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# Legal Professional Conduct Cram Notes

1<sup>st</sup> Edition



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## **1. INTRODUCTION**

### **A. HOW TO USE CRAM NOTES**

The Legal Professional Conduct Cram Notes are formatted into a step-by-step guide, which you can use as a checklist in your exams to ensure that every element of the exam question is answered. You may find the Table of Contents to be a quick and useful overview of the law to be applied.

You should also answer the exam question using the ILAC method, which will ensure your answer is comprehensive.

- |                   |  |
|-------------------|--|
| <b>Issue</b>      | State the legal issue relevant to the problem  |
| <b>Law</b>        | Identify the relevant case law and legislation   |
| <b>Analysis</b>   | Analyse and apply the law to the legal issue. This is the most important part, so ensure your legal analysis is very thorough. |
| <b>Conclusion</b> | Form a conclusion based on your analysis and application of the law, giving some practical advice to the hypothetical client.  |



It is very important to spend time perfecting your analysis section, as this is the part that examiners are most interested in. Do not worry if you reach the correct conclusion (there often isn't one clear answer) – examiners will give more weight to your legal analysis, and sometimes may even reward answers that propose an innovative and unconventional answer!

## **B. ABBREVIATIONS**

The Legal Professional Conduct Cram Notes will refer frequently to following using abbreviations.

### **Legislation**

*Legal Profession Act 2004 (NSW)*

*New South Wales Barristers' Rules*

*Revised Professional Conduct and Practice Rules 1995 (NSW)*

*Revised Professional Conduct and Practice Rules 1995 (NSW)*

– Section 23

### **Abbreviation**

LPA

Barristers' Rules

Solicitors' Rules

Advocacy Rules

In addition, the High Court of Australia will be referred to as the HCA.

## **2. ETHICAL PROBLEMS IN LEGAL REPRESENTATION**

### **A. MORAL ISSUES**

The moral issues faced by lawyers are concisely summarised by Richard Wasserstrom in *Lawyers as Professionals: Some Moral Issues*<sup>1</sup>. A summary is provided below:

- As the world is amoral, the lawyer is just a legal technician, who is overtly immoral
- The lawyer is engaged in *role-differentiated behaviour*, which arises out of the context of a *special, complicated relationship* between the lawyer and the client. This role-differentiated behaviour 'makes it both *appropriate and desirable to ignore moral considerations* that would otherwise be relevant if not decisive.'
- The lawyer is expected to make his/her *expertise fully available to realise the client's aims, irrespective of the moral worth of that aim*. Hence, so long as that aim is not illegal, the lawyer is an amoral legal technician whose skills are available to the client
- This moral arrangement is particularly comfortable for the lawyer, who would *otherwise have a very disturbed conscience*, and is further *justified by the entire structure* of our legal system.
- Explicitly, the idea is that the legal apparatus works best when all actors in the system (e.g. the lawyers) adhere to their institutional roles; *higher questions of morality and justice will be answered by the system itself*.
- *If lawyers passed moral judgment on clients and refused to serve them, the democratic hierarchy of our society would be hijacked by self-righteous lawyers*.
- Wasserstrom explicitly supports the role-differentiated behaviour of criminal defense lawyers, but believes that it is excessive in other areas of law.
- It is counterproductive when lawyers, in their combative, competitive, ruthless style, *undermine the very workings of the system by exploiting weaknesses for profit*.
- This leads to moral bankruptcy, as the lawyer immerses him/herself into the role - deep moral scepticism and an alienation from moral personality and feelings.
- Solutions to the problem involve:
  1. Justify the adversary system as being morally good

<sup>1</sup> 5 *Human Rights 1* (1975)



A barrister who wishes to return a brief must give enough time for another practitioner to have a proper opportunity to take over the case (r 97).

## ii. SOLICITOR

Under r 5 of the Solicitors' Rules, a solicitor must complete the work or legal service required by the practitioner's retainer, unless

- the solicitor and client have terminated the retainer by agreement (r 5.1.1)
- the practitioner is discharged from the retainer by the client (r 5.1.2)
- the practitioner terminates the retainer for just cause, and on reasonable notice to the client (r 5.1.3)

However, for criminal offence matters, a solicitor cannot terminate the retainer on the ground that the client has failed to make satisfactory arrangements as to the solicitor's costs (r 5.2).

Upon termination of the retainer, the solicitor must retain the client's document for at least 6 years after termination (r 8.2). In addition, upon termination, the solicitor must give the documents when requested to the client, unless the solicitor claims a lien over the document for costs due (r 8.3).

## E. DUTY TO OBEY CLIENT INSTRUCTIONS

The practitioner and the client will enter into a contract of retainer, whereby the client decides the scope of authority granted to the practitioner to act on the matter. The practitioner is the agent of the client, and has authority to do all things incidental to and within scope of his/her retainer. As a general rule, a party is bound by the conduct of his or her counsel, and counsel have a wide discretion as to the manner in which proceedings are conducted (*R v Birks*).

Under r 17 of the Barristers' Rules, a barrister must seek to assist the client to understand the issues in the case and the client's possible rights and obligations, if the barrister is instructed to give advice on any such matter so as to permit the client to give proper instructions, particularly in connection with potential settlement of the case.

### *McLoughlin*

- Facts: counsel sought to rely on an alternative defense, contrary to the client's instructions. Counsel had earlier sought client approval but this was refused.
- The court held that "the counsel had no right to disregard his instructions."
- "Following any advice he thought it proper to give to his client, his duty was either to act on the instructions he then received or withdraw from the case"
- Where client's instructions are incompatible with duty to court -
  - "Must inform client that unless instructions are changed he will be unable to act further" or immediately inform the judge during trial
- The practitioner cannot disregard client instructions and conduct the case as he/she himself thinks best

Note that there are problems with accepting the instructions of a clients labouring under undue influence (*Cockburn v GIO* - below)



## **9. LEGAL REPRESENTATION – IS THE CLIENT OF SUFFICIENT LEGAL CAPACITY?**

### **A. UNDUE INFLUENCE**

*Cockburn v GIO*

- Facts: the practitioner failed to make specific inquiries and failed to advise the plaintiff of significant matters i.e. their mortgage.
- Particularly in undue influence cases – the person influenced would give an affirmative answer to questions of whether that person knew what was being done. Knowing that client is in a vulnerable position, the solicitor needs to take extra care and effort in informing and advising the client.
- ‘The real question is whether the person so influenced has a sufficient understanding of all of the facts, including the financial circumstances of the person who exerts the influence and the likely consequences of his or her acts so as to be able to exercise an independent mind, with appropriate advice as to the wisdom of the transaction.’
- In such circumstances, the lawyer should have made further inquiries about whether the client is exercising independent decision-making, until the lawyer is satisfied that the client is independently making decisions.
- It is part of the solicitor’s retainer to ensure that the client proceeds through the transaction fully aware of what he/she was doing, voluntarily. This required the taking of reasonable care.

### **B. CHILDREN CLIENTS**

An independent children’s lawyer is appointed by the court to represent the child’s interests.

This includes:

- Helping the child to form an independent view of what is in best interest of the child, and advocate for those interests in the proceedings (*Family Law Act s 68LA*)
- Need not act on instruction of child – the independent children’s lawyer can adopt whatever course of action, in their own opinion, is in the best interests of the child (s68LA)
- However, they must ascertain the child’s views, and allow them the opportunity to express views in a non-intimidating environment free from influence of others, using appropriate questioning techniques
- There is no obligation to disclose confidential information disclosed by the child – but in some cases may disclose this information even if against the child’s wishes (e.g. abuse)
- The lawyer must minimise trauma to the child

The considerations of the best interests of the child include:

- primary considerations
  - The benefit to the child of having a relationship with both parents
  - Protecting child from physical/psychological harm from abuse, neglect, family violence
- additional considerations
  - nature of relationship with other person including grandparents
  - extent to which each parent has fulfilled their parental obligations
  - the right of child to enjoy their own culture

An independent children’s lawyer is appointed by the Family Court when there are

- allegations of abuse
- conflict between parents



- alienation of child from parent
- cultural/religious differences affecting the child

#### **i. THE ROLE OF THE SEPARATE REPRESENTATIVE:**

- To act in an independent and unfettered way in the best interests of the child (take into account client's views and preferences in determining what is in their best interests)
- To act impartially
- Inform the Court by proper means of the children's wishes, but need not follow the instructions of the children.
- Arrange for collation of expert evidence relevant to the welfare of the child.
- Test the evidence by cross examination where appropriate the evidence of parties and witnesses
- Minimise trauma to child
- Facilitate agreed resolution to proceedings.
- Family members cannot remove the separate representative.
- It is desirable that the separate representative be appointed at as early a stage in the proceedings as possible.

#### **ii. STERILIZATION PROCEDURE**

*P and P and Legal Aid Commission of NSW; HREOC*

- Parents do not have the right to consent to a sterilization procedure upon a child who cannot give consent for her or himself. The court's authorisation is required – if the child is found (as a question of fact) to be presently incapable and likely to remain incapable of giving informed consent (Marions Case)

Guidelines from *Re Grady* and *Re Jane*:

- It is ultimately the duty of the Court to determine the need for sterilisation rather than the parents.
- In such cases, where an application is made for authorisation to sterilise, the Court should appoint an independent guardian ad litem as soon as possible to represent the ward and should receive independent medical and psychological evaluations by qualified professionals.
- The court must be persuaded by clear and convincing proof that sterilisation is in the incompetent person's best interests.

#### **C. CLIENT CAPACITY GUIDELINES**

An incompetent client cannot instruct a solicitor, and the solicitor should not heed their instructions.

The test is provided in *PY v RJS*:

- A client is not shown to be incapable unless
  - They appear to be incapable of dealing, in a reasonably competent fashion, with the ordinary affairs of man; and
  - by lack of competence there is a real risk that
    - ◆ they may be disadvantaged in conduct of such affairs
    - ◆ their money and property owned may be dissipated or lost
  - It is not sufficient to merely demonstrate the person lacks the high level ability needed to deal with complicated transactions, or that he does not deal with simple things in the most efficient manner





In addition, the solicitor must be careful not to presume incapacity simply by reason of disability (*Anti-Discrimination Act*).

It is important to take all reasonable steps to ensure proper communication can take place or to allow for the client's disability before assuming a client is incapacity. Solicitor should thoroughly investigate different means of establishing communication, and try alternate interview techniques.

## **10. LEGAL REPRESENTATION – DUTY OF CARE & COMPETENCE**

### **A. LIABILITY IN NEGLIGENCE, CONTRACT & ADVOCATES' IMMUNITY**

#### **i. STANDARD OF CARE**

*Duchess of Argyll v Beuselinck*

- Issue: If a client employs a solicitor of high standing and great experience, will an action for negligence fail if it appears that the solicitor did not exercise the care and skill to be expected of him, though he did not fall below the standard of a reasonably competent solicitor?
  - The standard of care to be expected of a professional man must be based on events as they occur and not in retrospect.
  - On any footing, the duty of care is not a warranty of perfection.
  - The standard of care is that of the standard of a reasonably competent practitioner
  - The skills of the particular solicitor are not relevant in determining the standard of care

A solicitor's duty lies in both tort and contract. The duty in contract is that the practitioner will carry out the retainer with due care and skill. The duty in tort is the duty of reasonable care and skill to a client.

*Hawkins v Clayton*

- Because a solicitor's duty lies in tort as well as contract, it may be that in the particular circumstances it may require that the solicitor go beyond the specifically agreed professional task or function if that is necessary to avoid a real and foreseeable risk of economic loss being sustained by the client.

*Heydon v NRMA Ltd [2000]*

- The solicitor's liability remains a concurrent liability in contract and tort
- The standard is of care and skill is that which may be reasonable expected of practitioners. In the case of practitioners professing to have a special skill in a particular area of the law, the standard of care is not breached if the professional acted in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice (s 5O(1) of *Civil Liability Act 2002*)
- In each case the duty is to apply the relevant degree of skill and exercise reasonable care to carrying out the task. There is no implied undertaking that the advice is correct, but only that the requisite degree of professional skill and care has been exercised in the giving of the advice.

#### **ii. WAS THE DUTY BREACHED?**

*Pengrum and Pegrum v Fatharly*



- The present case is concerned with the implied agreement of retainer between the solicitor and a person alleged to be his client.
- In *Groom v Crocker* Scott LJ said in regard to the contractual relationship between solicitor and client: 'The relationship is normally started by a retainer, but the retainer will be presumed if the conduct of the two parties shows that the relationship of sol and client has in fact been established between them.'
- Applying the rule expressed *Australian Energy Ltd v Lennard Oil NL*, the de facto relationship of solicitor and client has to be a necessary and clear inference from the proved facts before a retainer will be presumed.
- Prima facie, the oral exchange between the parties, coupled with the agreement as to legal costs and fees is clear evidence of an acceptance that there was a relationship of solicitor and client.

*Griffiths v Evans* [1954] CA, England

- Facts: Griffiths was severely injured while at his place of employment. His solicitor advised him in relation to workmen's compensation, but not in relation to his common law rights. Griffiths failed in his suit for negligence and then appealed.
- Where the client specifically requested advice for a particular issue, the solicitor need not advise on the general issues, which may not be related to the particular issue at hand.

*Vulic v Bilinsky* [1983] NSWLR

- Facts: The solicitor failed to give advice on a common law remedy.
- The solicitor was negligent for failing to advise on that matter. Although the solicitor argued that he was inexperienced, Myles J said that it was no excuse because he could have briefed a barrister.

**iii. CAUSATION – WOULD CLIENT HAVE ACTED DIFFERENTLY?**

Consider whether the client would have acted differently if the advice had been different.

*Citcorp Australia Ltd v O'Brian*

- The relationship between solicitor and client is a relationship of proximity of a kind which may well give rise to a duty of care on the part of the sol which requires the taking of positive steps, beyond the specifically agreed professional task or function, to avoid a real and foreseeable risk of economic loss being sustained by the client.
- Furthermore, applying the decision in *Hedley Byrne*, the existence of any duty not found in the express, inferred or implied terms of the retainer would depend upon the solicitor's assuming responsibility to the client and the client's relying upon the solicitor to perform diligently and skillfully the services for which the solicitor assumed responsibility.
- Solicitor's duty is found in the terms of the retainer and the ambit of any additional assumed responsibility relied upon.
- Reliance is shown where the client would have followed a different course, but acted on the advice of the solicitor on the basis of their advice.

**iv. DEVELOPMENT OF THE IMMUNITY DOCTRINE**

*Saif Ali v Sydney Mitchell & Co*, 1980 (House of Lords)

- The scope of the immunity extends beyond what is done in court to pre-trial work, but the protection exists only where the particular work is so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing. That protection is no wider than absolutely necessary in the interests of administration of justice.



- Counsel (whether barrister or solicitor) may appear to represent the adversaries, but counsel's duty is to assist the court in the doing of justice according to law.
- The primary duty of assisting to do justice according to law - no duty to a client can be allowed to impair performance of the primary duty.

#### **D. INFERENCE WITH WITNESSES**

Various legislative provisions in each jurisdiction make it a criminal offence to induce the giving of false testimony or to intimidate a witness. Although there is no property in a witness, and there is nothing which prohibits a practitioner from telling a witness that he or she need not agree to being interviewed, going beyond this point and seeking to persuade a witness not to give evidence or to change his or her evidence may constitute obstructing the course of justice (*R v Miras*).

Under r 18 of the Solicitors' Rules, a solicitor must not confer with or interview witnesses from the opposing party. The Advocacy rules also provide that a practitioner must not suggest or condone another person suggesting in any way to any prospective witness the content of any particular evidence which the witness should give (Advocacy Rule A.43)

The concern of the courts with not having lawyers interfere with witnesses is demonstrated in *Kennedy v Council of the Incorporated Law Institute of NSW*:

- Fact: The Appellant was the solicitor for the plaintiff, who brought an action to recover compensation from the Commissioner for Railways who had caused his son's death. The charge against the appellant concerned a visit which he had made to a witness for the defendant. The appellant went to see the witness and wanted her to make a statement for him. The Statutory Committee of the Incorporated Law Institute of NSW removed the appellant's name from the roll of solicitors on the ground of misconduct
- A charge of misconduct need not amount to an offence under the law. It was enough that it amounted to grave impropriety affecting his/her professional character, and was indicative of a failure either to understand or to practise the precepts of honesty or fair dealing in relation to the courts, his or her clients or the public.
- The plaintiff's solicitor was engaged in a course of aggressive interference with the ordinary course of calling evidence on behalf of the defendant.
- The plaintiff's solicitor was interfering with the ordinary course of justice, and in all the circumstances showed that his misconduct manifested a definite unfitness for him to be trusted to discharge the duties of a solicitor, particularly in relation to the court.
- For practitioners, there is a general prohibition on communication with witnesses – the purpose of the prohibition is that communications may tend to intimidate, coerce or harass the witnesses.

#### **E. RUDENESS AND DISCOURTESY**

Rudeness and discourtesy in court can amount to contempt (*Lewis v Ogden* (1984)). Discourtesy is not limited to the tone of correspondence or the vigour of its language.

In *Hugo v R* (2000), Sheller AG observed that the ad hominem (attacking of the person) personal remarks demean the trial process and, if they are intended to influence the jury in the decision making process, they are improper. To the extent that solicitors act in this way, they run the risk of destroying the confidence and mutual respect which generally characterise the dealings between members of the legal profession.

Under r 25 of the Solicitors' Rules, a practitioner, in all of the practitioner's dealings with other



practitioners, must take all reasonable care to maintain the integrity and reputation of the legal profession by ensuring that the practitioner's communications are courteous and that the practitioner avoids offensive or provocative language or conduct.

## **F. DUTY OF CANDOUR**

The duty of candour is a duty of full and frank disclosure such that the court can properly determine the issues between the parties. It relates not only to questions of evidence and the testimony of witnesses, but also to the use of authorities and ensuring that the court is fully informed of the relevant law. The duty incorporates the notion of not making inferences in an opening address to the court which cannot be reasonably proven (*Taylor v Edwards*).

In the criminal setting, it would include the duty of the prosecution to bring to court all relevant and reliable witnesses. It is a duty which rests more heavily on the Crown in a criminal case, and more heavily on a party in an ex-parte hearing.

In *Garrard v Email Furniture Pty Ltd (1993)*, the NSW Court of Appeal held by majority that an order obtained in breach of an ex-parte applicant's of candour will almost invariably be set aside, even if on a fresh application following full disclosure the applicant would be entitled to an order in similar terms.

In *Re A Solicitor (1916)*, the court refused an application by a solicitor to be restored to the roll of practitioners on the ground that in his affidavits, he did not candidly state the cause of his removal, but misrepresented the nature of the offence.

Solicitors must not knowingly make a misleading statement to a court on any matter (Advocacy Rule A.21). In addition, a practitioner must take all necessary steps to correct any misleading statement made by the practitioner to a court as soon as possible after the practitioner becomes aware that the statement was misleading (Advocacy Rule A.22).

## **G. THE GIVING OF UNDERTAKINGS**

The giving of an undertaking is held to be a solemn promise and represents a trust between colleagues and between lawyers and the court. A failure by a solicitor to honour an undertaking can amount to contempt and the solicitor can be ordered to pay costs (*Specifier Publications v Long (1997)*). Undertakings should not be given unless the practitioner is satisfied that the promise can be kept, for if it is not, the practitioner may personally be held accountable (*Fraketon v Athow (1910)*). Personal liability will only be avoided if such liability is expressly disclaimed in the undertaking itself.

An undertaking against a client is only enforceable if it is given with the client's express authority. It is an abuse of process for the prosecution, after giving assurances that it would be proceeding on an information charging one offence, to depart from those assurances and proceed with charges of a different kind (*Rona v District Court (1995)*).

A practitioner who gives an undertaking to another practitioner to ensure the performance of some action or obligation, in circumstances where it might reasonably be expected that the other practitioner will rely on it, must honour the undertaking so given strictly in accordance with its terms, and within the time promised, or, if no precise time limit is specified, within a reasonable time (Solicitors' Rule r 26).



## **17. DUTIES OF PROSECUTORS & DEFENCE LAWYERS IN CRIMINAL TRIALS**

### **A. GUILTY PLEAS**

- Rule 17B of the Barristers' Rules requires barristers to advise clients of any law, procedure or practice which holds out the prospect of some advantage if the client pleads guilty.
- A conviction on the basis of a guilty plea can only be set aside if a miscarriage of justice has occurred. That will only occur where the accused did not understand the nature of the charge or did not intend to admit that he/she was guilty of it. The accused may also show that a miscarriage of justice occurred in other ways, e.g. that it was induced by intimidation, by an improper inducement, or by fraud.
- The general rule is that the accused has the right to decide whether to plead guilty or not guilty. Lawyers must not intimidate or induce clients into pleading guilty. Where the lawyer makes a decision without an accused's consent, this may lead to a mistrial.

#### *R v Turner (1970)*

- Facts: Turner appeal from his conviction of theft after he had changed his plea to guilty. Turner argued that he was pressured by his barrister to change his plea.
- Counsel must be completely free to do their duty, namely, to give the accused the best advice possible. This will often include advice that a plea of guilty, showing an element of remorse, is a mitigating factor which may well enable the court to give a lesser sentence that would otherwise be the case. Counsel should emphasise that the accused must not plead guilty unless he has committed the acts constituting the offence charged
- The accused, having considered counsel's advice, must have complete freedom of choice whether to plead guilty or not guilty.
- It is acceptable if the lawyer had made clear to an accused that the final decision is his, however forcibly counsel may put it. However, the position is different if the advice is conveyed as the advice of someone who has seen the judge, and has given the impression that he is repeating the judge's views in the matter

#### *Meissner v R (1995)*

- Any conduct designed to intimidate an accused person to plead guilty is improper conduct and necessarily constitutes an attempt to pervert the course of justice, even if the intimidator believes that the accused is guilty of the offence with which he or she is charged.
- Any argument or advice that merely seeks to persuade the accused to plead guilty is not improper conduct for this purpose, no matter how strongly the argument or advice is put.

### **B. PROSECUTOR'S DUTIES**

The prosecutor should not strive for a conviction at all costs (*R v Bathgate (1946)*). Thus, where counsel for the Crown uses intemperate language there is a real possibility of a miscarriage of justice (*Hugo v R (2000)*).

The primary function of the prosecutor is to aid in the attainment of justice, not in securing a conviction (*R v Callaghan (1994)*). It is ultimately the duty of the prosecution to see that a case is presented fairly, and in a way that avoids unfair prejudice arising in the minds of the jury (*R v Meier (1982)*).

While the prosecution owes no personal duty of fairness to an accused, the prosecutor does owe a duty to the court which defence counsel does not share; that is, the duty to bring to the attention of the other side, and the court, material which is cogent and relevant to the



prosecution of the accused (*R v Glover (1987)*).

The prosecutor has a discretion not to call certain witnesses (*R v Grant-Taylor; Ex parte Johnson (1980)*). There is no duty to call a witness whose evidence is not essential to the unfolding of the narrative upon which the prosecution case is based (*R v Lucas (1973)*).

In general, the prosecutor should call as witnesses all persons who are eyewitnesses to any events which go to prove the elements of the crime charged, and any witnesses who are considered by the prosecutor to be material, in the sense that their evidence is cogent, relevant and reliable.

*Re Van Beelen (1974)*

- There is a "long-established right of the prosecutor to exercise his discretion to determine who the material witnesses are" and that there is no obligation on the prosecution "to call one particular witness, even though a very important witness, at the committal proceedings"
- The discretion which vests in the Crown not to call witnesses is circumscribed by the following rules:
  - (1) Where the Crown calls a witness who did not give evidence at the committal proceedings, the accused should be given reasonable notice of the Crown's intention to call that witness and should be furnished with a proof of the witness's proposed evidence.
  - (2) Where the Crown does not propose to call a witness who gave evidence on the committal proceedings, it should, unless there are strong and satisfactory reasons to the contrary, have the witness available in court so that the counsel may have the opportunity of calling him, as his own witness, if he so wishes
  - (3) Where the Crown has in its possession the statement of a person who can give material evidence, but decides not to call him, it must make him available as a witness for the defence, but need not supply the defence with a copy of the statement taken
  - (4) Where the Crown has in its possession a statement of a credible witness who can speak of material facts" which tend to show the prisoner to be innocent", it must either call that witness or make his statement available to the defence.

*R v Apostilides (1984)*

- The following general propositions are applicable to the conduct of criminal trials in Australia:
  - (1) The Crown prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the Crown
  - (2) The trial judge may but is not obliged to question the prosecutor in order to discover the reasons which lead the prosecutor to decline to call a particular person. He is not called upon to adjudicate the sufficiency of those reasons
  - (3) The trial judge may properly invite the prosecutor to reconsider a decision not to call witnesses, but cannot direct the prosecutor to call a particular witness
  - (4) When charging the jury, the trial judge may make such comment as he thinks appropriate with respect to the effect which the failure of the prosecutor to call a particular person as a witness would appear to have had on the course of the trial.
  - (5) Save in the most exceptional circumstances, the trial judge should not himself call a person to give evidence.
  - (6) A decision of the prosecutor not to call a particular person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice.



A prosecutor must (Advocacy Rule A.62):

- fairly assist the court to arrive at the truth,
- must seek impartially to have the whole of the relevant evidence placed intelligibly before the court
- must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.

A prosecutor must not:

- press the prosecution's case for a conviction beyond a full and firm presentation of that case (Advocacy Rule A.63)
- by language or other conduct, seek to inflame or bias the court against the accused (Advocacy Rule A.64)

### **C. DISCLOSURE OF GUILT AND LIES**

Where the client discloses their guilt to the practitioner but maintains a plea of not guilty, the practitioner may be required to withdraw from the case. However, the practitioner must not disclose their client's guilt to the court.

Under r 32 of the Barristers' Rules, where the client reveals to the barrister that they have lied to the court, the barrister must refuse to take any further part in the case unless the client authorises the barrister to inform the court of the lie or falsification. A.32 of the Advocacy Rules provides the same in relation to solicitors. In addition, A.33 provides that where a practitioner is retained to appear in criminal proceedings whose client confesses guilt to the practitioner but maintains a plea of not guilty, the practitioner may cease to act, if there is enough time for another practitioner to take over the case properly before the hearing, and the client does not insist on the practitioner continuing to appear for the client.

Solicitors' Rules r 20 provides that if the client admits that they are guilty of the offence charged, the solicitor must not put a case which is inconsistent with the client's confession, falsely claim or suggest that another person committed the offence, or continue to act if the client insists on giving evidence denying guilt or requires the making of a statement asserting the client's innocence.



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