

KNIGHT AND UPHAM CRIMINAL LITIGATION IN HONG KONG

FIFTH EDITION



Simon So



SWEET & MAXWELL

I hope the text will continue to nurture the next generation of criminal practitioners like how it nurtured me when I was reading PCLL at HKU.
The text endeavours to state the law as of 28 February 2025.

Bar Scholar, Patrick
Chambers of Solicitors

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SAMPLE DOCUMENTS

Particulars of officers against whom complaints are made: _____
 Time, date and place of conduct alleged: _____

Any complaints lodged? _____ Yes / No*
 If so, to whom? Duty Officer / CAPO / Court**

Does client wish details of complaint be placed on court record? _____ Yes / No*
 Any injuries? _____ Yes / No*
 Description and sketch of injuries: _____

Any medical examination / treatment requested? _____ Yes / No*
 Has medication examination / treatment been received? _____ Yes / No*
 Details: _____

Identification Parade
 Has an identification parade / direct confrontation been held? _____ Yes / No*
 Place and time: _____
 Was the client positively identified? _____ Yes / No*
 By whom? _____
 Are the persons who positively identified client known to him? _____ Yes / No*
 Any complaints about the manner in which parade / confrontation was conducted? _____ Yes / No*
 Details of complaint: _____

Does client wish complaints to be placed on court record? _____ Yes / No*

Travel Documents
 Client has the following travel documents: HK Passport Yes / No*
 HK Re-entry Permit Yes / No*
 HK Certificate of Identity Yes / No*
 PRC Home Visit Visa Yes / No*
 Others (please specify) _____

Client's travel documents are located at [address] and can be surrendered to court on [date]
 Address: _____
 Date: _____

Does client need to travel abroad when on bail? _____ Yes / No*
 Date of intended travel: [place, time, mode]
 Place: _____
 Time: _____
 Mode: _____

Bail Conditions
 Client can report to [name] police station between the hours of [time] and [time]?
 Name: _____
 Times: _____ am / pm

Curfew: _____ Yes / No*
 Proposed times: _____

Agree to live at [specified address] [details of owner / occupier and relationship]
 Specified address: _____
 Details of owner / occupier and relationship: _____

Agree to not contact witness: _____ Yes / No*
 Agree not to go to [address] _____ Yes / No*
 Address: _____

Remarks: _____

Form completed by [name] _____
 Date: _____

*Delete as appropriate

CHAPTER 7

OBTAINING CASE PAPERS

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1. OBTAINING CASE PAPERS FROM THE PROSECUTION

Importance of Preparation. Chances for an acquittal can be ruined by poor preparation, even if the Prosecution has a weak case and a first-class advocate representing the defendant. Responsibility for the proper preparation of a trial or a guilty plea rests with the solicitor, not with counsel, and not with a solicitor's clerk. 7.001

Purpose of Obtaining Papers. Every client charged with a criminal offence will want to know the chances of acquittal. A responsible solicitor cannot give an answer until the case papers have been studied thoroughly. The client should be told that, until this is done, it is not possible to advise on the prospects of success. What the case papers are and how they are obtained depend on the venue of trial. 7.002

(a) Trial in the Court of First Instance

When the accused is to be tried in the Court of First Instance (CFI) before a judge and jury, the solicitor will need to obtain copies of the indictment and the prosecution's paginated committal bundle. 7.003

The Indictment. The indictment sets out the formal charge(s) against the accused. On the back of the indictment is a list of the witnesses the Prosecution intends to call, or have available, at the trial. See Sample Document 7.1: Indictment. 7.004

The Paginated Committal Bundle. The paginated Committal bundle contains: 7.005

- (1) transcripts of the accused's appearances before Magistrates from the time of the first appearance up to and including committal;
- (2) a list of the prosecution witnesses and a brief description of their roles and the pages in the bundle where their witness statements can be found;
- (3) statements of the prosecution witnesses and any translations;
- (4) a list of the documentary exhibits;
- (5) a list of all exhibits; and
- (6) copies of the documentary exhibits and any translations.

One must also check to see if there are additional witness statement(s), additional documentary exhibit(s), and/or additional list(s) of exhibits. It is also important to go through the list of unused materials and master list of exhibits. Solicitors (or counsel) might ask the prosecution for production of specific item(s). 7.006

To obtain the paginated committal bundle, if the solicitor's firm is instructed privately by the client and not by the Legal Aid Department (LAD), it is good practice to first file a Notice to Act (see Sample Document 7.2). The solicitor should then write to the Department of Justice (DoJ) requesting the paginated committal bundle. 7.007

7.008 Until the Notice to Act is filed, the client is regarded by the court as acting in person and the solicitor's firm has no standing. Filing a Notice to Act means that the client is committed to act for the accused. Withdrawal from the case may not be possible unless the accused dismisses the solicitor and the solicitor applies to the court for leave to withdraw from acting further (see Law Society Circular 90/30). Sufficient funds should have been received to cover the fees for trial before filing a Notice to Act.

7.009 Where the instructions to represent an accused come from the Director of Legal Aid (DLA), the indictment and the paginated committal bundle will be received by the solicitor. The paginated committal bundle will then be forwarded to the solicitor assigned to act for the accused, together with a Legal Aid Certificate and a letter instructing the solicitor to act on behalf of the accused.

7.010 On receipt of that letter of instruction and the Legal Aid Certificate, the solicitor should file a Notice to Act. This is because it is the solicitor's firm which represents the accused at trial, not the DLA. Unnecessary delays may arise if the DoJ sends communications to the DLA rather than to the solicitor representing the accused.

7.011 Whether the solicitors' firm is instructed privately or by the DLA, copies of the Notice to Act that have been filed at the Court Registry should be served on all other parties to the case. This includes the Secretary for Justice (SJ) and any other accused not legally represented, their solicitors.

7.012 Where an accused has been granted legal aid, the r.5D requirements about fees do not apply. However, a solicitor representing a client under a Legal Aid Certificate has additional obligations over and above the duties owed to the privately funded client (see Chapter 18: Duty Lawyer Service and the Legal Aid Department).

(b) Trial in the District Court

7.013 If privately instructed, the solicitor will need to obtain the documents from the defendant who will have been served with the paginated transfer bundle (see Appendix 1, Practice Direction 9.4, Criminal Proceedings in the District Court.)

7.014 If the firm is instructed by the DLA, the LAD will forward the paginated transfer bundle to the assigned solicitor with a Legal Aid Certificate and a letter of instruction to act for the defendant.

7.015 A Notice to Act should be filed with the Registrar of the District Court and served on the DoJ and all of the other defendants or, if they are represented, their legal representatives. In privately instructed cases, this should be done only when sufficient funds have been received to cover the fees for the trial. In legal aid cases, the Notice to Act should be filed on receiving the Legal Aid Certificate.

(c) Trial in the Magistrates' Court

7.016 Obtain Papers from Officer in Charge of the Case (OC Case) or Court Prosecutors (CPs). The papers may be obtained from either the OC Case or the Court Prosecutors

Office at the Magistrates' Court where the defendant is to be tried. As the CP will not get the papers until a late stage, normally the application for case papers will be made to the OC Case. It is only where the firm is instructed very close to the date of trial that the papers will be obtained from the CP. Where the police are not the prosecuting authority, the papers should be obtained from the prosecuting law enforcement agency concerned.

No Bundle of Documents. There is no bundle of documents as such where the trial is before a Magistrate. The particular documents needed must be specifically requested. The defendant may have some relevant papers, such as the charge sheet or a copy of an interview under caution or a copy of a video-recorded interview (VRI). To prepare the case for trial, the following should be requested:

- (1) a copy of the charge sheet or information laid before the Magistrate, and any additional charges;
- (2) a copy of any answer(s) to charge(s);
- (3) a copy of any drawing, sketch, or plan of the scene in question;
- (4) copies of all records of interview, both cautioned and without caution, allegedly made by the defendant(s) to the Police or other authority, including any video or audio recordings;
- (5) copies of any entries in police notebooks allegedly signed by the defendant;
- (6) copy of any Notice to Persons under Investigation by or Detained in the Custody of the Police;
- (7) a copy of any medical report or other expert report;
- (8) a copy of the Government Chemist's Certificate in cases involving dangerous drugs;
- (9) a copy of the list of exhibits;
- (10) copies of all documentary exhibits;
- (11) a copy of the Brief Facts;
- (12) a copy of the certified translations of all Chinese documents to be produced in court (if the trial is to be conducted in English);
- (13) if it is alleged that the defendant made an oral statement, the time, date, place and name of the person to whom the statement was allegedly made;
- (14) a copy of the criminal record, if any, of the defendant;
- (15) copies of the criminal records, if any, of prosecution witnesses;
- (16) details of any current criminal investigation of any prosecution witness and full particulars;
- (17) details of any disciplinary findings against any police officer(s) involved in the case and full particulars;

- (18) details of any complaints or disciplinary proceedings pending against any police officer(s) involved in the case and full particulars;
- (19) copies of any unused material; and
- (20) copies of the statements of the prosecution witnesses.

7.018

It is not a legal requirement, in cases before a Magistrate, for the prosecution to make available copies of the statements made by prosecution witnesses. In practice, these will be made available provided a letter is sent to the OC Case specifically requesting the statements made by prosecution witnesses. The letter should also confirm that, it is reasonable and necessary in the opinion of the solicitor acting for the defendant to obtain these documents to enable the Defence to prepare and conduct its case. Reasons need not be given why the requested witness statements are required (see Sample Document 7.3). The letter should:

- (1) be on the firm's letterhead;
- (2) request the statements of all persons from whom statements were taken, whether these persons will give evidence in trial or not;
- (3) certify that the statements are reasonably and necessarily required;
- (4) request such items in para.7.017 as are applicable to the case; and
- (5) be signed personally by the defendant's solicitor whose name should appear below the signature.

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When the letter is written, the solicitor may not know the names of all the witnesses. The request should be for the statements of all persons from whom statements were taken. That wording covers persons who have been interviewed but may not be called as prosecution witnesses. A solicitor should not simply rely upon a standard letter. Each case must be considered separately and it may be necessary to request additional material once the statements of the prosecution witnesses have been read.

2. ACTION TO BE TAKEN UPON RECEIPT OF THE CASE DOCUMENTS

7.020

The procedure to be adopted following the receipt of case papers will be essentially the same regardless of the venue of trial. The following deals with CFI proceedings.

7.021

Check the Indictment. Always check that the indictment and a complete paginated committal bundle have been provided. Studying the indictment is the starting point for case preparation. Next, a systematic reading of the paginated committal bundle is fundamental to understanding the prosecution case. Additionally, reading the paginated committal bundle will indicate what further information must be sought from the prosecution. The Defence must not simply assume that the prosecution will provide material that might assist the Defence. Sample Document 7.4 sets out a suggested letter to the DoJ for CFI and DC cases. The letter should be adapted to the circumstances of each case. The indictment sets out the charge or charges (referred to as "counts")

against the accused. On the back of the indictment are the names of the witnesses the prosecution proposes to call at trial.

Photographs. Prosecution exhibits often include photographs. These may be included in the paginated committal bundle or may be served separately. Photographs of the scene of the crime or the complainant can be of considerable help in understanding prosecution witness statements. A careful reading of the statements of the prosecution witnesses may indicate that photographs were taken even though none have been served upon the Defence. The solicitor should check whether the client was provided with a set of photographs which can be used for the time being. In any event, the prosecution should be asked to provide a set of the photographs. This can be done by writing to the DoJ (see Sample Document 7.4). The sooner photographs are obtained the better. Sometimes only photocopies of photographs (which are blurred and/or black-and-white) are included in the paginated committal bundle. It is not good practice to rely upon photocopies. It is essential to see the actual prints. Photocopies will not have the clarity of photographic prints.

Other Non-Documentary Exhibits. Non-documentary exhibits such as VRIs may not necessarily be provided with the bundle. If they are not provided, they must be requested. Other non-documentary exhibits, such as weapons or mobile phone(s), should be viewed by arrangement. It is not enough to rely on photographs of exhibits. Photographs will not always adequately show the size or characteristics of the non-documentary exhibits. Similarly, they will not enable an assessment to be made of their weight or their overall capacity or structure. These are matters which can be very relevant in drug trafficking cases, for example.

Research on the Charge. The first step in preparation of the case is to carefully study the statement of offence(s) and the particulars of the offence(s) in the indictment. It is important to refer to the particular section of the ordinance under which each of the counts in the indictment has been laid to confirm that there is such an offence in law. There have been cases that have been conducted under incorrect sections of ordinances or where the procedural requirements of the correct section have not been satisfied. Reference to the ordinance will also indicate whether any particular formality, for example consent of the SJ to prosecute, is required. If the necessary formalities have not been complied with, the subsequent trial will likely be a nullity that wastes time, effort, and resources. There is absolutely no point in going on with proceedings that are a nullity and there is no benefit to the accused. An acquittal on a nullity is itself a nullity and is no bar to a subsequent prosecution. The correct course would be to draw the attention of the court and the Prosecution to the defect as soon as it is apparent. There is a duty to assist the court by preventing it from falling into error and a duty to the client not to incur unnecessary costs.

The wording of each count should be examined to check whether:

- (1) it is bad for duplicity;
- (2) any time limits have been complied with;
- (3) it discloses an offence known in law; and
- (4) it contains sufficient details for the accused to know the criminal conduct alleged.

- 7.026 For each separate offence there must be a separate allegation so that the accused knows exactly what the alleged infringement of the law is. Where the particulars of the count or counts allege more than one act or more than one infringement of the law, the count(s) may be bad for duplicity. Whether a count is bad for duplicity is a question of fact in each case.
- 7.027 Where the indictment contains more than one count, it might be that the counts are laid in the alternative and the prosecution alleges that the accused is guilty of one count or the other. If this is not clear, write to and ask the Prosecution for clarification. Laying counts in the alternative does not infringe the rule against duplicity. Each count contains an allegation of a specific criminal offence, and it is left to the court to decide whether the defendant is guilty of an offence and, if so, which one.
- 7.028 Where there is both a conspiracy count and a substantive count arising from the same conduct, the prosecution will be required to elect which count it will proceed on — either the substantive charge or the conspiracy charge, but not both: Practice Direction 9.1, Conspiracy (Appendix C).
- 7.029 When considering whether a count is correctly worded or whether it is defective, it is necessary to consider the requirements of the Indictment Rules (Cap.221C, Sub Leg.). The Indictments Rules are subsidiary legislation made under the authority of the Criminal Procedure Ordinance (CPO) s.9.
- 7.030 Objections to the wording or correctness of a charge will normally be taken as a preliminary point before plea. These matters are not merely legal niceties; the accused must know exactly what offence is alleged. Knowing the precise offence and its particulars narrows the issues to be dealt with by the Defence. Raising such points may throw the prosecution case off course. The proper time for objections is before a plea is entered. It is not appropriate to save such objections for use on a possible appeal in the event of a conviction. The advocate has a duty to assist the court as well as a duty to defend the client. Both duties require that objections are made at the earliest opportunity.
- 7.031 The essential elements constituting the offence should be checked. Reference should be made to, for example:-
- (1) the Ordinance(s) creating the offence or offences in each count;
 - (2) relevant case law; and
 - (3) the latest editions of practitioner reference books, namely, *Archbold Hong Kong*, *Halsbury's Laws of Hong Kong*, or the Annotated Ordinances.
- 7.032 **Understand the Essential Elements of the Offences.** Understanding the essential elements of the offence(s) is vital. In subsequent studies of the witness statements, the solicitor should consider whether the prosecution's evidence is sufficient to establish each and every element of the offence(s). Similarly, when taking the client's proof of evidence, it will be necessary to consider whether the client's version of events amounts to a Defence against the count or counts in the indictment.

- Compliance with the Indictment Rules.** Indictments must comply with the Indictment Rules. The time limit within which the SJ must institute proceedings in the CFI is set out in CPO s.14. An accused can apply to a judge of the CFI under CPO s.16(1)(a) for a discharge, after the filing of the indictment or prior to his or her arraignment or if proceedings are not instituted within the prescribed time limit. If the CFI judge considers the evidence disclosed as insufficient to establish a *prima facie* case against the accused for the charged offence or any other offence for which he or she might be convicted upon that charge, the judge can direct the accused to be discharged (CPO s.16(3)) or require the SJ to file an indictment within a specified time (CPO s.16(2)(a)). The discharge, subject to an appeal by the SJ to the Court of Appeal (CA) under CPO s.81E, operates as an acquittal of the accused.
- The indictment need not include only those charges upon which the accused was committed for trial. The indictment may include, either in substitution for or in addition to counts charging the offence upon which the accused was committed for trial, any counts founded on facts or evidence disclosed by the committal papers or by additional evidence served upon the accused after committal for trial: CPO s.24A(2).
- In the District Court, the document setting out the charge(s) against the defendant(s) is also an Indictment. In cases heard in the Magistrates' Court, the offences alleged against the defendant are set out in information, complaints, or charge sheets.
- Look for Missing Pages.** Before studying the paginated committal bundle, the solicitor should have checked whether the bundle is complete and make a note of any pages which are missing or illegible. Replacements should be requested from the prosecution immediately.
- Transcripts before a Magistrate.** Copies of the court record of proceedings when the accused appeared before a Magistrate, from the time of the arrest up to and including committal, will form the first part of the paginated committal bundle in cases to be tried in the CFI. Pay attention to: (1) the dates when the accused appeared at court; (2) whether there was legal representation on each occasion; and (3) what took place on each appearance. In particular, check if the accused had complained about ill-treatment by the police. If the client alleges that force or other mistreatment was used to obtain admissions made in an interview, an explanation will be needed if no complaint was made to a Magistrate at the earliest opportunity. If the accused was represented, this question will be even more pertinent.
- Statements of Prosecution Witnesses.** The statements of the prosecution witnesses and the other case documents must be read thoroughly. The trial may be weeks or even months ahead and it is advisable to make notes of the important points. Unless notes are made when the statements are read through for the first time, they may be overlooked later on. Making notes may lead to identification of discrepancies and/or contradictions in the prosecution case. It may also be helpful to list what the solicitor considers to be the significant things said by prosecution witnesses in their statements.
- It is not necessary to make extensive notes on the contents of every witness's statement, such as a witness who photographs the scene of a crime or a surveyor who draws a scale plan of premises. Brief notes of their evidence will be sufficient as their evidence may not be in issue.

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7.040 With the charge(s) in mind, identify each piece of evidence linking the accused to the alleged offence. Make notes of the parts of a witness statement which appear important, to identify the significant evidence.

7.041 Study the dates when each witness statement was made:

- (1) In cases where identification of the accused is an issue, a lapse of time between the date of the alleged offence and the date when the witness identified the accused on an identification parade may be significant.
- (2) Different descriptions of the culprit given immediately after the offence was reported and at a later time may also be significant.
- (3) There may be a significant lapse between the time of the alleged offence and the time the victim makes a complaint to the Police. This may be important in cases involving sexual offences. The reason for the delay might need to be explored at trial.
- (4) Where a witness has made statements to the police on different dates, the police have on occasions put together a "composite" statement combining the contents of several statements in one document. The composite statement may conceal discrepancies in the original version given to the police. It is necessary to obtain copies of the original statements and examine them carefully for any discrepancies (see Sample Document 7.4).

7.042 When reading the statements made by prosecution witnesses, be alert to inconsistencies or any account of events which appear to be odd or unexplained. Make a separate note of the date and times of important events when reading through the paginated committal bundle. These notes can eventually form a chronology of events, which counsel will find very useful both in understanding the case and when conducting the trial. A chronology will help provide an overall view of the prosecution case. If a similar chronology is prepared for the Defence case, this will likely lead to early identification of inconsistencies and areas of conflict.

7.043 In particular, in cases involving triad gangs, civilian prosecution witnesses in their statements and defendants in records of interview will likely refer to other persons by their nicknames. It is helpful to record each nickname and try to relate that to the proper name of the person concerned. Also note which witness mentions the nickname. A list of these names can assist counsel at trial in understanding the identity of the different persons involved.

7.044 Make notes of any telephone numbers referred to by the prosecution witnesses. The Prosecution may use telephone records to show that an accused had contact with other persons involved in the alleged offence. The Prosecution may ask the court to draw an inference that such contact indicates that the accused must have been involved in the offence. Sometimes this evidence only becomes clear during the trial. By noting the telephone numbers during the preparation stage, it is possible to see whether the accused telephoned other persons involved and is therefore linked to the offence.

It is also possible with modern technology to identify the location from which a call was made using a mobile telephone. Such evidence may be used to destroy an alibi defence. The solicitor should at least be aware of this danger. 7.045

Documentary Exhibits. A list of documentary exhibits and the documentary exhibits themselves will normally be found in the paginated committal bundle after the statements of prosecution witnesses. Documentary exhibits should be examined carefully, before and after caution. These may take various forms, namely: 7.046

7.047 Documentary exhibits include written records of interview(s) of the accused both before and after caution. These may take various forms, namely:

- (1) entries made in a police officer's notebook and signed by the accused;
- (2) written records of interview;
- (3) transcripts and their translations of VRIs; and
- (4) the answer the accused gave when charged with the offence.

Written Records of Interview. When reading a written record of interview, pay attention to:- 7.048

- (1) the time, date and persons stated to be present at the interview;
- (2) the wording of anything said to the accused before a caution was administered;
- (3) the caution itself, and whether the accused was recorded as having confirmed that the caution was understood;
- (4) whether whatever the accused wanted to say was written down by the accused, or if this was done on the accused's behalf by the interviewing officer;
- (5) what the accused had said or written after the caution;
- (6) the language used or attributed to the accused: be alert to a formal or an official style of language or the use of terms which might not be the accused's own words or which might indicate if assistance was given in the selection and use of words;
- (7) if questions were asked, and if so whether they were in any way objectionable (e.g. leading questions);
- (8) whether the procedure by the officers during the interview complies with The Rules and Directions (see Appendix B).

Transcripts and Translations of VRIs. Most interviews are now recorded on videotape. It is necessary to:- 7.049

- (1) view the videotape;
- (2) check the accuracy of the transcript; and
- (3) check any translation of the transcript for accuracy.

DCCC [number] / [year]

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CRIMINAL CASE NO. [number] OF [year]

BETWEEN

HKSAR
v
[name]

Defendant

NOTICE OF ALIBI

Filed the [number] day of [month] [year].

[name of firm]
Solicitors
[address]
[firm's reference]

CHAPTER 9

BAIL

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1. INTRODUCTION

Scope of This Chapter. If the Prosecution does not intend to ask for a plea to be taken, or a client seeks an adjournment for legal advice (or obtaining papers from the Prosecution), or if the client does not intend to plead guilty, the client will want to apply for bail. This chapter deals with application for bail *in court*. Police bail is dealt with in Chapter 3: Visiting a Detained Person. 9.001

Criminal Procedure Ordinance, Part 1A. Criminal Procedure Ordinance (CPO) Part 1A provides a detailed procedure as to the law governing application for bail. Unless otherwise specified, all sections mentioned hereinunder refer to the CPO. 9.002

Presumption of Bail. Bail is a right and not a privilege. This is enshrined in Hong Kong Bill of Rights art.5: 9.003

(3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

Under s.9D(1), a court shall grant bail to an accused person, except in the situations addressed in s.9G(3)–9G(9). Section 9G(10) prevents a Magistrate from granting bail to a Defendant charged with murder or treason. Hence, the burden is upon the Prosecution to show that bail should not be granted. When bail is granted, it may be subject to such conditions as are necessary to ensure these requirements are met. 9.004

Grounds of Refusing Bail: s.9G. Any objection to bail raised by the Prosecution must relate to the reasons listed under s.9G(1). The section provides that bail need not be granted if there are substantial grounds for believing that the Defendant would either: 9.005

- (1) fail to surrender to custody as the court may appoint;
- (2) commit an offence while on bail; or
- (3) interfere with a witness or pervert or obstruct the course of justice.

In forming an opinion whether to refuse bail, the court may have regard to the matters in s.9G(2). These are: 9.006

- (1) the nature and seriousness of the alleged offence, and in the event of conviction, the likely sentence;
- (2) the behaviour, demeanour and conduct of the accused;
- (3) the background, associations, employment, occupation, home environment, community ties, and financial position of the accused;

- (4) the health, physical, and mental condition of the accused;
- (5) the history of any previous admission to bail of the accused;
- (6) the character, antecedents, and previous convictions, if any, of the accused;
- (7) the nature and weight of the evidence; and
- (8) any other thing that appears relevant.

9.007 As such, bail cannot be refused simply because the offence is serious, the prosecution's case appears strong or the Defendant has previous convictions. Such matters, however, go to whether the Defendant will surrender to bail, commit another offence while on bail or interfere with witnesses. This is a distinction that must be appreciated.

2. PREPARE FOR AN APPLICATION FOR BAIL

(a) General points to note

9.008 **Do Not Lecture the Magistrate.** While practitioners must be conversant with the statutory provisions relating to bail, successful applications are based upon common sense. It is not helpful to lecture the Magistrate on constitutional rights or the right to bail under CPO Part 1A. The Magistrate will already be familiar with these statutory provisions.

9.009 In most cases, the Magistrate's main concern is whether the Defendant will abscond (ie a failure to surrender to custody on the appointed date). The objective must be to persuade the Magistrate that if bail is granted, the Defendant will appear on the date of the next court hearing. Even though bail is a right and not a privilege, the application must be approached with this practicality firmly in mind.

9.010 There is no set formula for making a bail application. Every advocate develops a personal style. For an advocate with little or no court experience, it is advisable to plan the application to ensure all relevant points are made without repetition. The following structure may be adopted:

- (1) Briefly inform the court of the Defendant's personal particulars, emphasising those points which suggest that the Defendant will comply with any conditions that may be imposed.
- (2) Address the particular objections raised by the Prosecution and try to counter them.
- (3) Put forward realistic suggestions for possible terms of bail.

9.011 **Not to advance the Defence.** On an application for bail, it is unwise to positively advance the Defendant's case when dealing with the reliability of the Prosecution's case at trial on an application for bail. A short discussion with the Defendant in the court cells does not provide a sound basis upon which a legal representative can assert a case for the Defendant's acquittal. The Magistrate will not be receptive to a long

discourse about the unfairness of remanding the Defendant in custody when there will inevitably be an acquittal, or how it will adversely impact the Defendant's human rights and/or the rights of the Defendant's family.

Preparation Work before the Application for Bail. To facilitate prompt release should the court grant bail, the solicitor should contact a friend or family member of the client to ensure that:

- (1) cash can be deposited with the Registry for the amount ordered by the court;
- (2) the Defendant's travel documents are available for surrender, if required; and
- (3) the surety is in court and able to attend to complete the required formalities for bail.

(b) Personal particulars of the defendant

Take Instructions. Details of the Defendant's character and background will have to be obtained during the interview in the cells. Confirmation of any previous criminal convictions and advance notice of the Prosecution's objections to bail should have to be obtained from the prosecutor. Particulars, such as how much cash the Defendant can raise, persons who may stand as sureties, and whether travel documents can be surrendered, should be obtained from the Defendant, family members, or those giving instructions. Sample Document for Duty Lawyer [Green Sheet] might be useful.

Brief Background of the Defendant. Address the court briefly on the Defendant's character. Certain points may be highlighted to show that the Defendant is unlikely to abscond. Relevant factors would be that the Defendant:

- (1) was born in Hong Kong or has lived here for many years and has substantial family and/or business links in Hong Kong;
- (2) has a fixed address and has lived there for a particular length of time, owns the property or it is a public housing property granted to him or her;
- (3) is married and resides with his or her spouse and children;
- (4) has no criminal convictions in Hong Kong (this becomes more relevant the longer the Defendant has lived in Hong Kong);
- (5) (should there be previous convictions) had not committed similar offences, or that the offences committed were relatively minor in nature, or that they occurred some considerable time ago; and
- (6) has regular employment, has been in that employment for a number of years and has regular earnings.

(c) Responding to grounds of objections to bail

Prosecutors may advance one or more of the following arguments why bail should be refused. They are not in themselves grounds to refuse bail. The Prosecution will,

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however, put them forward in an attempt to persuade the Magistrate that bail should be withheld under s.9G(2).

9.016 Lengthy Imprisonment Leading to Risk of Absconding. The gravity of the alleged offence may be difficult to deny; however, it is often a question of degree. For example, all robberies are serious, but how serious depends on factors such as whether (and if so, what type of) weapons were used, whether violence was included, the extent of any injuries caused to the victim, and whether the robbery occurred in residential premises. It may be possible to point out that the offence is not the most serious of its kind and argue that while there is always a risk of absconding, it is unlikely in the circumstances of the case.

9.017 Likelihood of Interfering with Witnesses. The court will be concerned with preventing Defendants from interfering with witnesses. However, this objection may be countered by suggesting that it be made a condition of bail that the Defendant shall not contact prosecution witnesses directly or indirectly. The Prosecution may suggest that this condition would be ineffective because the Defendant works or lives near the witness. If the concerns raised by the Prosecution appear reasonable, it is best to acknowledge the problem and suggest solutions. It may be necessary for the Defendant to reside at another address or to find work elsewhere if bail would not be granted otherwise.

9.018 Strong Evidence and Likelihood of Conviction. The Prosecution has the advantage of knowing the evidence against the Defendant. The defence solicitor should be alert for any weaknesses or inaccuracies in the claims made by the Prosecution, for example:

- (1) Are the witnesses for the Prosecution independent, or are they accomplices giving evidence in the hope of securing a lenient sentence?
- (2) Will admissions (if any) made by the Defendant be challenged?
- (3) Is the evidence of identification of the Defendant reliable? Having attended the identification parade (ID Parade), for example, the solicitor may know that the witness only claimed the Defendant might be the culprit. This is not a positive identification. This knowledge might be used to weaken the Prosecution assertion of a strong case.

9.019 For Further Investigation and/or ID Parade. It is necessary to consider whether the Prosecution's claim is reasonable and well founded. If the police have had ample time to question the Defendant on the offences charged, they might intend to ask about other offences in hopes of obtaining admissions to unsolved crimes. Equally, a claim that a remand in police custody is necessary for the Defendant to be put on an ID Parade is not a valid objection to bail. The Defendant cannot be compelled to attend an ID Parade. In any event, suspects on bail routinely attend police stations to take part in ID Parades. Arrangements can be made for persons in jail custody to participate in ID Parades.

9.020 Likelihood to Commit Offence Whilst On Bail. A Magistrate will be reluctant to grant bail if a Defendant is likely to commit further offences. That the Defendant was on bail when arrested is not conclusive evidence of likelihood to re-offend. The two offences may be very different. The second offence may be out of character and

unlikely to be repeated. However, the commission of further offences when on bail is an aggravating factor for sentence in the event of conviction and arguably this increases the risk that the Defendant will not answer to bail.

Previous History of Abscondence. A court will be reluctant to grant bail to a Defendant who has previously abused the trust of the court by absconding from bail. The court will be more ready to conclude that the Defendant cannot be trusted. However, it may be possible to argue that the Defendant's circumstances have changed significantly since that abscondence, for example:

- (1) the Defendant may have absconded years ago but is now married and has children and stable employment;
- (2) the earlier offence may have been more serious than the present one; and
- (3) looking at all the circumstances, the Defendant will appear for trial if released on bail.

(d) Conditions of bail

In granting bail, a Magistrate may impose one or more conditions.

(i) Cash

Depositing Cash with Court. This is the most common condition. Defendants can be required to deposit cash with the court. That cash is liable to be forfeited if the Defendant absconds or fails to comply with the bail conditions. The deposit of cash operates as an incentive to comply. There is no fixed amount for any particular offence. The amount should be a "reasonable sum" and only for the purpose of securing the surrender to custody of the person granted bail.

In fixing the amount of the cash deposit, the Magistrate will take into account all relevant circumstances, such as the Defendant's income and other financial resources, the seriousness of the offence, the apparent strength of the prosecution evidence, the Defendant's previous convictions and any history of abscondence. The advocate should be prepared to address the Magistrate on all these matters.

Solicitor Prohibited to Advance Money to Defendant to Meet Condition of Cash Bail. A solicitor is prohibited from acting as a surety for bail. Similarly, a solicitor should not advance money to a Defendant or to a surety to meet a condition of a cash deposit: CPO s.9F; *The Solicitors' Guide*, Chapter 10.19.

(ii) Sureties

Surety to Ensure Compliance with Bail Obligations. One or more persons may act as sureties to ensure that the Defendant complies with the obligations of bail. If the Defendant fails to do so, the sureties risk forfeiture of the amount of cash deposited or the amount pledged by their recognisances. A recognisance is a promise to pay all or part of a stated sum of money if a specified event occurs, that is the Defendant's failure to surrender to bail when required or the breach of conditions attached to bail.

- 9.027 **Address Surety's Resources.** The advocate should be prepared to address the Magistrate on the surety's resources, the surety's influence and control over the Defendant and any other relevant matter. This might include whether the surety resides with and/or is related to the Defendant, and the influence the surety has over the Defendant.
- 9.028 **Fully Advise the Surety.** Before offering a surety or sureties, the advocate must ensure the proposed surety or sureties fully understand their obligations and are willing and capable of fulfilling them. The persons offered as sureties should be in court, as the Magistrate will want to be sure the obligations of being a surety are fully understood.
- 9.029 **Solicitor Not to Act as Surety.** *The Solicitors' Guide*, Chapter 10.19, provides as follows:
- "It is unlawful for any person including a solicitor to agree to indemnify a surety for bail.
- No solicitor or his employee may act as a surety for bail for a client of the firm without the prior written consent of the Council [of the Law Society], which consent would be forthcoming only in the most exceptional circumstances."
- (iii) *Not to contact directly or indirectly such persons as the court may specify*
- 9.030 **Advise on the Risk of Perverting the Course of Justice.** This condition prohibits both direct and indirect contact with a named person or prosecution witnesses in general. It is normally difficult to oppose because it seeks to deter the Defendant from committing the further offence of attempting to pervert the course of justice. Irrespective of any such condition attached to bail, it is always prudent to warn the Defendants not to contact prosecution witnesses in any way. Any such contact might come into evidence at the trial with potential adverse consequences. A Defendant who directly or indirectly seeks to persuade witnesses not to attend court or to change their evidence is at risk of being charged with intending to pervert the course of justice.
- (iv) *Not to enter/go within a specified distance of specified places*
- 9.031 **Objective of Such Prohibition.** This condition is intended to ensure that the Defendant does not interfere with witnesses or commit further offences. It may be used to reinforce a condition not to contact a specified person. The premises in question may be the workplace or residence of an alleged victim. This condition should not be resisted unless there is a very good reason to do so. Irrespective of any such condition attaching to bail, it is prudent to warn Defendants not to go to places where they are likely to come into contact with prosecution witnesses.
- (v) *Surrender of travel documents and not to leave Hong Kong*
- 9.032 **Surrendering Travel Documents.** Persons granted bail might be required to surrender to the court any passport or travel document and not to leave Hong Kong. Practical difficulties may arise if the Defendant does not have the travel document(s) at court. Magistrates may either make it a condition that the document be surrendered for the

Defendant to be released on bail or permit the travel document to be surrendered within a limited time after the Defendant's release.

Take Instructions on Whereabouts of the Travel Documents. Magistrates will rightly be cautious about releasing Defendants before the travel documents are surrendered. When advising the Defendant about bail, one should take instructions as to the whereabouts of the documents, whether any person can bring the documents to court and how long is needed after release from custody for the Defendant to retrieve the documents and surrender them to the court. Common travel documents include the Hong Kong Special Administrative Region passport, passports issued by other countries, the Return Home Permit, and the British National (Overseas) Passport (BN(O)).

Applying to Leave Hong Kong. Magistrates may be persuaded against imposing conditions requiring surrender of travel documents or Defendants not to leave Hong Kong, if there are pressing commitments requiring travel abroad and when attendance at trial can be secured by other conditions. Submissions that the Defendant would simply be inconvenienced by such conditions will not be well received. If a Defendant's circumstances change and there is a need to leave Hong Kong, an application can be made to vary the terms of bail.

(vi) *Report to a police station or to the office of the law enforcement agencies*

Reporting Condition. A Defendant may be ordered to report to the DO of a particular police station or to the office of the law enforcement agencies on specified days and between specified hours. There are conflicting views as to the effectiveness of such conditions. Monitoring and enforcing these conditions cost the authorities time and effort and inconvenience the Defendants. A Defendant with a reporting condition may just as easily abscond as a Defendant who is not required to report. However, it will be clear that this has occurred as soon as there is a failure to report, rather than when there is a failure to appear at court on the day of trial.

Take Instructions. Where reporting conditions are likely to be imposed, the solicitor should find out from the Defendant before the bail application is made when and where he or she can report. It is embarrassing for a solicitor to have to take instructions from the client when the Magistrate is minded to grant bail but the solicitor has no idea where and when the client is available to report.

(vii) *To reside at a specified address and be present therein between specified times*

Residing in Address Stated. If the address on the charge sheet is the Defendant's residential address, make sure the charge sheet correctly states such address. If, for some reason, the Defendant would not reside at the address stated on the charge sheet, for example in domestic violence cases where it is desirable that the Defendant shall not have contact with the victim's family member, the solicitor should take prior instructions as to where the Defendant will reside when bail is granted. The solicitor should write such address clearly on a neat and intact piece of paper and be prepared to hand the same up to the Magistrate and the Prosecution when called upon to.

Curfew Condition. A "curfew condition" may also be ordered. It is a practical way of trying to ensure the Defendant is of good behaviour on bail and does not commit

further offences. If it is foreseeable that a curfew condition will be imposed, take instructions from the Defendant when the Defendant is off from school/work and required to go to school/work. Care should also be taken as to the possible travelling time from school/work to home so that the curfew condition can be obeyed.

- 9.039 **To Notify a Police Station on a Change of Address 24 hours Prior to a Change.** The prosecution and the law enforcement authority would have to know the whereabouts of a Defendant. Be prepared to notify the Magistrate which police station a Defendant can undertake to notify if he or she would need to change the address he or she undertakes to reside at.

3. BAIL APPLICATION IN THE MAGISTRATES' COURT

(a) Procedure for bail application

- 9.040 **Procedure as Stated in s.9N.** Section 9N deals with the procedure on bail applications, in particular:

- (1) the court's right to make such inquiries of and concerning the Defendant as it feels desirable. This does not extend to the Defendant being asked questions about the alleged offence. However, the court may ask, for example, the probation service to provide background information on the family background;
- (2) the Prosecution's right to submit evidence to prove previous criminal convictions, previous failures to surrender to custody, other outstanding criminal cases, the circumstances of the alleged offence and how they relate to the probability of conviction; and
- (3) the power of the court to consider any other material or representations which it considers credible or trustworthy.

- 9.041 **Record of Bail Application.** Criminal Procedure (Record of Bail Proceedings) Rules (Cap.221I, Sub.Leg.) r.2(1) requires a record of all bail proceedings be maintained by the court hearing the application. The sample of such bail records can be found in Sample Document 9.1: Extract of Record of Bail Recordings. The record must include a summary of:

- (1) the application for bail;
- (2) the grounds of the application;
- (3) the grounds of any objection to bail;
- (4) the court's decision; and
- (5) the reasons for decision.

- 9.042 Defendants, or their counsel or solicitor, are entitled to a copy of that record pursuant to Cap.221I r.2(3). It should be obtained so that the reasons for refusing bail or the conditions, should bail be granted, can be explained to the Defendant.

Do Not Deal with Guilt or Innocence. When the court is dealing with a bail application, the objective, and therefore the procedure, is very different from that when the court is conducting a trial. The issue is whether the Defendant can safely be trusted with bail and, if so, what conditions will most effectively ensure surrender at the specified time and place. It must be appreciated that, on a bail application, the Magistrate is concerned simply with whether or not the Defendant will answer to bail. Guilt or innocence is not the issue. The application must be approached accordingly. The bail application is not a trial of guilt or innocence. Previous convictions are put before the court on a bail application so that the court can consider whether the Defendant can be given bail or whether there are substantial grounds for believing that, if bail is granted, the Defendant would abscond, commit further offences or interfere with witnesses.

Record of Previous Convictions. The rules of evidence do not apply to a bail application the way they apply to a trial. This is illustrated by how Defendants' previous convictions come before a court dealing with bail applications and the way they are used. Objecting to the court knowing about previous convictions is ill-conceived and demonstrates that the solicitor does not understand the issue the court is dealing with.

Start after Defendant Is Brought into the Dock. When the case is called, the Magistrate's clerk will call out the name of the Defendant who, being in custody, will be brought into the dock of the court. The solicitor should ensure that the proceedings do not start until the Defendant is in the dock and can hear what is being said or, if necessary, have it translated if he or she does not understand the language in which the proceedings are conducted.

Identify Yourself. When a Defendant's name is called, the advocate should stand up and tell the Magistrate that he or she appears for the Defendant. There is no need for advocates to give their names or the name of their firm as this information should have been entered into on the representation form.

Prosecution's Application. Once the Defendant has been brought into the dock, the Magistrate will hear the Prosecution's application. The prosecutor may ask for a plea to be taken or for an adjournment (or, in older language, remand) to a later date. (To avoid ambiguity, the chapter shall use "adjourn" to refer to setting down the date for subsequent appearances in court and "remand" for taking a Defendant into custody.) If no plea is taken and an adjournment is sought, the prosecutor should also state whether there is any objection to bail being granted.

Whether to Oppose Adjournment. Before addressing the matter of bail, it is necessary to consider whether to object to an application for adjournment. It is important to consider the adjournment itself, irrespective of whether bail is granted or not. The reasonableness of the Prosecution's application depends on the circumstances of the case. One must take care to guard against the Defendant being remanded any longer than is absolutely necessary. If the Defendant is remanded in police custody, the maximum length is three clear days: Magistrates Ordinance (MO) s.79(1).

While the length of adjournment and the granting of bail are separate issues, the Defence can link the two together. For example, the reasonableness of a request for an adjournment of three weeks and whether to object to it may be linked to whether the Defendant is granted bail. It may be less objectionable if the Defendant is granted bail,

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Sample Document 9.1: Extract of Record of Bail Proceedings provides an example of a court bail form.

9.058 **Offence of Breaking Conditions of Bail.** Defendants should be warned that they may be arrested if a police officer "has reasonable grounds for believing that any condition has been or is likely to be broken". The police need not wait until there has been a breach of condition of bail. Where there is a condition not to leave Hong Kong, the purchase of an airline ticket may trigger an arrest, especially if it is a one-way ticket.

9.059 **Subsequent Bail Applications to a Judge of the CFI.** A subsequent application for bail can be structured to deal with the reasons for the refusal of bail. If the Defendant applies directly to a Judge of the CFI for bail, it will be necessary to deal with the reasons for the Magistrate's refusal of granting bail when preparing submissions before the CFI Judge. In these situations, the record will be important.

4. APPLICATION BY THE SECRETARY FOR JUSTICE FOR REVIEW OF ADMISSION TO BAIL

9.060 **Right of Secretary for Justice to Review Decision to Grant Bail.** Where a District Judge or a Magistrate has granted bail, the Secretary for Justice may apply to a Judge of the CFI to review that decision: s.9H(1). This can be done before or after the Defendant has been released on bail.

9.061 **Defendant Remanded in Custody Pending Review.** Where bail is granted by a Magistrate, a prosecutor could immediately tell the Magistrate that an application for review will be made. Once the prosecutor has notified the court, the Magistrate must order the Defendant to be detained in custody and brought before a Judge of the CFI at a time and place appointed by the Registrar of the High Court: s.9I(1). A Defendant detained under s.9I(1) must be brought before a Judge of the CFI as soon as practicable and in any event within 48 hours.

5. APPLICATION OF BAIL BEFORE A JUDGE OF THE CFI

(a) Principles of bail before a Judge of the CFI

9.062 **Bail Application to a CFI Judge.** If a Defendant has been refused bail by a Magistrate or by a District Judge, he or she may apply for bail to a Judge of the CFI: s.9J. Previously, such application was made by summons, supported by the applicant's affirmation. The judiciary has now devised a form for making bail applications or requests to vary bail conditions (see Sample Document 9.2: Notice of Bail Application or Request for Variation of Bail Conditions to the Court of First Instance). The application is heard by a single Judge of the CFI sitting in chambers (open to public).

9.063 **Vary Conditions of Bail.** It is also permissible for a Defendant to have his or her bail condition varied: s.9J. Such application may also be heard by a Judge of the CFI.

"Bail Appeal"? An application for bail to a Judge in chambers is not an appeal against the decision of the lower court. It is a fresh consideration of whether bail should be granted, and, if so, upon what terms. 9.064

Whether to Make an Application. An accused who has been refused bail by either a Magistrate or a District Judge should be advised of: 9.065

- (1) the right to apply for bail to a Judge of the CFI;
- (2) the chances of the application being successful;
- (3) the most advantageous time to make the application; and
- (4) the likely legal fees and disbursements.

(b) When to apply

Do Not Make Premature Application. The solicitor must carefully consider whether there is a reasonable chance of success and the best time to apply for bail to a Judge of the CFI under s.9J. The client will want to be released on bail as soon as possible. Care must be taken, however, not to make an application which is either premature or insufficiently prepared. 9.066

Where an application for bail has been made to a Judge of the CFI, the decision of the Judge is binding on the lower court. Where, for example, an accused contends that there has been a fundamental change of circumstances since the application to the CFI Judge, there could only be a reference back to that Judge to reconsider bail: *HKSAR v. Siu Yat Leung*.¹ 9.067

An accused may wish to apply under s.9J immediately following a refusal of bail on the first appearance before a Magistrate. If a good case can be made, it may be worth trying to secure his or her release at the earliest possible opportunity. However, at such an early stage, the solicitor may know little about the evidence. The police may still be investigating and there is a possibility that the prosecution's case will be strengthened by, for example, identification or forensic evidence. A Judge will be reluctant to grant bail on serious charges, until the nature and extent of the prosecution evidence is known. 9.068

If bail has been refused once by a Magistrate, it does not necessarily follow that bail will be refused on future appearances. The same Magistrate may subsequently be persuaded to grant bail, for example because of undue delay by the Prosecution. 9.069

Unless the right is waived, persons refused bail in the Magistrates' Court will be brought up to the Court 1 of the Magistrates' Court in which the case is proceeding every eight days. It might be that a different Magistrate to the Magistrate who initially refused bail is sitting in Court 1 on the next appearance. That Magistrate may take a more generous view about bail than the original Magistrate. 9.070