



Oxford Pro Bono Publico

<http://www.law.ox.ac.uk/opbp>

The Right to Effective Counsel and Guilty Pleas in Criminal Courts

A Comparative Report Prepared for Reprieve

November 2017

CONTRIBUTORS

Faculty Supervisor:

Liora Lazarus

Associate Professor in Law;

Fellow of St Anne's College

University of Oxford

Research co-ordinator:

Tom Lowenthal

DPhil Candidate, University of Oxford

Researchers:

Cassie Blower

BCL Candidate, University of Oxford

Abby Buttle

BCL Candidate, University of Oxford

Anson Cheung

BCL Candidate, University of Oxford

Boya Jiang

MJur Candidate, University of Oxford

Maulshree Pathak

BCL Candidate, University of Oxford

Thara Wahab

MJur Candidate, University of Oxford

Courtney Olden

BCL Candidate, University of Oxford

David Cheifetz

MSt Candidate, University of Oxford

Aradhana Cherupara Vadakkethil

BCL Candidate, University of Oxford

Lucy Harry

MSc Candidate, University of Oxford

David Baker

BCL Candidate, University of Oxford

Finnian Clarke

BCL Candidate, University of Oxford

Muriuki Muriungi

MLF Candidate, University of Oxford

Sean Moore

BCL Candidate, University of Oxford

In addition, the research co-ordinator would like to thank:

- **Professor Anne Davies**, Dean of the Oxford Law Faculty, for her support of this project;
- **Philippa Collins, Max Harris, Rishika Sahgal, and Victoria Miyandazi**, the Members of the 2016-2017 Oxford Pro Bono Publico Executive Committee, **Professor Sandra Fredman, Professor Liora Lazarus, Professor Kate O'Regan, John Bowers QC, Dr Miles Jackson, Nomfundo Ramalekana, Ndjodi Ndeunyema, Sanya Samtani, Geoffrey Yeung, Reyna Ge and Weiran Zhang** for their support and assistance with the project.

Indemnity

Oxford Pro Bono Publico (OPBP) is a programme run by the Law Faculty of the University of Oxford, an exempt charity (and a public authority for the purpose of the Freedom of Information Act). The programme does not itself provide legal advice, represent clients or litigate in courts or tribunals. The University accepts no responsibility or liability for the work which its members carry out in this context. The onus is on those in receipt of the programme's assistance or submissions to establish the accuracy and relevance of whatever they receive from the programme; and they will indemnify the University against all losses, costs, claims, demands and liabilities which may arise out of or in consequence of the work done by the University and its members.

Intellectual property

This report has been prepared exclusively for the use of the Social Law Project in accordance with the terms of the Oxford Pro Bono Publico Programme. It may not be published or used for any other purpose without the permission of OPBP, which retains all copyright and moral rights in this report.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	4
ENGLAND AND WALES	10
SCOTLAND	17
IRELAND	22
CANADA	26
QUEENSLAND (AUSTRALIA)	36
NEW ZEALAND	42
JAMAICA	46
TRINIDAD AND TOBAGO	51
KENYA	55
SOUTH AFRICA	60
INDIA	66
SRI LANKA	73
BANGLADESH	78

EXECUTIVE SUMMARY

I. Introduction

1. OPBP has been asked by Reprieve to prepare a comparative report on the right to effective counsel. The request for this report arises from the case of *McCoy v Louisiana*, which is currently pending before the US Supreme Court.
2. The relevant facts of that case are as follows. Mr McCoy was defendant of a triple homicide. After dismissing his public defender, he retained counsel. That lawyer took the view that Mr McCoy's case was unwinnable, that he would never convince a jury, and that Mr McCoy's best interests were served by conceding the material elements of the offence, and arguing that Mr McCoy was nonetheless guilty only of the offence of second degree murder, by virtue of diminished capacity. At trial, over Mr McCoy's vocal objections, his lawyer told the jury that he had committed the killings in question. Mr McCoy then attempted to fire his lawyer and represent himself, but was prevented from doing so by the trial judge. He was found guilty and sentenced to death. The Louisiana Supreme Court dismissed his appeal.
3. Reprieve are keen to argue that the guarantee of effective counsel, which is protected by the United States Constitution, is not met where the counsel in question concedes that elements of a charged offence are met, over the client's express denials. Reprieve has therefore requested OPBP to conduct comparative research to determine whether a departure from a client's express and clear instructions by defence counsel is in violation of the right to effective counsel.

II. The Research Questions

4. OPBP has undertaken research to establish the legal position in jurisdictions around the world. Our research addresses four questions, as follows:
 - (1) In your jurisdiction, is it the defendant or defence counsel who is authorised to decide the plea in felony criminal proceedings?
 - (2) Under what circumstances, if at all, may defence counsel depart from the client's instructions to plead not guilty and make statements to the decision maker (judge or jury) to the effect that the defendant is guilty?

- (3) Where the defence counsel has made statements that run counter to the defendant's actual plea, what is the consequence (i.e., is the case automatically subject to mistrial or reversal)?
 - (4) What are the professional ethical implications of a departure from the client's plea?
5. The following jurisdictions are considered in this report:
- (1) England and Wales
 - (2) Scotland
 - (3) Ireland
 - (4) Canada
 - (5) Queensland (Australia)
 - (6) New Zealand
 - (7) Jamaica
 - (8) Trinidad and Tobago
 - (9) Kenya
 - (10) South Africa
 - (11) India
 - (12) Sri Lanka
 - (13) Bangladesh

III. Summary Conclusions

(1) In your jurisdiction, is it the defendant or the defence counsel who is authorised to decide the plea in felony criminal proceedings?

6. In every jurisdiction reviewed, the *choice* of how to plead is for the defendant alone. A plea of guilty must always be voluntary and informed. The freedom to make this choice is generally considered crucial to the process of a fair trial, with both legal provisions and professional conduct regulations supporting it. Counsel may advise as to the appropriate plea but may not decide which plea should be made against the wishes of the client.
7. In addition, in many of the jurisdictions, the law requires that, absent special circumstances, the defendant pleads personally: that is, the words must come from the mouth of the defendant themselves. This is the case in England and Wales, Ireland, Queensland (where mandatory),

Trinidad and Tobago, Kenya, and Sri Lanka. It is a matter of good practice in Canada and Queensland (where non-mandatory).

8. Where counsel may put forward a plea, it is often required that the court establish that counsel has the authority to plead on behalf of the defendant, as well as to ensure that the defendant confirms the choice of plea, as in Scotland and the plea bargaining provisions in Trinidad and Tobago and Jamaica.
9. In some jurisdictions, further demonstrating the importance of ensuring the correct plea is entered by the defendant, courts are authorised or even required to investigate pleas of guilty to satisfy themselves that the defendant admits all the facts necessary to establish the elements of the offence. The word 'guilty' will often be insufficient to actually effectively plead guilty, especially where the defendant is unrepresented. Paradigm examples of this are South Africa and Bangladesh, but questioning to ensure the defendant understands the meaning of the plea takes place to a greater or lesser extent in all jurisdictions.
10. Finally, where the defendant refuses to plead, courts in every jurisdiction reviewed are required to enter a default plea of not guilty. The same tends to be the case where an ambiguous or equivocal plea is given, such as where the defendant describes themselves as 'guilty, but in self-defence.'

(2) Under what circumstances, if at all, can the defence counsel depart from the client's instructions as to the plea of not guilty and make statements to the decision maker (judge or jury) to the effect that the defendant is guilty?

11. The core question that arises on this point is the extent to which defence counsel may determine how to conduct the case, and in particular the extent to which they may disregard their client's instructions without occasioning a miscarriage of justice.
12. In every jurisdiction, it is recognised that, on the one hand, counsel are supposed to be independent officers of the court who must make their own professional judgment, not being mere mouthpieces of their client, while on the other hand they must act in the best interests of their clients, and respect their client's instructions. This means that, in each jurisdiction, there are some trial decisions which are for counsel to make, and some which are for the defendant to

make. The contents of each set varies depending on how deferential counsel must be to the defendant, and where jurisdictions fall on this spectrum varies.

13. In every jurisdiction, the choice of plea falls within a set of special decisions which are for the defendant alone to make. In New Zealand and Trinidad and Tobago, for example, counsel are required to be deferential to the wishes of the defendant, even if they disagree with the course proposed by the defendant. In England and Wales, compliance is required with any 'proper' instructions. In South Africa and Canada, on the other hand, the defendant only gets a choice over certain limited decisions, such as whether to testify, or whether to be represented, or how to plead. It is noteworthy that, in England and Wales, the barrister decides whether the defendant testifies, showing that which matters are considered to be for the client can vary between jurisdictions. In Scotland the test is whether the defence was presented or not. If a defendant claims not to have met the elements of the offence, that claim forms part of the defence which must be presented.

(3) Where the defence counsel has made statements that run counter to the defendant's actual plea, what is the consequence (i.e., is the case automatically subject to mistrial or reversal)?

14. In every jurisdiction reviewed, it is recognised that sometimes, the conduct of the lawyer can imperil the fairness of the trial process, and may be reviewed by appellate courts.
15. It is necessary to distinguish between cases where counsel purports to plead for the defendant, and where counsel makes statements inconsistent with a recorded plea. In the former case, courts in England and Wales, Trinidad and Tobago, Scotland and Sri Lanka will automatically treat the trial as a nullity. In Queensland, a failure to comply with the provisions governing plea, which include that the defendant should usually plead personally, does not automatically result in the trial being treated as a nullity: it depends on whether there has been a fundamental defect in proceedings and a miscarriage of justice as a result.
16. In the latter case, there is widespread adoption of the *Strickland* principles from the US.¹ Under *Strickland*, if a defendant wishes to appeal their conviction on the basis that they were denied the

¹ *Strickland v Washington* 466 U.S. 668 (1984)

effective assistance of counsel, they must show, firstly, that the lawyer's performance fell below an objective standard of reasonableness; and that had they performed adequately, there is a reasonable probability that the result would have been different.

17. Some courts, such as those in Canada, India, and South Africa, explicitly cite *Strickland*. It must first therefore be asked whether counsel's conduct prejudiced the appellant, it must then be asked whether counsel's conduct was such as to make the trial unfair. The question is usually framed as whether the trial was fair, or whether there was a miscarriage of justice, or some similar form of words.
18. Courts are generally very unwilling to review how competently counsel conducted the case, and simple mistakes or conduct which could have been better with hindsight will not be enough.
19. Deviation from instructions on a fundamental point is widely treated as a matter so serious that it renders the trial unfair. This is the case, for example, in Ireland, Trinidad and Tobago, Scotland, Canada, and South Africa. Admissions of elements of the offence have been found to be grounds for reversal in South Africa and Sri Lanka.

(4) What are the professional ethical implications of a departure from the client's plea?

20. Professional codes of conduct in all the jurisdictions, to a greater or lesser extent, recognise a number of conflicting ethical principles.
 - (i) Counsel are expected to be independent, and not simply act as mouthpieces for their clients. They must also be honest with their clients.
 - (ii) Counsel are expected to act in their client's best interests, and defend their case with zeal.
 - (iii) Counsel have duties to court and to the administration of justice, which require them to tell the truth, but never to divulge confidential information.
21. The balancing act between these duties is very tricky. To the extent there is a hierarchy, the duty to the court is the higher duty. The resolution of these conflicting duties in the context of the plea tends to be the same throughout the jurisdictions. Counsel are free to give forceful advice, but must not unduly pressure the defendant into any plea. They must not do what the client tells

them if that would be unethical, but in that case they would be required to withdraw, and their client would retain the right to dismiss them.

22. It would not therefore be ethical to seek to undermine a client's plea: the choice of plea belongs to the client, and the duty of independence and right to conduct litigation do not seem to be tolerated, in the jurisdictions where the issue has arisen, as a basis for acting contrary to the client's plea.

ENGLAND AND WALES

I. In your jurisdiction, is it the defendant or the defence counsel who is authorised to decide the plea in felony criminal proceedings?

23. In England and Wales, the choice of plea is the defendant's alone.² A plea of guilty must come from the mouth of the defendant,³ aside from in a few special cases.⁴
24. In the context of a plea of not guilty, the right to personal arraignment and plea can be waived. In *R v Williams*,⁵ defending counsel indicated that a plea of not guilty would be forthcoming (though not in those exact words). The case then had to be adjourned. Through an error, this was recorded as a not guilty plea from the mouth of the defendant. As a result, this plea was announced to the reconvened court, and the clerk duly began empanelling a jury. The defendant stayed silent, and the case went on as normal. On appeal, the question was raised whether this must be a mistrial, given that no plea had technically been taken from the defendant.
25. The Court of Appeal considered the earlier decision of *Ellis*⁶ and remarked as follows:
- There [in *Ellis* –see below] the critical issue was whether a plea of guilty tendered by counsel and not by the accused himself could be regarded as an effective and binding plea. It is of course plain to see why it cannot and should not be so regarded. It is a plea which is self-incriminatory and self-incrimination cannot be vicariously accomplished. Any contrary view would be fraught with manifest dangers. Injustice rather than justice would be the likely products of a principle which permitted indirect delegated confessions of guilt.
- No qualification of or deviation from the rule that a plea of guilty must come from him who acknowledges guilt is thus permissible. A departure from the rule in a criminal trial would therefore necessarily be a vitiating factor rendering the whole procedure void and ineffectual.
26. However, it held that the conclusion drawn by the court in *Ellis* was wider than necessary to resolve the facts of the case. In *Ellis* counsel had tendered a plea of guilty, which was not

² (1973) 57 Cr. App. R. 571

³ Blackstone's Criminal Practice, D12.72

⁴ Richardson, *Archbold* (2017), 4-167

⁵ 64 Cr App R 106 CA

⁶ add full case name and citation

acceptable. That was not the case in *Williams*, where a plea of not guilty was entered by counsel. In the case of not guilty pleas, the Court held:

It does not seem to this court, at any rate at the present day, that the same fundamental objection exists where a plea of not guilty is vicariously offered or tacitly conveyed. It is difficult to conceive what possible prejudice to an accused person could derive from such a procedure.

[...]

Insistence on an express plea of not guilty by the defendant himself is no longer a necessary safeguard of justice where that is the intended plea and where the ensuing proceedings are precisely what they would have been if the accused had himself made the plea in plain terms.⁷

27. The Court of Appeal therefore held that, on the facts, since the trial was not affected by the 'regrettable' omission of the arraignment, the verdict was not vitiated.

28. The same principles do not apply to guilty pleas. This is made clear by *Westminster City Council v Oadally*:

"No qualification of or deviation from the rule that a plea of guilty must come from him who acknowledges guilt is thus permissible. A departure from the rule in a criminal trial would therefore necessarily be a vitiating factor rendering the whole procedure void and ineffectual".⁸

29. If the defendant remains silent when asked to plead, a jury must be empanelled to determine whether he is mute of malice or mute by virtue of some disability. As a matter of practicality, in modern courts it will have been noticed prior to arraignment that the defendant is unable to speak. If the defendant is mute of malice, a not guilty plea must be entered.⁹ The same result follows if he declines to plead or does not answer directly.¹⁰

⁷ *Ibid.*, 378-9

⁸ [2017] EWHC 1092 (Admin), [2017] WLR(D) 349 [30]

⁹ Richardson, *Archbold* (2017), 2-228

¹⁰ Richardson, *Archbold* (2017), 4-177

II. Under what circumstances, if at all, can the defence counsel depart from the client's instructions as to the plea of not guilty and make statements to the decision maker (judge or jury) to the effect that the defendant is guilty?

30. Under no circumstances is this permissible: barristers must not put forward any case inconsistent with their client's instructions.¹¹ In *R v Clinton*, the Court of Appeal considered the question of departure from instructions:

The court was rightly concerned to emphasise that where counsel had made decisions in good faith after proper consideration of the competing arguments, and, where appropriate, after due discussion with his client, such decisions could not possibly be said to render a subsequent verdict unsafe or unsatisfactory. Particularly does this apply to the decision as to whether or not to call the defendant. Conversely and, we stress, exceptionally, where it is shown that the decision was taken either **in defiance of or without proper instructions**, or when all the promptings of reason and good sense pointed the other way, it may be open to an appellate court to set aside the verdict by reason of the terms of section 2(1)(a) of the Act [the provision empowering the court to review unsafe convictions]. It is probably less helpful to approach the problem via the somewhat semantic exercise of trying to assess the qualitative value of counsel's alleged ineptitude, but rather to seek to assess its effect on the trial and the verdict according to the terms of the subsection. [Emphasis added.]¹²

III. Where the defence counsel has made statements that run counter to the defendant's actual plea, what is the consequence (i.e., is the case automatically subject to mistrial or reversal)?

Criminal Procedure

31. Where the defence counsel has entered a plea of guilty on their client's behalf without their consent, the plea has no validity and the proceedings constitute a mistrial.¹³ The court will then have the discretion as to whether to quash the conviction, or to quash the conviction and to grant a writ of *venire de novo*, meaning the defendant will be tried again on the same charge.

¹¹ Blackstone's Criminal Practice, D12.104

¹² *R v Clinton* [1993] 1 WLR 1181 at 1187-1188

¹³ Blackstone's Criminal Practice, D12.72

32. Edmund Davies LJ makes this clear in *Ellis*:¹⁴

“... [G]reat mischief would ensue if a legal representative was generally regarded as entitled to plead on an accused’s behalf. It would open the door to dispute as to whether, for example, counsel had correctly understood and acted upon the instructions which the accused had given him, and, if a dispute of that kind arose, the consequential embarrassment and difficulty could be difficult in the extreme... We think that the only safe and proper course accordingly is to say ... that (apart from a few very special cases) it is an invariable requirement that the initial arraignment must be conducted between the clerk of the court and the accused person himself or herself directly.”¹⁵

33. He then goes on to outline the consequences of the declaration of a mistrial:

“In cases of mistrial, of which the present is an example, the appellate Court has two courses open to it. It may, without more, simply quash the conviction... or it may quash the conviction and order that the accused be tried on the original charge... The power to grant a writ of *venire de novo*, which was formerly exercised by the Court of Criminal Appeal, was preserved by section 1 (8) of the Criminal Appeal Act 1966, and by Schedule V to the 1968 Act and is now exercisable by this Court”¹⁶

34. Such an action by defence counsel would therefore make the subsequent conviction invalid and thus a mistrial. It would then be open to the appellate court to decide whether to quash the conviction, or to quash the conviction and grant a *venire de novo*.

35. Where there is some lesser departure from instructions, the test for the court is always whether the conviction is safe or not. It will be exceptional for a case to be overturned on the basis that counsel’s conduct at trial rendered a conviction unsafe.¹⁷

Human Rights

36. As the European Convention of Human Rights (ECHR) is directly enforceable in English and Welsh courts,¹⁸ it is useful to assess whether Article 6 – the right to a fair trial – includes a right to effective legal representation.

¹⁴ *Ellis* (1973) 57 Cr App R 571

¹⁵ *Ibid.* at 574-575.

¹⁶ *Ibid.* at 577.

¹⁷ *R v Clinton* [1993] 1 WLR 1181

¹⁸ Human Rights Act 1998.

37. Article 6(1) states:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”¹⁹

38. Article 6(3)(c) states:

“Everyone charged with a criminal offence has the following minimum rights:
...to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.”²⁰

39. The European Court of Human Rights considered whether significant shortcomings in the performance of the defence counsel could constitute a breach of Article 6(3) in *Kamasinski v Austria*.²¹ The court held that “a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes. It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed.”²² However, the Court also noted that Article 6(3)(c) requires national authorities to ‘intervene only if a failure to provide effective representation is manifest or sufficiently brought to their attention in some other way’.²³ It is therefore incumbent upon the court to take steps to ensure that defendants are not prejudiced by obviously incumbent or inappropriate advocacy.

¹⁹ Available at http://www.echr.coe.int/Documents/Convention_ENG.pdf (see page 9) - last accessed 30/10/17.

²⁰ *Ibid.*

²¹ [1989] ECHR 24

²² *Ibid.* at paragraph 65.

²³ *Ibid.* at paragraph 65.

IV. What are the professional ethical implications of a departure from the client's plea?

40. There are a number of professional ethical implications of a departure from a client's plea.
41. Barristers have a core duty to maintain their independence,²⁴ as well as to act in their client's best interests.²⁵ The duty to maintain independence means that a barrister is personally responsible for their own work, and must exercise their judgment how to manage a case notwithstanding the views of their client.²⁶ One such matter is whether to call the client to give evidence.²⁷ Barristers are officers of the court, not mere mouthpieces of their clients.²⁸
42. However, barristers also have a duty not to mislead the court.²⁹ It is the role of the barrister to 'present [their] clients case, and it is not for [them] to decide whether [their] client's case is to be believed.'³⁰ It amounts to misleading the court for the barrister to put forward a case which is inconsistent with their instructions.³¹
43. The combined effect of these principles is set out by Lord Judge CJ in *R v Farooqi*:³²

The question was raised whether Mr McNulty discussed his proposed forensic strategy with his client. However, whether he did or not, and even assuming that his client agreed or encouraged it, the client's "instructions" were irrelevant. The client does not conduct the case: that is the responsibility of the trial advocate. The client's instructions which bind the advocate and which form the basis for the defence case at trial, are his account of the relevant facts: in short, the instructions are what the client says happened and what he asserts the truth to be. These bind the advocate: he does not invent or suggest a different account of the facts which may provide the client with a better defence.

Something of a myth about the meaning of the client's "instructions" has developed. As we have said, the client does not conduct the case. The advocate is not the client's mouthpiece, obliged to conduct the case in accordance with whatever the client, or when the advocate is a barrister, the

²⁴ BSB Code of Conduct, Core Duty 4; available at https://www.barstandardsboard.org.uk/media/1826458/bsb_handbook_31_march_2017.pdf - last accessed 30/10/2017.

²⁵ BSB Code of Conduct, Core Duty 2

²⁶ BSB Code of Conduct, Rule 20

²⁷ *R v Clinton* [1993] 1 WLR 1181 at 1187

²⁸ *Rondel v Worsley* [1966] 3 ALL ER 657

²⁹ BSB gC4 (p. 24)

³⁰ *Ibid.* (see gC6).

³¹ Blake, *A Practical Approach to Effective Litigation* (OUP 2015) 24.38

³² [2013] EWCA Crim 1649, [107]

solicitor “instructs” him. In short, the advocate is bound to advance the defendant’s case on the basis that what his client tells him is the truth, but **save for well-established principles, like the personal responsibility of the defendant to enter his own plea**, and to make his own decision whether to give evidence, and perhaps whether a witness who appears to be able to give relevant admissible evidence favourable to the defendant should or should not be called, the advocate, and the advocate alone remains responsible for the forensic decisions and strategy. That is the foundation for the right to appear as an advocate, with the privileges and responsibilities of advocates and as an advocate, burdened with twin responsibilities, both to the client and to the court.

44. Where a barrister’s instructions are inconsistent with their duty to the court, they must return their instructions and withdraw from the case.³³

³³ BSB Code of Conduct, Rule 21

SCOTLAND

I. In your jurisdiction, is it the defendant or the defence counsel who is authorised to decide the plea in felony criminal proceedings?

45. It is for the defendant to decide whether they wish to plead guilty or not. It is usually the advocate who intimates how the defendant will plead. Where the plea is one of guilty, instructions to tender it must be in writing and signed by the defendant.³⁴
46. If the defendant remains silent, refuses to plead, makes an ambiguous plea, or seems to not understand what he is being asked to do, a not guilty plea must be entered.³⁵

II. Under what circumstances, if at all, can the defence counsel depart from the client's instructions as to the plea of not guilty and make statements to the decision maker (judge or jury) to the effect that the defendant is guilty?

47. Courts draw a distinction between a failure to present the defence instructed by the client, and the making of a judgment as to how that defence should be presented.³⁶ An appeal against sentence on the basis that counsel's judgment as to how to present the case was flawed is unlikely to be successful, save for where no competent advocate would have presented the case the way the advocate did.³⁷
48. However, where a defence is simply not presented, this may give rise to a miscarriage of justice. *Winter v HM Advocate* concerned a decision by the defence not to put forward an alibi instructed by the defendant, on the basis that there was no independent evidence that the alibi was true. The Court held, at [48]:

The question whether a decision of counsel is one of judgment for counsel alone, or is a decision relating to the accused's specific instructions may involve a fine distinction. There were certainly questions of judgment involved in this case, but we are satisfied that the failure of counsel to pursue

³⁴ Renton and Brown's *Criminal Procedure* 18-28.1

³⁵ Renton and Brown's *Criminal Procedure* 18-31

³⁶ *Anderson v HM Advocate* 1996 JC 29

³⁷ Renton and Brown's *Criminal Procedure* 29-22

the question of the possible dates on which the incident alleged in charge 2 occurred, if it occurred at all, and the question of the whereabouts of the appellant and of Davidson on those dates, went beyond mere tactical judgment and constituted a failure to put forward the case that the appellant wished to have put forward on his behalf (cf *Anderson v HM Adv*, *supra*, at 44F-G).

49. As this shows, an advocate must balance their duty to the court with their duty to their client. Their duty is framed by the Faculty of Advocates' Code of Conduct in the following way:

[T]he nature of the Advocate's office makes it clear that in the performance of his duty he must be entirely independent, and act according to his own discretion and judgment in the conduct of the cause for his client. His legal right is to conduct the cause without any regard to the wishes of his client, so long as his mandate is unrecalled, and what he does bona fide according to his own judgement will bind his client, and will not expose him to any action for what he has done, even if the client's interests are thereby prejudiced.³⁸

50. The duty of the solicitor is slightly differently framed as the 'agent' of the client.:

The general rule may fairly be stated to be that the agent must follow the instructions of his client. But the general rule is subject to several qualifications. The agent, of course, cannot be asked to follow the client's instructions beyond what is lawful and proper. For the agent, as well as the Counsel, owes a duty to the Court, and must conform himself to the rules and practice of the Court in the conduct of every suit. He is also bound by that unwritten law of his profession which embodies the honourable understanding of the individual Members as to their bearing and conduct towards each other. But above all in importance, as affecting the present question, is the undoubted special rule that when the conduct of a cause is in the hands of Counsel, the agent is bound to act according to his directions, and will not be answerable to his client for what he does bona fide in obedience to such directions.

51. Therefore, while lawyers have the right to make tactical decisions as to the conduct of the defence, they may not put a case which is inconsistent with their instructions on a question as fundamental as the identity of the perpetrator. If they feel they are unable to do this, for example because it would conflict with their duty not to mislead the court, they would have to cease to act for the defendant.³⁹

³⁸ FOA, *Guide to the Professional Conduct of Advocates*, 2017: 1.2.1 Available at <http://www.advocates.org.uk/media/1417/guide-to-conduct-fifth-edition.pdf> - last accessed 30/10/2017.

³⁹ FOA, 2017: 7 (see 1.2.3).

III. Where the defence counsel has made statements that run counter to the defendant's actual plea, what is the consequence (i.e., is the case automatically subject to mistrial or reversal)?

52. A plea of guilty that runs counter to the defendant's actual plea can be withdrawn before conviction and sentence have been recorded where it is obtained by trickery, coercion or mistake.⁴⁰ However, once the conviction and sentence have been recorded, the defendant's only remedy is to appeal to the High Court.⁴¹ Following the appeal, the court may quash the conviction, or quash it and order that the defendant be re-tried on the same charge, if it determines that the proceedings amounted to a miscarriage of justice.⁴²

53. Whilst appeals will only be allowed against wrongly entered guilty pleas in exceptional circumstances, a guilty plea entered by defence counsel against client instructions constitutes such a circumstance. This is made clear by Lord Just Clerk (Gill) in *Reedie v HM Advocate*:⁴³

“[A guilty plea] can be withdrawn only in exceptional circumstances (*Dirom v Howdle*): for example, where it is tendered by mistake (*MacGregor v MacNeill* 1975 JC 54) or **without the authority of the accused** (*Crossan v HM Advocate* 1996 SCCR 279).”⁴⁴

54. This was reaffirmed in *Duncan v HM Advocate*, where it was held that, in the absence of clear, knowing consent on the part of the defendant to a plea, that plea could be withdrawn.⁴⁵

55. In the context of advocates who go against their client's instructions as to the defence to be put, in *Anderson* it was held that:

It can only be said to have resulted in a miscarriage of justice if it has deprived the accused of his right to a fair trial. That can only be said to have occurred where the conduct was such that the accused's defence was not presented to the court. This may be because the accused was deprived of the opportunity to present his defence, or because his counsel or solicitor acted contrary to his

⁴⁰ *Tudhope v Campbell* 1979 JC 24; Renton and Brown's *Criminal Procedure*, 20-32

⁴¹ *MacNeill v McGregor*, 1975 J.C. 55; *MacGregor v MacNeill*, 1975 J.C. 57

⁴² Brown 29-22

⁴³ [2005] HCJAC 55

⁴⁴ *Ibid.* at paragraph 11.

⁴⁵ *Duncan v HM Advocate* [2009] HCJAC12

instructions as to the defence which he wished to be put or because of other conduct which had the effect that, because his defence was not presented to the court, a fair trial was denied to him.⁴⁶

56. In a situation where a defendant had been convicted on the basis of guilty plea entered without their consent, they would have to appeal to the High Court in order to have their conviction quashed, and they may then be re-tried on the same charge.

IV. What are the professional ethical implications of a departure from the client's plea?

57. The Faculty of Advocates' *Guide to the Professional Conduct of Advocates* provides that barristers have a professional obligation to tender pleas only in accordance with their instructions:⁴⁷

1.2.3 - An Advocate is however obliged to follow instructions as to basic matters such as the line of defence in criminal cases...

5.2.2 Where the Crown offers to accept a reduced or restricted plea, the defending Advocate has a duty to advise the accused of that offer and to obtain his instructions about it. Likewise, where any limited offer to plead is made by an accused, it should (if considered in law to be appropriate) be conveyed to the Crown for consideration, without delay. For the avoidance of doubt, it is prudent to obtain written instructions from the accused, through the instructing solicitor, for the tendering of any plea. In no circumstances should Counsel tender any plea on behalf of an accused unless instructions to do so have been obtained either through, or in the presence of, the instructing solicitor.

5.2.3 In advising as to the possible consequences of a plea of guilty, Counsel should refrain from making any positive forecast of the possible sentence beyond drawing the attention of the accused to the normally anticipated range of sentences in the circumstances of that particular case, and to any current case law indicating that a discount in sentence may be expected when a plea of guilty is tendered at an appropriate stage.

⁴⁶ *Anderson v HM Advocate* [2010] ScotHC HCJAC_9 at 44

⁴⁷ FOA, *Guide to the Professional Conduct of Advocates*

58. However, this must be balanced with the advocate's duty to act with independence.⁴⁸ It is not the role of the advocate to act simply as the client's mouthpiece: so long as their mandate is unrecalled, they have the right to conduct the litigation as they see fit.⁴⁹
59. Putting forward a plea contrary to client instructions falls within FOA Rule 1.2.3, and therefore infringes Scottish regulatory standards of professional conduct. Additionally, if counsel knows that the information they are putting forward is false, they will have infringed their statutory duty to act with integrity. They may have committed professional misconduct, defined by the Faculty of Advocates as "any conduct that is a departure from the standards of competent and responsible advocates and that would be regarded by such advocates as serious and reprehensible."⁵⁰
60. Advocates can be made the subject of a complaint to the Faculty of Advocates.

⁴⁸ *Anderson v HM Advocate*, at 34

⁴⁹ *Ibid.*

⁵⁰ FOA, 2015: 2. Available at <http://www.advocates.org.uk/media/1916/disciplinaryrules2015.pdf> - last accessed 30/10/17.

IRELAND

I. In your jurisdiction, is it the defendant or the defence counsel who is authorised to decide the plea in felony criminal proceedings?

61. On arraignment, it is the defendant who is asked how they plead in response to the charges read to them.⁵¹ The plea must come from the person acknowledging guilt – it cannot be entered by anyone other than the defendant, including defendant’s counsel.⁵²
62. Where the accused stands mute, the judge must determine whether he is mute of malice.⁵³ If so, a plea of not guilty must be entered. Likewise if there is a refusal to plead, or an ambiguous plea.⁵⁴

II. Under what circumstances, if at all, can the defence counsel depart from the client's instructions as to the plea of not guilty and make statements to the decision maker (judge or jury) to the effect that the defendant is guilty?

63. Although counsel are bound to act with independence and take their own view of the way to conduct a case, they are not entitled to disregard the instructions of the client and conduct the case in any way they wish.⁵⁵ If counsel is given instructions by the client which he considers unwise to follow, then the client should be informed that counsel may not be able to act further unless the instructions are changed.⁵⁶ In *People (DPP) v Flynn*, the Court of Criminal Appeal held:

Subject to the general obligation to follow his client’s instructions, counsel is, on the other hand, not entitled but bound to conduct the defence in accordance with his own professional judgment. He must conduct the defence competently in accordance with his instructions.⁵⁷

64. In *People (DPP) v McDonagh*, it was remarked that defiance of proper instructions was not acceptable and may provide a basis for the setting aside of the conviction.⁵⁸

⁵¹ Thomas O’Malley, *The Criminal Process* (Round Hall 2009), 471.

⁵² *Walsh on Criminal Procedure* (Thomson Reuters 2016) 1209

⁵³ *Ibid.*, 19-06 – 19-07

⁵⁴ *Ibid.*, 19-113

⁵⁵ *R v McLoughlin* [1985] 1 N.Z.L.R. 106 at 107; *Sankar v State of Trinidad and Tobago* [1995] 1 W.L.R. 194 at 200, cited in O’Malley (n 1), 247.

⁵⁶ *Ibid.*

⁵⁷ Unreported, Court of Criminal Appeal, July 30, 2003. Cited in *Ibid.*, 248.

⁵⁸ [2001] 3 I. R. 411 at 427

III. Where the defence counsel has made statements that run counter to the defendant's actual plea, what is the consequence (i.e., is the case automatically subject to mistrial or reversal)?

65. Where a barrister purports to plead guilty for a defendant, that plea is a nullity and will result in the conviction being quashed on appeal.⁵⁹

66. The consequences of a substantive departure from the client's instructions as to their guilt will depend on whether the conduct of the defence counsel has caused a miscarriage of justice. The appeal court will set aside the conviction in such circumstances. In *People (DPP) v McDonagh*, the Court of Criminal Appeal held:

“A criminal trial, in which the defence of the accused was conducted with such a degree of incompetence or disregard of the accused's interests as to create a serious risk of a miscarriage of justice, could not be regarded as a trial ‘in due course of law’. That would apply as much to steps taken by the accused's legal advisors prior to trial as it would to the conduct of the trial itself.”⁶⁰

67. The Court also noted the approach of the English Court of Appeal in *R v Clinton*,⁶¹ where it was said that the circumstances in which a court is entitled to set aside a verdict on this ground would be extremely rare. The Clinton approach to instructions is set out in the England and Wales section of this report. While not necessarily agreeing with the very high standard for review set by English courts, the Court accepted the general principle that intervention should be rare, and the appellate court should not intervene just because counsel may have been mistaken in his view of the law.⁶² However, the Court clearly foresaw that defiance of instructions would be a case where intervention and the setting aside of the verdict would be appropriate.⁶³

⁵⁹ *Walsb on Criminal Procedure* (Thomson Reuters 2016) 1209

⁶⁰ [2001] 3 I. R. 411 at 425 *per* Keane C.J.

⁶¹ [1993] 1 W.L.R. 1181.

⁶² O'Malley (n 1), 248 n 117.

⁶³ [2001] 3 I. R. 411 at 426

IV. What are the professional ethical implications of a departure from the client's plea?

68. It will be a breach of professional ethics to concede the guilt of a client who maintains their innocence. Section 10.11 of the Code of Conduct for the Bar of Ireland provides that:

10.11: So long as an accused maintains his or her innocence a Barrister's duty lies in advising the accused on the law appropriate to his or her case and the conduct thereof. Barristers shall not put pressure on the accused to tender a plea of guilty whether to a restricted charge or not, so long as the accused maintains their innocence. Barristers should always consider very carefully whether it is proper, in the interests of justice, to accept instructions to enter a plea of guilty. They should ensure that the accused is fully aware of all of the consequences of such a plea and they should insist that the instructions to plead guilty are recorded by their instructing solicitor in writing and in their presence. Where the accused is pleading guilty Barristers should not accept instructions to tender a plea in mitigation on a basis inconsistent with the plea of guilty.

69. Where the client maintains their innocence, defence lawyers are obliged to attempt to expose weaknesses in the prosecution case.⁶⁴ Section 10.14 provides that:

Barristers are under a duty to defend any accused person on whose behalf they are instructed irrespective of any belief or opinion they may have formed as to the guilt or innocence of that person.

70. The obligation to act in the client's best interests⁶⁵ must be balanced with the obligation to be individually responsible for their conduct⁶⁶ and to serve the administration of justice.⁶⁷ They are also required not to compromise their independence, Section 2.8 stating that:

The many duties to which Barristers are subject require their absolute independence, free from all other influence, especially such as may arise from their personal interests or external pressure. Barristers must therefore avoid any impairment of their independence and be careful not to compromise their professional standards in order to please their client, the Court or third parties. This independence is necessary in non-contentious matters as well as in litigation.

⁶⁴ O'Malley at 14.48

⁶⁵ *Code of Conduct for the Bar of Ireland* s2.6

⁶⁶ *Code of Conduct for the Bar of Ireland* s2.3(h)

⁶⁷ *Code of Conduct for the Bar of Ireland* s2.5

71. Therefore, barristers are not obliged to follow every instruction of their clients, and must not do so if it would compromise their professional judgment or ethical obligations. However, a barrister entering a guilty plea or conceding guilt against their client's instructions will be acting contrary to their professional ethical obligations: that is a matter for the client alone.⁶⁸

⁶⁸ *Code of Conduct for the Bar of Ireland* s10.12

CANADA

I. In your jurisdiction, is it the defendant or the defence counsel who is authorised to decide the plea in felony criminal proceedings?

72. In accordance with s. 606 of the Criminal Code,⁶⁹ the defendant decides the plea in all cases. In practice, where the defendant is a natural person, it is the defendant himself or herself who speaks.
73. Counsel will advise the judge whether there has been compliance with s. 606 if there is a guilty plea, and this will usually be accepted by the judge, who will not make further enquiries.⁷⁰

S.606

(1) An accused who is called on to plead may plead guilty or not guilty, or the special pleas authorized by this Part and no others.

Conditions for accepting guilty plea

(1.1) A court may accept a plea of guilty only if it is satisfied that the accused

(a) is making the plea voluntarily; and

(b) understands

(i) that the plea is an admission of the essential elements of the offence,

(ii) the nature and consequences of the plea, and

(iii) that the court is not bound by any agreement made between the accused and the prosecutor.

Validity of plea

(1.2) The failure of the court to fully inquire whether the conditions set out in subsection (1.1) are met does not affect the validity of the plea.

Refusal to plead

(2) Where an accused refuses to plead or does not answer directly, the court shall order the clerk of the court to enter a plea of not guilty.

⁶⁹ RSC 1985, c C-46

⁷⁰ *R v Moser* (2002) 163 CCC (3d) 286

74. To be considered valid, there are minimum sufficient characteristics of the guilty plea.⁷¹ It must be unequivocal,⁷² informed⁷³ and voluntary. A plea should not be taken from counsel when the defendant is present.⁷⁴

II. Under what circumstances, if at all, can the defence counsel depart from the client's instructions as to the plea of not guilty and make statements to the decision maker (judge or jury) to the effect that the defendant is guilty?

75. Generally, Canadian courts follow the *Strickland* approach.⁷⁵ This means that counsel has a right to make tactical trial decisions. In a case where defence counsel decided unilaterally and against the defendant's express instructions to introduce a piece of evidence, the Supreme Court held that the counsel had implied authority to act in what he determined to be the best interests of his client.⁷⁶

76. There are certain fundamental decisions which the barrister may not make without client instructions. In *R v Swain*,⁷⁷ the Supreme Court set out some examples of such decisions, as well as the rationale for this:

The appellant argues that it is a principle of fundamental justice that an accused person be able to participate in a meaningful way in his or her defence and to make fundamental decisions about the conduct of his or her defence -- such as waiving the defence of insanity. (I pause here to note that I will use the term "defence" in the broad sense of "any answer which defeats a criminal charge"; see my reasons for judgment in *R. v. Chaulk*, [1990 CanLII 34 \(SCC\)](#), [1990] 3 S.C.R. 1303, at p. 1318.) It is argued that the functioning of the adversarial system is premised on the autonomy of an accused to make fundamental decisions about his or her defence which require certain consequences and risks to be weighed. The appellant's argument is reflected in the words of Stewart J. in *Faretta v. California*, 422 U.S. 806 (Calif. C.A., 1975), at p. 834:

The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct

⁷¹ *Ibid.*

⁷² The defendant's personal entry of the plea tends towards such a conclusion: *Regina v Eastmond* [2001] OJ No 4353 (CA).

⁷³ *R v T(R)* (1992) 17 CR (4th) 247 (Ont. CA)

⁷⁴ *Mellilo* [1963] 3 CCC 95 (Ont CA);

⁷⁵ 466 U.S. 668 (1984)

⁷⁶ *R v B (GD)* 2000 1 SCR 520

⁷⁷ [1991] 1 SCR 933, 1991 CanLII 104 (SCC)

his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law".

This Court has, on numerous occasions, acknowledged that the basic principles underlying our legal system are built on respect for the autonomy and intrinsic value of all individuals. In *Re B.C. Motor Vehicle Act*, *supra*, at p. 503, I referred to the principles of fundamental justice as:

...essential elements of a system for the administration of justice which is founded upon a belief in "the dignity and worth of the human person" (preamble to the *Canadian Bill of Rights*, R.S.C. 1970, App. III) and on "the rule of law" (preamble to the [Canadian Charter of Rights and Freedoms](#)).

Similarly, in *R. v. Morgentaler*, [1988 CanLII 90 \(SCC\)](#), [1988] 1 S.C.R. 30, Wilson J. stated, at p. 171:

In my opinion, the respect for individual decision-making in matters of fundamental personal importance reflected in the American jurisprudence also informs the [Canadian Charter](#). Indeed, as the Chief Justice pointed out in *R. v. Big M Drug Mart Ltd.*, beliefs about human worth and dignity "are the *sine qua non* of the political tradition underlying the [Charter](#)".

This Court has also recognized the constructs of the adversarial system as a fundamental part of our legal system. In *Borowski v. Canada (Attorney General)*, [1989 CanLII 123 \(SCC\)](#), [1989] 1 S.C.R. 342, Sopinka J., in analyzing the doctrine of mootness, stated, at pp. 358-59:

The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome.

Similarly, in *R. v. Hebert*, [1990 CanLII 118 \(SCC\)](#), [1990] 2 S.C.R. 151, at p. 195, Sopinka J. referred to "our accusatorial and adversarial system of criminal justice". The Ontario Court of Appeal has also acknowledged the adversarial process as an integral part of our system of justice. In *Phillips v. Ford Motor Co. of Canada Ltd.* (1971), [1971 CanLII 389 \(ON CA\)](#), 18 D.L.R. (3d) 641, Evans J.A. stated, at p. 661:

A trial is not intended to be a scientific exploration with the presiding Judge assuming the role of a research director; it is a forum established for the purpose of providing justice for the litigants.

Professor Weiler, in "Two Models of Judicial Decision-Making" (1968), 46 *Can. Bar Rev.* 406, at p. 412, has characterized the adversarial process as follows:

An adversary process is one which satisfies, more or less, this factual description: as a prelude to the dispute being solved, the interested parties have the opportunity of adducing evidence (or proof) and making arguments to a disinterested and impartial arbiter who decides the case on the basis of this evidence and these arguments. This is by contrast with the public processes of decision by "legitimated power" and "mediation-agreement", where the guaranteed private modes of participation are voting and negotiation respectively. Adjudication is distinctive because it guarantees to each of the parties who are affected the right to prepare for themselves the representations on the basis of which their dispute is to be resolved.

Given that the principles of fundamental justice contemplate an accusatorial and adversarial system of criminal justice which is founded on respect for the autonomy and dignity of human beings, it seems clear to me that the principles of fundamental justice must also require that an accused person have the right to control his or her own defence. The appellant has properly pointed out that an accused will not be in the position of choosing whether to raise the defence of insanity at his or her trial unless he or she is fit to stand trial. If at any time before verdict there is a question as to the accused's ability to conduct his or her defence, the trial judge may direct that the issue of fitness to stand trial be tried before matters proceed further (see [Criminal Code, s. 543](#), now [s. 615](#)). Thus, an accused who has not been found unfit to stand trial must be considered capable of conducting his or her own defence.

An accused person has control over the decision of whether to have counsel, whether to testify on his or her own behalf, and what witnesses to call. This is a reflection of our society's traditional respect for individual autonomy within an adversarial system. In *R. v. Chaulk, supra*, I indicated that the insanity defence is best characterized as an exemption to criminal liability which is based on an incapacity for criminal intent. In my view, the decision whether or not to raise this exemption as a means of negating criminal culpability is part and parcel of the conduct of an accused's overall defence.

77. In *R v Szostak*, it was held that a decision whether or not to plead not criminally responsible by reason of mental disorder must be made by the client:

I should begin by saying that I am satisfied that where, as here, the accused is fit, counsel is not entitled to advance the NCRMD defence against the wishes of the accused. I would go further and hold that counsel must have instructions before advancing the NCRMD defence. This control over

the defence is a necessary consequence of the values of dignity and autonomy that underlie our adversarial system.⁷⁸

78. It seems from these decisions that questions of whether to concede criminal intent (or, presumably, any other element of the offence) fall within that special set of fundamental decisions which the lawyer may not make without instructions.
79. Very recent case law has raised a similar issue to that in *McCoy v Louisiana*. In *R v Seipp*,⁷⁹ the defendant pleaded not guilty to a number of offences. In closing argument, his counsel conceded his guilt on one of the counts, without being instructed to do so. The concession arose from a mistake regarding the law: the lawyer in question told the appeal court that had not been mistaken, he would have not made the concession. The defendant appealed, arguing that this infringed his right to effective assistance of counsel.
80. The British Columbia Court of Appeal took the view that, even if Mr Seipp had been able to put forward the version of events he wanted to, he would nonetheless have been guilty of the offence, and so the appeal was dismissed. However, in response to an argument that counsel should have sought instructions before conceding the point, the court, in very perfunctory form, held that:
- Finally, Mr. Seipp submits that counsel failed to obtain his instructions before admitting the elements of the offence. In these circumstances, conceding an offence has been proved after hearing the evidence is within the ambit of counsel; it is a legal decision. It is not on the same footing as entering a guilty plea to an offence, which would require instructions. I would not give effect to this argument.⁸⁰
81. The Supreme Court granted permission to appeal the decision of the Court of Appeal on 8th June 2017,⁸¹ with a hearing tentatively set for 16th January 2018.⁸²

⁷⁸ 2012 ONCA 503 (CanLII) [\[77\]](#)

⁷⁹ 2017 BCCA 54

⁸⁰ *Ibid.*, [51]

⁸¹ 2017 CanLII 35112 (SCC)

⁸² <http://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37513>

III. Where the defence counsel has made statements that run counter to the defendant's actual plea, what is the consequence (i.e., is the case automatically subject to mistrial or reversal)?

82. The *Strickland* approach has a 'prejudice' and a 'performance' component: the question is not only how effective counsel's assistance was, but also whether there was any prejudice suffered by the appellant. This means that an appeal against conviction will only be successful if it can be shown that a miscarriage of justice resulted from counsel's incompetence or disobedience to instructions.
83. The power to set aside verdicts on the basis that they amount to a miscarriage of justice is contained in section 686 of the Criminal Code.

S. 686 (1)

On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(a) may allow the appeal where it is of the opinion that

- (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
- (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
- (iii) on any ground there was a miscarriage of justice;

(b) may dismiss the appeal where

- (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,
- (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a),
- (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or
- (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and

the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

(c) may refuse to allow the appeal where it is of the opinion that the trial court arrived at a wrong conclusion respecting the effect of a special verdict, may order the conclusion to be recorded that appears to the court to be required by the verdict and may pass a sentence that is warranted in law in substitution for the sentence passed by the trial court; or

(d) may set aside a conviction and find the appellant unfit to stand trial or not criminally responsible on account of mental disorder and may exercise any of the powers of the trial court conferred by or referred to in section 672.45 in any manner deemed appropriate to the court of appeal in the circumstances.

IV. What are the professional ethical implications of a departure from the client's plea?

84. The professional conduct of lawyers (meaning here lawyers qualified to practice law in a Canadian province or territory) is governed by Rules of Professional Conduct ("Codes of Professional Conduct" or "Codes") adopted by the law societies of the provinces or territories under enabling provincial or territorial legislation. The Codes are all now based on a model code created by the Federation of Law Societies of Canada. Each province or territory has adopted its own version.
85. On the question of whether instructions are required for a guilty plea, by way of example, the rules in British Columbia provide that:

Agreement on guilty plea

5.1-7 Before a charge is laid or at any time after a charge is laid, a lawyer for an accused or potential accused may discuss with the prosecutor the possible disposition of the case, unless the client instructs otherwise.

5.1-8 A lawyer for an accused or potential accused may enter into an agreement with the prosecutor about a guilty plea if, following investigation,

- (a) the lawyer advises his or her client about the prospects for an acquittal or finding of guilt;
- (b) the lawyer advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea;

- (c) the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged; and
- (d) the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea.

86. This is part and parcel of a lawyer's duty to act in their client's best interests. In *R. v. Anthony-Cook*, the Court stated:

Defence counsel is required to act in the accused's best interests, which includes ensuring that the accused's plea is voluntary and informed (see, for example, Law Society of British Columbia, Code of Professional Conduct for British Columbia (online), rule 5.1-8). ...⁸³

87. However, this must be seen in the context of professional independence. While the lawyer should not depart, in accordance with the rules of professional ethics set out above, from instructions that the client is not guilty, the importance of not simply being a 'mouthpiece' for the client was set out in *R v Samra*:⁸⁴

In my view, the trial judge properly dealt with the appellant's motion at that time and on other occasions when it was raised. He was presented with a difficult and unusual situation. It was apparent that Mr. Hamalengwa and another lawyer who also became the appellant's legal advisor, Mr. Bonzi-Simpson, were not retained as, and were not acting as, defence counsel. Although they gave advice to the appellant and made submissions to the court on legal issues, they were not exercising any independent judgment. It seems that they had retained the appellant's confidence by doing his bidding. I make no comment on whether they or any counsel should accept such a limited retainer. I merely point out that such is not the role of properly retained defence counsel.

There is an erroneous premise underlying the appellant's submissions in this case -- that defence counsel is but a mouthpiece for his client. His argument must be that counsel is bound to make submissions no matter how foolish or ill-advised or contrary to established legal principle and doctrine, provided that is what the client desires. It is upon this premise that the appellant builds his argument that since Mr. Black made submissions in his role as amicus curiae with which the appellant disagreed, the trial judge erred in failing to discharge him.

⁸³ [2016] 2 SCR 204, 2016 SCC 43 (CanLII), [44]

⁸⁴ 1998 CanLII 7174 (ON CA)

The mere fact that Mr. Black made legal submissions to the trial judge that did not coincide with what the appellant desired did not place Mr. Black in a disqualifying conflict of interest nor compromise the fairness of the trial. G. Arthur Martin, Q.C., in an address to 'The Advocates' Society entitled "The Role and Responsibility of the Defence Advocate" and which is reported at (1970) 12 Crim. L.Q. 376 at p. 382, gave this explanation of the role of defence counsel:

The defence counsel is not the alter ego of the client. The function of defence counsel is to provide professional assistance and advice. He must, accordingly, exercise his professional skill and judgment in the conduct of the case and not allow himself to be a mere mouthpiece for the client.

Arthur Maloney Q.C. took a similar view in "The Role of the Independent Bar", 1979 Law Society of Upper Canada Special Lectures 49 at pp. 61-62. After stressing the importance of the bar's independence from government, Mr. Maloney turned to the relationship with the client:

Of at least equal importance is the lawyer's duty to remain independent of his own client. It is clear that there are some decisions that the client must make -- such as whom to hire and what to plead. However, a lawyer must never allow himself to become a mere mouthpiece of his client.

Had Mr. Black remained as counsel for the appellant he would have been entitled to make the legal submissions that he did, even over the objections of his client, and his conduct would not have compromised the fairness of the trial nor placed him in a conflict of interest. The fact that he made such submissions in his role as amicus similarly could not affect the fairness of the trial. The fact that the appellant had lost confidence in Mr. Black because his submissions did not coincide with the appellant's wishes did not prevent Mr. Black from continuing to act as amicus curiae.

88. The duty to the court also requires that barristers not mislead the court: they may put forward any defence not known to be false or fraudulent. This becomes challenging in the context of putting an affirmative case: even if they find the client's case difficult to believe, lawyers should remember that it is the court and not they that decide the credibility of their client's story.⁸⁵ Nonetheless, this should not disturb the choice of plea, which is for the defendant alone: a plea of not guilty and the testing of Crown evidence without putting forward an alternative case is perfectly permissible.⁸⁶

⁸⁵ Hutchinson, *Legal Ethics and Professional Responsibility* (Irwin Law 2006), 167

⁸⁶ *Ibid.*, 168

89. On balance, the result of these principles is that, while lawyers can override the instructions of client's regarding the general strategic approach, they cannot do so on fundamental questions such as plea. In such cases, their duty is to advise, but not to dictate, the course of action.⁸⁷ A lawyer should never waive or abandon a client's legal rights without informed consent.⁸⁸

⁸⁷ *Ibid.*, 102

⁸⁸ *Ibid.*, 254

QUEENSLAND (AUSTRALIA)

I. In your jurisdiction, is it the defendant or the defence counsel who is authorised to decide the plea in felony criminal proceedings?

90. A general plea (that is, a plea of either guilty or not guilty) must be entered personally by the defendant person and not by their counsel or anyone else acting on their behalf in Queensland. The right to personally plead is given statutory force under sections 597C(1), 598(1) and 598(2) of the Criminal Code Act 1899 (Qld) and section 145 of the Justices Act 1886 (Qld) (“the Plea Provisions”).
91. The choice is always for the defendant and the defendant alone, as is the decision whether or not to give evidence.⁸⁹

The Criminal Code Act 1899 (Qld) provides:

597C Accused person to be called on to plead to indictment

On the presentation of the indictment or at any later time, the accused person is to be informed in open court of the offence with which he or she is charged, as set forth in the indictment, and is to be called upon to plead to the indictment, and to say whether he or she is guilty or not guilty of the charge.

...

598 Pleas

If the accused person does not apply to quash the indictment or move for a separate trial of any count or counts of the indictment, the person must either plead to it, or demur to it on the ground that it does not disclose any offence cognisable by the court.

If the accused person pleads, the person may plead either—

that the person is guilty of the offence charged in the indictment, or, with the consent of the Crown, of any other offence of which the person might be convicted upon the indictment; or

that the person is not guilty; or

that the person has already been convicted upon an indictment on which the person might have been convicted of the offence with which the person is charged, or has already been convicted of an offence of which the person might be convicted upon the indictment; or

that the person has already been acquitted upon an indictment on which the person might have been convicted of the offence with which the person is charged, or has already been acquitted upon indictment of an offence of which the person might be convicted upon the indictment; or

that the person has already been tried and convicted or acquitted of an offence committed or alleged to be committed under such circumstances that the person can not under the provisions of this

⁸⁹ Dal Pont, *Lawyers' Professional Responsibility* (5th ed.) (Thomson Reuters 2013), 608

Code be tried for the offence charged in the indictment; or (f) that the person has received the Royal pardon for the offence charged in the indictment; or that the court has no jurisdiction to try the person for the offence.

...

92. For criminal matters being heard summarily in the Magistrates Court, the Justices Act 1886 (Qld) relevantly provides:

145 Defendant to be asked to plead

When the defendant is present at the hearing the substance of the complaint shall be stated to the defendant and the defendant shall be asked how he or she pleads.

...

93. Good practice is always to require the defendant to plead personally, even in cases where it might be argued that there was a waiver of s145. As the court held in *Commissioner of Police Service v Magistrate Spencer*:⁹⁰

Additionally, the fact Mr Nicolaou was legally represented did not alter the requirements of s 145. Section 144 certainly contemplates the court may hear and determine a complaint if the parties appear either personally or by their lawyers. However, s 145 applies when the defendant is present and refers to the defendant, not the defendant's lawyer. Section 145 does not contemplate that a defendant's legal representative can substitute for the defendant to achieve compliance with it. Rather, it requires the participation of a defendant, at least to the extent of the defendant at the hearing being told of the substance of the complaint, being asked how he or she pleads to it and he or she then pleading guilty to it.

94. In circumstances where the defendant stays silent when asked to plead, section 601(1) of the Criminal Code Act 1899 (Qld) provides that a not guilty plea may be entered on the defendant's behalf by the court:

601 Standing mute

If an accused person, on being called upon to plead to an indictment, will not plead or answer directly to the indictment, the court may, if it thinks fit, order a plea of not guilty to be entered on behalf of the accused person.

⁹⁰ [2013] QSC 202, [46]

95. Further, if the court is not satisfied the defendant understands the nature of the proceedings and the implications of that plea, the court may reject the guilty plea and enter a not guilty plea instead. This rule was confirmed by the High Court of Australia in *Maxwell v The Queen*⁹¹ and by the Queensland Court of Appeal in *R v GV*⁹² where it was held:

... a plea of guilty which is not in plain, unambiguous and unmistakeable terms must be treated as a plea of not guilty, and further that where, on a plea of guilty, a defendant so qualifies the plea by giving an explanation in relation to the matter with which he has been charged, he should be taken to be pleading not guilty.⁹³

II. Under what circumstances, if at all, can the defence counsel depart from the client's instructions as to the plea of not guilty and make statements to the decision maker (judge or jury) to the effect that the defendant is guilty?

96. In Queensland, a defence counsel cannot depart from the client's instructions as to the plea of not guilty and make statements to the decision maker to the effect that the defendant is guilty. The defendant's right to personally plead outlined in Part I of this report has statutory force and must be complied with. Counsel may not deviate from the client's instructions when it comes to whether they will plead guilty, or whether they will give evidence⁹⁴

97. However, this must be seen against the backdrop of the barrister's general control of the conduct of the case.⁹⁵ In *R v Vaughn*, the appellant contended that his trial had been unfair because his counsel failed to challenge in cross-examination evidence which he had instructed him to. The court found that the lawyer had conducted the hearing competently and went on to say:

If defence counsel did ignore the appellant's instructions, the probabilities are that the appellant was well served by his counsel's disobedience.⁹⁶

98. The protections of the defendant's right to choose their plea, and the mechanisms in place for ensuring that guilty pleas are entered knowingly, following the principles in *Spencer*, do not usually

⁹¹ 184 CLR 501, 511

⁹² [2006] QCA 394

⁹³ *R v GV* [2006] QCA 394, [37]

⁹⁴ Dal Pont, *Lawyers' Professional Responsibility* (5th ed.) (Thomson Reuters 2013), 608

⁹⁵ *Ibid.*, 540

⁹⁶ [2011] QCA 224 at [31]

allow for circumstances to arise where a defendant's counsel could make statements to the effect that the defendant is guilty against a defendant's instructions.

III. Where the defence counsel has made statements that run counter to the defendant's actual plea, what is the consequence (i.e., is the case automatically subject to mistrial or reversal)?

99. In Queensland, the consequences of non-compliance with the Plea Provisions depend on the circumstances of the case and whether non-compliance leads to a fundamental defect in the proceedings. Non-compliance itself does not automatically render a mistrial.

100. In *Todunter v Zacka; Ex Parte Zacka*⁹⁷, following non-compliance with section 145 of the Justices Act 1899 (Qld) because a plea had not been taken prior to a summary trial, the Full Court of the Supreme Court of Queensland held that there had been no fundamental defect in procedure that was fatal to the validity of the proceedings. In that case, it was significant that the trial had progressed as if the defendant had pleaded not guilty.

101. Applying *Todhunter*,⁹⁸ the Queensland Supreme Court in *Commissioner of Police Service v Magistrate Spencer and Ors*⁹⁹ further explained that:

The mischief which s 145 is most obviously directed at avoiding is wrongful conviction resulting from a misunderstanding of the substance of the charge and whether the defendant intends to plead guilty or not guilty to it.¹⁰⁰

102. In *Spencer*¹⁰¹, the defendant's lawyer entered a guilty plea on the defendant's behalf. While it was held that the Plea Provisions had not been complied with, it did not constitute a fundamental defect in procedure that was fatal to the validity of the proceedings because:

...there was no misunderstanding or injustice occasioned or obscured by the non-compliance with s 145. The matter proceeded on the obvious understanding that Mr Nicolaou pleaded guilty to the charges he was facing. There was no suggestion later in the hearing or in the course of argument

⁹⁷ [1965] Qd R 515.

⁹⁸ [1965] Qd R 515.

⁹⁹ [2013] QSC 202.

¹⁰⁰ *Commissioner of Police Service v Magistrate Spencer and Ors* [2013] QSC 202, [11].

¹⁰¹ [2013] QSC 202

on the reopening that he in fact lacked understanding of the substance of the charges he was facing or lacked the intention that he be dealt with as having pleaded guilty to them. In short, there was no concern that Mr Nicolaou had been wrongly convicted.¹⁰²

103. However, the court made it clear that waiver of s145 by a defendant should not be encouraged, and that although nullity was not an inevitable consequence of non-compliance, lawyers and magistrates should still comply with it.¹⁰³ *Spencer* makes it very clear that best practice will be to put the charges to the defendant rather than have him speak through a lawyer:

Despite repeated judicial emphasis of the desirability of compliance with s145, a perception may linger that in the busy jurisdictions of the Magistrates Court that time consuming compliance with s145 is less important where defendants are legally represented because there is little risk of the misunderstanding and associated injustice which s 145 is obviously directed at minimising. However, legal representatives are not immune from misunderstanding and in any event the statutory procedure set out in s 145 does not discern between whether or not a defendant is legally represented. The safest and correct course, even where defendants are legally represented, is to comply with the statutory procedure.¹⁰⁴

104. Pleas may be withdrawn until they are formally accepted, or, if a formal procedure is not followed, until sentence is passed.¹⁰⁵

IV. What are the professional ethical implications of a departure from the client's plea?

105. Queensland defence counsel are required to comply with the Barristers' Conduct Rules, made pursuant to the Legal Profession Act 2007 (Qld). Those rules contain a number of relevant ethical principles.

106. Defence counsel have obligations to "promote and protect fearlessly and by all proper and lawful means the client's best interests to the best of the barrister's skill and diligence..."¹⁰⁶, to "assist the client to understand the issues in the case and the client's possible rights and obligations, sufficiently to permit the client to give proper instructions, including instructions in connection

¹⁰² *Commissioner of Police Service v Magistrate Spencer and Ors* [2013] QSC 202, [14].

¹⁰³ *Spencer*, 56

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*, 62

¹⁰⁶ Barristers' Conduct Rules 2011, r 37.

with any compromise of the case,”¹⁰⁷ and to advise a defendant “about any law, procedure or practice which in substance holds out the prospect of some advantage (including diminution of penalty), if the client pleads guilty or authorises other steps towards reducing the issues, time, cost or distress involved in the proceedings.”¹⁰⁸

107. Counsel also have a duty to “not deceive or knowingly or recklessly mislead the court.”¹⁰⁹ Where their instructions from their client are that some essential element of the offence is not present, it is for the court and not for them to determine whether that is true or not. Although this is not explicitly stated in the Queensland rules, it is an integral part of defence lawyering in Australia.¹¹⁰

108. In addition, barristers must remain independent such that the counsel “must not act as the mere mouthpiece of the client or of the instructing solicitor and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client’s and the instructing solicitor’s wishes where practicable.”¹¹¹

109. Generally, barrister’s duty to their clients is subordinate to their duty to the court and to the administration of justice.¹¹²

110. Accordingly, a balance must be struck between the advocate’s duties to the court and duties to be independent, and the promotion of the client’s best interests, while not misleading the court. Given the importance of the plea to the client, and the personal nature of the decision, it is submitted that failing to follow a client’s instructions in relation to a plea could amount to unsatisfactory professional conduct or professional misconduct under Chapter 4 of the Legal Profession Act 2007 (Qld).

¹⁰⁷ Barristers’ Conduct Rules 2011, r 39.

¹⁰⁸ Barristers’ Conduct Rules 2011, r 40

¹⁰⁹ Barristers’ Conduct Rules 2011, r 26

¹¹⁰ Dal Pont, *Lawyers’ Professional Responsibility* (5th ed.) (Thomson Reuters 2013), 604

¹¹¹ Barristers’ Conduct Rules 2011, r 41

¹¹² Baron and Corbin, *Ethics and Legal Professionalism in Australia* (OUP 2014), 101

NEW ZEALAND

I. In your jurisdiction, is it the defendant or the defence counsel who is authorised to decide the plea in felony criminal proceedings?

111. The process of pleading is governed by the Criminal Procedure Act 2011, which provides that, absent special circumstances, it is the defendant who must plead. Where they refuse to do so, a plea of not guilty must be entered on their behalf. If they are not represented, the court must satisfy itself that the defendant understands the plea and their rights.

37 Defendant may enter plea

- (1) At any time before the court requires a plea under [section 39](#) the court may receive a plea from the defendant.
- (2) The defendant may plead either guilty or not guilty, or enter a special plea.
- (3) If the defendant is not represented by a lawyer,—
 - (a) the court must be satisfied that the defendant—
 - (i) has been informed of his or her rights to legal representation, including the right to apply for legal aid under the [Legal Services Act 2011](#); and
 - (ii) has fully understood those rights; and
 - (iii) has had a reasonable opportunity to exercise those rights; and
 - (b) the substance of the charge must be read to the defendant.
- (4) A defendant who is represented by a lawyer may plead not guilty or enter a special plea by filing a notice in court.
- (5) The Registrar must notify the prosecutor if a notice is received under subsection (4) from the defendant.
- (6) If the defendant is not before the court but indicates that he or she intends to plead guilty, the defendant must be brought before the court to enter a plea.
- (7) A Registrar may exercise the power of the court under this section to receive a not guilty plea from a defendant charged with a category 1, 2, or 3 offence.

39 Requirement for defendant to plead

- (1) If the defendant has not pleaded to a charge under [section 37](#) or [38](#), the court may require a defendant to plead if the court is satisfied that the defendant has had initial disclosure in accordance with [section 12\(1\)](#) of the Criminal Disclosure Act 2008.
- (2) The defendant may plead either guilty or not guilty, or enter a special plea.
- (3) If the defendant is not represented by a lawyer,—

- (a) the court must be satisfied that the defendant—
 - (i) has been informed of his or her rights to legal representation, including the right to apply for legal aid under the [Legal Services Act 2011](#); and
 - (ii) has fully understood those rights; and
 - (iii) has had a reasonable opportunity to exercise those rights; and
 - (b) the substance of the charge must be read to the defendant.
- (4) A Registrar may exercise the power of the court under this section to require a plea from a defendant charged with a category 1, 2, or 3 offence.
- (5) If the defendant indicates to a Registrar exercising the powers of the court in accordance with subsection (4) that he or she intends to plead guilty, the defendant must be brought before the court to enter a plea.

41 Defendant who refuses or fails to plead under section 39 or 49(3)

If the defendant refuses to plead, or fails to plead, when required to do so under [section 39](#) or [49\(3\)](#), the defendant is deemed to have pleaded not guilty and the proceedings must be continued accordingly.

II. Under what circumstances, if at all, can the defence counsel depart from the client's instructions as to the plea of not guilty and make statements to the decision maker (judge or jury) to the effect that the defendant is guilty?

112. Defence counsel is not entitled to disregard the instructions of the defendant.¹¹³ In *McLoughlin and Isaacs*, the defendant instructed counsel to present an alibi defence to a rape charge. Counsel took the view that this defence was implausible, and instead ran a consent defence. The Court held that counsel was not entitled to defy the instructions of a client. It held that a failure to follow instructions may give rise to a miscarriage of justice. At 107 the court observed:

It is basic in our law that an accused person receive a full and fair trial. That principle requires that the accused be afforded every proper opportunity to put his defence to the jury (cf s 354 of the Crimes Act 1961). The present appellant has been deprived of that opportunity and justice has therefore been denied to him. Such a denial can be made good only by the ordering of a new trial.

¹¹³ *R v McLoughlin and Isaacs* [1985] 1 NZLR 106

III. Where the defence counsel has made statements that run counter to the defendant's actual plea, what is the consequence (i.e., is the case automatically subject to mistrial or reversal)?

113. The position in New Zealand in general is that a radical mistake by counsel may give rise to a miscarriage of justice.¹¹⁴ The question to be asked in each case is what constitutes such a “radical mistake”. In *R v Paul*, it was said at [38]: “A mere mistake in tactics will not ... suffice.”¹¹⁵ It is likely that, given the balance towards respect for the client's wishes which the rules of professional conduct in New Zealand demand (see below), a clear failure to implement explicit instructions as to plea would amount to a radical mistake.

114. The usual consequence following a miscarriage of justice is a new trial, though in one case where an appellant had served his sentence and was eligible to apply for home detention, a new trial was unwarranted and an order of acquittal was made.¹¹⁶

IV. IV. What are the professional ethical implications of a departure from the client's plea?

115. The expectations of a defence lawyer or counsel, in terms of professional legal ethics, are set out in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r. 13.13: ‘Duties of defence lawyer’. These rules are set out in more hard-edged form than in many other jurisdictions, and the balance tends more to obedience to the client. It is said that: ‘A defence lawyer must protect his or her client so far as is possible from being convicted (except upon admissible evidence sufficient to support a conviction for the offence with which the client is charged) and in doing so must’, in terms of r. 13.13(b) “put before the court any proper defence in accordance with his or her client's instructions”, but “must not mislead the court in any way”. The defence lawyer must ensure that the client is fully informed on the relevant implications of pleading: r. 13.13.1. Under r. 3, ‘Every lawyer must comply with the rules of conduct and client care for lawyers’.

¹¹⁴ *R v Pointon* [1985] 1 NZLR 109

¹¹⁵ [2000] NZCA 355, [38]

¹¹⁶ *R v Walling* [2006] NZCA 39

116. Defence counsel must therefore follow the instructions of a client, even if she does not agree with them, or withdraw from representing the client.¹¹⁷ This is made clear by Rule 13.3:

Subject to the lawyer's overriding duty to the court, a lawyer must obtain and follow a client's instructions on significant decisions in respect of the conduct of litigation. Those instructions should be taken after the client is informed by the lawyer of the nature of the decisions to be made and the consequences of them.

117. Counsel's obligations to act independently must also be borne in mind:

Independent judgement and advice

5.1 The relationship between lawyer and client is one of confidence and trust that must never be abused.

5.2 The professional judgement of a lawyer must at all times be exercised within the bounds of the law and the professional obligations of the lawyer solely for the benefit of the client.

5.3 A lawyer must at all times exercise independent professional judgement on a client's behalf. A lawyer must give objective advice to the client based on the lawyer's understanding of the law.

118. Finally, all of the above is explicitly subject to Rule 13.1:

Duty of fidelity to court

A lawyer has an absolute duty of honesty to the court and must not mislead or deceive the court.

119. It seems clear that, in New Zealand, departure from a client's instructed plea is a violation of the rules of professional conduct. A complaints service exists to deal with possible breaches of these rules, overseen by the New Zealand Law Society's or New Zealand Society of Conveyancer's Standards Committees. These committees may inquire into complaints and appoint investigators. Those investigators may make determinations that a complaint be considered by the Lawyers and Conveyancers Disciplinary Tribunal (see s 152, Lawyers and Conveyancers Act 2006). At that point a charge must be laid before the Disciplinary Tribunal. Charges include misconduct, unsatisfactory conduct amounting to misconduct, negligence or incompetence in professional capacity, and the commission of an offence reflecting on fitness to practise or bringing profession into disrepute. The Tribunal can strike a lawyer's name off the role, suspend a lawyer from practice, prohibit a person from practising on their own account, or pay a fine.

¹¹⁷ Sankoff in Tolmie and Brookbanks (eds), *Criminal Justice in New Zealand* (LexisNexis 2007), 208

JAMAICA

I. In your jurisdiction, is it the defendant or the defence counsel who is authorised to decide the plea in felony criminal proceedings?

120. In Jamaica, the authorisation to decide the plea in all criminal proceedings resides with the defendant alone. For indictable matters, the pleas must be personal, unequivocal and voluntary.¹¹⁸ There is no mention in any of the relevant legislation that counsel has any power to decide the plea, including in cases involving ‘fitness to plead’ issues. That the power resides in the defendant is implied in certain provisions in the Criminal Justice (Administration) Act 1960. For example, Section 10 reads:

(1) If any person, being arraigned upon any indictment for treason, felony, or piracy, shall plead thereto a pleading “not guilty”, he shall, by such plea, without any further form, be deemed to have put himself upon the country for trial, and the Court shall in the usual manner order a jury for the trial of such person accordingly

(2) Where a prisoner is arraigned on an indictment for any offence, and can lawfully be convicted on such indictment of some other offence not charged in such indictment, he may plead not guilty of the offence charged in the indictment, but guilty of such other offence.

121. Similarly, Section 11 holds that:

If any person, being arraigned upon or charged with entered any indictment or information for treason, felony, piracy, or misdemeanour, shall stand mute of malice, or will not answer directly to the indictment or information, in every such case it shall be lawful for the Court, if it shall so directly think fit, to order the proper officer to enter a plea of “not guilty” on behalf of such person, and the plea so entered shall have the same force and effect as if such person had actually pleaded the same.

122. The implication is that the power to enter a plea rests with the defendant. This applies even in cases where the defendant wilfully chooses not to speak: the defence counsel has no power to enter a plea on their behalf. This is reinforced by rules contained within the Plea Negotiations and Agreements Act 2017. The provisions in Sections 11 and 16 indicate that, even in the context wherein plea negotiations have taken place between the defence attorney and the prosecution, the ultimate prerogative rests with the defendant. For example, Section 11 holds that:

¹¹⁸ Seetahal, *Commonwealth Caribbean: Criminal Practice and Procedure* (4th edn, Routledge 2014), 94-98

The Plea Judge shall, before accepting a plea agreement, make a determination in open court that

-

- (a) the plea is voluntary and did not result from force, threats or promises (other than promises in the agreement);
- (b) The accused understands the nature, substance and consequence of the agreement;
- (c) there is a factual basis upon which the agreement has been made; and
- (d) acceptance of the agreement would not be contrary to the interests of justice.

123. Section 16 leads to similar conclusions:

- (1) An accused who enters into an agreement shall be entitled to withdraw from that agreement-
 - (a) before the court accepts the agreement, for any reason or no reason; or
 - (b) after the court accepts the plea but before it imposes sentence, if -
 - (i) the court does not accept the agreement; or
 - (ii) the accused person can show a fair and just reason for requesting the withdrawal.
- (2) The prosecutor shall be entitled to withdraw from an agreement before sentence where -
 - (a) The prosecutor is satisfied that he was -
 - (i) in the course of negotiations, misled by the accused person or by his attorney-at-law in some material aspect; or
 - (ii) induced to conclude the agreement by conduct amounting to an obstruction or perversion of the course of justice
 - (b) the accused person who offers to assist the prosecution fails to assist or is misleading with respect to the assistance being given or to be given.

124. The power of withdrawal rests with the defendant, or with the prosecution, but no mention is made of defence counsel having any such power here. It should, however, be noted that plea negotiations can take place between the prosecutor and the defence counsel in the absence of the defendant, as Section 5 shows ('A prosecutor and an accused person, or where the accused person is represented by an attorney-at-law, a prosecutor and the attorney-at-law for the accused person, may engage in negotiations...'). This goes as far as the attorney-at-law having the power to sign plea agreements on behalf of the defendant¹¹⁹. This power does not indicate any decision-making power, but it does indicate that the defence counsel has a procedural role within these agreements, albeit one checked by the defendant's ability to withdraw under Section 16.

¹¹⁹ Plea Negotiations and Agreements Act 2017, Section 8

125. As in England and Wales, this does not apply to pleas of not guilty, which need not be made personally.¹²⁰ If the plea is qualified by some defence or ambiguity, or the defendant stands mute of malice, or refuses to plead, a plea of not guilty should be entered.¹²¹

II. Under what circumstances, if at all, can the defence counsel depart from the client's instructions as to the plea of not guilty and make statements to the decision-maker (judge or jury) to the effect that the defendant is guilty?

126. It appears that defence counsel has no power to depart from the client's instructions in this way, or to make representations that the defendant is in fact guilty. Unless they are told they are untrue, lawyers should follow their client's instructions as to the defendant's case.¹²²

127. The Privy Council has held¹²³ that the approach to departures from pleas reflects the one set out in *Anderson v HM Advocate* (see the Scotland report). It is clear from this that for the defence counsel to depart from the substance of their client's plea, and in doing so fail to present their defence, is not permissible:

It can only be said to have resulted in a miscarriage of justice if it has deprived the accused of his right to a fair trial. That can only be said to have occurred where the conduct was such that the accused's defence was not presented to the court. This may be because the accused was deprived of the opportunity to present his defence, or because his counsel or solicitor acted contrary to his instructions as to the defence which he wished to be put or because of other conduct which had the effect that, because his defence was not presented to the court, a fair trial was denied to him.

128. This view is reinforced by a statement made by Jamaican Minister of Justice to the House of Representatives prior to the passage of the Plea Negotiations and Agreements Act 2017. It reads: 'Based on the Canons of the legal profession, an Attorney is duty bound to offer any possible defence based on the facts and to represent the Defendant to the best of his/her ability. It is not

¹²⁰ Seetahal, *Commonwealth Caribbean: Criminal Practice and Procedure* (4th edn, Routledge 2014), 100

¹²¹ *Ibid.*

¹²² *Boodram v The State* [2002] UKPC 20; Seetahal, *Commonwealth Caribbean: Criminal Practice and Procedure* (4th edn, Routledge 2014) 230

¹²³ *Balson v State* [2005] UKPC 2., [36]

for the Attorney to judge or force the client to plead guilty.¹²⁴ It follows that statements made contrary to the pleading, necessarily inhibiting the potential defence of the client, are prohibited.

III. Where the defence counsel has made statements that run counter to the defendant's actual plea, what is the consequence (i.e. is the case automatically subject to mistrial or reversal)?

129. As a general rule, in Jamaican law, where a trial is found to be unfair, a re-trial of the case is ordered. It is stated in *R v Thomas* in the Jamaican Court of Appeal that the 'right to a fair trial is absolute'.¹²⁵ While 'procedural breaches do not always result in harm so serious as to imperil the fairness of a conviction', where 'the occurrences of breaches are substantially prejudicial and an appellate court is of the view that great harm was occasioned to an appellant [or defendant], a conviction will be quashed as unsafe'.

This general rule applies to alleged dereliction by counsel where the alleged dereliction is such as to deny due process to the client, following the *Anderson* decision.¹²⁶

IV. What are the professional ethical implications of a departure from the client's plea?

130. As in other jurisdictions, lawyers have a duty to the court which is supreme over their duty to clients.¹²⁷ They are not mere mouthpieces of clients.¹²⁸ Barristers are required to exercise independent judgment in deciding how to put a case,¹²⁹ but must balance this against their obligation to take clear instructions.¹³⁰

131. However, there are some decisions which are so important that they are for the client alone, after taking advice. Whether the defendant gives evidence is one such decision.¹³¹ If the defendant

¹²⁴ Statement by the Honourable Minister of Justice to the House of Representatives - Reform of the Law relating to Plea Negotiations and Agreements, Page 4

¹²⁵ *R v Thomas* [2011] JMCA Crim 49, [13]

¹²⁶ *Balson v State* [2005] UKPC 2

¹²⁷ Ali, *The Ethical Lawyer: A Caribbean Perspective* (Sweet and Maxwell 2015), 123

¹²⁸ *Rondel v Worsley* [1966] 3 All ER 657

¹²⁹ Ali, *The Ethical Lawyer: A Caribbean Perspective* (Sweet and Maxwell 2015), 122

¹³⁰ *Bethel v The State*

¹³¹ *Kurt Fabian Ebanks* [2006] UKPC 16

pleads not guilty, the lawyer must defend them as best they can, subject to their other professional obligations, in their best interests.¹³²

132. Alongside that rule, Canon VI(cc) of the Legal Profession Act (Canons of Professional Ethics) Rules, passed under the Legal Profession Act 1978, states that:

An Attorney shall not knowingly represent falsely to a Judge, a Court, or other tribunal or an official of a Court, or other tribunal, that a particular state of facts exists.

133. Similarly, in Canon V(n) of the Rules, it says:

An Attorney shall not counsel or assist his client or a witness, in conduct that the Attorney knows to be illegal or fraudulent, and where he is satisfied that his client has in the course of the particular representation perpetrated a fraud upon a person or tribunal, he shall promptly call upon him to rectify the same.

134. It follows from these provisions that, if the defendant in the case had disclosed to the attorney some firm indication of their guilt, making representations against this conclusion might entail a breach of professional obligation. They are likely to be obliged to withdraw from the case under Canon IV(q) of the Legal Profession Act (Canons of Professional Ethics) Rules. This provision dictates that:

An Attorney shall withdraw forthwith from employment or from a matter pending before a Tribunal-

- (i) where the client insists upon his representing a claim or defence that he cannot conscientiously advance;
- (ii) where the client seeks to pursue a course of conduct which is illegal or which will result in deliberately deceiving the Court;...

135. The sum consequence of these provisions is that defence counsel will be prohibited from making representations to the court advising of their client's guilt where their client maintains that they are innocent, provided that this is consistent with their other professional obligations. Breaches of these provisions entail consequences under Section 12 of The Legal Profession Act 1978.

¹³² Nunez-Teshira, *The Legal Profession in the English Speaking Caribbean* (The Caribbean Law Publishing Company 2001)190-191

TRINIDAD AND TOBAGO

136. This report should be read with the report on Jamaica. There does not seem to be any significant difference in approach between the two jurisdictions.

I. In your jurisdiction, is it the defendant or the defence counsel who is authorised to decide the plea in felony criminal proceedings?

137. It appears that the defendant is authorised to decide the plea in Trinidad and Tobago. In rule 17.2(2) of the Criminal Procedural Act 2016, Chap. 12:02 (“The Criminal Procedural Rules 2016”)¹³³, the defendant, who is referred to throughout as “the accused”, appears to be the one who decides the plea in criminal proceedings. It indicates that the court must read the allegation of the offence to the accused, and “ask whether the accused pleads guilty or not guilty; and... take the accused’s plea”.

138. This is reinforced by the Criminal Procedure (Plea Discussion and Plea Agreement) Bill, 2017. Where a plea bargain has been concluded, the Attorney-at-law representing the defendant must sign a form stating that “[t]o the best of my knowledge and belief, *my client’s decision* to enter into this agreement is an informed and *voluntary one*” (emphasis added).¹³⁴ This seems to indicate that the defence counsel in Trinidad and Tobago cannot decide the plea.

139. Furthermore, in the textbook *Commonwealth Caribbean: Criminal Practice and Procedure*, it states that for indictable offences, “[t]he initial arraignment must be conducted by the Clerk of the Court and the defendant himself. The defendant must plead personally to the arraignment and the plea cannot be made through any other person on his behalf”¹³⁵. It cites *R v Ellis*¹³⁶ as its authority. In that case, Edmund Davies LJ states that “before a criminal trial by judge and jury can be properly launched there must generally be an arraignment of the accused of the offence charged and he must personally answer to it, and that this cannot be done through counsel or any other person on his behalf. [...] for great mischief could ensue if a legal representative was generally regarded as entitled to plead on an accused's behalf. It would open the door to dispute as to whether, for example, counsel had correctly understood and acted upon the instructions which

¹³³ Criminal Procedural Act 2016, Chap. 12:02, r.17.2(2)(c)

¹³⁴ Criminal Procedure (Plea Discussion and Plea Agreement) Bill, 2017, Sch., Form 5

¹³⁵ Seetahal, *Commonwealth Caribbean: Criminal Practice and Procedure* (4th edn, Routledge 2014), 205

¹³⁶ See the England and Wales section of this report.

the accused had given him” (emphasis added). As in England and Wales, this does not apply to pleas of not guilty.¹³⁷

140. If the plea is qualified by some defence or ambiguity, or the defendant stands mute of malice, or refuses to plead, a plea of not guilty should be entered.¹³⁸

II. Under what circumstances, if at all, can the defence counsel depart from the client's instructions as to the plea of not guilty and make statements to the decision maker (judge or jury) to the effect that the defendant is guilty?

141. There is no specific case in Trinidad and Tobago where a defence counsel has departed from his client’s instructions as to the plea of not guilty, and made statements that the defendant is guilty. However, there is case law on the general duty of the defence counsel to follow his client’s instructions, and not depart from them.

142. In *Bethel v The State* (1998)¹³⁹, a Privy Council case that originated from Trinidad and Tobago, a defendant accused his defence counsel of misconduct at the trial. One of the main allegations was that the counsel had refused to run a defence that the defendant had wished to take.

143. The Privy Council felt that for “practical reasons”, it was impossible to investigate the allegations.¹⁴⁰ However, it appeared that the defendant had made a full confession to the defence counsel, and put the counsel in a “gravely embarrassing position in the conduct of the defence”.¹⁴¹ As such, it was clear from the facts that this had impacted on the counsel’s conduct, by refusing to run the “contrived... story”¹⁴² that the defendant had wished to take. The Privy Council felt the counsel should have advised the defendant to seek a different representative. Due to the “exceptional” nature of the case, the case was remitted back to the Court of Appeal for investigation. This therefore appears to indicate that the counsel should **not** have departed from his client’s instructions, but dealt with the matter by recusing himself from representing the defendant.

¹³⁷ Seetahal, *Commonwealth Caribbean: Criminal Practice and Procedure* (4th edn, Routledge 2014), 100

¹³⁸ *Ibid.*

¹³⁹ *Bethel (Christopher) v The State* (1998) 55 WIR 394

¹⁴⁰ *Ibid.*, 398

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

144. In *Ebanks (Kurt) v R* [2006]¹⁴³, a Privy Council case that originated from the Cayman Islands, but cited law from Trinidad and Tobago, the appellant also alleged that the counsel had “defied his instructions” by not challenging police evidence.¹⁴⁴ Lord Rodger approvingly cited Waller LJ’s comments that even if tactically inadvisable, “counsel must carry out [his client’s] instructions even though he was aware”¹⁴⁵ of any adverse impact on the case. He went on to say that “even if [the appellant] had all along said that he would not give evidence, that would not, of itself, have been a reason why counsel could not have cross-examined the police officers to the effect that he had not made the statement, if [the appellant’s] instructions were that counsel should do so. Indeed, as a matter of proper professional practice, he would still have been bound to do so.”¹⁴⁶ (Emphasis added.)

145. In the *Commonwealth Caribbean: Criminal Practice and Procedure* textbook, the author summarises the effect of the above cases as “[emphasising] the necessity on the part of defence counsel to take written instructions and to act on those instructions. If counsel finds that he cannot do so, he must so indicate and seek leave to withdraw from the defence.”¹⁴⁷ (Emphasis added.)

146. It therefore seems clear that in Trinidad and Tobago, a defence counsel cannot depart from his client’s instructions, even if it is tactically advisable. It therefore follows that as part of this general duty, a defence counsel cannot depart from his client’s instructions as to the plea of not guilty, and made statements that the defendant is guilty.

III. Where the defence counsel has made statements that run counter to the defendant’s actual plea, what is the consequence (i.e., is the case automatically subject to mistrial or reversal)?

147. Again, there is no specific case where the defence counsel has made statements that run counter to the defendant’s actual plea. However, in *Ebanks*, the *dicta* of the Privy Council were that “if counsel had defied [the appellant’s] instructions in either way, he would have been guilty of professional misconduct which would in effect have led to a denial of due process, with the result

¹⁴³ *Ebanks (Kurt) v R* (2006) 68 WIR 249

¹⁴⁴ *Ibid.*, [31]

¹⁴⁵ *Ibid.*, [28]

¹⁴⁶ *Ibid.*, [30]

¹⁴⁷ Seetahal, *Commonwealth Caribbean: Criminal Practice and Procedure* (4th edn, Routledge 2014), 230

that the verdict would have to be quashed”.¹⁴⁸ On the facts, the Privy Council were satisfied no misconduct had occurred, and that the verdict was safe. Hence, it appears that if the facts could have proven misconduct of the counsel, a quashed conviction would have been automatic.

IV. What are the professional ethical implications of a departure from the client’s plea?

148. In the Legal Profession Act 1986 (as subsequently amended), s. 35 “Discipline” states that “the Code of Ethics set out in the Third Schedule shall regulate the professional practice, etiquette, conduct and discipline of Attorneys-at-law [...] A breach of the rules in Part A may constitute professional misconduct and in Part B shall constitute professional misconduct.”¹⁴⁹ In the Third Schedule, rule 35 of Part B states “an Attorney-at-law who commits such [professional misconduct] shall be liable to any of the penalties which the Disciplinary Committee and/or the Court is empowered to impose.”¹⁵⁰

149. There is no specific rule in the relevant Code as to following a client’s instruction. However, it states that “it is the right of an Attorney-at-law to undertake the defence of a person accused of crime regardless of his own personal opinion as to the guilt of the accused and having undertaken such defence he is bound by all fair and honourable means to present every defence that the law of the land permits so that no person may be deprived of life or liberty except by due process of law.”¹⁵¹ Where “the client insists upon his representing a claim or defence that he cannot conscientiously advance”, he should “withdraw forthwith from employment”¹⁵². The attorney must conduct this case competently, and should decide for themselves how to do so in their client’s best interests.

150. Reading these two rules together, it appears that while not explicitly condemned in the Code of Ethics, it is implicit that a defence counsel should not depart from the client’s plea, or more generally, the client’s instructions, subject to their other professional obligations, including their duty of independence, discussed at greater length in the Jamaica section of this report.

¹⁴⁸ *Ebanks* [14]

¹⁴⁹ Legal Profession Act 1986, Chapter 90:03, s 35 (1) – (3)

¹⁵⁰ *Ibid.*, Third Schedule, Part B, r. 35

¹⁵¹ *Ibid.*, Part A, r. 25

¹⁵² *Ibid.*, Part B, r. 13

KENYA

I. In your jurisdiction, is it the defendant or the defence counsel who is authorised to decide the plea in felony criminal proceedings?

151. Under Kenyan law, it is the defendant and not their counsel who tenders the plea in a criminal case. The defendant must plead personally, save for where statute permits otherwise.¹⁵³ The plea must be free and voluntary.¹⁵⁴ The courts must be circumspect in accepting a plea of guilty, and the simple word guilty is unlikely to suffice.¹⁵⁵ If the defendant is represented, the court is more likely to accept the plea.¹⁵⁶ An advocate is not authorised to tender a plea on behalf of the defendant who is his or her client. This was held in *Johnstone Kassim Mwandi & another v Republic* where the High Court stated:

In most cases the advocate can commit the person he represents. There are however specific issues that are directed at the party and an advocate in my view cannot purport to commit or do on behalf of a client. Such is the case with taking a plea in a criminal case. An advocate cannot plead on behalf of a client.¹⁵⁷

152. Similarly, in *Manager, Nanak Crankshaft Ltd v Republic (Nanak case)*, the Court observed that under section 207 of Kenya's Criminal Procedure Code, 'it is the accused person who must plead to the charge, and even an advocate is not ordinarily permitted to plead on his behalf'.¹⁵⁸ The full provision under section 207 specifically provides:

Accused to be called upon to plead

(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

¹⁵³ Kiage, *Essentials of Criminal Procedure in Kenya* (LawAfrica 2010) 90

¹⁵⁴ *Ibid.*, 92

¹⁵⁵ *Ibid.*; *Republic v BM Patel* [1985] KLR 22

¹⁵⁶ *Ibid.*, 95

¹⁵⁷ *Johnstone Kassim Mwandi & another v Republic* [2015] eKLR Criminal Appeal No. 1 of 2014 (High Court) [7]

¹⁵⁸ *Manager, Nanak Crankshaft Ltd v Republic* [2008] eKLR Criminal Revision Case 763 of 2007 (High Court) 3

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

(4) If the accused person refuses to plead, the court shall order a plea of “not guilty” to be entered for him.

(5) If the accused pleads—

(a) that he has been previously convicted or acquitted on the same facts of the same offence; or

(b) that he has obtained the President’s pardon for his offence,

the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge.¹⁵⁹

153. The *Nanake* case also laid out the position on the tendering of a plea in criminal proceedings by a corporate body. In this regard, quoting the decision in *M. S. Sondhi Ltd. v R.*, the High Court observed that ‘where a company is charged before any Court with a criminal offence the Court should satisfy itself before taking any plea from any person that he is a representative of the company for the purpose of answering the charge’.¹⁶⁰ In the said case, the Kenyan Public Health Act applied, which under section 165 provides:

Where a contravention of any of the provisions of this Act is committed by any company or corporation, the secretary or manager thereof may be summoned and shall be held liable for such contravention and the consequences thereof.¹⁶¹

154. On this basis, Ojwang J held that the respondent’s initial suit mentioning the applicant as the defendant, in his capacity as the company’s manager, was properly instituted. Nevertheless, even in the case of criminal proceedings against a company, the High Court was still emphatic that it is only the defendant person who may plead to a charge.¹⁶²

¹⁵⁹ Criminal Procedure Act, Cap. 75, Laws of Kenya

¹⁶⁰ See *ibid* and *M. S. Sondhi Ltd. v R.* (1950) 17 EACA 143

¹⁶¹ Public Health Act, Cap. 242, Laws of Kenya

¹⁶² *Nanake* [2008] eKLR Criminal Revision Case 763 of 2007 (High Court) 3-4

155. The critical importance placed on tendering a plea in criminal proceedings is underscored by the case of *Adan v Republic*, which laid down the procedural guidelines that must be followed during plea taking and particularly for capital offences.¹⁶³ These are:

- (i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.
- (ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.
- (iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.
- (iv) If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.
- (v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.¹⁶⁴

156. Based on the above cases and statutory provisions, it follows that it is only the defendant who can plead to a charge. It follows that only the defendant person may choose or decide how they are going to plead, although a defence counsel may advise the defendant. If the defendant refuses to plead, a plea of not guilty must be entered.¹⁶⁵

II. Under what circumstances, if at all, can the defence counsel depart from the client's instructions as to the plea of not guilty and make statements to the decision maker (judge or jury) to the effect that the defendant is guilty?

157. As far as is discernible from Kenyan case law, at no time will defence counsel be permitted to depart from the instructions of their client with respect to plea taking, nor is counsel allowed to make statements to the trier of facts that are contrary to the instructions of the defendant.

¹⁶³ *Adan v Republic* [1973] 1 EA 445 (Court of Appeal). See also the guidelines as quoted with approval in *Republic v Hassan Shaban Mshana* [2014] eKLR Criminal Revision No. 8 of 2014 (High Court) 16.

¹⁶⁴ *Adan v Republic* [1973] 1 EA 445 (Court of Appeal)

¹⁶⁵ Kiage, *Essentials of Criminal Procedure in Kenya* (LawAfrica 2010), 98-99

III. Where the defence counsel has made statements that run counter to the defendant's actual plea, what is the consequence (i.e., is the case automatically subject to mistrial or reversal)?

158. It would appear that based on the current reported case law, there exists no case or instance where a defence counsel has conveyed information that is contrary to their client's instructions, especially as regards the plea. Suffice to state however, that such an event would likely occasion a mistrial and lead to a quashing of a conviction and ordering of a retrial. This is based on various cases where the Kenyan courts, after finding that a trial was illegal or defective, has ordered for a retrial and especially where much time has not elapsed and it is in the public interest to do so. In *Muiruri v Republic*, it was stated that as a matter of general rule:

...whether a retrial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.¹⁶⁶

IV. What are the professional ethical implications of a departure from the client's plea?

159. There are ethical implications for a defence counsel's departure from a client's instructions, especially with regard to the tendering of a plea by the defendant. This is because such a move would be in breach of professional duty.

160. The duty of a defence counsel in criminal cases is to put the case of the defendant. Rule 3 of the Law Society of Kenya Code of Conduct and Ethics for Advocates states that:

An Advocate is under a duty to provide the legal services in respect to which he/she is engaged competently, diligently and ethically.

¹⁶⁶ *Muiruri v Republic* (2003) KLR 552 as quoted by the Court of Appeal in *Obedi Kilonzò Kevevo v Republic* [2015] eKLR Criminal Appeal No. 77 of 2015 (Court of Appeal) 6.

161. This requires honesty and good faith.¹⁶⁷ Advocacy must be zealous and competent.¹⁶⁸ In conducting a case, an advocate should follow the client's instructions.¹⁶⁹ This must be balanced against the requirement that they remain in control of the case, and do not accept any unethical instructions. As in other jurisdictions, Kenyan advocates have a duty of honesty and integrity to the court, set out in Rule 12:

The Advocate shall at times maintain the highest standards of honesty and integrity towards clients, the court, colleagues, all with whom the Advocate has professional dealings and the general public.

162. The advocate must also bear in mind that a client is entitled to expect independent, unbiased and honest advice from the Advocate. This may involve telling the client things they do not want to hear.

163. The correct weighting of the balance between the competing ethical obligations is that the authority of an advocate must not be used to do anything diametrically opposed to the client's instructions.¹⁷⁰ It would therefore seem that to deviate from instructions going to a matter as fundamental as plea would violate professional ethical standards in Kenya.

164. This could expose the particular defence counsel to professional misconduct and negligence litigation. In such a scenario, the Kenyan Advocates Act establishes a Disciplinary Tribunal which under section 60, is tasked with receiving complaints, from any person, against advocates for professional misconduct, 'which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate'.¹⁷¹ Advocates found guilty of professional misconduct may be: admonished; suspended from practice for a specified period not exceeding five years; have their name struck off the roll of Advocates; be required to pay a fine not exceeding one million shillings (USD 9,600); or be required to pay the aggrieved person compensation or reimbursement not exceeding five million shillings (USD 48,100).¹⁷²

¹⁶⁷ Ojienda and Juma, *Professional Ethics: A Kenyan Perspective* (LawAfrica Publishing 2011), 48

¹⁶⁸ *Ibid.*, 49

¹⁶⁹ As of September 2015, 21 Kenyan lawyers had been charged by the Law Society of Kenya with the specific offence of failing to comply with the client's instructions: [http://www.lsk.or.ke/Downloads/LSK-CODE-OF-CONDUCT-AND-ETHICS-FOR-ADVOCATES-\(1ST%20DRAFT\).pdf](http://www.lsk.or.ke/Downloads/LSK-CODE-OF-CONDUCT-AND-ETHICS-FOR-ADVOCATES-(1ST%20DRAFT).pdf)

¹⁷⁰ *Ibid.*, 52; citing *Republic v District Land Registrar and another ex parte Tegerei and another* [2005] KLR 521

¹⁷¹ Advocates Act, Cap. 18 Laws of Kenya

¹⁷² *Ibid.*, section 60(4)

SOUTH AFRICA

I. In your jurisdiction, is it the defendant or the defence counsel who is authorised to decide the plea in felony criminal proceedings?

165. Section 105 of the Criminal Procedure Act provides that:

105 Accused to plead to charge

The charge shall be put to the accused by the prosecutor before the trial of the accused is commenced, and the accused shall, subject to the provisions of sections 77, 85 and 105A, be required by the court forthwith to plead thereto in accordance with section 106.

166. A defendant must therefore have a charge put and be permitted to plead.¹⁷³ Pleas should be tendered freely and voluntarily, and are a choice for the client alone.

167. If a defendant refuses to plead, s109 applies:

109 Accused refusing to plead

Where an accused in criminal proceedings refuses to plead to any charge, the court shall record a plea of not guilty on behalf of the accused and a plea so recorded shall have the same effect as if it had been actually pleaded.

168. Where a plea is ambiguous, a plea of not guilty should be entered, and then questioning should take place to determine what it is the defendant admits.¹⁷⁴

169. Case law supports the view that it is the defendant and not the defence counsel, who chooses the plea and tells the court what the plea is. In *S v Mofokeng*,¹⁷⁵ Louw AJ said:

Counsel also is not the judge. He does not have, nor should he have, the distance to adjudicate on the strength and weaknesses of his client's cause. He must, of course, advise his client on the probable findings of the court but he must fearlessly argue his client's case even if he, himself, does not believe that the case is right or just. Whilst he is an officer of the court, he is a representative of a litigant and he does not have the luxury to distance himself from his client's instructions and to **condemn his client by making fatal concessions**. In the final analysis, he is but a representative of his client, a mandatory. It is his duty to carry out his mandate and to take all reasonable steps to accomplish his aim. He must perform his obligations in accordance with the

¹⁷³ *S v Sithole* 1999 (1) SACR 227 (T)

¹⁷⁴ Criminal Procedure Act s113; 115

¹⁷⁵ 2004 (1) SACR 349 (W), at 35g-i

terms and limitations of his mandate. If he does not do so, he is no representative. (Emphasis added.)

170. In *S v Motlaphing*,¹⁷⁶ the trial judge asked defence counsel whether her client had instructed her to plead. She replied: “Not guilty”. The trial judge then enquired where the defendant himself could confirm that he was pleading not guilty to all the charges. The defendant replied: “Not guilty”. On appeal Landman J (with whom the other two members of the court concurred) said that the trial judge’s approach “in requiring or permitting Counsel to plead on behalf of the applicant is not in accordance with the provisions of the [Criminal Procedure Act]... In my view it is best to follow the letter of the law and have the indictment read to a defendant and have the defendant plead to it”.

II. Under what circumstances, if at all, can the defence counsel depart from the client’s instructions as to the plea of not guilty and make statements to the decision-maker (judge or jury) to the effect that the defendant is guilty?

171. Defence counsel may not depart from the client’s instructions as to the essential elements of an offence. In *S v Mofokeng*, counsel for the defendant, on the hearing of an appeal, made concessions in his heads of argument that the conviction was correct and the sentence appropriate. Louw AJ said this:

“Counsel... concedes in his heads of argument that the conviction is correct and he concedes that the sentence is appropriate. In the absence of any indication that the appellant has withdrawn the appeal or has instructed his counsel to concede the correctness of the two essential findings of the court below, counsel has breached his duty of loyalty. Counsel was obliged to withdraw from the case if he felt that he could not advance the appellant’s case on appeal. The appellant could then, himself, have appeared at the hearing of the appeal or he could have sought other legal representation. To allow the matter to proceed in the absence of the applicant or a legal representative who can put forward submissions on his behalf would render the hearing on appeal a nonsense. Counsel has breached his trust. I do not believe that I can place any store in any submission made by the appellant’s counsel in this appeal. Should he persist along the lines of his heads of argument, he will, it seems to me, compound his breach of loyalty to the appellant. Should he now argue the opposite of what he contended for in his heads, he will probably find a judicial

¹⁷⁶ Unreported, NWM case no CAF 17/15, 17 September 2015, at para 7

deaf ear. The court will know that he does no more than lip service to his noble profession, having already betrayed one of its most important ground rules.¹⁷⁷

[...]

[W]ithin the four corners of the ethics which bind each defence advocate, counsel is not free to make submissions designed to destroy his client's case, or which may have that effect. He is, of course, in control of the presentation of the defence case... and he may otherwise bind his client through "vicarious admissions"... but where he, to the knowledge of the court, refutes his instructions, he fails to act as a representative.¹⁷⁸

However, not all departures from instructions are problematic. In *S v Halgryn*, the Court had to deal with a case where the defence counsel sought to demonstrate a racist motivation on the part of victim, to advance his client's case.¹⁷⁹ That the victim was racist was not part of the client's instructions.

[15] Turning to the facts, one of the allegations that the defence was improperly conducted is based on the fact that Mr H, without instructions from the accused, introduced a 'defence' based upon the theory that certain of the prosecution witnesses had been motivated by a racist prejudice against white men, something which the appellant had never alleged to be a feature of his defence.

[16] The appellant, a white male, visited a tavern. Some black males, including the deceased and the complainants, sat outside drinking. The appellant went outside and fired the shots that gave rise to the different charges. His version was that the blacks had attacked him without any motive and that he shot in self-defence. The State's version was that he, without provocation and after making racist remarks, fired the shots. In the course of their evidence the complainants explained why they sat outside – they were not allowed inside. The appellant suggested no motive for the attack on him. If counsel, through cross-examination, would be able to establish a plausible motive, it could have strengthened the probability of the appellant's version of an unprovoked attack. Mr H, understandably, probed the possibility of whether or not the attack on the appellant was motivated by a resentment of the racial discrimination perpetrated on the victims. This the witnesses denied. Mr H, it is important to note, never suggested that this theory was part of his instructions. The Court, in its judgment, dealt with this motive and came to the conclusion that it can be discounted. The Court, it is further important to note, did not make an adverse finding against the appellant because of the line of cross-examination. It follows from this that there is no basis for holding that probing this possibility is indicative of a failure to conduct the defence

¹⁷⁷ 2004 (1) SACR 349 (W), at 356b-e

¹⁷⁸ *Ibid.*, at 357f-g

¹⁷⁹ [2002] ZASCA 59, [15] – [16]

properly; it rather indicates that counsel under difficult circumstances acted prudently and in the interests of his client.

III. Where the defence counsel has made statements that run counter to the defendant's actual plea, what is the consequence (i.e. is the case automatically subject to mistrial or reversal)?

172. In *S v Halgryn*, the Court directly applied *Strickland v Washington*, and held that, as no adverse inference arose from the line of questioning challenged, the verdict was safe.

The constitutional right to counsel must be real and not illusory and an accused has, in principle, the right to a proper, effective or competent defence. *Cf S v Majola* 1982 (1) SA 125 (A) 133D-E. Whether a defence was so incompetent that it made the trial unfair is once again a factual question that does not depend upon the degree of *ex post facto* dissatisfaction of the litigant. Convicted persons are seldom satisfied with the performance of their defence counsel. The assessment must be objective, usually, if not invariably, without the benefit of hindsight. *Cf S v Louw* [1990] ZASCA 43; 1990 (3) SA 116 (A) 125D-E. The court must place itself in the shoes of defence counsel, bearing in mind that the prime responsibility in conducting the case is that of counsel who has to make decisions, often with little time to reflect (*cf R v Matonsi* 1958 (2) SA 450 (A) 456C as explained by *S v Louw supra*).¹ The failure to take certain basic steps, such as failing to consult, stands on a different footing from the failure to cross-examine effectively or the decision to call or not to call a particular witness. It is relatively easy to determine whether the right to counsel was rendered nugatory in the former type of case but in the latter instance, where counsel's discretion is involved, the scope for complaint is limited. As the US Supreme Court noted in *Strickland v Washington* [1984] USSC 146; 466 US 668 at 689:

'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has been unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.'

Not everyone is a Clarence Darrow or F E Smith and not every trial has to degenerate into an O J Simpson trial.¹⁸⁰

173. The test of whether an appeal court will interfere is therefore "two-pronged". First, it will assess the gravity of defence counsel's incompetence, which could include departure from the

¹⁸⁰ [2002] ZASCA 59 [14]

instructions. Second, it will assess whether this incompetence materially prejudiced the defendant.

174. Du Toit writes that:

“Grave incompetence, resulting in a fatal irregularity, is present where a legal representative (a) does not establish the defence of his client (b) fails to put such defence to the prosecution’s witnesses; and (c) fails to challenge and cross-examine the prosecution’s witnesses either effectively or at all.”¹⁸¹

175. In *S v Mafu*, a failure to put an alibi defence to state witnesses in cross-examination was held to breach ‘the very rudimentary duties of counsel when defending an accused.’¹⁸² There is authority that, where no objection is made by the defendant to the counsel’s deviation from instructions at trial, the correctness of the verdict cannot be challenged on that ground.¹⁸³

176. The Court of Appeal has a general discretion as to how to dispose of the appeal if there has been serious incompetence on the part of defence counsel, and if that incompetence has caused material prejudice to the defendant. It can, for example, set aside the conviction and/or remit the matter for a retrial.

177. The relevant jurisdiction is contained in section 322 of the Criminal Procedure Act 1977:

“(1) In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may – (a) allow the appeal if it thinks that the judgement of the trial court should be set aside on the ground of the wrong decision of any question of law or that on any ground there was a failure of justice; or (b) give such judgement as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or (c) make such other order as justice may require: Provided that, notwithstanding that the court of appeal is of opinion at any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect”.

¹⁸¹ du Toit et al. (2016), *Commentary on the Criminal Procedure Act*, para 11-42E

¹⁸² *S v Mafu* [2008] ZAGPHC 38 at [15]

¹⁸³ *S v Bennett* 1994 (1) SACR 392

IV. What are the professional ethical implications of a departure from the client's plea?

178. There are two bases on which such a departure would present ethical issues.

179. Firstly, counsel for the defence may be in breach of his or her general duty of loyalty: see *Mofokeng*.

180. Secondly, he or she also may be in breach of Rule 3.1 of the Uniform Rules of Professional Conduct. Rule 3.1 (Duty to Client), under the general heading "Duties of counsel in connection with litigation" provides:

"According to the best traditions of the Bar, an advocate should, while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interests of his client without regard to any unpleasant consequences either to himself or to any other person. Counsel has the same privilege as his client of asserting and defending the client's rights and protecting his liberty or life by the free and unfettered statement of every fact, and the use of every argument and observation, that can legitimately, according to the principles and practice of law, conduce to this end; and any attempt to restrict this privilege should be jealously watched".

181. This must be seen in light of the principle that counsel have control over the defence case, and the defendant has to abide by that control.¹⁸⁴ Du Toit writes that: "[t]he principle that a lawyer is in control of the defence case clearly requires that such control must be exercised professionally; and the lawyer's scepticism should not interfere with his professional duty to represent his client to the best of his ability".¹⁸⁵ The right to a fair trial embraces the right to legal representation by a person who has placed himself in a position to present the client's case as instructed.¹⁸⁶

¹⁸⁴ *S v Toba* 2008 (1) SACR 415 (E)

¹⁸⁵ du Toit et al. (2016), *Commentary on the Criminal Procedure Act*, at 11-32 (6.5)

¹⁸⁶ *S v Charles* 2002 (2) SACR 492 (E) at 497d

INDIA

I. In your jurisdiction, is it the defendant or the defence counsel who is authorised to decide the plea in felony criminal proceedings?

182. The provisions dealing with framing of charges under the Code of Criminal Procedure, 1973 (“CPC”) specify that it is the duty of the judge to read and explain the charge to the defendant and the defendant shall be asked whether she pleads guilty to the charge.¹⁸⁷

183. Section 205 of the CPC enables a magistrate to dispense with the personal attendance of the defendant, and enables the magistrate to allow the defendant to appear before court through a pleader.

184. In case of petty offences (offences not exceeding fine of thousand rupees), the Magistrate has the power to summarily dispose of the case and not require personal attendance of the defendant. In such cases if the pleader pleads guilty on behalf of the defendant, the defendant must authorize the pleader in writing for the same.¹⁸⁸

185. In case of other offences, the position of law with respect to whether a pleader can plead guilty to the charge on behalf of the defendant has not been finally settled by the Supreme Court. In *Bibbuti Bhusan Das Gupta v. State of West Bengal*¹⁸⁹ the Supreme Court declined to answer the question regarding whether the pleader may plead guilty to the charge on behalf of the defendant in warrant cases when the personal appearance of the defendant has been dispensed with.

186. In 2000, the Kerala High Court held in *Noorjahan v. T.T. Moideen And Ors.*¹⁹⁰ that in warrant cases, even if the personal attendance of the defendant has been dispensed with, the pleader must be specifically authorised by the defendant to record a plea of guilty on behalf of the defendant, and

¹⁸⁷ See section 228 of the Code of Criminal Procedure, 1973 with respect to cases before the Sessions Court, section 241 for warrant cases and section 252 for summons cases. Under the CPC, different procedures are specified depending on the nature of the case.

¹⁸⁸ See section 206, CPC.

¹⁸⁹ AIR 1969 SC 381, paragraph 14.

¹⁹⁰ *Noorjahan vs T.T. Moideen And Others* (2000) CriLJ 4264, paragraph 8.

the pleader's plea of guilty can be accepted in "appropriate cases". However, the Calcutta High Court in *Sm. Prova Debi v. Mrs. Fernandes*¹⁹¹ held that a pleader can take a plea of guilty on behalf of the defendant in warrant cases when the personal appearance of the defendant has been dispensed with.

187. The Bombay High Court held in *Dorabshah Bomanji Dubash v. Emperor*¹⁹² that in warrant cases, the pleader can make a plea of guilty on behalf of the defendant when the magistrate has dispensed with the personal attendance of the defendant under section 205 of the CPC. The court differentiated its decision from a prior case¹⁹³, in which the Bombay High Court had held that "no pleader can be called upon to plead on behalf of his client guilty or not guilty and it is improper for a Magistrate to act on such a plea" because in that case, the defendant was present at the time when the pleader gave his plea.

188. The Calcutta High Court in *S.R. Jhunjhunwalla v. B.N. Poddar*¹⁹⁴ has held that a pleader can represent the defendant while answering charges framed against her in summons cases.

II. Under what circumstances, if at all, can the defence counsel depart from the client's instructions as to the plea of not guilty and make statements to the decision maker (judge or jury) to the effect that the defendant is guilty?

189. There is no provision in the Code of Criminal Procedure, 1973 which authorises the defence counsel to depart from the client's instructions as to the plea of not guilty and make statements to the decision maker to the effect that the defendant is guilty. There are no Indian cases in which such a departure has been made by the defence counsel. As seen in the previous section, it is usually the defendant who is asked by the judge whether she or he wants to plead guilty or claim trial. Even in circumstances wherein the presence of the defendant has been dispensed with, the Code of Criminal Procedure allows the pleader to appear on behalf of the defendant and make

¹⁹¹ AIR 1962 Cal 203, paragraphs 4 and 5.

¹⁹² AIR 1926 Bom 218, paragraph 3.

¹⁹³ *Emperor v. Sirsing* [1904] 6 Bom. L.R. 861

¹⁹⁴ 1988 CriLJ 51, paragraph 2.

a plea provided that the pleader has specific authorisation. This rule is required to be followed in petty cases as well.

III. Where the defence counsel has made statements that run counter to the defendant's actual plea, what is the consequence (i.e., is the case automatically subject to mistrial or reversal)?

190. There does not seem to have been any case where this occurred. The Appellate Courts in India have the power to reverse the order and sentence or alter the sentence, maintain a conviction or order a retrial of the case under Section 386 of the Code of Criminal Procedure.

Section 386, Code of Criminal Procedure, 1973

386. Power of the Appellate Court. After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may -

[...]

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same.

191. The Courts in India have time and again laid down guidelines on when a case can be sent for retrial. The Court reiterated the principle again in the 2017 case of *Ajay Kr. Ghoshal Etc vs State Of Bihar*.¹⁹⁵ The Court explained that retrial can be ordered in cases in which there has been an omission or irregularity which has led to failure in justice.

192. The question of whether counsel's ineffective assistance can lead to a failure of justice was considered in *Ashok Debbarma*,¹⁹⁶ which applied the *Strickland* test:

¹⁹⁵ *Ajay Kumar Ghoshal Etc. vs. State of Bihar and another* (2017)(1) P.L.J.R. 458 (SC)

¹⁹⁶ *Ashok Debbarma* (2014) 4 SCC 747

32. Can the counsel's ineffectiveness in conducting a criminal trial for the defence, if established, be a mitigating circumstance favouring the accused, especially to escape from the award of death sentence. Counsel for the appellant, without causing any aspersion to the defence counsel appeared for the accused, but to only save the accused from the gallows, pointed out that the records would indicate that the accused was not meted out with effective legal assistance. Learned counsel submitted that the defence counsel failed to cross examine PW1 and few other witnesses. Further, it was pointed out that the counsel also should not have cross examined PW17, since he was not put to chief-examination. Learned counsel submitted that appellant, a tribal, coming from very poor circumstances, could not have engaged a competent defence lawyer to conduct a case on his behalf. Placing reliance on the judgment of the US Supreme Court in *Charles E. Strickland, Superintendent, Florida State Prison v. David Leroy Washington* 466 US 668 (1984), learned counsel pointed out that, under Article 21 of our Constitution, it is a legal right of the accused to have a fair trial, which the accused was deprived of.

33. Right to get proper and competent assistance is the facet of fair trial. This Court in *Madhav Hayawadanrao S. Hoskot v. State of Maharashtra* (1978) 3 SCC 544, *State of Haryana v. Darshana Devi and Others* (1979) 2 SCC 236, *Hussainara Khatoon and others (IV) v. Home Secretary, State of Bihar, Patna* (1980) 1 SCC 98 and *Ranjan Dwivedi v. Union of India* (1983) 3 SCC 307, pointed out that if the accused is unable to engage a counsel, owing to poverty or similar circumstances, trial would be vitiated unless the State offers free legal aid for his defence to engage a counsel, to whose engagement, the accused does not object. It is a constitutional guarantee conferred on the accused persons under Article 22(1) of the Constitution. Section 304 CrPC provides for legal assistance to the accused on State expenditure. Apart from the statutory provisions contained in Article 22(1) and Section 304 CrPC, in *Hussainara Khatoon case (supra)*, this Court has held that this is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons, such as poverty, indigence or incommunicado situation.

34. The question raised, in this case, is with regard to ineffective legal assistance which, according to the counsel, caused prejudice to the accused and, hence, the same may be treated as a mitigating circumstance while awarding sentence.

[...]

35. Right to get proper legal assistance plays a crucial role in adversarial system, since access to counsel's skill and knowledge is necessary to accord the accused an ample opportunity to meet the case of the prosecution. In *Charles E. Strickland case (supra)*, the US Court held that a convicted defendant alleging ineffective assistance of counsel must show not only that counsel was not functioning as the counsel guaranteed by the Sixth Amendment so as to provide reasonable

effective assistance, but also that counsel's errors were so serious as to deprive the defendant of a fair trial. Court held that the defiant convict should also show that because of a reasonable probability, but for counsel's unprofessional errors, the results would have been different. The Court also held as follows:

“Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case.”

36. The Court, in determining whether prejudice resulted from a criminal defence counsel's ineffectiveness, must consider the totality of the evidence. When an accused challenges a death sentence on the ground of prejudicially ineffective representation of the counsel, the question is whether there is a reasonable probability that, absent the errors, the Court independently reweighs the evidence, would have concluded that the balance of aggravating and mitigating circumstances did not warrant the death sentence.

193. In the case of *Navjot Sandhu*,¹⁹⁷ the court had to deal with an allegation that:

the counsel appointed by the Court as 'amicus curiae' to take care of his defence was thrust on him against his will and the first amicus appointed made concessions with regard to the admission of certain documents and framing of charges without his knowledge. It is further submitted that the counsel who conducted the trial did not diligently cross-examine the witnesses.

194. It was held that counsel had not been ineffective, also relying on *Strickland*:

The very decision relied upon by the learned counsel for the appellant, namely, *Strickland Vs. Washington* [466 US 668] makes it clear that judicial scrutiny of a counsel's performance must be careful, deferential and circumspect as the ground of ineffective assistance could be easily raised after an adverse verdict at the trial.

¹⁹⁷ (2005) 11 SCC 600

195. It therefore seems that the approach of courts in India to a case where the conduct of counsel is alleged to have interfered with the fairness of the trial will be a highly deferential application of the Strickland test.

IV. What are the professional ethical implications of a departure from the client's plea?

196. The Bar Council of India has set down rules that govern the professional conduct of advocates which arise out of the duty they owe to the court, their client, the opponents and other advocates. This rule making function has been bestowed upon the Bar Council of India as per section 49(1)(c) of the Advocates Act¹⁹⁸, 1961.

197. The Bar Council of India Rules¹⁹⁹ do not specifically mention any provision dealing with departure from client's plea. However, according to the Bar Council of India Rules, the advocate owes a duty to the client and is required to uphold the interests of the client and defend him regardless of his personal opinion as to the guilt of the defendant. The advocate is required to act on the instruction of his client or his authorised agent and no one else.²⁰⁰

198. The Bar Council of India rules also require the advocate to not commit a breach of Section 126 of the Indian Evidence Act 1872,²⁰¹ which bars the advocate from disclosing any professional communication made to him by the defendant unless he has obtained the express consent of the client.

199. The Rules also provide that:

An advocate shall exercise his own judgment in such matters. He shall not blindly follow the instructions of the client.

200. However, that provision applies in the context of clients who insist on unfair or improper means of litigating the case, which seems far removed from a case where a client insists that they are innocent.

¹⁹⁸ <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/Advocates-Act1961.pdf>, last accessed 30 October 2017.

¹⁹⁹ <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartVomwards.pdf>, last accessed 30 October 2017.

²⁰⁰ Rule 15 and Rule 19, Section II (Duty to Client), Chapter II (Standards of Professional Conduct and Etiquette), Bar Council of India Rules

²⁰¹ <http://lawmin.nic.in/ld/P-ACT/1872/A1872-1.pdf>, last accessed 30 October 2017.

201. Although the balance between respect for client instructions, independence and respect for the court may sometimes be hard to draw, there is nothing in the Rules which suggests that departing from a client's plea would be ethically tolerable.
202. In case of an allegation of professional misconduct by the complainant or if the State Bar Council has a reason to believe that there has been a professional misconduct by the advocate, then the case is referred to a disciplinary committee which can dismiss the complaint or reprimand the advocate or suspend or remove the name of the advocate from the State roll of advocates under the Indian Advocates Act, 1961.
203. Therefore, as seen above, the Bar Council of India Rules expect the advocates to work according to the instructions of the client. The Rules expect the Advocate to not disclose any professional communication communicated to him by the client unless the advocate has the client's express consent. A breach of the professional conduct, can lead to action being taken under Section 35 of the Indian Advocates Act, 1961.

SRI LANKA

I. In your jurisdiction, is it the defendant or the defence counsel who is authorised to decide the plea in felony criminal proceedings?

204. In Sri Lanka, it is a requirement of the Code of Criminal Procedure Act, 1979²⁰² (the “Criminal Code”) that pleas are entered by the defendant.²⁰³ This is the case whether the trial is conducted with, or without, a jury. Sections 196 to 198 and 204 to 206 of the Criminal Code set out the rules regarding the entering of a plea in a trial by a judge of the High Court without a jury and a trial by jury respectively. The provisions provide as follows:

Section 196

When the court is ready to commence the trial the accused shall appear or be brought before it and the indictment shall be read and explained to him and he shall be asked whether he is guilty or not guilty of the offence charged.

Section 197

- (1) If the accused pleads guilty to:
 - (a) the offence with which he is indicted; or
 - (b) a lesser offence for which he could be convicted on that indictment and the Court and the Attorney-General are willing to accept that plea, and it appears to the satisfaction of the Judge that he rightly comprehends the effect of his plea, the plea shall be recorded on the indictment and he may be convicted thereon:

Provided that when the offence so pleaded to is one of murder, the Judge may refuse to receive the plea and cause the trial to proceed in like manner as if the accused had pleaded not guilty.

- (2) The Judge shall in sentencing the accused have regard to the fact that he so pleaded.

Section 198

If the accused does not plead, or if he pleads not guilty, he shall be tried.

Section 204

When the court is ready to commence the trial the accused shall appear or be brought before it and the indictment shall be read and explained to him and he shall be asked whether he is guilty or not guilty of the offence charged.

²⁰² (No. 15 of 1979), as amended.

²⁰³ http://www.commonlii.org/lk/legis/num_act/cocpa15o1979276/ (last accessed 29 October 2017). Amendments are available at <http://www.documents.gov.lk/en/acts.php>, (last accessed 29 October 2017).

Section 205

If the accused pleads guilty to the offence with which he is indicted or to a lesser offence for which he could be convicted on that indictment, the provisions of section 197 shall apply.

Section 206

If the accused does not plead or he pleads not guilty or if in the circumstances set out in the proviso to section 205, the Judge refuses to receive the plea jurors shall be chosen to try the case as hereinafter provided.

205. These provisions set out that it is the defendant who has sole capacity to enter a plea. This was confirmed in *Punchiappubamy v Wijesinghe (Excise Inspector)*.²⁰⁴ Here, at the conclusion of a trial, the attorney who appeared for two defendants tendered a plea of “guilty” on behalf of the first defendant. The prosecution then withdrew the charge against the second defendant. The first defendant subsequently argued that his attorney had no authority to withdraw his previous plea of “not guilty” and tender a plea of “guilty”, and that the conviction could not, therefore, stand. It was held that a plea of guilty must be tendered by the defendant himself. The defendant cannot be convicted on a plea of guilty tendered by his attorney. The conviction was quashed and a retrial before another magistrate was ordered. The court stated that:

Section 188 of the Criminal Procedure Code makes *no provision for the pleader of the accused making the statement required*, thereunder. An accused cannot be punished on an admission of guilt unless that admission is unqualified and *made by the accused in person*. This Court has consistently laid this down.²⁰⁵

206. The case was decided under the 1898 Criminal Procedure Code, however, the relevant wording of section 188 of that code, to which the court referred, is identical to section 197 of the 1979 Criminal Code (as amended).²⁰⁶

²⁰⁴ 1948 NLR (49) 216. Available from: <https://www.lawnet.gov.lk/1977/12/31/punchiappubamy-appellant-and-wijesinge-excise-inspector-respondent/>, last accessed on 29 October 2017.

²⁰⁵ *ibid.* (emphasis added). At the relevant time, the rules governing the entering of pleas were set out in the

²⁰⁶ <https://www.lawnet.gov.lk/1949/12/31/criminal-procedure-code-2/> (Last accessed on 29 October 2017).

II. Under what circumstances, if at all, can the defence counsel depart from the client's instructions as to the plea of not guilty and make statements to the decision maker (judge or jury) to the effect that the defendant is guilty?

207. Any such statements by defence counsel fall may be regarded as a change of plea, a confession, or an admission; separate rules govern each. As set out above, defence counsel has no power to enter or change a client's plea.

208. Confessions and admissions are governed by the Evidence Ordinance.²⁰⁷ Section 2(1) of the Evidence Ordinance stipulates that the Ordinance's provisions apply "to all judicial proceedings in or before any court other than courts-martial, but not to proceedings before an arbitrator". Section 17(2) defines a confession as: "A confession is an admission made at any time by a person accused of an offence stating or suggesting the inference that he committed that offence."

209. This provision provides that it is the defendant who has sole capacity to make a confession. Therefore, statements made by defence counsel which explicitly state or suggest that the defendant has committed the relevant offence will not fall to be treated as confessions.

210. Section 17(1) of the Evidence Ordinance defines as admission as: "An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances herein-after mentioned."

211. Section 18 sets out who can make admissions. In particular, section 18(1) sets out when the agent of a party to proceedings can validly make an admission. It states that: "Statements made by a party to the proceeding, or by an agent to any such party, whom the court regards under the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions." This provision provides that an agent to a party in proceedings, e.g. counsel to a defendant, may only make statements amounting to admissions on behalf of the party where such statements have been expressly or impliedly authorised by the party. Statements made by defence counsel which depart from a client's instructions are not expressly or impliedly authorised by the client and would not, therefore, fall to be treated as admissions.

²⁰⁷ Ordinance No. 14 of 1895). http://brlibrary.umw.edu/research/srilanka/statutes/Evidence_Ordinance.pdf (Last accessed on 29 October 2017).

212. In sum, a defence counsel has no power to depart from the client's instructions as to the plea of not guilty and make statements to the decision maker (judge or jury) to the effect that the defendant is guilty.

III. Where the defence counsel has made statements that run counter to the defendant's actual plea, what is the consequence (i.e., is the case automatically subject to mistrial or reversal)?

213. As set out above, in *Punchiappahamy v Wijesinghe (Excise Inspector)* it was held that, in circumstances where a defence counsel had tendered a plea of guilty on behalf of a defendant at the conclusion of the trial, the resulting conviction should be quashed and a retrial before another magistrate should take place.²⁰⁸

214. Although that case concerned defence counsel tendering a formal plea, as opposed to comments falling short of that threshold, the court held that “[a]n accused cannot be punished on an admission of guilt unless that admission is unqualified and made by the accused in person.”

IV. What are the professional ethical implications of a departure from the client's plea?

215. The conduct of attorneys practicing in Sri Lanka is governed by the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules of 1988 (the “Rules”). Under Rule 15, an attorney, having accepted a professional matter from a client, must exercise their skill with due diligence to the best of their ability and care in the best interests of their client. Rule 15 states:

On accepting any professional matter from a client or on behalf of any client, it shall be the duty of an Attorney-at-Law to exercise his skill with due diligence to the best of his ability and care in the best interests of his client in such a manner as he may decide and he should do so without regard to any unpleasant consequences either to himself or to any other person. Furthermore he should at all times so act with due regard to his duty to Court, Tribunal or any Institution established for the Administration of Justice before which he appears and to his fellow Attorneys-at-Law opposed to him.

²⁰⁸ 1948 NLR (49) 216.

216. Under Rule 18(a) of the Rules “[a]n Attorney-at-Law should never act in a manner detrimental and/or prejudicial to his client”. Further, under Rule 20 of the Rules, an attorney may cease to act where their client refuses to accept and act upon the attorney’s advice and the attorney considers it would be improper or embarrassing to continue to act. Rule 15 states:

Where a client refuses to accept and act upon the advice of his Attorney-at-Law and such Attorney-at-Law decides that thereby it would be improper or embarrassing for him to continue to act for his client or where there is a loss of confidence between an Attorney-at-Law and his client, he may cease to act.

217. Nowhere in the Rules are attorneys permitted to act against the instructions of their client. In particular, nowhere in the Rules are attorneys permitted to change a client’s plea in criminal proceedings in circumstances where the client has not so instructed the attorney.

218. An attorney who acts in contradiction to his client’s express instructions will be in breach of Rules 15 and 18(a) of the Rules and will be subject to professional sanction. In circumstances where an Attorney advises a client plead guilty to an offence, and the client refuses, the attorney may be able to cease acting for the client. However, the attorney is not at liberty to act contrary to instructions, even where those instructions contradict the attorney’s considered advice. This requirement must be read alongside the obligation contained in Rule 50, which would limit the extent to which instructions from clients could be obeyed:

An Attorney-at-law owes a duty to Court [...] before which he appears to assist it in the proper administration of justice without interfering with the independence of the bar.

BANGLADESH

I. In your jurisdiction, is it the defendant or the defence counsel who is authorised to decide the plea in felony criminal proceedings?

219. Under the Code of Criminal Procedure, the defendant is asked by the Magistrate after the framing of charges whether she pleads guilty or not. If the plea is guilty, the court does not have to convict on that basis, if it is concerned that the facts do not bear out the plea.²⁰⁹

265E. If the accused pleads guilty, the Court shall record the plea and may, in its discretion, convict him thereon.

220. If the defendant refuses to plea, the defendant is taken to claim to be tried.²¹⁰ Case law developed by the Supreme Court of Bangladesh lays down that even in cases where a plea of guilty has been tendered, in cases involving the death penalty, a plea of not guilty should be entered. In *Ataur Mridha & Anr. v. The State*,²¹¹ the Court held:

Section 265E has been substituted for section 271 of the Code of Criminal Procedure. It provides that if the accused pleads guilty, the court shall record plea and may, in its discretion, convict him. But in a charge of murder, it is the practice being followed for a long time that no such plea be accepted without examining the accused in order to find out whether he knows exactly what he is pleading to and it is desirable that sufficient evidence is recorded by the court so that the court may have something before it from which it can ascertain whether the plea is genuine and whether any extraneous circumstances exist. (*Emperor v. Abdul Kader*, 48 CrL. L.J (SB) 329). (Emphasis added.)

II. Under what circumstances, if at all, can the defence counsel depart from the client's instructions as to the plea of not guilty and make statements to the decision maker (judge or jury) to the effect that the defendant is guilty?

221. It seems that the answer to this question is never. In the case of *Md. Khaliludin vs. The State*,²¹² the Supreme Court of Bangladesh held that:

In the existing scheme of criminal trials an accused can be convicted either on his pleading guilty to the charge or on his confession under section 164 Cr P.C, or extra Judicial confession if strongly

²⁰⁹ Huq, *Law and Practice of Criminal Procedure* (1980), 315

²¹⁰ *Ibid.*, 316

²¹¹ (Supreme Court of Bangladesh, 4 judge Bench) [2017 SCC OnLine Bang SC (App) 1]

²¹² 1986 BLD (AD) 1, p. 502

corroborated. Suggestion by Lawyer cannot be construed as admission of guilt. The accused is not required to prove his innocence. The prosecution must prove his guilt failing which the accused should be acquitted. Further, plea of guilt is not encouraged in cases involving serious charges, like murder.

III. Where the defence counsel has made statements that run counter to the defendant's actual plea, what is the consequence (i.e., is the case automatically subject to mistrial or reversal)?

222. There does not seem to be any provision explicitly stating the consequences of the defence counsel departing from the client's instructions as to the plea of not guilty.

223. However, there is case law to the effect that it is the fundamental right of a defendant to be defended by a lawyer, especially in a case punishable with death. A case can be remanded back to the Trial Court not only if no defence lawyer was appointed, but if the lawyer did not conduct the case properly or cross-examine witnesses. In *Abdul Hannan v. The State*, it was said that:²¹³

77. In this regard, we may profitably refer the provision of Rule 1 of Chapter-XII, in LR Manual, 1960. Pauper accused punishable with capital sentence to be given legal assistance: Every person charged with committing an offence punishable with death, shall have legal assistance at his trial and the court should provide advocate or pleaders for the defence unless they certify that the accused can afford to do so.

78. It is also stated in the Chapter XII, Rule-6 of LR Manual that, in all cases, advocate or pleader should be appointed in time to be able to study the case and the person selected should be of sufficient standing and ability to render substantial assistance. He should be given a brief similar to that of prepared for public prosecutor and it would be convenient if the two briefs were prepared together. He should be supplied free of cost, with copies of all papers as per this rule 6 of LR Manual. The accused is not only entitled to get legal assistance but he should get legal assistance in time of an able advocate.

81. Thus it is clear that, right of an accused to be defended by a lawyer in a case charged under section 302 of the Penal Code being punishable with death is an inalienable right guaranteed in the

²¹³ [(2009) 29 BLD (HCD) 189; 2008 SCC OnLine Bang SC (HC) 52]

law of our land and if any trial takes place refusing such fundamental right, the trial is a misnomer and the judgment-passed convicting an accused is no judgment in the eye of law.

[...]

84. In agreement with the principles of law laid down above and in consonance with Section 340 of the Code of Criminal Procedure and Rule 1 of chapter XII of the Legal Remembrance's Manual, 1960, we hold that right of an accused to be defended by appointing, a (lawyer in a case changed under section 302 of the Penal Code, being punishable with death, is an inalienable right guaranteed in the law of our land and if any trial takes place in refusing such fundamental right, the trial is misnomer and the judgment passed in such trial convicting an accused is no judgment in the eye of law. It appears from the evidence on record that the learned Sessions Judge, Narayangonj did not give any legal aid to the absconding appellant Abdul Hannan and others in this case. It further appears from the evidence on record that he framed charges against the absconding accused under section 302/34 of the Penal Code and section 302 of the Penal Code prescribes capital punishment and as such we are of the view that it was the duty of the learned Sessions Judge to take step or himself appoint a competent advocate to represent the absconding accused. Failure of the learned Judge to help the accused through a lawyer had vitiated the entire trial and as such the impugned judgment and order complained of cannot be maintainable.

224. In *State & Ors. v. Syed A. Salam & Ors.*,²¹⁴ a case was remanded back on account of the defence lawyer not conducting the case properly.

IV. What are the professional ethical implications of a departure from the client's plea?

225. The Canons of Professional Conduct And Etiquette framed by the Bangladesh Bar Council²¹⁵ mandates in Chapter II that:

9. It is the right of an Advocate to undertake the defense of a person accused of crime, regardless of his person opinion as distinguished from knowledge, as to the guilt of the accused. Otherwise innocent persons, victims merely of suspicious circumstances, might be denied proper defense. Having undertaken such defense, an Advocate, is bound by all fair and honorable means, to present every defense that the law of the land permit, to the end that no person may be deprived of life or liberty except by due process of law.

²¹⁴ (2009) 29 BLD (HCD) 189

²¹⁵ <http://www.barcouncil.gov.bd/disciplinary-jurisdiction/conduct-of-ethics-of-lawyers/>, last accessed on 26th October, 2017

[...] It is improper for an Advocate to assert in argument his personal belief in his client's innocence or in the justice of his cause. His professional duty is strictly limited too making submission at the bar consistency with the interest of his client.

An Advocate owes entire devotion to the interest of the client, with zeal in the maintenance and defence of his rights and the exertion of his utmost learning and ability to the end that nothing be taken or withheld from him save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his advocate to assert every such remedy or defense.

226. There is a complaint mechanism in place for the public to register complaints against advocates²¹⁶. The Bangladesh Legal Practitioner's and Bar Council Order, 1972²¹⁷, codifies the procedure to be followed to conduct these enquiries, under Order 34. Order 32(1) mandates the setting up of Tribunals to conduct such enquiries. Order 32(1) provides that an advocate can be suspended or removed from practice if found guilty of professional misconduct. Chapter IV of the Bangladesh Legal Practitioners and Bar Council Rules, 1972²¹⁸ further prescribes the procedure to be followed during Disciplinary Proceedings.

²¹⁶ <http://www.barcouncil.gov.bd/disciplinary-jurisdiction/procedure-for-complain-against-an-advocate/>, last accessed on 30th October, 2017

²¹⁷ <http://www.clcbd.org/document/download/339.html>, last accessed on 30th October, 2017

²¹⁸ *Ibid.*