Role of Advocates in Judiciary

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S.S. Upadhyay
Former District & Sessions Judge/
Former Legal Advisor to Governor
UP, Lucknow
Mobile : 9453048988
E-mail : ssupadhyay28@gmail.com

1. **Laws applicable to Advocates :** The main laws applicable to the advocates are as under :

(i) Advocates Act, 1961
(ii) Bar Council of India Rules, 1975
(iii) Advocates (Right to Take up Law Teaching) Rules, 1979
(iv) Provisions in the CPC
(v) Provisions in the CrPC
(vi) Provisions in the G.R. Civil
(vii) Provision in the G.R. Criminal
(viii) Circular Orders issued by the High Court
(ix) Allahabad High Court Rules, 1952
(x) Judicial pronouncements
(xi) Govt. Notifications & G.Os. etc.
(xii) Bar Council of India Training Rules, 1995 (declared ultra vires by the Supreme Court in V. Sudeer Vs. Bar Council of India, (1999) 3 SCC 176)

2.01. **Role of lawyers in administration of justice :** Lawyers play an important part in the administration of justice. The Profession itself requires the safeguarding of high moral standards. As an officer of the Court the overriding duty of a lawyer is to the Court, the standards of his profession and to the public. Since the main job of a lawyer is to assist the Court in dispensing justice, the members of the Bar cannot behave with doubtful scruples or strive to thrive on litigation. Lawyers must remember that they are equal partners with Judges in the administration of justice. If lawyers do not perform their function properly, it would be destructive of democracy and the rule of law. "Law is no trade, briefs no merchandise". An advocate being an officer of the Court has a duty to ensure smooth functioning of the Court. He has to revive the person in distress and cannot exploit the helplessness of innocent litigants. A willful and callous disregard for the interests to the client may in a proper case be characterized as conduct unbefitting

an advocate. See : In Re : Rameshwar Prasad Goyal, Advocate, AIR 2014 SC 850.

2.02. **Right to practice as an advocate is not a fundamental right under Article 19(1)(g) of the Constitution but only a statutory right:** Right of an advocate to practice is not a fundamental right under Article 19(1)(g) of the Constitution of India but a statutory right under the Advocates Act, 1961. Therefore, subject to conditions laid down in the Act and Rules, expression "subject to" occurring in Section 30 is included in Section 34 of the Act viz. the rule-making power of High Court. See: Bar Council of India Vs. High Court of Kerala, AIR 2004 SC 2227 (Three-Judge Bench).

2.03. **Legal Profession and Lawyer-Client Relationship and Duties of Lawyers :** The relationship between the lawyer and his client is one of trust and confidence. The client engages a lawyer for personal reasons and is at liberty to leave him also for the same reasons. He is under no obligation to give reasons for withdrawing his brief from his lawyer. The lawyer is not an agent of his client but he is dignified and responsible spokesman. He is not bound to tell the court every fact or urge every proposition of law which his client wants him to do, however relevant it may be. He is essentially an advisor to his client and is rightly called a counsel in some jurisdictions. Legal profession is essentially a service-oriented profession. The lawyer of the Govt. or a public body is not its employee but is a professional practitioner to do the specified work, though the lawyers on the full time rolls of the Govt. and the public bodies, are described as their law officers. It is precisely for this reason that in the case of such law officers, the saving clause of rule 49 of the Bar Council of India Rules waives the prohibition imposed by the said rule against the acceptance by a lawyer of a full time employment. The Supreme Court has quite elaborately discussed in this case the role and powers of legal professionals, lawyers-client relationship, position and powers of Legal Remembrancer in the context of U.P. Legal Remembrance Manual. See : State of U.P. vs. U.P. State Law Officers Association, (1994) 2 SCC 204

2.04. **Advocates as officers of courts :** An Advocate being an officer of the Court has a duty to ensure smooth functioning of the Court. See **: In Re : Rameshwar Prasad Goyal, Advocate, AIR 2014 SC 850**

2.05. **Lawyers are equal partners with the Judges in the administration of justice** : Lawyers are equal partners with the Judges in the administration of justice. See : In Re : Rameshwar Prasad Goyal, Advocate, AIR 2014 SC 850.

2.06. **Pre-conditions for practicing as an advocate before the Allahabad High Court :** Provisions under Rules 3 and 3-A of Chapter XXIV of the Allahabad High Court Rules, 1952 do not permit an advocate who is not enrolled with

the Bar Council of State of UP and is not on the roll of advocates maintained by the Allahabad High Court, to appear, act or plead in the High Court unless he files his Vakalatnama alongwith a local advocate i.e. advocate registered with the Bar Council of UP and on roll of advocates of the Allahabad High Court. **See : Jamshed Ansari Vs. High Court of Judicature at Allahabad & Others, (2016) 10 SCC 554.**

2.07. **Right to practice as an advocate is not an absolute right :** Right of advocates u/s 30 & 34 of the Advocates Act, 1961 is not an absolute right but is subject to the rule-making power of the High Court u/s 34 of the Advocates Act, 1961 and Article 225 of the Constitution of India. High Court by framing the said rules can regulate appearance of advocates in courts. Right to appear and conduct cases in court is a matter on which court must and does have major supervisory and controlling power. See : **Jamshed Ansari Vs. High Court of Judicature at Allahabad & Others, (2016) 10 SCC 554.**

2.08. **Lack of proper knowledge of an advocate is bound to adversely affect the rights of litigants and also the administration of justice :** The administration of justice is a sacrosanct function of the judicial institutions or the persons entrusted with that onerous responsibility and principle of judicial review has now been declared as a part of the basic structure of the Constitution. Therefore, if anything has the effect of impairing or hampering the quality of administration of justice either due to lack of knowledge or proper qualification on the part of the persons involved in the process of justice dispensation or they being not properly certified by the Bar Council as provided under the Advocates Act, 1961 and the Rules made thereunder, it will surely affect the administration of justice and thereby affect the rights of litigants who are before the courts seeking justice. See : **Jamshed Ansari Vs. High Court of Judicature at Allahabad & Others, (2016) 10 SCC 554 (para 19).**

2.09. **Lawyers and litigants cannot be allowed to terrorize or intimidate Judges with a view to secure orders which they want :** No lawyer or litigant can be permitted to browbeat the Court or malign the Presiding Officer with a view to get a favourable order. Judges shall not be able to perform their duties freely and fairly if such activities were permitted and in the result administration of justice would become a casualty and Rule of Law would receive a set back. The Judges are obliged to decide cases impartially and without any fear or favour. Lawyers and litigants cannot be allowed to terrorize or intimidate Judges with a view to secure orders which they want. This is basic and fundamental and no civilised system of administration of justice can permit it. A litigant cannot be permitted 'choice' of the 'forum' and every attempt at "forum shopping" must be crushed with a heavy hand. At the same time, it is of utmost importance to remember that Judges must act as impartial referees and decide cases objectively, uninfluenced by any personal bias or prejudice. A Judge should not allow his judicial position to be compromised at any cost.

This is essential for maintaining the integrity of the institution and public confidence in it. The credibility of this institution rests on the fairness and impartiality of the Judges at all levels. It is the principle of highest importance, for the proper administration of justice, that judicial powers must be exercised impartially and within the bounds of law. It must always be remembered that justice must not only be done but it must also be seen to be done. **See : M/s. Chetak Construction Ltd** Vs. **Om Prakash & Others, AIR 1998 SC 1855 (paras 19 & 20)**.

2.10. **Only because a lawyer appears as a party in person in his own case, he does not get a license to commit contempt of Court by intimidating the Judges or scandalizing the Courts :** Does the law give a lawyer, unsatisfied with the result of a case, any license to permit himself the liberty of scandalizing a Court by casting unwarranted imputations against the Judge in discharge of his judicial functions? Does the lawyer enjoy any special immunity under the Contempt of Courts Act, 1971 where he is found to have committed a gross contempt of Court? The answer has to be an emphatic No. In the instant case, the alleged contemnor has been making continuous attempts to subvert the course of justice in whichever Court his case was. He has been acting not only as if he is above the law but as if he is law unto himself. Notwithstanding his own assessment of his 'merit and 'competence' as stated by him in the memo of petitions, the alleged contemnor appears to be blissfully ignorant of the role of a lawyer and the law relating to drafting of pleadings which must be precise and not scandalous or abusive. By filing the applications, and the petition, as a party in person, couched in very objectionable language, he has permitted himself the liberty of indulging in an action which does little credit to the noble profession to which he belongs. An advocate has no wider protection than a layman when he commits an act which amounts to contempt of Court. It is most unbefitting for an advocate to make imputations against the Judge only because he does not get the expected result which according to him is the fair and reasonable result available to him. Judges cannot be intimidated to seek favourable orders. Only because a lawyer appears as a party in person, he does not get a license to commit contempt of the Court by intimidating the Judges or scandalizing the Courts. He cannot use language, either in the pleadings or during arguments, which is either intemperate or unparliamentary and which has the tendency to interfere in the administration of justice and undermine the dignity of the Court and the majesty of law. These safeguards are not for the protection of any Judge individually but are essential for maintaining the dignity and decorum of the Courts and for upholding the majesty of law. Judges and Courts are not unduly sensitive or touchy to fair and reasonable criticism of their judgments. Fair comments, even if, outspoken, but made without any malice and without attempting to impair the administration of justice and made in good faith in proper language do not attract any punishment for contempt of Court. However, when from the criticism, a deliberate, motivated and calculated attempt is discernible to bring down the image of judiciary in the estimation of the public or to impair the administration of justice or tend to bring the administration of justice into disrepute; the Courts must bitter themselves to

uphold their dignity and the majesty of law. The alleged contemnor, has, undoubtedly committed contempt of the Court by the use of the objectionable and intemperate language. No system of justice can tolerate such unbridled licence on the part of a person, be he a lawyer, to permit himself the liberty of scandalizing the Court by casting unwarranted, uncalled for and unjustified aspersions on the integrity, ability, impartiality or fairness of a Judge in the discharge of his judicial functions, as it undoubtedly amounts to an interference with the due course of administration of justice. No litigant, even a lawyer appearing in person in his own cause, can be permitted to overstep the limits of fair, bona fide and reasonable criticism of the judgment and bring the Courts generally into disrepute or attribute motives to the Judges rendering the judgment. Perversity calculated to undermine the judicial system and the prestige of the Court cannot be permitted for otherwise the very foundation of the judicial system is bound to be undermined and weakened. Liberty of free expression is not to be confused with a licence to make unfounded, unwarranted and irresponsible aspersions against the Judges or the Courts in relation to judicial matters. In the established facts of the case, the alleged contemnor would be guilty of gross contempt of Court and liable to be convicted accordingly. The alleged contemnor sentenced to undergo simple imprisonment for a period of four months and to pay a fine of Rs. 1,000/- (one thousand) and in default of payment of fine, to further undergo simple imprisonment for a period of 15 days. Since the contemnor has abused professional privileges while practicing as an Advocate, the Supreme Court also directed that the copy of the judgment together with the relevant record be forwarded to the Chairman, Bar Council of India, who may refer the case to the concerned committee for appropriate action as is considered fit and proper. See : **In re Ajay Kumar Pandey, Advocate, AIR 1998 SC 3299.**

3.01. **A pleader to act for the party/client only on appointment by vakalatnama (Order 3, rule 4 CPC) :** As per Order 3, rule 4 CPC no pleader can act for the party/client unless he has been appointed as such by the party/client by a document in writing which is popularly called as "Vakalatnama".

3.02. **Vakalatnama when not required ? :** Vakalatnama is not required for performance of legal work such as giving opinion, sending notices, drafting petitions or other documents. There is no need for a lawyer to obtain a signed Vakalatnama from his client for such works. But signed Vakalatnama under Order 3, rule 4 CPC is required to be obtained when it is filed in law courts or tribunals to enable the lawyer to plead cases on behalf of clients. See : Baru Singh vs. Babu Ram Sharma, AIR 1997 All 185

3.03. **No need for fresh Vakalatnama before superior court when one already filed in inferior court :** Filing of fresh Vakalatnama under Order 3, rule 4 CPC before superior court or in special appeal is not required when the same was already filed before the single Judge or inferior court. See : M/s. Ahmad Bakhsh vs. State of U.P., 1999 (36) ALR 74 (All)(D.B.)

3.04. **Fresh Vakalatnama when required** ? : The Supreme Court, expressing concern in regard to the manner in which defective vakalatnamas are routinely filed in courts, has clarified the necessity of filing fresh vakalatnamas at different stages of proceedings like original suits, appeals, revisions, executions and misc. proceedings can be insisted upon. See : Uday Shankar Triyar vs. Ram Kalewar Prasad Singh, 2006(1) ARC 1 (SC) (Three-Judge Bench)

3.05. **Vakalatnama & its contents as required by law :** The Supreme Court, expressing concern in regard to the manner in which defective vakalatnamas are routinely filed in courts, has clarified the necessity of filing fresh vakalatnamas at different stages of proceedings like original suits, appeals, revisions, executions and misc. proceedings and also the manner of filing the vakalatnamas as quoted below :-

"Vakalatnama, a species of power of Attorney, is an important document, which enables and authorizes the pleader appearing for a litigant to do several acts as an agent, which are binding on the litigant who is the principal. It is a document which creates the special relationship between the lawyer and the client. It regulates and governs the extent of delegation of the authority to the pleader and the terms and conditions governing such delegation. It should, therefore, be properly filled, attested, accepted with care and caution. Obtaining the signature of the litigant on blank vakalatnamas and filling them subsequently should be avoided. The Supreme Court took judicial notice of the following defects routinely found in vakalatnamas filed in courts :

(1) Failure to mention the name/s designation or authority of the person executing the vakalatnama and leaving the relevant column blank.

(2) Failure to disclose the name, designation or authority of the person executing the vakalatnama on behalf of the grantor (where the vakalatnama is signed on behalf of a company, society or body) either by affixing a seal or by mentioning the name and designation below the signature of the executant (and failure to annex a copy of such authority with the vakalatnama).

(3) Failure on the part of the pleader in whose favour the vakalatnama is executed to sign it in token of its acceptance.

(4) Failure to identify the person executing the vakalatnama or failure to certify that the pleader has satisfied himself about the due execution of the vakalatnama.

(5) Failure to mention the address of the pleader for purpose of service (particularly in cases of outstation counsel).

(6) Where the vakalatnama is executed by someone for self and on behalf of someone else, failure to mention the fact that it is being so executed.

For example, when a father and the minor children are parties, invariably there is a single signature of the father alone in the vakalatnama without any endorsement/statement that the signature is for self and as guardian of his minor children. Similarly, where a firm an it is partner, or a company and it's Director, or a Trust and it's trustee, or an organization and it's office bearer execute a vakalatnama, invariably there will be only one signature without even an endorsement that the signature is both in his/her personal capacity and as the person authorized to sign on behalf of the corporate body/firm/society/organization.

(7) Where the vakalatnama is executed by a power-of-attorney holder of a party, failure to disclose that it is being executed by an attorney holder and failure to annex a copy of the power of attorney.

(8) Where several persons sign a single vakalatnama, failure to affix the signatures seriatim, without mentioning their serial numbers or names in brackets as many a times it is not possible to know who have signed the vakalatnama where the signature are illegible scrawls.

(9) Pleaders engaged by a client, in turn, executing vakalatnamas in favour of other pleaders for appearing in the same matter or for filing an appeal or revision. It is not uncommon in some areas for mofussil lawyer to obtain signature of a litigant on a vakalatnama and come to the seat of the High Court and engage a pleader for appearance in a High Court and execute a vakalatnama in favour of such pleader.

(10) The abovenoted routine defects are found as registries/offices do not verify the vakalatnamas with due care and caution they deserve, such failure many a time leads to avoidable complications at later stages. The need to issue appropriate instructions to the registries/offices to properly check and verify the vakalatnamas filed requires emphasis.

(11) Filing a fresh vakalatnama with the memorandum of appeal etc. will always be convenient to facilitate the processing of the appeal by the office. See :

(i) Uday Shankar Triyar vs. Ram Kalewar Prasad Singh, 2006(1) ARC 1 (SC) (Three--Judge Bench)

(ii) Ram Kishan vs. State of U.P., 2008 (61) ACC 838 (All)

3.06. **Vakalatnama to be permitted to be signed by the counsel if not signed by him earlier :** A Vakalatnama which could not have been signed by the counsel at the time of presentation of the memorandum of appeal and the same was consequently dismissed by the Addl. District Judge/Appellate Court on that ground alone, it has been held by the Supreme Court that a procedural defect like non-signing of the Vakalatnama by the counsel could not have

been made a basis for dismissal of the appeal and permission to counsel to sign the Vakalatnama should have been accorded. See :

1. Uday Shankar Triyar vs. Ram Kalewar Prasad Singh, 2006(1)ARC 1(SC : Three Judge Bench)
2. Yagnapurushdasji vs. Muldas Bhundardas Vaishya, AIR 1966 SC 1119

3.07. **Change of counsel by party and filing of fresh vakalatnama by newly engaged counsel when permissible?** : In a civil appeal which was dismissed by the court under Order 41, Rule 17 of the CPC and thereafter restoration application under Order 41, rule 19 of the CPC was moved, explaining rule 39 of Chapter II in part VI of the Bar Council of India Rules, 1975, it has been held that so far as the courts are concerned it is not open to a party to determine the appointment of a Counsel without permission of the Court. It is not open to a client to withdraw the file of the case from his Counsel without permission of the Court as required under Order 3, Rule 4 and ordinarily a Counsel cannot withdraw from the case, on his being engaged without leave of the Court so far as the case is concerned, as if a party is deemed to be entitled to change Counsels one after other at his sweet will and take away from the file of the case from one Counsel without determining his appointment according to requirement of the rule and engage other and thereafter engages a third Counsel after taking the file of the second Counsel without consent in writing of the Counsel after taking the file of the second Counsel without consent in writing of the Counsel already on record of the case and without permission of the Court, disastrous consequences may ensue and follow. As such, it is not open to a party to subterfuge another Counsel before determining the appointment of the earlier one in accordance with law as provided under Order 3, Rule 4, except in the cases or in the circumstances provided by the modifying the rules or immediate appointment of the second Counsel with the consent writing of the Counsel already on record.Rule 39 of Bar Council of India Rules, per se shows as a rule of conduct on the part of Advocate and it imposes an obligation on Advocate that in cases or in any case where there is already an Advocate engaged by a party and vakalatnama has already been filed, no Advocate shall appear for that party except with the consent of the Advocate already on the record of the case and a reading of the rules indicates that as consent has to be produced before the Court, it means the consent should be in writing and if for some reasons or other the consent cannot be produced then the second Counsel put in appearance, in the case, with application for

permission in which he shall state the reasons as to why he is unable to produce the consent and will seek the permission of the Court for appearing in that case. The law and spirit of this rule of conduct on the part of Advocate also emphasize and indicates its purposes, which is two-fold, namely, firstly, that keeping pace with the position of an Advocate, it is necessary that in order to maintain certain norms of lis and ethics of profession as well as to maintain their status and dignity, it should be provided that they should not themselves to make their own-selves or their colleagues, a subject matter or a tool or a thing in the hands of litigants or touts or like persons to be changed every now and then according to the whims of the litigants or control over them of unwanted touts or like persons on one hand and the rule casts a duty on them that the Counsel should not accept a brief in which an Advocate is already there to represent the party who intends to engage him and should not put in appearance for a party who has already been filed on the record of the case unless and until the Counsel already on record given his consent in writing or in some special circumstances and cases where consents have not been obtained or could not be obtained and produced before the Court, requires the Counsels, narrating those circumstances and reasons why the consent could not be obtained move application for permission and then the Court having the power in such a case to grant permission to the second Counsel to appear grants the permission after considering those circumstances justifying the grant of permission. The second object of the rule is to maintain certainly of representation of a party in the case by a specifically appointed Counsel and, thirdly, as far as possible not to allow the parties litigants to abuse such a situation and to make it (sic) of and cause for obtaining adjournments which might otherwise be refused. See : Smt. Champa Devi vs. U.P. State Electricity Board, 1992 (2) ARC 634 (All).

3.08. **Government pleader to file only memorandum of appearance and not vakalatnama** : Order 27 Rule 9 CPC (as amended in UP) reads thus ***:*** **"**In every case in which the Government Pleader appears for the Government as a party on its own account, or for the Government as undertaking, under the provisions of rule 8(1), the defence of a suit against an officer of the Government, he shall, in lieu of a vakalatnama, file a memorandum on unstamped paper signed by him and stating on whose behalf he appears. Such memorandum shall be, as nearly as may be, in the terms of the prescribed form under the said Rule 9."

3.09. **Government counsel need not file Vakalatnama :** There is no need for the counsel of State to file Vakalatnama under Order 3, rule 1 CPC. State acts through counsel for State and he is entitled to represent the state in all proceedings initiated in court. Memo of appearance by counsel for state would be sufficient. See : Deputy Collector Northern Sub-Division, Panaji vs. Comunidade of Bambolim, AIR 1996 SC 148.

4.01. **Unilateral change of counsel by party only after permission of the court** : If the counsel's instruction are unilaterally terminated at the initiative of the client, the discharge of counsel can be by leave of court, but counsel will be entitled to full fees. But, while a client may have the luxury of changing as many counsel as he may desire to chose but everyone of them whose instructions be terminates unilaterally without a cause may be entitled to full fees. Should the fees be not settled the court would determine, it on the principle of *quantum meriat*. If counsel wants to abandon a client, he may seek a discharge from the court but he would not be entitled to fees. No counsel will withdraw from a case except by leave and permission of the court, no matter what that client may say. And, no counsel should enter a case in which a counsel stands engaged except with the prior permission of the lawyer who already appears. A violation of the principle would be unprofessional conduct by Rule 39 of the Standards of Professional conduct and Etiquette framed by the Bar Council of India. Further should there be allegations of misconduct against counsel, the court may examine the content of the allegations for their veracity and truth, and order of the court will rest on the circumstances. See : Dr. Hari Nandan Singh Vs. U.P. Higher Education Services Commission, Allahabad, 1992 ESC 311 (All)(DB).

4.02. **Government pleader (DGC/ADGC) to act on behalf of the Government :** Order 27, rules 2, 4, 5, 6, 8-B, 9 and 10 CPC empower the Government pleader (DGC/ADGC) to receive notices etc and to act on behalf of the Government in courts**.**

5.01. **Advocate bound to return papers to his client even in the event of non-payment of fee :** At any rate if the litigation is pending the party has the right to get the papers from his advocate whom he has changed so that the new counsel can be briefed by him effectively. In either case it is impermissible for the former counsel to retain the case bundle on the premise that fees is yet to be paid. This right of the litigant is to be read as the corresponding counterpart of the professional duty of the

advocate. Therefore the refusal to return the file to the client when he demands the same amounts to misconduct of the advocate u/s. 35 of the Advocates Act, 1961. Even if the advocate feels that he has any genuine claim or grievance against his client, the appropriate course is to return the brief with endorsement of no objection and agitate such right in an appropriate forum in accordance with law and not indulge in arm twisting methods by holding on to the brief. See :

(i) R.D. Saxena vs. Balram Prasad Sharma, AIR 2000 SC 2912

(ii) New India Assurance Co. Ltd. vs. A.K. Saxena, AIR 2004 SC 311

5.02. **Change of counsel and payment of fees to former counsel :** After change of counsel by the party, previous counsel cannot insist upon fees till conclusion of proceedings. But where the former counsel had worked till the stage of settlement of issues and leading evidence on behalf of the party partly, the trial of suit had thus partly concluded and therefore one fourth of the scheduled fee was directed by the court to be paid to the counsel by the party and the counsel was directed to give unconditional consent to engage another advocate. See : C.S. Venkatasubramanian vs. State Bank of India, AIR 1997 SC 2329.

5.03. **Writ Petition by the counsel maintainable under Article 226 of the Constitution to recover the remaining fees :** A writ petition by the counsel seeking a claim of his fees may be entertained and considered by the High Court and the request by counsel for directions in the matter relating to counsel fees ought to be examined by the High Court. Upholding counsel's claim of fees, the Supreme Court also gave directions that the fees due would be paid to counsel with interest at the rate of 12 %. See :

(i) Govt. of Tamil Nadu Vs. R. Thillaibillalan, AIR 1991 SC 1231

(ii) Dr. Hari Nandan Singh Vs. UP Higher Education Services Commission, Allahabad, 1992 ESC 311 (All)(DB)

5.04. **Counsel cannot claim any fees if he himself withdraws from the case :** Counsel cannot claim any fees if he himself withdraws from the case. See : Dr. Hari Nandan Singh Vs. UP Higher Education Services Commission, Allahabad, 1992 ESC 311 (All)(DB).

5.05. **Non-appearance by counsel in court for non-payment of fees etc. amounts to misconduct :** Where the counsel abstained from appearing in the court for the party on the ground of non-payment of fees etc. and consequently the case was dismissed in default, it has been held by the Allahabad High Court that non-payment of fees etc. cannot be an excuse

for non-appearance by counsel for the party in the court. A counsel is bound to appear in court for his client as soon as he files his Vakalatnama in the court and such non-appearance on the part of counsel amounts to grave misconduct towards the court. See : Narendra Kumar vs. ADJ, 2007 (67) ALR 530 (All)

6.01. **Order to proceed ex-parte on absence of Advocate due to condolence disapproved by the High Court** : Where an Advocate engaged by the party had not appeared before the Court due to resolution of the Bar Association on Account of condolence due to death of a senior lawyer and the court had directed to proceed the matter ex-parte and dismiss the appeal, it has been held by the Allahabad High Court that the appellate authority committed a manifest error by showing disrespect to the resolution of Bar Association for a genuine cause like attending the funeral of one senior lawyer who had expired on that date. See : Ravindra Nath Srivastava Vs State of UP, 2012 (117) RD 589 (All)

6.02. **Party to realize cost from Advocate if the case is decided ex-parte for non appearance of the Advocate in the court** : When ex-parte order is passed against the party due to absence of Advocate on the ground of their strike then if the court is satisfied, it can allow the party to realize cost of setting aside the ex-parte order on cost and with facility to the party to realize the amount from his Advocate. See : Raman Services (P) Ltd. vs. Subhash Kapoor, 2001 (1) ARC 570 (SC)

6.03. **Counsel cannot avoid to appear before court on the ground of resolution passed by Bar Association to boycott a particular court** : If any counsel does not want to appear in a particular Court, that too for justifiable reasons, professional decorum and etiquette require him to give up his engagement in that Court so that the party can engage another counsel. But retaining the brief of his client and at the same time abstaining from appearing in that Court, that too not on any particular day on account of some personal inconvenience of the counsel but as a permanent feature, is unprofessional as also unbecoming of the status of an advocate. No court is obliged to a adjourn a case because of the strike call given by any Association of Advocates or a decision to boycott the Courts either in general or any particular Court. It is the solemn duty of every Court to proceed with the judicial business during Court hours. No Court should yield to pressure tactics of boycott calls or any kind of browbeating. See : Mahabir Prasad Singh Vs. M/s. Jacks Aviation Pvt. Ltd., AIR 1999 SC 287 *(para 10).*

7.01. <u>Consent or waiver not to confer jurisdiction or power on court</u> : No amount of waiver or consent can confer jurisdiction on a court which it inherently lacks or where none exists. See : Vithalbhai (P) Ltd. Vs. Union Bank of India, (2005) 4 SCC 315.

7.02. <u>Admission or concession made wrongly by counsel not to bind the party</u> : A wrong concession or admission on question of law made before court by counsel will not bind his client. Opposite party cannot seek benefit on the basis of such concession or admission. See :

1. Union of India vs. Mohanlal Likumal Punjabi, (2004) 3 SCC 628
2. Central Council for Research in Ayurveda & Siddha vs. Dr. K. Santhakumari, (2001) 5 SCC 60
3. Uptron India Limited vs. Shammi Bhan, (1998) 6 SCC 538
4. Sanjeev Coke Mfg. Co. vs. Bharat Coking Coal Ltd., (1983) 1 SCC 147.

7.03. <u>Concession given by counsel to opposite party by "not pressing" the petition should be normally verified by the Court before acting upon it</u> : Where wife was granted maintenance by the lower court under the Protection of Women from Domestic Violence Act, 2005 and in appeal filed by the husband, the counsel engaged by the wife made an endorsement to the effect "not pressed" and the High Court had then dismissed the appeal but the wife had stated that she had never instructed her counsel not to press her claim for maintenance, the Hon'ble Supreme Court has held that before acting upon the said concession or endorsement of the counsel, the High Court should have got the concession verified and ought not to have accepted the statement of the counsel of the wife without verification**.** See **:** Shalu Ojha Vs. Prashant Ojha, (2015) 2 SCC 99.

8.01. <u>Compromise on behalf of party when to be entered into by the counsel ?</u>: The counsel appearing for a party is fully competent to put his signature to the terms of any compromise upon which a decree can be passed in proper compliance with the provisions of Order 23 Rule 3 CPC and such decree is perfectly valid, depending on the authority conferred on the counsel in terms of the vakalatnama. It will be prudent for counsel not to act on implied authority except when warranted by the exigency of circumstances demanding immediate adjustment of the suit by agreement or compromise and the signature of the party cannot be obtained without undue delay. In these days of easier and quicker communication, such contingency may seldom arise. A wise and careful counsel will no doubt arm himself in advance with the necessary authority expressed in writing to meet all such contingencies in order that neither his authority nor integrity is ever doubted. This essential precaution will safeguard the personal reputation of the counsel as well as uphold the prestige and dignity of the legal profession. To insist upon the party himself personally signing the agreement or compromise would often cause undue delay, loss and inconvenience, especially in the case of non-

resident persons. It has always been universally understood that a party can always act by his duly authorized representative. If a power-of -attorney holder can enter into an agreement or compromise on behalf of his principal, so can a counsel possessed of the requisite authorization by vakalatnama act on behalf of his client. Not to recognize such capacity is not only to cause much inconvenience and loss to the parties personally, but also to delay the progress of proceedings in court. See : Y. Sleebachen & Others Vs. State of Tamil Nadu through Superintending Engineer Water Recourses Organization/Public works Department and Another, (2015) 5 SCC 747 *(paras 16 to 20).*

8.02. <u>Compromise by counsel</u> : After the amendments in Order 23, rule 3 CPC in the year 1976, a compromise needs to be reduced in writing and signed by the parties and not by the counsel alone. See :

1. Gurpreet Singh vs. Chatur Bhuj Goel, (1988) 1 SCC 270
2. Banwari Lal vs. Chando Devi, (1993) 1 SCC 581
3. Dr. Jitendra Kumar Jain vs. ADJ, Roorkee, AIR 2006 (NOC) 1248 (All)

8.03. <u>Compromise by counsel alone invalid</u> : A compromise memo filed by counsel alone under Order 23, rule 3 CPC without signatures of the parties is invalid. Compromise petition must be signed by the parties as well. In the absence of signatures of the parties, a compromise petition containing only the signature of the counsel engaged by the parties should not be accepted by the Court. See :

(i) Premlata Vs. First Addl. Civil Judge Meerut, 1998 (32) ALR 352 (All)

(ii) Lokumal Topandas Vs. Allahabad Bank, AIR 1998 All 398

8.04. <u>Compromise by counsel held valid</u> : The words 'in writing and signed by the parties', inserted in Order 23, R. 3, CPC by the CPC (Amendment) Act, 1976 necessarily mean and include duly authorized representative and Counsel. Thus a compromise in writing and signed by counsel representing the parties, but not signed by the parties in person, is valid and binding on the parties and is executable even if the compromise relates to matters concerning the parties, but extending beyond the subject matter of the suit. A judgment by consent is intended to stop litigation between the parties just as much as a judgment resulting from a decision of the Court at the end of a long drawn out fight. A compromise decree creates an estoppel by judgment. Counsel's role in entering into a compromise has been traditionally understood to be confined to matters within the scope of the suit. However, a compromise decree may incorporate not only matters falling within the subject matter of the suit, but also other matters which are collateral to it. The position before the amendment in 1976 was that, in respect of the former, the decree was executable, but in respect of the latter, it was not executable, though admissible as judicial evidence of its contents. See :

1. Byram Pestonji Gariwala vs. Union Bank of India, AIR 1991 SC 2234
2. Jineshwardas vs. Smt. Jagrani, 2003 (53) ALR 599 (SC)

8.05. **Entering into compromise by counsel without consent of party amounts to misconduct :** Where an Advocate was not authorized by the party to enter into compromise and the Advocate had yet entered into compromise, it has been held by the Supreme Court that the said act of the Advocate amounted to misconduct within the meaning of Section 35 of the Advocates Act, 1961 and the party was directed to approach the State Bar Council for appropriate disciplinary action against the Advocate concerned. See :

(i) Ram Asarey Vs. DDC, Faizabad, (1998) 6 SCC 480

(ii) Narain Pandey Vs Pannalal Pandey, 2013 (118) RD 674 (SC)

8.06. **Compromise should be challenged before the Judge recording the compromise and not in appeal :** Party concerned should approach the court which recorded the compromise in the first instance rather than straight away filing appeals as it is judge before whom the compromise was recorded who is privy to events that led to the compromise order and is thus in a better position to deal with validity of compromise. See : Y. Sleebachen & Others Vs. State of Tamil Nadu through Superintending Engineer Water Recourses Organization/Public works Department and Another, (2015) 5 SCC 747.

8.07. **Concession made before court by counsel when binding on the party ?** : A concession made before court by counsel is binding on the party whom he represents and such party cannot resile therefrom subject to just exceptions. But a wrong concession made by a counsel on point of law would not be binding on the party concerned. Legal right possessed by a person, if waived, enforcement thereof cannot be thereafter insisted upon. See : BSNL vs. Subhash Chandra Kanchan, (2006) 8 SCC 279

9. **Advocate not to substitute his name for the name of party :** An advocate cannot maintain a petition on behalf of his clients (accused persons). In view of Sec. 30 of the Advocates Act, 1961, an advocate cannot file a writ petition in his own name to pursue the cause of his clients. See : Vinoy Kumar vs. State of U.P., (2001) 4 SCC 734

10. **Party not to suffer for a bonafide mistake or negligence of his counsel :** If there is a bonafide mistake or negligence on the part of the lawyer, the party should not be made to suffer. But it is equally true that for the negligence of the counsel of one party, the other party should not suffer. See : Smt. Leela Bhanott vs. Petrolube India, (2006) 64 ALR 403 (All—D.B.)

11. **Notice to counsel means notice to party himself (Order 3, rule 5 CPC) :** According to Order 3, rule 5 CPC, notice given to counsel is for all purposes a notice given to the concerned party whom he represents. Mere fact that the counsel on being served, desires the court to send notice to the party

concerned, does not change the position. A notice served on counsel is as good service as upon the party himself. See :

1. Brijlal vs. VIIth ADJ, Allahabad, 1995 (13) LCD 62 (All)
2. Sheo Ramdas Chela vs. Subhash Chandra, 1999 (36) ALR 324 (All)

12.01. "<u>No Instruction" endorsement by counsel & its effect</u> : Mere fact that the counsel engaged by the party made an endorsement on the notice sent to him that he had no instructions from his client does not terminate his authority and he continues to be a counsel for the party unless he formally withdraws from the case under leave from court u/o. 3, rule 4(2) CPC. See :

1. Jyoti Prasad vs. Punjab National Bank, AIR 1963 All 374
2. Narendra Kumar vs. ADJ, 2007 (67) ALR 530 (All)
3. Ashok Kumar Dhiman vs. Smt. Chandrawati Mehta, 1996 (27) ALR 6 (All)
4. Bijli Cotton Mills Pvt. Ltd. vs. M/s. Chagan Mal Basti Mal, AIR 1982 All 183 (D.B.)

12.02. <u>"No Instruction" endorsement by counsel & necessity of fresh notice to party</u> : Where the court issued notice to the counsel engaged by defendant but the counsel failed to appear and plead for the defendant by recording endorsement of "no instruction" on the notice with the result that the case was directed to proceed ex-parte and ultimately the suit was decreed ex-parte against the defendant and the counsel had not informed the defendant regarding his non-appearance for him in the court and the court had also not issued any fresh notice to the defendant under these facts and circumstances and the defendant came to know of the ex-parte decree only when he approached the counsel, it has been held by the Supreme Court that the defendant cannot be said to be careless and negligent and ex-parte decree was found liable to be set aside. In view of the provisions under Order 3, rule 4(2) CPC, a mere statement by counsel that he has no instructions from his client, does not terminate his authority unless he submits the same in writing and obtains permission of the court. See :

1. Malkiat Singh vs. Joginder Singh, AIR 1998 SC 258
2. Ashok Kumar Dhiman vs. Smt. Chandrawati Mehta, 1996 (27) ALR 6 (All)

12.03. "<u>No contact with client" endorsement by counsel & its effect</u> : Where despite repeated communications by counsel to the party, no further instructions were received by the counsel from his client and the statement of the counsel to the effect that the client had no contact for instructions with the counsel engaged by him, was recorded by the court, it has been held that the dismissal of the appeal for want of prosecution on the part of the party/appellant/client was proper. See : **Subedar vs. Ram Swaroop, 2006 (65) ALR 582 (All)**

12.04. **Non-appearance by counsel in court on the ground of "no contact by client" amounts to misconduct :** Where the counsel had abstained from appearing in the court for the party on the ground that his client did not respond to several letters sent by the counsel to the client and the counsel had not informed his client for his non-appearance in the court and the case was dismissed in default, it has been held by the Allahabad High Court that a counsel is bound to appear in the court for his client as soon as he files his Vakalatnama in the court and such non-appearance by the counsel amounts to grave misconduct towards the court. See : Narendra Kumar vs. ADJ, 2007 (67) ALR 530 (All)

13.01. **Advocate has no right to remain absent from court** : An advocate has no right to remain absent from court when the case of his client comes up for hearing. He is duty bound to attend the case in court or to make an alternative arrangement. Non-appearance in court without "sufficient cause" cannot be excused. Such absence is not only unfair to the client of the Advocate but also unfair and dis-courteous to the court and can never be countenanced. When a party engages an advocate who is expected to appear at the time of hearing but fails to so appear, normally, a party should not suffer on account of default or non-appearance of the Advocate. In terms of the explanation to Order 41, Rule 17 CPC, an appeal can be dismissed in default and not on merits. In the event of default by the appellant or his counsel, the appeal can only be dismissed in default. See :

1. Secretary, Department of Horticulture, Chandigarh vs. Raghu Raj, (2008) 13 SCC 395
2. Rafiq vs. Munshilal, (1981) 2 SCC 788
3. Lachi Tewari vs. Director of Land Records, 1984 Supp SCC 431
4. Mangilal vs. State of M.P., (1994) 4 SCC 564
5. Tahil Ram Issardas Sadarangani vs. Ramchand Issardas Sadarangani, 1993 Supp (3) SCC 256

13.02. **Hearing of counsel must in criminal cases whether trial, appeal or revision :** In the case of Md. Sukur Ali vs. State of Assam, 2011 CrLJ 1690 (SC), it has been held by the Supreme Court that criminal case, whether trial, appeal or revision should not be decided against accused in absence of is counsel. Liberty of a person is the most important feature of our Constitution. Article 21 which guarantees protection to life and personal liberty is the most important fundamental right of the fundamental rights guaranteed by the Constitution. Article 21 can be said to be the 'heart and soul' of the fundamental rights. It is only a lawyer who is conversant with law who can properly defend an accused in a criminal case. Hence, if a criminal case (whether a trial or appeal/revision) is decided against an accused in the

absence of counsel, there will be violation of Article 21 of the Constitution. As such even if the counsel for the accused does not appear because of his negligence or deliberately, even then the court should not decide the criminal case against the accused in the absence of his counsel since the accused in a criminal case should not suffer for the fault of his counsel and in such a situation the court should appoint another counsel as amicus curiae to defend the accused. Earlier decisions of the Hon'ble Supreme Court rendered in the matters of (i)*A.S Mohammed Rafi vs. State of T.N, AIR 2011 SC 308, (ii) Man Singh vs. State of M.P, (2008) 9 SCC 542 and (iii) Bapu Limbaji Kamble vs. State of Maharashtra, (2005) 11 SCC 413* have been relied on in the case of Md. Sukur Ali.

13.03. **<u>Hearing of accused or his counsel not necessary when their absence is deliberate</u> :** Relying on its earlier Three-Judge Bench decision rendered in the case of Bani Singh & Others Vs. State of UP, AIR 1996 SC 2439, the Two-Judge Bench of the Hon'ble Supreme Court has, in the case noted below, declared its earlier Two-Judge Bench decisions in M.D. Sukur Ali Vs. State of Assam, AIR 2011 SC 1222 and in A.S. Mohammed Rafi Vs. State of Tamil Nadu, AIR 2011 SC 308 *per in curiam* by holding (in para 36) thus : "In view of the aforesaid annunciation of law, it can safely be concluded that the dictum in M.D. Sukur Ali Vs. State of Assam, AIR 2011 SC 1222 to the effect that the court cannot decide a criminal appeal in the absence of counsel for the accused and that too if the counsel does not appear deliberately or shows negligence in appearing, being contrary to the ratio laid down by the larger Bench in Bani Singh & Others Vs. State of UP, AIR 1996 SC 2439 (Three-Judge Bench) is per incuriam. We may hasten to clarify that barring the said aspect, we do not intend to say anything on the said judgment as far as engagement of amicus curiae or the decision rendered regard being had to the other factual matrix therein or the role of the Bar Association or the lawyers. Thus, the contention of the learned counsel for the appellant that the High Court should not have decided the appeal on its merits without the presence of the counsel does not deserve acceptance. That apart, it is noticeable that after the judgment was dictated in open court, the counsel appeared and he was allowed to put forth his submissions and the same have been dealt with." See : K.S. Panduranga Vs. State of Karnataka, AIR 2013 SC 2164 (para 36).

Note : *In view of the larger Bench (Three-Judge Bench) decision in Bani Singh & Others Vs. State of UP, AIR 1996 SC 2439, the Division Bench decision of the Hon'ble Supreme Court in K.S. Panduranga Vs. State of Karnataka, AIR 2013 SC 2164 (para 36) has to be followed and not the other contrary smaller Bench decisions.*

13.04. **<u>Advocate has duty to represent an arrested/detained person</u> :**Where the Advocate husband of a selected Civil Judge (Junior Division) was practicing as an Advocate in the courts at Markapur (Andhra Pradesh) and the said Advocate was engaged and representing certain accused persons allegedly belonging to CPI (Maoist) Party, a prohibited organization, and on receiving a verification report from police to that effect, the selected female Civil Judge (Junior Division) was not issued appointment letter on the ground that her Advocate husband was representing the said accused persons belonging to a prohibited organization like CPI (Maoist) Party, setting aside the said decision of the Government of Andhra Pradesh regarding not issuing appointment letter to the said selectee on the ground aforesaid, it has been held by the Hon'ble Supreme Court that in view of the provisions of the Article 22(1) of the Constitution of India, Section 49 of the Advocates Act, 1961 and Rules 11 & 15 of the Bar Council of India Rules, 1975, an Advocate representing an arrested or detained person cannot be criticized and every arrested/detained person has constitutional right to be defended lawfully and an Advocate has corresponding duty to represent him. See : Smt. K. Vijaya Lakshmi Vs Govt. of AP, AIR 2013 SC 3589.

14.01. **<u>Counsel deemed to represent the party in court unless withdraws from the case under order of court (Order 3, rule 4 CPC)</u> :** According to Order 3, rule 4 CPC a counsel is deemed to continue to represent the party in the court unless he formally withdraws from the case under order of the court. See :

1. Ashok Kumar Dhiman vs. Smt. Chandrawati Mehta, 1996 (27) ALR 6 (All)
2. Smt. Champa Devi vs. U.P. State Electricity Board, 1992 (2) ARC 634 (All)

14.02. **<u>Withdrawal from case by counsel without leave from court & its effect</u>** : Where the counsel engaged by the party had recorded an endorsement to the effect "I withdraw" it has been held that such endorsement is to be treated as an action without any leave from the court which cannot be taken as a good ground for setting aside the ex-parte decree by way of an application under Order 9, rule 13 CPC. See : Smt. Veena Agarwal vs. M/s. Unjha Ayurvedic Pharmacy, 2007 (67) ALR 282 (All)(DB)

15. **<u>Death of the party and the duty of counsel (Order 22, rule 10-A CPC)</u> :** Whenever a pleader appearing for a party to the suit comes to

know of the death of that party, he shall inform the Court about it, and the Court shall thereupon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist.

16. **Remedy of the client against frauds etc. of his counsel :** Where the suit was dismissed in default because of the default of the counsel engaged by the party and the counsel had failed not only to inform his client but deliberately misled him and practiced systematic fraud on his client, it has been held by the Allahabad High Court that the client is entitled to all assistance from the court for setting right the injustice done to him. See : M/s. Narain Agricultural Corporation vs. Allahabad Bank, Civil Lines, Azamgarh, 1995 (13) LCD 569 (All).

17. **Verbal service of notice on pleader :** There is no ground to construe the expression "date of service of notice" to mean only a notice in writing served in a formal manner. When the legislature used the word "notice" it must be presumed to have borne in mind that it means not only a formal intimation but also an informal one. Similarly, it must be deemed to have in mind the fact that service of a notice would include constructive or informal notice. See : Nilkantha Sidramappa Ningashetti vs. Kashinath Somanna Ningashetti, AIR 1962 SC 666 (Four-Judge Bench)

18. **Supreme Court advocate entitled to appear and plead in all High Courts :** An advocate of the Supreme Court becomes entitled as of right to appear and plead as well as to act in all the High Courts including the High Court in which he was already enrolled, without any differentiation being made for this purpose between the various jurisdictions exercised by those courts. See : Aswini Kumar vs. Arabinda Bose, AIR 1952 SC 369

19. **Duty of junior counsel appearing with senior advocate :** Ordinarily, when a junior counsel and senior advocate appear in a case, it would be an adventurist act exposing himself to great risk on the part of the junior to report a compromise without consulting his senior, even assuming that the party was not available. It is right to stress that counsel should not rush in with a razi where due care will make them fear to treat, that a junior should rarely consent on his own when there is a senior in the brief, that a party may validly impugn an act of compromise by his

pleader if he is available for consultation but is by-passed. The lawyer must be above board, specially if he is to agree to an adverse verdict. See : Smt. Jamilabai Abdul Kadar vs. Shankarlal Gulabchand, AIR 1975 SC 2202

20.01. Time limit for arguments : Order 18, rule 2, sub-rule (3-D) CPC, as amended since 1.7.2002 provides that the court shall fix such time limits for the oral arguments by either of the parties in a case as it thinks fit.

20.02. Written arguments : The counsel for parties may submit their concise written arguments with the permission of the court under Order 18, rule 2, sub-rule (3-A) CPC as amended w.e.f. 1.7.2002.

20.03. No adjournment to be granted for filing written arguments : As per the amended provisions of Order 18, rule 2, sub-rule (3-C) CPC w.e.f. 1.7.2002, no adjournment shall be granted for the purposes of filing the written arguments unless the court, for reasons to be recorded in writing, considers it necessary to grant such adjournment.

20.04. No lengthy arguments : The Supreme Court and the Allahabad High Court have held that a counsel should not advance lengthy arguments so that precious time of court may not be wasted. See :

1. Gauri Shanker vs. DDC Allahabad, 2005 (4) AWC 3259 (All)
2. LIC of India vs. Escorts Ltd., AIR 1986 SC 1370

20.05. **No sentimental arguments :** Sentimental arguments cannot be entertained. See : Gopal Singh vs. State Cadre Forest Officers' Association, AIR 2007 SC 1878.

21.01. Public Prosecutors : Their powers & functions : In criminal matters, public prosecutors are appointed u/s 24 CrPC. Public Prosecutor is a statutory officer of high regard. See :

1. Sidharth Vashisth alias Manu sharma Vs. State of NCT of Delhi, AIR 2010 SC 2352
2. Shiv Kumar Vs. Hukam chand, (1999)7 SCC 467

21.02. Public Prosecutor appointed u/s 24 CrPC is an officer of court : A public prosecutor appointed u/s 24 CrPC is an officer of court. He has to act objectively and not according to dictates of the State Govt. See : Captain Amarinder Singh Vs. Prakash Singh Badal, (2009) 6 SCC 260 (Three-Judge Bench).

21.03. Appearance by Public Prosecutors (Section 301 CrPC) : (1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.

(2) If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader to

instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.

21.04. **Permission to conduct prosecution (Section 302 CrPC) : (1)** Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than police officer below the rank of Inspector; but no person, other than the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission.

(2) Any person conducting the prosecution may do so personally or by a pleader.

21.05. **Private counsel not to lead evidence on behalf of prosecution :** A privately engaged counsel may not have any liberty to lead prosecution evidence or to do the duties entrusted by law to a public prosecutor under Sections 301(1) & 301(2) CrPC or Section 225 CrPC. However, complainant can engage a private counsel but such counsel cannot get the status of a public prosecutor. Public prosecutor cannot abdicate his powers in favour of a person who is not a public prosecutor. See : Rajesh Kumar Vs. State of UP, 1998 (37) ACC 867 (All).

21.06. **Only public prosecutor to conduct prosecution** : Where in a complaint case instituted by private complainant, offences are triable exclusively by court of sessions, in the sessions court, a public prosecutor alone can conduct prosecution. See : Rosy Vs. State of Kerala, 2000 (40) ACC 444 (SC).

21.07. **A private counsel engaged by complainant can act only under guidance of the public prosecutor :** A private counsel engaged by the complainant can act only under the guidance and instructions of the public prosecutor who is in-charge of the prosecution u/s 301, 302, 225 CrPC. See :

(1) Sidharth Vashisth alias Manu sharma Vs. State of NCT of Delhi, AIR 2010 SC 2352
(2) Shiv Kumar Vs. Hukum Chand, 1999 (39) ACC 715 (SC)
(3) Kartika Chandra Bhattacharya Vs. State of UP, 1993 (30) ACC 688 (All)
(4) Suresh Chandra Sharma Vs. State of UP, 1986 (23) ACC 234 (All)
(5) Iqbal Ahmed Vs. Ketki Devi, 1976 CrLJ 244 (All)

22. **Debarring advocate from practice found having indulged in winning over prosecution witness / role of electronic media / sting operation / power of courts in such matters.** See **:** R.K Anand Vs. Registrar Delhi High Court, (2009) 8 SCC 106.

23. **Refusal by Bar to defend certain accused unethical :**Where the Coimbatore Bar Association, Tamil Nadu had passed a resolution that no lawyer will defend the accused policemen who had allegedly clashed with the lawyers, it has been held by the Supreme Court that the resolution of the Bar Association that they will not defend certain accused persons (policemen) is against

constitution, statute and the professional ethics. It is the duty of lawyers to defend irrespective of consequences. See : A.S. Mohammed Rafi Vs. State of TN, AIR 2011 SC 308.

24.01. <u>Hearing of counsel must in criminal cases</u> : Relying upon earlier Supreme Court decisions rendered in the matters of (i) A.S Mohammed Rafi vs. State of T.N, AIR 2011 SC 308 (ii) Man Singh vs. State of M.P, (2008) 9 SCC 542 & (iii) Bapu Limbaji Kamble vs. State of Maharashtra, (2005) 11 SCC 413, it has been held by the Supreme Court in Md. Sukur Ali vs. State of Assam, 2011 CrLJ 1690 (SC), that "criminal case, whether trial, appeal or revision should not be decided against accused in absence of his counsel. Liberty of a person is the most important feature of our Constitution. Article 21 which guarantees protection to life and personal liberty is the most important fundamental right of citizens guaranteed by the Constitution. Article 21 can be said to be the 'heart and soul' of the fundamental rights. It is only a lawyer who is conversant with law who can properly defend an accused in a criminal case. Hence, if a criminal case (whether a trial or appeal/revision) is decided against an accused in the absence of counsel, there will be violation of Article 21 of the Constitution. As such even if the counsel for the accused does not appear because of his negligence or deliberately, even then the court should not decide the criminal case against the accused in the absence of his counsel since the accused in a criminal case should not suffer for the fault of his counsel and in such a situation the court should appoint another counsel as amicus curiae to defend the accused. Even in the Nuremberg trials the Nazi war criminals responsible for killing millions of persons, were yet provided counsel. Therefore when we say that the accused should be provided counsel we are not bringing into existence a new principle but simply recognizing what already existed and which civilized people have long enjoyed. The Founding Father of our constitution were themselves freedom fighters who had seen civil liberties of our people trampled under foreign rule, and who had themselves been incarcerated for long period under the formula '*<u>Na vakeel,</u> <u>na daleel,</u> <u>na appeal'</u>* (No lawyer, no hearing no appeal). Many of them were lawyers by profession, and knew the importance of counsel, particularly in criminal cases. It was for this reason that they provided for assistance by counsel under Article 22(1), and that provision must be given the widest construction to effectuate the intention of the Founding Fathers."

24.02. **<u>Refusal to grant time to engage a new lawyer of choice of accused when proper</u> ? :** Where the accused wanted to delay framing of charges against him and his prayer to engage a new lawyer of his choice was refused by the Magistrate on the ground that some advocate had already appeared for him, it has been held by the Hon'ble Supreme Court that it cannot be concluded that the accused was not given chance to engaged counsel of his/her choice. See : Ashish Chadha Vs. Smt. Asha Kumari & another, AIR 2012 SC 431.

24.03. **<u>Magistrate not providing assistance of lawyer to accused liable to disciplinary proceedings</u> :** Every accused unrepresented by a lawyer has to be provided a lawyer at the commencement of the trial, engaged to represent him during the entire course of the trial. Even if the accused does not ask of a lawyer or he remains silent, it is the Constitutional duty of the Court to provide him with a lawyer before commencing the trial. Unless the accused voluntarily makes an informed decision and tells the Court, in clear and unambiguous words, that he does not want the assistance of any lawyer and would rather defend himself personally, the obligation to provide him with a lawyer at the commencement of the trial is absolute, and failure to do so would vitiate the trial and the resultant conviction and sentence, if any, given to the accused. But the failure to provide a lawyer to the accused at the pre-trial stage may not have the same consequence of vitiating the trial. It may have other consequences like making the delinquent magistrate liable to disciplinary proceedings, or giving the accused a right to claim compensation against the State for failing to provide him legal aid. But it would not vitiate the trial unless it is shown that failure to provide legal assistance at the pre-trial. That would have to be judged on the facts of each case. *(paras 487, 488)* See : Mohammed Ajmal Mohammad Amir Kasab alias Abu Mujahid Vs. State of Maharashtra, 2012 CriLJ 4770 (SC)

24.04. **<u>Assistance of lawyer to be provided to the accused even when he does not so ask</u> :** Every accused unrepresented by a lawyer has to be provided a lawyer at the commencement of the trial, engaged to represent him during the entire course of the trial. Even if the accused does not ask of a lawyer or he remains silent, it is the Constitutional duty of the Court to provide him with a lawyer before commencing the trial. Unless the accused voluntarily makes an informed decision and tells the Court, in clear and unambiguous words, that he does not want

the assistance of any lawyer and would rather defend himself personally, the obligation to provide him with a lawyer at the commencement of the trial is absolute, and failure to do so would vitiate the trial and the resultant conviction and sentence, if any, given to the accused. But the failure to provide a lawyer to the accused at the pre-trial stage may not have the same consequence of vitiating the trial. It may have other consequences like making the delinquent magistrate liable to disciplinary proceedings, or giving the accused a right to claim compensation against the State for failing to provide him legal aid. But it would not vitiate the trial unless it is shown that failure to provide legal assistance at the pre-trial. That would have to be judged on the facts of each case. *(paras 487, 488)* See : Mohammed Ajmal Mohammad Amir Kasab alias Abu Mujahid Vs. State of Maharashtra, 2012 CrLJ 4770 (SC).

25.01. **State Government not bound to renew or continue the engagement of DGC & ADGC (Civil or Criminal) :** While setting aside the Division Bench decision dated 05.11.2014 of the Lucknow Bench of the Hon'ble Allahabad High Court, the Hon'ble Supreme Court, in the case noted below, has ruled that the appointment to the post of District Government Counsel, civil or criminal, is a professional appointment. The LR Manual is not a law under Article 13 of the Constitution of India. The DGC or ADGC cannot claim a legal right for renewal of their appointment. The State Govt. is not under a legal duty to continue their engagement. The Supreme Court directed that fresh appointments to the posts of DGC/ADGC, civil or criminal, be made by keeping in view the observations of the Supreme Court already made in the case of State of UP Vs. Johri Mal, (2004) 4 SCC 714. See : State of UP Vs. Ajay Kumar Sharma, 2016 (1) ESC 41 (SC).

25.02. **Government free to appoint its counsel and to abolish their post :** The appointment of the lawyers on the panel of Brief Holders is made by the State Government only in consultation with the Advocate General who is its own officer and from among the advocates of the High Court who have completed a minimum of five years practice at he Bar. The selection of Brief Holders is not made after open competition. Their appointment is purely at the discretion of the State Government. The Brief Holders are further appointed to handle that work which cannot be attended to by the Government Advocate and Standing Counsel. No salary or any other kind of monthly remuneration is

payable to them. They are paid per brief handled by them. They are paid per brief handled by them. They are not barred from private practice or from accepting cases against the Government. It will thus be apparent that their appointment is in supernumerary capacity. It is necessitated because there may be work which cannot be attended to by the Government Advocate and the Chief Standing Counsel. They are not assured of any regular work much less any regular fee or remuneration. They get brief only if the Government Advocate and Chief Standing Counsel are over worked and not otherwise. They are like *ad hoc* counsel engaged for doing a particular work when available. Their only qualification is that they are on the panel of the counsel to be so appointed for handling the surplus work. The Supreme Court, therefore, is at a loss to understand as to how any fault can be found with the Government if the Government has not though it fit to abolish the said system and to appoint each time special counsel for special cases in their place. See : State of U.P. Vs. U.P. State Law Officers Association, 1994 AIR SC 1654.

26. **Punishment of Advocates for misconduct (Section 35) :** Section 35 of the Advocates Act, 1961 empowers the State Bar Councils to refer complaint received against an Advocate for misconduct to its Disciplinary Committee. Similar power has also been conferred by Section 36 on the Bar Council of India which is also the appellate authority against the punishment awarded by the State Bar Councils. On being found guilty, the Bar Council may suspend or debar the Advocate from practicing in any court or before any authority or person in India**.** Important cases on disciplinary proceedings against Advocates are as under :

(i) N.G. Dastane Vs. Shrikant Shivade, AIR 2001 SC 2028

(ii) S. Narayanappa Vs. CIT, Bangalore, AIR 1967 SC 523

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