Introduction
The adversarial system theoretically operates on a number of assumptions and over time lawyers have become an integral part of the process. Increasing self representation (that is, clients representing themselves instead of hiring lawyers) effectively severs this aspect of the system and has the possibility of creating a range of problems for both access to justice and the court system in general. Through examining the theoretical assumptions of the adversarial model and how lawyers help ensure its practical operation, I will highlight some of the potential issues raised by increasing levels of self representation both for access to justice (that is, access to a fair and “just” result based on the merits of the case) and for the practical operation of the court system.

The Adversarial Model
The adversarial system of litigation places control in the hands of the parties; they decide what evidence and law to present while a non-interventionist judge decides which side’s case has more merit (Bottomley and Parker 1997). For such a system to function, both parties must be equal before the judge and must have the same amount of power. Although in reality this is not the case as richer parties have more resources to litigate (Parkinson 2001), lawyers do help to implement this in practice to some extent by ensuring that both sides have access to legal expertise and knowledge of the complex procedure of litigation.

What will removing legal representation do?
Galanter argues that the court system favours “repeat players” (parties that litigate often, e.g. the government, corporations) over “one-shotters” (parties that rarely, if ever, litigate). This is due to the imbalance of expertise, experience and power of the parties. However, if a one-shooter is represented by a lawyer, he or she can stand up to a repeat player and receive a fair trial, since the legal knowledge of counsel can ameliorate the power gap. [\[ But 1 shotters still have disadvantages.\] Indeed, in Dietrich v R, the High Court stressed the importance of legal representation in serious criminal matters in ensuring a fair trial. On the other hand, an unrepresented “one-shooter” is likely to be crushed by the overwhelming expertise of a represented party. Thus, a fair outcome is less likely in such a situation, hindering access to justice for the unrepresented litigant.

Isn’t access to courts access to justice?
Clearly, if a litigant does not have to pay legal fees, it is easier for him or her to access the court system. However, this is not the same as access to justice. As discussed, there are many other barriers to access, mainly knowledge and experience with the court system (or lack thereof). Such problems are not alleviated by self representation, and indeed the Federal Court has referred more than 800 unrepresented litigants to pro bono schemes so that they might receive representation (and hence access to justice) (Merkel 2003).

What effect does this have on the role of judges?
A fundamental tenet of the adversarial system is that the judge is non-interventionist and reactive as opposed to proactive (Bottomley and Parker 1997). For this reason, judges are not supposed to help litigants nor are they there to advise points of law. However, there is an increasing trend for judges to play a more active part in the proceedings, especially in lower courts and with unrepresented parties (Bronitt and McSherry 2001; Bottomley and Parker 1997). Although it is in the judiciary’s interests to increase access to justice (Parkinson 2001), removing control from the parties violates a basic principle underlining our system of litigation. For this reason, it is possible that self representation is moving the court system closer to an inquisitorial one – a system better suited to exhaustive codes rather than common law precedent. [This is a bit garbled]

What are the practical consequences?
If judges needed to help litigants along in conducting their matters, the court process would undoubtedly take longer and be more stressful for the parties. Thus, lower courts would be even more flooded with matters and litigation would be even more drawn-out. For these reasons, self representation would increase the courts’ already-heavy workload as judges take a more active role and the proceedings slow down. Ultimately, people would become disillusioned with the court system and its lack of accessibility, something that can only harm access to justice.

Conclusion
Increasing levels of self representation create a number of dilemmas for access to justice and the courts in general. Notwithstanding the possibility of more people accessing the court system through self representation, access to justice is not increasing, as inherent power disparities that affect the outcome of an adversarial trial are exacerbated when one party has no lawyer (or even if both parties are unrepresented). This would fundamentally alter the role of the judge, for in the interests of ensuring a fair trial judges would be forced to take interventionist roles and aid unrepresented litigants. The consequences would be slower trials, higher case loads and ultimately public disillusionment with the legal system as cases drag on only to end with an unfair result. For these reasons, it is the duty of courts, governments and the legal profession to discourage self representation by enhancing existing legal aid and pro bono schemes.

[72 A good answer overall not much on solutions.]
**Question 2 – Mark: 78**

The main issues in this problem are:

1. Whether Portia (P) can enter a not guilty plea and act for Joe (J).
2. Whether P can call Peter Pedant (PP) and accuse him.
3. What P should do with the signed agreement.
4. Whether P can tell Triple B (BBB) about J’s confession as her senior partner wants.
5. Whether P can withdraw from the case if she wishes.

(1) The not guilty plea
Since P is a solicitor, it is likely that her professional body would use the Law Council Model Rules (‘LCMR’) (or jurisdictional equivalent) in determining the desired standard of professional conduct. These rules state that a practitioner may enter a not guilty plea on behalf of a guilty client (r 15.2). However, a lawyer may not mislead the court or make any false positive statements of a client’s innocence. Practitioners may only either insist that the client is not guilty by some reason of law or a lack of convincing evidence (LCMR rr 15.2; 14). Indeed, lying to the court is a breach of duty to the court which could leave a solicitor liable in ancillary orders (Rondel v Worsley). Subject to these restrictions, P can continue to act on behalf of J while entering a not guilty plea.

(2) Can P call and accuse PP?
There is no reason why P cannot call PP unless doing so would be contrary to J’s interests (duty to advance the client’s interests: LCMR rr 1.1; 12.1). However, she cannot lie to the court (See above) and suggest falsely that PP was the real embezzler. This is notwithstanding J’s instructions to the contrary (LCMR r 13: practitioners must exercise independent judgement when appropriate). If P advanced such a case, she would be engaging in dishonest and fraudulent conduct (prohibited by LCMR r 30) which would likely fall under the definition of misconduct (Legal Profession Act 2004 (NSW) (‘LPA’) s 494-498) leaving her liable to disbarment by the Law Society. She should therefore not call PP and suggest that he was the criminal.

What if J lies and says that PP did it?
Practitioners cannot be accessories to perjury and must withdraw from a case if a client lies under oath and does not wish the lie disclosed (LCMR r 15.1; R v Cox and Railton). Thus, if J lies during the trial, P should advise him to disclose the lie. If he does not consent to this, she should withdraw. \[\checkmark\]

(3) What should P do with the document?
Although P was not directly authorised to sign the document on J’s behalf, it could be argued that she was acting in his interests in doing so (LCMR r 1.1). Regardless, now that she has instructions to do so, she should tear up the agreement as J clearly does not wish to be party to it. \[\checkmark\]

(4) Can P tell BBB about J’s confession?
Lawyers owe their clients a duty of confidentiality which is paramount in the case of legal professional privilege (LCMR r 3; R v Derby Magistrates’ Court; Tuckiar v R). Since J’s confession relates only to past conduct and was disclosed in order to advance litigation and obtain advice, it clearly falls under the definition of legal professional privilege (R v Cox and Railton). Thus, P may not disclose the confession to BBB (or anybody outside the firm for that matter) no matter what her senior partner’s instructions are. Indeed, it would be unethical for the firm to advise BBB in the case, for J is a client and this may cause a concurrent conflict of interest (LCMR r 8.2; Bank of NZ v NZ Guardian Trust).

(5) Can P Withdraw? Should she?

P can withdraw from the case if there is either a clear conflict or if she would be “forensically embarrassed” to continue (ie. If J perjures; see above). LCMR r 15.2 also allows her to cease to act if there is time for another lawyer to be found on the grounds of the not guilty plea and confession. However, there is probably little time as a hearing date had been set so it would be best for P to continue if she has no other reason for withdrawal.

Conclusion

(1) P can enter (and maintain) the not guilty plea provided she does not lie to the court.

(2) P cannot accuse PP of the theft under any circumstances; this would probably be misconduct.

(3) P should obey J in tearing up the signed agreement.

(4) P cannot disclose J’s confession to BBB.

(5) P should continue to act unless given further reason to withdraw (e.g. if J lies).

[78 V good answer – needed slightly more discussion of wh P sh have signed agt (r 12 applies) + ng plea & accusing PP: r 18 also applies – conflict really issue of former client (r 4).]