

**Appendix 2: Victorian Bar Association Ethics Bulletin No 1 of 2007**

## **ETHICS BULLETIN**

### **APPEARANCES IN CRIMINAL MATTERS - MENTAL IMPAIRMENT**

An issue has arisen concerning barristers practising in the criminal jurisdiction as to the course to follow where an accused is unable to give instructions.

There may be many reasons why there is a lack of instructions. A client may refuse to instruct without disclosing a reason, or because of a lack of trust that a confidence will be respected, or out of an irrational fear of the consequences, and so on. Where this occurs, counsel is obliged to retain and act in accordance with the brief subject only to the application of Rule 98(b) which may authorise the return of the brief. Where resort is had to Rule 98 to justify a return of the brief, counsel must comply also with the statutory requirements for judicial leave to withdraw, which if within 7 days of the trial, is granted only if reasonable – see s.27 (2) *Crimes (Criminal Trials) Act 1999*. Rule 98(b) does not negate or diminish this judicial discretion. The duty counsel owes to a court requires, further, that return of the brief be done in sufficient time to allow the client to inform the court at the initial directions hearing whether or not he or she is represented – see s.5(4)(c) *Crimes (Criminal Trials) Act 1999*.

Some occasions have arisen where counsel has formed the opinion that the client's mental processes are disordered or impaired, with the consequence that there is a lack of understanding of the charge, or of the significance of a plea, or of the nature of the trial and the evidence to be or being led, or an inability to give any or any proper instructions. Rule 152 requires a barrister to take special care in these circumstances to ensure that the disordered or impaired mental processes do not work to the client's prejudice. The return of a brief by the application of Rule 98 is subject to Rule 152, and also subject to the application of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

A statutory presumption of fitness to stand trial (and thereby give instructions) is raised by s.7 of that Act. It binds counsel as it does all others concerned with the trial. It is rebuttable, but only by a judicial order made following investigation.

Until that occurs, counsel is not entitled to refuse or return a brief on the ground of an inability to obtain instructions by reason of mental disorder or impairment.

Where counsel forms an opinion that there is a mental disorder or impairment with a consequent inability to give instructions, counsel, if he or she retains the brief, is obliged, to disclose that inability to the trial judge in accord with the duty owed by counsel to the court. This arises because an inability to give instructions directly affects the proper administration of criminal justice. That a client may fear the consequences of a determination of unfitness does not negate or lessen this duty.

Before disclosing the matter, however, counsel must inform the client and the instructing solicitor as soon as such an opinion is formed, and seek instructions from the instructing solicitor to follow that course. Counsel must allow the maximum opportunity possible for other opinions to be obtained and for other counsel to be engaged. This may not always be possible, where for example the mental disorder or impairment first becomes apparent close to or at the commencement of a trial, or after the trial has commenced. If the instructing solicitor declines to give such instructions, counsel, having obtained the permission of the court, should return the brief. If the court refuses permission, counsel must continue to act, however difficult that may be.

If following the statutory investigation the court determines that the client is fit to stand trial, counsel must accept that finding, retain the brief, and conduct the trial as best can be done. Where it is determined that an accused is unfit to stand trial, the statutory 'special hearing' of the criminal charge will take place with the jury informed by the court of the mental disorder or impairment. Even though counsel may not be able to obtain proper or any instructions, the duty requires retention of the brief and conduct of the trial. There will be severe restrictions on what can be done by counsel and they need to be accommodated.

In due course the Practice Rules will be modified to reflect explicitly the duties imposed on counsel by reason of these statutory provisions.