some colourful passages about him.

#### **What do you do in the light of the client's response to the advice?**

You are persuaded that book contract is not a serious prospect and do not get the matter disclosed. The case finishes and the judge indicates he will retire to formulate his judgment. In the waiting area your client mutters, "Great, now I can sign a contract for the book."

#### **Do you do anything else?**

#### Civil 5

In a short personal injury trial one matter in dispute is whether your client (the defendant driver) had his lights on at the time of the accident. Up until the trial he has always said he thinks he did not turn on the lights. You have avoided the subject in dealing with the claimant's evidence and then, at lunchtime, just before your client is about to give evidence, you are told by instructing solicitors that the defendant now clearly recalls turning the lights on when he set out that day.

#### **What do you do?**

Your client gives evidence under cross-examination that his lights were on. Your opponent puts to him that this was not in his evidence in chief and your client replies blaming his legal team for not being careful enough.

#### **What do you do?**

#### Civil 6

Your client is exposed as lying in cross-examination about the lights. He suddenly says that it was your advice to conceal the truth.

#### **What action should you take?**

## In-house Scenarios

### In-house 1

You are a director, secretary and sole legal adviser of a UK company which is a wholly owned subsidiary of a US company. The US company is facing a massive damages suit in the US and needs to make contingency plans to cover the possible damages. The parent company identifies its subsidiaries with the most valuable unencumbered assets of which your company is one. The contingency plan requires all the assets of your company to be mortgaged to raise funds. You are concerned that this may result in the insolvency of your company and the UK Board is very unhappy about what they are being asked to do by the shareholder. You are concerned about conflicting responsibilities to your employer and to the parent which has instructed you and your colleagues to co-operate with the banks to arrange the funding.

**What action should you take?**

### In-house 2

Your client company had executed a comprehensive confidentiality agreement when it was participating in an auction to purchase another company (transaction "A"), and pursuant to that confidentiality agreement had received a very sophisticated and complex set of transaction documents and a considerable amount of state of the art technical information as part of the due diligence process. At the end of the auction process your company does not succeed in acquiring the target company. Negotiations are discontinued and apparently, in accordance with the confidentiality agreement, all materials are destroyed or returned.

Six months later your company proposes to sell a part of its business (transaction "B") which was very similar to the business you tried to acquire in transaction A. You realise quite late in the successful negotiations your company is pursuing with a number of potential buyers, that the contractual documentation your company is using is identical in language and structure to those that had been delivered to you six months earlier in respect of the transaction A and the information document which having been supplied to potential purchases draws heavily and plagiarises the documentation that had been disclosed in confidence in transaction A.

**What do you do?**

### In-house 3 Discovery

Your company is involved in litigation and the matter reaches the discovery stage. You advise the company of the duty to disclose "relevant" documents and you ask for a search to be carried out for such documents. You collect all the documents and

forward them to the company's solicitors. You later become aware of a document which if disclosed would be highly damaging to the company's case. The manager concerned had been aware of this document but had deliberately withheld it from you. He instructs you not to disclose it to the other side. **What action do you take?**

#### **In-house 4**

You are the legal adviser to one of the company's marketing groups. The group is setting up a scheme for its customers to operate which involves some consumer protection issues. The marketing group asks you to advise one of its customers who is having difficulty implementing the scheme. You have been newly appointed to this group and you very much want to do all you can to help them especially as the manager will have an input to your performance review.

**What should you do?**

#### **In-house 5**

You are appointed as the Head of the Legal Department and as a Director and Secretary of the company. It has always been the custom for the Legal Director to be a trustee of the company's pension fund. You feel that there is a conflict of interest as you have been appointed to be an adviser to the company and you cannot effectively carry out your responsibilities as a trustee in the event that the fund and the company's interests may diverge, especially if this involves a legal issue. The management cannot understand your concerns especially as your predecessors apparently had no such problem and urge you to re-consider. As you have been recently appointed to the top legal job you do not want to upset your boss (the Chairman and MD who Chairman of the Trustees). **What should you do?**

#### **In-house 6**

You work for a telecoms company that regularly reports data to the regulator on matters including performance against customer service standards. Failing to hit the standards can lead to regulatory sanction and claims from customers.

You are asked to review the data prior to its submission. You check that the data covers all the requirements of the regulator's reporting requirements and whether the service standards are met according to the data. The requirements and standards are met according to the data, but you have seen raw performance data recently which raises a suspicion to you that the reported data may not be accurate. You do not challenge any fellow employees and submit a report saying the reported data meets the requirements of the regulator and indicates the company is hitting the required performance standards.

**What ethical issues are raised by your actions? What might you have done differently?**

**You form the view that the suspect data is not the product of dishonesty but know - rather than just suspect - that the processes by which data was gathered were flawed and had a high likelihood for error. Does that change the ethical implications or what you would do?**

**You asked to be able to see the data before it was submitted to the regulator, but was told by the head of customer services that it did not concern you, "as it was not a matter on which legal advice was needed." What impact if any does that have on the ethical implications and your actions? Does it make a difference if the head of customer services sits on the executive committee and main board of the company?**