

Professional Practice :: Cliffnotes

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Professional Practice Cliffnotes

A. Retainer / Instructions

1. Accepting and Rejecting

- (a) *Solicitors: free to reject any brief [SG 5.01] except on discriminatory grounds [commentary 1].*

Solicitor should not be influenced by his **own opinion of the client's guilt** [commentary 2].

Solicitor must reject brief where:...

- (i) Acting would involve him in a **breach of the law or professional misconduct** [SG 5.02]. E.g. *R v Bridgwood 1988* – advocate knowingly used accused's false name in court. *Re a Solicitor 2000 CACV 117/2000* – owner retained solicitor to transfer house in breach of the [Housing Ordinance](#).
- (ii) Solicitor cannot represent client with **competence or diligence** [SG 5.03]. I.e. Undue delay, risk or expense [SG 6.01 commentary 3]. No breach where solicitor instructs suitable counsel, but solicitor must still exercise sufficient care, control and independence [SG 5.03, commentary 3] – *Davy-Chiesman 1984*. This is tied in with [SG 6.01], duty to act competently.
- (iii) **Hopeless case** unless client advised [SG 10.18].
- (iv) **Conflict of interest:**
 - There is a potential conflict between 2 or more clients instructing the solicitor in the same matter: [SG 9.03].
 - Prospective client's target is a solicitor with whom or with any of whose partners he is on friendly terms [SG 5.01, commentary 3].
 - Solicitor or affiliate **holds office** that might give the public the impression that he is able to use such appointment to his client's advantage [SG 5.08]. Affiliate includes employer, employee, spouse, parent, child, siblings and their spouses [commentary 1]. E.g. Partner sitting on tribunal before him [commentary 2].
 - Solicitor or firm discovers fault that might render them liable in **negligence** to the client. Solicitor must inform the client to seek independent legal advice; if client refuses, solicitor must decline to act unless satisfied that there is no conflict of interest and matter is kept under continuous review [SG 6.02, commentary 1], *Mung Chi Keung v Chan Kam Wong 2007* – wrong party sued, counsel advised that solicitor might be sued, solicitor continued to act; held personally liable for all further costs of action.
- (v) Clear that solicitor or firm will be **called as witness** on behalf of the client, unless purely formal evidence [SG 5.10, 10.13]. If solicitor has already been retained, he must exercise judgment [commentary 1] and must consider: nature of evidence to be given; importance to case; difficulties to client if solicitor ceased to act. Justice must be considered and not just the interests of the client [commentary 3].

- (vi) Solicitor cannot act for client **already retaining** a solicitor unless that solicitor consents [SG 5.11]. Solicitor must inform primary solicitor that he has been instructed to take over a litigation case [commentary 1]. Solicitor may give second advice without primary solicitor knowing [commentary 2].
- (b) **Barristers: first point of contact, cab-rank rule, two counsel and two-thirds rules: May only accept brief indirectly from instructing solicitors** except where:
- (i) Counsel instructed by DLA or Government [BC 50(a)].
 - (ii) Free legal advice to friend or relative [BC 50(a)].
 - (iii) Acting for Law Society Legal Advice, Duty Lawyer and Pro Bono Schemes [Annex 20].
 - (iv) Patent and trade mark agent instructions [Annex 20].
 - (v) Medical, dental, chiropractors councils and Veterinary Surgeons Board [Annex 20].
 - (vi) Foreign Lawyers [Annex 20].
 - (vii) Direct Professional Access Rules [BC 50(b), Annex 19, 19A]: HK Society of Accountants, HK Institute of Company Secretaries, Chartered Institute of Arbitrators; Taxation Institute; Surveyors and Ombudsman.
 - (viii) Employed barristers holding practising certificate – obtaining legal opinion only [LPO s.31C].

The **first point of contact** must be a solicitor [BC 73A].

Subsequent contact may be with the solicitor's clerk, but only if the 'clerk' identifies himself and produces his ID card, barrister is satisfied with the identity of that person; that person provides a backsheet (if not yet provided); and barrister endorses the 'clerk's' name and HKID [BC 73C].

Exceptions to the cab-rank rule, generally under [BC 21]:

- (i) Case outside counsel's listed **expertise**.
- (ii) Client unable to afford counsel's **fees**.
- (iii) **Conflict of interest** (expanded under [BC 57] at page 7):
- (iv) Difficulty in maintaining **professional independence** [BC 58, Annex 7]: Barrister who is member of association should not act for or against that association – *HK Scaffold Building Contractor v On Lee Contractors 2000* where barrister was censured for being a director of company. Barrister should not appear for solicitor after appearing for client during a solicitor and own taxation without client's consent.
- (v) Impair impartial administration of justice.
 - Barrister may appear before parents or near relative in the High Court or CFA, but may only appear before a spouse in the CFA [Annex 8].
 - *Re L (Minors) 2001* – solicitor cohabiting with counterparty solicitor. One solicitor disqualified.
- (vi) Likely to be **called as witness**. Barrister should not continue if he can retire without jeopardising his client's interests [BC 61] [SC 10.13]. Solicitor should not act if a member of his firm is likely to be called as witness

[commentary 1].

This situation can arise where client is accused of recent fabrication and the advocate knows of such instructions – [Jaquith 1989, CA](#).

- (vii) Instructions limiting counsel's ordinary authority or discretion **[BC 53]**.

Senior counsel no longer bound by the **two-counsel rule** as that rule has been abolished **[BC 2, Annex 6]**. However, it is common to appear with a junior and that should be done if SC considers it in the interests of the lay client **[BC 3, Annex 6]**.

Junior counsel no longer has to be paid **two-thirds of of senior counsel's fee** **[BC 11, Annex 6]**.

2. Fees

(a) General

- (i) *First contact between solicitor and barrister / barrister's clerk only: see above.*
- (ii) The solicitor or any agent must **negotiate the fee** with the barrister or the barrister's clerk **[BC 125]** **[PD F1(3)]**. See also [HK Bar Association v Norman Persaud 1987](#) (barrister struck off for breach).
- (iii) Barrister not deemed to have **accepted brief** until he has had reasonable opportunity to examine contents and determine adequacy **[BC 122]**.
- (iv) **Separate fee** for separate work **[BC 170]**.
- (v) Fee **includes** perusal of brief, preparation and conduct of the case **[BC 120]**.
- Fee includes skeleton drafting and may be a brief fee together with refreshers.
 - **Refreshers** are payable for every 5 hours after the first 5 hour period – [\[RHC O.62 First Schedule ¶2\(4\)\]](#).
 - Refreshers do not have to be marked on the backsheet **[BC 120]**.
- (vi) Counsel may **charge anything** though case law indicates otherwise – [New South Wales Bar Association v Evatt 1968](#) where there was some deception.
- Solicitors are not allowed to **overcharge** **[SG 4.12]**.
- (vii) Counsel cannot work for a **fixed salary** or brief fee for a **specified period**.
- (viii) Counsel cannot work on **multiple briefs for one client** for a single fee: **[BC 121]**.
- (ix) Counsel may have fee paid in instalments with interest on unpaid fees: **[BC 124]**.
- (x) **No contingency fees:** **[BC 124]** **[SG 4.16]** [\[LPO s.64\]](#).
- (xi) **Revision / increase of fees:**
- No revision unless **burden substantially increased**. In any case, no increase so close to the hearing or during the trial so that the client has no time to elect another barrister. If there is a revision, instructing solicitor should be informed so that he may instruct other counsel. **[BC 123]**

- (xii) Where there is **no need to brief counsel, fees may be disallowed** on taxation – *Lui Kam-heung v Specmeier 1969* where Oliver DR said that counsel should not be brought in unless a complication exists.
 - (xiii) Where **senior counsel** are not necessary, costs will be scrutinised – *Re Potts 1935*.
- (b) **Manner of Payment, Receipt**
- (i) Counsel must issue **written fee notes** for all professional work done for those instructing him [BC 73F(1)].
 - (ii) Payment to counsel must be by **cheque** [BC 73F(2), circular 85/95].
 - (iii) Counsel must issue a written receipt upon payment [BC 73F(3)].
- (c) **Recovery of Fees**
- (i) There is **no contract** between counsel and anyone else [SG 12.04, **commentary 1**]. Counsel cannot sue for his fees – *Thornhill v Evans 1742*.
 - (ii) Solicitors are liable to counsel for their fees as a matter of professional conduct [SG 12.04] save for reasonable excuse.
A reasonable excuse might be the bankruptcy of a client where his credibility was beyond question and it wasn't thought necessary to obtain barrister's funds on account [commentary 4].
Failure to pay is a matter for complaint [SG 12.01, circular 81-6] and a joint Bar and Law Society Tribunal has been set up to deal with such disputes.
 - The same goes for professional bodies [BC 127].
 - (iii) Counsel may recover fees even if they are not marked on his brief – *Portric v Golden Dragon Engineering 1984*. Legal considerations override codes of conduct.
 - (iv) If fees are unpaid, they must be **challenged within 2 months** of issuing the fee note [SG 12.05].

3. Third Party Retainer

- (a) Solicitor may not take **instructions from third party** purporting to act on behalf of a client. He should confirm with the actual client [SG 5.06].

4. Form of Retainer / Instructions

- (a) *Solicitors: Civil cases: oral retainer OK. Criminal cases: Must be written* [SG 4.01, **commentary 2**].

Not more than **7 days** after receiving instructions, solicitor must **confirm by letter** with client: instructions given; services to be provided; name of solicitor-in-charge; fee (estimate); and name of counsel, his fee / refreshers (estimate). An agreement must be signed and countersigned [Rule 5D, **Solicitor's Practice Rules**].

Solicitors in criminal cases in the High Court must notify the registrar [Rule 2, **Criminal Procedure (Representation) Rules**].

All retainers should inform client of the name and status of the person-in-charge for day-to-day operations and the partner responsible for overall supervision. [SG 5.17, commentary 1]

(b) ***Barristers: brief and backsheet***

Instructing solicitor must deliver **formal brief with fee** marked on backsheet [BC 73D] unless appearing for Government. Brief or backsheet must be signed by instructing solicitor [SG 12.02]. The brief and backsheet must be delivered to counsel 7 days after counsel has been instructed [Rule 5D(e) Solicitors Practice Rules].

Fee marked on backsheet avoids professional misconduct since barrister cannot appear in court without fee on backsheet or waiving the fee [BC 52] – *HK Bar Association v Norman Persaud 1987* (barrister struck off).

Every distinct piece of work needs a **separate brief** [BC 120], as do junior and senior barristers.

Limited instructions must be so stated on the brief / backsheet [BC 56A(c)].

Form of Backsheet (unless appearing for government at magistracy):

- (i) Case name / number
- (ii) Barrister name
- (iii) Solicitor name and firm / Legal Aid Department / Department of Justice
- (iv) Solicitor's file reference
- (v) Court hearing the case
- (vi) Hearing Date
- (vii) Nature of work
- (viii) Fee, unless appearing for government.

The barrister must sign the backsheet and ensure that the date of receipt is marked on every brief. He must also keep proper records in chambers [BC 72].

5. Limiting Liability

Any limitation for contentious business is void [s.59(2) Legal Practitioner's Ordinance].

Solicitors may limit, not exclude, liability for **business matters** subject to [Practice Direction M 'Limitation of Liability by Contract', Solicitors (Professional Indemnity) Rules].

6. Scope of Retainer

Not appropriate for solicitor to rely on implied authority except in exceptional circumstances or routine matters [SG 5.12].

No implied authority to commence proceedings – *Wray v Kemp 1884* though client may subsequently ratify proceedings – *Danish Mercantile v Beaumont 1951*.

Implied authority to:

- (i) Brief counsel, though solicitor should advise whether appropriate to instruct barrister and obtain consent before doing so [SG 5.17, commentary 3]. Consent of Director of Legal Aid required for legally aided litigants – *Chan Wai Yin v Wong Sau Ping 2006, DC*.
- (ii) Settle actions, unless client had restricted that authority [SG 10.17, commentary 1]. Settlements may still bind a client because of solicitor's ostensible authority.

Acting without authority may result in solicitor being personally liable for costs – *Mercury (London) v Mercury Shipping and Trading 1990; Re Raja Enterprises 1978*.

B. Withdrawal of Advocate After Instruction

- (a) Counsel should withdraw when:
 - (i) He receives instructions **beyond competence**. He should decline brief and inform instructing solicitor [BC 63A].
 - (ii) He is unable to perform within a **reasonable time** [BC 63B]. He should return the brief or obtain more time [BC 63(c)].
 - (iii) There is an appreciable risk that there is a **time conflict**. He should return with sufficient time for another counsel to be instructed [BC 64].
If there is a serious criminal case, that case must prevail unless:
 - the civil case is in the CA or above (despite date having been fixed subsequent to criminal case); and
 - Counsel had appeared in the courts below; or
 - Case is complex and counsel had been involved since appeal [Annex 18(f)] – cf. *Bar Council v Philip Wong 2003* where barrister having accepted brief of serious criminal case, accepted brief to appear in CA where serious risk that he was unable to attend both. Fined \$50,000.
 - (iv) There was a **breakdown in mutual trust and confidence** with his client – *Re Solicitor's Act: Collison v Hurst 1946* where client accused lawyer of fraud.
Offensive mannerism is not enough unless: barrister is justified in assuming his instructions had been withdrawn; his professional conduct is likely to be impugned; and he can withdraw from the case without jeopardising his client's interests.
The court ought not refuse to permit counsel to withdraw: *Sherman v Manley 1978*.
 - (v) The client **refused to accept counsel's advice** where disagreement was sufficiently fundamental to the conduct of the proceedings. Disagreement regarding proper plea or whether to testify is not sufficient since the client has the final say [SG 10.15, commentary 2] [BC 105(a)].
 - (vi) The client **pleads (not-)guilty** in certain circumstances:
 - If client confesses to counsel before trial, counsel should see whether the facts amount to the charge and advise as to the appropriate plea.
 - If client pleads guilty, then OK

- If client pleads not-guilty, counsel should still defend, but his conduct in court will be restricted. He may put P to strict proof, but he cannot: (i) adduce evidence supporting client's innocence; (ii) attempt to lay responsibility on another; or (iii) allow his client to testify denial of guilt [BC].
These limitations must be put to the client. If he resists, counsel must withdraw [BC 149(a), Annex 13].
 - If client confesses during trial, the same applies [BC 149(b)].
 - For *solicitor* advocates: [SG 10.15, commentary 4].
 - If the client tells counsel that he did not commit the offence but wishes to plead guilty, counsel can only continue to mitigate on the basis that the client is guilty [BC 150(b)].
- (vii) In a **civil case**, the client informed counsel that he had **committed perjury** (or there is an irresistible suspicion that he did so). Counsel cannot continue unless client allows him to inform the court, and he so informs the court of the perjured statement [BC 137].
[SG 10.03, commentary 3] makes provision for **criminal cases** too. There should be no differentiation between the two.
- (viii) Client insists that counsel perform contrary to **ethical duties** – *McLoughlin 1985* holding that the advocate should do everything he can to dissuade the client, but if that fails, he should withdraw [SG 10.05].
- (ix) **Conflict of interest** unless all clients consent and there is no embarrassment [BC 57]:
- No acting against former client if barrister **knows anything material and confidential** – e.g. *Earl Cholmondley v Lord Clinton*; *Bell v Nash 1992* – lawyer acted for wife, discovered that he was also acting for the husband.
 - **Cut-throat defences**. Cf. *Mills 1995* where 3 defendants put forward alibis and D4 argued self-defence. This was not a cut-throat defence.
 - Significant **pecuniary interest** [BC 60(a)].
- If barrister forms view that solicitor is in conflict with client, he should, in a conference with instructing solicitor, advise client that it is in his interests to instruct another person [BC 112].
- (x) Counsel has to first offer appeal services to closest client before accepting appeal briefs from others [BC 57].
- (xi) It is difficult to maintain professional independence – *see above*.
- (xii) Counsel has favourable relations with judge – *see above*.
- (xiii) Counsel likely to be called as witness – *see above*.
- (xiv) He (being a **solicitor**) is **not being paid** his disbursements: [SG 5.22, commentary 2].
- (b) **Bad reasons to withdraw:**
- (i) **Counsel** cannot withdraw if after solicitors have been retained and brief delivered, the client is **no longer able to pay the fees**. Leaving the client

unrepresented amounts to professional misconduct.

~ apply for legal aid.

As for **solicitors**, they have good reason to terminate the retainer if the client has agreed to pay disbursements (including counsel fees) wither before or during the retainer and fails to do so. There must exist such an agreement else such action is not possible [SG 5.22, commentary 2].

Where funds run out during trial, advocate should assist client to get legal aid. Unless exceptional circumstances, solicitor should act at legal aid rates if he is on the Legal Aid Panel and is assigned to act by the DLA [SG 5.22, commentary 3].

- (ii) Counsel cannot withdraw due to **inadequate fees** – *Re a Barrister 1966* where a barrister was suspended for 4 months for withdrawing in the course of a trial.
- (iii) Personal engagements are not excuses [BC 66].

C. Barrister's Authority

1. The Brief

The brief is the starting point of counsel's authority. It may not limit the ordinary authority of counsel [BC 53] though counsel may accept instructions limited to a particular issue [BC 56A(a)]. If he does so in criminal proceedings (excluding adjournments), he must ensure that the client remains represented after his withdrawal [BC 56A(b)].

Limited instructions must be so stated on the brief / backsheet [BC 56A(c)].

2. Implied Authority

- (a) Counsel can make **admissions** for his client in civil cases – *Dominion Act Co v Murphy 1923* so long as it is an honest exercise of judgement.

Admissions may be withdrawn so long as it does not amount to estoppel (recipient acting on admission to his detriment) – *H. Clark (Doncaster) v Wilkinson 1965*.

- (b) **Settlement** by counsel is binding on client – *Matthews v Munster 1887*. Generally, counsel should consult instructing solicitors who will consult the client [SG 10.17, commentary 1].

Counsel's ostensible authority overrides any express prohibitions unless counterparty has knowledge – *Hansen v Marco Engineering (Australia) 1948*.

- (c) **How to best conduct the case** rests with counsel [BC 53] so brief cannot restrict ordinary authority of counsel. This discretion is subject to counsel's duty to the court and express instructions, esp. as to **plea** [BC 150(a)] and **whether to testify** [BC 156(a)].

Counsel should **decide which witnesses to call** – *Briscoe v Briscoe 1966*.

Where counsel disregards instructions and conducts case in a manner **flagrantly incompetent**, it might constitute **grounds for setting aside conviction** – *Wong Fung Hung 1990*.

D. Conferences

- (a) Solicitor should hold conferences with counsel to clarify instructions and discuss facts, evidence and law [SG 12.01].
- (b) Counsel has **duty to make time for conference** on day before hearing. If not so arranged, he must be prepared for a conference on the day of the hearing [BC 141].
- (c) Barrister **must not attend conference in solicitor's offices** unless there is a good reason, e.g. documentary burden [BC 91].
Counsel may, however, attend social events there [BC 94].

E. Duties of Instructing Solicitor

1. Competency

- (a) Solicitor must **instruct competent counsel**:
 - (i) **Consent of client** required for instructing counsel, with appropriate advice given [SG 5.17, commentary 3].
 - (ii) **Ensure competency** of counsel for particular case – *Re A (a minor) 1988 CA*;
 - (iii) Give **proper and thorough instructions** – *Hawkins v Harwood 1849* where Pollock CB said that instructions should give counsel sufficient information to enable him to conduct the case properly. A person unable to do what is required of him is not properly instructed. Includes **proper estimate of trial time**. Also see [SG 12.01].
 - (iv) Instruction should come in **good time** – *Lung Chun-Pui 1986* where solicitors had to show cause as to why they should not be personally liable for costs thrown away because counsel had not seen the appeal papers.
- (b) Solicitor must be competent himself [SG 12.03]:
 - (i) But he must be able to **independently assess** the situation – *Davy Chiesman 1984 CA* where solicitor was personally liable to pay costs.
 - (ii) **Competence in legal services** undertaken on client's behalf [SG 5.12, 6.01(a)] which includes understanding of legal principles, adequate knowledge of practice and procedure and to put such knowledge to practical effect [SG 6.01, commentary 4].

2. Attending Counsel in Court

- (a) Solicitor sits behind counsel [Law Society Circular 128/1981].
- (b) Solicitor **should attend counsel unless agreement is made** [SG 10.22].
 - (i) Such agreement should not be made unless client's consent is obtained and solicitor is satisfied that it is reasonable in the circumstances and that the interests of the client and justice will not be prejudiced.
 - (ii) Counsel shall decide whether attendance may be dispensed with, where for example, instructions are not likely to be necessary [BC 142A].
- (c) Solicitors should **normally attend if** [SG 10.22, commentary 2(a)-(g)]:

- (i) Client is **person at risk**, e.g. juveniles, inadequate English skill, mental handicap, etc.
 - (ii) Client is of **difficult character**.
 - (iii) Client will receive first or substantial **prison term**.
 - (iv) **Witnesses** of fact / opinion (experts) (~~character~~), are present, whether or not they are called.
 - (v) Counsel appearing is **not counsel actually instructed**, unless solicitor is satisfied that interests of client are not prejudiced.
 - (vi) Client likely to need to give instructions.
 - (vii) Other circumstances.
- (d) If solicitor does not attend, he must:
- (i) **Inform counsel** and give information so counsel may decide whether it is appropriate for him to attend alone [**BC 142, 142A**].
 - (ii) **Tell client** that counsel will be unattended and the name of counsel.
 - (iii) If counsel returns saying it is inappropriate for counsel to go alone, solicitor ought to attend or send a representative.
- (e) Consequences of not attending:
- (i) *Chow Wong Wai Hung Margaret v Wong Hau Tak 2005* where court found highly unsatisfactory that solicitors only sent clerk to attend counsel where clerk was in no position to give proper instructions to counsel, especially since counsel was not conducting the matter on the previous occasion.

3. Ensure Witnesses Present

- (a) Else solicitor may be liable for **wasted costs** – *Limbu Netra Kumar v Lau Yee Construction 2006* where judge censured solicitor for failing to check expert witness' diary before fixing trial dates as gross dereliction of duty. There, the counterparty was legally aided with limited means, proceedings were delayed, which could easily have been avoided.

4. No Bail Agreements

- (a) Solicitor cannot act as surety for his (firm's) client [**SG 10.19, Law Society Circular 316/1993**].
 - (i) Their employees cannot either [**PD 11**].
 - (ii) Exceptionally, consent may be obtained from the Law Society Council.
- (b) Solicitor may not indemnify client or his surety [**SG 10.19**], [**CPO s.9F(1)**], *NSW Bar Association v Livesey 1982*.

F. Public Duties of Counsel

1. Generally

- (a) Counsel shall uphold the **dignity and high standing** of the Bar [BC 4].
 - (i) Comply with Bar Code;
 - (ii) Not engage in any conduct which is dishonest or might bring profession into disrepute or prejudicial to administration of justice;
 - (iii) Observe ethics and etiquette of profession;
 - (iv) Be **competent** in all professional activities [BC 6(a)-(d)].

2. Counsel to Report His Own Convictions

- (a) Counsel shall report to the Bar Council of criminal convictions involving dishonesty or which might bring the profession into disrepute [BC 11].
 - (i) Fraudulent offences, theft – *Re Davies 1948* (barrister struck off).
 - (ii) Sex offences, incitement to procure girl under 21 – *Re Edward Christopher Harris 1991* (barrister struck off).
 - (iii) Manslaughter – *Ziems v Prothonotary of the Supreme Court of NSW 1957* (barrister suspended).
 - (iv) Tax negligence – *Re Prescott 1971* (solicitor debarred for conduct unbecoming).

3. Misconduct in Private Affairs

- (a) A question of degree.
 - (i) *Re a Barrister 2499/1986* – barrister censured for gambling in Macao with presiding judge.
 - (ii) *Re a Barrister 2087/1986* – barrister suspended until bankruptcy order discharged.
 - (iii) *Lamontagne v Law Society (Saskatchewan) 1991* – lawyer suspended for taking drugs.

4. Touting and Advertising

- (a) A barrister may not do anything to (in)directly tout [BC 100].
- (b) A barrister may not cause or allow **personal advertisement** [BC 101].
 - (i) *HK Bar Association v Anthony Chua 1994* – barrister published article expressing grievance for losing a case with two photos, one of which showed him in a wig and gown.
 - (ii) *Dr. Kwok Hay Kwong v Medical Council of HK 2006* – restriction on advertising held unconstitutional as violation of right to free speech. However, Reyes J. expressly restricted the scope to the medical profession.
- (c) A barrister may not appear in robes in any **motion picture** without leave of the Bar Council [BC 105].

G. Joint Duties to Client

1. Duties to Court Prevail

- (a) *Rondel v Worsley 1967* – counsel has duty to fearlessly raise every issue to help his client, however, he must not mislead the court. He cannot put to the court matters of which he does not have sufficient basis. He cannot withhold documents or authorities even if they are against his client.
- (b) Solicitors must not do anything which impairs their duty to the court [SG 1.01].
- (c) *Gianarelli v Wraith 1988 Aus.-HC*

2. Competence

- (a) Solicitors – *see EI above*.
- (b) Barristers must be competent in all professional activities [BC 6(d)]. Represent client with reasonable skill and care [common law].
 - (i) Competence in **written opinions** – *Mathew v Maughold Life Assurance 1987 CA* (tax savings opinion);
 - (ii) Competence in **preparing the case** – *Fawell v Atkins 1981* (failure to contact essential witnesses);
 - (iii) Competence in **ensuring correct parties are sued** – *Saif Ali v Sydney Mitchell (a firm) 1978 HL* (failure to join necessary party).
 - (iv) Competence in conducting litigation – ¿ unknown as status of immunity is uncertain ?

3. Obedience

- (a) Obedience to the client cannot restrict ordinary discretion / authority of counsel [BC 53], i.e. it cannot require him to breach his code of ethics [SG 5.02].

4. Confidentiality

- (a) Advocates cannot communicate to third parties information entrusted to them [BC 116] [SG 8.01].
 - (i) No use of information to client's detriment or to another's advantage.
 - (ii) *China Light & Power v Michael Ford 1996* – barrister threatened to reveal confidential information, damages awarded.
 - (iii) Note conflict-of-interest rules governing a client's info.
- (b) **Legal Professional Privilege**
 - (i) *Legal advice privilege* – any communications between lawyer and client coming into existence for legal advice.
 - (ii) *Litigation privilege* – any communication between client / lawyer and third parties coming into existence with dominant purpose of preparing for (contemplated) legal proceedings.

Solicitors have duty to **assert privilege** on behalf of client [SG 8.01, commentary 8].

5. Uphold Interests of Client

- (a) Barrister's duty to client takes precedence over any consequences to himself or other person save the court **[BC 110]**.
 - (i) Defending clients who confessed;
 - (ii) **No duty to disclose weaknesses** of client's case;
 - (iii) Duty to bring all authorities to attention of the court;
 - (iv) Duty not to make unfounded allegations against others.
- (b) Solicitors cannot do anything which impairs his duty to act in the best interests of the client **[Solicitor Practice Rules rule 2(c)]**.

6. Criminal Trial – not to leave client unrepresented at any time

- (a) Counsel must ensure that client is **represented throughout a criminal trial** **[BC 151(a)]**.
- (b) If two counsel present, **neither may absent himself** for temporary period without good reason. Even if there is good reason, consent of both instructing solicitor and client is necessary **[BC 151(b)]**.
- (c) If one counsel present, he may only absent himself in exceptional, unforeseeable circumstances and only then, with consent of solicitor and client. Also, a competent deputy must take his place.
 - (i) A deputy is only competent if he is well informed and is able to deal with any question which might be reasonably expected to arise **[BC 151(c)]**.
 - (ii) After P concludes its opening speech and if D is satisfied that there will be no serious possibility that events will occur that relate to his client, he may, with consent of solicitor and client, absent himself from that part of trial. Counsel should also inform the judge. Such a case is e.g., a voir dire for other co-defendants if D had not contested the voluntariness of his confession **[BC 151(d)]**.

7. Plea Advice

- (a) Client has **complete freedom** of choice **[BC 150(a)]**.
- (b) **Strong advice may be given to a client wanting to plead *not guilty*** if he has admitted to the crime to his lawyers, that he is unlikely to escape conviction and that a guilty plea is generally regarded by the court as a mitigating factor **[BC 150(a)]** **[SG 10.16]**.
 - (i) Solicitor may assist the case by making pleas in mitigation and putting the prosecution to proof of his case **[SG 10.15, commentary 4]**.
 - (ii) If client insists on giving positive evidence in denial of his guilt or asserts his innocence, the solicitor must cease to act **[SG 10.15, commentary 4]**.
- (c) **Counsel** may continue to represent clients wanting to plead guilty but had told his lawyer that he did not commit the crime. Counsel should simply **advise** the client of the consequences and what can be submitted in mitigation **[BC 150(b)]**.
 - (i) As for **solicitors**, they should use best endeavours to **persuade** the client to plead not guilty. Advice that such a plea would restrict any plea in mitigation and appeal should be given. If client insists to plead guilty, solicitors should

continue to act **[SG 10.15, commentary 5]**.
Any such instructions should be taken **in writing**.

- (ii) Solicitors may not put forward any **positive case** of innocence, including suggesting that the ingredients of the offence have not been established **[SG 10.15, commentary 5]**.

8. Whether to Testify

- (a) Client has **complete freedom** of choice **[BC 156(a)] [SG 10.16]**.
(b) Advice may be given.

9. Inconsistent Statements

- (a) What happens if the accused says something different in court from what he told the lawyer?
- (i) Vague statement from **[BC Annex 13]** “dependant upon the circumstances” – prefer **SG** instead.
- (ii) For solicitors, inconsistent statements are not sufficient grounds for solicitor to stop acting. **[SG 10.03, commentary 3]**:
- If it becomes clear to the solicitor that the **client is attempting to mislead the court**, he must advise the client not to do so and explain to him the legal consequences of misleading the court (perjury, perverting the course of justice).
 - If the client refuses to take the advice, the solicitor should cease to act.
 - If the client **admits to the solicitor that he has committed perjury** or had misled the court in any material matter, it is the duty of the solicitor to cease to act further unless the client agrees to disclose his conduct to the court. **[SG 10.03, commentary 5]**.
 - If the court compels the advocate to continue acting, the advocate should not use any of the perjured points as evidence or positive matters in his case.

10. Duty to See Client After Conviction: **[BC 158]**

- (a) Counsel ought to see his client after conviction and sentence.
(b) If he cannot, he should send instructing solicitor.

H. Litigation (Negligence) Immunity

1. Historical Position

- (a) Advocates used to be immune from negligence for management of a case in court – *Rondel v Worsley 1969*; *Somasundaram v M. Julius Melchior (a firm) 1989 CA*.
- (i) Extended to pre-trial work immediately connected with conduct of case at court.
- (ii) Did not include settling pleadings or giving advice on other pre-trial steps, e.g. Advising parties whether or not to discontinue an action – *Rees v*

Sinclair 1974; or joinder of parties *Saif Ali v Sydney Mitchell (a firm) 1980 HL*.

2. Contemporary Position

- (a) **No immunity** from negligence suits
 - (i) United Kingdom – *Arthur JS. Hall (a firm) v Simons 2000 HL*.
 - (ii) New Zealand – *Lai v Chamberlains 2005*.
- (b) **Immunity**
 - (i) Australia – *Giannarelli v Wraith 1988 HC; D’Orta-Ekenaike v Victoria Legal Aid 2005 HC*.
- (c) Hong Kong? Probably follow UK position.

I. Advocate’s Duties to the Court

Solicitors acting in litigation have comparable duties as barristers and should acquaint themselves with barrister rules [SG 10.01, commentary 1].

1. Duty to Court Paramount - see G1

2. Pre-trial Duties to the Court

- (a) **WITNESSES**
 - (i) Barristers should only **interview lay clients** in the presence of instructing solicitor [BC 50(a), 142(a)]. Exceptions are:
 - Free advice / pro bono advice [BC 50(a), 142(a)].
 - Instructed by recognised professional body [BC 50(a), 142(a)].
 - Law Society Legal Advice / Duty Lawyer Schemes [BC 50(a), Annex 20].
 - Patent / trademark agents [BC 50(a), Annex 20].
 - Instructed for pro-bono work [BC 50(a), Annex 20].
 - Foreign lawyers [BC 50(a), 170, Annex 20].
 - While at trial, solicitor had properly excused himself under [BC 142A] at E2 above [BC 143(1)].
 - While at trial, instructing solicitor is not present and there are no other grounds to request an adjournment and there is no practical alternative [BC 143(2)].
 - In criminal cases or immigration ordinance cases, if instructing person:
 - Is unable to be present has granted approval to the interview;
 - Has given his approval to the interview taking place; or
 - Circumstances make it necessary
 - [BC 144].
 - (ii) Barrister should **interview lay client’s witnesses in the presence of instructing solicitor** [BC 142(b)], except in where there is no practical

alternative **[BC 143]** - *see directly above*. He should then inform his opponent.

- (iii) No one should **tamper or coach** any witness **[SG 10.12, commentary 12]**.
- (iv) Solicitors may **advertise for witnesses** to come forward as to a matter, but they cannot mention or tend towards any specific testimony **[SG 10.20, commentary 4]**.
- (v) **Reasonable payments to witnesses** may be made: **[SG 10.20, commentary 1]**.
Such payments must not be conditional or contingent **[SG 10.20]**.
- (vi) There is **no property in a witness** – *Harmony Shipping v Saudi Europe Line 1979*. Solicitors may interview and take statements from any witness **[SG 10.12]**.
However, it is better to be done in presence of opposing solicitors to avoid accusations of tampering **[SG 10.12, commentary 3]**.
- (vii) Opposing party should not be communicated with save through consent of the other solicitor **[SG 10.21, 11.02]**.
If unrepresented, suggest independent legal advice, but communication has to occur, I guess...

(b) Duty in Pleadings

- (i) No allegations may be made which are unsupported by instructions **[BC 113]**.
- (ii) No allegations of fraud may be made unless: (i) there are clear instructions; and (ii) there is reasonably credible material before him supporting a prima facie case **[BC 113]**.

(c) Duty in Affidavits / Affirmations

- (i) **Affidavits should not contain any argument** – *Robert Lee Flickinger v Director of Immigration 1988*.
- (ii) In **ex parte applications**, the solicitor must ensure the court is not misled **[SG 10.04]**.
 - **Full and frank** discovery has to be made **[commentary 1]**.
 - Any **material changes** should be disclosed to the court by the solicitor who obtained the order **[commentary 2]**.

(d) Wasting Court Time

- (i) Barrister should inform court as to probable **length of case** and to monitor situation so ensure that allocated time remains accurate – *Mandecly v Hao Wei 2005*. Solicitors have to correctly estimate trial time under general instructions rules: **[SG 12.01]**.
- (ii) **Developments** which affect information already provided should be disclosed to the court **[BC 133]**.
- (iii) Includes:
 - Lateness;
 - Last-minute applications for adjournment;

- Encourage settlement [**SG 10.17**], advise clients as to whether litigation justifies expense or risk involved [**commentary 2**].
- Inform court if settlement is reached [**BC 134**];
- Not to pursue hopeless cases / appeals (criminal appeal) unless properly arguable [**BC 114**].
- Acquaint themselves with all relevant authorities – *Copeland v Smith 2001*. General reports should be considered, and reported version should be cited.
- Excessive citation not good – *Hamblin v Field 2000 CA*.

(iv) **Discovery Duties**

- Full discovery should be made, evidence should be preserved. In any corporate organisation, knowledge of this should be passed on to those who may be affected by it – *Rockwell Machine Tool v EP Barrus (Concessionaires) 1968*.
- If client unwilling to make full discovery, counsel and solicitor should withdraw – *Myers v Elman 1940*.

3. Conducting Case in Court

(a) **Solicitors Rights of Audience**

- (i) In emergencies – *Re Gunston and Smart's Application 1965*.
- (ii) Before CFI:
- Magistracy appeals under [s.118\(2\) MO](#), if solicitor adopts meaning of 'counsel' in [s.2, MO](#);
 - In Chambers. Solicitor may appear in open court for delivery of judgment if judge decides to give judgment in open court [[High Court PD 23/4 'Solicitors: Rights of Audience'](#)].
- (iii) Before masters
- Chambers [[PD 15.1 'Appearances before a master'](#)];
 - Open court [[PD 15.3 'Appearances before a master in open court'](#)].
- (iv) Before District Court, if solicitor adopts meaning of 'counsel' in [s.2, DCO](#).
- [DCO s.15\(1\)](#)
- (v) Before Magistrates Court, if solicitor adopts meaning of 'counsel' in [s.2](#).
- [MO ss.16\(1\), 18](#)

Trainee solicitors rights of audience:

- (i) Before master:
- Uncontested application listed for 3-minutes.
 - Applications for judgment under [RHC O.14 'Summary Judgment'](#) and [O.88 'SJ Re: Property'](#) where hearing is no longer for 15 minutes - for trainees in last 6 months of traineeship only.

(b) Court Etiquette

- (i) Every barrister should observe the **ethics and etiquette** of his profession **[BC 6(c)]**.
 - Dark suits / dresses (women may wear trousers); white shirts; black shoes; dresses and blouses to cover arms; wigs to cover hair; no conspicuous jewellery; miniskirts and boots banned in England **[Annex 11]**.
- (ii) Solicitors should appear duly robed where it is necessary and must always wear suitable clothing **[SG 10.08]**.
- (iii) Court **courtesy [BC 133]**. Solicitors have courtesy duty to the court all witnesses and the other side **[SG 10.07]**.
 - The court must be properly addressed – *Re a Barrister 1989 NZLR 327* where barrister who accused judge of being racist and compared him to Adolf Hitler was suspended for 6 months.
 - *Edwards v Almao 1957* where counsel who stated in affidavit that judge had been actuated by collusion, fear, extra-judicial and improper considerations, bias, favour, misplaced sense of loyalty and instructions from a higher authority was held in contempt of court.

(c) Cross-Examination of Witnesses

- (i) Counsel should avoid statements intended only to **insult or annoy [BC 131] [SG 10.07]**.
- (ii) **Suggestions of fraud, misconduct, that someone else committed the offence or the commission of criminal offences** may only be put forward if they are part of his client's case and only then if not solely for the purpose of impugning the witness' character **[BC 138]**. There must exist reasonable grounds before credibility (character) is attacked **[BC 139(a)]**. Solicitor's instructions may be taken at face value but must ensure that for third party statements, the third party can give reasonable reasons for his statement **[BC 139(b)]**.
 - *Keith Stevens McConnell v Bak Ling Enterprises 1983* where counsel was criticised for suggesting that a letter was 'manufactured', causing offence to the witness.
 - *Lo Chi-keung 1989* where counsel suggested to a police officer that a confession had been 'stage-managed' without proper instructions.
- (iii) Counsel must not **blame someone else** for the crime unless there are facts or circumstances which reasonably suggest thus **[BC 147]**.
- (iv) **Third parties should not be named** if their character would be impugned **[BC 157] [SG 10.07 commentary 5]**. Names, addresses, etc. should be written down and handed to the court **[BC 157]**.
 - In mitigation, statements that are merely scandalous or calculated to vilify or insult any person without reasonable grounds must be avoided **[BC 157] [SG 10.07, commentary 6]**.

(d) Jury, Inflammatory Language

- (i) Counsel should avoid emotive language – *Mok Wing Hung 1991* where counsel, having described the serious consequences of perjury, asked the

jury whether such a man as the witness should be likely to commit perjury; CA ordered a retrial.

- [Guise v Kouvelis 1946](#) where it was held improper for counsel to tell jury that damages would be awarded to charity.

(e) Advocate's Own Opinion, Evidence

- (i) An advocate's own opinion of the evidence is irrelevant and must not be given **[BC 132]**.
 - OK to say: "Your Honour, you might feel that order *x* would be most appropriate here."
- (ii) Counsel should not give his own evidence:
 - [Benjamin 1913](#) where court said that counsel should not give results of his own investigation in the course of preparing an appeal.
 - Counsel should not orally supplement his affidavit if he discovers a material omission.
 - [Ching Shing-yum 1991](#) – counsel criticised for introducing documentary evidence for first time in closing address.
 - [Ngai Man](#) – counsel suggested the speed of a vehicle using a table of braking distances and the length of skid marks. Held: proper role of expert witness, not counsel.
- (iii) Where technical matters are not in dispute, counsel might explain them – [Bristol Myers v Beecham Group 1968](#) where counsel explained some technical terms occurring in specifications and affidavits.

(f) Court Time During Trial

- (i) Tediously lengthy words, explanations, etc. should be avoided – [Cox v Mead 1989](#) stating that there should be a change from prolixity to conciseness.

(g) Authorities

- (i) Court must be informed of any relevant law whether for or against that side's contention **[BC 136]** **[SG 10.03, commentary 7]** and [Glebe Sugar Refining v Greenock Park & Harbour Trustees 1921](#).

(h) Summing-up

- (i) In cases requiring a careful direction to the jury, trial judge should invite counsel to address him on the legal issues to be covered – [R v Miles 1992](#).
- (ii) **Prosecution counsel should draw the court to any apparent errors** of fact or law which should be corrected **[BC 162]**, [R v McVey 1988 CA](#).
 - Any comment must be made in open court.
 - [Chan Hing Chi 1988 CA](#) where P should point out the possible mistake in the absence of the jury so judge could make amendment. D has the same duty.
- (iii) **Defence counsel**
 - Where there is a **procedural irregularity** (in law or by police), D must inform the court immediately and not make it an appeal point **[BC 154]** **[SG 10.15** (solicitor should say anything the client would say if he were so trained)].

- **Errors of law** must be raised in a **jury break**. **Errors of fact** must be **raised immediately** – *Shing Siu Ming 1999 CA*. Counsel is not obliged to raise either under the Code, however, common law is different.
 - *UK cases*
 - *R v Southgate 1963 CA* – counsel’s drawing attention to error in summing up “commendable and desirable”.
 - *R v Edwards 1983 CA* – CA expressed surprise when D remained silent whilst judge did not mention standard of proof to jury. Counsel should have interjected in the best interests of his client.
 - *Higgins, Litchfield 1995 CA* – counsel should take initiative in raising matters of concern about jury directions.
 - *HK cases*
 - *Ho Cheun-yuen 1961* – counsel’s duty to draw attention to errors and omissions within his knowledge.
 - *Leung Chi Yuen 1989 CA* – counsel’s duty to secure acquittal during trial and wrong to refrain from make submissions on grounds that it would be a good point to take on appeal.

(i) **Duty not to knowingly deceive / mislead court**

- (i) Lawyers may not knowingly deceive or mislead the court, including, in criminal cases, not to make up facts that would assist in advancing their client’s cases [BC 130] [SG 10.15, commentary 3].
- *Bridgwood 1988* – advocate knowingly used accused’s false name in court.
 - *Re a Practitioner of the Supreme Court 1956* – practitioner commenced divorce proceedings on grounds of cruelty knowing that husband did not admit such cruelty, but on understandings that he would not oppose it. (Held guilty of professional misconduct, suspended).

(j) **Perjury**

- (i) Where solicitor comes to know that client **intends to mislead** the court, he has a duty to **dissuade** the client and **explain legal consequences** (grave criminal offences as perjury, perverting the course of justice). If client refuses to accept advice and **purge his perjury**, solicitor must cease to act [SG 10.03, commentary 3].
No Bar Code equivalent.
- (ii) If, during trial, lawyer is **informed by client that he had committed perjury**, unless his client authorises him to inform the court of such perjury, lawyer must withdraw [BC 137 (civil trials)] [SG 10.03, commentary 5].
- (iii) Court has no discretion to refuse lawyer to withdraw – *Sherman v Manley 1978 Ontario*. This is deference to tactical decisions.
- (iv) **If witness perjures**, counsel should tell him to inform the court that he has done so. If he continues, advocate must not continue examination in chief because it would involve him misleading the court.

- (v) If perjury is discovered after trial and if some person had suffered, counsel should bring this to the attention of the court – no authority.

(k) Disclosure of Material Facts

- (i) Solicitor who knows of facts / witness who might assist the counterparty is **generally under no duty** to bring that to the attention of the court [SG 10.03, commentary 6].
- However in *Meek v Fleming 1961 CA*, the court held that it was D's duty to raise the fact that, in an action against police claiming damages for assault, the officer had been reduced in rank by a disciplinary board for deception to the court. The court held that the facts **significantly reduced the credibility** of the defendant.
 - Cf. *Tombling v Universal Bulb 1951* where *Meek v Fleming* was distinguished on the grounds that a motoring offence conviction, even if not revealed was not ground for complaint because it was not so relevant to credibility.
 - In *Vernon v Bosley 1997 CA*, the court held that litigants were under a duty not to mislead the court and his opponent.
 - Where a case had been conducted on the basis of certain material facts which were an **essential part of the party's case**, if they were discovered to be significantly different before judgment was given and there was a danger that the court might be misled, it was counsel's duty to advise the client that disclosure should be made, and if the client refused, counsel should withdraw (Stuart-Smith LJ).
 - Counsel should disclose correct facts to his opponent and, unless otherwise agreed, to the judge.
- (ii) Positive duty to disclose arises for **prosecuting counsel**, who must bring raise all relevant facts with the court [BC 159] (see also last chapter). Also **ex parte** proceedings [SG 10.04, commentary 1].
- (iii) Overriding confidentiality might occur where the **interest of public safety** provides sufficient justification – *Jones v Smith 1999* where psychiatrist reports described D with having plans to kidnap, rape and murder other prostitutes.
- Clear risks to identifiable persons;
 - Risk of serious bodily harm;
 - Imminent danger.
- (iv) D has **no duty to reveal previous convictions** in any case.
- However, where there may be previous convictions, D may not assert any positive case or ask P-witnesses whether there are any convictions against his client in the hope for a negative answer [BC 155].

(l) Communications with Witness During Testimony

- (i) Save with the court's consent, no one may communicate with any witness until his evidence is concluded [BC 145].
- Includes cross-examination of one's own client – *R v Savoy 1977*.

(m) Absconding Client

- (i) If D absconds in criminal trial before sentence and instructing solicitor withdraws, counsel ought also withdraw **[BC 152(a)]**.
- (ii) If court requests counsel to remain, counsel has discretion.
 - If he remains, he may only use parts already established in the evidence.
 - He should also request the trial judge to instruct the jury the above basis on which he s prepared to assist the court **[BC 152(b)]**.
- (iii) If instructing solicitor does not withdraw, he also may continue the case on the basis that the client will not give further evidence himself. Counsel is free to use any material in his brief and to call any witnesses **[BC 152(c)]**.

J. Advocate's Duty During Plea Bargaining**1. Types of Bargaining**

- (a) Charge Bargaining
 - (i) Guilty plea to one of the charges or a lesser offence,
 - (ii) Exchange for dropping other charges.
 - (iii) Evidence Bargaining
- (b) Information to assist police;
 - (i) Give evidence for the prosecution.
 - (ii) Exchange for dropping other charges, substitute lesser charges or offer immunity for testifying against others.

2. Bargaining Without Intervention of Judge

- (a) Prosecution will decide the terms of the bargain. It is not a matter for the court.
- (b) However, if judge feels that P had taken a wrong decision on a plea bargain, he is entitled to say so in open court and P must then decide what to do.

3. Bargaining With Intervention of Judge

- (a) Exceptional circumstances.
- (b) *R v Turner 1970*
 - (i) Freedom of access between counsel and judge, but plea bargaining must be done in the presence of prosecuting counsel.
 - (ii) Judge should never indicate the sentence which he is minded to impose if there is any suggestion that it would be different if the accused pleaded guilty or not guilty.
- (c) *Yuen Kuen Chi 1985 CA* – Court quashed conviction and ordered retrial for judge having had suggested that sentence would be three years and less following a guilty plea.

- (d) *R v Scales 1987 CA* – regardless of what the judge suggested in Chambers, he can order something else in court. In this case, he had suggested a suspended sentence and he subsequently ordered a custodial sentence.

K. Prosecuting Counsel Duties

1. General Overriding Duty

- (a) P-Counsel is a minister of justice.
- (b) He is not to convict by all means but should lay before the court fairly and impartially all facts comprising his case and see that the jury are properly instructed in the law applicable to those facts [BC 159]. Unscrupulous fairness [SG 10.14].

2. Duty of Disclosure

- (a) *HKSAR v Gao Hejia 2003* – P under a duty in *all* cases in *all* courts to disclose *all* evidence relevant to the defence case, including: P-witness statements, sketches, photographs and P-witness previous convictions.
- (b) **Witness Information**
- (i) Names and addresses of all witnesses P intends or does not intend to call (“All Witnesses”) must be supplied – *Bryant & Dickinson 1946*; *R v Armstrong 1995 CA*.
- (ii) As normal practice, statements of All Witnesses must be given to the defence [BC 160(a)].
- (iii) [SG 10.14, commentary 2] principles:
- Evidence not intended to be used but which might assist the defence, or witness not considered credible:
 - Supply particulars to D;
 - No need to supply copies of statements.
 - Credible witness who can speak to material facts which tend to cast doubt on the prosecution case or show the accused to be innocent:
 - Call witness; or
 - Supply particulars; and
 - Make copies of statement available to defence.
- (iv) Previous convictions of witnesses should be disclosed [SG 10.14], *Gao Hejia 2003*.
- *Ching Kwok-yin 2000 CFA* – P should make enquiries about witness when credibility likely to be in issue.
- (c) **Inconsistent Statements**
- (i) P-witness statements differing in any respect from his own or his committal statements should be disclosed to D [BC 160(b)] – *Seto Ming 1978* where conviction set aside because P had failed to disclose a “material and fatal discrepancy” between the evidence and per previous written statement to the police.

- (ii) *R v Berry 1992 PC* – materiality is not for P to decide, but for D.
- (iii) Facts of which he has knowledge and which are inconsistent with those which he presented to court should be disclosed [**SG 10.014, commentary 1**].
 - Where P-witness makes a dock identification, P has duty to inform the court if P-witness failed to make identification at any prior identification – *Liu Ping-yeung 1965*.

(d) Other Facts

- (i) Forensic evidence that might assist the defendants – *Maguire 1992*.
 - *Wong Tin Lung 1999* – D charged with possession offensive weapons, conviction quashed when discovered that P knew that a friend's fingerprints were on the weapons and did not disclose such to the defence.

3. Sentencing

- (a) P should inform court of any **mitigating circumstances** if accused is unrepresented [**BC 163**].
- (b) *AG v Jim Chong Shing 1990 CA*:
 - Decisions of higher courts may be presented to the court if they may assist the court in arriving at a just and proper sentence.
 - This should be done before mitigation and P should not be given anything in the nature of a reply.
 - Tariff and guideline cases may be presented, but not those which merely uphold, increase or decrease sentence.
 - P should not suggest any particular type of sentence or say anything advocating severity.

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