

Team News

Guildhall Chambers welcomes three new arrivals to the Crime team. **Ian Dixey**, recognised by Chambers and Partners as a leader in his field for each of the last three years, joined Guildhall Chambers from St Johns Chambers earlier this year. **Julian Kesner**, who was called to the Bar in 1983, practised as a solicitor from 1987 and worked most recently with Bristol-based Bobbets Mackan, before joining Guildhall Chambers earlier this summer. **Brendon Moorhouse**, who has been a Senior Crown Prosecutor at Bristol CPS since 1994, also has a particular expertise in high tech crime. When not in Court, he is a keen military historian. **Jim Bennett**, who joined the Crime team as a pupil in October 2002, has now become a full member of Chambers and brings the current Crime team total up to twenty-six.

Meanwhile **Ian Pringle** joined **Ian Glen** and **Richard Smith** to become the third member of Guildhall Chambers Crime team to be appointed Queen's Counsel earlier this year. **Richard Smith** has recently had an eventful few months, working out in Australia as part of the management team with England's Rugby World Cup Squad.



The powers of civil recovery awarded to the Assets Recovery Agency (ARA), the independent Government Department established earlier this year, can lead to the confiscation of any assets or funds believed to have resulted from a criminal activity, whether or not there have been any related criminal proceedings or conviction. Moreover, last year's Proceeds of Crime Act toughens up on the definition of money laundering. Any organisation regularly holding large sums of client money will need to keep a close eye on its source to make sure none of that money is tainted.

Director of the ARA, Jane Earl, re-emphasised these points when she joined Barristers from the Guildhall Chambers Crime team this summer, to address members of the South West legal profession at a Guildhall Chambers' seminar on the Proceeds of Crime Act. This issue of the Crime team's newsletter covers some of the key points addressed at the event, with Andrew Langdon delving into what is and isn't a criminal lifestyle and Ray Tully giving his best advice on how to avoid falling foul of money laundering and disclosure legislation.

Amongst the other issues covered are the implications of a new protocol for child internet pornography cases, presented by Robert Davies and, on a considerably lighter note, Andrew Macfarlane follows the style of recent contributions to The Times with some guidance for fellow barristers seeking to delight their clientele. Don't miss the chance to take a magnum of champagne away from the Crime team. Details on page 4.

Ian Pringle QC, Editor

The Proceeds of Crime Act 2002

The Proceeds of Crime Act 2002:

- Consolidates all confiscation legislation
- Sets up the new Assets Recovery Agency with specific powers
- Targets those with a 'criminal lifestyle'
- Creates a new liability to Money Laundering offences, alarming to many practitioners in its breadth
- Sets up a range of interim powers for the Court to prevent targets 'salting away' their assets
- Establishes an entire machinery for civil recovery, enabling recovery where there has been no conviction, whether the lack of conviction results from the fact that there have been no, or aborted, criminal proceedings or because there was an acquittal
- Needs to be understood by anyone practising in Crime: gone are the days when confiscation was confined to fraud or drugs
- Is in force

A matter of simple deduction?



In the preamble, the Proceeds of Crime Act claims to consolidate confiscation procedures. In debate the Government has said the end result would simplify matters. It certainly consolidates them, but does it simplify? Andrew Langdon lets his creativity flow, with his own route map to avoiding pitfalls and complications.

The key to circumventing any complicated arithmetic is to steer clear of confiscation procedures entirely. If you are defending, this means avoid being categorised as an offender with a 'Criminal Lifestyle'. There are a number of offences that qualify you automatically. They are listed in Schedule 2 of the Act. They make an odd hotchpotch - it is difficult to see what criteria were applied in selecting them. For example blackmail is there but theft isn't. In round terms they are Drugs; Money Laundering; Terrorism; People Trafficking; Counterfeiting; Arms Trafficking; Intellectual Property; Pimps and Blackmail. It calls for a mnemonic, 'Don't Mention The Proceeds of Crime Act, Its Pro Bono.'

There are two other routes to acquiring a *Criminal Lifestyle*. The first is to commit an offence over a period of more than six months (s 75 (2)(c)), though quite what the legislators have in mind here is unclear. Not many offences take six months to commit. Alternatively an offence will qualify if it is seen to be 'conduct forming part of a course of criminal activity', either because a minimum of three other offences are covered in the same proceedings or because there have been two previous convictions on separate occasions in the last six years (s 75(3)).

For the 'criminal lifestyle' label to stick, the final rider for either of the above routes is that each offence has to amount to conduct from which the defendant has benefited, although the definition of benefit is pretty wide. 'A person benefits from conduct if he obtains property as a result of, or in connection with, the conduct.' s.76 (4). Moreover the total value of the benefit has to be at least £5,000. Although TICs won't act as a trigger in terms of number of offences, they do go into the equation in determining whether the £5,000 figure has been reached.

To avoid any pitfalls, it will be absolutely crucial for the Prosecution to:

- consider carefully how many offences to include and over what time period, in framing charges in Magistrates' Courts or Courts on Indictment, and
- beware specimen counts where four offences are needed. TICs will not trigger this requirement but only be relevant in determining whether the cut-off £5,000 figure has been reached.

In the advice they give, the Defence, on the other hand must:

- decide how many offences to plead to. It may not be so clever to seek to persuade Crown to take a number of substantives rather than a conspiracy because that factor alone may trigger confiscation powers.
- consider pleading to something as a sample of a course of conduct
- understand the value involved in the relevant offending. How about a basis of plea specifying a benefit of less than £5,000?
- be clear on of the value of any TICs.

A Quadruple Whammy

If you have a criminal lifestyle, four assumptions (s10) come into play against you. They are taken from the 'old' legislation. The Court must assume that the following goodies come from your general criminal conduct:

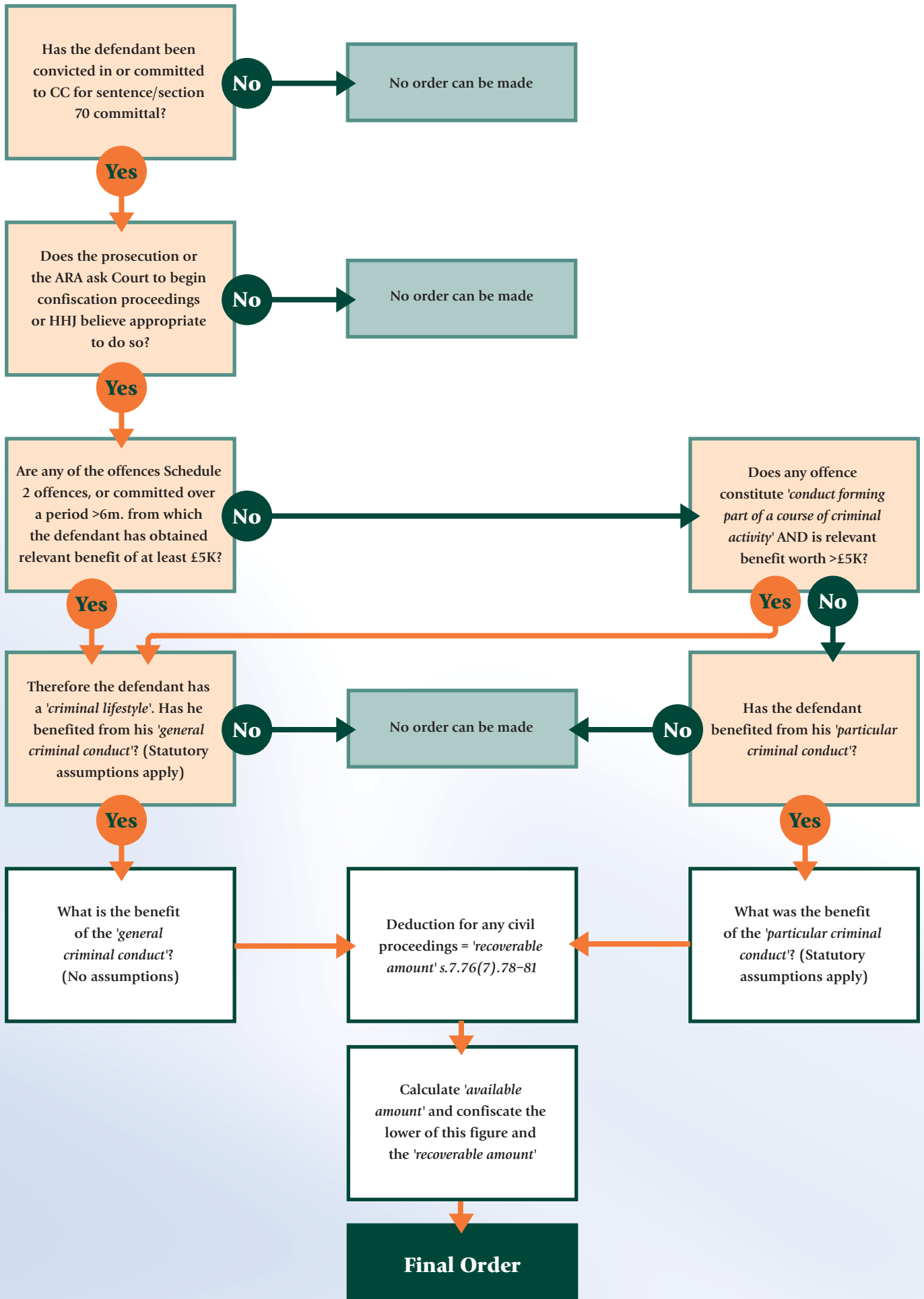
One...anything you have got now. Two ...anything you acquired in the last six years. Three.... anything you spent in last six years.

And if you want to say 'not mine but someone else's', (or assert that property is jointly owned), the final onus is on you to displace the assumption that everything identified within the above three categories is yours - and yours alone.

With this in mind, the 'Recoverable Amount' is no small change. Once it's been established, the Courts then ascertain the 'Available Amount'. Resolution comes at last when the lower of the two figures is made the subject of the Final Order.

Andrew Langdon

Proceeds of Crime Act 2002



For richer or poorer?

Can you spot a criminal lifestyle? Which of the following face to lose their assets and by how much? A magnum of champagne for the most erudite answers e-mailed to lucy.northeast@guildhallchambers.co.uk by 9th January 2004. Answers on www.guildhallchambers.co.uk.

- 1 A man is convicted of supplying £8,000 worth of drugs for cash that he's spent by the time of his arrest. His only remaining asset is a £2,000 car. On the balance of probabilities, he has committed an offence of similar proportions over each of the last ten years. In fifteen years' time he wins the lottery.
 - 2 A woman of previous good character is convicted of conspiracy to steal. The dates on the indictment cover a 12-month period and in total she notched up £20,000 out of the offence. A look at her bank accounts shows regular lump sums received before that period, some £100,000 in total from an unknown source. She owns an expensive house in Sneyd Park acquired by her seven years ago.
 - 3 A man with considerable assets, probably acquired in part through ripping off clients renting his holiday lets on the Costa Brava, has two previous convictions, both £3,000 deceptions, in the last six years. He is caught stealing a bottle of wine.
 - 4 A man who has a £20,000 share in the equity of his home faces one count of burglary and two TICs for handling. Tallied together, they are said to be worth in excess of £5,000.
- What would be the situation if:
- she had two former convictions for dishonesty, three and five years previous?
 - the indictment contains not a conspiracy but four counts of theft?

The day of reckoning

One of the frequent problems in confiscation cases is seeking to identify the truly "recoverable amount" when the individual Defendant has operated as a sole trader, in partnership with another or others, or under a corporate identity. In this regard, see the following cases (decided under CJA but with relevance to the POCA).



In *Dimsey and Allen* [2000] 1 Cr.App.R.(S) 497 the Court of Appeal decided:

- i Non-payment of tax as a pecuniary advantage, which is susceptible to a Confiscation Order.
- ii The valuation of that benefit is dependent upon what the convicted person obtained not on the loss, if any, to a victim.

iii Where a company is used as a vehicle for fraud then the corporate veil can be lifted and the tax liability of the company can be the liability of the convicted person.

In *Moran* [2002] 1 WLR 253 the Court of Appeal held that an individual sole trader who had not paid any tax for a 20 year period did not benefit to the extent of his undeclared income but had only benefited to the extent of his unpaid tax and interest, accordingly the Confiscation Order was set in the sum of the underpayment of tax and interest accrued or any investment returned on that sum.

In *Cadman Smith* [2002] 1 WLR 54 the House of Lords held that the Court of Appeal's approach involving an examination of the fate of the contraband (cigarettes) was not the right approach. The correct approach was to determine the pecuniary advantage by identifying the moment when the advantages are obtained. In a duty evasion case, that was the point at which the liability to declare the goods or pay the duty arose.

In *Foggon* (Times Law Reports, 19th February 2003), the Court of Appeal held that the Defendant was liable to confiscation for the whole of monies which had been earned by a company and then diverted to the Defendant's own benefit (in effect stealing the money from the company and not declaring the tax due to the Revenue).

The key would seem to lie in the way in which the Prosecution put their case and particularise the same in the Indictment.

It can be seen from the above and under the POCA that the extent of confiscation will depend very much upon the way in which the Prosecution frame their case against the individual concerned.

Ian Pringle QC

Dirty laundering – not just money for old dope?

No one should have missed the fact that legal professionals need to grasp the detail of the Proceeds of Crime Act or risk paying a heavy price and with targets to confiscate £60 million per annum by 2004/2005, expect tough action from the Assets Recovery Agency.



The main thrust of the Act is to beef up earlier legislation, the Drugs Trafficking Act 1994 and the Criminal Justice Act 1988. The effect has been to create three specific offences, laundering (s327 - 329), disclosure (s330 - 332) and tipping off (s333), all of which can trip up an unsuspecting legal professional.

These offences apply to the proceeds of all crimes, not just drug trafficking, and count no matter when the crime occurred. The legislation is yet to be fully tested and there are plenty of anomalies.

Money laundering offences are serious offences, carrying a maximum sentence of fourteen years. They involve any activity classified as concealing, disguising, converting, transferring or removing criminal property from the UK. You can be prosecuted for having possession or use of criminal property. Without handling cash, you can be guilty of involvement in an arrangement that facilitates any of the above. However to be guilty of these offences, a solicitor must know or suspect that the property in question has been derived from an activity criminal in the UK. We could argue that the unsuspecting solicitor really shouldn't be tripped up, but Courts are unlikely to be forgiving if the lack of knowledge results from a failure to grasp the issues and professional oversight.

A charge of money laundering can be levelled at any legal professional, not just those conducting regulated business. Property conveyancers or practitioners holding defendants' money need to take care. Anything out of the ordinary, such as payments to third parties, should ring alarm bells. If in doubt, share any suspicions with the NCIS before carrying out instructions. The only acceptable defence for not disclosing is proof of an intention 'to make such a disclosure and having a reasonable excuse for not doing so'. It's hard to imagine what this reasonable excuse could be.

Disclosure offences apply to the Regulated Sector and carry up to five years imprisonment. Perversely, specialist criminal firms are least likely to get caught in a disclosure issue since they are unlikely to deal with transactional work but lawyers in private practice will fall within this definition simply by holding client money.

To avoid an offence, anyone in this regulated sector must pass on concerns to the NCIS as soon as is practically possible if, through information gained in the course of business, there is

knowledge or suspicion, or simply reasonable grounds for knowledge or suspicion, of involvement in money laundering. Here the Act implies even less room for manoeuvre for an unsuspecting solicitor. An offence is committed if the solicitor is deemed simply to have reasonable grounds for suspecting. It will be hard to plead ignorance if clear warning signs were missed.

What if the information at the root of the suspicion did not arise in the course of business? When is a solicitor not a solicitor? Playing golf? At a dinner party? Presumably if information is revealed because of the fact of your profession, whenever that happens, it can be viewed as coming under the scope of this Act.

There is some defence to allow for professional legal privilege, but not if the information shared has the effect or intention of furthering a criminal purpose. You can't hide behind 'privilege' if you are failing to disclose real suspicions.

Tipping off can also land you five years in prison and again the boundaries between good and bad practice are nebulous. You do it if you suspect an external or even internal disclosure report has been filed against a client, and information you subsequently give that client, or a third party, prejudices any investigation. It applies even without a disclosure report, if there is reason to believe that any investigator, police or customs officer is proposing to act in a laundering or recovery action.

Confused on paper, it's less clear in practice. The NCIS would prefer legal advisors make no reference to a disclosure for the first seven days, or in fact for 31 days if refusal to consent is given. How to explain a sudden lack of progress or action without causing suspicion? The recent case of *P-v-P [2003] EWCA 2260 (Fam)* in the appeal courts highlights the confusion, especially since, in this case, the NCIS admitted their own advice was incorrect. Meanwhile if you suspect an investigation is taking place or is about to begin, be very careful what you tell your client. Unfortunately the Act doesn't come with any kind of script.

If it all seems a bit academic *R v Duff (2002) Crim 2007* should animate the subject. Misinterpretation of the legislation regarding duty to report and a subsequent guilty plea were not enough to reverse a six-month custodial sentence for solicitor, Mr Duff. The view from the bench was that the custodial sentence was in no way excessive.

Ray Tully

The Crime Team



Ian Glen QC

ian.glen@guildhallchambers.co.uk



Richard Smith QC

richard.smith@guildhallchambers.co.uk



Ian Pringle QC

ian.pringle@guildhallchambers.co.uk



Andrew Macfarlane

andrew.macfarlane@guildhallchambers.co.uk



James Townsend

james.townsend@guildhallchambers.co.uk



Peter Blair

peter.blair@guildhallchambers.co.uk



Julian Kesner

julian.kesner@guildhallchambers.co.uk



Andrew Langdon

andrew.langdon@guildhallchambers.co.uk



Stephen Dent

stephen.dent@guildhallchambers.co.uk



Christopher Quinlan

christopher.quinlan@guildhallchambers.co.uk



Brendon Moorhouse

brendon.moorhouse@guildhallchambers.co.uk



Anna Vigars

anna.vigars@guildhallchambers.co.uk



Martin Lanchester

martin.lanchester@guildhallchambers.co.uk



Jim Bennett

jim.bennett@guildhallchambers.co.uk



Lucy Northeast Team Clerk

lucy.northeast@guildhallchambers.co.uk



James Turner Team Clerk

james.turner@guildhallchambers.co.uk

Give the solicitor a chance

Prompted by a recent exchange in *The Times Law Supplement*, Andrew Macfarlane offers barristers a guide to delighting their instructing solicitors.

- Never ring your solicitors to discuss a case they have sent you, particularly if it is interesting. They will not want to be distracted by such things and do not care if you find the case intriguing.
- Make sure your clerk gives a wholly unrealistic time estimate for completing your work and then miss that deadline by a mile. It keeps solicitors on their toes and shows them how very busy you must be.
- Never ask your solicitors to send any documents that should have been enclosed in the brief. Mention in your

advice how helpful it would have been to have had them – ensuring the client knows the solicitor has cocked up.

- Make the first conference a “getting to know you” conference. It saves having to read the papers beforehand and gives the client the chance to shine when you ask them to tell you what they think their case is about.
- Alternatively deal with unprepared conferences by removing page 3,980 and draw your solicitor’s attention to the fact they have omitted to copy it – they will always assume you have read every page bar this and the client will appreciate that their barrister is much smarter than their solicitor. You can then busk the rest of the conference.

(continued at the bottom of Page 7)



Ian Dixey

ian.dixey@guildhallchambers.co.uk



Kerry Barker

kerry.barker@guildhallchambers.co.uk



Ian Fenny

ian.fenny@guildhallchambers.co.uk



Rosaleen Collins

rosaleen.collins@guildhallchambers.co.uk



Ray Tully

ray.tully@guildhallchambers.co.uk



James Patrick

james.patrick@guildhallchambers.co.uk



Mark Worsley

mark.worsley@guildhallchambers.co.uk



Robert Davies

robert.davies@guildhallchambers.co.uk



Ramin Pakrooh

ramin.pakrooh@guildhallchambers.co.uk



Tabitha Macfarlane

tabitha.macfarlane@guildhallchambers.co.uk



Jennifer Tallentire

jennifer.tallentire@guildhallchambers.co.uk



Tara Wolfe

tara.wolfe@guildhallchambers.co.uk



Claire Russell Team Clerk

claire.russell@guildhallchambers.co.uk



Grant Bidwell Team Clerk

grant.bidwell@guildhallchambers.co.uk



George Monck Chambers Director

george.monck@guildhallchambers.co.uk

(Continued from Page 6)

- Always ask the client something that the solicitor has clarified in the brief. It provides that exquisite dilemma that every solicitor relishes – do I point out that I have already dealt with that and appear to have instructed someone who hasn't bothered even to read the papers or stay silent thus convincing the client that their solicitor hasn't prepared a thorough brief?
- Make sure you set your solicitor plenty of homework, especially if the alternative is to do it yourself. Set it in front of the client so that the solicitor cannot protest.
- Always be over-optimistic as to the outcome – it makes the client feel really good and you won't be around to cope with the grief when all goes wrong.
- Make sure your clerk does not tell your solicitor that you are unable to conduct the case for them until the very last

moment – it helps to preserve that element of surprise that solicitors love so much and ensures they will never find anyone as good as you in your place.

- If by any chance you are able to conduct the case make sure you turn up at the last minute – it helps keep solicitor and client on their toes.
- If you are asked for anything during the hearing, don't trouble to check if you have it. Just turn around and in as loud a voice as possible ask your solicitor for it – it is good for the client always to see where the buck stops.
- Leave sending your fee note for as long as possible – it will enable the solicitor to avoid sending their bill to their client.

The author (who has been helped to write the above by his clerks) used to be a solicitor and can still remember how it feels.

New rules for cases involving indecent images of children

Robert Davies introduces the ideas behind a new protocol for Bristol Crown Court designed to improve procedures for child pornography cases.



The number of prosecutions made under Section 1 of the Protection of Children's Act 1978 and Section 160 Criminal Justice Act has risen dramatically in recent years as a direct consequence of the increased use of the Internet.

The FBI's landmark decoding of the Landslide website in 1998 yielded credit card details of 7000 UK individuals who

had subscribed to, or paid for, images from sites dedicated to child pornography and abuse, triggering many early prosecutions. Surprisingly, given the elapsed time period, it's still catching out some offenders who, in the meantime, could have cleaned up their acts, or at least their hard disks.

However, that early intelligence only points to the tip of today's iceberg. In 2003, offenders have recognised the value of simply sharing images and material through news groups and peer-to-peer web sites. For the average collector, the more you share, the more you get. It's the catalyst for a massive proliferation of offensive material. As a result, the average prosecution now involves thousands of images, sometimes hundreds of thousands, and there's an equal increase in the severity of the material involved, to include video and soundtrack.

The sheer volume of material has created problems for police and the Courts. In Bristol, the police officers in the High Tech Crime Unit spend every day trawling through hard drives, classifying material in terms of both its severity and its source. There has been little consistency in the handling of cases, something exacerbated by the technical aspects of the crime, which require a working knowledge of computers and the Internet. Both Judges and Defence Counsel occasionally insist on a hard copy of every image, an increasingly impossible task with the quantities involved. Perhaps most disturbing, especially given the predominance of guilty pleas, is the number of people consequently exposed to a high volume of disturbing images, in order to get a case to court.

A new protocol drawn up in conjunction with the High Tech Crime Unit for Bristol Crown Court should tackle many of these issues. A key objective of the proposals (see www.guildhallchambers.co.uk, on the Crime Team seminar papers page, for full details) is to enable consensus to be reached between Counsel as to the nature and scale of offences and the categorisation of the material without the need for all parties to view all images.

As a starting point it requires all parties to have an acceptable understanding of the technical aspects of the issues, in particular the downloading and saving of images. Everyone should also be familiar with the full judgement in the leading sentencing authority, *R v Oliver*.

A full report on the contents of a hard drive or disk containing illicit material will be served as part of the Prosecution evidence, and if possible, agreement should be reached at Court between the defence and prosecution Counsel as to the accuracy of the information in this statement. This report will cover issues such as the number of indecent images logged and the ratio of photographs to films. It will indicate where on the hard drive the images were found and how they were obtained, through peer-to-peer groups, email or websites. It will also detail any attempts to frustrate the forensic examination through encrypted folders or evidence eliminator software and show any proof of distribution to others parties.

In the majority of cases the number of counts indicted will be far fewer than the number of images found. As a general rule, the indictment will be drawn up to include the (twenty? or so) most serious images discovered, with film clips and the participation of young children generally increasing the severity of the charge. The aim is to avoid lengthy legal argument over less serious material. The officer in charge of the case will set out a detailed description of each of these images. All others will simply be classified according to severity, without the need for a detailed description.

Assuming the statement is prepared conservatively, particularly in cases involving thousands of images, it won't benefit the Court to debate marginal differences of opinion over classification. On this basis it shouldn't be necessary for the defence to view all the images to satisfy themselves as to the precise accuracy of the classification evidence.

Once in action, the new protocol should reduce the amount of time taken to get a case to court and to trial or sentence.

Quite how we should view the role of technology in delivering up potential sex offenders for prosecution is still in the balance. On the one hand, the existence of computer-generated material is frequently strong enough evidence to convict in a charge of child pornography without having to impose on a child witness, yet whether many of these offences would have been committed without the opportunities of the Internet is unknown. It remains to be seen whether a visible increase in the number of prosecutions itself acts as any kind of deterrent.

Robert Davies

Guildhall Chambers, 23 Broad Street, Bristol BS1 2HG
DX 7823 Bristol Tel. 0117 930 9000 Fax. 0117 930 3898
e-mail firstname.surname@guildhallchambers.co.uk

This newsletter is for information purposes only and is not intended to constitute legal advice. The content is digested from original sources and should not be relied upon without checking those sources. Any views expressed are those of the editor or named author.

www.guildhallchambers.co.uk