

Table 5.4. *On acting for apparently 'guilty' clients*


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Non-lawyers are often amazed that as lawyers we can with a clear conscience act for defendants who we think 'are guilty'.

If you decide to become a criminal defence lawyer, the issue of your client's guilt or otherwise is not something you should immediately assess when you first meet them. With the armour of traditional role morality you can be determined to resist premature conclusions about your client or their culpability and be intent on carefully and caringly representing them, but you will still be tempted to reach some of those conclusions before you ought to. Forget that you have been given the job because someone else thinks you will be good at it, or it's 'your turn' to do some pro bono.

Guilt or otherwise is something on which you must make your own mind up, but only after much thought. In preparing for a trial, there will be many claims on your attention: you will be trying to fill gaps in the instructions you have received, juggling procedural obligations in relation to evidence, working through inconsistencies in witnesses' statements and often also trying to understand the details of forensic evidence.

All of this takes time, and to be truly zealous in your client's interests, all these factors need to be addressed before you ask your client too many questions. If, when you are ready, you do ask those questions and your client gives answers that are not inconsistent with a plea of 'not guilty', then it is your duty to proceed on that basis.

You will anticipate that you will go home that night and will perhaps be challenged by 'what did you do today?' questions. So because you are emotionally integrated and understand the claims of general morality on your wider life, you will have considered whether your client is mentally coherent enough to have committed an offence; you will also have considered whether substance abuse has had an effect on their intentions; and you will also have taken into account any cultural factors that could have influenced your client's understanding of what they were doing; but most of all, because you have self-respect, you need to be able to say two things honestly to yourself: that

- you have not prevented your client from giving you self-incriminating information;<sup>a</sup> and
- you are not putting someone forward on a 'not guilty' plea if you are certain that they are guilty of the offence as charged.<sup>b</sup>

Fortunately (or not), being 'certain' about anyone's guilt is not that easy. It is almost impossible to be certain about anything, of course, but confessions can be forced, or very hard to believe because of obvious mental illness. By the time of trial, any confession should have been thoroughly tested and

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either accepted (leading to advice to plead 'guilty') or rejected because it is incomplete or tainted.

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**A confession may not be the whole truth – scenario**

You are asked to represent a woman who is charged with murdering her husband.

She has confessed to police that she killed him. The Procuratorate's office assumes you will confirm that she will plead guilty, and they say that the judge who is likely to hear the case is sympathetic to defendants who plead guilty as soon as possible.

When you meet your client in custody for the first time, you are surprised. She is quiet and has a bruised face, but is not frightened. She talks about stabbing her husband while he was asleep in bed, but she is not regretful. She is determined and strangely relieved. You sit at a table across from her and wonder about what happened and why.

Slowly, over several long meetings with your client in jail, she tells you something of her story.

She was married at 17 to her father's workmate. Her husband was powerful and much older, but also kind. However, his temperament began to change as he struggled at work, and he became demanding and controlling. Her own parents lived many hours away and she rarely saw them. Her husband began to drink excessively and gamble. Increasingly, he had too little money to give her for food and was frequently drunk. She was also regularly threatened about speaking to her parents. He also said that the children would also suffer if she left him. Eventually, after many beatings by her husband, she tells you that she could not go on, and one night used a kitchen knife.

You advise your client to plead not guilty of murder and argue that the abuse she had suffered meant that she had no choice, in order to defend herself against repeated attacks, and the threats he had made about their children. The Procuratorate emphasizes that she had told no one of this alleged abuse and suggest that you are only trying to make a name for yourself as a criminal lawyer. They also hint that the court will be tougher on your client than might otherwise be the case. You are also well aware that pleading not guilty may attract longer sentencing, while pleading guilty may result in more lenient treatment.

Assuming that your client trusts you, is freely giving her consent to a plea of not guilty, and that you have her best interests at heart. . .

**What will be your advice to her?**

Table 5.4. (*cont.*)***Virtue ethics***

Virtue is tested by the ‘confession’ because your first instinct would be revulsion about stabbing someone to death while asleep. But, driven by *honesty* and a desire for what you might think to be *justice*, you would want your client to be able to tell the court what you have just heard from her. *Wisdom* will assert itself as well, since such circumstances obviously point to deeper issues that mean the ‘confession’ is incomplete and must be explored carefully.

*Prudence* requires your immediate silence and reflection on the risks to your client if she proceeds with a not-guilty plea and is disbelieved by the court. After all, there is no independent evidence that she has been abused in the manner she describes. But even if your client might perform badly as a witness, your *judgment* may persuade you to test the prosecution case.

***Confucian teaching***

A strict or narrow Confucian understanding of this situation would not require you to contest the so-called confession, because your client is not a part of your family and you owe her nothing beyond a contract to represent them in a conventional manner; that is, by accepting what she has told you and informing the court as part of a guilty plea. However, a broad or ‘thick’ Confucian view would assert that your implied obligation of *loyalty* to the wider community is to help the court to fully understand a particular defendant’s circumstances so that appropriate decisions can be made by the judge. If you have this wider Confucian loyalty, then you should stress to the court and the judge that the evidence points to self-defence.

***Consequentialism***

If you decide to protect your client in the interests of achieving an acquittal even though you have received an apparent confession, you may do nothing about it and continue on as planned, calculating that your client, if acquitted, will be grateful and will not cause further harm to anyone. You will assist your client to give evidence that her confession was made out of context and when she was too traumatized to understand that she needed to tell the police her whole story.

But if your calculation of consequences is that you are not completely sure as to the truth of the your client’s story or that the victim(s) of the crime (her husband’s relatives and perhaps her children?) will suffer more as a result of an acquittal; or that your assessment of the judge’s likely approach will be to disbelieve any suggestion of a woman killing her husband instead of simply leaving him, you may determine to change your advice to your client so that she has a chance to plead guilty, reasoning that better consequences are more likely if you then ask the court to approach the case as one of a lesser crime only, not murder.

Table 5.4. (cont.)

**Kantian ethics**

The Kantian perspective is straightforward in relation to this apparent confession. Fairness as between your client and the justice system means that you must pressure the prosecution to prove its case by pleading not guilty. This is the time-honoured, conventional and dominant Kantian view as to what is ‘fair’.

**Applicable law and conduct rules – acting for apparently ‘guilty’ clients**

Again, the International Bar Association’s *International Principles on Conduct for the Legal Profession*, Principle 2, is relevant: ‘2. Honesty, integrity and fairness: A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer’s clients, the court, colleagues and all those with whom the lawyer comes into professional contact.’<sup>c</sup>

Throughout Greater China, the various professional conduct rules do not require lawyers to enquire whether their clients are telling the truth, but China (including Taiwan) in particular encourage consideration of what is required in the broader interests of justice.

PRC	HKSAR	Taiwan
All China Law Association, <i>Codes of Profession Conduct for Lawyers</i> , 2018.	Law Society of Hong Kong <i>Professional Guide</i> , 2013	Taiwan Bar Association, <i>Code of Ethics for Lawyers</i> , 2009.
<b>Article 45:</b> Where the opinions on defence or representation are not adopted, they shall not be deemed as false commitments.	<b>Sec. 10.3(4):</b> ... there is no duty upon a solicitor to enquire in every case where he is instructed as to whether his client is telling the truth and it will be for the court, and not the solicitor, to assess the truth or otherwise of the client’s statement.	<b>Article 29:</b> If a lawyer shall discover in the course of performing his/her duties that a settlement, cessation of litigation or admission of guilt conforms to his/her client’s interests and legal justice, he/she ought to work in concert to bring it about.
— — — <i>Lawyers’ Law of the People’s Republic of China</i> (2017 Amendment)	—	
<b>Article 31:</b> A lawyer serving as a defender shall present materials and arguments proving that a criminal suspect is innocent or is less guilty than charged or his criminal liability should be mitigated or	Hong Kong Bar Association <i>Code of Conduct</i>	

Table 5.4. (*cont.*)

relieved, on the basis of fact and law, so as to protect the procedural rights and other lawful rights and interests of the criminal suspect or defendant.	<b>s10.55:</b> [A]. . . [defence] barrister to whom a confession of guilt has been made by his client must observe the following rules:
<b>Article 32:</b> ... After accepting authorization, a lawyer shall not refuse to defend or represent a client without good reasons. However, if the authorized matter violates the law, the client makes use of the services provided by the lawyer to engage in illegal activities or deliberately conceals a material fact related to the case, the lawyer shall have right to refuse to defend or represent the client.	(a) If the confession is made before the proceedings have started he may continue to act only if the plea is to be one of guilty, or if the plea is to be one of not guilty he acts in accordance with the rules set out in Annex 12 which impose very strict limitations on the conduct of the defence.
----- All China Bar Association, <i>Rules on the Handling of Criminal Cases by (Defence) Lawyers</i> , 2017	In the latter case he must explain his position to the client and his instructing solicitor. If the barrister is instructed to act otherwise than in conformity with this rule he should return his brief.
<b>Article 5:</b> ... In defence activities, a lawyer shall respect the opinions of the litigants on the basis of law and fact, carry out work according to the principle of being conducive to the litigants, and shall not present any defence opinions inconducive to the litigants and contrary	(b) If the confession is made during the proceedings or in

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to the free will of the litigants.	such circumstances that he cannot
<b>Article 12</b> [in part, effectively repeats Article 32 of the <i>Lawyers' Law of the People's Republic of China</i> (2017 Amendment), followed by]:	withdraw without compromising the position of his client, he should continue to act and to do all he
A lawyer that strongly disagrees with the litigant or the client on the defence or representation plan and cannot reach an agreement may terminate the representation relationship with the client on behalf of the law firm.	honourably can for him; but this situation similarly imposes very strict limitations on the conduct of the defence; and the barrister may not set up an
<b>Article 22:</b> When meeting a criminal suspect or defendant, a defence lawyer shall focus on the following information:	affirmative case inconsistent with the confession by, for example, asserting or
... (2) Whether the criminal suspect or defendant has committed or participated in the alleged crime.	suggesting that some other person committed the
... (4) Defence on innocence of the criminal suspect or defendant or the pettiness of a crime.	offence charged or calling evidence in support of an alibi.
... (11) Whether the confession and defence collected by the investigation authority are consistent with the statements made in meeting between the lawyer and the criminal suspect, whether there is any change and the reasons for the change.	

Table 5.4. (*cont.*)***Conclusions in relation to defending an apparently guilty client***

The whole idea of having a persuasive and determined lawyer for the defence is to give our communities confidence that our legal systems work for everyone. Societies are less fragile when their communities believe that the courts, and the lawyers working in them, are trusted to be fair for all defendants – since prosecutors and procurators do make mistakes and no one really knows when they will be in court themselves, or have their own family members facing court.

<sup>a</sup> Some lawyers think it is consistent with their zealous advocate role not to ask their client questions that might produce answers that would then compel advice to plead ‘guilty’. But the virtuous and zealous advocate will be repulsed by this. Note that, once such questions are asked and answers are received, it is an offence to connive at improper conduct. An example is a Canadian case where a lawyer advised their client to be forgetful and evasive in answering police questions about his connections with a criminal gang. See *R v. Sweezy* (1988) 39 CCC 182.

<sup>b</sup> *Tuckiar v. the King* (1934) 52 CLR 335 makes it clear that a lawyer must never assert as true what they know to be false, or be a party to fraud.

<sup>c</sup> See, further, International Bar Association, *International Principles on Conduct for the Legal Profession* 2019 at IBA guides, rules and other free materials | International Bar Association (ibanet.org).